Public Law 100-679
100th Congress

An Act

To amend and extend the Office of Federal Procurement Policy Act, and for other purposes.

Nov. 17, 1988
[S. 2215]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Office of Federal Procurement Policy Act Amendments of 1988.
41 USC 401 note.

SECTION 1. SHORT TITLE.

This Act may be cited as the "Office of Federal Procurement Policy Act Amendments of 1988".

SEC. 2. POLICY; FINDINGS AND PURPOSE.

(a) POLICY.—Section 2 of the Office of Federal Procurement Policy Act (41 U.S.C. 401) is amended by striking out "the Congress" and inserting "the United States Government".

(b) FINDINGS AND PURPOSE.—Section 3 of the Office of Federal Procurement Policy Act (41 U.S.C. 402) is amended in subsection (a) by inserting "Government-wide" before "procurement policies".

SEC. 3. AUTHORITY AND FUNCTIONS OF THE OFPP ADMINISTRATOR.

(a) IN GENERAL.—Section 6 of the Office of Federal Procurement Policy Act (41 U.S.C. 405) is amended—

(1) in subsection (a), by striking out "which shall be implemented in the single system of Government-wide procurement regulations and shall be" and inserting a period and the following: "These policies shall be implemented in a single Government-wide procurement regulation called the Federal Acquisition Regulation and shall be";

(2) in subsection (b)—

(A) by inserting after "timely manner" the following: ", including any such regulations, procedures, and forms as are necessary to implement prescribed policy initiated by the Administrator under subsection (a),"; and

(B) by striking out "may" and inserting "shall";

(3) in subsection (d) by striking out paragraphs (4) and (5) and inserting the following:

"(4)(A) providing for and directing the activities of the computer-based Federal Procurement Data System (including recommending to the Administrator of General Services a sufficient budget for such activities), which shall be located in the General Services Administration, in order to adequately collect, develop, and disseminate procurement data; and

"(B) ensuring executive agency compliance with the record requirements of section 19;

"(5) providing for and directing the activities of the Federal Acquisition Institute (including recommending to the Administrator of General Services a sufficient budget for such activities), which shall be located in the General Services Administration, in order to—

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"(A) foster and promote Government-wide career management programs for a professional procurement work force; and

Research and development.

"(B) promote and coordinate Government-wide research and studies to improve the procurement process and the laws, policies, methods, regulations, procedures, and forms relating to procurement by the executive agencies;"; and

(4) in subsection (f) by striking out "The Director of the Office of Management and Budget" and inserting "The Administrator, with the concurrence of the Director of the Office of Management and Budget, and with consultation with the head of the agency or agencies concerned,".

(b) REAUTHORIZATION.—Section 11 of such Act (41 U.S.C. 410) is amended by striking out "for each of the three succeeding fiscal years" and inserting "such sums as may be necessary for each succeeding fiscal year".

41 USC 403.

(c) CONFORMING AMENDMENT.—Section 4 of such Act is amended by striking out paragraph (4) and redesignating paragraphs (5) through (11) as paragraphs (4) through (10), respectively.

SEC. 4. FEDERAL ACQUISITION REGULATORY COUNCIL.

The Office of Federal Procurement Policy Act is further amended by adding at the end the following:

"FEDERAL ACQUISITION REGULATORY COUNCIL

41 USC 421.

"SEC. 25. (a) ESTABLISHMENT.—There is established a Federal Acquisition Regulatory Council (hereinafter in this section referred to as the 'Council') to assist in the direction and coordination of Government-wide procurement policy and Government-wide procurement regulatory activities in the Federal Government.

"(b) MEMBERSHIP.—(1) The Council shall consist of the Administrator for Federal Procurement Policy and—

"(A) the Secretary of Defense,

"(B) the Administrator of National Aeronautics and Space; and

"(C) the Administrator of General Services.

"(2) Notwithstanding section 205(d) of the Federal Property and Administrative Services Act of 1949, the officials specified in subparagraphs (A), (B), and (C) of paragraph (1) may designate to serve on and attend meetings of the Council in place of that official (A) the official assigned by statute with the responsibility for acquisition policy in each of their respective agencies; or (B) if no official of such agency is assigned by statute with the responsibility for acquisition policy for that agency, the official designated pursuant to section 16(3) of this Act. No other official or employee may be designated to serve on the Council.

Regulations.

"(c) FUNCTIONS.—(1) Subject to the provisions of section 6 of this Act, the General Services Administration, the Department of Defense, and the National Aeronautics and Space Administration, pursuant to their respective authorities under title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251, et seq.), chapters 4 and 137 of title 10, United States Code, and the National Aeronautics and Space Act of 1958 (42 U.S.C. 2451, et seq.), shall jointly issue and maintain in accordance with subsection (f) of this section a single Government-wide procurement regulation, to be known as the 'Federal Acquisition Regulation'.

"(2) Any other regulations relating to procurement issued by an executive agency shall be limited to (A) regulations essential to implement Government-wide policies and procedures within the agency, and (B) additional policies and procedures required to satisfy the specific and unique needs of the agency.

"(3) The Administrator, in consultation with the Council, shall ensure that procurement regulations promulgated by executive agencies are consistent with the Federal Acquisition Regulation and in accordance with the policies set forth in section 2 of this Act or any policies issued pursuant to section 6(a) of this Act.

"(4)(A) Under procedures established by the Administrator, a person may request the Administrator to review any regulation relating to procurement on the basis that such regulation is inconsistent with the Federal Acquisition Regulation.

"(B) Unless the request is frivolous or does not, on its face, state a valid basis for such review, the Administrator shall complete such a review not later than 60 days after receiving the request. The time for completion of the review may be extended if the Administrator determines that an additional period of review is required. The Administrator shall advise the requester of the reasons for the extension and the date by which the review will be completed.

"(5) If the Administrator determines that a regulation relating to procurement is inconsistent with the Federal Acquisition Regulation or that the regulation should otherwise be revised to remove an inconsistency with any policies issued under section 6(a) of this Act or the policies set forth in section 2 of this Act, the Administrator shall rescind or deny the promulgation of the regulation or take such other action authorized under section 6 as may be necessary to remove the inconsistency. If the Administrator determines that such a regulation, although not inconsistent with the Federal Acquisition Regulation or such policies, should be revised to improve compliance with such Regulation or policies, the Administrator shall take such action authorized under section 6 as may be necessary and appropriate.

"(6) The decisions of the Administrator shall be in writing and made publicly available. The Administrator shall provide a listing of such decisions in the annual report to Congress required by section 8 of this Act.

Public information.

"(d) ADDITIONAL RESPONSIBILITIES OF MEMBERSHIP.—Subject to the authority, direction, and control of the head of the agency concerned, each official who represents an agency on the Council pursuant to subsection (b) shall—

"(1) approve or disapprove all regulations that are, after 60 days after the date of enactment of this section, proposed for public comment, promulgated in final form, or otherwise made effective by such agency relating to procurement before such regulation may be promulgated in final form, or otherwise made effective, except that such official may grant an interim approval, without review, for not more than 60 days for a procurement regulation in urgent and compelling circumstances;

"(2) carry out the responsibilities of such agency set forth in chapter 35 of title 44, United States Code, for each information collection request (as that term is defined in section 3502(11) of title 44, United States Code) that relates to procurement rules or regulations; and

"(3) eliminate or reduce (A) any redundant or unnecessary levels of review and approval, in the procurement system of such agency, and (B) redundant or unnecessary procurement regulations which are unique to that agency.

The authority to review and approve or disapprove regulations under paragraph (1) of this subsection may not be delegated to any person outside the office of the official who represents the agency on the Council pursuant to subsection (b).

"(e) GOVERNING POLICIES.—All actions of the Council and of members of the Council shall be in accordance with and furtherance of the policies of section 2 and the policies prescribed under section 6(a) of this Act.

"(f) GENERAL AUTHORITY WITH RESPECT TO FAR.—Subject to section 6(b), the Council shall manage, coordinate, control, and monitor the maintenance of, and issuance of and changes in, the Federal Acquisition Regulation.

"(g) REPORTS.—The Administrator for Federal Procurement Policy shall—

"(1) publish a report within 6 months after the date of enactment of this section and every 6 months thereafter relating to the development of procurement regulations to be issued in accordance with subsection (c) of this section;

"(2) include in each report published under paragraph (1)—

"(A) the status of each such regulation;

"(B) a description of those regulations which are required by statute;

"(C) a description of the methods by which public comment was sought with regard to each proposed regulation in accordance with section 22 of this Act, and to the extent appropriate, sections 3504(h) and 3507 of title 44, United States Code;

"(D) regulatory activities completed and initiated since the last report;

"(E) regulations, policies, procedures, practices, and forms that are under consideration or review by the Office of Federal Procurement Policy;

"(F) whether the regulations have paperwork requirements;

"(G) the progress made in promulgating and implementing the Federal Acquisition Regulation; and

"(H) such other matters as the Administrator determines would be useful; and

"(3) report to Congress within 180 days after the date of the enactment of this section, in consultation with the Administrator of the Office of Information and Regulatory Affairs, regarding—

"(A) the extent of the paperwork burden created by the Federal procurement process, and

"(B) the extent to which the Federal procurement system can be streamlined to reduce unnecessary paperwork while at the same time maintaining recordkeeping and reporting requirements necessary to ensure the integrity and accountability of the system.".

SEC. 5. COST ACCOUNTING STANDARDS BOARD.

(a) AMENDMENT.—The Office of Federal Procurement Policy Act is further amended by adding at the end thereof the following:

"COST ACCOUNTING STANDARDS BOARD

"SEC. 26. (a) ESTABLISHMENT; MEMBERSHIP; TERMS.—(1) There is established within the Office of Federal Procurement Policy an independent board to be known as the 'Cost Accounting Standards Board' (hereinafter referred to as the 'Board'). The Board shall consist of 5 members, including the Administrator, who shall serve as Chairman, and 4 members, all of whom shall have experience in Government contract cost accounting, and who shall be appointed as follows: 41 USC 422.

"(A) two representatives of the Federal Government—

"(i) one of whom shall be a representative of the Department of Defense and be appointed by the Secretary of Defense; and

"(ii) one of whom shall be an officer or employee of the General Services Administration appointed by the Administrator of General Services; and

"(B) two individuals from the private sector, each of whom shall be appointed by the Administrator and—

"(i) one of whom shall be a representative of industry; and

"(ii) one of whom shall be particularly knowledgeable about cost accounting problems and systems.

"(2)(A) The term of office of each of the members of the Board, other than the Administrator for Federal Procurement Policy, shall be 4 years, except that—

"(i) of the initial members, two shall be appointed for terms of two years, one shall be appointed for a term of three years, and one shall be appointed for a term of four years;

"(ii) any member appointed to fill a vacancy in the Board shall serve for the remainder of the term for which his predecessor was appointed; and

"(iii) no individual who is appointed under paragraph (1)(A) of this subsection shall continue to serve after ceasing to be an officer or employee of the agency from which he or she was appointed.

"(B) A vacancy on the Board shall be filled in the same manner in which the original appointment was made.

"(C) The initial members of the Board shall be appointed within 120 days after the date of enactment of this section.

"(b) SENIOR STAFF.—The Administrator, after consultation with the Board, may appoint an executive secretary and two additional staff members without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and may pay such employees without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, except that no individual so appointed may receive pay in excess of the annual rate of basic pay payable for GS-18 of the General Schedule.

"(c) OTHER STAFF.—The Administrator may appoint, fix the compensation, and remove additional employees of the Board under the applicable provisions of title 5, United States Code.

"(d) DETAILED AND TEMPORARY PERSONNEL.—(1) The Board may use, without reimbursement, any personnel of a Federal agency (with the consent of the head of the agency concerned) to serve on advisory committees and task forces to assist the Board in carrying

out the functions and responsibilities of the Board under this section.

"(2) The Administrator, after consultation with the Board, may procure temporary and intermittent services under section 3109(b) of title 5, United States Code, of personnel for the purpose of serving on advisory committees and task forces to assist the Board in carrying out the functions and responsibilities of the Board under this section.

"(e) COMPENSATION.—Except as otherwise provided in subsection (a), the members of the Board who are officers or employees of the Federal Government, and officers and employees of other agencies of the Federal Government who are used under subsection (d)(1), shall receive no additional compensation for services, but shall continue to be compensated by the employing Department or agency of such officer or employee. Each member of the Board appointed from private life shall receive compensation at a rate not to exceed the daily equivalent of the rate prescribed for level IV of the Executive Schedule for each day (including travel time) in which the member is engaged in the actual performance of duties vested in the Board. Individuals hired under subsection (d)(2) may receive compensation at rates fixed by the Administrator, but not to exceed the daily equivalent of the rate prescribed for level V of the Federal Executive Salary Schedule under section 5316 of title 5, United States Code, for each day (including travel time) in which such appointees are properly engaged in the actual performance of duties under this section. While serving away from homes or the regular place of business, Board members and other appointees serving on an intermittent basis under this section shall be allowed travel expenses in accordance with section 5703 of title 5, United States Code.

"(f) COST ACCOUNTING STANDARDS AUTHORITY.—(1) The Board shall have the exclusive authority to make, promulgate, amend, and rescind cost accounting standards and interpretations thereof designed to achieve uniformity and consistency in the cost accounting standards governing measurement, assignment, and allocation of costs to contracts with the United States.

"(2) Cost accounting standards promulgated under this section shall be mandatory for use by all executive agencies and by contractors and subcontractors in estimating, accumulating, and reporting costs in connection with pricing and administration of, and settlement of disputes concerning, all negotiated prime contract and subcontract procurements with the United States in excess of $500,000, other than contracts or subcontracts where the price negotiated is based on (A) established catalog or market prices of commercial items sold in substantial quantities to the general public, or (B) prices set by law or regulation.

"(3) Not later than 180 days after the date of enactment of this section, the Administrator, after consultation with the Board, shall prescribe rules and procedures governing actions of the Board under this section. Such rules and procedures shall require that any cost accounting standard promulgated, amended, or rescinded (and interpretations thereof) shall be adopted by majority vote of the Board members.

"(4) The Board is authorized—

"(A) to exempt classes or categories of contractors and subcontractors from the requirements of this section; and

"(B) to establish procedures for the waiver of the requirements of this section with respect to individual contracts and subcontracts.

"(g) REQUIREMENTS FOR STANDARDS.—(1) Prior to the promulgation under this section of cost accounting standards and interpretations thereof, the Board shall—

"(A) take into account, after consultation and discussions with the Comptroller General and professional accounting organizations, contractors, and other interested parties—

"(i) the probable costs of implementation, including inflationary effects, if any, compared to the probable benefits;

"(ii) the advantages, disadvantages, and improvements anticipated in the pricing and administration of, and settlement of disputes concerning, contracts; and

"(iii) the scope of, and alternatives available to, the action proposed to be taken;

"(B) prepare and publish a report in the Federal Register on the issues reviewed under paragraph (1)(A); Reports. Federal Register, publication.

"(C)(i) publish an advanced notice of proposed rulemaking in the Federal Register in order to solicit comments on the report prepared pursuant to subparagraph (B); Federal Register, publication.

"(ii) provide all parties affected a period of not less than 60 days after such publication to submit their views and comments; and

"(iii) during this 60-day period, consult with the Comptroller General and consider any recommendation the Comptroller General may make; and

"(D) publish a notice of such proposed rulemaking in the Federal Register and provide all parties affected a period of not less than 60 days after such publication to submit their views and comments. Federal Register, publication.

"(2) Rules, regulations, cost accounting standards, and modifications thereof promulgated or amended under this section shall have the full force and effect of law, and shall become effective within 120 days after publication in the Federal Register in final form, unless the Board determines a longer period is necessary. Implementation dates for contractors and subcontractors shall be determined by the Board, but in no event shall such dates be later than the beginning of the second fiscal year of the contractor or subcontractor after the standard becomes effective. Rules, regulations, cost accounting standards, and modifications thereof promulgated or amended under this section shall be accompanied by prefatory comments and by illustrations, if necessary. Effective date.

"(3) The functions exercised under this section are excluded from the operation of sections 551, 553 through 559, and 701 through 706 of title 5, United States Code.

"(h) IMPLEMENTING REGULATIONS.—(1) The Board shall promulgate rules and regulations for the implementation of cost accounting standards promulgated or interpreted under subsection (f). Such regulations shall be incorporated into the Federal Acquisition Regulation and shall require contractors and subcontractors as a condition of contracting with the United States to—

"(A) disclose in writing their cost accounting practices, including methods of distinguishing direct costs from indirect costs and the basis used for allocating indirect costs; and

"(B) agree to a contract price adjustment, with interest, for any increased costs paid to such contractor or subcontractor by

the United States by reason of a change in the contractor's or subcontractor's cost accounting practices or by reason of a failure by the contractor or subcontractor to comply with applicable cost accounting standards.

"(2) If the United States and a contractor or subcontractor fail to agree on a contract price adjustment, including whether the contractor or subcontractor has complied with the applicable cost accounting standards, the disagreement will constitute a dispute under the Contract Disputes Act (41 U.S.C. 601).

"(3) Any contract price adjustment undertaken pursuant to paragraph (1)(B) shall be made, where applicable, on relevant contracts between the United States and the contractor that are subject to the cost accounting standards so as to protect the United States from payment, in the aggregate, of increased costs (as defined by the Board). In no case shall the Government recover costs greater than the increased cost (as defined by the Board) to the Government, in the aggregate, on the relevant contracts subject to the price adjustment, unless the contractor made a change in its cost accounting practices of which it was aware or should have been aware at the time of the price negotiation and which it failed to disclose to the Government.

"(4) The interest rate applicable to any contract price adjustment shall be the annual rate of interest established under section 6621 of the Internal Revenue Code of 1986 (26 U.S.C. 6621) for such period. Such interest shall accrue from the time payments of the increased costs were made to the contractor or subcontractor to the time the United States receives full compensation for the price adjustment.

"(i) REPORTS TO CONGRESS.—The Board shall report to the Congress not later than one year after the date of enactment of this section, and annually thereafter, with respect to the activities and operations of the Board under this section, together with such recommendations as it considers appropriate.

"(j) EFFECT ON OTHER STANDARDS AND REGULATIONS.—(1) All cost accounting standards, waivers, exemptions, interpretations, modifications, rules, and regulations promulgated by the Cost Accounting Standards Board under section 719 of the Defense Production Act of 1950 (50 U.S.C. App. 2168) shall remain in effect unless and until amended, superseded, or rescinded by the Board pursuant to this section.

"(2) Existing cost accounting standards referred to in paragraph (1) shall be subject to the provisions of this Act in the same manner as if promulgated by the Board under this Act.

"(3) The Administrator, under the authority set forth in section 6 of this Act, shall ensure that no regulation or proposed regulation of an executive agency is inconsistent with a cost accounting standard promulgated or amended under this section by rescinding or denying the promulgation of any such inconsistent regulation or proposed regulation and taking such other action authorized under section 6 as may be appropriate.

"(4) Costs which are the subject of cost accounting standards promulgated under this section shall not be subject to regulations that are established by another executive agency that differ from such standards with respect to the measurement, assignment, and allocation of such costs.

"(k) EXAMINATIONS.—For the purpose of determining whether a contractor or subcontractor has complied with cost accounting standards promulgated under this section and has followed consist-

ently the contractor's or subcontractor's disclosed cost accounting practices, any authorized representative of the head of the agency concerned, of the offices of inspector general established pursuant to the Inspector General Act of 1978, or of the Comptroller General of the United States shall have the right to examine and make copies of any documents, papers, or records of such contractor or subcontractor relating to compliance with such cost accounting standards.

"(l) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this section.".

(b) CONFORMING AMENDMENT.—Section 719 of the Defense Production Act of 1950 (50 U.S.C. App. 2168) is repealed.

SEC. 6. PROCUREMENT INTEGRITY.

(a) AMENDMENT.—The Office of Federal Procurement Policy Act is further amended by adding at the end the following:

"PROCUREMENT INTEGRITY

"SEC. 27. (a) PROHIBITED CONDUCT BY COMPETING CONTRACTORS.— During the conduct of any Federal agency procurement of property or services, no competing contractor or any officer, employee, representative, agent, or consultant of any competing contractor shall knowingly— 41 USC 423.

"(1) make, directly or indirectly, any offer or promise of future employment or business opportunity to, or engage, directly or indirectly, in any discussion of future employment or business opportunity with, any procurement official of such agency;

"(2) offer, give, or promise to offer or give, directly or indirectly, any money, gratuity, or other thing of value to any procurement official of such agency; or

"(3) solicit or obtain, directly or indirectly, from any officer or employee of such agency, prior to the award of a contract any proprietary or source selection information regarding such procurement.

"(b) PROHIBITED CONDUCT BY PROCUREMENT OFFICIALS.—During the conduct of any Federal agency procurement of property or services, no procurement official of such agency shall knowingly—

"(1) solicit or accept, directly or indirectly, any promise of future employment or business opportunity from, or engage, directly or indirectly, in any discussion of future employment or business opportunity with, any officer, employee, representative, agent, or consultant of a competing contractor;

"(2) ask for, demand, exact, solicit, seek, accept, receive, or agree to receive, directly or indirectly, any money, gratuity, or other thing of value from any officer, employee, representative, agent, or consultant of any competing contractor for such procurement; or

"(3) disclose any proprietary or source selection information regarding such procurement directly or indirectly to any person other than a person authorized by the head of such agency or the contracting officer to receive such information.

"(c) DISCLOSURE TO UNAUTHORIZED PERSONS.—During the conduct of any Federal agency procurement of property or services, no person who is given authorized or unauthorized access to propri-

etary or source selection information regarding such procurement, shall knowingly disclose such information, directly or indirectly, to any person other than a person authorized by the head of such agency or the contracting officer to receive such information.

"(d) CERTIFICATION AND ENFORCEMENT MATTERS.—(1) A Federal agency may not award a contract for the procurement of property or services to any competing contractor, or agree to any modification or extension of a contract, unless the officer or employee of such contractor responsible for the offer or bid for such contract, or the modification or extension of such contract, as the case may be—

"(A)(i) certifies in writing to the contracting officer responsible for such contract that such officer or employee of the competing contractor has no information concerning a violation or possible violation of subsection (a), (b), (c), or (e), or applicable implementing regulations, pertaining to such procurement; or

"(ii) discloses to such contracting officer any and all such information and certifies in writing to such contracting officer that any and all such information has been disclosed; and

"(B) certifies in writing to such contracting officer that each officer, employee, agent, representative, and consultant of such competing contractor who has participated personally and substantially in the preparation or submission of such bid or offer, or in such modification or extension of such contract, as the case may be, has certified to such competing contractor that he or she—

"(i) is familiar with, and will comply with, the requirements of subsection (a) and applicable implementing regulations; and

"(ii) will report immediately to the officer or employee of the competing contractor responsible for the offer or bid for any contract or the modification or extension of such contract, as the case may be, any information concerning a violation or possible violation of subsection (a), (b), (c), or (e), or such applicable implementing regulations, pertaining to such procurement.

"(2) A Federal agency may not award a contract for the procurement of property or services, or agree to any modification or extension of any such contract, unless the contracting officer responsible for such procurement—

"(A) certifies in writing to the head of such agency that the contracting officer has no information concerning a violation or possible violation of subsection (a), (b), (c), or (e), or applicable implementing regulations, pertaining to such procurement; or

"(B) discloses to the head of such agency any and all such information and certifies in writing that any and all such information has been disclosed.

"(3) The head of a Federal agency may require any procurement official or any competing contractor, at any time during the conduct of any Federal agency procurement of property or services—

"(A) to certify in writing to the head of such agency that such procurement official or the officer or employee of the competing contractor responsible for the offer or bid for such contract or the modification or extension of such contract, as the case may be, has no information concerning a violation or possible violation of subsection (a), (b), (c), or (e), or applicable implementing regulations, pertaining to such procurement; or

"(B) to disclose to the head of such agency any and all such information and to certify in writing that any and all such information has been disclosed.

"(4) If a procurement official leaves the Government during the conduct of such a procurement, such official shall certify that he or she understands the continuing obligation not to disclose proprietary or source selection information.

"(5) For the purposes of enforcing the requirements of this section, the contracting officer responsible for the conduct of a procurement shall maintain, as part of the procurement file—

"(A) all certifications made by procurement officials and competing contractors with regard to such procurement, as required by this subsection; and

"(B) a record of all persons who have been authorized by the head of the agency or the contracting officer to have access to proprietary or source selection information regarding such procurement. Records.

"(6) Any person making a certification required by this subsection shall be notified of the applicability of section 1001 of title 18, United States Code, to false, fictitious, or fraudulent statements in such certification. Fraud.

"(7)(A) This subsection applies only to contracts, extensions, and modifications in excess of $100,000.

"(B) This subsection need not be applied to a contract—

"(i) with a foreign government or an international organization that is not required to be awarded using competitive procedures pursuant to section 303(c)(4) of the Federal Property and Administrative Services Act of 1949 or section 2304(c)(4) of title 10, United States Code; or

"(ii) in an exceptional case, when the head of the Federal agency concerned determines in writing that this subsection should be waived pursuant to procedures and criteria established in implementing regulations issued pursuant to subsection (m) and notifies the Congress in writing of such determination.

The authority to make determinations under clause (ii) of this subparagraph may not be delegated.

"(e) RESTRICTIONS ON GOVERNMENT OFFICIALS AND EMPLOYEES.—No Government official or employee, civilian, or military, who has participated personally and substantially in the conduct of any Federal agency procurement or who has personally reviewed and approved the award, modification, or extension of any contract for such procurement shall—

"(1) participate in any manner, as an officer, employee, agent, or representative of a competing contractor, in any negotiations leading to the award, modification, or extension of a contract for such procurement, or

"(2) participate personally and substantially on behalf of the competing contractor in the performance of such contract,

during the period ending 2 years after the last date such individual participated personally and substantially in the conduct of such procurement or personally reviewed and approved the award, modification, or extension of any contract for such procurement.

"(f) CONTRACTUAL PENALTIES.—(1) Regulations issued pursuant to subsection (m) shall require that each contract awarded by a Federal agency contain a clause specified in such regulation that provides appropriate contractual penalties for conduct of any competing

contractor prohibited by subsection (a) and for any such conduct of any officer, employee, agent, representative, or consultant of such contractor.

"(2) The following remedies are authorized to be included in, and shall be considered in the development of, such regulations:

"(A) Denial of payment of all or any portion of the profit component of amounts otherwise payable to the contractor by the Federal agency under the contract and recovery of all or any portion of the profit component of amounts paid to the contractor by the Federal agency under the contract.

"(B) Termination of the contract for default.

"(C) Any other appropriate penalty.

"(g) ADMINISTRATIVE ACTIONS.—(1) If an agency receives a disclosure of information pursuant to subsection (d) or otherwise receives or obtains information providing a reasonable basis to believe that an officer, employee, agent, representative, or consultant of a competing contractor has knowingly violated the requirements of this section—

"(A) in the case of a procurement in which a contract has not been awarded, the agency shall determine whether to terminate the procurement or take other appropriate actions;

"(B) in the case of a procurement with respect to which a contract has been awarded, the agency shall determine whether to void or rescind the contract, to terminate the contract for default, to impose sanctions upon the contractor, or to permit the contractor to continue to perform the contract, subject to review in accordance with, and to the extent provided in, the Contract Disputes Act of 1978, or to take other appropriate actions; and

"(C) if the agency determines that such a knowing violation has occurred, the agency, pursuant to procedures specified in the Federal Acquisition Regulation—

"(i) may impose an immediate suspension, and

"(ii) shall determine whether to initiate a debarment proceeding,

against the competing contractor or other person who committed such violation.

"(2) Any procurement official of a Federal agency who engages in conduct prohibited by subsection (b) or (c) shall be subject to removal or other appropriate adverse personnel action pursuant to the procedures specified in chapter 75 of title 5, United States Code, or other applicable law or regulation.

"(3) The actions taken under paragraph (1) or (2) may be suspended by the agency head upon the request of the Attorney General pending the disposition of any civil or criminal actions pursuant to subsections (h) and (i).

"(h) CIVIL PENALTIES.—Any person who engages in conduct prohibited by subsection (a), (b), (c), or (e) shall be subject to the imposition of a civil fine in a civil action brought by the United States in an appropriate district court of the United States. The amount of any such civil fine for such violation may not exceed—

"(1) $100,000 in the case of an individual; or

"(2) $1,000,000 in the case of a competing contractor (other than an individual).

"(i) CRIMINAL PENALTIES.—Whoever, during the conduct of a Federal agency procurement of property or services—

"(1) being a competing contractor or an officer, employee, representative, agent, or consultant of a competing contractor, knowingly and willfully solicits or obtains, directly or indirectly, from any officer or employee of such agency any proprietary or source selection information (as such terms are defined in subsection (n) and in regulations prescribed pursuant to subsection (m)), or

"(2) being an officer or employee of such agency, knowingly and willfully discloses or promises to disclose, directly or indirectly, to any competing contractor or any officer, employee, representative, agent, or consultant of a competing contractor any proprietary or source selection information,

shall be imprisoned for not more than 5 years, or fined in accordance with title 18, United States Code, or both.

"(j) TRAINING.—The head of each Federal agency shall establish a procurement ethics program for its procurement officials. The program shall, at a minimum—

"(1) provide for the distribution of written explanations of the provisions of subsection (b) to such procurement officials; and

"(2) require each such procurement official, as a condition of serving as a procurement official, to certify that he or she is familiar with the provisions of subsection (b), and will not engage in any conduct prohibited by such subsection, and will report immediately to the contracting officer any information concerning a violation or possible violation of subsection (a), (b), (c), or (e), or applicable implementing regulations.

"(k) REMEDIES NOT EXCLUSIVE.—Nothing in this subsection shall be construed to limit the applicability of the requirements, sanctions, contract penalties, and remedies established under any other law, but no agency shall be relieved of the obligation to carry out the requirements of this section because such agency has also applied such other requirements, sanctions, contract penalties, or remedies.

"(l) NO AUTHORITY TO WITHHOLD INFORMATION.—Nothing in this section shall be construed to authorize the withholding of any information from the Congress, any committee or subcommittee thereof, a Federal agency, any board of contract appeals of a Federal agency, the Comptroller General, or an Inspector General of a Federal agency.

"(m) IMPLEMENTING REGULATIONS AND GUIDELINES.—Government-wide regulations and guidelines deemed appropriate to carry out this section shall be issued in the Federal Acquisition Regulation within 180 days after the date of enactment of this section.

"(n) DEFINITIONS.—As used in this section:

"(1) The term 'during the conduct of any Federal agency procurement of property or services' means the period beginning with the development, preparation, and issuance of a procurement solicitation, and concluding with the award, modification, or extension of a contract, and includes the evaluation of bids or proposals, selection of sources, and conduct of negotiations.

"(2) The term 'competing contractor', with respect to any procurement (including any procurement using procedures other than competitive procedures) of property or services, means any entity that is, or is reasonably likely to become, a competitor for or recipient of a contract or subcontract under such procurement, and includes any other person acting on behalf of such an entity.

"(3)(A) The term 'procurement official' means any civilian or military official or employee of an agency who has participated personally and substantially in the conduct of the agency procurement concerned, including all officials and employees who are responsible for reviewing or approving the procurement, as further defined by applicable implementing regulations.

"(B) For purposes of subparagraph (A), the term 'employee of an agency' includes a contractor, subcontractor, consultant, expert, or adviser (other than a competing contractor) acting on behalf of, or providing advice to, the agency with respect to any phase of the agency procurement concerned.

"(4) The term 'contracting officer' means any official or employee of a Federal agency who has been authorized by the agency head or his or her designee to enter into, administer, or terminate contracts and make related determinations and findings.

"(5) The term 'Federal agency' has the meaning provided by section 3(b) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 472(b)).

"(6) The term 'proprietary information' means—

"(A) information contained in a bid or proposal;

"(B) cost or pricing data; or

"(C) any other information submitted to the Government by a contractor and designated as proprietary, in accordance with law or regulation, by the contractor, the head of the agency, or the contracting officer.

"(7) The term 'source selection information' means information determined by the head of the agency or the contracting officer to be information—

"(A) the disclosure of which to a competing contractor would jeopardize the integrity or successful completion of the procurement concerned; and

"(B) which is required by statute, regulation, or order to be secured in a source selection file or other restricted facility to prevent such disclosure;

as further defined by regulations issued pursuant to subsection (m) of this section.".

41 USC 423 note.

(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall take effect 180 days after the date of enactment of this Act.

41 USC 405 note.

SEC. 7. PROFIT METHODOLOGY STUDY.

(a) IN GENERAL.—The Administrator shall conduct a study to develop a consistent methodology which executive agencies should use for measuring the profits earned by government contractors on procurements, other than procurements where the price is based on adequate price competition or on established catalog or market prices of commercial items sold in substantial quantities to the general public.

(b) CONTRACTORS' FINANCIAL DATA.—The methodology developed under subsection (a) shall include adequate procedures for verifying and maintaining the confidentiality of contractors' financial data.

SEC. 8. DEFINITION OF ARCHITECTURAL AND ENGINEERING SERVICES.

Section 901 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 541) is amended by striking out paragraph (3) and inserting the following:

"(3) The term 'architectural and engineering services' means—

"(A) professional services of an architectural or engineering nature, as defined by State law, if applicable, which are required to be performed or approved by a person licensed, registered, or certified to provide such services as described in this paragraph;

"(B) professional services of an architectural or engineering nature performed by contract that are associated with research, planning, development, design, construction, alteration, or repair of real property; and

"(C) such other professional services of an architectural or engineering nature, or incidental services, which members of the architectural and engineering professions (and individuals in their employ) may logically or justifiably perform, including studies, investigations, surveying and mapping, tests, evaluations, consultations, comprehensive planning, program management, conceptual designs, plans and specifications, value engineering, construction phase services, soils engineering, drawing reviews, preparation of operating and maintenance manuals, and other related services.".

SEC. 9. ESTABLISHMENT OF THE COMMERCIAL PRODUCTS ADVOCATE.

The Office of Federal Procurement Policy Act is further amended by adding at the end thereof the following:

"ADVOCATE FOR THE ACQUISITION OF COMMERCIAL PRODUCTS

"SEC. 28. There is established in the Office of Federal Procurement Policy the position of Advocate for the Acquisition of Commercial Products. The Advocate shall report directly to the Administrator. The Advocate for Acquisition of Commercial Products shall— 41 USC 424.

"(1) review all proposed procurement regulations and report to the Administrator as to whether such regulations will encourage or discourage the acquisition of commercial products by Federal agencies; Reports.

"(2) provide recommendations to the Administrator as to which procurement regulations should be rescinded or modified to encourage the acquisition of commercial products; and

"(3) provide recommendations to the Administrator as to methods of simplifying procurement regulations governing acquisition of commercial products, including the most efficient method to apply, modify, or waive the certification requirements of section 27 of this Act with respect to contracts for such products.".

SEC. 10. STUDY AND REPORT BY THE ADMINISTRATOR FOR FEDERAL PROCUREMENT POLICY.

No later than April 1, 1989, the Administrator for Federal Procurement Policy, in consultation with the Comptroller General, shall conduct a study and submit a report to the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House of Representatives—

(1) on the extent to which the data collected by the Federal Procurement Data System is adequate for the management, oversight, and evaluation of Federal procurement; and

(2) which shall include any appropriate recommendations for improvements of such system.

SEC. 11. ELEVATION OF PRESIDENTIAL APPOINTEES WITHIN THE OFFICE OF MANAGEMENT AND BUDGET.

(a) EXECUTIVE SCHEDULE, LEVEL I.—Section 5312 of title 5, United States Code, is amended by adding at the end thereof the following:

"Director of the Office of Management and Budget.".

(b) EXECUTIVE SCHEDULE, LEVEL II.—Section 5313 of title 5, United States Code, is amended—

(1) by adding at the end thereof the following:

"Deputy Director of the Office of Management and Budget."; and

(2) by striking out "Director of the Office of Management and Budget.".

(c) EXECUTIVE SCHEDULE, LEVEL III.—Section 5314 of title 5, United States Code, is amended—

(1) by adding at the end thereof the following:

"Administrator for Federal Procurement Policy.

"Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget."; and

(2) by striking out "Deputy Director of the Office of Management and Budget.".

(d) EXECUTIVE SCHEDULE, LEVEL IV.—Section 5315 of title 5, United States Code, is amended—

(1) by striking out "Administrator for Federal Procurement Policy."; and

(2) by striking out "Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget.".

5 USC 5312 note.

(e) EFFECTIVE DATE.—The amendments made by this section shall be effective on January 20, 1989.

SEC. 12. TRAVEL EXPENSES UNDER CERTAIN GOVERNMENT CONTRACTS.

Section 24 of the Office of Federal Procurement Policy Act (41 U.S.C. 420) is amended—

(1) by redesignating such section as subsection (a) of section 24; and

(2) by adding at the end thereof the following new subsection:

"(b)(1) The provisions of subsection (a) shall not apply to any agreement between an executive agency and a State institution, or an executive agency and a nonprofit institution, entered into for the purpose for conducting federally sponsored research and related activities.

"(2) Under any agreement described under paragraph (1), costs incurred by personnel for travel, including costs of lodging, other subsistence, and incidental expenses, shall be considered reasonable and allowable only to the extent that such costs do not exceed—

"(A) charges normally allowed by the respective institution in its regular operations as a result of an institutional policy; and

"(B) the limits and principles as are provided for by government-wide regulation of such costs established by the Director of the Office of Management and Budget.

"(3) The regulation under paragraph (2)(B) shall specifically provide that in the absence of an institutional policy regarding travel costs, the rates and amounts established under subchapter I of chapter 57 of title 5, United States Code, or by the Administrator of General Services or the President (or his designee) pursuant to any provisions of such subchapter shall apply to agreements between an executive agency and a State institution, or an executive agency and a nonprofit institution, entered into for the purpose of conducting federally sponsored research and related activities.".

SEC. 13. FEDERAL EMPLOYEE BENEFITS FOR CERTAIN EMPLOYEES OF FORMER PRESIDENTS AND VICE PRESIDENTS.

(a) RETIREMENT BENEFITS.—(1) Section 8331(1) of title 5, United States Code, is amended by—

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

(B) by inserting "and" after the semicolon at the end of subparagraph (J); and

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

"(K) an individual appointed to a position on the office staff of a former President, or a former Vice President under section 4 of the Presidential Transition Act of 1963, as amended (78 Stat. 153), who immediately before the date of such appointment was an employee as defined under any other subparagraph of this paragraph;".

(2) Section 8401(11) of title 5, United States Code, is amended by striking out "or (J)" and inserting in lieu thereof "(J), or (K)".

(b) LIFE INSURANCE.—Section 8701(a) of title 5, United States Code, is amended by—

(1) striking out "and" at the end of paragraph (8);

(2) by inserting "and" after the semicolon at the end of paragraph (9); and

(3) inserting after paragraph (9) the following new paragraph:

"(10) an individual appointed to a position on the office staff of a former President, or a former Vice President under section 4 of the Presidential Transition Act of 1963, as amended (78 Stat. 153), who immediately before the date of such appointment was an employee as defined under any other paragraph of this subsection;".

(c) HEALTH BENEFITS.—Section 8901(1) of title 5, United States Code, is amended by—

(1) striking out "and" at the end of subparagraph (F); and

(2) inserting after subparagraph (G) the following new subparagraphs:

"(H) an individual appointed to a position on the office staff of a former President under section 1(b) of the Act of August 25, 1958 (72 Stat. 838); and

"(I) an individual appointed to a position on the office staff of a former President, or a former Vice President under section 4 of the Presidential Transition Act of 1963, as amended (78 Stat. 153), who immediately before the date of such appointment was an employee as defined under any other subparagraph of this paragraph;".

Approved November 17, 1988.

LEGISLATIVE HISTORY—S. 2215 (H.R. 3345):

HOUSE REPORTS: No. 100-911 accompanying H.R. 3345 (Comm. on Government Operations).
SENATE REPORTS: No. 100-424 (Comm. on Governmental Affairs).
CONGRESSIONAL RECORD, Vol. 134 (1988):
Aug. 11, considered and passed Senate.
Sept. 13, H.R. 3345 considered and passed House; proceedings vacated and S. 2215, amended, passed in lieu.
Oct. 19, Senate concurred in House amendments with an amendment.
Oct. 20, House concurred in Senate amendment.