OVERSIGHT OF IMPLEMENTATION OF FEDERAL ACQUISITION STREAMLINING ACT OF 1994

HEARING

BEFORE THE

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTH CONGRESS

FIRST SESSION

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OVERSIGHT OF IMPLEMENTATION OF FEDERAL ACQUISITION STREAMLINING ACT OF 1994

TUESDAY, FEBRUARY 21, 1995

HOUSE OF REPRESENTATIVES,
COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT,
Washington, DC.

The committee met, pursuant to notice, at 2 p.m., in room 2154, Rayburn House Office Building, Hon. William F. Clinger, Jr. (chairman of the committee) presiding.

Present: Representatives Clinger, Morella, Shays, Zeliff, Horn, Mica, Blute, Fox, Chrysler, Gutknecht, Souder, Flanagan, Slaughter, Thurman, Maloney, Taylor, and Mascara.

Staff present: Ellen Brown, procurement counsel; James Clarke, staff director; Jonathan Yates, associate general counsel; Judith McCoy, chief clerk; Russell George, staff director/counsel, Subcommittee on Government Management, Information, and Technology; Mark Brasher, professional staff member, Subcommittee on Government Management, Information, and Technology; Susan Marshall, procurement specialist, Subcommittee on Government Management, Information, and Technology; Andrew Richards, clerk, Subcommittee on Government Management, Information, and Technology; Cheryl Phelps and Miles Q. Romney, minority professional staff members.

Mr. CLINGER. The Committee on Government Reform and Oversight will come to order.

The committee is meeting today to hear testimony from the administration on its implementation plan for the Federal Acquisition Streamlining Act of 1994.

Reforming the incredibly arcane and red tape constructed Federal procurement system is an extremely difficult and complex task. Nevertheless, it is an issue of vital importance to American business, both large and small, and to the American taxpayer.

There is no doubt that the almost $200 billion spent each year by the Federal Government has been done in an inefficient and Byzantine way. The current system costs too much, has involved too much red tape, and has ill-served both the taxpayer and industry. The Federal Acquisition Streamlining Act of 1994, FASA, was a direct attack on a procurement system that had gone haywire. It applied some common sense approaches to the bureaucracy to reduce the inefficiency of the system, get some real cost savings for the taxpayer by encouraging competition, and reduce the burdens

on both government contracting officials and those who sell to them.

The new law was developed over a long period of time and represented the coordinated bipartisan efforts of both the House and the Senate with much participation and input from the administration and from industry sources. It reflected many of the recommendations of the Section 800 panel, a congressionally mandated panel of industry and government officials charged with developing recommendations to streamline and simplify the procurement system. Consistent with the administration's National Performance Review, it included many reforms advocated for years to enable the government to act more like a business in the way it buys goods and services.

Yet, as I said on the House floor when we passed FASA, the true impact of this new law would not be fully realized until the regulations are written that implement this legislation. We left to the executive branch, as we often do, much of the hard work in seeing through the goals and purposes of the new law.

We have been expecting that the regulation writers would not only execute the letter of the law fully and promptly, but would also carry out the spirit of what all of us, I think, intended when we enacted FASA. This would include not just writing and revising regulations pursuant to FASA, but looking at and attacking internal agency regulations and procedures which are contrary to the letter and spirit of the new law.

We are here today to hear from those two individuals who have been trusted, and rightfully so, with the important responsibility of doing just that, the Honorable Steven Kelman, the Administrator for Federal Procurement Policy at the Office of Management and Budget, and Mrs. Colleen Preston, Deputy Under Secretary of Defense for Acquisition Reform.

We are looking forward to your testimony to outline for us your plans for implementing this important new law, and I think it is worth noting at this point that these are the two major players here because we now have a coordinated procurement policy, which we have not had in the past.

In addition to your testimony, we have asked industry and other interested parties to submit for the record written testimony to help us review and analyze your regulatory implementation. Since some of the significant regulations have not been issued and not all parties could get their written statements to us in time for this hearing today, we intend to leave the record open for a sufficient time after the hearing to permit those who are interested an opportunity to provide their comments to us on the regulatory actions that are in progress. We are going to follow up with you through specific written questions, if we may, and we may from time to time ask you to come back and give us a status report on your progress.

The success or failure of this streamlining effort really rests with, in large part, on your shoulders. We are going to be embarking on further legislative efforts to reform and streamline the procurement system, building on, I think, a very successful effort we had last year.

Later this week I intend to introduce a bill which will be the foundation for further procurement reforms. My bill will include two issues which we were unable to resolve. At least as a start, we will include two issues which we were unable to resolve to my satisfaction and to the satisfaction of some others during the development of FASA, and then I am going to be calling on you and industry to help this committee develop the remainder of this legislative package as we move through the process.

But we must ensure that our attention is not diverted from implementation of FASA. Further legislative changes which complement FASA are necessary, but only through the vigorous implements of FASA will the Federal procurement system work better, work smarter, and just plain work.

And now, if I may ask Mr. Kelman and Mrs. Preston to come forward, and would you mind, we have a practice in the committee of swearing all witnesses. Is that all right with you?

Mr. KELMAN. This is fine. Do we just stand up?

No, no, you don't need to stand up.

Mr. CLINGER. Well, I will stand up. Let's all stand up.

[Witnesses sworn.]

Mrs. MALONEY. Mr. Chairman, I have a statement.

Mr. CLINGER. Yes, indeed. The gentlelady from New York.

Mrs. MALONEY. Thank you very much, Chairman Clinger. Mrs. Collins, unfortunately, cannot be here and I ask that her full statement be part of the record. I hope you approve; OK? May Mrs. Collins——

Mr. CLINGER. Without objection, so ordered.

[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, it is indeed timely that we today assess the Administration's progress in prescribing the regulations necessary to implement the Federal Acquisition Streamlining Act of 1994. This is because it also affords us the opportunity to acknowledge the success of this Committee and the 103rd Congress in achieving truly bipartisan consensus on the most sweeping procurement reform legislation in the last ten years. Mr. Chairman, you and other Republicans now serving in the majority on this Committee played an integral role in that success. I have every confidence that under your leadership, our efforts to further reform the Federal acquisition system will reflect a similarly cooperative and bipartisan intent.

The U.S. Government spends approximately $200 billion annually on civilian and defense-related goods and services—about $800 for every man, woman and child in the country. And, as we are all well aware, the government's process for procuring these goods and services has become fiscally and commercially untenable.

Revising more than 225 statutory rules and encouraging the use of innovative procurement techniques, the Federal Acquisition Streamlining Act of 1994 (or "FASA") vastly improves the procurement process and creates a more efficient, responsive and uniform acquisition system. FASA enables Federal contracting agencies to effectively embrace the Administration's vision of a leaner and smarter government. In fact, in the words of one of our witnesses here today: "FASA has become the cornerstone of the Administration's procurement streamlining program."

I look forward to learning from our distinguished witnesses what progress has been achieved toward the regulatory implementation of FASA. Clearly, the benefits of this important legislation cannot be fully realized until the rules are in place. In addition, I am seeking assurances that provisions of the Act that serve to further critical socio-economic objectives remain in focus and on schedule.

As the custodians of the largest single purchaser in the world, the Congress—and specifically this Committee in the House—has an obligation to ensure that the Federal government is an informed, responsible, strategic, and compassionate consumer. I take every nuance of this obligation seriously, and anticipate playing

a significant role in this and all Committee proceedings addressing procurement reform issues.

Mrs. MALONEY. Very well.

Mr. Chairman, the Federal Government spends over $200 billion a year on procurement, that is $800 for every American taxpayer spent on goods and services. There are few areas of the Federal Government that are more important for controlling spending and better managing our limited resources.

I thank you for holding this hearing to ensure the timely and accurate implementation of this law. This law, when fully implemented, will simplify and streamline the Federal procurement process while ensuring its fairness, accountability, and integrity. It will reduce paperwork, especially for contracts under $100,000, and will encourage the Federal Government to buy commercial products at the fairest prices. It will also strengthen the protest and oversight process, improve the integrity of the procurement process, and standardized the procurement code by eliminating obsolete and redundant laws. In other words, by allowing government to cut red tape and purchase products off the shelf instead of following detailed specifications, we will hopefully get rid of the so called $500 hammers.

The Federal Acquisition Streamlining Act incorporated several of Vice President Gore's National Performance Review recommendations, such as providing for multiyear contracts, promoting excellence in vendor performance, and allowing State and local governments to use Federal supply services.

The law included a 5 percent procurement goal for women-owned and minority-owned businesses. Procurement by women-owned and minority-owned businesses has been unacceptably low for far too long, and the inclusion of this goal was a clear indication of Federal support for equal opportunity for women and minority business owners.

I would like to commend the chairman for all of his hard work on this act and for his continuing bipartisan approach on the issue of procurement reform. Without your determination and hard work, enactment of the Federal Acquisition Streamlining Act would not have been possible. Hopefully further improvements to the Federal Government's procurement system can be achieved in the same bipartisan spirit.

Thank you, Mr. Chairman.

Mr. CLINGER. Thank you very much, Mrs. Maloney, and I believe the gentlelady from Maryland, Mrs. Morella, has a statement.

Mrs. MORELLA. Thank you, Mr. Chairman.

Very briefly, I want to also thank you for calling today's hearing to review the implementation of the Federal Acquisition Streamlining Act of 1994. Passage of FASA last year was the culmination of many years of work by Congress, the executive branch, and industry. When it passed, I held a procurement conference in my district, in Montgomery County, MD. When I mentioned some of the highlights of this legislation, there was a resounding applause. People were so looking forward to having us come to grips with this problem.

I was not on the committee last year when you held the hearings, but, again, I commend the committee for passing it and look

forward to hearing today about its implementation and what more can be done.

FASA did make important changes in the government's acquisition process. The law increases the government's use of commercial products, reduces the paperwork burden on industry, and simplifies the acquisition process for contracts under $100,000. Nonetheless, the success of procurement reform depends not only on successful implementation of FASA but also on improved agency management and oversight of procurement procedures and practices. In addition, there are several legislative proposals to build on last year's passage of FASA. I am looking forward to reviewing the bill that you are planning to introduce, Mr. Chairman.

We are fortunate to have with us today witnesses from the Office of Management and Budget, and from the Department of Defense to give us their assessment of problems and progress in the implementation of FASA, and I look forward to hearing them.

Thank you, Mr. Chairman.

Mr. CLINGER. Thank you very much, Mrs. Morella.

[The prepared statement of Hon. Constance A. Morella follows:]

PREPARED STATEMENT OF HON. CONSTANCE A. MORELLA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MARYLAND

Mr. Chairman, I want to commend you for calling today's hearing to review the Implementation of the Federal Acquisition Streamlining Act of 1994 (FASA). Passage of FASA last year was the culmination of many years of work by Congress, the executive branch, and industry.

FASA made important changes in the Government's acquisition process. The law increases the Government's use of commercial products, reduces the paperwork burden on industry, and simplifies the acquisition process for contracts under $100,000.

Nonetheless, the success of procurement reform depends not only on successful implementation of FASA, but also on improved agency management and oversight of procurement practices. In addition, there are several legislative proposals to build on last year's passage of FASA. We are fortunate to have with us today witnesses from the Office of Management and Budget and from the Department of Defense to give us their assessment of problems and progress in the implementation of FASA.

[The prepared statement of Hon. Charles F. Bass follows:]

PREPARED STATEMENT OF HON. CHARLES F. BASS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW HAMPSHIRE

Mr. Chairman, I would like to thank our witnesses for taking the time to testify before us today. The Federal Acquisition Streamlining Act of 1994, or FASA, represents an important step in our efforts to bring some sanity to government spending. I am therefore looking forward to the opportunity to hear from these witnesses on how much progress the executive branch is making on carrying out the mandate of FASA.

Both as a member of this Committee and as a member of the Budget Committee, I am very interested in seeking new ways in which we can better streamline how the government makes its purchases. I hope that our witnesses today will be able to shed some light on whether we can expect FASA to be a success, in addition to whether Congress should make further improvements to the procurement process.

Finally, I would like to give particular thanks to Mrs. Colleen Preston from the Department of Defense for appearing today. DoD has been responsible for some of our government's best procurement successes, as well as some of its worst failures. I hope that Mrs. Preston's testimony will help illustrate what works, what doesn't work, and what improvements can be made.

I thank the Chairman.

Mr. CLINGER. If no other Members have any opening statements, I would again welcome Mr. Kelman and Mrs. Preston to the wit-

ness table and tell you without objection your entire written statement would be included in the record and you may read it or proceed as you will.

STATEMENT OF STEVEN KELMAN, ADMINISTRATOR, OFFICE OF FEDERAL PROCUREMENT POLICY

Mr. KELMAN. I will try to summarize as best I can.

Thanks, Mr. Chairman, members of the committee. I very much appreciate the opportunity to come here today to talk about the administration's efforts both to implement FASA and also some of our broader management efforts to create a procurement system that works better and costs less.

Mr. CLINGER. Could you turn on the microphone?

Mr. KELMAN. You heard the beginning? I talk so loud, who needs a microphone.

Let me, if I could, please, start off by expressing my appreciation on behalf of the administration to Chairman Clinger, to Representative Maloney, to Chairman Horn, and for the other members of this committee for working so hard last year to make FASA a reality, and this is really an example of bipartisan efforts, as you indicated in your opening statement, on behalf of the public interest.

I have also been pleased to learn that you, Chairman Clinger, and you, Representative Maloney, have agreed to make personal visits to a government buying office to meet with contracting officers on the front line to hear their concerns—is that a vote?

Mr. CLINGER. No.

Mr. KELMAN. It is not a call; OK.

You will be going out to meet with contracting—this is not easy. Do you have to do this all the time?

Mrs. MORELLA. We live with it all the time.

Mr. KELMAN [continuing]. To meet with contracting officers on the front line, to hear their concern and to demonstrate your support, as Republicans and Democrats both, for procurement reinvention.

Over the last 25 years, the Federal acquisition system has developed into a complex burdensome maze of laws and regulations that have made it difficult for Federal personnel to exercise prudent discretion and business judgment. And that has become both cumbersome, expensive to administer, and also has hindered our ability to provide economical, timely support to taxpayers and to government programs. By decreasing the burdens placed on the procurement process, FASA has become a cornerstone of this administration's efforts to streamline and reinvent the procurement process.

The administration has committed itself to implementing in regulation the authorities given us in FASA as quickly as possible. We do not want to lose a single day unnecessarily of giving taxpayers the benefits that this law provides. You gave us in Congress 330 days to develop these regulations: The President announced, when he signed the bill last October, that we intend to beat that deadline. We are going to develop those regulations on an accelerated basis by streamlining and reinventing and reengineering our own regulatory development process.

To date, 19 interim and proposed rules have already been published implementing FASA. The six remaining rules are being readied for quick publication. So we have 19 out, we have 6 to go.

The most important of the remaining regulations on commercial products and on the simplified acquisition threshold and the FACNET, the electronic commerce system, are just about ready to be published in the Federal Register. I actually signed off on them this morning. They will be out shortly, and I will provide the committee, several days from now in the status report, of the four additional regulations that are not yet out.

Let me also just emphasize that the public's opportunity to offer input into the regulatory process has not been curtailed despite the tight time schedule we are following. We are allowing a full 60 days for public comments. We are having a number of public hearings, and I want to make a pledge, both to you on the committee and to members of the public who are present or listening today, that we will take very seriously any of the suggestions for improvements that are made in comments on the regulations. We want to produce the best possible regulations in cooperation with the public.

Let me move on, because while achieving successful regulatory implementation of FASA is a very high priority, our commitment within the administration to reinventing the procurement system extends as Representative Morella indicated in her opening statement not just to regulations but also to management practices and what is going on in the agencies.

Our overall strategy for procurement reinvention has three goals: No. 1, streamlining; No. 2, achieving quality and good prices for the Government; and, No. 3, improving the partnership between Government and our suppliers.

The message of the NPR was to move from red tape to results and that is the common theme of many of our efforts. We have only been at it for a year, but I am proud to be able to state to this committee today that we are beginning to see our procurement reform efforts bear some fruit and some results and I would like to spend the rest of my testimony sharing some of these concrete success stories with you.

What I would also like to do, if I could, is to acknowledge by name some of the career Federal employees who have made these successes possible. Too often members, career employees of the Federal Government hear their names mentioned in congressional hearings only in conjunction with wrongdoing. Today, I want to have a chance to have these people's names mentioned in conjunction with "rightdoing," with work that they have done on behalf of the taxpayers to give the employees recognition for their efforts.

The first example of success stories I want to talk about relates to what all three of you said in your introductory statements, increasing the government's reliance on commercial products. For many years, as you know, the government has spent enormous time and money developing its own specifications for common consumer products. The bizarre thing has been often ordinary normal every day commercial products, the kinds we often, we use ourselves, have been unable to meet every detail of these specifications. The result has been that the only people able to bid for these

government products have been people manufacturing specifically for the government's specifications rather than regular commercial manufacturers.

Rather than having access to commercial brands of, let's say, salad dressing, the government has by this process been forced in the past to buy products such as this. This is government salad dressing produced specifically for government requirements that are sold nowhere on the commercial marketplace. It is a government-unique product. This is what we bought in the past. Thanks to the procurement reinvention efforts at the Defense Personnel Supply Center in Philadelphia, PA, working to move toward commercial products, this is what we are now buying for salad dressing. So we have moved from this government-unique, government-manufactured salad dressing to the same kind of salad dressing that all of us buy in the store every day.

This has not only allowed us to save on average between 5 and 10 percent on the food we bought this way, but we are getting quality national brands for this less money rather than government-unique items.

In addition, we are now getting just-in-time delivery. So we do not need to spend as much money to store these items in government warehouses. Right here in Washington, Walter Reed Army Hospital has been able to cut its food inventory levels in half, that is food for patients, close a storage facility, and get rid of two refrigerated trucks.

I want to acknowledge before this committee the work of Tony DiCioccio and the Food Demonstration Program Team at the Defense Personnel Supply Center in Philadelphia for making this success story possible.

In addition, I would like to point out the Air Force has reduced the number of military standards and military specifications documents from 150 to 2 when it contracted recently for the space-based infrared system, which was an upgrade of an existing satellite system. The Air Force is relying instead of those special government requirements on international and best commercial practice standards for the new system. And for that I want to acknowledge before this committee the efforts of Colonel Craig Weston of the Air Force's Space-Based Infrared Program office for making that success story possible.

Let me move on to using incentives to motivate contractors.

Thanks to an innovative procurement technique that has allowed us to unleash the ingenuity of the private sector, the Santa Monica Freeway, fairly near Congressman Horn's district, not quite in your district, the Santa Monica Freeway which collapsed during the 1994 Los Angeles earthquake was rebuilt in record time. Contractors were allowed to compete both on price and on how quickly they could reconstruct the freeway. Contractors agreed to accept financial penalties for failing to achieve their time commitments and were given the prospect of financial rewards if they came in under their time commitments.

The result was that the actual reconstruction, which was initially expected to take 104 weeks, ended up being accomplished within 10 weeks, one-tenth of the time originally expected. I would like to acknowledge before this committee the work of Jim Bednar and his

team at the Department of Transportation for making that story the success that it is.

Let me move on to talk about the increasing use of purchase cards, commercial bank cards, in the government. In October 1993, 10 Federal agencies pledged to double their use of purchase cards, commercial bank cards, to allow program offices to make simple purchases under $2,500 without needing to go through a separate procurement bureaucracy. On average, the government saves $54 every time we bypass these extra bureaucratic administrative steps and allow program offices to buy direct.

We make 10 million purchases under $2,500 a year. In addition to saving money, using the purchase card allows us to shave as much as several weeks off of procurement lead time. The 10 agencies that made the pledge to double their use of the purchase card met their pledge 4 months ahead of schedule.

At one custom service field office, the government was able to purchase privacy panels for an office from a liquidator for $2,450 compared to a low bid of $4,000 received through the normal process because the purchase card allowed them to take advantage of a special-while-supplies-last offer.

Scientists at the National Oceanic and Atmospheric Administration have reported that the ability to use the purchase card has allowed for timely repair of scientific equipment when otherwise scientific data would have been lost or experiments interrupted.

The supply operation at the Pentagon was able to absorb a 40 percent cut in purchasing staff due to the expanding use of the card from 500 actions in 1993 to 16,000 actions in 1995. I am pleased to commend before this committee Annelie Kuhn at the Department of the Treasury and her interagency team for successfully promoting expanded use of the purchase card.

Let me just talk quickly about a few more success stories and then I will finish up. Expanding use of past performance. Since the Defense Personnel Supply Center in Philadelphia moved several years ago to a best value procurement of clothing and textiles, where they looked very carefully at how contractors had performed in the past before awarding new contracts, the dollar value of the contracts the government has needed to terminate because a supplier performed so poorly has declined from $133 million a year to one-tenth of that, $13 million a year.

I would like to acknowledge before this committee the efforts of Paul Zebrowski of the clothing and textiles unit's quick response team at DPSC in Philadelphia for making this success story possible.

Using multiple award contracts. I saw recently an article in a computer magazine in a trade press reporting Zenith Data Systems, a vendor supplying personal computers to the Air Force, lowered the price and increased the performance of the PCs it was supplying under the contract.

Now, presumably, to any of us, as consumers, that does not sound surprising since those kinds of price drops are taking place every day in the commercial marketplace. Traditionally, however, the government had locked itself into long-term contracts with one supplier to supply these PC's over several years, and prices typically did not go down in line with the marketplace.

Now the Air Force and many other agencies have begun competitively awarding such PC contracts to two or more suppliers, which allows them to compete in real time through the life of the contract for the customer's business. So we are achieving the savings that we should be. And I would like to commend before this committee Ms. Kay Walker and the Desktop 4 team at Gunter Air Force Base, AL, for this success story.

Last two.

Increasing the use of performance-based service contracting. On the same day the administration or the President signed FASA into law, the administration initiated a pilot project to encourage the use of performance-based service contracting which basically means writing contracts in terms of the results the government wants to achieve.

The first contract to be awarded under this pilot program was just awarded recently by the Treasury Department, and Treasury has converted a contract for base operating support for the Federal Law Enforcement Training Center at Artesia, NM, two performance-based contracting methods.

In the process, the contract, which formerly reimbursed the contractor for all the allowable costs they submitted in their bills, was converted to a fixed price contract. And this was the first contract awarded by the new method. The successful bidder proposed a price 22 percent less than what the government was paying previously, which means that over the life of this 5-year contract we are going to be getting a whole year of contract performance for free.

I would like to acknowledge before this committee the work of John Richardson and his team at the Department of Treasury's Law Enforcement Training Center for making this success story.

Last example.

Streamlining the award process. Through streamlined procurement methods, the Air Force reduced the size of its program office. On a recent procurement for wind-corrected munitions from 75 to 20 people and the length of contractor proposals—all the money contractors have to spend on these proposals—from several thousand pages to 215 pages.

For that success story, I would like to acknowledge Harry Schulte of the Air Force's conventional strike systems program executive office.

Similarly, NASA has developed procedures to simplify award of contracts up to $500,000. They have been able to reduce the size of the typical solicitation from 70 pages to 7 to 10 pages. And to reduce the size of the resulting contract from 40 pages to 10 to 15 pages. Such documents are far less intimidating to industry and are encouraging more interest in bidding on NASA work.

I would like to acknowledge the work of Lydia Butler at the Marshall Space Flight Center in Huntsville, AL, for helping make this program the success that it is.

Those are just some of the examples. In the interest of time, I have only developed some of them from the files that is growing on this.

Mr. Chairman, Representative Maloney, the message of reform is being heard. As you can see, our efforts are under way. We have

a long way to go but they are under way. Let me emphasize that some of the success stories that I am outlining to you began under the previous administration, which shows, illustrates very well, I think, that the job of making government work better and cost less is a fully bipartisan effort.

The Congress can count on the continuing support of the administration for working to the very, very best of our ability to really make procurement streamlining and procurement reinvention work, and we know that we can continue on your efforts as well.

We are going to be submitting, as you know, very shortly an administration procurement reform package for 1995 emphasizing our themes of streamlining, quality and partnership, and we look forward to working with the committee to make this a reality.

Thank you very much.

Mr. CLINGER. Thank you, Mr. Kelman, for your excellent testimony, and we do indeed look forward to working with you and look forward to receiving the legislation which you are presently preparing and working with you as we move forward.

[The prepared statement of Mr. Kelman follows:]

PREPARED STATEMENT OF STEVEN KELMAN, ADMINISTRATOR, OFFICE OF FEDERAL PROCUREMENT POLICY

Mr. Chairman and Members of the Committee, I appreciate the opportunity to appear before you today to discuss the Administration's efforts to implement the Federal Acquisition Streamlining Act of 1994 (FASA), as well as our broader management efforts to create a procurement system that works better and costs less. FASA, which incorporates many of the recommendations of the Vice President's National Performance Review (NPR), is, in my view, the most significant piece of procurement legislation in over a decade.

I would like to start off by expressing my appreciation to you, Chairman Clinger, as well as to Representative Maloney and the other members of this Committee, for working so hard to secure passage of FASA during the last Congress, and for the bipartisan cooperation we have achieved in the public interest. I am pleased to learn that Chairman Clinger and Representative Maloney have agreed to make personal visits to a government buying office to meet with contracting officers on the front line to hear their concerns and demonstrate support for procurement reinvention.

Over the last 25 years, the federal acquisition system has evolved into a complex and burdensome maze of laws and regulations that have made it difficult for federal personnel to exercise prudent discretion. This system has become both cumbersome and expensive to administer and thus has failed to provide timely, economical support to government programs and taxpayers. By decreasing the burdens on the procurement process and increasing the faith placed in our contracting officials' ability to make sound professional business judgments on behalf of our taxpayers, FASA has become the cornerstone of the Administration's procurement streamlining program.

You should know that we have already begun to take advantage of those authorities that became effective upon FASA's enactment. Two such provisions—one which permits the conduct of procurements under $2,500 ("micro-purchases") as a virtual paperless transaction, and another which creates a consistent $500,000 threshold for the requirement to submit cost and pricing data—are important facets of our streamlining program. The micro-purchase authority is helping to facilitate the widespread use of commercial bank cards—what we call purchase cards—which is making these purchases quick, easy, and inexpensive, as they should be. The $500,000 threshold for the submission of certified cost and pricing data is an important step in lessening the burden of government-unique requirements on the contracting process.

Most of FASA's benefits cannot be realized until implementing regulations are in place. This afternoon, I would like to discuss the steps we are taking to meet this goal. I would also like to share with you a few examples of how some of our ongoing management initiatives to reform the procurement process are already showing positive results. Finally, I would like briefly to mention what we are doing to meet

the challenges presented by, and reap the rewards associated with, transitioning from a paper-based to an electronic procurement process.

Developing Implementing Regulations for FASA

Recognizing that FASA authorizes critical procurement streamlining in an era of declining resources, the Administration has committed itself to implementing its authorities as quickly as possible. We do not want to lose even a single day of the benefits this law provides to the taxpayer. Congress gave us 330 days to develop the regulations. The President announced when he signed FASA in October last year that regulations would be developed on an accelerated basis, faster than the statutory deadline.

Following the President's commitment, the Federal Acquisition Regulatory Council adopted an action plan to carry out this promise. Under the action plan, teams of procurement specialists have been established to address the various substantive areas of the legislation. Each team includes at least one legislative liaison who participated in the discussions with Congress in the development of the law. The liaison's role is to provide background on the legislative history of the provisions and a better understanding of Congress' intent.

To help ensure that implementation occurs expeditiously, special measures have been incorporated into the action plan to avoid the more time-consuming process that would typically occur under routine procedures for regulatory development. The teams have been operating on a full-time basis to draft regulations. Review of the team's work has been performed simultaneously by both defense and civilian officials. Traditionally, this review is performed sequentially. Agencies have been required to offer comments on the draft regulations within 10 days. OMB review of draft regulations has also been accelerated based on our office's agreement to conduct expeditious technical review.

To date, four interim rules and fifteen proposed rules have been published. The six remaining rules are being readied for quick publication. The most important of the remaining regulations—those on commercial items, the simplified acquisition threshold (SAT), and the Federal Acquisition Computer Network (FACNET)—will be published shortly. In fact, I cleared the rule on SAT and FACNET this morning. I will be providing you with a status report within the next few days.

I want to emphasize that the public's opportunity to offer input in the development of these regulations has not been curtailed despite this tight time schedule. Rules are being published for a full 60-day public comment period. The FAR Council will also consider requests for public meetings on any proposed regulation, provided the request is made during the first 30 days of the public comment period. So far, public meetings have been held on the proposed regulations dealing with small business programs and the revisions to the Truth in Negotiations Act. I also note that meetings are scheduled on March 17th for the proposed rules dealing with commercial items, simplified acquisitions, and FACNET.

In all, I am very optimistic about our regulatory implementation efforts. While the task is formidable, I believe that upon its completion, the new regulations will allow for the streamlining we need and the cost savings our taxpayers deserve.

Procurement Reform in Action

While ensuring the successful regulatory implementation of FASA is of the highest priority, you should know that the Administration's commitment to reinventing procurement hardly stops here. Our goals are three: streamline the process, obtain good quality and fair prices, and achieve partnership between government customers and industry suppliers. Moving "from red tape to results" was the message of the NPR—and is the common theme of our many procurement reform projects.

Our project to increase the use of past performance as an evaluation factor in the source selection process promises not only to secure for the government better value for its dollar but also to streamline the evaluation process by reducing the amount of technical requirements that need to be evaluated. Our performance-based service contracting initiative to get agencies to focus on what they need done in mission-related output terms can be expected to reduce significantly the total cost of services and improve contractor performance at the same time. Our effort to help agencies better understand FASA's clarifying authority to make multiple awards for the same requirement and then allow a fair opportunity for consideration of each task order amongst the contract awardees should help reduce costs and improve contractor performance as contractors compete for business in real time.

We've only been at it for a year, but I am proud to say that we are beginning to see our procurement reform efforts show some results. I would like to share some of the success stories with you. I would also like to acknowledge by name some of the career federal employees who have made these successes possible. Too often, fed-

eral employees hear their names mentioned in Congressional committee hearings only when they are being accused of wrongdoing. I want to make sure that those who've been involved in "rightdoing"—in serving the taxpayer—start to get recognition for their efforts.

• *Increasing Reliance on Commercial Practices.* For many years, the government has spent enormous time and money developing its own specifications for common consumer items. Often, ordinary commercial products were unable to meet every detail of these specifications. The bizarre result was that only suppliers producing products specifically for the government were able to compete. Rather than having access, say, to commercial brands of salad dressing, the government ended up buying products such as these—paying more and not getting the benefits of quality that had proved itself with consumers.

As a result of innovative procurement techniques at the Defense Personnel Supply Center (DPSC) in Philadelphia—which buys food, clothing, and medical supplies for our soldiers—the government has now started making available to our military bases ordinary commercial products such as these. Savings of between 5 and 10 percent on food bought this way are being reported—and for those lower prices we're getting quality national brands rather than items produced specially for the government. Furthermore, we're now getting just-in-time delivery, so we don't need to spend as much money to store these items in government warehouses. Walter Reed Hospital, for example, has been able to cut its food inventory levels in half, close a storage facility, and get rid of two refrigerated trucks. In one year at Fort Lee, Virginia, food inventories were reduced from $585,000 to $32,000, and the facility was able to close down its warehouse.

I would like to acknowledge before this Committee the work of Tony DiCioccio and the Food Demonstration Program Team at DPSC for making this success story possible.

You should also note that the Air Force reduced the number of MIL–STDs and MIL–SPECs compliance documents from 150 to 2 when it contracted for the Space-Based Infrared System which increased performance over the existing Defense Support Program satellite system. The Air Force now relies on international and best commercial practices standards for the new system.

I am happy to acknowledge before this Committee the efforts of Col. Craig Weston at the Air Force's Space-Based Infrared Program Office for making this success story possible.

• *Using Incentives to Motivate Contractors.* Thanks to an innovative procurement technique that has allowed us to unleash the ingenuity of the private sector, the Santa Monica Freeway, which collapsed during the 1994 Los Angeles earthquake, was rebuilt in record time. Contractors competed both on price and on how quickly they could safely reconstruct the freeway. Contractors agreed to accept financial penalties for failing to achieve their time commitment and were promised financial rewards for each day they exceeded their commitment. The result was that the actual reconstruction, originally estimated to take 104 weeks, ended up taking only 10 weeks!

I am pleased to acknowledge before this Committee the work of Jim Bednar and his team at the Department of Transportation in making this story the success that it is.

• *Increasing Use of Purchase Cards.* In October 1993, ten agencies pledged to double their use of purchase cards to allow program offices to make purchases under $2,500 without going through the procurement bureaucracy. On average, the government saves $54 every time we bypass these extra bureaucratic steps and allow program offices to buy direct. The government makes almost ten million purchases under $2,500 per year. In addition to saving money, program office use of the purchase card allows us to cut as much as several weeks off procurement leadtime. In short, this is an example of business process re-engineering such as has been used successfully to make private companies more competitive.

The ten agencies that made the pledge to double their use of the purchase card met their pledge four months ahead of schedule. The government is now making over a million transactions a year using this money-saving method. At one Customs Service field office, the government was able to purchase privacy panels for an office from a liquidator for $2,450, compared to a low bid of $4,000 received through the normal process, because the purchase card allowed them to act quickly on a "while supplies last" offer. In other field operations, downtime out in the field has been reduced because of the ability to get quick repair of vehicles or other equipment using the card. Scientists at the National Oceanic and Atmospheric Administration have reported that the ability to use the card has allowed for timely repair of scientific equipment where otherwise scientific data would have been lost or experiments interrupted. The supply operation at the Pentagon was able to absorb a 40 percent

cut in purchasing staff thanks to the expanding use of the card from 500 actions in FY93 to an estimated 16,000 actions in FY95.

In the recent California floods, an agreement between the Federal Emergency Management Agency and the government's purchase card vendor, Rocky Mountain Bank Card System, Inc. of Denver, Colorado, provided, for the first time, for cards to be issued on a rush 24-hour turnaround time to designated temporary disaster workers. The results were positive: the purchases were made quickly and the need for on-site administrative support was greatly reduced.

I am pleased to commend before this Committee Annelie Kuhn at the Department of Treasury and her interagency team for successfully promoting expanded use of the purchase card.

• *Expanding Use of Past Performance.* Since the Defense Personnel Supply Center moved several years ago to best-value procurement of clothing and textiles emphasizing past performance, the dollar volume of contracts that the government needed to terminate for supplier non-performance has declined from $133 million a year to $13 million a year. By identifying poor performers, the Federal Supply Service at GSA improved its on-time delivery rate in one year from 92 percent to almost 96 percent.

As you know, OFPP is pushing hard to get all agencies to expand their use of past performance so that all government customers can see the quality of work done for them go up. In January 1994, 20 Departments and agencies pledged to make past performance a major selection criterion in the award of 60 pilot program contracts, valued at over $2 billion. The Bureau of Prisons in the Department of Justice has been so impressed with the improved quality of services it has seen under contracts for halfway-house services pledged under the pilot program, that it has decided to make past performance a significant evaluation factor in all future halfway-house procurements.

I would like to acknowledge before this Committee the efforts of Paul Zebrowski of the Clothing and Textiles Unit's Quick Response Team at DPSC in making this success story possible.

• *Using Multiple Award Contracts.* An article in the trade press reported recently that Zenith Data Systems, a vendor supplying personal computers to the Air Force, lowered the prices and increased the performance of the computers it was supplying under its contract. That doesn't sound too surprising, since we see such price drops in the private marketplace all the time. Traditionally, however, the government has locked itself into a contract for several years with only one contractor to buy PC's, and prices typically didn't go down in line with the marketplace. Now the Air Force—and many other agencies—have begun competitively awarding such PC contracts to two or more suppliers, having them compete in real time, through the life of the contract, for the customer's business. So we're achieving the savings we should.

I commend before this Committee Kay Walker and the Desktop IV Team at Gunter Air Force Base, Alabama for this success story.

• *Increasing Use of Performance-Based Service Contracting.* On the same day the President signed FASA into law, the Administration initiated a pilot project to encourage the implementation of performance-based service contracting, which basically means writing contracts around the results the government wants to achieve. Twenty-six agencies pledged to convert 87 contracts worth $1.2 billion to this methodology. The first pledged contract to be awarded under this pilot program looks promising indeed. The Department of the Treasury converted its contract for base operating support services for the Federal Law Enforcement Training Center at Artesia, New Mexico, to performance-based contracting methods. In the process, the contract, which formerly reimbursed the contractor for whatever allowable costs it submitted in its bills, was converted to a fixed priced contract. The successful bidder proposed a price 22 percent less than the price the government was paying under the previous contract. That's the equivalent of getting a year's services for free. When factoring in inflation over the past five years, the savings rise to roughly 40 percent. The new fixed-price contract will also allow for the elimination of the time and expense of audits, as well as other administrative savings.

I would like to acknowledge before this Committee the work of John Richardson and his team at the Department of Treasury's Law Enforcement Training Center for making this story one of success.

• *Streamlining the Award Process.* Through streamlined procurement methods, the Air Force reduced the size of its program office on a recent procurement for wind-corrected munitions from 75 to 20 personnel and the length of contractor proposals from several thousand pages to 215 pages. For this success story, I would like to acknowledge Harry Schulte of the Air Force's Conventional Strike Systems Program Executive Office.

Similarly, the National Aeronautics and Space Administration (NASA) has developed, and is testing, midrange procedures to simplify and expedite the award of contracts up to $500,000. NASA has been able to reduce the typical solicitation to 7–10 pages and resulting contract to 10–15 pages (down from an average of 70 pages and 40 pages respectively). Such a document is far less intimidating to industry and will encourage more interest in bidding on NASA work. Evaluation, approval, and award time have also been significantly reduced.

I would like to acknowledge before this Committee the work of Lydia Butler at Marshall Flight Space Center for helping to make the Midrange program the success that it is.

Meeting the Challenges of Electronic Commerce

One area to which I am giving particular attention is the initiative to streamline the procurement process through the use of electronic commerce (EC)—by sending out requests for bids, receiving quotes, and making awards over computer networks. The Administration shares your belief that EC can reduce procurement leadtimes, increase the productivity of the procurement workforce, and reduce the prices for what we buy through better competition. As you know, the President issued a Memorandum back in October 1993 establishing an aggressive schedule for implementing EC in the federal acquisition process, and we were pleased to see the provisions in FASA endorsing its use.

Many agencies have undertaken enormous efforts to get started on EC on a faster schedule than would have occurred without this presidential and congressional interest. We owe a vote of thanks to the dedicated federal employees who have been working to make EC a reality.

However, the number of transactions occurring using EC has been growing more slowly than I would like. In all likelihood, volume will pick up somewhat as we move beyond typical startup problems, such as transitioning from agency-unique dedicated electronic systems to a governmentwide system, getting the "bugs" out of the new network, and so forth.

Startup problems notwithstanding, I want to make you aware that there is still a difficult hurdle which we will need your support in conquering if EC is to be the streamlining tool we envision. I am talking about how effectively and efficiently to deal with vastly larger number of offerors who respond to solicitations for small purchases.

By way of example, assume that an agency sends out a request for quotation for a computer printer for which they specify "brand name or equal"—a given brand or a product equal in performance to that brand. Assume the agency receives back 100 bids electronically and that the 20 low bids are from companies bidding an "or equal" product, many of which the buying office has never heard of or done business with before. The twenty-first low bid is from a firm offering to provide the brand name. Under these circumstances, you can imagine the apprehension buying offices have with using EC. They are understandably worried that they will have to evaluate the specifications on a large number of bids before they can make an award, that they will have no streamlined way to weed out companies that have had delivery or performance problems in the past, and that their exposure to bid protests will increase dramatically because the number of losing bidders will go up significantly. For all these reasons, they are afraid—and rightly so—that, in practice, EC will not increase productivity but rather that it will actually require more resources than the current process.

We are actively working to develop regulatory language that would address some of these problems, by allowing various simplified screening techniques for purchases using EC. We will also be proposing statutory language to address this critical situation. We urge your support both for our regulatory approach and for our legislative change. Without it, I am seriously concerned that EC's potential to make the procurement process faster and less resource-intensive will never be fully realized.

For my part, I am also committing myself to strengthening governmentwide EC program management. In this regard, I have asked the Electronic Commerce Acquisition Program Management Office, which has responsibilities for day-to-day governmentwide management, to develop, implement, and maintain an EC project management tracking and statistics system so we can better monitor major tasks, key milestones, costs, and transaction volume.

Conclusion.

The message to reform is being heard. And, as you can see, our efforts are underway. Let me emphasize that some of the success stories I have described to you began under the previous Administration. This shows that the job of making government work better and cost less knows no party lines.

As my discussion of EC demonstrates, reform is not easy. Fortunately for the taxpayer, we're working together on this one. The Congress can count on the continued support of the Administration for reinventing procurement. We know we can count on your support for our efforts as well. Very shortly, the Administration will be transmitting to this Committee its legislative proposal for a new round of initiatives to promote streamlining, quality, and partnership. We look forward to on our initiatives.

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

PROCUREMENT REFORM IN ACTION

SUCCESS STORIES

Increasing Reliance on Commercial Practices

Contact No. 1: Tony DiCioccio
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Telephone: 215–737–2900
Contact No. 2: Col. Craig Weston
Organization: The Space-Based Infrared Program Office, AF
Telephone: 310–363–0276

Using Incentives to Motivate Contractors

Contact: Jim Bednar
Organization: Federal Highway Administration, DOT
Telephone: 202–366–2048

Increasing Use of Purchase Cards

Contact: Annelie Kuhn
Organization: Department of Treasury
Telephone: 202–622–0203

Expanding Use of Past Performance

Contact: Paul Zebrowski
Organization: Defense Personnel Supply Center, DLA
Telephone: 215–737–3000

Using Multiple Award Contracting

Contact: Kay Walker
Organization: Directorate of Contracting, Standard System Group, AF
Telephone: 205–416–1781

Increasing Use of Performance-Based Service Contracting

Contact: John Richardson
Organization: Law Enforcement Training Center, Department of Treasury
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Streamlining the Award Process

Contact No. 1: Harry Schulte
Organization: The Conventional Strike Systems Program Executive Office, AF
Telephone: 703–695–8343
Contact No. 2: Lydia Butler
Organization: Marshall Space Flight Center, NASA
Telephone: 205–544–0304

Mr. CLINGER. Mrs. Preston.

STATEMENT OF COLLEEN PRESTON, DEPUTY UNDER SECRETARY OF DEFENSE, ACQUISITION REFORM

Mrs. PRESTON. Thank you, Mr. Chairman, Representative Maloney, members of the committee. It is certainly my pleasure to be here today representing the Department of Defense and to tell you as the buyer of approximately——

Mr. CLINGER. Turn your microphone on.

Mrs. PRESTON [continuing]. As the buyer of approximately 75 percent of the Federal Government's goods and services, we cer-

tainly, in DOD, appreciate the need for reform, and I will, today, be talking about what exactly it is that we are attempting to do to realize these reforms.

In my statement I have gone through an analysis of why it is that the Department of Defense feels that acquisition reform is so critical. I will not reiterate that now but rather talk to you about how we expect to proceed from here and the actions we have taken so far.

The primary mission of the acquisition system in DOD is of course to meet our war-fighter's needs—we must never forget that the customer's needs are paramount. Our goal in DOD is to become the world's smartest buyer, continuously reinventing and improving the acquisition process while taking maximum advantage of emerging technologies that enable business process reengineering.

We will procure best value goods and services by buying from world class suppliers, predominantly in the commercial marketplace. We will deliver on a timely basis, efficiently and effectively, by reinventing the acquisition system to make DOD a world class customer. And because we are buying on behalf of the U.S. taxpayer, we will do so by using strategies and methods that are fair, open and efficient, protect the public trust, and are supportive of the Nation's socioeconomic policies, and that foster the development of an integrated national industrial base as opposed to a defense and commercial industrial base. We expect that this industrial base will be composed of globally competitive U.S. suppliers predominantly making commercial items.

We will do so by balancing the restrictions to prevent abuse of the process and the gains to be achieved by socioeconomic goals, with the cost of compliance with those efforts. We believe that the Federal Acquisition Streamlining Act gave us the tools that we need to change many parts of the system. Of course, there are still several things that we would like to see this year and we have been working with the administration to bring forward those proposals to you. They will be included in the administration's package.

Let me talk to you a little bit about the difference between the system that we have now versus what we would like to see in terms of an acquisition process.

In the existing system, there is a reluctance to change. Rules and practices are established to address every single contingency that might occur, and because people are so worried about being second-guessed by the IG, by the GAO, by Congress, and by the public, people have a tendency to be risk averse. They will not take the chance, even when they know it is the right thing to do, of using innovative procedures, et cetera, because of the fear of that second-guessing or recriminations if something goes wrong.

The system we want to see in the future is a system where we have totally reengineered our business processes, where we have a continuous learning environment, where change is the constant rather than an exception, and where there are incentives for people to innovate and to use techniques that we would use ourselves in going out and buying goods and services. And to manage risk rather than to avoid it.

Some of the tools that we think we can use to do that are, first of all, to change our regulatory structure. And we at DOD have just initiated an effort, using modern technology, to come up with what we call an "acquisition desk book." And we are going to rewrite the major systems acquisition rules and take them from the very lengthy documents that they are now to a small set of mandatory guidelines that will be in a directive and then place everything that would be guidance or direction to the program managers—lessons learned, and what we call acquisition wisdom, or procurement wisdom—in an electronic desk book that will be readily accessible so that we can take advantage of the experiences of buyers and all program managers all across the country.

Any time someone has utilized a procurement method that they think will save time or money, it will be documented in the system, and their name will be placed in the system so that people can call and ask questions of that individual.

And, in addition to that, we are focusing a large part of our effort on education and training of not only the acquisition work force but what we hope will be a joint effort with industry, with our buyers, and with our overseers, the IG and DCAA. We all need to make sure that we understand the same rules and regulations. We are developing a strategic plan to go out and train approximately 150,000 people in the DOD acquisition work force alone on the new regs as soon as the last period for public comment has expired. We will have approximately 30 days to go out and train these individuals on these new regulations before they become effective.

Right now we have many antiquated automated information systems that are not integrated with each other. So, for example, you might have a buyer who has prepared a solicitation on a computer, but that computer cannot talk to the contract administration office. So, that when we award the contract and it then goes to another organization where it is actually administered, that organization has to download the information, put it back up on a brand new system. When we go to make payment, which is done by the defense finance and accounting service; they have to load all the information into their computer systems. So one of our major efforts is going to be what we call enterprise integration—that is, to establish automated systems across functional areas within DOD and to maximize the shared use of information.

One of our largest efforts to date has been our process action team on electronic commerce and electronic data interchange. We started almost 1½ years ago in DOD, and really set the stage for the Federal Government effort on what has now become the Federal electronic commerce initiative. What we are trying to do is get to a paperless contracting system.

This process action team is one example, I believe, where people within the system who have been working at this process for many, many years basically worked 18, 20 hour days for 3 months in order to come up with these recommendations.

People in the field are committed. They want change. They know there needs to be change and despite the fact that we have developed the best weapon systems in the world; it is very clear that we did that because of the dedication of individuals, not because of the system within which they work. What we are trying to do now is

to make sure that the system facilitates their making these good judgments and making good acquisition decisions rather than them having to fight the system in order to acquire those best-value weapon systems.

We want to rely on commercial products and technology. Why? Because we cannot support an industrial base any longer that is defense unique. It is a simple matter of dollars. We have mergers and acquisitions going on every day in the defense industry. Many companies are going out of business. We are not supporting the research and development efforts that we have in the past as a result of our budget reductions, it is very difficult for us to maintain a defense-unique industrial base.

It helps us if we can leverage off of what the commercial sector is doing, and so that is one of our major goals—to establish and maintain a united national industrial base that we can rely on for DOD-unique goods and services, but most of all, to acquire commercial products to the maximum extent possible.

We also want to rely on suppliers who are using state-of-the-art technology. DOD used to, because of the money we spent, lead the world in the technology-related area. Now that technology is in the commercial sector. The basic components of every one of our major systems are primarily electronics, computer systems and software, and all of those areas are predominantly led by the commercial sector.

One of our problems is that because of many government-unique rules, regulations, and policies that we have placed on the system, many commercial companies refuse to do business with us. We no longer have the leverage in the marketplace that we used to in order to entice these companies. We are such a small percentage of their marketplace, even though we are perhaps the largest corporation in the world in terms of buying power. In most cases we represent only 1 to 2 percent of any major commercial company's sales.

Therefore, they are unwilling to change the way they do business just to sell to the U.S. Government. They would rather not bother in most cases. Or they will find another way to get around the system such as supplying the products through another contractor so that the provisions do not apply to them.

We also are working at making sure that we have less adversarial relationships with our contractors. We believe in the use of integrated process teams, integrated product and process development teams, and we are working to institute this process for all DOD major systems.

Another initiative that we are focusing on is to establish and maintain the most timely, flexible, responsive and efficient system, where individuals or teams are accountable for an entire process and can change the process where necessary. One of the comments that we most frequently receive from individuals when we go out in the field is "I suggested this change 2 or 3 years ago, it went nowhere, why bother." We want to make sure that people control the process themselves, that we have empowered these individuals to use the judgment and expertise that they have, given the training that they have received, to establish the timely, flexible, and

responsive system that will allow us to get products we need to our war fighters to fight whatever mission may come up.

We are dealing with uncertain and unpredictable times right now. We have to do a number of things to achieve this goal. One of them was accomplished last year in the Federal Acquisition Streamlining Act, and that is an increase in the simplified acquisition threshold from $25,000 to the current $50,000. And as soon as we can get our electronic commerce system up and running, we will be able to increase that threshold to $100,000.

Our purchases in DOD under $100,000 account for 99 percent of our contract actions, and yet it is only 16 percent of our dollars. We spend the majority of our time working on small purchases that take an inordinate amount of time. If we use simplified procedures, we can typically get a product or service within 29 days. If we use just the normal invitation for bids, just give me a price, it takes us approximately 90 days. That goes up to 210 days if we have to do any negotiation or we want to make a best value tradeoff. For a complex services type contract, our lead time is approximately 300 days.

How can any system be responsive to its customers' needs with lead times like that? It also means that we are not acquiring the latest state-of-the-art technology, and that is something that is very critical to us. When we went into Desert Shield and Desert Storm, we found that people were able to do a lot of innovative things if they were just given some freedom to do that.

Lead times are significant in that it causes us to keep inventory in stock, something that this committee has been very aggressive about challenging the department on. If we can utilize some of these new procedures, we will be able to concentrate the majority of our time on that 84 percent of our dollars that accounts for 1 percent of our contract actions.

We also have been very involved in working with the administration and working the regulatory process in the implementation of several issues that are major impediments to the acquisition of commercial products. Primary among them is the Truth in Negotiations Act, the requirement for cost through pricing data. That is a very significant issue for many commercial companies because they do not have accounting systems that keep costs in a way that would allow them to provide cost and pricing data to the government.

If we cannot get around the requirement, in many cases the companies have refused to supply to us or we have had to purchase through other vendors. You may remember the President's example of the transceiver that was utilized in Desert Storm, where we were we spent almost 6 months trying to figure out how to buy from the contractor because they could not provide the cost and pricing data that was required, and we finally had the Japanese Government purchase those particular items from a United States company for us.

As I mentioned earlier, we have been using process action teams in the Department of Defense for a lot of initiatives. We have had five process action teams. These are teams of individuals from the field. They are the experts on the "front lines" who day to day are working these processes. We have asked them to come in for a min-

imum of 3 months, some 4 and 5 months. They have been doing their own jobs back in their offices as well because there are no replacements for them, as well as working these process action teams.

I cannot tell you how dedicated these individuals are. I can tell you that at least in two instances people had to be removed by ambulance for exhaustion and taken to the hospital. That is how much they want acquisition reform. That is what they are willing to do to make sure that we understand and appreciate what they need out there in the field because they are committed to doing their job, and they know that right now they do not have the tools to do that. They know what they are. They know what changes are necessary.

As I mentioned, we have had five of these teams. The first was on electronic commerce and electronic data interchange [EC/EDI]. We then had one on military specifications which resulted in the Secretary of Defense mandating that there will be no use of military specifications unless no other alternative exists, and setting a very high approval level in order to use one even if that determination is made.

We have had two process action teams complete their work in the last couple of weeks, one on contract administration and one on the procurement process. They have been looking at streamlining our internal processes by making sure that any oversight and review is value added, that the people who participate in that process are contributors, not inspectors or critiquers, and we have had one final process action team and that is on oversight and review of our major systems acquisition process. And we are now working out the final recommendations in that area.

One of our final goals is to better balance what is the primary mission of the acquisition process, and that is to meet our war fighters' needs, our customers needs in the case of the other departments, and to do that while still complying with the socioeconomic requirements that we have established as a Nation; that the department and the administration are very much in support of, support of small business goals, and support of many of the other socioeconomic provisions, but doing it in a way that makes the most sense, where we get the best return on our investment.

We got much relief from FASA last year in increasing the threshold for which these laws would apply, but, in addition, there were several that were retained with respect to commercial companies that we would like to see some relief on and believe that the cost of compliance with these rules and regulations far outweighs any benefit that we can gain. We would like the opportunity to prove to Congress that we can do a much better job of attaining these goals if we can do it and concentrate on it when we are talking about the bigger dollar procurements where we are not buying from commercial companies.

Finally, we are going to have to define some performance-related measures of success. Our system right now judges success in terms of compliance with regulations. If you met the rules and regulations, you have done a good job. That is not what we want to see in our future acquisition system. We want to see individuals who are committed to performing successfully, and in doing so, we want

to try and provide as much guidance as we can to them but also allow them some leeway to make the decisions and judgments that they should.

I, too, have a couple of examples, just to bring home some points that I mentioned here. One is on electronic commerce, and the other on the Joint Advance Strike Technology Program Office [JAST PMO]. The JAST PMO used a simplified solicitation process, all electronic, and asked that bids be submitted electronically as well, for a major systems procurement. By doing that, they received two solicitations that required less than 4 months each from initiation to contract award, a savings of typically 47 weeks in acquisition lead time compared to our traditional process.

In addition, over 2,000 work sheets were generated during each evaluation of over 300 proposals. The electronic tools that were used permitted one person to administer the entire evaluation and provide immediate documentation following a determination. This equates to a savings of about three full time administrators and 2 months of document preparation for each procurement.

In terms of MILSPECs, we have had a number of successes that the services have initiated on their own in many cases. One is the Army's new training helicopter, where the training helicopter solicitation did not require the offeror to comply with any military specifications whatsoever. The first helicopter was delivered ahead of schedule, only 8 months after contract award, by purchasing a commercial helicopter modified for government use. The result is that training is more effective; that we have leading-edge technology right now in place; and we have generated a savings of approximately $20 million per year in operational and support costs alone by getting rid of our previous helicopters, which were so old it was costing us a fortune to keep them going.

In addition, we have an individual, Vaughn Martin, out at San Antonio Air Logistics Center at Kelly Air Force Base, who, on his own, has transferred over 200 military specifications to commercial standards and enabled us to purchase 200 commercial items of test equipment. In just one case alone, using the commercial item description allowed us to procure 500 spectrum analyzers that were listed for $60,000 apiece. And that is what—we have been purchasing them for only $14,000 each, a savings of $23 million. These are not peanuts that we are talking about here.

Finally, in terms of acquisition lead time, I would like to just give you two examples. The Defense Industrial Supply Center initiated something called Bulk Metals Initiative. Under that program they have dropped their average lead time from 99 days to less than 23. Under the defense Construction Supply Center's Wood Products Initiative, their lead time dropped from 72 days, on average, to a standard 10 to 30 days, depending on the size of the order, with 1-day delivery available.

These are some examples of what people have been doing on their own. I would be remiss if I did not say and emphasize that this is a team effort. My office is there in the department, established by the Secretary of Defense, to facilitate and coordinate the efforts of our services and defense agencies. We also have been working very hard with the administration, with OFPP—and the

other civilian agencies to make sure that we are all on the same baseline and that we are all working toward the same ends.

Many of the problems I have mentioned today with respect to DOD also affect the other Federal Government agencies. We are perhaps feeling the pinch much more in Defense because of the dramatic decline in our budget. But, clearly, it is a team effort. We are working together. And a big part of that team is you, the Members of Congress. In the Defense Department particularly we appreciate the support and response we have gotten from Members in assisting us in trying to improve our acquisition process. Thank you.

Mrs. MORELLA [presiding]. Thank you very much for that very thorough testimony and the plans that you have for continuing. I appreciate hearing from both of you and I know the committee does, too.

[The prepared statement of Mrs. Preston follows:]

PREPARED STATEMENT OF COLLEEN PRESTON, DEPUTY UNDER SECRETARY OF DEFENSE, ACQUISITION REFORM

We live in changing times. Never has this statement been more appropriate than it is today. Why? Because despite having built the best weapon systems in the world, (thanks to the ability and dedication of the people in DoD and industry who were able to achieve this success not because of the system, but in spite of it), the foundation upon which our national security strategy has been built is being shaken to the core. Our world has changed dramatically—so much so that we are no longer amazed at changes that would have been unthinkable even five years ago.

DoD, as an enterprise, must respond to these changes in every facet of how it accomplishes its mission—and the acquisition system is no exception.

I appreciate the opportunity to be here today to explain why the continuous improvement of the acquisition process that has been occurring within DoD on an on-going basis is no longer sufficient; why we must now totally reengineer the system; why we must be even bolder in our efforts to facilitate the merger of the defense and commercial industrial bases, improve the responsiveness of our acquisition system, and reduce its cost. I also appreciate the opportunity to explain some of our accomplishments to date and a number of our on-going acquisition reform efforts.

Why It Is Imperative to Reengineer the Acquisition Process

Why is it imperative to reengineer the acquisition process now? Because the acquisition process must be able to respond to the external changes in the world. DoD faces new national security challenges, a drastically reduced budget, reduced influence in the marketplace, and technology that is changing faster than the system can respond—and that technology is available to the entire world. We must design an acquisition system that can get out in front of these changes instead of reacting to them.

• First of all—the new security challenges. You all are very aware of the fact that we face a situation of mostly regional or limited conflicts that are often unpredictable in nature. We must be concerned about proliferation of weapons of mass destruction—both nuclear and non-nuclear. We must be concerned about the possible failure of democratic reforms in the former Soviet Union. And, we are increasingly called upon to support new missions—humanitarian in nature, and dwarfing previous Cold War efforts such as the Berlin airlift.

• Yet, this is the 10th year of a declining defense budget. Our overall budget has been reduced 40%, but our procurement accounts have been reduced over 65%, and as we downsize, we take our most modern equipment and give that to a smaller number of troops. That has a cascading effect, so that by the time we're done, we've essentially eliminated old inventory and modernized our remaining forces at the same time. We are at the point now, however, where we have to spend the capital to start investing in modernization if we are to maintain our technological superiority.

• Improvements in technology now predominantly occur in the commercial sector—at a pace our acquisition system cannot keep up with. If we are to have access to this advanced technology, we must be able to buy from commercial suppliers, who are more often than not, unwilling to change their business practices to comply with

government unique requirements for actions or activities. We're just not a big enough market to make it worth their while.

• Even if we can figure out a way to purchase such products, the length of our acquisition process is such that the technology is often outdated by the time we acquire it. It's no surprise to any of you, I'm sure, that our acquisition process simply is not designed to allow us to acquire products at the pace at which technology is changing. For example, information systems technology turns over on an average of 18 months, yet, not using small purchase procedures, but a simple Invitation for Bids, takes us an average of 90 days. A negotiated procurement, takes an average of 210 days, and a complex services contract to support one of our program management offices takes an average of 300 days. We can't even get on contract before technology is obsolete.

• In addition, we must remember that our national security strategy is founded on the precept that we will maintain technological superiority rather than numerical superiority. We've been able to do that in the past because we have been the leader in technology. The fact of the matter is, however, with our reductions in defense spending and other world changes, the majority of technological development is happening in the commercial sector. And it is increasingly available to the entire world. The building blocks that make up our major weapons systems are primarily electronic in nature, and that electronic capability is too easily spread around the world. Our past strategy of being able to keep technology a secret, and therefore have this advantage over our opponents, is no longer a viable strategy. The key to winning the technology war today is to be the first to integrate. The first to be able to integrate the technology that is already out there is the one who will maintain the superior force.

Because the nature of this situation is so unpredictable now, the acquisition system must be even more flexible and agile than it was in the past. Because of the decline in the budget, affordability rather than performance of systems becomes paramount when making those critical tradeoffs between cost, schedule, performance and reliability. Because DoD cannot maintain the infrastructure that we have had in the past—the "tooth to nail" ratio that you hear about all the time—we can no longer support a defense-unique industrial base. We are going to have to rely on commercial and dual-use suppliers who can meet DoD's needs.

Unique Demands Placed on Contractors Who Sell to the U.S. Government

In addition, over the years many laudable restrictions and requirements have been added to the acquisition process to ensure it is fair, prevent fraud waste and abuse, to standardize treatment of contractors, to ensure that the government receives a fair and reasonable price when buying products that are not competitively available, to check the government's demands upon its suppliers, and to further socioeconomic objectives. The problem is that all of these demands, while valid goals of our acquisition process, encrusted upon each other have become a reef that surrounds the Pentagon, and most of our federal government—almost challenging suppliers to find a way to penetrate the reef without risking everything. That reef poses a particular barrier to the acquisition of commercial products and state-of-the-art technology, and increases our costs.

Industrial Era Bureaucracy in an Information Age

In addition, our internal DoD acquisition systems and acquisition organizations evolved over time. But they have not been able to keep up with changes in the world around us. They are designed to respond to a different time and purpose. Essentially, what we have is an industrial-era bureaucracy that was created and was responsive to the needs we had in the past—a very hierarchical structure, with minimal cross-training requirements because we set out to make people experts in certain areas. We are now learning that when competition is based on time, not efficiencies of scale, that we can no longer keep that type of management structure—we have to break down the walls. We have to, for example, use integrated cross-functional teams, because the hand-offs that occur between functional experts inherently cause errors and waste time. Time we can no longer afford.

System is Risk Averse

Probably the biggest problem we face, however, is that the system now has few, if any, incentives for acquisition personnel to be innovative or to take reasonable risks. If I had to identify any one critical problem that we must solve as we go through the process of acquisition reform, it is the lack of ability to reward and provide incentives for people to make judgments and to take reasonable risks—because our risk-averse system right now is killing us.

The price we are paying to make sure that our system is perfect, and to promote social goals in every one of our contracts, is too high. No, we do not want to abandon

these goals. We cannot abandon those goals because they are valid goals of the federal procurement process that we as a nation are committed to supporting. But what we must do is better balance the costs of achieving those goals with the achievements that we gain from pursuing them through most procurement efforts. And above all, we cannot lose sight of the fact that the acquisition system is not an end in itself—that it was created to serve a purpose: to meet the warfighter's needs.

Acquisition System Vision

What are we doing to try to change this process? First of all, we've set out as our vision for the DoD acquisition system that:

> "The primary mission of the acquisition system is to meet warfighter needs, and that we must never forget that meeting the customer's needs is paramount. We will be the world's smartest buyer, continuously reinventing the acquisition process while taking maximum advantage of emerging technologies that enable business process reengineering. We will procure best value goods and services by buying from world class suppliers, predominantly in the commercial marketplace, and by using commercial practices. We will deliver efficiently and on a timely basis by reinventing the acquisition system to make DoD a world class customer. And, because we are buying on behalf of the U.S. taxpayer, we will do so by using strategies and methods that are fair, open, efficient timely, protect the public trust, are supportive of the nation's socio-economic policies, that foster the development of an integrated National industrial and technology base composed of globally competitive U.S. suppliers, by balancing the risk of abuse of the process and the socioeconomic gains to be achieved, with the cost of compliance."

Execution

How are we, and will we, execute this vision? First of all, the Secretary of Defense established my office—the Office of the Under Secretary of Defense for Acquisition Reform, to be a focal point and a catalyst for the development of a coherent and practical step-by-step plan to reengineer the acquisition process while focusing on implementation and institutionalization of the reforms. My office has been kept small on purpose—so that we are forced to rely on Process Action Teams of individuals from the field—experts who know what it is to buy on a day-to-day basis, and know what it's going to take to make the system right.

We have successfully utilized Process Action Teams to develop implementation plans to change the acquisition process on five very difficult issues. People have come together from all over the country. They have worked through the process of team building and spent 3, 4, sometimes 5 months together trying to work out recommendations and implementation plans, and they've done it in a way that will identify metrics of success so that we have measurable goals and ways to achieve them. They have identified the road map to get us there, as well as the disincentives in the existing process that are inhibitors to making change.

I am advised by a Senior Acquisition Reform Steering Group, made up of representatives of various affected offices in OSD, the Services, Defense agencies, the IG, and DCAA—all of whom are essential to the process of acquisition reform. These are the "stakeholders," and everyone of us must work together to implement these reforms and achieve these goals.

Acquisition Reform Actions

Actions we have already instituted recommendations of a Process Action Team on specifications and standards reform. On June 29, 1994, Secretary Perry directed DoD to use performance specifications beginning December 26, 1994. If a performance specification cannot meet the user's needs, then a nongovernmental standard may be used. If a nongovernmental standard will not ensure that you can meet your user's need, then you may use a MILSPEC, but only after you have received a waiver from the milestone decision authority. So, depending on what ACAT level program it is, you're going to go up to the MDA at that level. The only things that are excluded from the waiver process, even though the underlying philosophy applies, are basically spares and repairables. And we're looking at ways to address those issues as well, so that we affect many of our current systems.

In terms of improving how we buy, one of our major focuses has been the adoption of commercial practices to acquire not only commercial items, but military-unique items. We approved regulatory waivers for the JPATS program, the JDAM program, some DPSC procurements, commercial derivative engines, commercial derivative aircraft, and a few Army lead programs. We've got really two types of programs that we're working: that is we're working "pilot" programs, which we have used to refer to those programs that need not only regulatory waivers, but also statutory waivers

if we are to buy using commercial practices; and then what we call "lead" programs—those which require really only regulatory waivers and don't require any statutory changes.

The Federal Acquisition Streamlining Act of 1994 granted the statutory waivers, but it wasn't as early as we had hoped, and many of the programs had already gone to contract award. They're now going through the process of trying to see what changes can be made in the programs to streamline them further and to allow the contractor and the government to save some money by utilizing commercial suppliers to a greater extent.

Another of our goals has been to improve the Service and OSD milestone decision making and information collection processes for major systems—or in short-hand, the Defense Acquisition Board process—the oversight and review process that every program manager has to go through in order to get his program approved at the OSD level, or for that matter, the Service level.

We commissioned a Process Action Team that made a number of far reaching and very provocative recommendations in terms of changing the existing way in which we review programs. Its report is now being coordinated throughout DoD. We have just finished assimilating the comments of the Steering Group. My office will make a recommendation on them, along with the Acquisition Reform Senior Steering Group, and we expect those recommendations to go up to Secretary Kaminski in the next few weeks. We will then meet with Dr. Kaminski and the Service Acquisition Executives in what will probably be about a 2- to 3-hour meeting to see if we can resolve some of the outstanding issues and concerns about some of these recommendations, and determine which ones can be implemented immediately.

We are trying to adopt internal best practices of world-class customers and suppliers/ and the way we identify the best mechanism to reach that goal is to pursue legislative change. In the Federal Acquisition Streamlining Act, we received I would say 95 percent of what we needed to be able to make all of the changes necessary so that DoD can, in fact, become a world-class customer and supplier. We focused in that statute on two primary objectives:

(1) Increasing the small purchase threshold to $100 thousand so that we could use simplified procedures for 99 percent of our contract actions, which by the way account for only 16 percent of our dollars, freeing up our well trained contracting officers and senior buyers to work on that 1 percent of our contracts that encompass 84 percent of our dollars. The savings there, as you can imagine, are phenomenal. And we are pursuing that—we did get relief. It is tied to the implementation of a Federal Computer network. Suffice it to say, we were very happy with the statutory changes.

(2) The second objective in crafting FASTA as focused on removing government-unique laws and regulations from the acquisition of commercial products, and that includes our "pilot" programs, which have been deemed commercial products for purposes of the statute. Now we're looking at further changes as a result of other Process Action Teams. The procurement Process Action Team, which has been working for the last 3½ months, recently reported to the Acquisition Reform Senior Steering Group on the items in disagreement—the recommendations that various services, etc., had reclaimed on and had objected to. They have worked out all of the issues, and after briefing Dr. Kaminski received his endorsement on their recommendations. We also have a Contract Administration Team whose recommendations have just now been briefed to Dr. Kaminski.

In the Contract Administration arena, I think it's easy to encapsulate exactly what we're trying to do here by just saying that we need to move from inspection to process control. We need to be out of the business of inspecting products and contractors, period. We've taken a lot of actions already this year to enhance that process. One of the things we've found is we just completed a study—the first empirical study or verifiable study—of what it costs to do business with the government looking at firms who do both commercial business and government business. That study was conducted for us by Coopers and Lybrand and The Analytical Sciences Corporation. They concluded through an activity-based cost accounting assessment that 18 percent was the price differential we were paying—non-value-added cost at the prime contractor level. The difference between what the commercial sector was paying for essentially the same product. The reasons for that: No. 1 on the list is MILQ 9858a, our quality assurance standard. Why? Because the requirements imposed by this document are different from anything the contractor utilizes in his commercial division.

No. 2 was the Truth in Negotiations Act, because it requires contractors to maintain accounting data based on cost for every product. Commercial companies do not track their costs on a product-by-product basis; therefore, all of the costs of creating

that accounting system are added costs. Now, knowing what it costs the contractor to build the product is helpful when we're negotiating in a sole-source environment, but it doesn't guarantee that we're getting a fair and reasonable price, because that contractor could be totally inefficient. What we are trying to do with the changes as a result of FASTA, and we have these out on the street right now for public comment, are changes to the regulations and the Truth in Negotiation Act, to establish that what is critical is a determination of price reasonableness. And contracting officers should go through a step-by-step process of trying to determine price reasonableness without requesting cost and pricing data. That is the last alternative that we want pursued because that is the most costly to the government, to industry, and is one of the biggest inhibitors to companies selling to the U.S. Government.

Another thing that we're doing is expanding the use of integrated decision or integrated product and process development teams; and we're looking at this not only from the standpoint of a program management office or a program structure, but also in terms of the DAB oversight and review process. OSD staff members, who typically, in the past, have been the ones that the program manager confronted 6 months prior to the DAB, are now involved in the process up front. They are a part of the team with the program manager and are sitting in on all the Service Reviews, etc. We've just started that, but I think it's probably one of the most positive steps that has been taken. It doesn't preclude that staff individual from giving the Under Secretary of Defense (Acquisition and Technology) an independent assessment of the program at some later point in time. And I would almost put a caveat on it to say that no one in OSD can raise an issue if they have not brought it up to the program manager's attention prior to the time when that program comes up for a DAB.

In conclusion, we are in an environment of change. And we are going to have to accept that change is now a given, rather than the exception. Many people have said that you cannot reorganize or reengineer an entity or enterprise unless it reaches the crisis stage. We in DoD are at that crisis stage. We simply cannot continue to conduct business the way we have in the past. We won't have the people to do it; we don't have the money to do it; and every dollar that we spend on that infrastructure is a dollar that we lose in terms of a person out there in the field with the proper equipment to do their job.

Thank you very much. I'll be happy to answer any of your questions.

Mrs. MORELLA. Mrs. Preston, you said in your remarks that you are giving a 30-day training course for 150,000 people on the new FASA regulations. Will it then become a continuing part of the procurement work force training? Is it going to be a one-shot deal, or are you going to continue it or see how it works to decide?

Mrs. PRESTON. Actually, what we are going to do is go out—we have a 30-day window of time in between when the final public comments have to be submitted and we publish a final rule before it can become effective. And it is during that time period that we are going to try to train all of these individuals. What we are envisioning now is about a 2½ day course where we are going to bring in a whole group of people and try to train them and then send them out across the country to give these 2½ day courses. That will only be the first of many.

What we have been working to do in our strategic plan, and I have learned a lot about adult learning in the last couple of months, is really make sure that we are targeting our message to the right audience; that we give the right groups of people the right information so that they can better do their job, and we want to make sure that we are doing this in partnership with our vendors, our trading partners as well, so that we all understand what the rules of the game are.

In our opinion, there is no reason to hide anything that we are doing; the more our vendors know about how it is we buy, the better off we are going to be in terms of buying from them.

Mrs. MORELLA. It would be very helpful for those of us in Congress also to have a simplified synopsis so that we can tell our con-

stituents where they can go to get more thorough knowledge, so that we can be the conduit for conveying what is happening not only with your department but throughout.

Mrs. PRESTON. We would be happy to follow up on that and get back with you on making sure that we can give you some avenues to send people to.

Mrs. MORELLA. Great. It would be very, very helpful.

[The information referred to follows:]

Information about acquisition reform in the Department of Defense is available through a central clearinghouse and coordination point:

Acquistion Reform Communication Center
Defense Acquisition University
2001 N. Beauregard St.
Alexandria, VA 22311
(703) 845–6755
fax (703) 820–9753

Members of Congress, your staff, your constituents in the Defense acquisition workforce, and your constituents who do business with the Department of Defense may contact the Acquisition Reform Communication Center for leads to training and other information sources about acquisition reform.

Those with questions about policy matters I would encourage to contact my office, (703) 695–7413, rather than the Acquisition Reform Communication Center.

Mrs. MORELLA. We will be following up in writing with some specific questions; I know some of the Members who are not here because of conflicting schedules have indicated that they wanted to submit some questions. I just have a few general process related questions. Incidentally, the chairman had been called by the Speaker and so it is an honor for me to be in his chair.

The FASA statute provides 210 days for publication of proposed regulations, 60 days for public comment, and promulgation of final rules not later than 330 days after enactment. We chose, the committee did, what was considered a doable schedule for such a comprehensive statute. We understand that the administration has considerably accelerated this schedule and commend you for your ambition.

However, how will you ensure that quality regulations that are fully coordinated with all interested parties are not sacrificed for expediency?

Mr. KELMAN. Well, first of all, as I indicated in my testimony, the public comment period for review of these regulations has not been decreased at all. It is the same. It is actually greater than it has been in the past. Traditionally, it has been 30 days. It has been moved up as per congressional intent to 60 days. So we have a significant public comment period. We already have had hearings on some of the most important regs. We are going to be having some hearings on important regulations that have not come out.

I guess one of the ways it is possible, ma'am, for us to assure a quality product while doing it faster is we are learning the same lessons that businesses have learned as part of business process reengineering. You do not necessarily gain in quality by some of the traditional procedures we have used where things have gone sequentially and back and forth and so forth. You just use up time.

What we have done is basically to create a team approach. Again, we are really following the precepts of business process reengineering used successfully in the private sector where we are creating teams of all the people among whom this needs to be co-

ordinated so they can sit down together and work through some of these problems.

So in taking less time, it does not at all mean that we are sacrificing quality, I do not think.

Mrs. MORELLA. I am delighted to hear this kind of enthusiasm and the teamwork that you mentioned, and also what Mrs. Preston mentioned in terms of teams. Would you like to respond to that?

Mrs. PRESTON. Yes, if I may, please. I would just like to elaborate a little on what Dr. Kelman said, because we in DOD initially proposed the structure on how to do the regulatory reform effort, and we are very conscious of the fact that what had happened in the past is that there was a serial effort where our individuals in the department, and I am sure in the civilian agencies as well, worked on regulations as an adjunct to their normal job. They participated in weekly or biweekly meetings as necessary, and worked on the regulations somewhat sporadically through a committee process.

Then, after it went through the Department of Defense, they would send a regulation over to the civilian agency council. Their council would do the same thing, starting all over again from a clean sheet of paper, and then the two groups would meet together and try to resolve their issues and develop a final package. That is the old serial process.

What we have done is completely sidestepped that by going to these integrated teams, as was mentioned, and also by putting people on the effort full time. This has not been easy for anyone in the department, as we are taking some significant downsizing of our personnel, and I think we owe a lot to all of the individuals who participated on these regulatory drafting teams throughout the government. They have been putting in some long, hard hours, full time, weekends, everything, to make sure they could get the regulations out as fast as possible for public comment.

They are very attuned to listening to what the public has to say. It is a whole new way in which they are approaching the regulatory process, and I think people should realize that.

Mrs. MORELLA. Again, I am very excited that people are cooperating beautifully and you have these task forces and teams that are established. I wanted to thank you also, Dr. Kelman, for mentioning Federal employees. I represent a great number of them and I know they do not often, be they civilians or in the military, get the kind of recognition that I think they deserve.

I have a few other questions, I know that Mrs. Maloney does too, but I know Mr. Chrysler will be leaving and she has been willing to defer to Mr. Chrysler, who is obviously from Michigan, for any comments he might have.

Mr. CHRYSLER. Thank you, Connie.

A major focus of FASA was to encourage the government to utilize commercial products and services, where appropriate. What have you done to ensure that those experiences in commercial buying practices have participated in drafting the regulation for both government and industry?

Mr. KELMAN. I think it is fair to say that many of the people involved in buying commercial products are involved in the regulatory writing team. I would add that Mrs. Preston and I have just

established a what we are calling a front line procurement professionals forum, which is having its first meeting tomorrow afternoon in the Vice President's ceremonial office downtown. That is a group of about 30 nonsupervisory front line buyers who are going to be many from the D.C. area but others from outside who will meet with Colleen and me each month to talk about how to make procurement streamlining happen in the field, on the ground.

One of the things we will do, again going back to Representative Morella's question about how we are doing in the process, traditionally in the past the people on the front lines, on the operational end, have not been asked to comment or give their reactions to regulations. We are going to be showing those draft commercial product regulations, for example, to the members of this front line procurement professionals forum and get their input and feedback. They are the people who are actually trying to buy these things out there. So we are doing that.

And then we continue, when the commercial product proposed regulation comes out it will be on a 60-day public comment period. Has not come out quite yet, it will be out soon. I will repeat to industry and notify the industry people who are in the audience today or who are listening to this hearing today, that we are committed to making this happen and we are also committed to listening to comments from industry and others about how to make this work most effectively.

Mr. CHRYSLER. Wouldn't it have been more efficient to have solicited input before the drafting process so that the proposed regulations could have incorporated some of their expertise?

Mr. KELMAN. Colleen would like to add.

Mrs. PRESTON. I would like to address that first, if I might, and that is that we wanted to have joint industry participation, that we looked at the process and tried to figure out a way to do that and have everybody involved in the initial drafting when we made our proposal. We just could not figure out a way to do it and do it in the timeframes we were looking at.

So we tried to do the best we could by holding the public meetings where people could come in and then stating that afterwards we would be happy to discuss these initiatives with anyone, and would be receptive to changes, I think, is something that most of industry would agree is something new for the Federal Government in terms of responsiveness in the regulatory process. Even being willing to meet with them publicly and sitting down and discussing some of these issues.

It is our commitment, both Steve's and myself, to make sure that this process works. People are going to have to rely on, and we are the ones that will be held accountable if it does not occur. But we decided that efficiency was the most important aspect of the process right now and at some point you get where you have so many people involved and you are in such great levels of detail that it does not help to have additional groups of people in.

Did you want to add anything?

Mr. KELMAN. As always, Colleen spoke very well. I will not add anything to that.

Mr. CHRYSLER. I appreciate your efforts. We certainly can do better and we need to do better.

Mr. KELMAN. We are trying.

Mr. CLINGER. Thank you.

The gentlelady from New York, Mrs. Maloney.

Mrs. MALONEY. Thank you both for your very thoughtful testimony. I would like to ask Mr. Kelman, are you in fact cutting down on regulation and can you provide any quantitative and qualitative assessment as to how much of the FAR will be reduced?

I loved your story about the government-regulated salad dressing. It is beyond the pale that our government had specifications for this, and of course we know the story about the $500 hammer and the ash trays. Do you have a list of these items and how much it was costing government and how much we are saving by having it bought off the shelf?

Every now and then I will read a story about Vice President Gore's activities, and I compliment his leadership on this and the bipartisan effort that he has led in moving forward with reforms in the procurement process, but can you give us specifics of how much it is saving? When I read about it, it will say, oh, we are saving $100 billion. Well, how are you saving $100 billion?

Can you break it down to us in writing; how many ridiculous salad dressing requirements do we have, and how many more of them are out there that need to be changed?

Mr. KELMAN. Good question. There are so many of these government-specific specifications, whether they be MILSPECs and military standards for defense-unique production, or whether they be specifications for sort of common consumer items like this government-unique salad dressing I spoke about. It is hard—there are so many that it is hard to get a list. I have seen some printouts again of specific examples of—we moved from a government-specified tent for field use by soldiers and brought the price down from about $2,000 per tent to about $1,000 per tent. They go down from there to moving from government-specific underwear for the soldiers. We were paying—I saw a printout we were paying $1.35 for a pair of underwear. We reduced it down to 92 cents for a pair of underwear. There are a bunch of printouts that individual organizations have developed. There are so many of these individual specs, it is a fairly daunting task to get overall lists of all of them.

I think some of the folks who are buying these things are trying to do a better job now that they know the system is focusing on this issue to get better lists. It is the old story, sort of a tradeoff between how much money you spend on developing the record keeping versus how much time and effort you spend on actually trying to bring about the changes. It is hard.

I gave the example before of this contract out at Artesia, NM, for the Federal Law Enforcement Training Center, where they are reducing the cost by about 22 percent. That is only about a $7.5 million contract. We have 20 million contract actions a year.

I share the frustration that I think is a little reflective of your question: Could we just get one number and here is where we are at.

Mrs. MALONEY. I think for credibility with the citizen taxpayer, when they hear we are saving money and their tax bills go up every year, not that I want a wonderful report in which you put a tremendous amount of time, but if you could just break down—

I know we are having a hearing on this and Chairman Horn has planned a series of hearings on the whole bill and what it means, but I would like to hear the theory come down to the reality.

And not that you have a task force of people working on it, but maybe if you could ask one person to spend maybe 20 hours between now and the next hearing making a list of exactly where we have saved money so far from off-the-shelf purchases or from other specific areas, I think that would be helpful for us to see. And if you could give it to us at that hearing or back as a written question some examples of some of the specifications that you are looking at now; that you think may be wasteful of taxpayers' money, I think that would be very helpful. I am not asking it now, but in the future.

[The information referred to follows:]

A list of initial measures relating to military specifications and standards reform efforts on a few specific weapon system programs. Please note that the acquisition time for major weapon systems can span a decade or more and have many interrelated factors that can affect cost. For the most part, the results of military specification and standards reform on these types of programs will take several years to become visible and will always be hard to measure. The saving identified for Joint Direct Attack Munitions (JDAM) and Wind Corrected Munitions Dispenser are based upon a comparison of total estimated unit costs. Military specification and standard reform is only one of the factors affecting the change in estimated cost.

EXAMPLES OF MILSPEC REFORM

Enhanced Seasparrow Missile
97 MILSPECs and STDs originally cited:
23 were deleted
31 were replaced
43 remained but were tailored

Mark 48 Torpedo went from 103 MILSPECs and STDs cited down to five.

Cobra Helicopter had 70 MILSPECs and STDs in the RFP. Reduced down to two—one for ADA and one for weapon system interfaces.

Advance Seal Delivery System—The SOW contained over 50 MILSPECs and STDs. No there are zero.

Joint Direct Attack Munition
100 page SOW is down to seven pages.
Data requirements reduced by 60%
Zero MILSPECs and STDs.
Initial cost estimate was $100K per system.
In 1991, after some streamlining, it was estimated that in 1995 dollars it would cost $60K.
Now the estimate is down to $30K. Air Force and Navy are going to buy around 74,000 systems. Streamlined requirements have saved a little over $2B.

Wind Corrected Munitions Dispenser
Zero data requirements.
Down to two MILSTDs.
$25K per unit, which is 20–30% lower than initial costs.

COMMERCIAL ITEMS SAVINGS

Item 1—Gasoline Lantern

The military specification (MIL–L–1594) was replaced by a commercial item description (CID) (A–A–52078) in 1991. The last buy to the MILSPEC was in 1990 at an item price of $71.49; the first buy to the CID was at $54.90. Coleman is the current supplier. A long history of quality problems ended after switching to the commercial item—in addition to the cost savings.

Item 2—Barracks Bags

The military specification (MIL–B–2378) was replaced by a CID (A–A–55105) in 1994. The last buy to the MILSPEC was in 1993 at an item price of $6.53; the first buy of the CID was in 1994 at $2.29. It is interesting to note that the manufacturer, Mississippi Independent, did not change. We switched to their commercial product. The last buy was a quantity of $168,900 for a total savings of $716,000.

Item 3—Syringe and Needle

Two military specifications (MIL–N–36157 and MIL–S–36124) were replaced by a CID (A–A–54773). The last buy to the MILSPEC in 1992 was at a price of $5.45 per 100 syringes; the first buy to the CID in 1993 was at $3.47 per 100.

Item 4—Men Trousers

The military specification (MIL–T–41834) was replaced by a CID (A–A–55086) in 1994. The last buy to the MILSPEC in 1993 was at an item price of $13.60; the first buy to the CID was in 1993 $12.97. The quantity of the last buy was 89,280 for a total savings of $56,000.

Item 5—1000 and 1300 CC Motorcycles

The military specification (MIL–M–1320) was replaced by a CID (A–A–52165) in 1991. The cost under the MILSPEC and CID are not comparable because the Army changed models at the same time. Also specific customizing is included depending on whether the bike is used for patrol, messenger, etc.

Mrs. MALONEY. We had a hearing recently, and I want to get an answer to this, it was on H.R. 450, which would be a termination of all Federal regulation. It will be on the floor this week. It was reported out by this committee last week and it imposes a moratorium on certain regulatory action. I would like to ask both of you what, if any, will be the impact of this legislation on the issuance of the implementation regulations?

Mr. KELMAN. Well, we are—the administration is somewhat concerned. We are concerned about the regulatory moratorium as a whole and the administration is on record on this. But we are concerned specifically, although there are some efforts in the moratorium bill as it has been introduced to try to carve out some exceptions for procurement, we are afraid that the exceptions are not written strongly and clearly enough to take us away from the possibility of litigation and more full employment for lawyers.

For example, the bill language, as written, talks about competing loans, grants, benefits, or contracts. However, the regulations that we are doing under FASA are not themselves contracts. They are regulations about contracts. And we are somewhat worried that the language, as written, could subject us to court challenges, and, again, it is a full employment for lawyers kind of situation.

Second, there is an exemption in the language as written for regulations that streamline. And, of course, that is the brunt of the regulations in FASA. However, any time you streamline a process when you take away, let's say, three forests of underbrush, you sometimes want to leave something in the system and you may replace sort of the three forests of underbrush with one very simple little tree that was not there before, just to use an analogy. That tree that you are replacing the three forests of underbrush with could again be interpreted in judicial review as being something that did not streamline but that, quote, added on a new regulation.

So I guess I would say two things, Representative Maloney. One is that, as you know, the administration is concerned that this approach is too much in general of a blunderbuss approach toward reforming the regulatory process. We think reform is necessary but we are not convinced that this is the best way to do it.

In procurement, specifically, we are afraid that the language, as written, although it seems to be attempting to exclude procurement regulations from the onus of this moratorium, we are afraid that some, excuse me for saying this, clever lawyers could try to, could

subject this to judicial review and court challenge and hold up our ability to save the taxpayers money here.

Mrs. MALONEY. Well, I know Chairman Clinger wants to save taxpayers money, and this is going to the floor, so if you have any ideas, I suggest you meet with him or his staff and let us try to clean it up before it goes to the floor.

Do you want to comment? Excuse me, sir.

Mr. CLINGER [presiding]. If the gentlelady would yield. Yes, I think those are legitimate concerns. We have indicated in the report language that it was certainly the intention that the procurement regulations will not be affected by this and would be exempted from it. I think your point about judicial review is a legitimate one.

Mr. KELMAN. We I hope, for instance, over next few days, we can work with the committee on that issue.

Mrs. MALONEY. Mr. Kelman, I am studying everything you have done and it takes a while to learn all of this. I found your testimony really heartening, the examples that you gave, of how government officials are saving taxpayers money. Maybe you could comment briefly now but in writing back, how did FASA allow them to do this? In other words, was there action just that of a bureaucracy listening to a talented employee and reasoning to their suggestions of how to make government work better; or were they a direct result of the bipartisan Vice President Gore initiative? And if it is a direct result, again, I would like to tie it into the section of the law, et cetera, and how it was changed and maybe, maybe that is too long or lengthy of an answer to be given now, but I would like that on the four or five excellent examples, and I applaud you and applaud the people that made it happen, but again I want to get down to the specifics of the law.

[The information referred to follows:]

The Federal Acquisition Streamlining Act (FASA) directs purchasing agencies to procure commercial items to the greatest extent possible. Many agencies looked for ways to implement this strategy because of the potential cost savings to be realized. The enactment of FASA with its statutory preference for commercial products placed greater priority on these efforts.

Mr. KELMAN. I will answer briefly that, as you know, the provisions of the law do not take effect until the implementing regulations become final. Of course, there are several interim regulations that are out, but I think it is fair to say that each of these efforts, and again, as I indicated in my testimony, some of these efforts actually had their genesis in the previous administration. This is bipartisan. Each of these efforts results from the spirit of reinvention and the unleashing of an empowerment of our work force to say let us do things in more sensible ways; let us get away from red tape and bureaucracy.

And I think that the regulations are crucial, and once the regulations start coming out I think we will be able to multiply these success stories tenfold, a hundredfold. These are things that have all been done even prior to the law being implemented.

I think that one of the reasons I so much welcome Chairman Clinger's willingness, your willingness to actually come out to a buying office and meet some of those folks on the line, the operat-

ing folks is to show the support within the political system for these kinds of spontaneous initiatives from the work force.

Mrs. PRESTON. If I could, Representative Maloney, could I add something to this discussion because I think it is important, particularly when you talk about the hammer, since these were DOD purchases and the tee shirts Steve mentioned and also the salad dressing.

There are some critical things we need support from Congress on. One of the things we cannot do today, for example, at least in the Department of Defense, is go out and buy a hammer from a hardware store. That is why you find people buying hammers from their prime contractors—because they know they can get it and they can get it that day. Although we received purchase card authority last year under FASA to use a credit card and go out and buy something of that nature, one of the laws that Congress did not exempt is a law peculiar to DOD, a procurement integrity provision. Because of that and because that law has no dollar threshold, in order for us to contract with anyone, we have to get them to sign a statement that says they complied with this law. And that is one reason. These are not things that people do because they wanted to do or because they are stupid.

In the case of the salad dressing, we have MILSPECs just like we did for fruitcake, for whistles, for things like that because the intention of the procurement process had always been at that time to buy from the low bidder. People were afraid that their decision would not be supported or the procurement would be protested if they bought from anyone other than the low bidder. In order to do that and still let everyone compete, you have to specify every single detail.

The first time we went out to buy commercial tee shirts, we ended up with 400,000 tee shirts that shrunk four sizes the first time they were washed and were totally unusable. So there are changes that have to be made.

There are MILSPECs for a reason. And in order to go away from that, we are having to change the way we do business, much of which was directed or is a result of legislation, some of which was just regulatory.

Mrs. MALONEY. I was going to question you later, I do want to have a series of questions for you, also. But just to follow up, I found your testimony very confusing because I thought the whole purpose of FASA was to make your life easier in procurement. I thought that you would be able to purchase off the shelf. Wasn't that part of FASA that should apply to DOD? Why is that not applying to DOD?

Mrs. PRESTON. Because we did not get a waiver of one particular law that we requested that applied only to DOD. There are many laws particularly in the procurement integrity area that were adopted by Congress that apply only to DOD.

Mrs. MALONEY. I would like to meet with you on what that is and try to get it changed. It was my understanding that——

Mr. KELMAN. It will be a part of our legislative package.

Mrs. MALONEY. The goal was to bring commercial or private expenditures in Defense under the same system, that would not be confusing, that would save taxpayers dollars.

In your testimony you made one statement, you said that some of the FASA regulations were cost prohibitive; to follow the FASA regs would cost too much money, that DOD needed their own regs.

I am just taking down notes of what you said on certain things. And, to me, the idea was to allow DOD to buy off the shelf, so you are not buying $500 hammers, and allow you to simplify your purchasing, but it sounds like they are not letting that happen to you.

Mrs. PRESTON. If I said that, I apologize because I certainly did not intend to indicate that. We believe that FASA gave us 95 percent of everything we need to be able to reengineer our business processes. We, in fact, have just concluded a study that showed what the difference was in doing business with the government versus the same company providing that same product to a commercial supplier and found it is about an 18 percent price differential that we pay, and, more importantly——

Ms. MALONEY. That is outrageous.

Mrs. PRESTON. Many of the factors are factors we have in our control to change. No. 1 was our specification for quality control, which has now been changed and we have adopted the international standard. But, No. 2 is the Truth in Negotiations Act.

So these top 10, what we call our top 10 cost drivers, we are now working a plan to come up with recommendations on what we need to do to change that.

Mrs. MALONEY. Could we get, for the record, the copy of the top 10 cost drivers?

Mrs. PRESTON. Certainly.

[The information referred to follows:]

The top ten cost drivers identified in a recent study conducted for the Secretary of Defense by Coopers & Lybrand/TASC of the value-added costs incurred by the ten firms participating in the study were: quality assurance, TINA, cost/schedule control system, configuration management, contract specific requirements, DCAA/DCMAO interface, cost accounting standards, material management accounting system, engineering drawings, and government property administration.

Mrs. MALONEY. You also testified——

Mr. CLINGER. The gentlelady's time is about to expire. We will have another round, if you wish.

Mrs. MALONEY. Can I ask one more question, please?

Mr. CLINGER. Certainly.

Mrs. MALONEY. You said many private businesses refuse to do business with us because of the large amount of paperwork. Again, a goal of FASA was to cut down on the paperwork so that it is easier to contract with the government. So has FASA not accomplished this for you? Can you elaborate on that?

Mrs. PRESTON. I meant to refer to the existing system and then the system that we want, which is to have—yes, FASA did 95 percent of what we needed. Are there still unique provisions that would impede the ability or the willingness of some companies to do business with us? Yes.

Mrs. MALONEY. Can we get a copy of those, what those suggestions are?

Mrs. PRESTON. Yes, we would be happy to provide you at least the listing of laws that were not waived.

Mrs. MALONEY. Thank you.

[The information referred to follows:]

The following laws were requested to be waived by the Administration, but were not waived by the Federal Acquisition Streamlining Act of 1994:

10 USC 2207
Walsh-Healey (41 USC 35–45)
10 USC 2397c
Davis Bacon
Service Contract Act
Cargo Preference

Mr. CLINGER. The gentleman from California, Mr. Horn.

Mr. HORN. Thank you, Mr. Chairman.

My first question, in essence, has partly been discussed because what I wanted to know besides the reference in Mr. Kelman's statement as to the legislative package you are sending up, especially as it relates to electronic commerce, is what else do you need to do and would you like to amend the law, any law, to get done so that you can do it based on this experience and all the teams you have working?

That is a most impressive recitation you have set forth, but basically I have analyzed every single law that needs some sort of amendment or waiver by Congress so you can get the job done? One law has just been explored. I am not quite sure what the law is. I have heard it referred to. What is that law?

Mrs. PRESTON. It is a provision in title X.

Mr. HORN. Essentially what is the reference to it, the common reference?

Mrs. PRESTON. It is a particular procurement integrity provision. It is a prohibition on a contractor involvement with a government employee. I can give you the specific cite. I don't recall it.

Mr. HORN. Will all of this——

Mrs. PRESTON. Gratuities.

Mr. HORN. This will be part of the package coming up or are you leaving something on the cutting room floor because nobody would clear it or something? I want to know what else is left and, forget it, you clear your own testimony anyhow probably.

Mr. KELMAN. That is not a fair question, is it?

Mr. HORN. What is on the cutting room floor we do not know about?

Mr. KELMAN. First of all, I think we will be testifying before your subcommittee next week on the administration's package and we will have a chance at that point to go through what is in the package. And I think it is fair to say it is a mixture of things that we, in writing the regs on FASA, things that we realized.

In some cases, we did not realize it had not been put in, or things we just did not realize last year, No. 1. Some are things that we have asked for in the past and we will be asking for again this time. And then a few additional areas we want to take up, some streamlining changes, some areas to improve the quality of what we buy, some efforts to look at some of the things that create an excessive adversarial relationship between government and contractors, such as some of the features of the bid protest system right now. We will be addressing all those issues in legislation.

In terms of what, as you put it, was left on the cutting floor, Representative Maloney asked Mrs. Preston for a list of provisions of law that currently apply to commercial contractors, for example. We will provide a complete and thorough list of those provisions to

you. They are not all in the administration's package, but as per your request we will provide that list to you.

Mr. HORN. Good.

[The information referred to follows:]

Many of the provisions that were left on the cutting room floor are represented in the Administration's new bill including the revision to the bid protest system. The NPR recommendations that were not addressed in either FASA or the new bill are:

PROC07.1: Repeal statutory limitations on subcontracting that requires contractor to perform significant portion of the work under a federal contract.

PROC12.2: Allow federal agencies and state/local governments to enter into cooperative agreements for goods and services.

PROC20.1: Amend the Resource Conservation and Recovery Act to facilitate buying recovered materials.

Mr. HORN. Let me just now concentrate for a little while on the electronic commerce portion of your testimony, Mr. Kelman.

In terms of sending out requests for bids, receiving quotes, so forth, are you talking strictly within the Federal establishment or are you also talking within the private sector in terms of this linkage?

Mr. KELMAN. We send out bids to the private sector. It is the private sector, obviously, that is selling to us.

Mr. HORN. Right.

Mr. KELMAN. We send out requests for quotes to any small business that signs up to participate in any one of about, oh, 20, 30 large number of value-added things, just to get a service where they can learn about these bids. And then just using a PC or a modem they can then bid on the business.

I think at some point, as the Internet develops and as particularly security on the Internet develops, this system may migrate into using the Internet as a vehicle. But, no, the bids go out, or the request for quotes go out to the private sector so they can bid on them.

Mr. HORN. You have labeled the group I am concerned about, the small business. To what degree are they electronically wired? You imply there are—service organizations are developing which small business can feed into and would share those with them, but the average mom and pop store that is not electronically up to speed is not going to have access to this system; is that not correct?

Mr. KELMAN. Fair question. What a business would need is one PC and a modem and, of course, you know today most PC's or many PC's you buy come with a modem. That is all you need to hook into the system. From then on, it is like signing on to Prodigy or America Online, one of the services. Those are value-added services. Sign up for one of those services and this will hook you into your PC and you will get PC access.

Mr. HORN. Are you working with groups such as the National Federation of Independent Businesses to get the word out about this system? Because they have thousands of members, and I would think that would be a helpful group for you to work with.

Mr. KELMAN. Both the SBA, Small Business Administration, and the Department of Defense are working not only with NFIB, but will be working with other trade associations to get the word out in any way we can.

And Representative Morella earlier on talked about communicating with constituents. Just listening to your question, it might be useful for us, as we move toward implementing the system, to prepare a simple package that Members could include at your discretion, obviously, in communications you send to your local business community. This really gives access to small businesses that do not live right near a government facility to be able to bid on government business.

What has happened in the past is, often only the small businesses able to bid are those who are right near, physically located to the government facility. This will allow really for it to be nationwide.

Mr. HORN. That is an excellent idea.

Mrs. PRESTON. May I mention—we do have a package of information that has already been developed that we can hand out to individuals and we also have a 1–800 number for anyone that wishes to call and get information.

Mr. KELMAN. Let us put the number on the record. We have a 1–800 number on EC. Can we put that on the hearing record?

Mrs. PRESTON. I knew I was not going to remember it.

Mr. HORN. I think a good demonstration group would be the members of this committee.

Mrs. PRESTON. We will provide that for the record, but we do have the package, and I would also like to say we are already planning to work with the small business procurement technical assistance centers, and DOD has funded the Small Business Administration over $80,000, to assist us in working with small businesses. We have also worked out an arrangement with what we call ECRC's in the Department of Defense which are Electronic Commerce Research Centers.

The 1–800 number is 1–800–EDI–3414. I should trust my memory better. That is what I was going to say, but I was not sure. But people can call that number. It is manned until 8 o'clock every night.

Mr. HORN. That is eastern time.

Mrs. PRESTON. Eastern time.

Mr. HORN. OK. Some of us think in other time periods.

Mrs. PRESTON. If we can get some more money, we can keep it open 24 hours a day.

Mr. KELMAN. That is 11 o'clock in California.

Mr. HORN. With reinventing and reprogramming, you will have more money already under your own control.

I was impressed by the success stories and particularly pleased to see, Mr. Kelman, you mentioned the people involved. I long ago learned, like 30 or 40 years ago, we have a very distinguished civil service and to give people the opportunity to think and create and see some of their actions implemented and be encouraged by others is impressive.

To what degree are all of these success stories being shared in some systematic repetitive way with other agencies and getting down into where the real work is done in all these agencies? You cannot just say it once. You cannot just say it 10 times. You might have to say it 100 times. How are we doing that?

Mr. KELMAN. Again, a very good question. We need to develop various mechanisms to do that better. We have gotten started. We are engaging in a, I like to think, very innovative cooperative program with the Contract Management Association, which is the professional association of both government contracting folks and industry contracting folks. It is their professional association whereby we have now, through sort of a voluntary agreement with them, once every month, a special feature in their magazine contract management to share procurement reform success stories and changes.

As Mrs. Preston pointed out, DOD is planning to put on-line sort of an electronic best practices system to allow the people in the trenches, in operations, to get their ideas and their innovations into the system so others with Internet access or whatever can get them on-line. That is something coming out of DOD.

We are working to try to do a version of that governmentwide. In fact, there was a NPR meeting last week. The report I got from my staff was there was a lot of enthusiasm about an effort to set up, again through the Internet, something called "Procurementnet" that would put on-line an ability of folks involved in the procurement process to both get their success stories and their ideas and innovations across, but also to have a real time electronic conversation; a little like, again, some of the services such as America Online and so forth have, where, for example, a contracting officer might say I am thinking of trying out for the first time increasing the use of past performance in the source selection process; I am worried about *X* or *Y* or *Z*. Anybody out there who has tried this and want to give me some suggestions?

So the idea would be to allow a real time conversation over the Internet with, among contracting folks, to share ideas and get those ideas out.

I think your question represents something we need to work on better and we are starting. As with all these efforts, this is a long process. We do 20 million contract actions a year. There are about 60,000, 1102 and 1105 contracting series folks out there. We are at the very beginning. We are excited by what we have started to do but we realize we still have a long way to do.

Mr. HORN. Let me just suggest you might want to send every Member of Congress a little package, say it is at the request of a Member of Congress if you would like, which would give us a paragraph, the 800 number, that we could use in our cable shows, in our newsletters, in all these ways we communicate with constituents, try to keep them up to date on what the government is doing.

Also, I assume you are working through the various Chambers of Commerce that conduct how do you access government type seminars for their membership, either State government procurement or whatever.

My last question, the rest we can hold until next week, is this: And that is to DOD, what specifically are you referring to, Mrs. Preston, when you say socioeconomic factors that are considered in the bidding and purchasing process in addition to price? What are we talking about there?

Mrs. PRESTON. We are talking about such things as a preference for particular business groups, such as small businesses or small

and disadvantaged businesses. In some cases there are price differentials that are applied on those procurements. We are talking buy American restrictions; and things like cargo preference requirements. There are a number of things which do not necessarily affect price but which would affect the costs of a supplier—we would not directly see it in the price as an additional add-on, but we would see it in the ultimate cost of the product or the price to us if a company had to comply with those rules.

Mr. HORN. Now, are you going to make recommendations in any of these areas as to waivers that the law ought to grant you or what?

Mr. KELMAN. In some cases we will, in some cases we will not. It is a—there is a balancing, as Mrs. Preston indicated in her testimony, between those objectives that certainly in the past Congress has endorsed and procurement and procurement reform issues. As I indicated to Representative Maloney in responding to her question, we will provide the committee a list of all such provisions for your consideration.

Mr. HORN. Good. Well, I thank you both. You are both excellent witnesses and we appreciate the work you are doing to implement Mr. Clinger's and Mr. Conyers' very successful bipartisan legislation. Thank you.

Mr. CLINGER. Gentleman's time has expired. The gentlelady from Florida, Mrs. Thurman.

Mrs. THURMAN. Thank you, Mr. Chairman. I, too, want to let both our witnesses know that I am quite impressed. Only being here in my second term, this is probably one of the more enjoyable hearings we have had, to know that things are working a little bit better than we were, and particularly I think it was good to hear about real people out there on the real line doing some really good things.

Let me ask some information, though. In some of the comments today, we have been talking about how small businesses get this information. How are your agencies in your different States getting this information and what are they getting built in to make sure they can do the same things that we might think of here inside the beltway?

Mr. KELMAN. That, again, ma'am, as I indicated in my response to Congressman Horn, is a very, very big challenge. As Mrs. Preston indicated in her testimony, the Defense Department will be undertaking a very aggressive training program. We are going to do everything we can. I am not sure where you are from exactly in Florida. Last Friday I was down in Orlando and visited Patrick Air Force Base and the Kennedy Space Center and we were talking with contracting folks there and it was interesting because it was sort of on the one hand/other hand story. On the one hand, there was certainly a lot of knowledge about the ideas of reinventing procurement, a real compliment to streamlining, a number of examples they pointed out to me of ways they have cut back on red tape, saved on administrative expenses and so forth and they are very proud of a lot of the things that they are doing, particularly in the area of commercial launch services.

On the other hand, they were not that familiar with a lot of the specific details of FASA, of what is going in the process, of what

is going on as you put it very aptly inside the beltway. So I will endorse what you say, said, what Congressman Horn said, that it is a real challenge. It is a big government out there.

Mrs. THURMAN. I found it interesting that when you talked about one of your Customs Service field offices that they were able to save—I guess they were going to pay probably $4,000 for privacy panels, but yet they were able to go to a liquidation sale.

Mr. KELMAN. That was in Florida, also, I might say.

Mrs. THURMAN. See, we are good. We may want to check and see how they received that information; what was the best avenue for them to get it and how you could spread that?

Mrs. PRESTON. We are exploring a lot of different ways to go out there with information, and hopefully, redundant as well. We are conducting what we call road shows. Many of the services are doing—where they are going out and putting on a "road show." I know that Dr. Kelman and myself speak more times than we would like to in any given week at conferences, et cetera, that are sponsored and we try to hit all over the country and get the word out.

We are also looking at putting in a segment on the Internet with all of the new implementing regulation guidance once we get the materials developed. But we cannot even start developing the education and training materials until we have the final regulations—well, we will begin, but we cannot finalize them until we get the regulations done, and that in and of itself is going to be a huge task—to just put training materials together.

I think in terms of text, I am keeping copies of each one of the packages we have sent out for comment, and I know my copy is at least 4 inches high. So we are talking about some very complex and detailed things we are going to have to teach people.

Mrs. THURMAN. With that, too, let me ask a question that I do not think has been asked? What kind of opposition you are getting from what might have been the traditional contractors to going into a new procurement?

It would seem to me if I were losing $1,500 when I could have gotten my $4,000 or if this tradeoff that we are doing, are we having any opposition because they are saying, wait a minute, you cannot do this, you cannot go into hometowns and buy this, you are supposed to be buying from us?

Mr. KELMAN. Well, I think that is a risk. There are some, obviously. Any bad system has some special interests that benefit from it, and there has been—I get letters. I suspect Colleen gets letters from people who are saying, gee, we used to have certain things reserved for us. It was marketed to be bought just from us. You are taking our business away.

My response is we are not taking your business away, you still have an opportunity to compete for the government's dollar, we are just not giving you a right to that business.

I think, though, that the reaction in general from industry as a whole has been positive. I think that there is a need for, in my view, a cultural change within industry as a whole in a direction of having the same laser beam-like emphasis on customer satisfaction that companies show vis-a-vis their commercial customers.

We need to get more of that laser beam direction on satisfying the government, customer, and the taxpayer as to who the govern-

ment is representing. We need to get that cultural change into industry.

But I think, by and large, the reaction of industry has been very supportive of procurement reform because there are so many nonvalue-added burdens that do not help anybody that the traditional system has created and we are trying to get rid of.

Mrs. THURMAN. One of the other areas that concerns me every so often is that one of the reasons I think some of this started, and you alluded to it, was the idea of the $600 toilet seat, and the $4,000 hammer. So the public will come back to us in another 2 or 3 years and say, OK, wait a minute, let me show you where you spent *X* amount.

Are we actually putting accountability in this as you go through these changes?

Mrs. PRESTON. I would not say that we were putting additional accountability into the process. I think it is a question of looking at how much is it costing us to try to make the system perfect, and also separating the system itself, the process, from an individual action. In other words, if you have a system that is bad, you ought to fix the system. If you have an individual who makes a mistake, you do not want to kill the individual.

And, in fact, we have been talking, as we go through and looking at incentives and things like that, particularly in companies who have done reinventing or reengineering, what they do is go out and give every one of their employees three chits for mistakes for that year, and when you do something that is really bad or something goes wrong, you turn that in. That is the only way you get people to do something innovative.

And it is interesting because we have some groups now where the only way they would go out and try a new practice is through a reinvention lab cover, in essence, because they said what happens if it does not work. We are trying to reduce our oversight of contractors. We think we can do this in a much better way with much less expense to the government because we ultimately bear the burden of that cost for both the government and the contractor, since it gets included in their product to us. But they did not want to take a chance until the reinvention lab opportunity came up, because as a laboratory now, if there is a failure they can say, OK, it did not work and now we will start all over again.

I would analogize it to how many policemen are you going to put on the beltway to make sure nobody goes over 55 miles an hour. At some point it just does not make sense. There will always be mistakes and we should never lead anyone to believe we will not have another horror story on a spare part or something of that nature, because if we did, there would be the opportunity to come back in then, a couple years from now, and we would be back in the same situation we are now, which is, as you alluded to, every time there was a problem in the system, there was a law enacted to make sure that would not happen again or a regulation adopted to make sure it would not happen again.

And I would also analogize it to a reef building up. We have now created a reef that totally has encircled our procurement process and any ship that tries to get through does so at their own peril, in some cases.

Mr. KELMAN. Representative Thurman, let me add two short things to Colleen's observation. One is, I see us as trying to redirect the focus of accountability from accountability for process, and then you follow the bureaucratic rules and so forth to accountability for results, which is really very much in the spirit of the Government Performance and Results Act that was a bipartisan piece of legislation passed when you started in 1993. It was one of the first actions of the 103d Congress.

So we would like to see people rewarded for things like I saved the government 22 percent on recompeting this contract rather than did I go through and follow all the thousand pages of the Federal acquisition regulation, No. 1.

No. 2, just to follow up on what Colleen said, I think the greatest challenge for all of us involved in the political process and all of us cooperating together to make the system work better is to avoid the easy temptation, which afflicts all of us, to get the quick hit on a scandal or a horror story.

If you take—for example, I talked in my testimony about the purchase card. I am sure, without knowing the specifics, I am sure, as I am sure the sun will come up the next day, with 10 million of these small purchases we make a year, someone, somewhere, some time is going to go out and use this card and go and buy a can of paint and take it home for their personal use and cheat the government. And that is going to happen at some point somewhere. There are a lot of controls we put in the system to prevent it but it will happen one time. If we then react to the first time we see somebody do that with saying, the way we have traditionally reacted in the past, ah, waste, fraud, and abuse, we need to end this, we lose sight of the big picture, which is on those 10 million purchases, that for each one we are making we are saving $54 in administrative costs and we are saving weeks in lead time, we are allowing people to take advantage of short-term liquidation sales and so forth.

So I think the biggest challenge for all of us in this business is going to be to show the courage and the strength, the internal strength, to avoid the temptation to go for the quick sound bite.

Mrs. THURMAN. The sound bite.

Mr. KELMAN. Yes, that is it. It will be a challenge for all of us.

Mrs. THURMAN. Let me say quickly two things. I hope you will take up the chairman's and Mrs. Maloney's recommendation about the bill coming up on reform, regulatory reform, because it does come to the floor I believe on Thursday. So we really do not have much time.

And, second, to reemphasize that I hope that as you pull your package together, it seems like over the short period of time you have been doing this you have in fact found that reef of laws out there that we can help let that ship glide through there.

And last, let me say I agree with you that I hope we do not end up putting this into a situation where one small mistake tears down a whole system that seems to be doing a better job than where we were before and I congratulate both of you.

Mr. KELMAN. Thank you.

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

Mr. FLANAGAN. Thank you, Mr. Chairman.

Good afternoon. I would like to also congratulate you on excellent testimony and very good implementation of what appears to be working very well.

I do have one question, though, for Mrs. Preston. You mentioned just a few minutes ago in balancing out a perfect system against a reasonable system and how much we are willing to absorb and not absorb, and I heard about the paint and someone will buy a can of paint and take it home.

When I was in the service, I was a dining facility officer and I had a six figure budget every year and I fed 60 soldiers, and had a terrific job doing it. But I will tell you, I am a good, honest, wonderful person, and I would never cheat the system, certainly never take a hotdog home for my own use. But I would tell you that, particularly in the area of small purchases, with a threshold of $100,000, even though it does only make up 16 percent of the dollars spent, and that you have given us in your testimony, Mrs. Preston, that is still a significant amount of money. And it goes far beyond a can of paint.

At what level of oversight are we talking about for those small purchases and for the micropurchases, as well?

Mrs. PRESTON. The micropurchases are $2,500 and below right now. We have not precluded the use of credit cards for purchases above that level, but the intention is and the regulations actually are being crafted and have not been finalized, but there are levels of oversight in there depending on the dollar value of the purchase and there are requirements for specific training, et cetera, that are required of an individual.

As you get up to $2,500, you would receive one level of training; above $2,500 and up to $100,000, you would receive an additional level of training. And with all the credit card purchases there is a process where there is an oversight individual who is responsible for reviewing the bill that comes in once a month to make sure that there have been no inappropriate purchases, just as we review the telephone bills every month to make sure nobody is making personal phone calls.

So I think we have set up adequate controls. As you know, someone will always figure out a way to beat the system, but we at least have something in place that we think is reasonable to prevent that type of thing.

Mr. KELMAN. I would add, if I could, above $2,500 we have competitive procedures. There are simplified procedures but we get price competition and quality competition and so forth once we get above $2,500.

When I was visiting a contracting office in Oregon—or actually Seattle. I am sorry, us Easterners, I don't know, it is all one big blur out there. I apologize.

Mr. FLANAGAN. I understand; it is the Atlantic, Manhattan Island, the Hudson River, and then the Pacific Ocean.

Mr. KELMAN. I am humiliated. I apologize.

But, nonetheless, in Seattle I was actually looking at the procedures that Mrs. Preston referred to that, for example, when they were reviewing, I looked at some previous credit card billings that were checked, and one was for getting auto repair services. And I noticed in the personal review that there was a circle around the

license number on the bill from a repair shop. The license number of the car and the guy in the file were checked to be sure it was a license number of a government vehicle. To give you an example of the kinds of controls and checks that will be put into the system.

Mr. FLANAGAN. That is very encouraging, because it is extremely important not to look at the taxpayer and say, well, it is an enormous administrative burden up to $100,000 to watch every purchase, so we are just not going to do it any more and we will hope there are good and honest people. That is unsatisfactory.

Mr. KELMAN. No, no.

Mrs. PRESTON. That is why we are careful to say there is a balancing. I hope I did not give you the indication we were simply removing any of these things. It is our goal to find a more efficient and better way to do and achieve the same goal.

Mr. FLANAGAN. Tremendous. I hope you bring forth the cutting room floor, as Mr. Horn referred to it, legislation that you have looked at and the other statutes that have been an impediment to further refining this process. I will look forward to more testimony next week.

Thank you very much.

Mr. KELMAN. Thank you, sir.

Mr. FLANAGAN. Thank you, Mr. Chairman.

Mr. CLINGER. I just have one or two questions for you and the first is: is that salad dressing any good, the GI issue?

Mr. KELMAN. It is sealed for your protection, so I have not dared open it yet. I don't know. Who knows.

Mr. CLINGER. It has been child proofed, I take it.

Mr. KELMAN. It has been child proofed. The main thing about it is that it is really sold just to the government. You have some manufacturer—might be actually fine, who knows. It has not been subjected to a consumer market test, but these folks are producing this thing just to sell to a government customer, with all the extra costs that brings about.

Mrs. PRESTON. Of course, the last time we tested, we found we had one chocolate chip per thousand cookies. We said we just wanted something that was sold commercially, and it was. So for every horror story you can find this sort of thing. We found someone who was making catsup in their bathtub and we were precluded from telling them that we could not buy from them. So for every horror story, there is another on the other side.

Mr. KELMAN. I see these sort of pieces of basil or something. I bet that is a thing in the specification saying how much basil per ounce has to be in there.

Mr. CLINGER. About how many pinches of basil per cubic centimeter.

Somebody asked the question about what if you had some resistance from the supplier community in terms of not doing business; taking away my business. The bureaucracy—obviously, one of the objectives of what we are trying to do here, hopefully, is there will be a lot fewer purchasing agents throughout government, which seems to me might cause them to be a little resistant to change.

Has that been a problem for you?

Mr. KELMAN. Maybe each of us can take a stab at that. Certainly, it does not make the task easier. And, obviously, all of the

uncertainty in this town this year about the fate of various government programs and so forth. I am not asking anybody to redo sort of larger political things to make procurement reform easier, but since you asked the question obviously it does make our task more difficult.

There traditionally has been a fairly high level of turnover in the procurement work force, and we are hoping to the extent possible to be able to achieve the downsizing targets that we already have and then perhaps more aggressive ones that may be coming down the pike, as much as possible through attrition. It is obviously a problem. There is obviously a lot of uncertainty out there. At the same time, and I would be curious to hear Colleen's reaction, when I go out there and I am trying to spend as much of my time, consistent with having an 11 year old and a 7 year old at home, out visiting buying offices.

There is also, as you will see it yourself when you go out, there is a surprising amount of enthusiasm, eagerness for change. There are a—I will not say everybody, but there are a significant number of folks out there who really have been feeling shackled by the system from serving the taxpayers and are saying, finally, the political folks, whether they be in the administration or on the Hill, finally the political folks are listening to us and are wanting to hear our ideas for how to make things work better.

So I think that there are a significant number of people out there who are not letting what you are referring to get them down, but I would not be telling the truth if I didn't say it was a problem.

Mr. CLINGER. Mrs. Preston.

Mrs. PRESTON. Within the department, we have already taken a substantial number of personnel reductions in DOD, and in fact as part of the——

Mr. CLINGER. In procurement?

Mrs. PRESTON. In procurement.

In the defense management review, there were substantial cuts taken.

I try, whenever I go out to speak to any of the groups in the work force, to separate the two and say acquisition reform is not going to drive personnel cuts. The personnel cuts are going to occur anyway because we just do not have the budget, and it is only a matter of time and any delay is making it more difficult. If you were to ask me, would it be easier if we took the personnel cuts first before we tried to reengineer the process, obviously, yes. Because there is some resistance and concern about people losing their jobs. Much like you find when industry was automating and everyone said, well, I am going to lose my job if you bring a robot in here to do it.

We see the same kind of savings when we go through and can do electronic commerce, for example, in terms of the efficiency in the process and that will mean that someone is going to lose their job. But I firmly believe that the personnel reductions are going to occur no matter what, and our job right now is to figure out how we can help people continue to effectively do the work that needs to be done with almost half the people that we had previously doing it.

Mr. CLINGER. Well, I think it is pretty apparent that if there has been resistance within the bureaucracy it has not slowed down the process at all. Because you obviously are ahead of schedule in terms of implementation of the regulations.

Just one other question, FASA contained the repeal of a lot of laws, apparently not as many as perhaps we should, would have liked and hopefully we will revisit that to simplify the process.

And the streamlining goal, I understand that in some specific cases, like the travel cost provision, a regulatory process has been proposed which could be more complex, possibly, and might be implemented inconsistently within the various agencies, which of course would not be the sort of result we would like to achieve. We are trying to get more uniformity, not less. This could potentially require a company to maintain several systems, programs, for accounting for these costs. This is not streamlining.

How would you respond?

Mr. KELMAN. Well, I don't want—I only want to talk about that in general because it is an ongoing regulatory process where we will need to make some decisions.

As you indicated, Mr. Chairman, Congress last year repealed the statutory provisions regarding tying reimbursement for travel costs for contractors to government per diems. So you cannot get more for hotels if you are a government contractor than I can or Colleen can as a government employee. And that was previously in statute. The statute was repealed and it was left to regs to determine what the rules should be.

We do understand there has been some industry concern about the draft reg that has come out. We will look at the industry concerns. At the same time, I need to say at this time of budget cutting there is a lot of money at stake here and if as a result of moving our travel reimbursement from the current system, which is linked to government per diems, to a reasonable cost system, we could easily, I think it is a conservative estimate, that could easily cost the government $1 or $200 million a year. So in these times of tight budgets, we are going to have to—and I look forward—we look forward to working with industry on this to think about a way that looks at minimizing administrative burdens while not in a time when budgets are in a very, very tight situation. If I can put it in the vernacular, start paying out more money so contractors can stay at the Hyatt instead of the Holiday Inn.

Mrs. PRESTON. I would just second that in terms of the administrative burden and that is a primary concern for us. If you have no regulation of the process, what happens is the contractors' costs are assessed to determine whether or not they are reasonable. If they are reasonable, they would be allowed. If we have to go in and review or somehow set up a system to sample the costs, there is a significant administrative burden associated with that as well. And so what we were looking for in the regulatory process was for industry to say either you either are capped at whatever the government rate is or you have to set up an internal system yourself to show that your costs are reasonable so that we do not get into a process of having to verify that every person who stayed in the Washington, DC, area did not spend more than $150 a night for a room.

So there are a couple of competing interests there we are trying to balance, and we have made a commitment to industry at our meeting last week that we would sit down with them and figure out—in fact, we are waiting for a proposal from them on what they think makes sense.

Mr. CLINGER. The gentleman from Indiana, Mr. Souder.

Mr. SOUDER. I have a couple of questions, and as a freshman Republican I am going to plead ignorance on some of the details of the bill, so tell me if this is not covered.

A number of years ago when I was working for then Congressman Coats in Indiana doing economic development, I got directly involved in Federal procurement with a number of our auto and truck manufacturers who wanted to bid on defense contracts.

One of the main problems was in Columbus, OH, where we were trying to get more competition to drive a bid down. We did a pilot program, at that point, where they took photos of all the things they were buying and made a presentation and we eventually wound up with a 125 additional bidders they had not previously had.

One of the problems was that they could not tell what price they had paid or the quantity they were going to purchase. When we first raised this the local business group thought it was kind of a ridiculous situation to go into a bidding process.

I understand a reluctance to state what is going to be purchased and at what price, because it varies on the quantity you order and various budgeting type concerns. But they, at that point, would not even release how many they bought, or the average price paid.

Has that been changed over the last few years, or is that information still very difficult for someone who wants to bid on defense contracting? Is that still difficult to obtain?

Mrs. PRESTON. I would say no. Many of the activities are published at the beginning of every year, a document listing what their particular acquisitions are expected to be. Any contract, after it is awarded, is a publicly available document, so that anyone could go in and request on any particular buy what price the government paid for it.

They may not have had the information there where they could tally it for you and give it to you on an average basis, but there should not be any reason that could not be done now. In fact, we have the electronic commerce system operating.

What will happen is that the, through the electronic commerce system all of the bid prices will be posted right on the system and everyone can see what the market price is and basically who won the procurement, et cetera. It will be much more visible.

Mr. SOUDER. On a historic basis as well up to——

Mrs. PRESTON. I don't think we are planning on trying to keep it on a historic basis, but most people keep track of the market and know what is a given.

Mr. SOUDER. What we found is that small manufacturers were being priced out of the market because they did not have the personnel that could know when the bids were going to be posted and how to tap into the system.

We put together a resource center funded by a development group in northeast Indiana to try to create some sort of resource

bank, because an average firm simply does not have the resources to track it.

If there was at the beginning, some kind of order before you set up an assembly line or buy the equipment, it would be helpful to see not only what the current is but what the historical pattern is on that item.

Mrs. PRESTON. I think that is something that will be solved by going on the electronic commerce system because companies have to understand that they are still going to have to market. The government cannot be there to provide them every single piece of data they need to know to be able to run their business. I don't think it is unreasonable to ask a company that gets into the business to look at past procurements or to study their market before they do that.

Our obligation should be to make that information available in the easiest way we can, and when we get our electronic commerce system they will be able to look over a period of time through those various acquisitions.

Mr. SOUDER. I would comment that in this case it is to the government's benefit to get more competition, and that in the private sector I cannot imagine a contract where you would bid and you could not just at the tip of your tongue say how many did you buy over the last 2 years, what was the average price paid, how many months did you do that. That is information that comes from the person seeking the bids to try to drive the price down not something that is necessarily the job of the supplier to go get.

I agree with you, the easier you can make it, and I am sure it has advanced quite a bit, and that will help. I am just suggesting that sometimes we think in terms that it is up to the suppliers to figure this out, and if we made it easier for them, we would drive the bids down.

That is what happened in a lot of the things that were overpriced. It was one or two sole sources who knew all the inside information, how the stuff was written. I have an MBA and I could not figure out how half the stuff was written and there were certain consultants who could not. You had to go to specialist consultants to figure out how the bids were written.

I have a second——

Mrs. PRESTON. I understand the point. Thank you.

Mr. SOUDER. I have a second question, too. I realize this is an extreme case but it leads to another type of a problem and that is the privileged information on sole source bidders.

We had a pump that was requested by a naval aircraft carrier. One pump, which is how you get problems in the first place. Nobody was bidding. A company in Fort Wayne, which is the second biggest pump supply company decided to bid. They asked for the specifications for the pump and the Navy said it was privileged information for the person who had previously built the pump. So there were no designs for what kinds of pump they needed.

Then they said, well, give us a number of the company, it is probably our competition, they will probably free up the information because they are no longer in the Federal supply business. It turned out they were the company, the one in Fort Wayne.

So when the company asked for the specs, the Navy said that they did not have the specs, it was the responsibility of the supplier to have the specs. So neither of them had the specs for the pump. I had this vision of a carrier gradually sinking over in Spain while the commander was trying to drive the pump.

That is probably the exception, that nobody has the specs, but the question is in that type of situation you can see there were multiple things that lead to these type of problems that caused a lot of bad publicity for the Defense Department and others. Has any of that been addressed or is there a statute of limitations on some of this? If you go into the supply field and then you drop out of the business does that become public information or——

Mrs. PRESTON. Well, Congress has actually dealt on the issue of rights and data over several years and initially that was one of the proposals that there be sort of a statute of limitations on how long you could keep your data proprietary.

We found, though, that the biggest problem is the one you mentioned, which is that we did not have a good handle on the tech data that was delivered; that when you really analyzed the root cause of the problem, it was not so much that we had so many vendors, who we were stuck with one sole source and they would not give up the rights on the data, but that the biggest problem was repositories and we have had a long, ongoing process to digitize technical data so we can keep it in these repositories. But we are also looking at some other mechanisms to do that and that is to rely on the contractor and make it a part of their contract that they have to keep the technical data because they are the ones who when the system specifications change on other parts, are the only ones that are going to know that you have to change the spec on that particular part as well.

So there has been some effort to go to a new policy of putting it in as a contractual requirement that the contractor keep up-to-date data and then the government will have real time computer access to that data.

Mr. SOUDER. Thank you very much.

Mr. CLINGER. Thank you.

The gentleman from Mississippi, Mr. Taylor.

Mr. TAYLOR. Thank you, Mr. Chairman.

Mrs. Preston, I want to verify something you have on page 7. When you are saying that the small purchase threshold of $100,000, that covers 99 percent of your contractual actions?

Mrs. PRESTON. Yes, sir.

Mr. TAYLOR. And then 1 percent of all your contracts is equal to 84 percent of your dollars?

Mrs. PRESTON. Yes, sir.

Mr. TAYLOR. That is DOD?

Mrs. PRESTON. Department of Defense only.

Mr. TAYLOR. The entire DOD acquisition budget——

Mrs. PRESTON. The entire budget.

Mr. TAYLOR [continuing]. Is, if I am not mistaken, it means that when you buy something like a C–17 or a fast sealift ship, it means more than those pumps and paint cans and all these others, as the hammers and things we hear about are small potatoes compared to that.

Mrs. PRESTON. Yes, sir.

Mr. TAYLOR. Which leads to the next question on why is—I realize that F–16's, F–15 combat vehicles, there ought to be a MILSPEC; it ought to be one of a kind and it ought to be the absolutely best in the world. But for those things that are cargo carriers in nature for the sealift ships, for the C–17, I really wonder if you all have given much thought in the past year or so toward the possibility of acquiring a C–17 equivalent on the commercial market?

Mrs. PRESTON. Yes, sir, we have. And, in fact, that is the proposal for the C–17, if we do go to another aircraft, that will be called the nondevelopmental airlift aircraft, and we are coming over under a provision of statute that has passed now—it has been 5 years. But last year is the first year we were ever successful in getting any pilot programs adopted. And we come over with a request and say even though this is a military-unique item, we believe that we can buy it using commercial practices, and we ask that it be treated as a commercial product. And so the only thing that would be done uniquely is any modifications that might be necessary. But we are planning on buying that directly off the shelf.

The five pilot programs that were authorized last year are JPATS, the primary aircraft chain near, JDAM, which is a smart missile guidance system to put—smart bomb, I am sorry, and the nondevelopmental airline or aircraft initiative, nondevelopmental engines because airplane engines are another example of where we are buying the same thing that the commercial sector is buying; and I'm going to forget the last one.

Mr. KELMAN. Let me add to that, Congressman Taylor, that as part of the administration's legislative package for this year we will be asking you folks in Congress to give us additional pilot authority to do additional numbers of these kinds of commercial buys that you are talking about for major weapons systems.

Mr. TAYLOR. Would this nondevelopmental aircraft include something like the replacements for the P–3? I realize it is not in the works yet but at some point you will have a replacement obviously something like that. It might make a heck of a lot more sense to buy something off the shelf.

Mrs. PRESTON. I can tell you that every effort is being made to buy anything off the shelf that we can now. And, in fact, every major system when it comes up for a review, we are looking through the entire solicitation to see what MILSPECs are in there and to make sure that there are a minimum number of military specifications. And Mr. Longvemare and Dr. Kaminski personally sit in on those reviews and the question is asked at every meeting that I have been at now.

Mr. TAYLOR. It is my understanding that at some point the Navy will have to come to us to replace the aging fleet of tankers. What are the chances of going to a commercial—I am talking about for ship tankers—what are the chances of going to commercial—getting back, Mrs. Preston, to something you and I went through, and that is in the Gulf War where we had been so insistent upon having picture perfect MSC capability, and spent a great deal of money, and then we turned around and chartered 90 ships just off

the market that were nowhere near MILSPEC and they were doing the same thing right next to the ones that were MILSPEC.

It gets kind of silly in our striving for perfection we end up with very few of what we need whereas if we just lowered the standard a little and went to a commercial standard on nonoffensive weapons that we could save a heck of a lot of money and accomplish 90 percent—well, a great deal more of what we need.

Mrs. PRESTON. I cannot answer that question directly. I am just not familiar with the procurement, but I would be happy to go back and look into it and give you an answer for the record.

Mr. TAYLOR. One thing that was brought to my attention as we were trying to, when we did fund some sealift ships that almost every one of the bidders that I spoke to said they could have saved an enormous amount of money to the taxpayer and come up with a ship that was just slightly less capable had it gone to a commercial spec or even a commercial spec plus but not quite a MILSPEC.

Again, it was kind of silly when you think about it that we had gone to a lot of trouble to upgrade the Cape May and some of those fast RoRo ships when the ships right next to them were just a commercial RoRo ship we had to pick up on the market because we needed something to get the troops over there in a hurry.

Mrs. PRESTON. In fact, the fast sealift ships was one of the early DOD programs for pilot programs, and it never made it out of the building. I think we found now that one of the reasons is that the law requires in order for us to come forward with a proposal to waive the government-unique laws that would apply, that we have to justify them, and we have to justify them based on cost savings, et cetera.

It is not an easy thing to do, and what the program managers told us was that it was more trouble than it was worth because the amount of time it would take them to come up with cost estimates of how much money they were going to save, et cetera, made the process so difficult for them that they just were not willing to put the effort in. The thing they wanted was to get relief from oversight from OSD, and OSD was not willing to give up the reins at that point and lessen up on the oversight process.

Things have changed now, and it was a lot of work for us to get the packages together to get the congressional agreement to authorize these pilot programs, and so for those program managers it took double the effort because they did not know if they were going to get them approved and they had to do two separate acquisition strategies until they knew they were going to get approval for the program. When we finally got the approval in some cases the contracts had already been awarded, so it was too late to take advantage of the legislative relief we did get.

Mr. TAYLOR. If I could make a recommendation. I understand that there will be about a half dozen sealift ships yet to be purchased. We have purchased some under a MILSPEC. I would certainly recommend that your department look at buying the second set without the MILSPEC. Just see for yourself what the savings would be.

I have a feeling, and, again, this is based on not one supplier telling me he could have saved the government some money but every one of the suppliers who bid on it said they could have run the cost

down tremendously had they built to a commercial spec or even a higher grade than commercial spec but something less than what you were asking for.

Mrs. PRESTON. I will take a look at——

Mr. KELMAN. Your general proposal, Congressman, beyond even just this one sealift kind of ship is a very, very good one and a very—I think it is something we have also been thinking about on the governmentwide level.

Part of Secretary Perry's MILSPEC initiative is to try to implement exactly what you suggest, is that we will be putting or the DOD will be putting into its solicitations a provision saying if we have put a MILSPEC in our request for proposals, and you think that you can meet our needs or meet almost all of our needs through a commercial spec come back and tell us that when you hand in your proposal to the government.

I would like to see that similarly become part of our process in general, because anybody who has any experience in industry knows that a lot of times for that last 5 percent of performance you might double your price.

And I just wrote down what you said. I am not sure whether there are currently any problems in statute that would inhibit an agency from just requesting those kinds of things. I will go back and ask my lawyers. I do not think there are, but I will go back and ask my lawyers about whether we need any statutory changes. If so, we will come back with them. If not, I will pledge to you that we will, governmentwide, continue to do more to promote the kind of approach you just outlined, where we invite offerors to tell us here is a cheaper way we can do something.

[The information referred to follows:]

REVISED LIST OF STATUTES THAT IMPACT COMMERCIAL ACQUISITION

NUMBER, STATUTE, AND EXPLANATION

1. 10 USC 2241 Note—Berry Amendment. Limitation on Defense procurement of food, clothing, and specialty metals not produced in the U.S.

2. 10 USC 2313—Permits Comptroller General or authorized representative of GAO to examine contractor records related to contract. Requires flowdown to first-tier subcontracts exceeding the small purchase limitation.

3. 10 USC 2320—Rights in technical data. FASA established a presumption of private development for commercial products, but currently commercial companies are required to share rights.

4. 10 USC 2321—Validation of proprietary data. Provides that supply or service contractors for DOD justify any use or release restriction related to their provision of technical data. Covers any tier subcontractor.

5. 10 USC 2327—Requires firms contracting with DOD to disclose any significant interest in a firm controlled by a foreign entity that has the State Department has listed as having terrorist affiliations.

6. 10 USC 2384(b)—Requires marking of supplies with name of seller, contractor's part number etc. unless commercial items sold in substantial quantities to the public and to DOD at established catalog or market prices.

7. 10 USC 2391—If DOD plans to reduce spending and downsize facilities, DOD may conduct studies of the impact and make grants if there has been a significant adverse impact on a community.

8. 10 USC 2393—Prohibits DOD from doing business with debarred or suspended contractors, and requires contractors to disclose whether any subcontractors are debarred or suspended.

9. 10 USC 2397—Procurement integrity. Requires employees or former employees of defense contractors to file reports concerning their work related activities.

10. 10 USC 2402—Prohibits prime contractors from limiting subcontractor sales directly to the U.S.

11. 10 USC 2406—Requires contractors to make available in a timely manner access to their cost and pricing records for major weapon systems.
12. 10 USC 2408—Prohibits employment, for up to 5 years, of persons on DOD contractors or first tier subcontracts if person convicted of fraud or any other felony.
13. 10 USC 2501 Note—Requires Defense to notify each prime contractor of any substantial reduction or proposed termination in major defense programs.
14. 10 USC 2533—Statutory list of considerations that DOD must consider before buying non American goods.
15. 10 USC 2534—A list of restrictions related to DOD procurement of items such as multipassenger bus, chemical antidotes, valves and machine tools, carbonyl iron powders, air circuit breakers, and sonabuoys. Specialized Buy America requirements for these items.
16. 10 USC 2631—Requires sea transportation in US flag vessels for military goods.
17. 15 USC 637(d)—Offerors for construction contracts in excess of $1 M, and other contracts in excess of $ 500K, must incorporate a subcontracting plan into the contract, which includes % goals for small business, etc.
18. 15 USC 644(d)—Priority shall be given to awarding of contracts and placement of subcontracts to small business concerns within labor surplus areas or areas of concentrated unemployment.
19. 29 USC 793—Contracts in excess of $ 10K shall contain a provision that the contractor shall take affirmative action to employ and advance qualified individuals with disabilities.
20. 31 USC 1352 note—Byrd amendment regarding lobbying restrictions.
21. 38 USC 4212—Contracts in excess of $ 10K shall contain a provision to take affirmative action for disabled veterans and Vietnam era veterans.
22. 41 USC 10a–10d—Buy American Act. Requires purchase of American goods unless not in public interest, cost unreasonable, unavailable in sufficient quantity, or unsatisfactory quality.
23. 41 USC 43—Walsh Healy Act Requires minimum wage as determined by Secretary of Labor and prohibits contract employees from working more than 40 hrs/week. Doesn't apply to purchases of materials, supplies, or equipment bought in the open market.
24. 41 USC 422—Cost Accounting Standards Board (CASB). Establishes a CASB to oversee accounting standards used in government contracts.
25. 41 USC 423—Procurement Integrity Act. Requires ethical conduct. Discusses prohibited conduct by contractors and procurement officials. Provides for certification, enforcement, and penalties.
26. 41 USC 51–58—Anti-Kick Back Act Prohibits and provides penalties for money etc paid to improperly obtain favorable treatment in connection with a contract.
27. 41 USC 701—Drug Free Workplace. Requires a drug free workplace for Federal contractors. Provides for certification of same and debarment, suspension penalties if false certification.
28. 46 USC 1241(b)—Cargo Preference. Requires agencies to transport in American vessels at least 50% of procured, furnished or financed equipment, materials, or commodities.
29. For the Department of Defense, the national defense authorization acts, appropriation acts, and other statutory restrictions on foreign purchases restrict purchase of the following goods to American goods:

P.L. 100–202, Section 8088—Polacrylonitrile Based Carbon Fibers
P.L. 101–511, Section 8041—Anchor and Mooring Chain
P.L. 102–172, Section 8011—Carbon, Alloy, and Armor Steel Plates
P.L. 102–396, Section 9108—Four ton dolly jacks
P.L. 102–484, Section 832—Anti friction Bearings
P.L. 103–139, Section 8090—Aircraft Fuel Cells
P.L. 103–139, Section 8124—Totally enclosed lifeboat survival systems
P.L. 103–335, Section 8023—Supercomputers
P.L. 103–335, Section 8050—Multibeam Sonar Mapping Systems
P.L. 103–335, Section 8115—Ship Propellers
P.L. 103–335, Section 8120—120 mm Mortars and Ammunition

Mr. TAYLOR. And I hope you also will keep—Mr. Chairman, one last thing. I hope you also keep in mind, obviously, when six people are bidding on something and you have, in the case of the sealift ship, two winners, there is going to be a heck of a lot of resistance on their part to want to change the game plans. And I hope you

will not sit back and wait for the winners to come back and offer to show you some ways to save money, because they are the least likely. I came from business and they are the least likely to want to change the equation since the equation is working in their favor.

Mr. KELMAN. No, we will come up with some proposals so that they can win the proposal if they come up with some good ideas.

Mr. TAYLOR. Thank you, Mr. Chairman.

Mr. CLINGER. Gentlelady from New York.

Mrs. MALONEY. I would like to request the implementation plan be part of the record.

Mr. CLINGER. Without objection, so ordered.

[The information referred to follows:]

IMPLEMENTATION PLAN FOR THE FEDERAL ACQUISITION STREAMLINING ACT OF 1994
(FINAL VERSION)

ROLES AND RESPONSIBILITIES

FAR Council

Federal Acquisition Regulatory (FAR) Council, and the Deputy Under Secretary of Defense for Acquisition (DUSD(AR)) acting as an advisor to the FAR Council, (referred to herein collectively as the FAR Council) will oversee the implementation of the Federal Acquisition Streamlining Act of 1994, resolve any interagency disputes, decide whether to grant requests for public meetings, and approve all final rules implementing the Act.

Senior Agency Procurement Executives

Senior Agency Procurement Executives will identify highly capable people to serve on interagency drafting teams and relieve these people of all other work responsibilities during the periods they are needed to work on implementation of this Act. In addition, each Senior Agency Procurement Executive shall establish internal procedures and identify a point of contact for formally coordinating draft rules within the allotted time period. Senior Agency Procurement Executives shall provide the name of the focal point to the project manager.

Project and Deputy Project Manager

Captain Barry Cohen (voice 703–614–3882, fax 703–614–1690) will serve as the project manager for implementation of the Act and will perform the following: 1) provide the interagency drafting teams with necessary guidance, procedures, and formats to assure a full understanding of the overall plan; 2) track all progress toward meeting established milestones and statutory dates; 3) serve as the focal point for the receipt of all documentation to and from the drafting teams and the various federal agencies; 4) upon receipt of a draft proposed rule or a draft final rule from a drafting team, distribute the rule to the Office of Federal Procurement Policy (OFPP) and agency points of contact for agency comments; 5) provide comments and any alternative language developed back to the drafting teams for review; 6) keep the FAR Council informed of all significant events, particularly any potential slippage in milestone schedules, as soon as they are known, and the reasons for the slippage; 7) through the FAR Secretariat, sign and forward all necessary paperwork to the Federal Register for the publication of rules; and 8) provide draft proposed rules and final rules to the FAR Council for approval. Mr. Edward Loeb (voice 202–501–4547, fax 202–501–4067) will serve as deputy project manager. He will assist the project manager in the duties listed above, serve as liaison between the drafting teams and the civilian agencies, and with the FAR Secretariat.

Interagency Drafting Teams

Interagency drafting teams, generally consisting of, but not limited to 5 or 6 selected people from the various federal agencies, will draft the implementing FAR language. Each drafting team shall include at least one member representing the Defense Acquisition Regulations Council (DARC) and/or the Civilian Agency Acquisition Council (CAAC), as appropriate; a legal representative who will be responsible for review of all rules during the drafting phase; at least one individual, a Legislative Team Liaison (LTL), who was involved in the discussions with Congress on the legislation; and selected other people with current experience in the FAR system. The LTL will brief the team at the beginning of the drafting process on policy issues

and legislative intent, be available to answer questions from drafting team members, and review all draft language with the team leader.

As amplified below (see—Agency Coordination), each drafting team will have 14 calendar days to develop initial proposed FAR language to fully implement its assigned sections of the law and submit such language to the project manager. That language will then be circulated by the project manager to OFPP and agency points of contact for agency comment for a 10 day period. The teams will study and respond to agency comments and develop a draft proposed rule within 10 days. After a 60 day public comment period, each drafting team will have 10 days to resolve comments and develop a final proposed rule. The final proposed rule will be provided to OFPP and agency points of contact for coordination within 10 days. All rules will be approved by the FAR Council.

Each team leader is responsible for: 1) meeting schedule milestone dates; 2) resolving interagency disagreements if possible; 3) securing space to conduct meetings; 4) justifying the recommended use of interim rules; 5) providing all necessary administrative support to the team; and 6) and keeping the project manager fully informed of the progress of the team. The team leader will immediately bring to the project manager's attention any problems that may hamper the team's ability to meet its objectives in the alloted time.

Under the guidance of the designated team leader, each interagency drafting team, with the assistance of the FAR Secretariat, is responsible for: 1) drafting quality rules that consider all relevant issues including consistency with related work being completed by other drafting teams; 2) reconciling agency and public comments; 3) meeting established deadlines; 4) participating in public meetings including preparation of detailed minutes of all proceedings; 5) providing technical advice upon request; 6) briefing the FAR Council upon request; and 7) preparing and submitting complete and accurate committee reports and all collateral requirements including a Paperwork Reduction Act analysis, Regulatory Flexibility Act analysis, and Federal Register notice. To the maximum extent practicable, teams will resolve interagency and public comments in writing, with such resolutions made publicly available.

Teams will make every effort to reach full agreement in the drafting of proposed and final rules. The project and deputy project manager will facilitate resolution of issues, if possible, or otherwise elevate an issue for FAR Council resolution (see "Agency Coordination" below).

PUBLIC MEETINGS

Notice will be published in the Federal Register inviting public comment for a 60-day period. The notice will advise interested parties that they may request a public meeting on any topic in the public notice prior to its final implementation in a regulation, provided the request is submitted in writing and received within the first 30 days of the comment period by the FAR Secretariat. The FAR Secretariat will provide a copy to members of the FAR Council and the project manager. The request must fully support the reason for holding the meeting. The project manager will provide a copy of each request to the cognizant team leader, who will analyze the request and prepare a recommendation within 6 working days for FAR Council consideration. The FAR Council, within 5 working days, will decide each request on a case-by-case basis. If the FAR Council decides to grant such a request, it will, through the FAR Secretariat, and within 15 calendar days of the request, publish a notice in the Federal Register scheduling the meeting. The FAR Council will promptly schedule meetings within the 60 day comment period to the maximum extent practicable. In the event the meeting cannot be conducted within the initial 60-day period allotted for submission of public comments, the public comment period will be extended to allow sufficient time for the meeting plus an additional 5 days. In any event, the closing date for receipt of public comments will be at least 5 days after the date of the public meeting. Persons or groups, other than the person or group who requested the public meeting, may also make presentations provided they have submitted a statement of presentation to the project manager by the date requested in the Federal Register notice that announces the meeting and have notified the project manager of the desire to make a presentation. Team members will participate in the meeting as advisers to FAR Council. Minutes of the meeting will be the responsibility of the cognizant drafting team.

AGENCY COORDINATION

The agency coordination process will include OFPP, all agencies represented on the Defense Acquisition Regulations Council, and all agencies represented on the Civilian Agency Acquisition Council. The Administrator of OFPP will be responsible

for coordination within the Office of Management and Budget (OMB) and for expediting paperwork reduction clearance numbers for publication in the Federal Register.

Prior to publication of a draft proposed rule, the project manager will submit drafts to OFPP and agency points of contact for coordination. If, because of an interagency disagreement, a drafting team is unable to reach agreement in the development of a draft proposed rule, the team will develop the necessary provisions and implementing language to support all alternative positions, which will be submitted by the project manager to OFPP and agency points of contact for coordination. OFPP and each agency will have 10 calendar days to review and submit comments to the project manager. OMB review, with the exception of the Office of Information and Regulatory Affairs (OIRA), as well as review by the FAR Secretariat will be conducted during this 10 calendar day period. OFPP or agencies that do not agree with the draft proposed rule shall, as part of their formal comments, include suggested alternative language and rationale to support that language. Unless such language is provided, full coordination will be assumed. Agencies subsequently can comment on draft proposed rules during the 60-day public comment period, but are not permitted to request a public meeting. Each drafting team has 10 calendar days to fully reconcile agency comments on draft proposed rules and incorporate any appropriate revisions.

If the drafting team reaches the agreement on the draft proposed rule after considering OFPP and agency comments, the rule will be submitted to the project manager for distribution to OIRA for review, and publication in the Federal Register for a 60-day public comment period. The project manager will coordinate publication through the FAR Secretariat. The project manager will then proceed immediately with publication of the rule, without further review, and will provide a courtesy copy to OFPP and agency focal points. If, because of an interagency disagreement, a drafting team is unable to reach agreement in the development of a draft proposed rule after considering OFPP and agency comments, the team will develop the necessary provisions and implementing language to support all alternative positions. The team will present the issue to the FAR Council for resolution. If the FAR Council does not accept one of the alternatives and cannot reach agreement on a compromise draft proposed rule within 5 calendar days, it will be considered in dispute and resolved by the Administrator of OFPP.

At the conclusion of the public comment period, the project manager will provide public comments back to the drafting teams. Each drafting team has 10 calendar days to fully reconcile all comments received, including comments received during any public meetings conducted on the published proposed rules, and make any appropriate revisions. If the full drafting team is in agreement on the draft final rule after considering all comments, the rule and an analysis of comments will be submitted to the project manager for distribution to OFPP and agency points of contact. If, because of an interagency disagreement, a drafting team is unable to reach agreement in the development of a draft final rule, the team will develop the necessary provisions and implementing language and an analysis of comments to support all positions which will be provided to the project manager for distribution to OFPP and agency points of contact.

On draft final rules, OFPP and each agency will have 10 calendar days to review and voice any objections in writing to the project manager. If no objection is heard, It will be forwarded to the FAR Council and acted upon by them within 5 calendar days. If not acted upon within 5 calendar days, it will be considered in dispute and resolved by the Administrator of OFPP. If, because of an interagency disagreement, the drafting team is unable to reach agreement on a draft final rule after review of agency comments, the team will prepare, within 5 calendar days of such determination, alternate draft final rules and present them to the FAR Council for resolution within 5 calendar days. If the FAR Council does not accept one of the alternatives and cannot reach agreement on a compromise draft final rule, the rule will be considered in dispute and resolved by the Administrator of OFPP.

ATTACHMENTS

A milestone plan for the implementation of the Act is at Tab 1. The composition of each team and the sections of the Act for which it is responsible are at Tab 2. Sections of the Act that require implementation in a regulation other than the FAR, or that are deferred, are at Tab 3.

Tab 1—Milestone Plan

Action	OPR	Milestone
Meet with DoD senior contracting executives to elicit their support and commitment of personnel resources, work space, and all administrative requirements	DUSD(AR)	Sep 16, 1994
Seek agreement from OFPP and other federal agencies on plan	DUSD(AR)	Sep 19, 1994
OIRA agreement to expedite (24 hours) E.O. 12866 review of proposed and final FAR rules to implement the Act	OFPP, DUSD(AR)	Sep 19, 1994
FAR Council Mtg to Finalize Proposal and to take action to identity teams and team members. Resolve any membership issues with FAR Council and DUSD(AR). Discuss requirement for Regulatory Flexibility and Paperwork Reduction Act accelerated procedure analyses	Project Mgr	Sep 23, 1994
Develop tasker for teams	Project Mgr	Sep 28, 1994
Set up tracking and reporting system to monitor progress	Project Mgr	Sep 30, 1994
Meet with teams to ensure they fully understand objectives and conventions	FAR Council and DUSD(AR) Project Mgr.	Oct 3, 1994
Issue taskers for teams to begin work	Project Mgr	Oct 4, 1994
Submit reports with draft proposed rule to Project manager	Teams	Oct 19, 1994
Start writing Regulatory Flexibility Act analyses, Paperwork Reduction Act analyses, and Federal Register Notice	Teams	Oct 19, 1994
Project manager sends rule to OFPP, agency focal points, and to FAR Secretariat for comment	Project Mgr	Oct 20, 1994
FAR Secretariat establishes FAR case file; analyzes case for codification and effect on current regulations or forms; drafts amendatory language to identify regulatory changes and clearance documents as necessary	FAR Secretariat	Oct 21, 1994
Project manager receives agency comments	Project Mgr	Oct 31, 1994
Project manager tasks drafting teams	Project Mgr	Nov 1, 1994
Drafting teams submit revised proposed rule to project manager. Report must include Regulatory Flexibility Act analyses, Paperwork Reduction Act analyses, and Federal Register notice	Teams	Nov 14, 1994
Technical proofing on publication package	FAR Secretariat	Nov 15, 1994
Proposed rule reviewed by project manager	Project Mgr	Nov 16, 1994
Proposed rule to OIRA	Project Mgr	Nov 17, 1994
Send proposed rule to Federal Register for publication	Project Mgr FAR Secretariat.	Nov 18, 1994
Proposed rule published for 60-day public comment period	Federal Register	Nov 25, 1994
Project manager receives requests for public meetings	Teams	Various
Arrange place of meeting and publish notice in Federal Register	FAR Secretariat	Various
Conduct public meetings	FAR Council, DUSD(AR), Teams.	Various
Project manager receives public comments	Project Mgr	Jan 24, 1995
Project manager tasks drafting teams	Project Mgr	Jan 25, 1995
Drafting teams reconcile public comments and submit draft final rule, Federal Register notice, revised Regulatory Flexibility Act analyses, and revised Paperwork Reduction Act analyses	Teams	Feb 6, 1995
Project manager submits draft final rule to OFPP, agency focal points, and AR Senior Steering Group and FAR Seretariat	Project Mgr	Feb 16, 1995
Prepare loose leaf pages and final FAC; technical proofing of Federal Register document	FAR Secretariat	Various
Drafting teams reconcile agency comments and submit draft final rule to project manager	Teams	Feb 27, 1995
Technical proofing on revisions	FAR Secretariat	Mar 3, 1995
Draft final rule reviewed by project manager	Project Mgr	Mar 6, 1995
Submit FAC to FAR Council	Project Mgr	Mar 7, 1995
FAR Council signs FAC	FAR Council	Mar 14, 1995
Submit FAC to OIRA for review	Project Mgr	Mar 15, 1995
OIRA approval obtained	Project Mgr	Mar 16, 1995
Send final rule to Federal Register for publication	Project Mgr	Mar 17, 1995
Publish final rule	Federal Register	Mar 23, 1995
Final rule effective	FAR	Apr 22, 1995

TAB 2—DRAFTING TEAMS

CONTRACT AWARD

Team Leader: DoD Melissa Rider (AF)
Team Members: Norma Bailey-Mueller (DLA), Ron Crider (NASA), Sharon Ellis (Navy), Paul Linfield (GSA), Jack Miller (GSA), Verlyn Richards (Army), Joyce Runyon (Navy), Susie Schneider (Army), Shirley Scott (GSA)
LTL: Terry Squillacote (DoD)
Sections:
Sections 1002 and 1052, Alternate Sources of Supply
Sections 1003 and 1053, Approval Authority for Use of Procurement Other Than Full and Open Competition
Sections 1005 and 1055, Acquisition of Expert Services
Sections 1011 and 1061, Source Selection Factors
Sections 1012 and 1062, Solicitation Provision Regarding Evaluation of Purchase Options
Sections 1013 and 1063, Prompt Notice of Award
Sections 1014 and 1064, Post-Award Debriefings
Sections 1021 and 1071, Repeal of Requirement for Secretarial/Agency Head Determination Regarding Use of Cost Type or Incentive Contracts
Sections 1031 and 1092, Repeal of Requirement for Annual Report on Competition
Section 1061, Solicitation, Evaluation, and Award
Section 1555, Cooperative Purchasing
Section 4104(b)(2), Alternatives to Payment Bonds as Payment Protections for Suppliers of Labor and Materials
Section 7203, Merit-Based Award of Contracts and Grants
Section 10004, Data Collection Through the Federal Procurement Data System
Effective Dates: Sections 1021, 1031, 1071 and 1092 are effective on date of enactment.

SPECIAL CONTRACTING METHODS

Team Leader: GSA Ed Mc Andrew
Team Members: Norm Audi (HHS), Dick Higgenbotham (DLA), Tom Holubik (AF), Bruce King (NASA), Ed Lovett (DOE), Leonard Lowentritt (GSA), Collette McKenna (GSA), Jack O'Neill (GSA), Baerbell Prentiss (Navy), Robert Sebold (DLA), Joe Sousa (Navy)
LTL: Barry Cohen (DoD) and Matt Blum (OFPP)
Sections:
Sections 1004 and 1054, Task and Delivery Order Contracts [OFPP Policy Letter]
Section 1022, Revision and Reorganization of MultiYear Contracting Authority
Section 1072, MultiYear Contracting Authority
Section 1074, Economy Act Purchases [FAR case]
Sections 1503 (except (c)) and 1552, Delegation of Procurement Functions
Sections 1504 and 1553, Determinations and Decisions
Section 6002, Contracting Functions Performed by Federal Personnel

TINA

Team Leader: DoD Al Winston (Navy)
Team Members: Robert Bemben (AF), Jesse Bendahan (Navy), Bill Childs (NASA), Mary Haskell (OSO), Jona McKey (Army), Jerry Olson (GSA), Susan Quinlan (DCAA), Steve Swart (DLA), Elaine Wheeler (DOT)
LTL: Colleen Presten (DoD)
Sections:
Section 1201, Stabilization of Dollar Threshold of Applicability
Section 1202, Exceptions to Cost or Pricing Data Requirements
Section 1203, Restrictions on Additional Authority to Require Cost or Pricing Data or Other Information
Section 1204, Additional Special Rules for Commercial Items
Section 1205, Right of United States to Examine Contractor Records
Section 1206, Required Regulations
Section 1207, Consistency of Time References
Section 1208, Exception for Transfers Between Divisions, Subsidiaries, and Affiliates

Section 1209, Coverage of Coast Guard and NASA for Interest and Payments on Certain Payments
Section 1210, Repeal of Superseded Provision (Truth in Negotiations)
Section 1251, Revision of Civilian Agency Provisions to Enure Uniform Treatment of Cost or Pricing Data
Section 1252, Repeal of Obsolete Provision (41 U.S.C. 253e)
Effective Dates: Sections 1201 and 1251 are effective on date of enactment.

PROTESTS/DISPUTES

Team Leader: DoD Craig Hodge (Army)
Team Members: Ralph DeStefano (GSA), Hugh Long (AF), Bobby Melvin (Army), Donna Scott (Navy)
LTL: Terry Squillacote and Matt Blum
Sections:
Sections 1015 and 1065, Protest File
Sections 1016 and 1066, Agency Actions on Protests
Section 1401, Protest Defined
Section 1402, Review of Protests and Effect on Contracts Pending Decision
Section 1403, Decisions on Protests
Section 1404, Regulations
Section 1432, Authority of GSA Board of Contract Appeals
Section 1433, Periods for Certain Actions
Section 1434, Dismissals of Protests
Section 1435, Award of Costs
Section 1436, Dismissal Agreements
Section 1437, Matters to be Covered in Regulations
Section 1438, Definition of Protest
Section 2301, Certification of Contract Claims
Section 2351, Contract Disputes Act Improvements
Section 2352, Extension of Alternative Dispute Resolution Authority
Section 2353, Expedited Resolution of Contract Administration Matters
Section 2354, Authority for District Courts to Obtain Advisory Opinions from Boards of Contract Appeals in Certain Cases
Effective Dates: FAR coverage cannot be done until GAO and GSBCA finalize their versions of changes to their own rules.

AUDIT

Team Leader: DoD Daniel Tucciarone (DCAA)
Team Members: Timothy Brown (AF), Joel Grover (GSA), Kirk Moberley (DCAA), Paul Mitchell (DCAA), Richard Powers (HHS)
LTL: Terry Squillacote (DoD)
Sections:
Section 2201, Consolidation and Revision of Authority to Examine Records of Contractors
Section 2251, Authority to Examine Records of Contractors

COST PRINCIPLES

Team Leader: DoD Clarence Belton (Navy)
Team Members: William Dunn (EPA), Rix Edwards (DLA), Glenn Gulden (DLA), Paul Schill (AF), Terry Sheppard (DOE), Dale Siman (Army), Hirschell Clyde Wray (DCAA)
LTL: Michael Gerich (OFPP)
Sections:
Sections 2101 and 2151, Allowable Contract Costs
Section 2191, Travel Expenses of Government Contractors [GSA Travel Regulations?]
Section 2192, Revision of Cost Principle Relating to Entertainment, Gift, and Recreation Costs for Contractor Employees
Section 7202, Prohibition on Use of Funds for Documenting Economic or Employment Impact of Certain Acquisition Programs
Effective Dates: Section 2191 is effective on date of enactment. Section 2192 requires revision of FAR 31.305–14 NLT 90 days after enactment.

CONTRACT FINANCING/PAYMENT

Team Leader: DoD John Galbraith (OSD)

Team Members: Cassandra Bain (EPA), Henry Bizold (OSD), Bill Hair (DFAS), Dorothy Mills (DLA), Marion Palaza (AF), Peg Olsen (Navy), Barrington Turner (DCAA)
LTL: Michael Gerich (OFPP)
Sections:
Section 1073, Severable Services Contracts Crossing Fiscal Years
Sections 2001 and 2051, Contract Financing (Partial, also Simplified Acquisition and Commercial Contracting)
Section 2091, Government-wide Application of Payment Procedures for Subcontractors and Supplies
Section 2451, Expansion of Authority to Prohibit Setoffs Against Assignees

SIMPLIFIED ACQUISITION PROCEDURES/FACNET

Team Leader: DoD Diana Maykowskyj (DLA)
Team Members: Mary Ackerman (DOT), Barbara Danzig (VA), Karl Eichenlaub (NASA), Kathryn Ekberg (AF), Teresa Elmendorf (GSA), Mary Kringer (AF), Kevin O'Brien (DLA), Eva Robinson (Navy), Gayle Stroman (Navy), Diane Taylor (Army)
LTL: Bill Coleman (OFPP) Fred Kohout (DoD), Micki Chen (GSA)
Sections:
Sections 1502 and 1551, Definitions (Partial, also Commercial Contracting Team)
Sections 2001 and 2051, Contract Financing (Partial, also Contract Financing and Commercial Contracting Teams)
Section 4001, Simplified Acquisition Threshold Defined
Sections 4002 and 4003, Establishment of Simplified Acquisition Threshold
Section 4101, List of Inapplicable Laws in FAR
Section 4102, Armed Services Acquisitions
Section 4103, Civilian Agency Acquisitions
Section 4104, (except (b)(2)), Acquisitions Generally
Section 4201, Simplified Acquisition Procedures
Section 4202, Procurement Notice
Section 4203, Implementation of Simplified Acquisition Procedures
Section 4301, Procedures for Purchases Below Micro-Purchase Threshold
Section 4401, Armed Services Acquisitions—Conforming Amendments
Section 4402, Civilian Agency Acquisitions—Conforming Amendments
Section 4403, OFPP—Conforming Amendments
Section 4404, Small Business Act—Conforming Amendments
Sections 9001, 9002, 9003, and 9004, Federal Acquisition Network (FACNET)
Effective Dates: Section 4301 is effective on date of enactment. Requires implementation in FAR not later than 60 days after enactment.

SMALL BUSINESS

Team Leader: GSA Victoria Moss
Team Members: Nellie Dixon (Navy), Ken Dougherty (SBA), Susan Haley (Army), Patrick Hillar (AF), Linda Klein (GSA), Anthony Kuders (DLA), Sharon Pomeranz (GSA), Beth Sawyer (Army)
LTL: Bill Coleman (OFPP), Fred Kohout (DoD)
Sections:
Section 4004, Small Business Reservation
Section 7101, Repeal of Certain Requirements—SB Laws
Section 7102, Contracting Program for Certain SB Concerns
Section 7103, Extension of Test Program for Negotiation of Comprehensive SB Subcontracting Plan [separate announcement]
Section 7105, Contract Goals for SDB and Certain Institutions of Higher Education
Section 7106, Procurement Goals for SB Concerns Owned by Women
Effective Dates: Sections 7101 and 7103 are effective on date of enactment. Section 7105, for DoD, applies to each of fiscal years 1987 through 2000.

ETHICS

Team Leader: DoD Jules Rothlein (Army)
Team Members: Deborah Erwin (GSA), Norm Lussier (DLA), Ken Wernick (Navy)
LTL: Bo McBride (DoD), Michael Gerich (OFPP)
Sections:
Section 2455, Uniform Suspension and Debarment
Section 6001, Post-Employment Rules
Section 6004, Interests of Members of Congress

Sections 6005 and 6006, Whistleblower Protections for Contractor Employees
Effective Dates: Section 6001(a) is effective on date of enactment.

COMMERCIAL CONTRACTING

Team Leader: DoD Larry Trowell (AF)
Team Members: Dixie Bennett (Army), Anne Burleigh (DLA), Les Davison (GSA), Lou Gaudio (OSD), Rob Lloyd (DOS), Eve Lyon (NASA), Ludlow Martin (Army), Pam Pilz (Navy)
LTL: Bill Mounts (DoD), Alan Brown (OFPP)
Sections:
Sections 1502 and 1551, Definitions (Partial, also Simplified Acquisition Team)
Sections 2001 and 2051, Contract Financing (Partial, also Simplified Acquisition and Contract Financing Teams)
Sections 8001, 8103, 8202, Definitions
Section 8002, Regulations on Acquisition of Commercial Items
Section 8003, List of Inapplicable Laws in FAR
Section 8101, Establishment of New Chapter in Title 10
Sections 8102 and 8201, Relationship to Other Provisions of Law
Sections 8104 and 8203, Preference for Acquisition of Commercial Items
Sections 8105, 8204, 8301, Inapplicability of Certain Provisions of Law
Section 8106, Presumption that Technical Data Under Contracts for Commercial Items are Developed Exclusively at Private Expense
Section 8302, Flexible Deadlines for Submission of Offers of Commercial Items
Section 8303, Additional Responsibilities for Advocates for Competition
Section 8304, Provisions Not Affected
Section 8305, Comptroller General Review of Federal Government Use of Market Research
Effective Dates: Section 8003 permits petitions to be filed within six months after enactment.

TAB 3—SECTIONS OF THE ACT REQUIRING EITHER NO REGULATION OR IMPLEMENTATION IN REGULATIONS OTHER THAN THE FAR

TECHNICALS—NO REGULATORY CHANGE REQUIRED

Sections 1001 & 1051, References to Federal Acquisition Regulation
Section 1501, Repeal of Policy Statement (2301 of Title 10)
Section 2452, Repeal of Requirement for Deposit of Contracts with GAO
Section 2453, Repeal of Obsolete Deadline Regarding Procedural Regulations for CAS
Section 6003, Repeal of Executed Requirement for Report and Study
Section 7205, Repeal of Obsolete Provisions
Section 7204, Maximum Practicable Opportunities for Apprentices on Federal Construction Projects [sense of Congress]
Section 7206, Repeal of Obsolete and Redundant Provisions of Law
Section 10005, Technical and Clerical Amendments

PROTESTS/DISPUTES

Section 1431, Revocation of Delegations of Procurement Authority (Protests in Procurements of ADP)
Section 2302, Shipbuilding Claims

MAJOR SYSTEMS/TESTING

Section 1508, Repeal of Requirement Relating to Production Special Tooling and Production Special Test Equipment
Section 2401, Clarification of Provision Relating to Quality Control of Certain Spare Parts
Section 2402, Contractors Guarantees Regarding Weapon Systems
Section 3001, Weapon Development and Procurement Schedules
Section 3002, Selected Acquisition Report Requirement
Section 3003, Unit Cost Report Requirement
Section 3004, Requirement for Independent Cost Estimate and Manpower Estimate before Development or Production
Section 3005, Baseline Description

Section 3006, Repeal of Requirement for Competitive Prototyping for Major Programs
Section 3007, Repeal of Requirement for Competitive Alternative Sources for Major Programs
Section 3011, Authority of Director of OT&E to Communicate Views Directly to SECDEF
Section 3012, Responsibility of Director of OT&E for Live Fire Testing
Section 3013, Requirement for Unclassified Version of Annual Report on OT&E
Section 3014, Survivability and Lethality Testing
Section 3015, Limitation on Quantities to be Procured for Low-Rate Initial Production
Section 3062, Repeal of Requirements Regarding Product Evaluation Activities

SERVICE SPECIFIC

Section 3021, Gratuitous Service of Officers of Certain Reserve Components
Section 3022, Authority to Rent Samples, Drawings, and Other Information to Others
Section 3023, Repeal of Application of Public Contracts to Certain Naval Vessel Contracts
Section 3024, Repeal of Requirement for Construction of Vessels on Pacific Coast
Section 3025, Scientific Investigation and Research for the Navy
Section 3031, Definitions (CRAF)
Section 3032, Consolidation of Provisions Relating to Contractual Commitment of Aircraft
Section 3033, Use of Military Installations by Contractors
Section 3065, Codification and Revision of Limitation on Lease of Vessels, Aircraft, and Vehicles
Section 3064, Liquid Fuels and Natural Gas: Contracts for Storage, Handling, or Distribution
Section 3066, Soft Drink Supplies

ACQUISITION MANAGEMENT

Section 1503(c), Approval of Terminations and Reductions of Joint Acquisition Programs
Sections 5001 & 5051, Performance Based Management
Section 5002, Review of Acquisition Program Cycle
Section 5052, Results-oriented Acquisition Process

PILOT PROGRAMS

OFPP

Section 5061, OFPP Test Program for Executive Agencies

NASA

Section 5062, NASA Mid-Range Procurement Test Program

FAA

Section 5063, FAA Acquisition Pilot Program

DoD

Section 5064, DoD Acquisition Pilot Programs

CONTRACT AWARD

Section 1091, Policy Regarding consideration of Contractor Past Performance
Section 1301, Research Projects
Section 1439, Oversight Acquisition of ADP Equipment by Federal Agencies
Section 1505, Restrictions on Undefinitized Contractual Actions
Section 1507, Regulations for Bids
Section 1555, Cooperative Purchasing
Section 2102, Repeal of Authority for Contract Profit Controls during Emergency Periods
Section 3061, Regulations on Procurement, Production, Warehousing, and Supply Distribution Functions

CONTRACT ADMINISTRATION

Section 2002, Repeal of Vouchering Procedures Section

Section 2454, Codification of Accounting Requirement for Contracted Advisory and Assistance Services
Section 3063, DoD Acquisition of Intellectual Property Rights
Section 3067, Disbursement of Funds of Military Departments to Cover Obligations of Another Agency of DoD
Section 6008, Cost Savings for Official Travel
Section 6009, Prompt Resolution of Audit Recommendations

SMALL BUSINESS

Section 7104, Small Business Procurement Advisory Council
Section 7107, Development of Definitions Regarding Certain SB Concerns
Section 7108, Functions of OFPP Relating to SB
Section 7201, Acquisition Generally—Socioeconomic Laws

LABOR (KELMAN LETTER TO DOL)

Sections 7301, 7302, 7303, 7304, and 7305, Community Volunteer Act of 1994
Section 7306, Report (Volunteer Act)

MISCELLANEOUS

Section 5091, Vendor and Employee Excellence Awards
Section 6007, Comptroller General Review of Provision of Legal Advice for Inspectors General
Section 10001, Effective Date and Applicability
Section 10003, Evaluation by Comptroller General

ACQUISITION MANAGEMENT (ROUND II FAR COUNCIL)

Team Leader: GSA
Sections:
Section 1093, Discouragement of Nonstandard Contract Clauses
Section 5092, Waiting Period for Significant Changes Proposed for Acquisition Regulations
Section 5093, Sense of Congress on Negotiated Rulemaking
Effective Dates: Sections 5092 and 5093 are effective on date of enactment.

Mrs. MALONEY. And we have received, and I am sure you have, too, responses from the private industry on the regulations and, again, would their responses be part of the record?

I have ones that tie into one of your statements. And Mrs. Preston and you testified that you anticipate commercial suppliers will resist conforming to the Truth in Negotiations Act, TINA, and the requirements of FASA, and how does DOD envision complying with the intent of Congress given this resistance?

I have one letter here where they have outlined all the problems they see in TINA. Could you comment further on that?

Mrs. PRESTON. Yes. We have tried to be very forward thinking in terms of the approach to TINA. We had a meeting last week where industry expressed some concerns and we have set up a process for the group that drafted that regulation to meet with industry.

It is the intention of the administration to ensure that TINA not be applied in any instance in which we can in some other way, shape, or form figure out whether the price is fair and reasonable. And that was our goal.

I think industry made some very good comments at the meeting, and we understand some things we thought were helpful, they did not view as helpful. So we obviously need to go back to the drawing board to some extent on that and we will be working that over the next couple of months. TINA is a big impediment to doing business with the government and we want to make sure that we remove that impediment in every instance that we can.

Mrs. MALONEY. I would like to follow up on a comment by Mr. Chrysler. He was interested in ways that the private sector was involved in this and you mentioned a series of public hearings that have taken place. I would like to have that as part of the record so we know how we have reached out to everyone with the government community, the vendor community.

[The information referred to follows:]

The entire rule making process to implement FASTA was conducted on a government-wide basis utilizing the personnel resources of all procurement agencies that were available. DoD participated in this and did not act on its own. No special groups or committees including private sector personnel were convened for the purpose of rulemaking. By contrast, the Section 800 Panel that was chartered by Congress and whose work provided the genesis for FASTA was an Advisory Committee made up of 13 individuals equally drawn from the private and public sector under the leadership of the Commandant of the Defense Systems Management College. Now that we are in the proposed rulemaking stage of the implementation effort, we are providing a 60 day period during which the public is encouraged to provided comments. At the recommendation of DoD, public meetings on the more significant rules are being held approximately half way through this 60 day period so that we can have a face to face dialog with the public. This is unique and different from what we have done in the past.

Mrs. MALONEY. Likewise, if you have public hearings or public forums coming up, if you could put them in the record so we will know about it, I might want to go and listen myself.

And what responsibilities do you believe the members of the contractor communities have in improving the acquisition process?

Mr. KELMAN. That is a good question. I have spent a moderate amount of time interacting, separate from my government job, with large commercial companies that are competing in the private marketplace, separate from doing government business. One thing you notice when you deal with or when you talk to or interact with world class companies competing in the commercial marketplace is they are very, very strong—I guess I would use the word "obsession." I mentioned this before in another context with the idea of customer satisfaction.

While I certainly would not go so far as to say that that concern is entirely missing or even close to entirely missing from the government contractor community, I really think there is a difference in attitude and a need for a cultural change in industry on this issue of customer satisfaction; that there is far more litigation in the government contracting context than in the commercial context. I would really like to see a situation where the contractors that do business with the government spend less time thinking about how to sue the customer and more time thinking about how to satisfy the customer.

I met recently with a woman who is a vice president of a large, I won't mention the company, of a large company that deals both with the government and with the commercial sector. And talking about in her commercial dealings and her division dealings only with the general public, not with the government, all the work they are doing for customer satisfaction. And I mentioned to her that their Federal division did not necessarily always have the same attitude.

She said it is impossible; the Federal division is still the only division of this company that is dominated by lawyers; every place else is accommodated by people who are in the business of serving

customers, the Federal division is still dominated by lawyers, and if I had to make one plea to industry and one cultural change that I think is necessary on industry's part to make the procurement process work better just as we are seeking to bring about cultural changes in the government, it is to show that kind of devotion toward satisfying the customer which in this case in the final analysis is the taxpayer that is shown in the commercial marketplace.

Mrs. MALONEY. Mr. Kelman, what is the administration doing to achieve the contracting goals Congress has mandated with respect to small businesses and small disadvantaged businesses?

Mr. KELMAN. Representative Maloney, we have congressional goals of congressionally established goals of 20 percent of Federal contracting dollars for small business and 5 percent for small disadvantaged business.

Last year, the first year of the administration for which we have numbers, we are exceeding both of those goals. On awards to small disadvantaged businesses, where the congressional goal is 5 percent, last year 5.7 percent of our purchases were from small disadvantaged businesses. That was up from 5.5 percent the year before. I believe we are running something over 22 percent on our purchases from small businesses as a whole. That also is in excess of—we are exceeding——

Mrs. MALONEY. How are you achieving this if we were not able to achieve it in the past? What are you doing to make things——

Mr. KELMAN. They are ongoing efforts. Again, I don't want to make a partisan statement about this. These efforts began this past—they are continuing in the present to reach out to small and small disadvantaged businesses to make them more aware of government contracting opportunities.

I think probably the biggest innovation that we are doing is in our electronic commerce initiative, because through electronic commerce knowledge about government contracting opportunities will become available to hundreds of thousands of small businesses, that, as Representative Souder indicated before, people may not have known about now, a lot more small businesses will find out about the ability to do business with the government than existed before.

Mrs. MALONEY. On electronic commerce, when do you expect that to be—what is your timetable? When do you expect that to be up and running?

Mr. KELMAN. We have already gotten started. We have—let's see, where should I start? We are working on a very, very aggressive time schedule that the President set up in an executive memorandum October 93. We are moving I think much faster than we ever would have been without that. Almost all the agencies now have at least a pilot electronic commerce capability available.

I am, as I indicated in my written testimony, feeling that we need to do a better job in actually getting the number of transactions working through that system up faster than we have been doing it. DOD, as Mrs. Preston indicated in her testimony, is probably leading the government; has a very, very aggressive plan for bringing new sites on line.

Mrs. MALONEY. You mentioned there might be difficulties. One thing that—when you get this electronic commerce division going,

you could have a 100,000 people respond to one bid. How are we going to be able to process?

It sounds wonderful and I am all for it, but earlier I asked for a list of salad dressings that are being changed and you say we do not have the staff to do that. I am asking for 20 hours dedicated to that one project and I think that is legitimate but how in the world are we going to handle this? Because I can see every person in the United States deciding to bid on whatever and you will have 4,000 bid requests come in.

Mr. KELMAN. That is a fair question and that is just the kind of practical management issue that we are grappling with now. You can take the 4,000 bids and the computer can list them low bid to high bid. So the computer will do that work for you. The problem is if we do not ask for a specific brand name or model number, which we generally do not want to do, we want to try to avoid that, when you say brand name or equal or something like that, then you start getting a lot of people who are saying, well, here is my product and here is how it is equal.

There, if you have 400 bids or however many you said, unless we can find a streamlined way to screen those bids and take only a few of the most promising ones, you are absolutely right, the system is not going to work and it will not succeed at being a streamlined method of procurement.

Therefore, we are trying, we are working very hard in our regs, one of the reasons the regulation on electronic commerce is only just going to be coming out, is we have been talking with people in the field and on the front lines about how we can craft our regulatory language to empower them to do that kind of screening. We are going to need support from Congress on that.

We also are going to need support from Congress. As you start having a thousand bidders, you have just increased by a thousand times the universe of potential protestors against a decision. And we are going to be asking Congress in the package we send up to say that if a procurement is done under $100,000 and using electronic commerce that there is no opportunity to protest this into the normal protest bodies because we are afraid that we are just so much increasing the exposure of the system to bid protests as the number of bids orders come up so dramatically, again we will be in a situation if we do not watch out it will not be streamlined.

Mrs. MALONEY. I would like to understand this better myself and possibly you would not like to respond now but in writing.

[The information referred to follows:]

EC BID PROCESS

The government wide EC process consists of the following steps:

(1) the government buyers prepare the electronic equivalent of a Request for Quotation (RFQ). The RFQ is sent out electronically addressed to "The Public."

(2) The RFQ goes to a "hub" facility (also referred to as a "virtual network" much like a switchboard).

(3) When the RFQ is received at the hub, it is forwarded to all value added network (VAN) providers that are certified to participate in this process.

(4) The VANs make the RFQs (and Notification of Award) available to their subscribing vendors.

(5) A vendor that wants to bid on a particular RFQ prepares a bid and sends it via its VAN of choice.

(6) The VAN will send it to the hub where the information will be validated against the vendor registration database.

(7) Information from un-registered vendors will be rejected and the remaining bids are forwarded to the designated government buyer.

(8) The government buyer will screen the offers and make an award to the responsible offeror, who's offer is most advantageous to the government, based, as appropriate on either price alone, or price and other factors (e.g. past performance and quality considered, including the administrative cost of the purchase).

Mrs. MALONEY. She mentioned earlier the problem with the tee shirts. You went to the lowest bidder and you got a thousand tee shirts, all of which shrunk within 24 hours.

I would like to know what exceptions do we now have to the lowest possible bidder? And I am sure you have language that says something like the lowest qualified bidder so that you can throw out quacks and people that are not really going to do the job right. But before getting into electronic commerce and everything else, what are we doing now to screen and make these decisions in a way that we are not purchasing tee shirts that shrink?

Mrs. PRESTON. Representative Maloney, right now we are authorized to buy on the basis of best value and have been since the adoption of the Competition in Contracting Act in 1984, which put what we call the competitive negotiation process on an equal par with sealed bids.

Now, some would say because there is one legislative provision in there that there still is a preference for sealed bids. We will come back in the reform package and recommend that that be taken out so that there is no confusion.

The problem is administrative. It is an administrative one. First of all, if you buy from the low bidder there is very little chance you will get a protest because there is no exercise of judgment. If you buy from other than the low bidder, you take a chance of getting a protest that will hold up your procurement for a minimum of 45 days but in most cases longer than that. So, then, you have to justify why you made the decision that you made.

The other one is as was mentioned, just the number of procurements that you get. Some of our activities have come up with innovative ways to deal with that. For example, at DGSC down in Richmond Defense General Supply Center, they have their preferred vendor group and that list of people get a 10-percent price advantage over everyone else. What they do, though, in order to do that they had to set up a whole computer system to track on time deliveries, et cetera, and the other parameters so that if you have been an on time deliverer and your quality has been good, et cetera, then you are a qualified vendor and you get this price preference.

So there are a number of different techniques that are used but, again, it is just whether or not administratively it is more difficult than another process.

Mr. KELMAN. Congress last year in the FASA legislation, also authorized the use of past performance as a source selection factor. So the people whose tee shirts shrunk the last time would get downgraded if they tried to bid the next time. They would lose points for having poor past performance.

Mr. ZELIFF [presiding]. Unfortunately, our time has expired, but if there are any additional questions, if you would be willing to put them in writing.

Mrs. MALONEY. I do have a series of questions for both individuals. Again, I thank you for your excellent testimony. I will submit them in writing and thank you again for using civil servants and giving them positive examples of how they are working to help taxpayers, and I look forward to seeing you next week at the other hearing. Thank you.

Mr. ZELIFF. Thank you both very much. The meeting stands adjourned.

[Whereupon, at 4:45 p.m., the committee was adjourned.]

[Additional material submitted for the record follows:]

PREPARED STATEMENT OF THE COALITION FOR GOVERNMENT PROCUREMENT

The Coalition for Government Procurement appreciates this opportunity to submit comments for the record on your hearing held February 21st on the implementation of the Federal Acquisition Streamlining Act (FASA). As you know, the Coalition played an important role in crafting the original legislation and has closely monitored the implementation of regulations that would affect Coalition members. We support continued Congressional oversight during the implementation process.

The Coalition represents over 250 companies selling commercial goods and services to the federal government. Together, Coalition members account for over half of the sales of commercial items made to the federal government each year. Since our inception in 1979, the Coalition has worked with Congress and the Executive Branch to bring about positive change to the commercial product procurement process. Recommendations made by the Coalition have improved things such as the General Services Administration's Multiple Award Schedule program. These improvements have benefitted both government users and contractors in saved time and money. We look forward to continuing our work with you and other procurement decision makers as changes continue to evolve in the commercial product procurement arena.

The Coalition would like to comment on three broad areas affecting the implementation of the Federal Acquisition Streamlining Act; the need to ensure that all federal users understand and follow both new and existing federal procurement regulations; the need to ensure that adequate time is provided for all parties to review and comment on the proposed regulations and; the need to ensure that new regulations do not impose significant new burdens on the procurement process.

While the Coalition applauds the general implementation efforts of the Administration, we feel that these three areas must be adequately addressed so that the government's procurement process functions as intended.

ENSURING THAT ALL FEDERAL USERS FOLLOW NEW AND EXISTING REGULATIONS

The Coalition is concerned that many federal buyers will interpret the Federal Acquisition Streamlining Act in their own way. As a result, they may conduct "procurement by headline" looking only at the surface portion of a particular provision and conducting buys without waiting for the implementing regulation. When the regulation is published it may be totally different from what the user thought it was on the surface. Under these circumstances, too, the buyer would not be following existing procurement rules designed to protect the government and the tax payer.

For example, a user needing $26,000 in office chairs might assume that simplified acquisition procedures could be used. As a result, the user would place a request for bids electronically on an on-line bulletin board, receive proposals for chairs that looked as if they were the same as those currently in use in the agency. He could pay for the order with his government credit card. Unfortunately, he might also never receive his order, or be stuck with cheap chairs that do not meet his needs.

Similar problems have already occurred numerous times with existing electronic bulletin board systems. Several Coalition members have reported unauthorized sellers trying either to sell products they are not authorized to sell, or selling junk. As a result, government money has been wasted and using agencies are deprived of the products they need to do their job efficiently. Even though the user may have thought he was following the new rules, in fact, this scenario violates both existing and proposed regulations.

Existing regulations require agencies to follow the procurement priorities laid out in Part 8 of the Federal Acquisition Regulations. The user must check with a variety of mandatory and preferred sources, including the Multiple Award Schedules, before making an open market purchase.

Had the user followed these guidelines, he would have been able to purchase commercial chairs from the schedules that have been certified to meet all commercial and government safety specifications from authorized contractors at competitive prices. The chairs would have been delivered on time and, if there was a problem, redress would have been readily available.

The Committee Report accompanying the Simplified Acquisition Threshold portion of the Federal Acquisition Streamlining Act retains the requirement for government users to consult mandatory and preferred sources of supply. The Committee recognized the importance of retaining fundamental safeguards and the need to ensure that the government gets a good deal.

The Coalition supports this language as well, but feels that agency procurement officials need to be better educated about the continuation of this requirement and the reasoning behind it. Without clear guidance, well-intentioned procurement officials may illegally commit government funds to purchase goods of questionable quality.

We strongly recommend that Administration officials issue a government-wide statement and hold training courses to clarify that existing rules must still be followed and that, even under the new rules, certain steps must still be taken before simplified acquisition or micro-purchase procedures can be used.

ENSURING THE ADEQUATE TIME IS TAKEN BEFORE REGULATIONS BECOME EFFECTIVE

While the Coalition understands the Administration's desire to implement FASA in a timely manner and not let reform languish, we feel that moving too quickly can, and has, caused problems in the regulation writing process. We feel that it is important to note that the Federal Acquisition Streamlining Act was several years in the making. Proposals were amended countless times and various provisions were added and deleted depending on shifting political winds. All parties were given substantial time to comment on various bills.

The fine result of this multi-year process was the Federal Acquisition Streamlining Act. FASA is a complex amalgam of procurement change. It has potentially dramatic implications for the future of the government's acquisition of commercial products. Adequate time should be spent on the crafting of regulations, therefore, to implement this change and ensure that the original intent of the legislation is carried out. All affected parties should have an ample opportunity to provide their comments. The Coalition believes that Congress should play an important role in this process.

Additional care should also be taken to allow both government contracting officials and contractors time to absorb the changes and assess what they mean for their individual missions. Moving too quickly may leave some people on both sides unsure of what they are supposed to be doing and result in harm to the Acquisition process until all of the fallout can be gauged.

An example of how too quick a pace can be harmful can be seen in the Proposed Rule implementing the Truth In Negotiations Act (TINA) changes. The intent of this part of FASA was to substantially streamline the certifications and data submission requirements commercial product contractors must now encounter when seeking a government contract. The Proposed Rule, however, falls far short of this intent and would not result in any substantial changes for contractors over the status quo. In fact, several of our members have reported that the proposal could increase their data submission burdens and increase their exposure to audit.

Had all parties been able to work with the drafters of this regulation, the Proposed Rule could have been originally written to more accurately reflect the original intent of the legislation. As a result, however, the final rule will now be implemented much later than it otherwise might have been if a slower, more inclusive, pace had been taken by those writing this regulation.

The Coalition urges the Committee to work with the teams writing the various FASA implementation regulations to ensure that this occurrence is not repeated for other provisions.

ENSURING THAT NEW REGULATIONS DO NOT IMPOSE SIGNIFICANT NEW BURDENS ON THE PROCUREMENT PROCESS

In addition to the unintended potential new burdens of the proposed TINA regulations, the Coalition is also concerned that the implementation of other regulations may impose unintended new burdens which will hamper, instead of help, the government's commercial product procurement process. The intent of the Federal Acquisition Streamlining Act was to make it easy for the government to buy commercial products at competitive prices. Some of the regulations being contemplated or issued, however, do not seem to follow in the spirit of the original legislation.

Some examples of where this is happening, in addition to TINA, include the implementation of Cooperative Purchasing regulations and the removal of an automatic waiver of the small business nonmanufacturer rule for purchases under the new Simplified Acquisition Threshold.

The Cooperative Purchasing section of FASA allows state and local governments to use federal supply schedules upon the approval of the GSA Administrator. While GSA appears to be retaining the original intent that the extension of contracts be optional on the part of the contractor, many Coalition members feel that the proposed method on how GSA would be paid by state and local users is unworkable. Although the implementing rule has not yet officially been published, preliminary discussions the Coalition has had with GSA on the funding issue have led to this concern.

Under the proposed plan, the additional burden of extending the schedules to nonfederal users would be borne by the users. While no Congressional appropriation would be needed, however, contractors would be required to play the role of bill collector.

The Coalition is concerned that GSA's Office of Acquisition Policy may implement a mechanism to self-fund Cooperative Purchasing sales that is different from that currently being crafted by the Federal Supply Service (FSS) branch of GSA. The Coalition recommends that the Office of Acquisition Policy work closely with FSS officials to develop a self-funding plan for Cooperative Purchasing similar to the one which FSS has nearly completed to self-fund their federal schedule operations. In this way, both contractors and GSA would be able to use one system, eliminating confusion and increasing the likelihood that schedule contractors will extend their GSA contract to state and local government entities. This would increase GSA's revenues and decrease their reliance on direct appropriations.

Similarly, several Coalition members have expressed concern over the Small Business Administration's (SBA) decision to do away with automatic waivers of the nonmanufacturer rule once the new Simplified Acquisition Threshold is instituted.

Currently, the SBA grants an automatic waiver of the nonmanufacturer rule for purchases under the $25,000 Small Purchase Procedure limit. As a result, federal buyers are free to purchase products from any small business dealer selling the product of any domestic manufacturer. Such purchases are conducted in a timely and efficient manner and benefit numerous small business dealers through out the country, many of whom rely on government business for their livelihood.

The SBA has decided, however, to do away with automatic waivers once the $25,000 limit is increased and renamed the Simplified Acquisition Threshold. As a result of this action, agencies seeking to buy products from small business dealers must request a waiver of the nonmanufacturer rule for each such contemplated buy. The Coalition feels that this will significantly increase the commercial product procurement cycle and impose new burdens on the government and contractors. The SBA, too, will see a tremendous increase in their paperwork and research functions as they will have to conduct extensive searches to determine whether or not there is a small business manufacturer for the product requested and, if so, whether or not it will be able to meet the agency's need.

We believe that this decision will harm small businesses across the country and make it more difficult for agencies to meet their small business contracting goals.

The current system has served all parties well. The original decision to grant automatic waivers was based in part on the fact that few, if any, small business manufacturers capable of meeting the governments needs existed for many products. Additionally, SSA officials at the time recognized that an automatic process would allow agencies to get the products they needed in a more efficient way, while still benefitting small businesses overall. The automatic waiver process in no way precludes small business manufacturers that may make a given product from bidding for federal requirements.

The Coalition recommends that the Government Reform and Oversight Committee discuss this issue with its counterparts in the Small Business Committee and the Small Business Administration. We believe that re-instituting the automatic waiver of the nonmanufacturer rule for purchases under the Simplified Acquisition Threshold will benefit the maximum number of small businesses and allow the procurement process to function more efficiently.

These are just a few examples of the unintended consequences that can occur when regulators try to interpret Congressional intent. The Coalition urges the Committee to maintain its diligent oversight of the implementation process to ensure that new burdens are not imposed when the intent is to streamline the acquisition process.

CONCLUSION

Many of the regulations which will implement the provisions of the Federal Acquisition Streamlining Act have yet to be published for comment. The Coalition will continue to be an integral part of this process and would appreciate the opportunity to submit comments on further developments should the Committee so desire. We applaud the Committee's role in this process and recommend continued oversight. Again, the Coalition appreciates this opportunity to submit comments on developments to date for the hearing record on this important subject. We would be pleased to discuss the issues we have presented here with the Committee further and look forward to working with you on commercial product procurement reform.

PREPARED STATEMENT OF THE COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS

In response to your request for industry comments on the proposed regulations implementing the Federal Acquisition Streamlining Act of 1994 (FASA) and on the FASA regulatory implementation process, members of the Council of Defense and Space Industry Associations (CODSIA) are pleased to submit the following documents:

1. CODSIA letter of 8 March 1995 to the FAR Council and to Truth in Negotiations Act (TINA) Team Leader Al Winston on the nature and timing of public meetings
2. CODSIA letters on implementing regulations:
   a. FAR 94–802: Officials Not to Benefit
   b. FAR 94–803: Whistleblower Protections for Contractor Employees
   c. FAR 94–804: Procurement Integrity
   d. General Services Administration Board of Contract Appeals Rules of Procedure
   e. FAR 94–720: Certified Cost or Pricing Data Threshold
   f. FAR 94–753: Implementation of Various Cost Principle Provisions
   g. FAR 94–754: Travel Costs
   h. FAR 94–771: Micropurchase Procedures
   i. FAR 94–700: Repeal of Requirement for Secretariat/Agency Head Determinations Regarding Use of Cost Type or Incentive Contracts
   j. FAR 94–751: Penalties on Unallowable Indirect Costs
   k. FAR 94–752: Contractor Overhead Certification
   l. FAR 94–801: Debarment, Suspension and Ineligibility (two letters)
   m. FAR 94–740: Consolidation and Revision of the Authority to Examine Records
   n. FAR 94–780: Small Business
3. Statement at the February 13, 1995 Public Meeting on Small Business by Alan L. Chvotkin, Sundstrand Corporation, on behalf of CODSIA
4. Three statements at the February 13, 1995 Public Meeting on TINA:
   a. Richard J. Wall, Ernst & Young, on behalf of the American Electronics Association
   b. Charles E. Rumbaugh, Hughes Aircraft Company, on behalf of the Aerospace Industries Association
   c. Carol A. Hulgus, Rockwell International Corporation, on behalf of the Electronic Industries Association

We hope these documents will be helpful in your analysis of the proposed regulations and your review of the implementation process.

CODSIA Case 13–94

March 8, 1995

FAR Council
Al Winston, TINA Team Leader
General Services Administration
FAR Secretariat (VRS)
Room 4037
18th & F Streets, NW
Washington, DC 20405

DEAR COUNCIL MEMBERS AND MR. WINSTON: Three member associations of CODSIA presented statements at the FAR Council public meeting on February 13 on the proposed Truth in Negotiations Act (TINA) regulations which implement var-

ious provisions of the Federal Acquisition Streamlining Act of 1994 ("FASA", P.L. 103–355). The TINA implementing regulations are among the most important draft rules published to date. Changes in TINA coverage can, if made properly, not only provide significant streamlining of the procurement process, but may also represent one of the best opportunities for culture change within both Government and industry.

On behalf of all CODSIA member associations, we appreciate the opportunity to share our initial views on the proposed rule. However, based on the experience of the February 13 meeting, we want to share our concerns about both the meeting and implementation process in the hope of improving the process for the remainder of the regulatory implementation of FASA.

As you know, when the FAR Council announced its drafting teams in late 1994, CODSIA organized comment teams to mirror the government's drafting team organization. We promptly conveyed our points of contact to the Council and to your teams in order to facilitate dialog during the drafting process. However, we were disappointed to find that, due in part to the accelerated schedule set by the Administration, we were not permitted to participate in or even monitor the FAR Council's drafting process.

We occasionally receive status information on the imminent timing of publication of certain rules, but little, if any, substantive information on their content. More typically, our first substantive information on a proposed rule is when it is published in the Federal Register. The public has sixty days to provide written comments; for major cases, public meetings are held thirty days into the public comment period.

At the least, the CODSIA associations anticipated that public meetings on the implementing regulations would include, as stated in the preamble statement with each published rule, an exchange of views between the government and industry—that is, a forum in which industry would have an opportunity to discuss initial reactions to the proposed regulations with the Council and the drafting team. Contrary to our expectations and the public notice, however, both the Small Business and the TINA public meetings opened with a statement from the FAR Team Leader that the government representatives would listen to industry comments and ask questions for clarification only. The meeting would not be an exchange of ideas as indicated in the notices. Furthermore, since no official record of the meeting was prepared, we question the long-term impact of any presentation made. This is disheartening at best and serves as a disincentive (if this practice is to be followed for all hearings) to any meaningful partnering between government and industry in this rulemaking process.

We recommend that future public meetings be structured as a dialog that will allow for mutual questioning and discussion. This would allow industry to structure its input so that our written final comments are provided to the Government in a way most helpful for final rule promulgation. If the meetings were scheduled toward the end of the public comment period rather than the middle, industry might be in a better position to discuss the full content of our comments. The meeting could then serve as the initiation of an ad hoc working group to understand and work toward resolving the differences for the final regulations. However, this may be too late in the process. Alternatively, a public meeting near the beginning of the comment period where the Government outlines its approach to a complex rule (like the TINA case) would be of great benefit to the public. This approach would help industry embark on a meaningful, productive and perhaps more expeditious review and comment process.

Further, it seemed that the Government representatives expected to hear final or near-final comments from those appearing at the TINA and Small Business public meetings, which were only thirty days into the comment period. It is not reasonable to shorten the comment period in any event, and certainly industry should not be expected to have well-developed positions in 30 days if we first see the regulations when they are published in the Federal Register. It was announced at the meeting that, if industry submits final comments on day 60, the Government would have "little time to consider our input in the final rule" due to the Government's self-imposed accelerated schedule. This scenario, where artificial deadlines take precedence over substance, places the public in a no-win situation and thwarts the Congressional purpose for the public comment process.

We also recommend that adequate time be scheduled for dialog with the public after the final comments are submitted at the sixty day mark. This will still allow time to work out final regulations cooperatively within the statutory deadlines for final rule publication. Alternatively, or in addition, we recommend interaction with the drafting team prior to publication of the proposed rules in the Federal Register.

If we are allowed to work with the teams as partners in the drafting process, there should be fewer and more meaningful comments to be submitted.

We continue to support the Government's goal of accelerating the statutory deadlines where possible and of timely publication of the final regulation. Our recommendations will allow for a more meaningful public comment process without sacrificing on-time publication of clear, concise and fully-coordinated final rules.

Government and industry alike will be looking to these regulations as an indication of whether there really is a new approach to Government procurement. We believe industry's contribution is vital to sending the right message in the final regulatory implementation of FASA.

We are ready to work with you as the implementation process progresses. To that end, we have again provided our CODSIA points of contact for each of the drafting team sections.

Best regards,

DON FUQUA,
President, Aerospace Industries Association.

LAWRENCE F. SKIBBIE,
President, American Defense Preparedness Association.

JOHN F. MANCINI,
Chief Operating Officer, American Electronics Association.

GARY D. ENGEBRETSON,
President, Contract Services Association.

DAN C. HEINEMEIER,
Vice President, Electronic Industries Association.

KENNETH MCLENNAN,
President, Manufacturers Alliance for Productivity and Innovation.

JAMES R. HOGG,
President, National Security Industrial Association.

BERT M. CONCKLIN,
President, Professional Services Council.

PENNY L. EASTMAN,
President, Shipbuilders Council of America.

CODSIA Subject Teams for FASA
Federal Acquisition Regulations Review

CODSIA Project Chair: Patrick D. Sullivan, AIA (202) 371-8522
Industry Chair: Carol Hulgus, Rockwell Int'l. (703) 412-6729

Subject Matter	CODSIA Association Review Responsibility	Association Point of Contact/Phone #	Mailing Address
Contract Award	* Contract Services Association / Professional Services Council	(CSA) Stan Soloway (202) 347-0600/ (PSC) Julie Noufer (703) 883-2030	CSA: 1200 G St., N.W., Suite 750 Washington, D.C. 20005
Special Contracting Methods	* Professional Services Council / National Security Industrial Association	(PSC) Julie Noufer (703) 883-2030/ (NSIA) Ed Schiff (202) 775-1303	PSC: 8607 Westwood Center Dr., Suite 204 Vienna, VA 22182
TINA	* American Electronics Association / Electronics Industries Association	(AEA) Roger Smith (202) 682-4434/ (EIA) Ella Schiralli (703) 907-7585	AEA: 1225 Eye St., N.W. Ste. 950 Washington, D.C. 20005
Protests/Disputes	National Security Industrial Assoc./ Shipbuilders Council of America	(NSIA) Ed Schiff (202) 775-1303/ (SCA) Frank Losey (703) 548-7447	NSIA: 1025 Connecticut Av., Suite 300, Washington, D.C. 20036
Audits	Aerospace Industries Association / Shipbuilders Council of America	(AIA) Pat Sullivan (202) 371-8522/ (SCA) Frank Losey (703) 548-7447	AIA: 1250 Eye St., N.W., Suite 1100 Washington, D.C. 20005
Cost Principles	Aerospace Industries Association / Shipbuilders Council of America	(AIA) Pat Sullivan (202) 371-8522/ (SCA) Frank Losey (703) 548-7447	AIA: 1250 Eye St., N.W., Suite 1100 Washington, D.C. 20005
Contract Financing/Payment	Aerospace Industries Association / Shipbuilders Council of America	(AIA) Pat Sullivan (202) 371-8522/ (SCA) Frank Losey (703) 548-7447	AIA: 1250 Eye St., N.W., Suite 1100 Washington, D.C. 20005
Simplified Acquisition Procedures/ FACNET	* American Electronics Association American Defense Preparedness Assoc.	(AEA) Roger Smith (202) 682-4434/ (ADPA) Peter Scrivner (703) 247-2551	AEA: 1225 Eye St., N.W., Suite 950 Washington, D.C. 20005
Small Business	* National Security Industrial Assoc./ American Defense Preparedness Assoc.	(NSIA) Ed Schiff (202) 775-1303/ (ADPA) Peter Scrivner (703) 247-2551	NSIA: 1025 Connecticut Av., Suite 300 Washington, D.C. 20036
Ethics	Manufacturers Alliance for Productivity and Innovation	Elaine Guth (703) 841-9000	1525 Wilson Bl., Suite 900 Arlington, VA 22209
Commercial Contracting	* Electronics Industries Association / American Electronics Association	(EIA) Ella Schiralli (703) 907-7585/ (AEA) Roger Smith (202) 682-4434	EIA: 2500 Wilson Blvd. Arlington, VA 22201-3834

* = denotes lead association in teaming arrangements. (Send correspondence to this association for further distribution of subject information.)

CODSIA Case 13–94.1

January 27, 1995

General Services Administration
FAR Secretariat (VRS)
ATTN: Mr. Julius Rothlein
Ethics Team Leader
18th & F Streets, NW
Room 4037
Washington, DC 20405

Re: FAR Case 94–802: Officials Not to Benefit (Ethics)

DEAR MR. ROTHLEIN: The undersigned members of the Council of Defense and Space Industry Associations (CODSIA) appreciate the opportunity to comment on the proposed rule to amend the Federal Acquisition Regulation (FAR) and implement Section 6004 enacted in the "Federal Acquisition Streamlining Act of 1994" (FASA, Public Law 103–355) on coverage designated as "Officials Not to Benefit." The text of the proposed rule was issued for public comment in the Federal Register of December 1, 1994.

CODSIA was formed in 1964 by industry associations having common interests in the defense and space fields. The Department of Defense encouraged formation of this organization as a vehicle for obtaining broad industry reactions to new or revised procurement regulations, policies and procedures. In our 30th year, CODSIA is comprised of nine associations, representing some 4,000 large and small member firms across the nation.

In general, we support the proposed change to current FAR coverage which, if adopted, would eliminate the requirement for contracts to contain the clause at FAR 52.203–1. Elimination of unnecessary contract terms and conditions is consistent with the FASA move toward commercial practices.

Of broader concern is the manner in which the FAR Council has, by this example, undertaken to implement FASA. The FAR Council has responded to section 6004 of FASA by proposing to delete the clause prescription at FAR 3.102–2 and the clause itself at 52.203–1. This leaves in the relevant FAR both 3.102, "Officials not to benefit," and 3.102–1, "General" (although a "–1" appears at this point to be surplusage). These proposed changes are in literal compliance with the statutory direction, but they represent a less-than-whole-hearted approach toward real change.

Specifically, the proposed implementation leaves in the FAR language describing the amended statute at 41 U.S.C. Section 22, which is a broad prohibition addressed to Members of Congress that is applicable to all government contracts or agreements. If the FAR Council leaves in the general description of the law and deletes the FAR clause that was required in association with that law, then two consequences inevitably follow:

1. Of significant concern is the implied authority for any buying office or agency to develop its own, non-standard clause to implement 41 U.S.C. Section 22—or any other law that does not have a standard FAR clause but is mentioned in the FAR. If FAR 3.102 is retained, we recommend that a sentence be added to this section such as: "No clause is required to implement this provision."

2. The FAR will have to include/maintain a section in the regulation for every single law that is applicable to any government contract, or is applicable to the public and business generally. To include a FAR description of some, but not all, laws applicable to government contracts will give the impression that a law is only applicable if it is discussed in the FAR. Then what happens if a law is inadvertently left out? Does that make it inapplicable to government contracts, or does the Christian Doctrine apply? It is difficult, if not impossible, to keep an absolutely correct and up-to-date listing of all applicable laws in the FAR. Such a list would be out of date before it was published. The better system is to delete all FAR coverage on all statutes that have general application to U.S. businesses and the public and which do not require a unique contract clause.

We appreciate the opportunity to comment on the proposed rule designated as FAR Case 94–802, "Officials Not to Benefit." If we may provide further information in connection with these industry comments, please contact Elaine Guth of the Manufacturers Alliance and CODSIA's project officer for this FAR Case at (703) 841–9000.

Sincerely,

DON FUQUA,
President, Aerospace Industries Association.
LAWRENCE F. SKIBBIE,
President, American Defense Preparedness Association.
JOHN F. MANCINI,
Chief Operating Officer, American Electronics Association.
GARY D. ENGEBRETSON,
President, Contract Services Association.
DAN C. HEINEMEIER,
Vice President, Electronic Industries Association.
KENNETH MCLENNAN,
President, Manufacturers Alliance for Productivity and Innovation.
JAMES R. HOGG,
President, National Security Industrial Association.
BERT M. CONCKLIN,
President, Professional Services Council.
S.O. NUNN,
Acting President, Shipbuilders Council of America.

CODSIA Case 13–94.2

January 27, 1995

General Services Administration
FAR Secretariat (VRS)
ATTN: Mr. Julius Rothlein
Ethics Team Leader
18th & F Streets, NW
Room 4037
Washington, DC 20405

Re: FAR Case 94–803: Whistleblower Protections for Contractor Employees (Ethics)

DEAR MR. ROTHLEIN: The undersigned members of the Council of Defense and Space Industry Associations (CODSIA) appreciate the opportunity to comment on the proposed rule to amend the Federal Acquisition Regulation (FAR) and implement Sections 6005 and 6006 enacted in the "Federal Acquisition Streamlining Act of 1994" (FASA, Public Law 103–355) on coverage designated as "Whistleblower Protections for Contractor Employees." The text of the proposed rule was issued for public comment in the Federal Register of December 1, 1994.

CODSIA was formed in 1964 by industry associations having common interests in the defense and space fields. The Department of Defense encouraged formation of this organization as a vehicle for obtaining broad industry reactions to new or revised procurement regulations, policies and procedures. In our 30th year, CODSIA is comprised of nine associations, representing some 4,000 large and small member firms across the nation.

In general, we support the proposed change to current FAR coverage but ask that the following comments and concerns be incorporated as changes to the text to the proposed rule in your draft of a final rule:

1. The duplicative coverage under DFARS 203.71 should be deleted and reserved. Although by operation of law this DFARS section expired on November 5, 1994, there is no reason to retain this section in the DFARS except for any special routing that the Department of Defense (DoD) may want to develop. For example, under the current regulations, all notifications are to be sent to the Defense Logistics Agency (DLA);

2. Neither the DFARS rule nor the proposed FAR coverage provides for treating complaints, responses, or Inspector General (IG) investigations in a "confidential" manner to protect the reputations of individuals who may be identified in the investigation. We are not suggesting that "confidentiality" be used to mask the existence of a complaint, but rather that the proceedings be treated like any other company or government personnel matter. Without specific coverage under the regulations, we are concerned that the government would not be able to properly protect government or contractor employees;

3. With regard to the text of FAR 3.901, definition of "head of agency," we believe that this term is adequately defined at FAR 2.101 and at DFARS 202.101. This redundant definition should be deleted:

4. With regard to the text of FAR 3.901, definition of "authorized official of an agency," we believe that this term, while not defined by the statute, is defined much too broadly in this proposed regulation. Under this definition, any conversation with any employee of the contracting agency would qualify a contractor employee for coverage. This is not what the statute was intended to do;

5. With regard to the text of FAR 3.902, "Applicability," we believe that the language is too broad. There is sufficient latitude in the statute to establish a dollar threshold or contract-type limitation. At the least, this subpart should not be applicable to purchases made under the simplified threshold;

6. With regard to the text of FAR 3.905, generally, "Procedures for Investigating Complaints," we note that paragraph (a) requires the IG to conduct an initial inquiry, even if the complaint is later determined to be wholly frivolous. It is quite foreseeable that some complaints may be lodged that are so obviously without merit on their face that not even an initial inquiry is justified. In such instances, the IG should have the authority to reject such complaints immediately without any "initial inquiry" and the regulation should so provide. Subsection (b) of the statute clearly allows the IG to reject a frivolous complaint without conducting any investigation;

7. With regard to the text of FAR 3.905(b), we suggest that this provision include a time period of 60 days for the IG to notify the complainant, contractor, and head of the contracting activity if the complaint merits further investigation; and

8. With regard to the text of FAR 3.905(d), we believe that 30 days, as proposed, for the contractor to submit a written response to the IG's report may be too restrictive a period of time for a contractor to submit a written response. Since the statute does not fix a period of time for the contractor's response, we recommend that FAR 3.905(d) provide authority for the IG to set a reasonable period of time for the response appropriate to the nature and complexity of the issue and the facts.

We appreciate the opportunity to comment on the proposed rule designated as FAR Case 94–803, "Whistleblower Protections for Contractor Employees." If we may provide further information in connection with these industry comments, please contact Elaine Guth of the Manufacturers Alliance and CODSIA's project officer for this FAR Case at (703) 841–9000.

Sincerely,

DON FUQUA,
President, Aerospace Industries Association.

LAWRENCE F. SKIBBIE,
President, American Defense Preparedness Association.

JOHN F. MANCINI,
Chief Operating Officer, American Electronics Association.

GARY D. ENGEBRETSON,
President, Contract Services Association.

DAN C. HEINEMEIER,
Vice President, Electronic Industries Association.

KENNETH MCLENNAN,
President, Manufacturers Alliance for Productivity and Innovation.

JAMES R. HOGG,
President, National Security Industrial Association.

BERT M. CONCKLIN,
President, Professional Services Council.

S.O. NUNN,
Acting President, Shipbuilders Council of America.

CODSIA Case 13–94.3

January 27, 1995

General Services Administration
FAR Secretariat (VRS)
ATTN: Mr. Julius Rothlein
Ethics Team Leader
18th & F Streets, NW
Room 4037
Washington, DC 20405

Re: FAR Case 94–804: Procurement Integrity (Ethics)

DEAR MR. ROTHLEIN: The undersigned members of the Council of Defense and Space Industry Associations (CODSIA) appreciate the opportunity to comment on the proposed rule to amend the Federal Acquisition Regulation (FAR) and implement Section 8301(e) enacted in the "Federal Acquisition Streamlining Act of 1994" (FASA, Public Law 103–355) on coverage related to "Procurement Integrity." In particular this provision of FASA excludes procurements of commercial items from the certification requirements of the Procurement Integrity Act (PIA) which requires that contractor employees certify familiarity with the PIA and will report violations of the PIA. The text of the proposed rule was issued for public comment in the Federal Register of December 1, 1994.

CODSIA was formed in 1964 by industry associations having common interests in the defense and space fields. The Department of Defense encouraged formation of this organization as a vehicle for obtaining broad industry reactions to new or revised procurement regulations, policies and procedures. In our 30th year, CODSIA is comprised of nine associations, representing some 4,000 large and small member firms across the nation.

The proposed text of the FAR rule is a straightforward implementation of Section 8301(e) of FASA. In general, we support the proposed change to current FAR coverage but ask that the following comments and concerns be incorporated as changes to the text to the proposed rule in your draft of a final rule:

1. We ask that the words "or subcontracts" be added to each of the revised sections of FAR 3.104 and FAR 52 to make it clear that both contracts and subcontracts for commercial items are exempt from the PIA certification requirements;

2. We suggest that the rule would be internally consistent if all references to commercial contracts were in the singular, such as "not required in a contract for the procurement of a commercial item or modifications to such a contract;" and

3. While not part of this rule, we believe the regulation's reference to "commercial item" would benefit from the cross-reference to the definition of a commercial item whenever that is created in the FAR. This cross-reference could minimize any future confusion about whether an item is or is not a "commercial item.

We appreciate the opportunity to comment on the proposed rule designated as FAR Case 94–804, "Procurement Integrity." If we may provide further information in connection with these industry comments, please contact Elaine Guth of the Manufacturers Alliance and CODSIA's project officer for this FAR Case at (703) 841–9000.

Sincerely,

DON FUQUA,
President, Aerospace Industries Association.
LAWRENCE F. SKIBBIE,
President, American Defense Preparedness Association.
JOHN F. MANCINI,
Chief Operating Officer, American Electronics Association.
GARY D. ENGEBRETSON,
President, Contract Services Association.
DAN C. HEINEMEIER,
Vice President, Electronic Industries Association.
KENNETH MCLENNAN,
President, Manufacturers Alliance for Productivity and Innovation.
JAMES R. HOGG,
President, National Security Industrial Association.
BERT M. CONCKLIN,
President, Professional Services Council.
S.O. NUNN,
Acting President, Shipbuilders Council of America.

CODSIA Case 13–94.4

January 31, 1995

General Services Administration
Board of Contract Appeals
ATTN: Mr. Wilbur T. Miller, Chief Counsel
18th & F Streets, NW
Washington, DC 20405

Re: Proposed Rules of Procedure of the General Services Administration Board of Contract Appeals—Federal Register, Vol. 59, No.231, December 2, 1994

DEAR MR. MILLER: The undersigned members of the Council of Defense and Space Industry Associations (CODSIA) appreciate the opportunity to comment on the proposed rules to revise the procedures of the GSA Board of Contract Appeals (GSBCA) and to implement various sections of the "Federal Acquisition Streamlining Act of 1994" (The Act, Public Law 103–355).

CODSIA was formed in 1964 by industry associations having common interests in the defense and space fields. The government encouraged formation of this organization as a vehicle for obtaining broad industry reactions to new or revised procurement regulations, policies and procedures. In our 30th year, CODSIA is comprised of nine associations, representing some 4,000 large and small member firms across the nation.

In general, we have examined the subject proposed rules and support them as proposed subject to the following comments.

The GSBCA does not propose to issue rules concerning Section 2354 of The Act which authorizes the district courts to request a board of contract appeals to provide the court with an advisory opinion on pending matters of contract interpretation which could be the proper subject of a contracting officer's final decision appealable under the Contract Disputes Act. No other rule issued to date to implement The Act has included coverage of this important section of the law. We believe all boards of contract appeals should adopt a uniform rule concerning this. We recommend that the Board adopt a rule which provides interested parties the opportunity to fully brief the Board (at least in writing and if necessary through oral presentations), consistent with other Board rules and on a timing schedule established by the Board which provides the greatest opportunity for interested parties to participate, consistent with the schedule set by the district court, if any. We suggest a rule substantially as follows:

> When pursuant to Section 10(f) of the Contract Disputes Act as amended by Section 2354 of the Federal Acquisition Streamlining Act of 1994 (Public Law 103–355) a district court of the United States requests the Board for an advisory opinion on the matters of contract interpretation properly pending in the district court, the board shall promptly afford the parties before the district court a reasonable opportunity to submit briefs and reply briefs to the Board for its guidance in rendering the advisory opinion to the district court.

We believe such a rule will permit all parties a fair and reasonable opportunity to get their views before the advising board.

Congress intended in Section 1433(a) of The Act to allow a protester to obtain a suspension of the procurement if it files a protest within five days of its required debriefing. The purpose of this relief is to obviate the need for protesters to file "discovery" protests prior to receiving information in their debriefings. The Section 800 Panel recognized that needless protests could be avoided if offerors were given meaningful debriefings prior to the filing deadline for their protests (Section 800 Panel Report, 1–232).

The GSBCA rules as currently proposed may fail to carry out this Congressional intent. These rules now require protesters to file protests within 10 working days of the date on which the protester knew, or should have known, of the grounds for its protest. For protests based on information known (or constructively known) at the time an award is announced, the 10-day timeliness period may expire before a required debriefing is held. Accordingly, if an unsuccessful offeror waits to file a protest until after receipt of a required debriefing, its protest will trigger a suspension, but may be dismissed as untimely. The disparity between the Board's timeliness regulations and The Act's suspension provisions may result in the filing of unnecessary "discovery" protests, which Congress sought to avoid.

To correct this disparity, the Board rules should provide that a protest, other than one based upon information that was known or should have been known prior to award of the contract, will be considered timely if: (a) it is filed within 10 days after the protester knew or should have known of the basis of protest; or (b) it would trigger the suspension procedure under The Act, Section 1433(a).

We appreciate the opportunity to comment on the proposed rules of procedure for the GSBCA. If we may provide further information in connection with these industry comments, please contact Ed Schiff of the National Security Industrial Association and CODSIA's project officer for this matter at (202) 775–1303.

Sincerely,

DON FUQUA,
President, Aerospace Industries Association.

LAWRENCE F. SKIBBIE,
President, American Defense Preparedness Association.

JOHN F. MANCINI,
Chief Operating Officer, American Electronics Association.

GARY D. ENGEBRETSON,
President, Contract Services Association.

DAN C. HEINEMEIER,
Vice President, Electronic Industries Association.

KENNETH MCLENNAN,
President, Manufacturers Alliance for Productivity and Innovation.

JAMES R. HOGG,
President, National Security Industrial Association.

BERT M. CONCKLIN,
President, Professional Services Council.

S.O. NUNN,
Acting President, Shipbuilders Council of America.

CODSIA Case 13–94.5

February 1, 1995

General Services Administration
FAR Secretariat (VRS)
18th & F Streets, N. W.
Room 4037
Washington, D. C. 20405

Subject: FAC Case 90–22, Certified Cost or Pricing Data Threshold (FAR Case 94–720)

DEAR FAR COUNCIL: The undersigned members of the Council of Defense and Space Industry Associations (CODSIA) appreciate the opportunity to comment on the interim rule published in the Federal Register on December 5, 1994 (Vol. 59, No. 232). Formed in 1964 by industry associations with common interests in the defense and space fields, CODSIA is currently composed of nine associations rep-

resenting over 4,000 member firms across the nation. Participation in CODSIA projects is strictly voluntary; a decision by any member association to abstain from participating in a particular activity is not necessarily an indication of dissent.

The interim rule, which was effective December 5, 1994, implements provisions of the Federal Acquisition Streamlining Act of 1994 (Public Law 103–355) which (1) increased the threshold for certified cost or pricing data from $100,000 to $500,000 and (2) removed the requirement for commercial pricing certificates. Similar provisions had been previously adopted for the Department of Defense, National Aeronautics and Space Administration, and Coast Guard.

CODSIA generally concurs with the amendments made by the FAR Council and offers a few recommendations to improve the guidance being given to contracting officers (see attached analysis).

Effective Date of Threshold Increase

CODSIA notes that the interim rule was effective December 5, 1994. With respect to the threshold increase, this date appears to be inconsistent with the effective date established under the Act. Specifically, Section 1251(b) stated that certain provisions were to be effective on and after the date of enactment (October 13, 1994). CODSIA recommends that the FAR Council retroactively establish October 13, 1994, as the effective date.

Changes to Existing Contracts

The interim rule at FAR 14.201–7(d) and FAR 15.804–2(a)(2) instructs contracting officers to incorporate the increased threshold into existing contracts at the request of the contractor, without requiring consideration. The contracting officer is to insert "new contract clauses" that now refer to the threshold specified in FAR 15.804–2(a)(1) rather than a specific dollar amount (i.e., $500,000).

In the interest of acquisition streamlining, CODSIA recommends that the Administration consider alternative methods of implementing the threshold increase. Rather than requiring individual contractors to petition each civilian agency contracting officer to make this one-time change, the Administration should consider using its broad authority to implement the change across-the-board by direction. This alternative approach takes advantage of the fact that each of the affected contract clauses are incorporated by reference rather than full text. Failing this approach, the Administration should grant agency heads, heads of contracting activities, contracting officers, and contractors (i.e., for subcontracts) the means to adopt the threshold increase on a blanket basis.

CODSIA also believes that this type of action would be more appropriate as a FAC item rather than as a regulatory provision at FAR 14.201–7(d) and FAR 15.804–2(a)(2). Terms such as "new contract clauses" and "current version of the clauses" will later have a confusing meaning as other changes are adopted (e.g., inserting additional exemption for commercial products). The FAR, instead, should provide a means for implementing future threshold increases on modifications and subcontracts through self-executing provisions contained in the pertinent contract clauses.

CODSIA further recommends that the Administration make a stronger statement of its policy intent for taking full advantage of this streamlining initiative. For example, the FAC should instruct contracting officers to amend contracts as quickly as possible. The goal should be to apply the threshold increase to all appropriate undefinitized contract actions for which no agreement on price was reached as of October 13, 1994. Further, the FAC should state that it is the Administration's intent that higher tier contractors take similar action with respect to its subcontractors as quickly as possible (conforming changes are probably needed to FAR 15.806).

Commercial Pricing Certificate

CODSIA was pleased to see that the FAR Council took swift action to eliminate the commercial pricing certificate at FAR 14.214 and FAR 15.813. CODSIA urges the FAR Council to also permit contracting officers to remove the related clauses from existing contacts, without requiring consideration. The Government has little to benefit from obtaining commercial pricing certificates on future modifications to existing contracts.

If you have any questions about our comments or need additional information, please contact Roger Smith, American Electronics Association, at (202) 682–4434.

Attachment

CODSIA Analysis, FAR Case 94–720

Sincerely,

DON FUQUA,
President, Aerospace Industries Association.
LAWRENCE F. SKIBBIE,
President, American Defense Preparedness Association.
JOHN F. MANCINI,
Chief Operating Officer, American Electronics Association.
GARY D. ENGEBRETSON,
President, Contract Services Association.
DAN C. HEINEMEIER,
Vice President, Electronic Industries Association.
KENNETH MCLENNAN,
President, Manufacturers Alliance for Productivity and Innovation.
JAMES R. HOGG,
President, National Security Industrial Association.
BERT M. CONCKLIN,
President, Professional Services Council.
S.O. NUNN,
Acting President, Shipbuilders Council of America.

COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATION ANALYSIS
FAR CASE 94-720[1]

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[1] Interim Rule published in Federal Register (Vol. 59, No. 232), December 5, 1994.

COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATION ANALYSIS
FAR CASE 94-720

REF **INTERIM RULE - [ADDED] ~~DELETED~~** **CODSIA COMMENT** **CODSIA RECOMMENDATION**

FAR SUBPART 14.2 - SOLICITATION OF BIDS

14.201-7	**Contract clauses.**		
(a)	When contracting by sealed bidding, the contracting officer shall insert the clause at 52.214-26, Audit-Sealed Bidding, in solicitations and contracts if the contract amount is expected to exceed ~~$100,000, or for the Department of Defense, the National Aeronautics and Space Administration, and the Coast Guard, is expected to exceed $500,000~~ **[the threshold for submission of cost or pricing data at 15.804-2(a)(1)].**	CODSIA concurs with revision.	
(b)(1)	When contracting by sealed bidding, the contracting officer shall insert the clause at 52.214-27, Price Reduction for Defective Cost or Pricing Data-Modifications-Sealed Bidding, in solicitations and contracts if the contract amount is expected to exceed ~~$100,000, or for the Department of Defense, the National Aeronautics and Space Administration, and the Coast Guard, is expected to exceed~~ $500,000 **[the threshold for submission of cost or pricing data at 15.804-2(a)(1)].**	CODSIA concurs with revision.	
(b)(2)	In exceptional cases, the head of the contracting activity may waive the requirement for inclusion of the clause in a contract with a foreign government or agency of the government. The authorizations for the waiver and the reasons for granting it shall be in writing.		
(c)(1)	When contracting by sealed bidding, the contracting officer shall insert the clause at 52.214-28, Subcontractor Cost or Pricing Data-Modifications-Sealed Bidding, in solicitations and contracts if the contract amount is expected to exceed ~~$100,000, or for the Department of Defense, the National Aeronautics and Space Administration, and the Coast Guard, is expected to exceed $500,000~~ **[the threshold for submission of cost or pricing data at 15.804-2(a)(1)].**	CODSIA concurs with revision.	

REF	INTERIM RULE - [ADDED] ~~DELETED~~	CODSIA COMMENT	CODSIA RECOMMENDATION
(c)(2)	In exceptional cases, the head of the contracting activity may waive the requirement for inclusion of the clause in a contract with a foreign government or agency of the government. The authorizations for the waiver and the reasons for granting it shall be in writing.		
[(d)]	**[Contracting officers shall, if requested by the prime contractor, modify contracts to change the threshold in the contract to the cost or pricing data threshold in 15.804-2(a)(1), without requiring consideration. The contract modification shall be accomplished by inserting into the contract the current version of clauses 52.214-27, Price Reduction for Defective Cost or Pricing Data-Modifications-Sealed Bidding, and 52.214-28, Subcontractor Cost or Pricing Data-Modifications-Sealed Bidding. These new contract clauses shall apply only to contract modifications and subcontracts for which agreement on price occurs after the contracting officer has inserted the new clauses.]**	CODSIA concurs with guidance, but the new provision is awkward. The guidance being communicated seems more appropriate as a FAC item (i.e., change contracts now without consideration). Future threshold increases should become self-executing within the provisions of the appropriates clauses and 15.804-2(a)(2). Otherwise, the term "new contract clauses" will later have a confusing meaning. Reference to "prime" contractor is unnecessary and should be removed in the interest of FAR consistency.	~~Contracting officers shall, if requested by the prime contractor, modify contracts to change the threshold in the contract to the cost or pricing data threshold in 15.804-2(a)(1), without requiring consideration. The contract modification shall be accomplished by inserting into the contract the current version of clauses 52.214-27, Price Reduction for Defective Cost or Pricing Data-Modifications-Sealed Bidding, and 52.214-28, Subcontractor Cost or Pricing Data-Modifications-Sealed Bidding. These new contract clauses shall apply only to contract modifications and subcontracts for which agreement on price occurs after the contracting officer has inserted the new clauses.~~
~~(d)~~ [(e)]	When contacting by sealed bidding the contracting officer shall insert the clause at 52.214-29, Order of Precedence-Sealed Bidding, in solicitations and contracts to which the uniform contract format applies.		

REF	INTERIM RULE - [ADDED] ~~DELETED~~	CODSIA COMMENT	CODSIA RECOMMENDATION
14.214	~~Commercial pricing certificates.~~ [Reserved]	CODSIA concurs with revision.	
	~~Sealed bid acquisitions of parts or components as defined in 15.812-2 are subject to the requirements of 15.813, Commercial pricing certificates, including the solicitation provision and contract clause description in 15.813-7, when conditions specified therein are applicable.~~		

REF	INTERIM RULE - [ADDED] ~~DELETED~~	CODSIA COMMENT	CODSIA RECOMMENDATION
FAR SUBPART 15.8 - PRICE NEGOTIATION			
15.804-2	Requiring certified cost or pricing data.		
(a)(1)	~~Except as provided in 15.804-3, certified cost or pricing data are required before accomplishing any of the following actions:~~ [The threshold for obtaining cost or pricing data is $500,000. This amount will be subject to adjustment, effective October 1, 1995, and every five years thereafter. Except as provided in 15.804-3, certified cost or pricing data are required before accomplishing any of the following actions expected to exceed the threshold in effect at time of agreement on price or, in the case of existing contracts, the threshold specified in the contract -]	CODSIA concurs with revision.	
(a)(1)(i)	The award of any negotiated contract (except for undefinitized actions such as letter contracts) ~~expected to exceed $100,000, or for the Department of Defense, the National Aeronautics and Space Administration, and the Coast Guard, for contract awarded after December 5, 1990, expected to exceed $500,000;~~ [;]	CODSIA concurs with revision.	
~~(a)(1)(ii)~~ [(a)(1)(II)]	The award of a subcontract at any tier, if the contractor and each higher tier subcontractor have been required to furnish certified cost or pricing data, ~~when the subcontract is expected to exceed $100,000, or for the Department of Defense, the National Aeronautics and Space Administration, and the Coast Guard, for subcontracts expected to exceed $500,000 if the contract includes or has been modified to include the $500,0000 threshold per 15.804-2(a)(2). (But see 15.804-3(i).)~~ [; or]	CODSIA concurs with revision.	

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REF	INTERIM RULE - [ADDED] ~~DELETED~~	CODSIA COMMENT	CODSIA RECOMMENDATION
~~(a)(1)(ii)~~ [(a)(1)(iii)]	The modification of any sealed bid or negotiated contract (whether or not cost or pricing data were initially required) ~~when the modification involves a price adjustment expected to exceed $100,000, or for the Department of Defense, the National Aeronautics and Space Administration, and the Coast Guard, for modifications involving a price adjustment expected to exceed $500,000 threshold~~ **[or subcontract covered by paragraph (a)(1)(ii) of this subsection]**. Price adjustment amounts shall consider both increases and decreases. (For example, ~~$30,000~~ **[$150,000]** modification resulting from a reduction of $70,000 **[$350,000]** and an increase of $40,000 **[$200,000]** is a pricing adjustment exceeding $100,000 **[$500,000.]**, ~~and a $150,000 modification resulting from a reduction of $350,000 and an increase of $200,000 is a pricing adjustment exceeding $500,000.~~) This requirement does not apply when unrelated and separately priced changes for which cost or pricing data would not otherwise be required are included for administrative convenience in the same modification.	CODSIA concurs with revision.	
~~(a)(1)(iv)~~	~~The modification of any subcontract covered by subdivisions (a)(1)(iii) of the subsection, when the price adjustment (see subdivision (a)(1)(ii) of this subsection) is expected to exceed $100,000, of for the Department of Defense, the national Aeronautics and Space Administration, and the Coast Guard, for subcontracts when the modification involves a price adjustment expected to exceed $500,000 if the contract includes or has been modified to include the $500,000 threshold per 15.804-2(a)(2).~~	CODSIA concurs with revision.	

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REF	INTERIM RULE - [ADDED] ~~DELETED~~	CODSIA COMMENT	CODSIA RECOMMENDATION
(a)(2)	~~Department of Defense, National Aeronautics and Space Administration, and Coast Guard~~ c[C]ontracting officers shall, if requested by the [prime] contractor, modify contracts ~~entered into on or before December 5, 1990, to incorporate the $500,000 threshold~~ [**to change the threshold in the contract to the cost or pricing data threshold in paragraph (a)(1) of this subsection,**] without requiring consideration. ~~Contracting officers shall comply with contractors' requests for the threshold increase unless a contracting officer determines in accordance with the criteria at 15.804(a)(3) that a change in the threshold is not in the best interest of the Government. The requirement to submit certified cost or pricing data shall be determined by the threshold in the contract at the time of agreement on price regardless of when a undefinitized modification, change order or subcontract is issued.~~ [**The contract modification shall be accomplished by inserting into the contract the current version of the clauses 52.215-23, Price Reduction for Defective Cost or Pricing Data-Modifications, and 52.215-25, Subcontractor Cost or Pricing Data-Modifications, or 52.215-24, Subcontractor Cost or Pricing Data, as applicable. These new contract clauses shall apply only to contract modifications and subcontracts for which agreement on price occurs after the contracting officer has inserted the new clauses.**]	CODSIA concurs with guidance, but the provision is awkward. The provision should address the implementation of future threshold increases which should be self-executing within the provisions of the appropriates clauses. The terms "current version of the clauses" and "new contract clauses" will later have a confusing meaning. Reference to "prime" contractor is unnecessary and should be removed in the interest of FAR consistency.	**Threshold increases made pursuant to 15.804-2(a)(1) shall apply only to contract modifications and subcontracts for which agreement on price occurs after the effective date of the threshold increase.**

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REF	INTERIM RULE - [ADDED] ~~DELETED~~	CODSIA COMMENT	CODSIA RECOMMENDATION
(a)(3)	The contracting officer may obtain certified cost or pricing data for pricing actions below the pertinent threshold in subparagraph (a) (1) of this subsection provided the action exceeds the small purchase limitation. For such pricing data and inclusion of defective pricing clauses would be justified should be few; however, the contracting officer shall give special consideration to requiring certified cost or pricing data for such pricing actions if the offeror, contractor, or subcontractor-		
(a)(3)(i)	Has been the subject of recent or recurring, and significant findings of defective pricing;		
(a)(3)(ii)	Currently has significant deficiencies in it cost estimating systems; or		
(a)(3)(iii)	Has recently been indicted for, convicted of, or the subject of an administrative or judicial finding of fraud regarding its cost estimating systems or cost accounting practices.		
(a)(3) continued	The Contracting officer shall document the file to justify the requirement for cost or pricing data not required by regulation. The documentation shall include the contracting officer's written finding that certified cost o pricing data are necessary, the facts supporting that finding, and the approval of the finding at a level above the contracting officer.		
(a)(4)	The contracting officer shall not require certified cost or pricing data when awarding a contract below the small purchase limitation at 13.000.		
(a)(5)	When certified cost or pricing data are not required, the contracting officer may request partial or limited data to determine a reasonable price (see 15.804-6(a)(2)).		
(b)	When certified cost or pricing data are required, the contracting officer shall require the contractor or prospective contractor so submit to the contracting officer (and to have any subcontractor or prospective subcontractor submit to the prime contractor or appropriate subcontractor tier) the following in support of any proposal:		
(b)(1)	The cost or pricing data.		

REF	INTERIM RULE - [ADDED] ~~DELETED~~	CODSIA COMMENT	CODSIA RECOMMENDATION
(b)(2)	A certificate of current cost or pricing data, in the format specified in 15.804-4, certifying that to the best of its knowledge and belief, the cost or pricing data were accurate, complete, and current as of the date of final agreement on price.		
(c)	The requirement of this section also apply to contracts entered into by the head of an agency on behalf of a foreign government.		

REF	INTERIM RULE - [ADDED] ~~DELETED~~	CODSIA COMMENT	CODSIA RECOMMENDATION
15.813	~~Commercial pricing certificate.~~ [Reserved]	CODSIA concurs with revision.	
~~15.813-1~~	~~Scope and applicability.~~		
	~~This section prescribes policies and procedures for obtaining certificates from contracts relating to prices offered for parts of components as defined in 15.813-2. It implements 41 U.S.C. 253e. This section does not apply to the Department of Defense, the National Aeronautics and Space Administration, and the Coast Guard.~~		

REF	INTERIM RULE - [ADDED] ~~DELETED~~	CODSIA COMMENT	CODSIA RECOMMENDATION
~~15.813-2~~	**~~Definitions.~~**		
	~~"Lowest commercial price", as used in this section, means the lowest price at which a sale was made to the general public of a particular part or component. The term does not include the price at which a sale was made to-~~ ~~(a) Any agency of the United States;~~ ~~(b) Customers located outside the United States; or~~ ~~(c) A subsidiary, affiliate, or parent business organization of the contractor or any other branch of the same business entity.~~		
~~(1)~~	~~For resale after such customer performs a service or function in connection with such part or component that increases the cost of the part of component unless the agency procuring the part or component can demonstrate that the agency is procuring the part or component before such service or function has been performed by any such customer (see 15.813-6(c)); or;~~		
~~(2)~~	~~At a price that, for the purpose of making a donation, has been substantially discounted below the fair market value or regular price of such part or component.~~		
	~~"Part or component," as used in this section, means any individual part, component, subassembly, assembly, or subsystem integral to a major system, and other property which may be replaced during the service life of the system, and includes spare parts and replenishment spare parts, but does not include packaging or labeling associated with shipment or identification of a part of component.~~		

REF	INTERIM RULE - [ADDED] ~~DELETED~~	CODSIA COMMENT	CODSIA RECOMMENDATION
~~15.813-3~~	~~Policy.~~		
	~~Contracts entered into using other than full and open competition may not result in prices for parts or components (as defined in 15.813-2) offered for sale to the general public that exceed the contractor's lowest commercial prices for such parts or components unless the price difference is clearly justified by the seller or the contracting officer has determined to exempt the contractor from the requirement under 15.813-5(d). To this end, 41 U.S.C. 253e requires offerors to certify that prices offered for parts or components are not more than their lowest commercial prices, or to submit a written statement, specifying the amount of the difference between their lowest commercial prices for the parts or components and the prices offered, and providing justification for those differences. Because the forces of the competitive marketplace usually ensure that the Government does not pay too high a price for commercial parts or components, commercial pricing certificates are necessary only when these forces are not present in a particular contract action.~~		

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REF	INTERIM RULE - [ADDED] [DELETED]	CODSIA COMMENT	CODSIA RECOMMENDATION
~~15.813-4~~	~~Requirements for submission of commercial pricing certificates.~~		
	~~Unless a contract is exempt from the requirement pursuant to 15.813-5, commercial pricing certificates are required to be submitted with any of the following:~~		
~~(1)~~	~~Offers/proposals in connection with contracts to be awarded with other than full and open competition.~~		
~~(2)~~	~~Contract modifications, including contract modifications for additional parts or components, but not including contract modifications that are within the scope and under the terms of the contract, such as contract modifications issued pursuant to the Changes clause (but see subparagraph (b)(5) of this subsection, or funding and other administrative modifications.~~		
~~(3)~~	~~Orders under the provisioning line item of a contract, a basic ordering agreement, or similar arrangement if the order is being placed with other than full and open competition.~~		
~~(4)~~	~~Definitizationof price on a letter contract, unpriced order, or other contract, modification, or order awarded without a definitive price. (The commercial pricing certificate is not required before the initial award, but rather shall be submitted with the proposal to definitize.)~~		
~~(5)~~	~~Any modification issued pursuant to the Changes clause that results in the providing of new or different parts or components.~~		

REF	INTERIM RULE - [ADDED] ~~DELETED~~	CODSIA COMMENT	CODSIA RECOMMENDATION
~~15.813-5~~	~~Exemption from the requirement to submit commercial pricing certificates.~~		
	~~A contract is exempt from the requirement that a commercial pricing certificate be submitted if~~		
~~(a)~~	~~The simplified small purchase procedures of Part 13 are used;~~		
~~(b)~~	~~An acquisition is being made under the procedures established by the General Services Administration for its multiple award schedule program; or~~		
~~(c)~~	~~An order is placed under an indefinite delivery type contract (a certificate is required in connection with the award with other than full and open competition of an indefinite delivery type contract); or~~		
~~(d)~~	~~The contracting officer determines that obtaining the commercial pricing certificate is not appropriate because of~~		
~~(d)(1)~~	~~National security considerations; or~~		
~~(d)(2)~~	~~Significant differences between the terms of the commercial sales of the parts of components to be acquired under the contract and the terms of the contract, including differences in quantity, quality, delivery requirements, or other terms and conditions.~~		

REF	INTERIM RULE - [ADDED] ~~DELETED~~	CODSIA COMMENT	CODSIA RECOMMENDATION
~~15.813-6~~	~~Procedures.~~		
~~(a)~~	~~If a commercial pricing certificate is required in accordance with 15.813-4, the contracting officer shall ensure that the certificate set forth in paragraph (b) of the clause at 52.215-32, Certification of Commercial Pricing for Parts or Components, is submitted with each offer/proposal. Notice of the requirement and requests for submission of a certificate in the solicitation is accomplished through use of the solicitation provision at 52.215-37. Contracting officers are encouraged to enter into advance agreements with contractors to consolidate submission requirements when detailed repetitive certifications and justifications would otherwise be required.~~		

REF	INTERIM RULE - [ADDED] DELETED	CODSIA COMMENT	CODSIA RECOMMENDATION
~~(b)~~	~~When requested pursuant to paragraph (a) of this subsection, offerors/contractors are required to submit the commercial pricing certificate with their proposals unless the contracting officer determines to grant an exemption pursuant to 15.813-5(d). Exemptions of from the requirement to submit a commercial pricing certificate should not be granted pursuant to 15.813-5(d)(2) unless the contracting officer has sufficient information to verify that the contractor's lowest commercial pricing for parts or components offered for sale to the general public are subject to such substantial differences (in quantity, quality, delivery, or other terms and conditions) from Government contract terms so as to warrant the exemption. If the contracting officer determines that use of the lowest commercial price for a part or component is not appropriate for a contract under 15.813-5(d), this determination should be communicated to the offeror/contractor in writing. Contracting officers may accept information supporting possible exemptions from offerors/contractors at any time prior to agreement on pricing. Exemptions relieves the offeror/contractors from the statutory and contractual submission requirement.~~		
~~(c)~~	~~The contracting officer shall request submission of a new certificate when the validity of the certificate originally submitted with an offer/proposal becomes doubtful before awarded because of submission of a new or revised proposal or as a result of discussions.~~		

REF	INTERIM RULE - [ADDED] ~~DELETED~~	CODSIA COMMENT	CODSIA RECOMMENDATION
~~(d)~~	~~If, after award, the contracting officer learns or suspects that a certificate was inaccurate, incomplete, or misleading, the contracting officer shall request an audit under the authority of paragraph (c) of the clause at 52.215-32. If the contracting officer determines that a certificate is inaccurate, incomplete, or misleading, the Government is entitled to a price adjustment for any overcharge (see paragraph (d) of the clause at 52.215-32).~~		
~~(e)~~	~~Individual or class determinations made under 15.812-5(d)(1) or (2), and advance agreements made under paragraph (a) of this subsection, shall be documented in the contract file.~~		
~~(f)~~	~~Possession of a commercial pricing certificate is not a substitute for examining a contractor's proposal and determining that the prices offered are fair and reasonable. The certificate represents a tool to assist the contracting officer in the determination. The contracting officer shall obtain sufficient information with regular parts or components to permit an understanding of the contractor's commercial pricing structure and where within that structure the acquisition fits. (See 15.804-3(h) and data obtained on the Standard Form 1412, Claim for Exemption from Submission of Certified Cost or Pricing Data.)~~		

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REF	INTERIM RULE - [ADDED] ~~DELETED~~	CODSIA COMMENT	CODSIA RECOMMENDATION
~~15.813-7~~	~~Solicitation provision and contract clause.~~		
~~(a)(1)~~	~~The contracting officer shall insert the clause at 52.215-32, Certification of Commercial Pricing for Parts or Components, in solicitations and contracts if a commercial pricing certificate is required by 15.813-4.~~		
~~(a)(2)~~	~~The contracting officer shall insert the clause with its Alternate I in solicitations and contracts for sealed bids or negotiated acquisition involving the furnishing of parts or components using full and open competition.~~		
~~(b)~~	~~The contracting officer shall insert the provision at 52.215-27, Commercial Pricing Certificate Notice, in solicitations if a commercial pricing certificate is required by 15.813-4.~~		

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FAR SUBPART 52.2 - TEXTS OF PROVISIONS AND CLAUSES

REF	INTERIM RULE - [ADDED] ~~DELETED~~	CODSIA COMMENT	CODSIA RECOMMENDATION
52.214-27	**Price Reduction for Defective Cost or Pricing Data-Modifications-Sealed Bidding.**		
	As prescribed in 14.201-7(b), insert the following clause:		
	PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA-MODIFICATIONS-SEALED BIDDING ~~(DEC 1991)~~ [Nov 1994]		
(a)	This clause shall become operative only for any modification to this contract involving aggregate increases and/or decreases in costs, plus applicable profits, of more than $100,000, ~~or for the Department of Defense, the National Aeronautics and Space Administration, and the Coast Guard, more than $500,000~~ [the threshold for submission of cost or pricing data at (FAR) 48 CFR 15.804-2(a)(1)], except that this clause does not apply to any modification for which the price is-	CODSIA concurs with revision. The provision should be considered self-executing on any future threshold increases, as provided under 15.804-2(a)(2).	
(a)(1)	Based on adequate price competition;		
(a)(2)	Based on established catalog or market prices of commercial items sold in substantial quantities to the general public; or		
(a)(3)	Set by law or regulation.		

REF	INTERIM RULE - [ADDED] ~~DELETED~~	CODSIA COMMENT	CODSIA RECOMMENDATION
(b)	If any pricing, including profit, negotiated in connection with any modification under this clause, was increased by any significant amount because (1) the Contractor or a subcontractor furnished cost or pricing data that were not complete, accurate, and current as certified in its Certificate of Current Cost or Pricing Data, (2) a subcontractor or prospective subcontractor furnished the Contractor cost or pricing data that were not complete, accurate, and current as certified in the Contractor's Certificate of Current Cost or Pricing Data, or (3) any of these parties furnished data of any description that were not accurate, the price shall be reduced accordingly and the contract shall be modified to reflect the reduction. This right to a price reduction is limited to that resulting from defects in data relating to modifications for which this clause becomes operative under paragraph (a) above.		
(c)	Any reduction in the contract price under paragraph (b) above due to defective data from a prospective subcontractor that was not subsequently awarded the subcontract shall be limited to the amount, plus applicable overhead and profit markup, by which (1) the actual subcontract or (2) the actual cost to the Contractor, if there was not subcontract, was less than the prospective subcontract cost estimate submitted by the Contractor; provided, that the actual subcontract price was not itself affected by defective cost or pricing data.		
(d)(1)	If the Contracting Officer determines under paragraph (b) of this clause that a price or cost reduction should be made, the Contractor agrees not to raise the following matters as a defense-		
(d)(1)(i)	The Contractor or subcontractor was a sole source supplier or otherwise was in a superior bargaining position and thus the price of the contract would not have been modified even if accurate, complete, and current cost or pricing data had been submitted.		

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REF	INTERIM RULE - [ADDED] ~~DELETED~~	CODSIA COMMENT	CODSIA RECOMMENDATION
(d)(1)(ii)	The Contracting officer should have known that the cost or pricing data in issue were defective even though the Contractor or subcontractor took no affirmative action to being the character of the data to the attention of the Contracting Officer.		
(d)(1)(iii)	The contract was based on an agreement about the total cost of the contract and there was not agreement about the cost of each item procured under the contract.		
(d)(1)(iv)	The Contractor or subcontractor did not submit a Certificate of Current Cost or Pricing Data.		
(d)(2)(i)	Except as prohibited by subdivision (d) (2)(ii) of this clause, an offset in an amount determined appropriate by the Contracting Officer based upon the facts shall be allowed against the amount of a contract price reduction if-		
(d)(2)(i)(A)	The Contractor certifies to the Contracting Officer that, to the best of the Contractor's knowledge and belief, the Contractor is entitled to the offset in the amount requested; and		
(d)(2)(i)(B)	The Contractor proves that the cost or pricing data were available before the date of agreement on the price of the contract (or price of the modification) and that the data were not submitted before such date.		
(d)(2)(ii)	An offset shall not be allowed if-		
(d)(2)(ii)(A)	The understated data was known by the Contractor to be understated when the Certificate of Current Cost or Pricing Data was signed; or		
(d)(2)(ii)(B)	The Government proves that the facts demonstrate that the contract price would not have increased in the amount to be offset even if the available data had been submitted before the date of agreement on price.		
(e)	If any reduction in the contract price under this clause reduces the price of items for which payment was made prior to the date of the modification reflecting the price reduction, the Contractor shall be liable to and shall pay the United States at the time such overpayment is repaid-		

REF	INTERIM RULE - [ADDED] ~~DELETED~~	CODSIA COMMENT	CODSIA RECOMMENDATION
(e)(1)	Simple interest on the amount of such overpayment to be computed from the date(s) of overpayment to the Contractor to the date the Government is repaid by the Contractor at the applicable underpayment rate effective for each quarter prescribed by the Secretary of the Treasury under 26 U.S.C 6621(a)(2); and		
(e)(2)	For Department of Defense contracts only, a penalty equal to the overpayment, if the Contractor or subcontractor knowingly submitted cost or pricing data which were incomplete, inaccurate, or noncurrent. (End of clause)		

REF	INTERIM RULE - [ADDED] ~~DELETED~~	CODSIA COMMENT	CODSIA RECOMMENDATION
52.214-28	**Subcontractor Cost or Pricing Data-Modifications-Sealed Bidding.**		
	As prescribed in 14.201-7(c), insert the following clause in solicitations and contracts:		
	SUBCONTRACTOR COST OR PRICING DATA-MODIFICATIONS-SEALED BIDDING ~~(DEC 1991)~~ [Nov 1994]		
(a)	The requirements of paragraphs (b) and (c) of this clause shall (1) become operative only for any modification to this contract involving aggregate increases and/or decreases in costs, plus applicable profits, expected to exceed ~~$100,000, or for the Department of Defense, the National Aeronautics and Space Administration, and the Coast Guard, expected to exceed $500,000~~ **[the threshold for submission of cost or pricing data at (FAR) 48 CFR 15.804-2(a)(1)]**, and (2) be limited to such modifications.	CODSIA concurs with revision. The provision should be considered self-executing on any future threshold increases, as provided under 15.804-2(a)(2).	

REF	INTERIM RULE - [ADDED] ~~DELETED~~	CODSIA COMMENT	CODSIA RECOMMENDATION
(b)	Before awarding any subcontract expected to exceed ~~$100,000, or for the Department of Defense, the Nation Aeronautics and Space Administration, and the Coast Guard, expected to exceed $500,000~~ **[the threshold for submission of cost or pricing data at (FAR) 48 CFR 15.804-2(a)(1)]** when entered into, or pricing any subcontract modification involving aggregate increases and/or decreases in costs, plus applicable profits, excepted to exceed ~~$100,000, or for the Department of Defense, the National Aeronautics and Space Administration, and the Coast Guard, expected to exceed $500,000~~ **[the threshold for submission of cost or pricing data at (FAR) 48 CFR 15.804-2(a)(1)]**, the Contractor shall require the subcontractor to submit cost or pricing data (actually or by specific identification in writing), unless the price is- (1) Based on adequate price competition; (2) Based on established catalog or market prices of commercial items sold in substantial quantities to the general public; or (3) Set by law or regulation.	CODSIA concurs with revision. The provision should be considered self-executing on any future threshold increases, as provided under 15.804-2(a)(2).	
(c)	The Contractor shall require the subcontractor to certify in substantially the form prescribed in subsection 15.804-4 of the Federal Acquisition Regulation that, to the best of its knowledge and belief, the data submitted under paragraph (b) above were accurate, complete, and current as of the date of agreement on the negotiated price of the subcontract or subcontract modification.		

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REF	INTERIM RULE - [ADDED] ~~DELETED~~	CODSIA COMMENT	CODSIA RECOMMENDATION
(d)	The Contractor shall insert the substance of this clause, including this paragraph (d), in each subcontract that exceed ~~$100,000, or for the Department of Defense, the National Aeronautics and Space Administration, and the Coast Guard, in each subcontract that exceeds $500,000~~ **[the threshold for submission of cost or pricing data at (FAR) 48 CFR 15.804-2(a)(1)]** when entered into. (End of clause)	CODSIA concurs with revision. The provision should be considered self-executing on any future threshold increases, as provided under 15.804-2(a)(2).	

REF	INTERIM RULE - [ADDED] ~~DELETED~~	CODSIA COMMENT	CODSIA RECOMMENDATION
52.214-29	**Order of Precedence-Sealed Bidding.**		
	As prescribed in 14.201-7(d)[e], insert the following clause:	CODSIA concurs with revision.	
	ORDER OF PRECEDENCE-SEALED BIDDING (JAN 1986)		
	Any inconsistency in this solicitation or contract shall be resolved by giving precedence in the following order: (a) the Schedule (excluding the specifications); (b) representations and other instructions; (c) contract clauses; (d) other documents, exhibits, and attachments; and (e) the specifications. (End of clause)		

REF	INTERIM RULE - [ADDED] ~~DELETED~~	CODSIA COMMENT	CODSIA RECOMMENDATION
52.215-23	**Price Reduction for Defective Cost or Pricing Data-Modifications.**		
	As prescribed in 15.804-8(b), insert the following clause:		
	PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA-MODIFICATIONS (~~DEC 1991~~) [(NOV 1994)]		
(a)	This clause shall become operative only for any modification to this contract involving a pricing adjustment expected to exceed ~~$100,000, or for the Department of Defense, the National Aeronautics and Space Administration, and the Coast Guard, expected to exceed $500,000~~ **[the threshold for submission of cost or pricing data at (FAR) 48 CFR 15.804-2(a)(1)]**, except that this clause does not apply to any modification for which the price is- (1) Based on adequate price competition; (2) Based on established catalog or market prices of commercial items sold in substantial quantities to the general public; or (3) Set by law or regulation.	CODSIA concurs with revision. The provision should be considered self-executing on any future threshold increases, as provided under 15.804-2(a)(2).	

REF	INTERIM RULE - [ADDED] ~~DELETED~~	CODSIA COMMENT	CODSIA RECOMMENDATION
(b)	If any price, including profit or fee, negotiated in connection with any modification under this clause, or any cost reimbursable under this contract, was increased by any significant amount because (1) the Contractor or a subcontractor furnished cost or pricing data that were not complete, accurate, and current as certified in its Certificate of Current Cost or Pricing Data, (2) a subcontractor or prospective subcontractor furnished the Contractor cost or pricing data that were not complete, accurate, and current as certified in the Contractor's Certificate of Current Cost or Pricing Data, or (3) any of these parties furnished data of any description that were not accurate, the price or cost shall be reduced accordingly and the contract shall be modified to reflect the reduction. This right to a price reduction is limited to that resulting from defects in data relating to modifications for which this clause becomes operative under paragraph (a) of this clause.		
(c)	Any reduction in the contract price under paragraph (b) of this clause due to defective data from a prospective subcontractor that was not subsequently awarded the subcontract shall be limited to the amount, plus applicable overhead and profit markup, by which (1) the actual subcontract or (2) the actual cost to the Contractor, if there was no subcontract, was less than the prospective subcontract cost estimate submitted by the Contractor; *provided*, that the actual subcontract price was not itself affected by defective cost or pricing data.		

REF	INTERIM RULE - [ADDED] ~~DELETED~~	CODSIA COMMENT	CODSIA RECOMMENDATION
(d)(1)	If the Contracting Officer determines under paragraph (b) of this clause that a price or cost reduction should be made, the Contractor agrees not to raise the following matters as a defense- (i) The Contractor or subcontractor was a sole source supplier or otherwise was in a superior bargaining position and thus the price of the contract would not have been modified even if accurate, complete, and current cost or pricing data had been submitted. (ii) The Contracting Officer should have known that the cost or pricing data in issue were defective even though the Contractor or subcontractor took no affirmative action to bring the character of the data to the attention of the Contracting Officer. (iii) The contract was based on an agreement about the total cost of the contract and there was n agreement about the cost of each item procured under the contract. (iv) The Contractor or subcontractor did not submit a Certificate of current Cost or Pricing Data.		

REF	INTERIM RULE - [ADDED] ~~DELETED~~	CODSIA COMMENT	CODSIA RECOMMENDATION
(d)(2)	(2)(i) Except as prohibited by subdivision (d)(2)(ii) of this clause, an offset in an amount determined appropriate by the Contracting Officer based upon the facts shall be allowed against the amount of a contract price reduction if- (A) The Contractor certifies to the Contracting Officer that, to the best of the Contractor's knowledge and belief, the Contractor is entitled to the offset in the amount requested; and (B) The Contractor proves that the cost or pricing data were available before the date of agreement on the price of the contract (or price of the modification) and that the data were not submitted before such date. (ii) An offset shall not be allowed if- (A) The understated data was known by the Contractor to be understated when the Certificate of Current Cost or Pricing Data was signed; or (b) The Government proves that the facts demonstrate that the contract price would not have increased in the amount to be offset even if the available data had been submitted before the date of agreement on price.		
(e)	If any reduction in the contract price under this clause reduces the price of items for which payment was made prior to the date of the modification reflecting the price reduction, the Contractor shall be liable to and shall pay the Unites States at the time such overpayment is repaid-		
(e)(1)	Simple interest on the amount of such overpayment to be computed from the date(s) of overpayment to the Contractor to the date of the Government is repaid by the Contractor at the applicable underpayment rate effective for each quarter prescribed by the Secretary of the Treasury under 26 U.S.C. 6621(a)(2); and		

REF	INTERIM RULE - [ADDED] ~~DELETED~~	CODSIA COMMENT	CODSIA RECOMMENDATION
(e)(2)	For Department of Defense contracts only, a penalty equal to the amount of the overpayment, if the Contractor or subcontractor knowingly submitted cost or pricing data which were incomplete, inaccurate, or noncurrent. (End of clause)		

REF	INTERIM RULE - [ADDED] ~~DELETED~~	CODSIA COMMENT	CODSIA RECOMMENDATION
52.215-24	**Subcontractor Cost or Pricing Data.**		
	As prescribed in 15.804-8(c), insert the following clause:		
	SUBCONTRACTOR COST OR PRICING DATA ~~(DEC 1991)~~ [(NOV 1994)]		
(a)	Before awarding any subcontract expected to exceed ~~$100,000, or for the Department of Defense, the National Aeronautics and Space Administration, and the Coast Guard, expected to exceed $500,000~~ **[the threshold for submission of cost or pricing data at (FAR) 48 CFR 15.804-2(a)(1)]**, when entered into, or before pricing any subcontract modification involving a pricing adjustment expected to exceed ~~$100,000, or for the Department of Defense, the National Aeronautics and Space Administration, and the Coast Guard, expected to exceed $500,000~~ **[the threshold for submission of cost or pricing data at (FAR) 48 CFR 15.804-2(a)(1)]**, the Contractor shall require the subcontractor submit cost or pricing data (actually or by specific identification in writing), unless the price is- (1) Based on adequate price competition; (2) Based on established catalog or market prices of commercial items sold in substantial quantities to the general public; or (3) Set by law or regulation.	CODSIA concurs with revision. The provision should be considered self-executing on any future threshold increases, as provided under 15.804-2(a)(2).	
(b)	The Contractor shall require the subcontractor to certify in substantially the form prescribed in subsection 15.804-4 of the Federal Acquisition Regulation (FAR) that, to the best of its knowledge and belief, the data submitted under paragraph (a) of this clause were accurate, complete, and current as of the date of agreement on the negotiated price of the subcontract or subcontract modification.		

REF	INTERIM RULE - [ADDED] ~~DELETED~~	CODSIA COMMENT	CODSIA RECOMMENDATION
(c)	In each subcontract that exceed ~~$100,000, or for the Department of Defense, the National Aeronautics and Space Administration, and the Coast Guard, in each subcontract that exceed~~ $500,000 **[the threshold for submission of cost or pricing data at (FAR) 48 CFR 15.804-2(a)(1)]**, when entered into, the Contractor shall insert either- (1) The substance of this clause, including this paragraph (c), if paragraph (a) of this clause requires submission of cost or pricing data for the subcontract; or (2) The substance of the clause at FAR 52.215-25, Subcontract Cost or Pricing Data-Modifications. (End of clause)	CODSIA concurs with revision. The provision should be considered self-executing on any future threshold increases, as provided under 15.804-2(a)(2).	

REF	INTERIM RULE - [ADDED] ~~DELETED~~	CODSIA COMMENT	CODSIA RECOMMENDATION
52.215-25	**Subcontractor Cost or Pricing Data-Modifications.**		
	As prescribed in 15.804-8(d), insert the following clause:		
	SUBCONTRACTOR COST OR PRICING DATA-MODIFICATIONS ~~(DEC 1991)~~ [(NOV 1994)]		
(a)	The requirements of paragraphs (b) and (c) of this clause shall (1) become operative only for any modification to this contract involving a pricing adjustment expected to exceed ~~$100,000, or for the Department of Defense, the National Aeronautics and Space Administration, and the Coast Guard, expected to exceed $500,000~~ **[the threshold for submission of cost or pricing data at (FAR) 48 CFR 15.804-2(a)(1)]**; and (2) be limited to such modifications.	CODSIA concurs with revision. The provision should be considered self-executing on any future threshold increases, as provided under 15.804-2(a)(2).	
(b)	Before awarding any subcontract expected to exceed ~~$100,000, or $500,000 for the Department of Defense, the National Aeronautics and Space Administration, and the Coast Guard~~ **[the threshold for submission of cost or pricing data at (FAR) 48 CFR 15.804-2(a)(1)]** when entered into, or pricing any subcontract modification involving a pricing adjustment expected to exceed ~~$100,000, or for the Department of Defense, the National Aeronautics and Space Administration, and the Coast Guard, expected to exceed $500,000~~ **[the threshold for submission of cost or pricing data at (FAR) 48 CFR 15.804-2(a)(1)]**, the Contractor shall require the subcontractor to submit cost or pricing data (actually or by specific identification in writing), unless the price is- (1) Based on adequate price competition; (2) Based on established catalog or market prices o commercial items sold in substantial quantities to the general public; or (3) Set by law or regulation.	CODSIA concurs with revision. The provision should be considered self-executing on any future threshold increases, as provided under 15.804-2(a)(2).	

REF	INTERIM RULE - [ADDED] ~~DELETED~~	CODSIA COMMENT	CODSIA RECOMMENDATION
(c)	The Contractor shall require the subcontractor to certify in substantially the form prescribed in subsection 15.804-4 of the Federal Acquisition Regulation (FAR) that, to the best of its knowledge and belief, the data submitted under paragraph (b) of this clause were accurate, complete, and current as of the date of agreement on the negotiated price of the subcontract or subcontract modification.		
(d)	The Contractor shall insert the substance of this clause, including this paragraph (d), in each subcontract that exceeds ~~$100,000, or for the Department of Defense, the National Aeronautics and Space Administration, and the Coast Guard, in each subcontract that exceeds $500,000~~ [**the threshold for submission of cost or pricing data at (FAR) 48 CFR 15.804-2(a)(1)**], when entered into. (End of clause)	CODSIA concurs with revision. The provision should be considered self-executing on any future threshold increases, as provided under 15.804-2(a)(2).	

REF	INTERIM RULE - [ADDED] ~~DELETED~~	CODSIA COMMENT	CODSIA RECOMMENDATION
52.215-32	~~Certification of Commercial Pricing for Parts or Components.~~ [Reserved]	CODSIA concurs with revision.	
	~~As prescribed in 15.813-7(a), insert the following clause:~~		
	~~CERTIFICATION OF COMMERCIAL PRICING FOR PARTS OR COMPONENTS (AUG 1991)~~		

REF	INTERIM RULE - [ADDED] DELETED	CODSIA COMMENT	CODSIA RECOMMENDATION
~~(b)~~	~~*Submission requirements.* The Offeror/Contractor shall execute and submit to the Contracting Officer the following certificate with any offer/proposal as required by FAR 15.813-4 when requested by the Contracting Officer:~~ ~~CERTIFICATE OF COMMERCIAL PRICING FOR PARTS OR COMPONENTS~~ ~~(1) Unless justified in subparagraph (b)(2) of this clause, by submission of this offer/proposal, the Offeror/Contractor certifies that, to the best of its knowledge and belief, the prices offered for those parts or components (whether or not separately identified that the Contractor offers for sale are no higher than the lowest commercial price at which such items were sold to the public during the most recent regular monthly, quarterly, or other period for which sales data are reasonably available, provided that in no event shall this period be less than 1 month in duration.~~ ~~(2) All parts or components for which prices offered are higher than the lowest commercial price referred to in subparagraph (b)(1) of this certificate are identified below (including the amounts by which such offered prices are higher) and are written justification for the differences is attached (list as necessary):~~ ~~Part or Component Difference~~ ~~Offer/Proposal No.~~ ~~Time Period for sales data~~ ~~Firm~~ ~~Typed name and signature~~ ~~Title~~ ~~Date~~ ~~(End of certificate)~~		

REF	INTERIM RULE - [ADDED] ~~DELETED~~	CODSIA COMMENT	CODSIA RECOMMENDATION
~~(c)~~	~~*Audit*. The Contracting Officer or representatives of the Contracting Officer who are employees of the Government shall have the right to examine and audit all directly pertinent records of sales and related documents, including contract terms and conditions, necessary to verify the validity of any certificate executed in accordance with paragraph in paragraph (b) of this clause. The Contractor shall make those records, books, data, and documents available for examination, audit, or reproduction until 3 years after the date the certificate set forth in paragraph (b) of this clause is executed. Nothing contained in this clause shall require the submission of cost or pricing data not otherwise required by law or regulation.~~		
~~(d)~~	~~*Price reduction*. If any price, including profit or fee negotiated in connection with this contract, or any cost reimbursable under this contract, has increased because the certification in subparagraph (b)(1) of the certificate or the information provided as justification in subparagraph (b)(2) of the certificate was inaccurate, incomplete, or misleading, the price or cost shall be reduced accordingly and the contract shall be modified to reflect the reduction.~~		
	~~*Alternate I* (JUL 1990). As prescribed in 15.813-7(a)(2), insert the following paragraph in the clause without a paragraph identifier, before paragraph (a) of this clause:~~ ~~The requirements of this clause shall become operative only for any modifications to this contract involving the furnishing of parts or components, as defined in paragraph (a) of this clause, if awarded as a result of other than full and open competition.~~ ~~(End of clause)~~		

REF	INTERIM RULE - [ADDED] ~~DELETED~~	CODSIA COMMENT	CODSIA RECOMMENDATION
52.215-37	~~Commercial Pricing Certificate Notice.~~ [Reserved]	CODSIA concurs with revision.	
	~~As prescribed in 15.813-7(b), insert the following provision:~~		
	~~COMMERCIAL PRICING CERTIFICATE NOTICE (JUL 1990)~~		
	~~Line items_____of this solicitation are parts or components to be acquired under conditions that require the submission of a commercial pricing certificate. The Offeror shall comply with the clause at FAR 52.215-32, Certification of Commercial Pricing for Parts or Components, and execute and submit a certificate with its offer.~~		

CODSIA Case 13–94.6

February 13, 1995

Mr. Clarence Belton
FAR Secretariat (VRS)
Room 4037
General Services Administration
18th and F Streets, N. W.
Washington, D.C. 20504

DEAR MR. BELTON: The undersigned members of the Council of Defense and Space Industry Associations (CODSIA) appreciate the opportunity to respond to the proposed FAR revisions to various provisions of Parts 31, 37, 42, and the prescription reference language and clauses at Part 52.237.

Our comments are shown below in the same order as the proposed revisions appear in the December 13th Federal Register Notice.

31.205–6 Compensation for Personal Services

The first sentence of subparagraph (g)(3) states that ", the costs of severance payments to foreign nationals employed under a service contract *or subcontract* performed outside the United States are unallowable . . .". (Emphasis added.) The emphasized words "or subcontract" are an addition to the language contained in FASA Section 2151, which amends 41 U.S.C. 256., and are in addition to the language under 10 U.S.C. 2324(e). While the words "or subcontract" do appear in DFARS 231.205–5(g)(2)(i), they are not contained in the related DFARS clause at 252.237–7020. If there is a compelling rationale for adding the words "or subcontract" in the FAR implementation when they were not included in any of the related legislative provisions, it should have been added to the "Background" section of the Federal Register issuance (12/13/94). Absent a compelling rationale, the words "or subcontract" should be eliminated from subparagraph (g)(3) and the proposed additional Solicitation and Contract Clauses at 52.237–XXX and 52.237–YYY.

31.205–22 Legislative Lobbying Costs

The proposed rule would change subparagraphs (a)(3) and (4) to read "Federal, state, or local" each time the words "Federal or state" appears. The change is proposed based on the statutory text making certain costs unallowable, found in Section 2151 of Federal Acquisition Streamlining Act (FASA), subparagraph (e)(B). The actual text language reads as follows:

> "(B) Costs incurred to influence (directly or indirectly) legislative action or any matter pending before Congress, a State legislature, or a legislative body of a political subdivision of a State."

The use of the term "or local" in place of "a legislative body of a political subdivision of a State." may have broadened the language of subparagraph (B) beyond that intended by the legislation. Depending on the structure of the "local" government, the proposed changes to 31.205–22 may, or may not, refer to "a legislative body of a political subdivision of a State." Therefore, we recommend that the specific language in FASA Section 2151 (e)(B), i.e., "or a legislative body of a political subdivision of a State," be used in revising subparagraphs (a)(3) and (4) of FAR subpart 31.205–22 to incorporate the FASA change.

42.703 Policy

The proposed rule would change subparagraph (c)(2) to require that contracting officers "use established final indirect rates in negotiating the final price of fixed-price incentive and fixed-price redeterminable contracts and in other situations requiring that indirect costs be settled before contract prices are established." This amends the current FAR provision which states that contracting officers shall "take into consideration established final indirect cost rates" in such negotiations.

The proposed change would limit the flexibility of contracting officers in firming up prices under incentive and price redeterminable contracts. Moreover, the proposed change is inconsistent with the applicable statutory provisions in 10 U.S.C. 2324 (a) and 41 U.S.C. 256 (a) since the legislation is silent on what the contracting officer must use as rates in such negotiations. The law only states that if a cost contained in a proposal for settlement of indirect costs is unallowable because it violates FAR or a FAR supplement, then the cost shall be disallowed.

Final indirect cost rates (frequently audit determined rates) are computed giving consideration to the composition of the proposed indirect cost bases, the allowability of costs in the proposed pools, and a variety of other factors which both parties bring to the negotiation table. For example, a contracting officer, in negotiating a final price under a price redeterminable contract, may be uncomfortable using a 35% au-

dited G&A rate following the establishment of audited rates for both of the two previous years fiscal years of 25%. The higher audited rate (35%) may be due exclusively to a declining contract workload rather than allowable indirect cost increases and the Contracting Officer may be inclined to offer a lower rate for price redetermination purposes because he/she believed that the contractor had not exerted enough effort to reduce indirect costs commensurate with base declines. If the proposed revision is incorporated into subparagraph (c)(2), the Contracting Officer will have no choice but to use the higher audit determined rate. Since the current FAR coverage is consistent with FASA in that it provides Contracting Officers with flexibility in the use of final indirect cost rates in negotiating final prices under flexibly priced contracts, we recommend no change.

If you should wish to discuss any of the above comments and recommendations, please contact Mr. Richard Powers, Director of Financial Administration, Aerospace Industries Association, at (202) 371–8526.

Sincerely,

DON FUQUA,
President, Aerospace Industries Association.

LAWRENCE F. SKIBBIE,
President, American Defense Preparedness Association.

JOHN F. MANCINI,
Chief Operating Officer, American Electronics Association.

GARY D. ENGEBRETSON,
President, Contract Services Association.

DAN C. HEINEMEIER,
Vice President, Electronic Industries Association.

KENNETH MCLENNAN,
President, Manufacturers Alliance for Productivity and Innovation.

JAMES R. HOGG,
President, National Security Industrial Association.

BERT M. CONCKLIN,
President, Professional Services Council.

S.O. NUNN,
Acting President, Shipbuilders Council of America.

CODSIA Case 13–94.7

February 9, 1995

Mr. Clarence Belton
FAR Secretariat (VRS)
Room 4037
General Services Administration
18th & F Streets, N. W.
Washington, D.C. 20405

DEAR MR. BELTON: We appreciate the opportunity to respond to the proposed revisions to FAR Subpart 31.205–46, Travel Costs (FAR Case 94–753).

We strongly disagree with the proposed changes because they are inconsistent with the intent of Congress in repealing Section 24 of the Office of Federal Procurement Policy Act (41 U.S.C. 420).

As noted in the Background Section of the Federal Register issuance of the proposed revisions, the intent of Congress in enacting the Federal Acquisition Streamlining Act of 1994 (FASA) was to streamline the acquisition process and minimize burdensome Government-unique requirements. The Streamlining Act repealed the above-referenced provision in the OFPP statute that essentially established for Federal contractors the per diem rates in the Federal Travel Regulations (FTR) or the Joint Travel Regulations (JTR) as the basis for determining the reasonableness of a contractor employee's cost of travel (hotel and meals).

The Section 800 Panel Report advised Congress that limiting reimbursement of contractors' travel to rates applicable to travel of Federal employees was unreasonable and unrealistic. Hotel rates available to Federal employees are rarely available to contractor employees and the same is true of Federal employee state/city tax exemption certificates that most hotels honor. The result is significantly higher lodging costs for contractor employees, with taxes alone adding as much as ten percent to the hotel charges.

The Section 800 Panel also made the following additional point in its report to Congress:

> "Currently, there are several complex and comprehensive provisions in the FAR governing the allowability and allocability of contractor travel expenses. Because the regulatory process provides greater flexibility in implementation and quicker responses to changing conditions, it is unnecessary to retain this statutory authority. In the interests of encouraging the integration of the defense and commercial markets, it is further recommended that the regulations promulgated in the place of this statute require contractors to keep travel costs to a reasonable level, without restricting them to rigid rate schedules."

Congressional acceptance of the 800 Panel Report recommendations recognized the inequities and burdensome administrative costs associated with the earlier statute and that was the rationale for its repeal.

The proposed rule does not implement Congressional repeal of the use of Federal per diem rates for Federal contractors and the added revision proposes an alternative new process that potentially will generate hundreds of individual company rate schedules that would need to be negotiated and administered by contractors and the Government. Each segment of each company will be required to support rate schedules of travel cost incurred by each employee. The new process is neither cost effective nor consistent with Congressional efforts to streamline Federal Acquisition policies and procedures. We believe there is a better alternative to respond to both Government and contractor concerns about ensuring the reasonableness of contractor travel costs in the current environment.

In our opinion, the existing provisions in FAR 31.201–3 are satisfactory for establishing cost reasonableness, and therefore we recommend that the proposed travel cost principle be revised to eliminate the use of Federal per diem rates as a basis for establishing the reasonableness of contractor travel costs. Our revision to the proposed rule would include the elimination of FAR 31.205–46 (a) subparagraphs (2), (3), (4), (5) and (6). FAR 31.201–3 provides an opportunity to question or challenge the reasonableness of a contractor's cost without requiring Federal per diem rate tables or hundreds of alternative rate tables. Moreover, competition in the marketplace demands that contractors not exceed the boundaries of reasonableness, and competition for the services of valued employees requires that a contractor's travel policies ensure that its employees are fairly reimbursed for business travel expenditures. We strongly believe that our recommended approach of control by market forces coupled with existing FAR 31.203–3 provisions in lieu of additional regulatory control is both cost effective and more beneficial to the Government. Furthermore, the Government can still challenge any transactions where travel costs appear to be excessive.

Finally, returning to the subject of Congressional intent, Section 2191 of the Streamlining Act made the repeal of Section 24 of the OFPP Act effective immediately. (See FASA Section 10001(c).) Nothing in the law or "statement of managers" authorized the retention of the complex system referred to in paragraph (a) (2) of 31.205–46 until a contracting officer approves of an acceptable alternative system. As indicated above, we believe the FAR Council is obliged to consider the intent of Congress in developing implementing regulations relating to the immediate repeal of the OFPP statutory provision.

If we may be of further assistance and/or answer questions regarding our recommendations, please contact Mr. Richard Powers, Director of Financial Administration, Aerospace Industries Association (202/371–8526).

Sincerely,

DON FUQUA,
President, Aerospace Industries Association.
LAWRENCE F. SKIBBIE,
President, American Defense Preparedness Association.
JOHN F. MANCINI,
Chief Operating Officer, American Electronics Association.
GARY D. ENGEBRETSON,
President, Contract Services Association.
DAN C. HEINEMEIER,
Vice President, Electronic Industries Association.
KENNETH MCLENNAN,
President, Manufacturers Alliance for Productivity and Innovation.
JAMES R. HOGG,
President, National Security Industrial Association.
BERT M. CONCKLIN,
President, Professional Services Council.
S.O. NUNN,
Acting President, Shipbuilders Council of America.

CODSIA Case 13–94.8

February 13, 1995

General Services Administration
FAR Secretariat (VRS)
ATTN: Ms. Diane Maykowskyj
18th & F Streets, N.W.
Room 4037
Washington, D.C. 20405

Subject: FAC Case 9024, Federal Acquisition Regulation, Micro-Purchase Procedures (FAR Case 94–771)

DEAR FAR COUNCIL: The undersigned members of the Council of Defense and Space Industry Associations (CODSIA) appreciate the opportunity to comment on the interim rule published in the Federal Register on December 15, 1994 (Vol. 59, No. 240). Formed in 1964 by industry associations with common interests in the defense and space fields, CODSIA is currently composed of nine associations representing over 4,000 member firms across the nation. Participation in CODSIA projects is strictly voluntary; a decision by any member association to abstain from participating in a particular activity is not necessarily an indication of dissent.

The interim rule, which was effective December 15, 1994, implements provisions of the Federal Acquisition Streamlining Act of 1994 (Public Law 103–355) which (1) established the threshold for micro-purchases at $2,500 and (2) exempts purchases not exceeding the micro-purchase threshold from the Buy American Act and certain small business requirements.

CODSIA members have reviewed this interim rule and do not believe that it fully supports the FASA goal to simplify micro-purchase acquisitions. Our review suggests the administrative burden has not been eased and we offer the following comments to support that position and suggest improvements that will take steps toward that end.

We believe that micro-purchases should be handled on a commercial basis with no government-unique clauses included as part of the purchase. It is our understanding that in many instances, credit cards will be used to buy commercial items and may make purchases directly from retail outlets. We do not believe such a system will be workable with a number of government-unique clauses being used on such small dollar purchases.

However, if the government is not going to eliminate all such clauses, we strongly suggest that a new section be added to the new FAR subpart 13.6 that would list the only clauses that apply to micro-purchases. We believe the section should state that "no other clause, even if incorporated onto a purchase order, is effective other than the clauses listed in the section." An exception could be made for terms and conditions pertaining to the identity of items and services, quantities, price, delivery date, and delivery location. The government might consider whether it wants to add another form for micro-purchases.

We suggest that the list be drawn from the current version of the clauses listed in the OF347 with—at least—the following deleted:

FAR 52.203–1, Officials Not to Benefit (proposed to be deleted on December 1, 1994)

FAR 52.222–41, Service Contract Act (only applies over $2,500)

FAR 52.225–3, Buy American Act-Supplies (only applies over $2,500)

FAR 52.243.1, Changes-Fixed Price (no application to commercial items)

A possible additional clause to add would be the old DFAR 252.7001, "Warranty Exclusion and Limitation of Damages (February 1983)." Commercial companies provide for such protection in selling their items and this clause would provide for uniformity.

FAR Subpart 13.602 does not recognize that micro-purchase procedures can be effectively used by prime contractors. The clauses that are required to be flowed down prohibit prime contractors from taking advantage of the simplified procedures of the micro-purchase. Therefore we recommend that a subparagraph (d) be added as follows:

"(d) Contracts and subcontracts for less than the micro-purchase threshold of $2,500 may be awarded without including any contract clauses otherwise required by FAR."

The interim rule in FAR Subpart 13.603 states in subparagraph (a) that the "Micro-purchases may be awarded without soliciting competitive quotations if the contracting officer determines that the price is reasonable." Also, in subparagraph (b)(1), the contracting officer is directed to verify price reasonableness if there is a suspicion that the price may not be reasonable. This language places too much emphasis on the determination of price reasonableness and is going to give contracting officers the message that the need for a determination is the norm. We believe the subpart should be rewritten to emphasize the fact that the administrative cost of verifying the price reasonableness will offset potential savings.

This subpart does not recognize that the micro-purchases can be made without the use of required FAR clauses. FAR requires the clause at 52.203–6, Restrictions on Subcontractor Sales to the Government. This type clause cannot and should not be included when a Government-wide Commercial Purchase Card is used to make a purchase.

Therefore, we recommend that 13.603(a) be changed to read "Micro-purchases shall be awarded without soliciting competitive quotations unless the contracting officer determines in writing that the price is not reasonable." Paragraph (b)(1) should say "The contracting officer has information to indicate that the price may not be reasonable . . ." Also, a subparagraph (d) should be added as follows:

"(d) Micro-purchases may be awarded without including any contract clauses otherwise required by FAR.."

If you have any questions about our comments or need additional information, please contact Roger Smith, American Electronics Association, at (20) 682–4434.

Sincerely,

DON FUQUA,
President, Aerospace Industries Association.

LAWRENCE F. SKIBBIE,
President, American Defense Preparedness Association.

JOHN F. MANCINI,
Chief Operating Officer, American Electronics Association.

GARY D. ENGEBRETSON,
President, Contract Services Association.

DAN C. HEINEMEIER,
Vice President, Electronic Industries Association.

KENNETH MCLENNAN,
President, Manufacturers Alliance for Productivity and Innovation.

JAMES R. HOGG,
President, National Security Industrial Association.

BERT M. CONCKLIN,
President, Professional Services Council.

CODSIA Case 13–94.9

February 13, 1995

Ms. Melissa Rider
Contract Award Team Leader
FAR Secretariat
General Services Administration
18th & F Streets, NW
Room 4037
Washington, DC 20405

Re: FAR Case 94–700

DEAR MS. RIDER: The undersigned members of the Council of Defense and Space Industry Associations (CODSIA) are pleased to have this opportunity to comment on the proposed rules implementing Sections 1021 and 1071 of the Federal Acquisition Streamlining Act of 1994 (FASA). The rules address the repeal of the requirement for secretariat/agency head determinations for the use of cost-type or incentive contracts.

We believe the proposed rule effectively reflects the letter and intent of FASA and we are supportive of it. We do, however, have one request for a modest addition to the rule.

We are concerned that the rule lacks clarity regarding the use of Fixed-Price, Incentive Fee (FPIF) contracts, which, depending on the incentive matrix involved, can be quite similar to a Firm Fixed Price (FFP) contract. Currently, the law and the DFAR contains specific proscriptions against the use of fixed-price type contracts for research and development, unless a high level agency official grants specific approval otherwise. It has been unclear whether the proscription—and corresponding higher level approval requirement—applies to both FPIF and FFP type contracts.

The passage of FASA, and the removal of higher-level approval requirements, will result in there being even less, if any at all, oversight to ensure that an incentive contract for R&D is not structured in such a way as to approximate a FFP type contract while circumventing the current requirements for higher level review of the use of such contracts in R&D.

Therefore, we request that the final rule include a requirement that the use of FPIF contracts for R&D for contracts in excess of $25 million continue to be subject to a secretarial determination. In so doing, we believe the intent and spirit of FASA as well as current, and important DFAR requirements can be met.

If you have any questions or need further information on this subject, please contact Stan Soloway of the Contract Services Association (202/347–0600), who is serving as CODSIA's project officer for this FAR Case.

Thank you for your time and consideration.

Sincerely,

DON FUQUA,
President, Aerospace Industries Association.

LAWRENCE F. SKIBBIE,
President, American Defense Preparedness Association.

JOHN F. MANCINI,
Chief Operating Officer, American Electronics Association.

GARY D. ENGEBRETSON,
President, Contract Services Association.

DAN C. HEINEMEIER,
Vice President, Electronic Industries Association.

KENNETH MCLENNAN,
President, Manufacturers Alliance for Productivity and Innovation.

JAMES R. HOGG,
President, National Security Industrial Association.

BERT M. CONCKLIN,
President, Professional Services Council.

S.O. NUNN,
Acting President, Shipbuilders Council of America.

CODSIA Case 13–94.10

February 16, 1995

FAR Secretariat (VRS)
ATTN: Ms. Beverly Fayson
General Services Administration
Room 4037
18th & F Streets, N.W.
Washington, D.C. 20405

DEAR MS. FAYSON: The undersigned members of the Council of Defense and Space Industry Associations are pleased to comment on the proposed rule that establishes FAR requirements for the imposition of penalties in instances where unallowable costs are found in final indirect cost proposals, or in the final statement of costs incurred or estimated to be incurred under a fixed-price incentive contract. Penalties would apply to all contracts in excess of $500,000, except fixed-price contracts without cost incentives or any firm fixed-price contract for the purchase of commercial items.

There appear to be a number of inconsistencies in the proposed FAR coverage. The new subpart 31.110 reads as follows:

> "Certain contracts require certification of the indirect cost rates proposed for progress or billing purposes. If unallowable costs are included in final indirect cost settlement proposals, penalties may be assessed. See 42.703–2 and 42–709 for administrative procedures regarding the certification and penalty assessment provisions and for related contract clause prescriptions."

The above-referenced paragraph begins by referencing the need to certify in certain contracts "only" indirect cost rates proposed for "progress and billing purposes." The statements following that beginning sentence note that penalties may be assessed if unallowable costs are included in "final indirect cost settlement proposals." There is no reference to penalties being imposed when unallowable costs are found in rates proposed for "progress or billing purposes." Then the last sentence in the paragraph refers the reader to 42–703–2 and *42–709* for administrative procedures regarding the certification and penalty assessment provisions. (Emphasis added.)

The referenced and proposed new FAR 42–709 (a) states that . . . "It covers the assessment of penalties against contractors which include unallowable indirect costs in (1) Final indirect cost rate proposals, or (2) The Final statement of costs incurred or estimated to be incurred under a fixed-price incentive contract. . . ." This paragraph makes no mention of penalties for the inclusion of the allowable indirect costs in rates proposed for "progress or billing purposes." Nevertheless, the proposed clause prescribed to be used in 42.709–6, i.e., 52.202–00 (Penalties for Unallowable Costs), states in paragraph (a) that a "proposal" means "either (1) A final indirect cost rate proposal submitted by the contractor after the expiration of its fiscal year which (i) Relates to any payment made on the basis of billing rates or (ii) Will be used in negotiating the final contract price; . . . ." In the solicitation and contract clause, then, there is a nebulous reference to penalties in a proposal for "billing rates" containing unallowable costs even though the provision (42–709) prescribing the use of the clause makes no reference to penalties for unallowable costs in billing rate proposals.

When the regulation writers consider correcting what appear to confusing inconsistencies in the proposed coverage, they should note the points that we made in providing comments on FAR Case 94–752, Contractor Overhead Certification. Section 2151 (h) of FASA does not include a requirement for the certification of indirect "billing rates." Accordingly, the final coverage in both FAR Cases should eliminate any references to "billing rates."

Also, in the proposed 42.709–2(a)(3) and 42.709–2(b)(3), the same responsibilities are assigned to the contracting officer and the contract auditor for "referring the matter to the appropriate criminal investigative organization . . . , if there is evidence that the contractor knowingly submitted unallowable costs." To avoid confusion and duplication, it is recommended that (b)(3) be amended to add the following sentence:

> "The referral actions should be coordinated with the Contracting Officer, except in cases when the audit matters normally involve only contract audit staff, e.g., establishment of auditor-determined rates."

In addition, in the same aforementioned subparagraphs, the drafters of the proposed regulation should refrain from using phrases such as the "appropriate criminal investigative organization." Use of this language prejudges the intentions of the person(s) involved in preparation of cost proposals. We suggest that the wording be changed to the "appropriate organization," or at a minimum, to the "appropriate investigative organization."

Finally, we believe the proposed regulation should note, and accept in the provisions of subpart 42.709, a contractor's voluntary disallowance of a lump-sum amount to offset any inadvertent unallowable costs in the final rate submission. Voluntary disallowances are occasionally proposed when the contractor's representative suspects there are some inadvertent unallowable costs included in rate proposal submission to the Government. These situations may arise in cases where the contractor has undergone frequent reorganizations, or where the immateriality of Government business makes the costs of instituting procedures, staff training, and oversight to identify the unallowable costs appear to be of unequal benefit. If the contractor's representative believes it is in the company's interest to voluntarily set-aside a certain lump sum (reduce the proposed indirect cost pool) to compensate for specific unallowable costs which might be identified during a Government audit, the contractor should be allowed to offset the lump sum against any unallowable amounts identified by the auditor. We understand that such a position has been taken by individual ACO's on a case-by-case basis.

If you have any questions concerning the above comments and recommendations, please contact Mr. Richard Powers, Director of Financial Administration, Aerospace Industries Association at (202) 371–8526.

Sincerely,

DON FUQUA,
President, Aerospace Industries Association.

LAWRENCE F. SKIBBIE,
President, American Defense Preparedness Association.

JOHN F. MANCINI,
Chief Operating Officer, American Electronics Association.

GARY D. ENGEBRETSON,
President, Contract Services Association.

KENNETH MCLENNAN,
President, Manufacturers Alliance for Productivity and Innovation.

BERT M. CONCKLIN,
President, Professional Services Council.

S.O. NUNN,
Acting President, Shipbuilders Council of America.

CODSIA Case 13–94.11

February 16, 1995

FAR Secretariat (VRS)
ATTN: Ms. Beverly Fayson
General Services Administration
Room 4037
18th & F Streets, N.W.
Washington, D.C. 20405

DEAR MS. FAYSON: The undersigned associations of the Council of Defense and Space Industry Associations are pleased to respond to the December 19, 1994, Federal Register notice requesting comments on the proposed rule entitled "Contractor Overhead Certification," FAR Case 94–752.

The proposed rule appears to go beyond the legislative intent of Section 2151(h) of the Federal Acquisition Streamlining Act of 1994. Section 2151(h)(1) requires a certification by a contractor official when submitting "a proposal for settlement of indirect costs applicable to a covered contract." There is no mention of a certification being required to "establish billing rates." Apparently, the writers of the draft regulation are attempting to extend to civilian agencies the same DFAR Supplement requirements that are applicable to DoD contractors. This is inappropriate because in most civilian agency contracts, provisional "billing rates" are the same as rates established in Forward Pricing Rate Agreements (FPRAs) or incorporated specifically into cost reimbursement type contract provisions based on rates used to "estimate" contract funding amounts. Civilian agency contractors should not be expected to certify the allowability of costs included in indirect cost proposals submitted to establish either FPRA rates or estimated rates for the funding of a specific cost reimbursement type or flexibly priced contract. This is particularly true for offerors who have never been awarded a Federal contract.

We recommend that the proposed rule be amended to eliminate all requirements for a certification of "any proposal to establish or modify billing rates." If you have any questions concerning the above comments and recommendation, please contact

Mr. Richard Powers, Director of Financial Administration, Aerospace Industries Association, at (202) 371–8526.
Sincerely,

DON FUQUA,
President, Aerospace Industries Association.
LAWRENCE F. SKIBBIE,
President, American Defense Preparedness Association.
JOHN F. MANCINI,
Chief Operating Officer, American Electronics Association.
GARY D. ENGEBRETSON,
President, Contract Services Association.
KENNETH MCLENNAN,
President, Manufacturers Alliance for Productivity and Innovation.
BERT M. CONCKLIN,
President, Professional Services Council.
S.O. NUNN,
Acting President, Shipbuilders Council of America.

CODSIA Case 13–94.12

February 17, 1995

General Services Administration
FAR Secretariat (VRS)
Attn: Mr. Julius Rothlein
Ethics Team Leader
18th & F Streets, NW.
Room 4037
Washington, DC 20405

Re: FAR Case 94–801: Debarment, Suspension and Ineligibility (Ethics), Federal Register, December 20, 1994

DEAR MR. ROTHLEIN: The undersigned members of the Council of Defense and Space Industry Associations (CODSIA) appreciate the opportunity to comment on the proposed rule to amend the Federal Acquisition Regulation (FAR), Part 9, to provide for uniform suspension, debarment and ineligibility procedures and reciprocity in recognition for such on a government-wide basis, as required by Section 2455 of the "Federal Acquisition Streamlining Act of 1994" (FASA, Public Law [P.L.] 103–355) and other authorities. The text of the proposed rule was published in the Federal Register of December 20, 1994 for public comment.

CODSIA was formed in 1964 by industry associations having common interests in the defense and space fields. The Department of Defense encouraged formation of this organization as a vehicle for obtaining broad industry reactions to new or revised procurement regulations, policies and procedures. In our 30th year, CODSIA is comprised of nine associations, representing some 4,000 large and small member firms across the nation.

In large measure, the proposed changes to FAR Part 9 successfully meet the major objective in this effort which is to provide uniformity and reciprocity in suspension and debarment actions on a government wide basis. For this, we commend you. However, the proposed modifications in regulatory guidance do raise some issues of concern which we present below.

COMBINED RULEMAKING; PRELIMINARY COMMENTS

We note initially that, according to background information provided with the proposed rule, the proposed changes to the coverage in FAR Part 9, "Contractor Qualifications," are intended to respond to the joint requirements of Executive Order (E.O.) 12689 and Section 2455 of FASA. Effective on August 16, 1989, E.O. 12689 directed agencies to establish regulations for reciprocal government wide effect across procurement and nonprocurement for each agency's debarment and suspension actions. FASA was signed into law on October 13, 1994 and, similar to the requirements of E.O. 12689, Section 2455 of this law provides that the debarment, suspension, or other exclusion of a participant in a procurement activity under the FAR, or in a nonprocurement activity under regulations issued pursuant to E.O. 12549, shall be given reciprocal government wide effect.

To fully effectuate the dictates of these provisions, we recognize that the proposed regulatory implementation of these provisions is in two parts: (1) proposed amendments to the 1988 agency-wide nonprocurement "common rule," also published for public comment on December 20, 1994 and the subject of a similar, but separate CODSIA letter (copy enclosed); and (2) proposed amendments to FAR Part 9, "Contractor Qualifications," referenced above and the subject of this letter. Clearly the two proposed regulatory actions must be read in combination and, in similar manner, we ask that our comments in response to both actions also be treated in combination.

SPECIFIC COMMENTS

In order to successfully implement these provisions which call for uniformity and reciprocity in debarment, suspension and other exclusionary procedures across numerous federal agencies, it is essential that there be consistency in the terms and the scope of coverage of the rules, both internally within either the nonprocurement "common rule" or the FAR Part 9 rule, and between the two rules. As presently drafted, we believe that that consistency does not now exist between the changes proposed for the common rule and proposed changes to FAR Part 9. To underscore our concern, we note the following specifics with the proposed coverage which modifies FAR Part 9:

Section 9.401, Applicability.

1. It is fundamental to this FAR rule, and the related "common rule," to ensure that the reciprocal effect is given to only comparable enforcement. There are significant substantive differences between a suspension action and a debarment action, and the "reciprocal effect" granted by other federal agencies to the actions of a single agency should be parallel. For example, a suspension by one agency for a procurement "violation" should operate as no more and no less than a suspension from nonprocurement benefits by other federal agencies. Under the common rule, the use of the term "an exclusion" could be applied in a manner that arbitrarily imposes greater or different burdens on a person by a secondary agency than the burden imposed by the initiating agency. To protect against such inconsistency, we recommend that two changes be incorporated into this section: (a) that the phrase "debarment or suspension" in the first sentence should be changed to "a comparable action" and (b) that the phrase "as an exclusion" in the second sentence be changed to "as a comparable action." (We suggest similar changes in our comments to the nonprocurement common rule.)

2. In the last sentence of the first paragraph, as a point of clarification, we suggest that the phrase "imposed under this subpart" be followed with the words "after [the effective date of the rule]."

Section 9.403, Definitions.

In the definition given for "Nonprocurement Common Rule," we recommend deleting the phrase "under Executive Order 12549" as it appears to be surplusage.

Section 9.404, List of Parties Excluded.

In this subsection, there is a reference to the list that is maintained by the General Services Administration (GSA) of parties that are "debarred, suspended, proposed for debarment, or declared ineligible by agencies or by the General Accounting Office." This is the only place in either the proposed FAR rule or the proposed changes to the common rule that a reference is made to the General Accounting Office (GAO). For purposes of consistency, we recommend that either the reference to GAO appear in the text of both proposed rules (FAR and nonprocurement common rule) or deleted from the language of this proposed rule.

Reciprocal Application

An extremely important issue is raised by the proposed rule with regard to reciprocal application between the FAR coverage and the nonprocurement common rule coverage. Under existing FAR Section 9.405, a contractor who is "proposed for debarment" is excluded from receiving contracts. By contrast, under the existing nonprocurement common rule, a "notice of proposed debarment" does not operate to exclude persons from receiving "nonprocurement transactions" (as that term is used in the revised FAR Section 9.403 definition). Thus, the "proposed for debarment" status under the FAR rule is given full reciprocal effect, but the "notice of proposed debarment" status under the common rule is given no recognition under the FAR rule. To avoid this inconsistency and imbalance between the two rules, the FAR category of "proposed for debarment" should be excluded from the actions that are given reciprocal effect under the common rule.

Exceptions

Subsection 2455(b) of FASA states that regulations implementing this provision of the Act "shall provide that an agency may grant an exception permitting a debarred, suspended, or otherwise excluded party to participate in procurement activities of that agency to the extent exceptions are authorized under the Federal Acquisition Regulation. . . ." A slight inference may be found for this provision in existing coverage at FAR Subpart 9.405(a), but the reference is weak and ambiguous at best. We suggest that the proposed rule at FAR Subpart 9.405(a) be modified to incorporate the direction of FASA Subsection 2455(b) and be rewritten as follows:

(a) Contractors debarred, suspended, or proposed for debarment are excluded from receiving contracts, and agencies shall not solicit offers from, award contracts to, or consent to subcontracts with these contractors [delete remainder of existing text of sentence]. *Agencies may grant an exception permitting a debarred, suspended, or otherwise excluded party to participate in a contract or subcontract with that agency upon certain conditions to be prescribed in agency implementing regulations.* Contractors debarred, suspended or proposed for debarment are also excluded from conducting business with the Government as agents or representatives of other contractors. [New language to coverage appears in italics.]

We appreciate the opportunity to comment on the proposed FAR rule to implement government-wide reciprocity for procurement and nonprocurement suspension and debarment actions designated as FAR Case 94–801. If we may provide further information in connection with these industry comments, please contact Elaine Guth of the Manufacturers Alliance and CODSIA's project officer for this FAR Case at (703) 841–9000.

Sincerely,

DON FUQUA,
President, Aerospace Industries Association.
LAWRENCE F. SKIBBIE,
President, American Defense Preparedness Association.
JOHN F. MANCINI,
Chief Operating Officer, American Electronics Association.
GARY D. ENGEBRETSON,
President, Contract Services Association.
DAN C. HEINEMEIER,
Vice President, Electronic Industries Association.
KENNETH MCLENNAN,
President, Manufacturers Alliance for Productivity and Innovation.
JAMES R. HOGG,
President, National Security Industrial Association.
BERT M. CONCKLIN,
President, Professional Services Council.
S.O. NUNN,
Acting President, Shipbuilders Council of America.

Enclosure (Letter to Mr. Robert Meunier re: Notice of Proposed Rulemaking on Debarment, Suspension, and Ineligibility (Nonprocurement Common Rule))

CODSIA Case 13–94.12

February 17, 1995

Mr. Robert Meunier
Director
Suspension and Debarment Division
Office of Grants and Debarment
Mail Code 3902F
Environmental Protection Agency
401 "M" Street, SW
Washington, DC 20460

Re: Notice of Proposed Rulemaking on Debarment, Suspension, and Ineligibility (Nonprocurement Common Rule), Federal Register, December 20, 1994

DEAR MR. MEUNIER: The undersigned members of the Council of Defense and Space Industry Associations (CODSIA) appreciate the opportunity to comment on the notice of proposed rulemaking on debarment, suspension, and ineligibility which

is intended to revise coverage in what is generally referred to as the 1989 agency-wide nonprocurement "common rule." The text of the notice of proposed rulemaking was published in the Federal Register of December 20, 1994 for public comment.

CODSIA was formed in 1964 by industry associations having common interests in the defense and space fields. The Department of Defense encouraged formation of this organization as a vehicle for obtaining broad industry reactions to new or revised procurement regulations, policies and procedures. In our 30th year, CODSIA is comprised of nine associations, representing some 4,000 large and small member firms across the nation.

In large measure, the notice of proposed rulemaking successfully meets the major objective in this effort which is to provide uniformity and reciprocity in suspension and debarment actions on a government wide basis. For this, we commend you. However, the proposed modifications in regulatory guidance do raise some issues of concern which we present below.

COMBINED RULEMAKING; PRELIMINARY COMMENTS

We note initially that, according to the summary statement provided with the notice, the proposed revisions to the nonprocurement common rule are intended to respond to the joint requirements of Executive Order (E.O.) 12689 and Section 2455 of the "Federal Acquisition Streamlining Act of 1994" (FASA, Public Law [P.L.] 103–355). Effective on August 16, 1989, E.O. 12689 directed agencies to establish regulations for reciprocal government wide effect across procurement and nonprocurement for each agency's debarment and suspension actions. FASA was signed into law on October 13, 1994 and, similar to the requirements of E.O. 12689, Section 2455 of this law provides that the debarment, suspension, or other exclusion of a participant in a procurement activity under the Federal Acquisition Regulation (FAR), or in a nonprocurement activity under regulations issued pursuant to E.O. 12549, shall be given reciprocal government wide effect.

To fully effectuate the dictates of these provisions, we recognize that the proposed regulatory implementation of these provisions is in two parts: (1) proposed amendments to the 1989 nonprocurement common rule, referenced above and the subject of this letter; and (2) proposed amendments to FAR Part 9, "Contractor Qualifications," also published for public comment on the same date and the subject of a similar, but separate CODSIA letter (copy enclosed). Clearly, the two proposed regulatory actions must be read in combination and, in similar manner, we ask that our comments in response to both actions also be treated in combination.

SPECIFIC COMMENTS

In order to successfully implement these provisions which call for uniformity and reciprocity in debarment, suspension and other exclusionary procedures across numerous federal agencies, it is essential that there be consistency in the terms and the scope of coverage of the rules, both internally within either the nonprocurement "common rule" or the FAR Part 9 rule, and between the two rules. As presently drafted, we believe that that consistency does not now exist between the changes proposed for the common rule and proposed changes to FAR Part 9. To underscore our concern, we note the following specifics with the proposed coverage relative to the common rule:

Section _____.100, Purpose

In this particular section, the "laundry list" of terms that requires the inclusion of all parties differs from the definition of the term "List of Parties Excluded" in proposed "Section _____.105, Definitions." This section (_____.100) includes "persons against which government-wide exclusions have been entered," but that phrase is not covered in proposed Section _____.105. Section _____.105 includes individuals who have been "voluntarily excluded," but that term is not included in Section _____.100. While, admittedly, the term "voluntarily excluded" parties does not flow directly from the imposition of governmental action, the inclusion of that term in Section _____.100 would perhaps help to maintain the consistency necessary for this rule to accomplish the required goal.

Section _____.105, Definitions

We suggest that, at a minimum, the proposed definition for "List of Parties" delete the phrase "Executive Orders 12549 and 12686 and". Those two Executive Orders (E.O.s) provide procedural guidance to provide for the reciprocal effect of the two "systems" (i.e., procurement and nonprocurement). The basis for debarment, suspension, or voluntary exclusion comes from exercising the authorities under each agency's "nonprocurement" rules, or the FAR, not these E.O.s.

Furthermore, the definition proposed for "List of Parties" differs from the definition proposed in amending FAR Part 9.403. Again, the argument is for consistency between the two proposed rules and we prefer that the proposed language for FAR Part 9 also be incorporated into this coverage for the common rule.

Section _____.110, Coverage.

1. To streamline the text further, we suggest that the phrase "in accordance with E.O. 12689 and Section 2355 of Public Law 103–355" be deleted for the reason that the cited authorities are already provided in the proposed text for _____.100(c).

2. It is fundamental to this "Common Rule", and to the related FAR rule, to ensure that the reciprocal effect is given only comparable enforcement. There are significant substantive differences between a suspension action and a debarment action, and the "reciprocal effect" granted by other federal agencies to the actions of a single agency should be parallel. For example, a suspension for a procurement "violation" by one agency should operate as no more and no less than a suspension from the non-procurement benefits by other federal agencies. Under the Common Rule, the use of the term "an exclusion" could be applied arbitrarily by a secondary agency to mean "either a suspension or debarment" in a manner that imposes greater or different burdens on a person than the burden imposed by the initiating agency. To protect against such inconsistency, we recommend that two changes be incorporated into this section: (a) that the phrase "as an exclusion" in the first sentence should be changed to "a comparable action" and (b) that the phrase "as a debarment or suspension" in the second sentence be changed to "as a comparable action." (We suggest similar changes in our comments to the FAR rule.)

3. In the last sentence of this section, as a point of clarification, we suggest that the phrase "imposed under this regulation" be followed with the words "after [the effective date of the rule]."

Reciprocal Application

An extremely important issue is raised by the correlating proposed rule to FAR Part 9 with regard to reciprocal application between the FAR coverage and the nonprocurement common rule coverage. Under existing FAR Section 9.405, a contractor who is "proposed for debarment" is excluded from receiving contracts. By contrast, under the existing nonprocurement common rule, a "notice of proposed debarment" does not operate to exclude persons from receiving "nonprocurement transactions" (as that term is used in the revised FAR Section 9.403 definition). Thus, the "proposed for debarment" status under the FAR rule is given full reciprocal effect, but the "notice of proposed debarment" status under the common rule is given no recognition under the FAR rule. To avoid this inconsistency and imbalance between the two rules, the FAR category of "proposed for debarment" should be excluded from the actions that are given reciprocal effect under the common rule.

We appreciate the opportunity to comment on the notice of proposed rulemaking for nonprocurement agency actions on the subject of uniform suspension and debarment. If we may provide further information in connection with these industry comments, please contact Elaine Guth of the Manufacturers Alliance and CODSIA's project officer for this matter at (703) 841–9000.

Sincerely,

DON FUQUA,
President, Aerospace Industries Association.

LAWRENCE F. SKIBBIE,
President, American Defense Preparedness Association.

JOHN F. MANCINI,
Chief Operating Officer, American Electronics Association.

GARY D. ENGEBRETSON,
President, Contract Services Association.

DAN C. HEINEMEIER,
Vice President, Electronic Industries Association.

KENNETH MCLENNAN,
President, Manufacturers Alliance for Productivity and Innovation.

JAMES R. HOGG,
President, National Security Industrial Association.

BERT M. CONCKLIN,
President, Professional Services Council.

S.O. NUNN,
Acting President, Shipbuilders Council of America.

Enclosure (Letter to FAR Council Re: FAR Case 94–801)

CODSIA Case 13–94.13

February 21, 1995

Mr. Daniel J. Tucciarone
General Services Administration
FAR Secretariat (VRS)
18th & F Streets NVV
Room 4037
Washington DC 20405

DEAR MR. TUCCIARONE: The undersigned members of the Council of Defense and Space Industries Associations are pleased to provide comments on the proposed rule implementing Sections 2201(a) and 2251(a) of the Federal Acquisition Streamlining Act which addresses consolidation and revision of the authority to examine records. FAR Case 94–740 applies.

In our view, the regulatory implementation of the statute broadens the government's access to data and expands upon the record keeping requirements. Neither of these actions were provided for by law or contemplated by the drafters of the legislation. Our comments are keyed to the specific paragraphs of the regulation:

4.703(c)(1)

This paragraph needs further clarification. It requires procedures to ensure that the imaging process preserves the integrity, reliability and security of the "original records." This wording seems to indicate a concern that the imaging process might damage the original documents. The intention, however, is more likely to be that the process preserve a reliable, secure image of the original document. If the electronic or photographic image is to be the sole official record after one year, the integrity of the new record is paramount. We suggest that subparagraph (c)(1) be rewritten as follows:

> (1) The contractor or subcontractor has established procedures to ensure that the imaging process preserves an accurate image of the original record and that the imaging process is reliable and secure so as to maintain the integrity of the records.

52.215–2(b)

We recommend deletion of the words "or which may contain information useful in the evaluation of the allowability of such costs." This is a major change to the audit clause because it extends the right to examine records to all records "which *may* contain information *useful* in the allowability of such costs." [Emphasis added] Under this subjective standard nearly any record may contain useful information. It shifts the burden of proof to the contractor to show that the records that were not retained did not contain any useful information. Further, this language does not appear anywhere in section 2201 of FASA. Many prior decisions on DCAA access have established the standards used to determine government access to records. The new standard would disturb important legal precedents.

52.215–2(c)(1)

Section 2201 of FASA revises 10 USC 2313 and, as revised, 2313(a)(2)(A) refers to audits of records related to "the proposal", not "development of the proposal." The FAR clause should repeat the wording of the statute rather than expand the language. The use of the terms "development of" and those "discussions" related to "negotiating," further expand the government's access to records during audit without a legislative basis. We recommend that these terms be deleted.

52.215–2(c)(4)

The phrase—"in the evaluation of the accuracy, completeness, and currency of the certified cost or pricing data"—is misplaced. The text of sections 2201 and 2251 of FASA makes it obvious that this language applies to (c)(1) through (c)(4), not just (c)(4) alone. We recommend that the phrase be moved to the first sentence of paragraph (c): ". . . shall have the right to examine and audit, for the purpose of evaluating the accuracy, completeness, and currency of the certified cost or price data, all of the Contractor's records, . . ."

52.215–2(d)(2

This paragraph addresses the creation and maintenance of documents and should not be limited to subparagraph (d) which deals with the Comptroller General's rights, but rather should apply to the whole clause. Therefore it should state "this clause" rather than "this paragraph" and should be a new paragraph (h).

If there are any questions, or if we can be of further assistance, please do not hesitate to contact the industry coordinator, Patrick Sullivan, Aerospace Industries Association, (202) 371–8522.
Sincerely,

DON FUQUA,
President, Aerospace Industries Association.
LAWRENCE F. SKIBBIE,
President, American Defense Preparedness Association.
JOHN F. MANCINI,
Chief Operating Officer, American Electronics Association.
GARY D. ENGEBRETSON,
President, Contract Services Association.
DAN C. HEINEMEIER,
Vice President, Electronic Industries Association.
KENNETH MCLENNAN,
President, Manufacturers Alliance for Productivity and Innovation.
JAMES R. HOGG,
President, National Security Industrial Association.
BERT M. CONCKLIN,
President, Professional Services Council.
S.O. NUNN,
Acting President, Shipbuilders Council of America.

March 6, 1995

General Services Administration
FAR Secretariat (VRS)
18th & F Streets, N.W., Room 4037
Washington, DC 20405

Re: Proposed Changes to the Federal Acquisition Regulation, Small Business, 60 Fed. Reg. 2302–2316 (1995) FAR Case 94.780

DEAR SIR OR MADAM: The Council of Defense and Space Industry Associations (CODSIA) is pleased to take this opportunity to comment on the proposed implementation of small business changes included in the Federal Acquisition Streamlining Act of 1994 (FASA), Public Law 103–355, appearing in the January 6, 1995 Federal Register, 59 Fed. Reg. 2302–2316 (1995).

CODSIA was formed in 1964 by industry associations having common interests in the defense and space fields. The Department of Defense encouraged formation of this organization as a vehicle of obtaining broad industry reactions to new or revised procurement regulations, policies and procedures. In our 30th year, CODSIA is comprised of nine associations, representing some 4,000 large and small member firms across the nation.

Our comments follow the order of the proposed changes of the Federal Register notice.

1. Section 8.404—Using schedules.

CODSIA believes that the term "Federal Supply Schedule" appearing in the first line of paragraph (a) should be replaced with the term "Multiple Award Schedule." This change is necessary because the term "Federal Supply Schedule" may be interpreted to apply only to the Federal Supply Schedule portion of the Multiple Award Schedule Program. Currently, purchases under both the Federal Supply Service and Information Technology Service Schedules are exempt from small business set-aside requirements. According to the legislative history, Congress intended purchases from the entire Multiple Award Schedule Program—both the Federal Supply Schedule and the Information Technology Service Schedule—to continue to be exempt from the set-aside requirements. The following colloquy occurred during the debate on the legislation:

> Mr. LIEBERMAN: Will the Senator yield? Section 4012 of this bill establishes a small business reservation for contracts under the new simplified acquisition threshold of $100,000. It is my understanding that, in effect, this amendment merely updates Section 15(j) of the Small Business Act to reflect the new threshold.
>
> Mr. GLENN: The Senator is correct . . .

> Mr. ROTH: . . . It is my understanding that the GSA's Multiple Award Schedule program will continue to be available to Federal agencies without change, as they are today, to acquire good and services at fair and reasonable prices that meet the government's needs.
>
> Mr. GLENN: The Senator is correct.

140 Cong. Rec. S6592, S6596 (June 8, 1994).

In addition, on page 213 of the Statement of Managers of FASA, the conferees noted that "[t]he conferees do not intend that the increased threshold alter the current priority among sources of supplies and services under Parts 8 and 15 of the FAR." Accordingly, given that the legislative history plainly reflects Congressional intent to maintain this exemption for the entire Multiple Award Schedule Program, the language in Section 8.404 should be changed from "Federal Supply Schedule" to "Multiple Award Schedule."

2. Section 19.001—Definitions.

Section 7107 of FASA requires the Administrator of Federal Procurement Policy to study, and develop uniform definitions for small business, small disadvantaged and woman-owned small business concerns. A notice of that study effort was recently published in the Federal Register 60 Fed. Reg. 456 (Jan. 4, 1995). CODSIA strongly supports this study, which includes development of government-wide definitions for small business, small disadvantaged business, and woman-owned small business, and believes that the uniform definitions developed from this study should be incorporated into the FAR, or recommended to Congress for legislative changes. In our view, the preamble to any final rule here should indicate the government's intent to proceed with the study required by Section 7107, and a commitment to incorporate appropriate results into the FAR.

Further, we have concerns about the reference in this section (and elsewhere) that "the definition of small disadvantaged business concern is different for DOD, NASA and the Coast Guard; see agency regulations." While this statement is true, the statement is only partially true since other federal agencies (such as the Agency for International Development and the Department of Transportation) also have unique definitions of "small disadvantaged businesses" that affect certain of their procurement programs. Although we appreciate the importance of highlighting that some agencies may have a different statutory definition than provided for in the FAR, we believe this rule should accommodate that difference by following the FAR convention: delete this unique phrase and leave it to each agency supplement (such as the DFARS, or the NASA Supplement) to describe instances when the FAR would not be applicable. Alternatively, the proposed phrase should be modified to state: "the definition of small disadvantaged business concern is different for DOD, NASA, the Coast Guard and possibly other agencies; see agency supplemental regulations for applicability and coverage." Similar treatment should be given to the reference to 13 CFR 124 in Parts 19.001(b) and (d).

3. Section 19.202—Labor Surplus Area Priority

Given that labor surplus areas are no longer accorded an award preference by statute, FAR paragraph 19.202–3, together with the language in the existing section, should be deleted.

4. Section 19.301—Representation by the offeror.

Paragraph (a) prescribes the time when an offeror must certify its status. It provides that "[t]o be eligible for award as a small or a small disadvantaged business, an offeror must represent in good faith as to its status at the time of written self certification."

To promote consistency and efficiency in the procurement process, this section should be modified to camport with the time period for certification included in the SBA regulations. 13 CFR 121.904 provides that ". . . the size status of a concern (including affiliates) is determined as of the date of its written self-certification as a small business. The concern shall certify that it is a small business for the purpose of performing a particular contract at the time it submits its initial offer which includes price to the procuring agency for that contract." The language in small business regulations should be substituted for the current draft FAR language.

5. Section 19.304—Solicitation provisions and clause.

For the reasons discussed in comment 3, above, paragraph 19.304(b) should be deleted.

6. Section 19.502—Set aside program order of precedence.

For the reasons set forth in comment 2, above, paragraph (b) of this section should be deleted. That paragraph provides: "[s]et-aside priorities of the Department

of Defense, the National Aeronautics and Space Administration, and the Coast Guard are set forth in the respective agency FAR Supplements."

7. Section 19.503–1—Requirements for setting aside acquisitions.

For the reasons discussed in comment 1, above, the phrase "multiple award Federal Supply Schedule contracts" appearing in the last line should be replaced with the term "Multiple Award Schedule contracts."

8. Section 19.503–2—Total Small Disadvantaged Business (SDB) set-asides.

For the reasons discussed in comment 2, above, paragraph (e) should be deleted. That paragraph provides: "[s]mall disadvantaged business set-aside requirements and procedures for DOD, NASA and Coast Guard are different and are set forth in agency supplements."

9. Section 19.503–3—Total small business set-asides.

The draft regulations have omitted the rule of two for total small business set-asides under $100,000. The rule of two is expressly required by FASA, which provides:

> Each contract for the purchase of goods and services that has an anticipated value greater than $2,500 but not greater than $100,000 shall be reserved exclusively for small business concerns *unless the contracting officer is unable to obtain offers from two or more small business concerns that are competitive with market prices and are competitive with regard to the quality and delivery of the goods or services being purchased.*

Pub. L. No. 103–355, §4004, 108 Stat. 3243, 3338 (1994) (emphasis added).

Although included in Section 19.502–3 for total small disadvantaged set-asides, the draft regulations have failed to include the language that appears in italics in this section. The draft regulations must be changed to include the "Rule of Two" language required by the statute.

In addition, the draft regulations in this section and in 19.502–3 provide that "each acquisition of supplies or services that has an anticipated dollar value exceeding the micro-purchase threshold in 13.106" shall be set-aside for small businesses. In order to faithfully follow the statutory language, the phrase "the micro-purchase threshold in 13.106" should be replaced with the term "$2,500."

The draft regulations must also be changed in another important respect to comply with FASA. In their present form, the draft regulations fail to link set-aside procurement between $50,000 and $100,000 to agency implementation of interim FACNET capability. This important statutory goal is enunciated in Title IV of the Act. Section 4004 in Title IV establishes the set-aside threshold, which applies to purchases with an anticipated value between $2,500 and $100,000. Section 4201—also in Title IV—is the principal statutory source for the procedure to be followed for a procurement that falls within the simplified acquisition threshold. Significantly, however, section 4201 expressly conditions the use of those procedures for purchases between $50,000 and $100,000 to a certification that a procuring activity "has implemented an interim FACMET capability." Nonetheless, the draft regulations entirely disregard the interplay between sections 4004 and 4201. Rather, the draft regulations set aside all procurements between $2,500 and $100,000, without regard to the procuring activity's FACNET capability. Accordingly, the draft regulations should be revised to reflect the link between set-asides of procurements between $50,000 and $100,000 and FACNET capability.

10. Section 19.505—Rejecting Small Business Administration recommendations.

For the reasons discussed in comment 2, above, paragraph (g) should be deleted. That paragraph provides: "[p]rocedures for rejecting SDB set-aside recommendations are different for DOD, NASA and Coast Guard and are set forth in agency supplements."

11. Section 19.704—Subcontracting plan requirements.

CODSIA members believe that the continuation of the current one year term of master plans included in paragraph (b) is too short a period. On September 8, 1994 the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council proposed a draft rule extending the life of master subcontracting plans for 3 years. 59 Fed. Reg. 46385, 46386 (1994). We believe that master plans should continue in effect indefinitely and should be revised only when a change in business circumstance requires revision.

12. Section 19.1100—Policy.

For the reasons discussed in comment 2, above, the last sentence of this section should be deleted. That sentence provides: "[e]valuation preference for small dis-

advantaged business concerns is different for DOD, NASA and Coast Guard, see agency supplements."

13. Section 42.302—Contract administration.

For the reasons discussed in comment 3, above, the term "labor surplus area contractual requirements" in paragraph (55) should be modified to provide "labor surplus area contractual requirements existing before October 13, 1994."

14. Section 52.219–01—Priority for Labor Surplus Area Concerns.

For the reasons discussed in comment 3, above, this section should be deleted.

We appreciate the opportunity to comment on the proposed rules on Small Business. If we may provide further information in connection with these industry comments, please contact Ed Schiff of the National Security Industrial Association and CODSIA's project officer for this matter at (202) 775–1303.

Sincerely,

DON FUQUA,
President, Aerospace Industries Association.

LAWRENCE F. SKIBBIE,
President, American Defense Preparedness Association.

DAN C. HEINEMEIER,
Vice President, Electronic Industries Association.

KENNETH MCLENNAN,
President, Manufacturers Alliance for Productivity and Innovation.

JAMES R. HOGG,
President, National Security Industrial Association.

PREPARED STATEMENT OF ALAN CHVOTKIN, CORPORATE DIRECTOR OF GOVERNMENT RELATIONS AND SENIOR COUNSEL, SUNDSTRAND CORPORATION

Thank you for the opportunity to make this statement on behalf of the Council of Defense and Space Industry Associations—CODSIA. At present, nine associations, representing more than four thousand member companies, both large and small, are members of CODSIA. My name is Alan Chvotkin, and I am the corporate director of government relations and senior counsel for Sundstrand Corporation.

We have been actively involved in the development of contracting rulemaking for and about small business almost since CODSIA was formed in 1964. Of course, we have been intimately involved in commenting on applicable regulations from the enactment of P.L. 95–507 in 1978, through the enactment of the Federal Acquisition Streamlining Act last October.

We are pleased to offer this statement on the proposed regulations implementing four sections of the Federal Acquisition Streamlining Act. As we continue our detailed review of the rule and the comments from today's public hearings, we will be submitting further detailed written comments by March 7, in response to the January 6 Federal Register request for comment, as amended.

Before delving into the substance of the rule, we do have a concern about the segmented nature of the rulemaking under FASA affecting small business that has made it difficult for us and others to offer comprehensive comments on the implementation of the statute. As the team knows all too well, the implementation of even the small business portion of the statute has been divided into several regulatory actions—some of which have already been issued and some important ones which have not yet been published for review and comment. In addition, there is other rulemaking taking place by the FAR agencies, by the Small Business Administration and by the Office of Federal Procurement Policy, for example, that could have a significant impact on any final rule implementing these provisions.

As a result, it is difficult to assess the full impact of any single rule or set of rules, and we believe that, to the maximum extent practicable, you should leave the record open for a reasonable period of time after all of the regulations have been published for any comments that the public may have that may cut across two or more of the individual rules that are published.

Before focusing on the specific suggestions for change in the proposed rule, and on behalf of CODSIA, let me compliment the small business team for and the FAR Council for the timely action in preparing this proposed rule and for the content of it. By and large, CODSIA associations, and our member companies, believe that the team has fairly implemented the law and adhered to the goal of streamlining and simplifying the Federal Acquisition System. But we still have some comments!

Let me begin our detailed comments by proceeding in rough numerical sequence through the rule. This sequence is not a list of priorities or of the magnitude of our concerns: it is just an easy way for me to proceed.

Section 8.404 relates to the use of required sources of supplies and services—basically the GSA Schedules. The team may or may not be aware that the present GSA Multiple Awards Schedule Program really has two components: the Federal Supply Schedule for commodity type items and the Information Technology Services Schedule for those types of items. Currently, purchases under both schedules are exempt from the set-aside requirement. In our final written comments, we will cite clear legislative history of FASA to demonstrate that Congress intended to retain that exemption. It only takes a few words to retain this congressional policy, but it is vital to those businesses and agencies that utilize both schedules. We know of no reason not to make this change and a similar change to section 19.503–1.

Our next comment focuses on the all-important area of definitions in section 19.001. Our comments fall into two different areas.

First, while this rule includes a clear application of the statutory definition of "woman owned small business, we note that neither Congress nor the agencies are satisfied with the differing definitions of the key terms of "small business", "small disadvantaged business" and even "woman-owned small business" that litter the United States Code, the FAR and the various agency supplements. Your team did not have the responsibility to implement section 7107 of the Acquisition Streamlining Act—which calls for the development of a uniform set of definitions (statutory and regulatory) for these critical terms. That work, which was assigned to the Office of Federal Procurement Policy, is underway. Regrettably, the current version of FASA does not require that the work under that section be completed before May, 1996!

As a result, we request that the preamble to any final rule here should indicate the Government's intent to proceed with the study required by section 7107, and include a commitment to incorporate appropriate results into the FAR.

A second concern we have relates to the reference in this section, and throughout the rule, to the unique definitions of "small disadvantaged business" for DoD, NASA and the Coast Guard. While this statement is true, the statement is only partially true since other Federal agencies also have unique definitions for "small disadvantaged businesses." A partial listing of these definitions is included in the OFPP notice of their commencement of the study of all definitions as required by section 7107 of FASA.

As a result, we believe that this rule should accommodate every unique difference in the definitions by following the FAR Convention—delete this phrase throughout this rule and leave it to each agency supplement that requires special coverage to include their unique definitions in their supplements. As an alternative, we believe the proposed rule could be modified to add the phrase "and possibly other agencies" each place it appears in the rule. At least these additional words would make the key statement more accurate and suggest to the FAR users that they consult each agency supplement to determine whether a unique definition is in use.

Section 19.202–3 covers a category called "labor surplus area priority." As the preamble to the rule correctly notes, Congress explicitly and intentionally abolished the labor surplus area set-aside priority under the Small Business Act. Yet this section preserves a vestige of a priority—albeit a very narrow one. We know Congress repealed the LSA provisions, and we strongly recommend that the small business team repeal the entire section 19.202–3—both the current FAR coverage and the additional lead in sentence that the team sought to include.

Our next comment relates to section 19.503–3, titled "Total Small Business Set-Asides." We identified three issues in this section of the proposed rule.

First, the rule fails to carry forward on the key element of the statute when the small business reservation was raised from $25,000 to $100,000. Under the existing rule, and the explicit language of section 4004 of FASA, the small business reservation is raised to $100,000, subject always to the so-called "rule of two". That important statutory qualification has been included in section 19.503–2 with respect to total SDB set-asides, but has not been included in this section 19–503–3 relating to total small business set-asides. The "rule of two" is an essential element of the statutory scheme. We could not support this regulation without that qualification included in the both sections of any final rule.

Second, both sections 19.503–2(a) and 19.503–3(a) of the rule tie the lower level of the reservation to the so-called "micro-purchase" threshold in 13.106, although the statute provides for the numerical threshold of $2500. Today, the two items are synonymous; but may not be in the future. Despite our support for setting the floor for the small business reservation at the "micropurchase level", and allowing that micropurchase level to fluctuate with the benefits of future acquisition reform initia-

tives, the Congress did not agree with us or others, and fixed the floor at $2,500. The rule should not create future confusion where none now exists.

Finally, there has been some confusion in our industry about the relationship between the small business reservation established under section 4004 of FASA and the requirements for FACNET established under section 4201 of that same act for "simplified acquisition threshold" purchases. Notwithstanding the legal questions about the mandatory linkage between the small business reservation and FACNET, we believe the draft regulations should be revised to reflect that linkage: that is, no small business reservation for contracts between $50,000 and $100,000 if the agency has not met its obligations under at least "interim FACNET" as that term is defined in section 4201.

We next comment on section 19.704—subcontracting plan requirements. The proposed rule has carried without change the current regulations on master subcontract plans—and states that the plans will be considered "current" for only one year at a time. To the FAR Council's credit, last September 8, the FAR Council published a notice of proposed rulemaking that would extend the life of these master subcontracting plans for three years, unless changes occurred before that period of time that necessitated a revision to the plan. Several of the CODSIA associations commented favorably on that proposal, although CODSIA itself did not comment on that proposal. We believe your team should adopt at least that September 8 proposal making master subcontracting plans good for a three year period when a final rule is written here; if you want to truly embrace the concepts of acquisition streamlining, there is no reason to put any time limit on the effectiveness of these master subcontracting plans—unless there has been a change of business circumstance that requires revision.

Finally, section 42.302 of the proposed rule modifies the existing laundry list of responsibilities for those in contract administration. Since the Congress has abolished labor surplus area set-asides for the future, contract administration personnel have an obligation to ensure compliance only with contractual requirements for LSA awards that predate FASA. We recommend a modification of the proposed coverage in 42.302 to reflect the historical nature of these obligations.

Thank you again for providing CODSIA with the opportunity to present these views. I would be happy to try to answer any questions you may have.

PREPARED STATEMENT OF RICHARD J. WALL, ERNST & YOUNG, ON BEHALF OF THE AMERICAN ELECTRONICS ASSOCIATION

INTRODUCTION

The American Electronics Association is comprised of 3,000 U.S. high technology companies ranging from small to large businesses. The member companies are located in 44 different states and span the breadth of the electronics industry, from silicon to software, microelectronics to major weapons systems, all levels of computers, communications networks and systems engineering and integration. AEA was founded over 50 years ago by David Packard along with the top 15 technology firms in the Silicon Valley.

Many of AEA's member companies support the Government's information systems requirements. The market for federal information systems is estimated to be worth over $26 billion in Fiscal Year 1995. Additionally, the U. S. Government is the largest single buyer of electronics in the world. Since technologies are rapidly and constantly improving, a more streamlined Government procurement system is required for the Government to be able to buy the latest commercial technologies available. For the reasons, improvements to the Federal Acquisition Regulations, regarding the Truth in Negotiations Act, must occur so the Government can invoke true commercial market buying practices.

AEA'S STATEMENT ON PROPOSED COMMERCIAL PRICING RULES (FAR CASE 94–721)

AEA is pleased to present oral comments to the Federal Acquisition Regulatory Council on the Government's proposed rules on contract pricing, which were published in the Federal Register on January 6, 1995.[1] For purposes of this statement, AEA's comments will be limited to the proposed rules on commercial pricing. This includes prices based on adequate price competition, catalog or market price, and the new additional exception for commercial items. AEA will submit written com-

[1] Proposed Rule, Federal Register (Vol. 60, No. 4), January 6, 1995, pages 2282 to 2299.

ments on all of the proposed contract pricing rules to the Federal Acquisition Regulation (FAR) Secretariat at the conclusion of the public comment period.

BACKGROUND

The topic of commercial pricing reform is not new to either the Government or industry. Calls for reform date as far back as the Packard Commission (President's Blue Ribbon Commission on Defense Management) in 1986, and perhaps even before then. Numerous studies have been conducted. Congressional hearings have been held. Much legislation has been introduced—some enacted, such as Section 824 of the National Defense Authorization Act for Fiscal Years 1990 and 1991[2] and more recently, the Federal Acquisition Streamlining Act of 1994.[3] Finally, regulatory changes have been proposed, most notably the proposed rules published in the Federal Register on September 6, 1990.[4] Those proposed rules were intended to implement Congress' directives under Section 824. However, in industry's view, they fell far short of any meaningful reform.[5]

Calls for commercial pricing reform have not been restricted to the Department of Defense, either. Concerns have been raised by several industry groups about the commercial pricing policies adopted by other Federal agencies, especially the General Services Administration (GSA). AEA recognizes and supports the reform efforts that are presently underway in these agencies. For example, as a member of the Industry Alliance for Multiple Award Schedule Reform, AEA has been closely following GSA's initiatives to update their multiple award schedule pricing policies and corresponding data collection requirements. AEA is hopeful that the commercial pricing reforms being sought in FAR Part 15 will reach these other agencies, as well, and make it unnecessary to have unique policies in this area.

Of course, the most significant event affecting commercial pricing policies was the recent enactment of the Federal Acquisition Streamlining Act. This Act provided the means for breaking through traditional barriers which have either prevented commercial companies from selling their products to the Government or prevented the Government from gaining access to important commercial technologies and capabilities. Specifically, the Act increased the Truth in Negotiations Act threshold for submitting certified cost or pricing data to $500,000 (with an adjustment—provision for inflation); added a new exception for commercial items; established a new policy on pricing modifications to contracts for commercial items; and added a new exemption under the Cost Accounting Standards. The accompanying Conference Report also challenged the Administration to provide broader flexibility in the catalog or market pricing rules.

OVERALL ASSESSMENT

Notwithstanding the important contributions of the Federal Acquisition Streamlining Act, industry remains disappointed with the Government's efforts at implementing any meaningful reform. As the core issue, a commercial company's risk of doing business with the Government have not yet been significantly reduced. If the proposed commercial pricing rules are not substantially revised, a commercial company would be best advised to stay away from Government contracts, unless it is willing to make a large investment in risk aversion infrastructure.

Industry's principal criticisms over the years have not been with the Truth in Negotiations Act but rather with the Government's regulations which implemented this ACL. The Act's conceptual foundations about adequate price competition, catalog price, and market price, are just as valid today as they were in 1962 when the Act was passed.[6] That is, if there are sufficient competitive influences on price, then a contracting officer should be able to obtain a fair and reasonable price without having to acquire certified cost or pricing data from the offeror. Instead, industry's criticisms have been directed at the policies imposed by the Government on the offeror to demonstrate that sufficient competitive influences on price actually exist. Industry believes that what worked in the 1960's and 1970's will not work in the 1990's. The Act's implementing policies on commercial pricing must be modernized, and the proposed rules do little to accomplish this.

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[2] Public Law 101–189, November 28, 1989.
[3] Public Law 103–355, October 13, 1994.
[4] Proposed Rule, Federal Register (Vol. 55, No. 173), September 6, 1990, pages 36774 to 36780.
[5] Council of Defense and Space Industry Associations (CODSIA) letter to FAR Secretariat, November 6, 1990.
[6] Public Law 87–653, 1962.

ADEQUATE PRICE COMPETITION

To be fair, the best example of where the Government has adequately modemized its pricing policies is in the area of adequate price competition. Under existing rules, adequate price competition meant that a contracting officer had to receive two or more offers and make award to the lowest price (responsiveness and responsibility assumed). Literally interpreted, this rule meant that if the selection considered technical factors, adequate price competition could not possibly exist. This interpretation was moderated in practice when the Comptroller General released a decision which stated that, in order to have adequate price competition, price need only be a substantial factor. Notwithstanding the Comptroller General's decision and reaffirming policy letters and pronouncements, industry continues to observe instances where the literal interpretation is being applied today and given as rationale for requiring cost or pricing data in competitive procurements.

AEA strongly supports the measures being proposed by the Government which are summarized below.

Clarify that adequate price competition exists if award is made to the offeror proposing greatest value and price is a substantial factor,

Allow that adequate price competition exists even if only one offer was submitted, as long as that offer was made with a reasonable expectation of competition.

Preclude requests for cost or pricing data when offers are being solicited on basis of adequate price competition. AEA believes that requirement for any data should be strongly discouraged.

Improve the understanding of "based on" adequate price competition. AEA hopes that this understanding will include competitions for supplies and services which have been conducted in the commercial market place.

CATALOG OR MARKET PRICES

The creativity displayed in the adequate price competition rules was not equally apparent in the efforts to modernize the Truth in Negotiation Act's implementing rules on catalog or market price. The proposed rules appear to be little more than an incorporation of the specific legislative provisions contained in the Federal Acquisition Streamlining Act. In some cases, however, the proposed rules seem to conflict with that Act. In AEA's view, taken as a whole, the proposed rules do not represent a reasonable attempt to satisfy the Conferee's intent that "the current regulatory interpretation of this exception [catalog or market price] should be changed in light of the purposes of this Act to provide broader flexibility for the purchase of commercial items . . ."[7] The proposed rules have not adopted substantive recommendations made by industry in response to the previous proposed rules on catalog or market prices. Specific concerns follow.

RELATIONAL TESTS

In the previous public comments on catalog or market price reforms, industry had urged the Government to eliminate the relational tests being prescribed to contracting officers for determining whether a substantial quantity of commercial items had been sold to the general public.[8] In industry's view, the tests were unnecessary to implement the exceptions provided under the Truth in Negotiations Act and often produced unfair and illogical results. Moreover, industry was concerned about industry's continued exposure to the enormous risk inherent in circumstances where the Government might allege, after contract award, that a company failed to pass either test.

AEA was pleased to see that the Federal Acquisition Streamlining Act banned determinations of substantial quantity on the basis of the quantity of items sold to the Government.[9] Yet, despite this ban, the Government's proposed rules continue to perpetuate such relational tests in several places:

FAR 15.804–1(b)(2)(i)—"An item will automatically qualify for this exception if sold in substantial quantities, and sales at established catalog prices made to the general public are at least *one-fourth of total sales of the item.*"

FAR 15.804–1(b)(2)(vi)—"Even though the criteria of paragraphs (b)(2)(i) and (ii) of this section are not met [established catalog price and established market price], the contracting officer may use other criteria to determine that the price

[7] Conference Report, page 185.

[8] FAR 15.804–3(f) applies two tests: Test #1 = (B+C)/(A+B+C) and Test #2 = B/(B+C). Where: A = sales to Government; B = sales to general public at catalog price; C = sales to general public not at catalog price. An offeror generally passed the tests if Test #1 > 55% and Test #2 > 75%.

[9] Sections 1202 and 1251.

of the item is based on an established catalog or market price of a commercial item sold in substantial quantities to the general public. For example—(A) The item recently qualified for an exemption but *no longer qualifies due to an unusual level of sales to the Government . . .*" (emphasis added)

AEA still believes that the relational tests should be removed entirely. The tests are unnecessary to implement the Truth in Negotiations Act, and they represent a source of risk to commercial companies. If not removed, the tests will continue to be a barrier between the Government buyer and the commercial seller. Instead, substantial quantity should be an assessment of the market characteristics and whether an offeror's price has been tested through market acceptance.

PRICE REASONABLENESS

In the previous public comments, industry had also urged the Government to seek a fair and reasonable price rather than a most favored customer price. Further, the pricing examples to be supplied by the offeror should be pricing circumstances more relevant to those of the Government. Industry believed that companies were being exposed to undue risk in having to disclose its lowest prices and then certify or otherwise represent that such disclosures were accurate. Lowest prices are singular transactions, sometimes numbering among millions of transactions. This information is not readily maintained by commercial companies, and even then, there is not a commonly understood meaning of "lowest price." For example, how should the company regard rebates, nonmonetary incentives, special promotions, future credits, trade-ins, national account agreements, and many more types of business arrangements and concessions?

The Government's proposed rule contains virtually no relief in this area, and to some extent, is worse than the existing rules. The Standard Form 1412, "Request for Exception to Cost or Pricing Data Requirements," would now require an offeror to present the following examples and represent to the best of its knowledge and belief that the examples were accurate.

Item 11a—"*Lowest price* at which sales of the offered item were made to *any customer* during the period *regardless of quantity.*"

Item 11b—"*Lowest price* at which *any sales* of the offered item were made at *comparable quantities* to *any customer.*"

Item 11c—"If the proposed price of the catalog item was determined on the basis of assignment of the Government to a particular customer class, insert the *lowest price* at which sales of the offered item were made at *comparable quantities* to *any customer* in that class." (emphasis added)

AEA has a number of concerns in this area. First, AEA is concerned that the price examples now include sales to any customer, which presumably includes even sales made to the Government, regardless of the circumstances (e.g., adequate price competition). AEA notes that this issue had been debated and resolved in connection with the Commercial Pricing Certificate.[10] At that time, the Government agreed that Government sales would not be an appropriate benchmark for evaluating commercial prices, so it is not clear why the Government finds it necessary to make this comparison now.

Second, by asking for lowest prices, there is an implicit standard that the contracting officer should seek the lowest price or, at the very least, be able to explain its variance from the negotiated price. Although this pricing policy has been practiced by the Government before, it has since been largely discontinued in favor of using the long-standing fair and reasonable standard. For example, although the most favored customer pricing policy is applied in GSA's multiple award schedule program, there is a proposed rule to change this.[11] The Commercial Pricing Certificate was a most favored customer pricing policy and has been rescinded by Congress. AEA urges that the requirement to submit lowest price examples be removed and, instead, leave it to the offeror to demonstrate the reasonableness of its proposed prices based on comparable circumstances, terms, and conditions.

On a related issue, AEA was encouraged that the Government will take into account future sales and prices of items that have either not yet been introduced into the commercial market place or not yet been sold substantial quantities. While this is a welcomed step, the provision will likely fail because it imposes a post-award price reduction provision as shown below.

[10] Formerly FAR 15.813.

[11] GSA letter, "Multiple Award Schedule Procurement," October 1, 1982. GSA issued a Proposed Rule in the Federal Register (Vol. 58, No. 108), on June 8, 1993, pages 32085 to 32091, which proposed to adopt a fair and reasonable standard.

FAR 15.804–1(b)(2)(i)—"If a price is based on estimated future sales and prices, then *provision should be made for future price adjustment,* if actual sales and prices *differ significantly from the estimated sales and prices* upon which the contract price was based." (emphasis added)

AEA recommends that the provision be removed. First, differences in the estimated volume of sales should have no bearing on the negotiated price. Second, an open-ended lower price protection is unworkable and not customarily found in commercial practice. The future price of an item will depend upon market forces and a company's position within that market. It should not be made relevant to the negotiation of price in the present moment. Presumably, the Government would not accept a provision which would raise negotiated prices if the market's demand subsequently pushed prices higher.

Finally in this area, AEA is concerned with the additional data requirements that will be imposed on the offeror. In the previous public comments, AEA had recommended that exposure to additional information requirements be lessened. Instead, the proposed rule adds to the list.

Current Requirements

Supplier's marketing system (e.g., use of jobbers, brokers, sales agencies, or distributors)

Services normally provided commercial purchasers (e.g., engineering, financing, advertising or promotion)

Normal quantity per order;

Annual volume of sales to largest customers;

Proposed Additional Requirements

Adjustments such as rebates, credits, or trade-ins available commercially *but not available or used by the Government;*

Additional sales inducements such as training or extended warranty periods provided to some customers if *not provided to the Government;* or

Prices charged by the primary source of an item offered by a reseller. (emphasis added)

AEA does not understand the need to expand the Government's information requirements, particularly for adjustments and inducements that will not be available to the Government. It is inconsistent with the goals of acquisition streamlining and only serves to increase business risk to the extent such information is covered by post-award audit rights (discussed later).

MARKET PRICES

In its previous public comments, industry had urged the Government to broaden the use of the market price exception and remove the requirement that market price data must come from sources independent of the offeror. The "sources independent" requirement has become the Achilles Heel of this pricing method because it is difficult to obtain adequate information from external sources about actual selling prices and actual quantities sold. Industry, instead, had recommended that market price be supported by any objective means which demonstrates the market's willingness to accept a product price. For example, even though an offeror does not maintain a catalog or formal price list, there still could be "going price" that the offeror charges the general public. This should qualify as a market price so long as it could be supported through objective means, such as sales orders, contracts, shipments, invoices, etc.

The Government's proposed rule offers almost no reform in this area, and this is a significant missed opportunity.

POST-AWARD AUDITS

There is little question that post-award audits represent the most serious business risk to commercial companies, especially in the Age of Oversight that now characterizes Government procurement. The level of risk is at its highest when the Government seeks to determine, after contract award, whether the information supplied by the offeror on the Standard Form 1412 or comparable documents (e.g., GSA's data collection format) was accurate. Two unfortunate consequences could result: (1) the sales data was inaccurate and caused the company to pass the relational tests when it should not have or (2) the lowest price example was inaccurate and precluded the Government from negotiating an even lower price.

In either case, the Government has generally no contractual remedies for adjusting contract price.[12] Therefore, if a company is unwilling to offer a voluntary refund, the Government might wish to explore other means, such as the fraud statutes. Just the process of resolving a pricing dispute in this forum alone can be lethal enough to a company, regardless of the damages, fines, penalties, and sanctions that the Government might ultimately seek. Perhaps, the best indication of the level of risk faced by commercial companies is GSA's own expressed policy that anything other than a simple error or mistake must be reported to the Inspector General as a suspected irregularity.[13]

AEA is disappointed that the Government will continue to impose post-award audit rights on contracts awarded using established catalog or market prices. These rights are granted through the "fine print" representation signed by the offeror at the bottom of the Standard Form 1412, as shown below, and no place else in the FAR. AEA is also alarmed that these rights would now be extended to determinations of reasonableness rather than limiting them to verification of data contained on the form.

> Representation—"Pending consideration of the proposal supported by this submission and, if this proposal or a modification of it is accepted by the Government, until the expiration of *3 years from the date of final payment* under a contract resulting from this proposal, the Contracting Officer and authorized representatives are *granted access* to books, records, documents, and other supporting data that will *permit verification of this request* for exemption and the *reasonableness of price.*" (emphasis added)

AEA believes that any audit rights on actions being supported by catalog or market prices (and prices set by law or regulation) should be limited to the pre-award. Even then, such audit rights should be confined to a verification of the pricing data supplied by the offeror. This limitation would be consistent with the Truth in Negotiations Act and the rights being proposed by the Government under the Standard Form 141X, "Proposal Cover Sheet (Cost or Pricing Data Not Required)."

On a related issue, AEA is concerned with the apparent continued use of GSA's "Certificate of Established Catalog or Market Price" (see FAR 15.804–1(c)(ii)). AEA agrees that the inclusion of a commercial item on a GSA multiple award schedule should, in and of itself, be sufficient evidence that the commercial item satisfies the criteria for established catalog or market price. It should also serve as a baseline for determining a fair and reasonable price. However, AEA is concerned with GSA's practice of requiring offerors to execute a certificate and the apparent FAR sanction of this practice. In essence, this is like imposing the Certificate of Current Cost or Pricing Data on circumstances that have been explicitly excepted from the Truth in Negotiations Act. It should also be noted that GSA's certificate contains a caution; "False statements may subject the offeror to penalties provided by statute and regulation." Again, industry's principal concern is risk.

COMMERCIAL ITEM EXCEPTION

Industry supported the new exception for commercial items added by the Federal Acquisition Streamlining Act.[14] It should benefit companies that do not wish to use the existing exceptions for catalog or market price. Offerors should have the option of submitting a Standard Form 1412 on the basis of catalog or market price or, alternatively, supply other information to the contracting officer to demonstrate the reasonableness of price.

Consistent with industry's previous comments, there is a significant concern with access to records and post-award audit rights, which in this case is 2 years from date of contract award or modification. While AEA is aware that these rights were imposed by the Federal Acquisition Streamlining Act, the proposed rule's silence on remedies for inaccurate data creates a high risk condition for industry. That is, assuming that the Government found that the data submitted by the offeror was inaccurate (without fraudulent intent) and it had a bearing on negotiated price, what is the next step the Government wants the contracting officer to take?

In AEA's view, there should be no unilateral action taken by the contracting officer to adjust contract prices, and the condition should not give rise to a referral action under the fraud statutes. Instead, the results of the post-award audit should shared with the offeror, who may or may not offer a voluntary price adjustment. The submission of inaccurate data should be considered as a past performance factor. It should also be used as a basis for establishing the amount of pre-award re-

[12] GSA imposes a defective pricing provision.
[13] GSA Federal Supply Schedule Handbook (Chapter 38), paragraph 92d, December 19, 1990.
[14] Sections 1204 and 1251.

view and price negotiation needed by the Government on subsequent contracts. However, consistent with the policy expressed in FAR 15.802,[15] the condition should not be used as an offset to contract prices in the future.

MODIFICATIONS TO CONTRACTS FOR COMMERCIAL ITEMS

Industry also supported the provision in the Federal Acquisition Streamlining Act which prohibited contracting officers from obtaining cost or pricing data on contract modifications, as long as the modification did not change the commercial item to a noncommercial item.[16] This provision addressed the problem of being forced to comply with the cost or pricing data rules when contract modifications occur. However, AEA believes that the proposed rule may not properly implement that provision, as shown below.

> FAR 15.804–1(b)(4)(ii)—"For modifications of commercial items, the exception at 15.804–1(a)(3) applies if the modification of a commercial item does not change the item from a commercial item to a noncommercial item. *However, if the modification changes the nature of the work under the contract/subcontract either by a change to the commercial item or by the addition of other noncommercial work, the contracting officer is not prohibited from obtaining cost or pricing data for the added work.*" (emphasis added)

The proposed rule appears to allow the contracting officer to obtain cost or pricing data if the nature of the work has been changed, irrespective of the fact that the commercial item might still be a commercial item. To avoid confusion, AEA recommends that the provision be more closely aligned with the provision contained in the Federal Acquisition Streamlining Act.

COST ACCOUNTING STANDARDS (CAS)

Finally, although the proposed rule did not contain any revisions to the CAS applicability rules at FAR Part 9903.201–1, AEA believes that such action should be taken soon, possibly concurrent with the issuance of final rules on commercial pricing. As you know, the Federal Acquisition Streamlining Act added a new exception for commercial items purchased under firm fixed-price contracts (without cost incentives).[17] AEA wishes to avoid situations where CAS is applied to circumstances where the Government did not intend do so, especially because of timing differences in implementing these rules.

Furthermore, industry has on previous occasions urged the CAS Board to revise the CAS applicability rules in a number of other ways in order to ease the burden being place on commercial companies. These are recapped below.

> Make CAS inapplicable to all contracts awarded on the basis of adequate price competition (rule now exempts only firm fixed-price contracts awarded with submission of cost data).
>
> Make CAS inapplicable to all contracts where a substantial portion of the price is based on established catalog or market price (e.g., fixed-price labor contract with cost reimbursable other direct charges) or, if such contracts are to be CAS covered, only include the portion not based on established catalog or market price.
>
> Make CAS inapplicable to commercial segments.

SUMMARY

In summary, AEA's basic concern is that the proposed rules do not reduce the risk of doing business with the Government. As long as the Government intends to apply relational tests, focus on lowest prices, demand certifications and representations, and assert post-award audit rights, companies will be forced to invest in expensive risk aversion infrastructure. This will do little to remove the barriers that now exist between the Government and the commercial market place. Removing these barriers will be vital to the success of the Federal Acquisition Streamlining Act and the efforts to increase use of commercial items to satisfy Government requirements.

AEA, and other industry groups, are anxious to work with OFPP, the Board of Directors, and the Federal Acquisition Regulatory Council to make the commercial pricing rules satisfy the needs of all. AEA thanks you for the opportunity to present comments at this hearing.

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[15] FAR 15.802 requires contracting officers to price each contract separately and independently.

[16] Sections 1202 and 1251.

[17] Section 8301.

PREPARED STATEMENT OF CHARLES E. RUMBAUGH, HUGHES AIRCRAFT COMPANY, ON BEHALF OF THE AEROSPACE INDUSTRIES ASSOCIATION

My name is Charles E. Rumbaugh, Assistant to Corporate Vice President, Contracts, for Hughes Aircraft Company. I'm appearing today at this public meeting on FAR Case 94–721 on behalf of the Aerospace Industries Association (AIA) in order to affirmatively support three aspects of this TINA case—

A new Standard Form (SF) 141X

Replacement of "estimate" for the term "best estimate" on the SF1411

"Adequate price competition could be established to exist even though there may ultimately be only one offeror

Initially, I want to personally commend the TINA team for their excellent efforts in these three areas whereby they literally took the Federal Acquisition Streamlining Act (FASA) as a mandate for regulatory change. Congratulations! We support these proposed changes as being consistent with the Congressional intent as well as the expressed direction of Congress to streamline the acquisition process.

NEW SF141X AS A PROPOSAL COVER SHEET

The SF141X is long overdue!

There have been numerous Government admonishments by senior acquisition officials over the past several years which have attempted to "discourage" contracting-officers from requesting cost or pricing data where there is adequate price competition. During this same time period the added, unnecessary cost to Industry was being voiced on this ongoing burden. A survey of AIA member companies in late 1993 resulted in an AIA estimate that the expense of producing cost and pricing data for competitive procurements to be in excess of $250 million annually. This figure does not include the equally significant amount spent by the Government in auditing and analyzing this data.

However, at the same time, contracting officers were finding that they were saddled with only one form to use as a proposal cover sheet, i.e. the current SF1411 since it was the only regulatory tool available to them. Consequently when adequate price competition was present, and only limited information was needed to support a finding of price reasonableness or cost realism analyses, the detailed TINA requirements embodied in the SF1411 was the regulatory "operating" rule of the day.

This FAR Case proposes a new form, entitled, "Proposal Cover Sheet (Cost or Pricing Data Not Required)" and fills this regulatory void, i.e. provide a regulatory vehicle to collect information other than cost or pricing data which may be necessary in some circumstances to help establish price reasonableness or cost realism. Such information would also not be deemed cost or pricing data.

It is proposed that this form would be used in competitive procurements and would mitigate as noted above the tremendously expensive "cost and pricing data" content and format requirements included in the SF1411 and eliminate the unnecessary confusion associated with the current use of SF1411. While permitting offerors to submit SF141X information in their own format, and thus reducing proposal preparation costs, this regulatory change also provides the necessary flexibility for the contracting officer such that requests for information could be tailored to suit the specific needs of a particular solicitation/program.

Clearly, change is needed and the time is ripe for "two proposal cover sheets being on the shelf." Government procurement professionals need them and with the SF1411 and the new SF141X each form will satisfy a specific need.

The genesis of this initiative for a new proposal cover sheet was the pricing organization at Wright-Patterson Air Force Base—the contracting officers "who are on the line." The Air Force recognized the need for such a change (and it should be noted, this had exactly the same type of origins as the FASA change in the micro-purchasing arena). Industry, primarily through the Aerospace Industries Association, also provided support. The Center for Strategic and International Studies also provided invaluable assistance.

REPLACEMENT OF "ESTIMATE" FOR THE TERM "BEST ESTIMATE" ON THE SF1411

Briefly, we support the proposed replacement of "estimate" for "best estimate" in the language between items 14 and 15 on the face of the SF1411. The use of the word "best estimate" is vague and ambiguous as well as being undefined and not required by the Truth In Negotiations Act.

Again, this proposal originated with the Air Force at Wright-Patterson Air Force Base.

"ADEQUATE PRICE COMPETITION" COULD BE ESTABLISHED TO EXIST EVEN THOUGH THERE ULTIMATELY MAY BE ONLY ONE OFFEROR

We support the regulatory change in proposed FAR 15.804–1(b)(1)(ii). This proposal provides a regulatory process for an exception to cost or pricing data submittal requirements under TINA. Adequate price competition could exist if the contracting officer reasonably determines-based upon specific enumerated criteria—that it was reasonable to expect two or more offers in response to a specific solicatation even though only one offer was in fact later received.

As background on the need for this evolutionary definition change one should look to the legislative language. It must be realized that Congress compelled regulatory change in the definition of the TINA exceptions when FASA at Section 1202(a), in modifying 10 USC 2306a, require that

> The Federal Acquisition Regulation shall provide *clear standards for determining whether the (TINA) exceptions . . . apply.* In the case of the (adequate price competition) exception . . . , *the regulations shall specify the criteria to be used to determine whether adequate Drice competition exists. . . .*" (emphasis added)

Accordingly, what was a past definition in this area, is past! It is now a new environment in which we operate with the passage of FASA. The question to be answered is whether or not this regulatory proposal properly implements the Congressional direction of FASA and not whether any new definition conforms to some prior notions of "adequate price competition." Congress knew the history of the prior definition(s) and the need for change. Congress has provided a sufficient road map and directions with this FASA change to 10 USC 2306a.

Specific, objective criteria are listed in the proposed regulations in order to determine whether such competition exists. Further, requirements are imposed by regulation whereby approval at a level above the contracting officer must be obtained on whether the (i) the proposed price is based on adequate price competition and (ii) the price is reasonable. This double-edged standard provides the final "check and balance" and should satisfy the FASA statutory direction. This regulation also provides sufficient flexibility in the executive agencies for any "required" agency supplements to define the appropriate level above the contracting officer for the specific approval of that determination. Equally important is the stated regulatory requirement that the price be determined to be reasonable for a TINA exception.

Accordingly, this "new' definition for "adequate price competition" is a proper implementation of FASA.

In conclusion we support the regulatory policy shift evidenced in these three aspects of the proposed TINA changes.

We will also provide written input by the March 7th response due date, but we do appreciate this opportunity to speak at this public forum.

I would be pleased to address any questions you may have.

PREPARED STATEMENT OF CAROL A. HULGUS, ROCKWELL INTERNATIONAL CORPORATION, ON BEHALF OF THE ELECTRONIC INDUSTRIES ASSOCIATION

Good afternoon, my name is Carol Hulgus of Rockwell International. I am presenting this testimony on behalf of the Electronic Industries Association (EIA). EIA and several other trade associations represented here today are working with the Council of Defense and Space Industry Associations (CODSIA) to prepare one set of final industry comments to the draft Federal Acquisition Streamlining Act of 1994 (FASA) implementing regulations for TINA. However, the positions taken herein are, at this point, the view of EIA, as full coordination within CODSIA has not yet occurred.

I must begin today by saying that the proposed rules on TINA are some of the most important regulations resulting from last year's Federal Acquisition Streamlining Act (FASA). EIA strongly supports the intent of the proposed regulations. Numerous studies, most recently the Coopers & Lybrand/TASC study sponsored by the Office of the Secretary of Defense, have identified the Truth in Negotiations Act (TINA) as a major barrier to the Government's use of commercial products and NDI. If properly implemented, the TINA provisions of the Federal Acquisition Streamlining Act (FASA) will go a long way toward eliminating this barrier.

The proposed rule is a good faith attempt at implementing the FASA provisions and we support a number of the regulatory changes which have been made. However, the proposed regulations fail to overcome a fundamental problem with their construction. The authors have attempted to superimpose FASA implementation language, which is premised on the use of certified cost or pricing data as a last resort, over the preexisting regulatory language which is premised on certified cost

or pricing data being required unless an exception is justified. This is a far cry from a "clean sheet" approach to the regulations.

The result is a patchwork quilt of confusing and contradictory statements which are guaranteed to confuse government and industry personnel alike. For this reason, it is highly unlikely that the proposed regulatory language will lead to the changes in pricing practices intended by FASA.

As presently drafted, the regulations do not provide clear and concise guidance on three fundamental questions: (1) When are certified cost or pricing data required? (2) When is information other than cost or pricing data required? (3) What type of information is required to determine price reasonableness when certified cost or pricing data are not required?

In order to correct these problems, we recommend a fundamental reorganization of the proposed regulations. The revised regulation should be structured to provide guidance on each of the pricing methods described in the hierarchy in the proposed FAR 15.802 Policy, with which we fully concur. The proposed 15.802 language states that in establishing the reasonableness of prices offered to the government, the contracting officer "shall not obtain more information than necessary and shall generally use the following order of preference" in determining the type of information required:

1. No further information should be required from the offeror if the price is based on adequate price competition.

2. Information other than cost or pricing data may be required in order to establish cost realism or price reasonableness, including: (i) information related to prices (e.g., established catalog or market prices), relying first on information available within the government, second on information obtained from sources other than the offeror, and last on information obtained from the offeror; and (ii) limited cost information, which does not meet the definition of cost or pricing data.

3. The contracting officers "should use every means available to ascertain a fair and reasonable price prior to requesting cost or pricing data."

We recommended a reorganization of the proposed rule which tracks this hierarchy. Under this arrangement 15.800 Scope, 15.801 Definition and 15.802 Policy, would be followed by sections which would provide detailed guidance for pricing procurements based on adequate price competition (15.803), based on information other than cost or pricing data (15.804) and based on certified cost or pricing data (15.805). Each section would describe the procedures, clauses, forms, etc., prescribed for the pricing technique. Such an arrangement would allow contracting personnel to focus only on those procedures pertinent to the pricing method appropriate for the particular procurement (as determined by the hierarchy). This organization would be far easier to understand than the current organization.

The draft TINA regulations are the first set of FASA regulations that directly impact the government's ability to buy commercial products. EIA is disappointed that these draft regulations are difficult to follow, but we appreciate the fact that these regulations are only drafts. EIA, along with the other CODSIA associations, will be providing you with specific elements toward simplifying and retooling the final regulations to get the practical results we all desire—user friendly regulations that make it easier, rather than harder, under the proper statutory conditions, to be granted an exemption from TINA. We hope that you will listen to our concerns with an open mind, and allow us to help create final regulations that will achieve meaningful TINA reform.

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