

S. REP. 103-258, S. Rep. No. 258, 103RD Cong., 2ND Sess. 1994,  
1994 U.S.C.C.A.N. 2561, 1994 WL 188485 (Leg.Hist.)  
(Cite as: S. REP. 103-258, 1994 U.S.C.C.A.N. 2561)

P.L. 103-355, \*\*2561 FEDERAL ACQUISITION STREAMLINING ACT OF 1994

\*1 THE FEDERAL ACQUISITION STREAMLINING ACT OF 1994

DATES OF CONSIDERATION AND PASSAGE

Senate: June 7, 8, August 23, 1994

House: June 27, September 20, 1994

Cong. Record Vol. 140 (1994)

Senate Report (Governmental Affairs Committee) No. 103-258,  
May 11, 1994 (To accompany S. 1587)

Senate Report (Armed Services Committee) No. 103-259,  
May 12, 1994 (To accompany S. 1587)

House Report (Government Operations Committee) No. 103-545(I),  
June 13, 1994 (To accompany H.R. 2238)

House Report (Armed Services Committee) No. 103-545(II),  
June 17, 1994 (To accompany H.R. 2238)

House Conference Report No. 103-712,

Aug. 21, 1994 (To accompany S. 1587)

SENATE REPORT NO. 103-258

May 11, 1994

[To accompany S. 1587]

The Committee on Governmental Affairs to which was referred the bill S. 1587, The Federal Acquisition Streamlining Act of 1993, to reform the Federal Acquisition process, to amend laws relating to Federal Procurement, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended do pass.

CONTENTS

	Page
I. Summary and purpose .....	1
II. Background and need for legislation .....	2
III. Legislative history .....	3
IV. Analysis of legislation .....	5
V. Regulatory impact .....	13
VI. Effect on current law .....	13
VII. Cost impact .....	13
VIII. Sectional analysis .....	15

\*\*2562 I. SUMMARY AND PURPOSE

S. 1587 would revise and streamline the acquisition laws of the Federal government in order to reduce paperwork burdens, facilitate the acquisition of commercial

S. REP. 103-258, S. Rep. No. 258, 103RD Cong., 2ND Sess. 1994,  
1994 U.S.C.C.A.N. 2561, 1994 WL 188485 (Leg.Hist.)

**(Cite as: S. REP. 103-258, 1994 U.S.C.C.A.N. 2561)**

products, enhance the use of simplified procedures for small purchases, clarify protest procedures, eliminate unnecessary statutory impediments to efficient and expeditious acquisition, achieve uniformity in the acquisition practices of federal agencies, and increase the efficiency and effectiveness \*2 of the laws governing the manner in which the government obtains goods and services.

## II. BACKGROUND AND NEED FOR LEGISLATION

The acquisition of goods and services by the Federal government has been governed by congressional legislation and executive regulations since the Revolutionary War, when the Continental Congress established the first Commissary General. As the Commission on Government Procurement noted in 1972:

In many respects, Government procurement is guided by the same considerations the Commissary General faced in 1775: maximize competition, obtain reasonable prices, and assure accountability of public officials for public transactions.

There is no single acquisition statute. A wide array of acquisition laws are codified in statutes such as the Small Business Act, the Office of Federal Procurement Policy Act, the Federal Property and Administrative Service Act, and agency-specific laws (including numerous provisions of title 10, United States Code, which governs acquisitions by the Department of Defense).

Over the past decade, Congress and the Executive Branch have struggled to make sense out of the complex process of purchasing goods and services. In the 1980s, the need for reform was underscored by the stories of excessive prices paid for spare parts, the criminal enterprises characterized by the Ill Wind prosecutions, the frequency of cost overruns, and the increasing delays in fielding new systems. The result was a proliferation of often contradictory requirements governing almost every aspect of the acquisition process.

With the exception of a few obsolete provisions, every one of these statutes was enacted to serve some valid purpose. Competition requirements have been enacted to obtain low prices, avoid favoritism and conflict of interest, and provide offerers with a fair chance to compete for government contracts. Audit requirements and cost principles have been provided to ensure that the government gets what it pays for under "cost" type contracts. Socio-economic requirements promote desirable social objectives like promoting small and minority businesses. Ethics requirements have been enacted to ensure that procurement officials do not engage in employment discussions with contractors with whom they are negotiating contracts or show favoritism by giving inside information to contractors.

**\*\*2563** When all of these laws-and hundreds more requirements that are imposed by regulation-are added together, the result is a complex and unwieldy system. In recent years, the need for acquisition reform has been raised by a series of procurement review panels and commissions. For example, the President's Blue Ribbon Commission on Defense Management (also known as the "Packard Commission"), stated that new legislative initiatives were needed to recodify federal procurement laws and create "a single, consistent, and greatly simplified procurement statute."

More recently, Congress commissioned an Advisory Panel on Streamlining and Codifying Acquisition Laws pursuant to Section \*3 800 of the National Defense Authorization Act for Fiscal Year 1991 (the so-called "Section 800 Panel"). In accordance

S. REP. 103-258, S. Rep. No. 258, 103RD Cong., 2ND Sess. 1994,  
1994 U.S.C.C.A.N. 2561, 1994 WL 188485 (Leg.Hist.)

**(Cite as: S. REP. 103-258, 1994 U.S.C.C.A.N. 2561)**

with its charter, the Section 800 Panel reviewed over 600 laws related to acquisition, and provided specific legislative proposals to amend or repeal almost 300 laws. In January 1992, the panel completed this mammoth undertaking, producing an 8 volume report with over 1,800 pages of material. The report called for a comprehensive overhaul of the federal procurement laws that would-

Improve government access to commercial technologies;

Reduce administrative overhead, especially in light of anticipated reductions in the federal acquisition workforce; and

Reverse a perceived trend toward the incremental enactment of procurement statutes without a clear analysis of their impact on the overall acquisition system.

The conclusions of the Section 800 panel were reinforced in 1993 by a government-wide "National Performance Review" (NPR) headed by the Vice President. The NPR's report, entitled "From Red Tape to Results: Creating a Government that Works Better and Costs Less," recommended increased reliance on acquisitions of commercial items, an increased "simplified acquisition threshold" of \$100,000, and other streamlining measures.

S. 1587 is a comprehensive overhaul of the federal acquisition laws, based in large part on the recommendations of the Section 800 Panel, the National Performance Review and prior legislative efforts of the Committee on Governmental Affairs. The bill would increase the government's access to products developed in the commercial sector; create a new simplified acquisition threshold of \$100,000; and streamline and consolidate hundreds of other acquisition laws. As amended, the bill would also address chronic management problems that have resulted in cost and schedule overruns on large government acquisition programs. Along these lines, the bill would provide incentives for saving time and money, while fulfilling user requirements. Moreover, these objectives would be accomplished without undermining the key features of the current procurement statutes, such as full and open competition and an effective bid protest process, that have been established over the years to safeguard the acquisition system and prevent abuse.

### III. LEGISLATIVE HISTORY

S. 1587 was introduced on October 26, 1993, by Senators Glenn, Bingaman, Levin, Nunn, Bumpers, and Lieberman. The bill was **\*\*2564** the product of a lengthy review process which was conducted on a bipartisan basis by the leadership of the Senate Governmental Affairs, Armed Services, and Small Business Committees.

In the course of this review, the three Committees considered the recommendations of the Section 800 Panel and the Vice President's NPR, as well as several procurement reform bills which had been introduced in this and previous Congresses. These bills included:

S. 1958, introduced by Chairman Glenn (and co-sponsored by Senator Akaka) on November 13, 1991, to clarify the procurement protest authority of the General Services Board of Contract Appeals (GSBCA) and the General Accounting Office (GAO); raise the threshold of the Truth in **\*4** Negotiations Act; establish clear "debriefing" requirements for disappointed bidders; and make other procurement reforms. S. 1958 was approved by the Committee in the 102d Congress, but was not considered by the full Senate.

S. REP. 103-258, S. Rep. No. 258, 103RD Cong., 2ND Sess. 1994,  
1994 U.S.C.C.A.N. 2561, 1994 WL 188485 (Leg.Hist.)

**(Cite as: S. REP. 103-258, 1994 U.S.C.C.A.N. 2561)**

S. 260, introduced by Senator Levin (and co-sponsored by Senators Cohen, Glenn and Roth) on January 24, 1991, to remove impediments to efficient and cost-effective acquisition of commercial items by federal agencies. S. 260 was approved by the Senate on two occasions, and similar legislation was approved by the House. However, the two bills were not reconciled before the end of the session.

S. 554, introduced by Senator Glenn on March 10, 1993 (and co-sponsored by Senators Pryor and Cohen) to prescribe that evaluation factors and significant sub-factors in solicitations be set forth clearly, along with their relative importance; and to provide that the government establish a process whereby agencies assess the ready availability of trained federal employees to perform proposal evaluation in procurements and requiring the use of such available employees before securing the services of consultants to perform proposal evaluation.

S. 555, introduced by Senator Glenn on March 10, 1993 (and co-sponsored by Senators Pryor and Cohen) to clarify the procurement protest authority of the GSBICA.

S. 556, introduced by Senator Glenn on March 10, 1993 (and co-sponsored by Senators Levin and Cohen) to clarify the procurement protest authority of the GAO.

The Senate Governmental Affairs Committee conducted three joint hearings with the Senate Armed Services Committee on S. 1587 in 1994. At the first hearing, on February 24, the two Committees received testimony on the bill from John M. Deutch, then-Under Secretary (and currently Deputy Secretary) of Defense; Roger Johnson, the Administrator of the General Services Administration; and Steven Kelman, the Administrator of the Office of Federal Procurement Policy. At that time, Mr. Kelman, speaking for the Administration, testified that "the administration strongly supports S. 1587. \*\*\*"

On March 10, the two Committees heard from Robert Murphy, General Counsel of the General Accounting Office; Derek Vander Schaaf, Deputy Inspector General of the Department of Defense; \*\*2565 Donald J. Kinlin, Chair of the Public Contract Law Section of the American Bar Association; and Erik Pages, representing the Business Executives for National Security.

On March 16, the two Committees received testimony from individuals representing diverse interests in the private sector, including the Acquisition Reform Working Group (a coalition consisting of the Aerospace Industries Association, the American Defense Preparedness Association, the American Electronics Association, the Contract Services Association, the Electronics Industries Association, the National Security Industrial Association, the Professional Services Council, the Shipbuilders Council of America, and the U.S. Chamber of Commerce); the Small Business Legislative Council; the Minority Business Enterprise Legal Defense and Education Fund; the Independent Defense Contractors Association; the Information \*5 Technology Association of America; the Integrated Dual-Use Commercial Companies; the Computer and Communications Industry Association; and the Computer Business Equipment Manufacturers Association.

Following the hearings, representatives of the bipartisan leadership of the Senate Governmental Affairs, Armed Services and Small Business Committees reviewed each comment and recommendation proposed during the hearings and in testimony received for the record. On March 24, 1994, Senators Roth and Cohen introduced the Federal Acquisition Management Improvement Act of 1994 (S. 1982) proposing government-wide reforms to streamline management organizations and revise incentive structures for

S. REP. 103-258, S. Rep. No. 258, 103RD Cong., 2ND Sess. 1994,  
1994 U.S.C.C.A.N. 2561, 1994 WL 188485 (Leg.Hist.)  
(Cite as: S. REP. 103-258, 1994 U.S.C.C.A.N. 2561)

government employees and contractors. The provisions of S. 1982 were also reviewed in light of the testimony received at the hearings. Based upon the work of the three Committees, a substitute bill was prepared.

On April 26, 1994, the Committee on Governmental Affairs took up S. 1587. The Committee approved the bill as amended by a complete substitute offered by Senators Glenn, Roth, Levin, Cohen, and Nunn on a voice vote. In addition, the Committee adopted an amendment offered by Senator Stevens to delete provisions of the bill addressing U.S.-flag shipping requirements. The Committee concluded that amendment to these provisions was premature because: (a) the Commerce Committee is actively considering comprehensive reform provisions; and (b) the Administration is engaging in ongoing discussions with the maritime transportation industry to determine if such provisions can be drafted in a manner that accommodates both the purposes of the Cargo Preference laws and the types of commercial procurements that S. 1587, as introduced, sought to address. All other proposed amendments to the bill were withdrawn without a vote.

#### IV. ANALYSIS OF LEGISLATION

##### Commercial items

The commercial items provisions of the bill, which are set forth in Title VIII, would encourage the use of commercial items, and where such items are not available, other nondevelopmental items, and make it substantially easier for federal agencies throughout **\*\*2566** the government to purchase such items. The purchase of proven products such as commercial and nondevelopmental items can eliminate the need for research and development, minimize acquisition leadtime, and reduce the need for detailed design specifications or expensive product testing.

The Subcommittee on Oversight of Government Management has held a series of hearings on this subject and has issued a number of reports concluding that action is necessary. [FN1] As Senator Levin explained when S. 587 was introduced-

[I]t only makes sense that products that are already in use-known as nondevelopmental items or NDI's-are less expensive and easier to purchase than government-unique **\*6** items. The acquisition of NDI's can lower initial purchase costs by reducing or eliminating the need for research and development. Acquisition leadtime can be reduced since NDI's are readily available and can be produced on existing production lines. Because the product is already developed and has been shown to work, the need for detailed design specifications and extensive testing is also reduced. [FN2]

Title VIII includes provisions that would reduce impediments to the purchase of commercial items by exempting such purchases from a series of statutes that are unique to government purchases, and that have no counterpart in the commercial sector. The bill would authorize the Federal Acquisition Regulatory Council to waive the applicability of future statutes to commercial item procurements, unless such a waiver is expressly prohibited by the statute.

The bill, in Title I, also would amend the Truth in Negotiations Act for DOD and civilian agencies to create a new commercial items exception. This new exception shall be used where competition is not feasible and adequate information on commercial prices is available to determine price reasonableness. This approach would relieve commercial contractors from what they consider their number one disincentive

S. REP. 103-258, S. Rep. No. 258, 103RD Cong., 2ND Sess. 1994,  
1994 U.S.C.C.A.N. 2561, 1994 WL 188485 (Leg.Hist.)

**(Cite as: S. REP. 103-258, 1994 U.S.C.C.A.N. 2561)**

to participating in government procurements-the burden of collecting cost data for the government. The Section 800 Panel recommended a similar exemption.

#### Simplified acquisition threshold

Title IV of the bill would raise the small purchase threshold from \$25,000 to \$100,000 and relabel it the "simplified acquisition threshold," as recommended by the Vice President's National Performance Review and the Section 800 Panel. Of federal agency contract actions over \$25,000, the vast majority are under \$100,000-but these purchases account for only 5% of the contract dollars. The new simplified acquisition threshold should substantially streamline the process of making small purchases and reduce the amount of staff time needed for such purchases, resulting in substantial savings for the government.

**\*\*2567** The procedural changes made in these sections would be enhanced by the establishment of an effective electronic data interchange (EDI) system to provide access to information on contracting opportunities. The Vice President's NPR has committed the executive branch to establish such a system in the next year. The Committee feels that continuance of requirements regarding notice of contracting opportunities is essential in the presence of a paper-based system. As the bill provides, however, the notice requirement will be satisfied by any agency system, certified by the Administrator of the Office of Federal Procurement Policy, to implement an appropriate architecture of design for electronic commerce with appropriate notice and solicitation capabilities, and which will ensure that all small business concerns are permitted to respond to solicitations within specified time frames.

Title IV would also raise the threshold on a number of procurement-related provisions to \$100,000 as recommended by the Section **\*7** 800 panel and would authorize the Federal Acquisition Regulatory Council to waive the applicability of future statutes to contracts below the simplified acquisition threshold, unless such a waiver is expressly prohibited by the statute.

#### Protests

When Congress enacted the Competition in Contracting Act (CICA) in 1984, it established in statute two protest fora to provide for the resolution of challenges to agency contract awards: the GAO and the GSBICA. In so doing, Congress set in place a mechanism to assure that full and open competition, the cornerstone of government procurement, would be enforced. To strengthen this critical process, Title I of the bill would make a number of changes to provisions regarding bid protests filed with the GAO, the GSBICA and the federal courts.

Sections 1013, 1014, 1063, 1064, 1402, 1433 would establish a new, accelerated schedule for notice of contract award, contractor debriefings, and bid protests. Under these provisions, agencies would be required to notify unsuccessful offerors of award decisions as soon as practicable after the date of contract award, and to provide debriefings if an offeror requests one within 3 days after receipt of notice of contract award. Contracting officers would be empowered to withhold performance in the first ten days after contract award, or within five days after a debriefing date is offered, in cases where a bid protest is likely and immediate performance is not in the best interest of the United States.

S. REP. 103-258, S. Rep. No. 258, 103RD Cong., 2ND Sess. 1994,  
1994 U.S.C.C.A.N. 2561, 1994 WL 188485 (Leg.Hist.)  
(Cite as: S. REP. 103-258, 1994 U.S.C.C.A.N. 2561)

These changes would address concerns that have been expressed about the ability of losing offerors to obtain meaningful debriefings. Generally speaking, post-award debriefing are intended to provide losing offerors with pertinent information concerning the basis for the award decision, as well as an indication of how those offerors can improve their chances for success in future procurements. It has become apparent, however, that debriefings are inconsistently given and often-times fail to achieve their purpose.

**\*\*2568** At the hearing on S. 1958, industry representatives testified that debriefings are a frustrating experience and that agencies are generally not forthcoming with useful information. [FN3] Additionally, these witnesses observed that the inability to obtain sufficient information in debriefings, in particular a meaningful explanation of the basis for the award decision, leads many firms to file protests in order to obtain that information. [FN4]

The primary purpose of mandating meaningful debriefings as part of the acquisition streamlining effort is to eliminate the filing of protests as a means to discover the propriety of an award decision. These protests unnecessarily tax the already burdened procurement system in a manner which could be obviated simply by requiring the appropriate disclosure of such information in the form of a debriefing.

**\*8** Sections 1403 and 1435 would authorize the payment of consultant and expert witnesses fees (in addition to attorneys' fees) in protests to the GAO and the GS-BCA, as recommended by the Section 800 Panel. These provisions would also limit all such fees to the levels established in the Equal Access to Justice Act for attorneys fees against the United States generally. At present, there is no statutory limit on attorneys' fees in bid protest actions. These provisions should add uniformity and cost savings to the process.

Section 1403 would also amend the provisions applicable to bid protests to the GAO to provide that the Comptroller General may recommend the payment of attorneys fees in bid protest cases, rather than directing agencies to pay such fees. This provision (which parallels language included in H.R. 3161 and S. 1958 in the last Congress, and S. 556 in this Congress) would address questions that have been raised about the constitutionality of existing law.

For many years, GAO has provided advisory opinions to agencies where bidders or offerors on agency solicitations file protests. This activity has assisted agencies over the years to remedy unlawful or unfair award decisions, and it has been upheld by the courts.

One provision, of CICA, which in 1984 clarified in statute GAO's bid protest function, permits the Comptroller General to award bid protest and proposal preparation costs to successful protesters. [FN5] On June 20, 1991, after over six years of Executive Branch compliance with this provision, the Department of Justice notified the President of the Senate of its intent to challenge this provision on constitutional grounds. On June 26, 1991, Justice filed this challenge in the District Court for the District of Columbia. [FN6]

The gravamen of Justice's argument is that because the law currently permits the Comptroller General to "declare" a successful protester entitled to recover costs after a determination that the underlying contract award does not comply with law or regulation, the Comptroller General, as an officer of the legislative branch, [FN7] is entrusted with the ability to interpret a law "with the purpose and **\*\*2569** ef-

S. REP. 103-258, S. Rep. No. 258, 103RD Cong., 2ND Sess. 1994,  
1994 U.S.C.C.A.N. 2561, 1994 WL 188485 (Leg.Hist.)

**(Cite as: S. REP. 103-258, 1994 U.S.C.C.A.N. 2561)**

fect of altering the legal rights, duties, and relations of persons \*\*\* outside the Legislative Branch.' \*\*\* In so doing, the provision violates the constitutional principle of separation of powers." [FN8]

It is not certain how the constitutional issue will be resolved in this case. In its current form, however, the cost provision deviates from the balance of the provisions in CICA related to the Comptroller General's procurement protest authority in that those other provisions do not vest him with binding authority. The central feature of CICA's bid protest procedure is a carefully circumscribed role for the Comptroller General in receiving bid protests and issuing recommendations, but not binding orders, to government agencies on remedies to redress unlawful procurement actions.

The Committee believes that GAO performs an important service to the procurement community which should be maintained. In order to assure the stability of this system and avoid the \*9 uncertainty that would be created by protracted litigation of this issue, the Committee believes that the amendment to CICA envisioned in section 1403 would bring the bid protest cost provision in line with the balance of the Act.

Sections 1434 and 1438 would address frivolous or bad faith protests to the GSBICA, as recommended by the section 800 Panel. Section 1434 would authorize the GSBICA to dismiss a protest that is frivolous, brought in bad faith, or does not state on its face a valid basis for protest. Section 1438 would authorize the GSBICA to invoke procedural sanctions where a person brings a frivolous or bad faith protest, or willfully abuses the board's process.

The appellate authority for decisions rendered by the GSBICA in procurement protests rests in the United States Court of Appeals for the Federal Circuit. [FN9] Several decisions of that tribunal, however, have thrown into question the Board's ability to manage its docket and provide effective relief to legitimate protesters. Sections 1434 and 1438 are intended to resolve these questions.

In Vion Corporation, [FN10] the GSBICA found what appeared to be repeated delays by the protester regarding non-compliance with a discovery order. It concluded that the case was not being prosecuted fairly and questioned the motives of the protester. On the basis of this conduct, the GSBICA dismissed the case as frivolous based on its authority under the Brooks Act. [FN11]

The Federal Circuit overturned the Board's dismissal in this case, holding:

A protest cannot be dismissed as "frivolous" unless the protest lacks an arguable basis in fact or law. On this record, non-compliance with a discovery order on issues the protester need not prove and the Board's irrelevant finding that the motive of the protester was "not genuine" cannot make the protest frivolous. [FN12]

**\*\*2570** From the Committee's perspective, a tribunal, such as the GSBICA which works under statutorily imposed time frames, should not be constrained in the management of its docket. Government efficiency alone compels support for the Board's ability to weed out cases manifesting an intent outside the raising and settling of a legitimate claim.

Furthermore, under the current protest system, protests may result in the suspension of procurement activity. [FN13] Under such circumstances, to permit the potential bad faith of a party to operate unabated seriously impacts the efficiency of the questioned acquisition. Such improper delay of procurement action is something that should not be ignored and sections 1434 and 1438 would permit the GSBICA to bet-

S. REP. 103-258, S. Rep. No. 258, 103RD Cong., 2ND Sess. 1994,  
1994 U.S.C.C.A.N. 2561, 1994 WL 188485 (Leg.Hist.)

**(Cite as: S. REP. 103-258, 1994 U.S.C.C.A.N. 2561)**

ter manage its case load.

Title I would adopt a number of provisions from S. 555 to clarify GSBICA protest jurisdiction and address other major concerns. Section 1431 would clarify the GAS's authority to revoke a delegation of authority after the award of a contract where there is a finding \*10 of a violation of law or regulation in connection with the contract award. Section 1432 would clarify the GSBICA's authority to review contracting decisions that are alleged to have violated a statute, regulation, or the conditions of any delegation of procurement authority. Section 1436 would provide for the public disclosure of any settlement agreement that provides for the dismissal of a protest and involves a direct or indirect expenditure of appropriated funds. This Title would also consolidate judicial jurisdiction over bid protests in the Court of Claims, as recommended by the Section 800 Panel.

In 1990, GAO addressed the settlement process at the Board. [FN14] This review was in response to reports that disappointed offerors were filing protests of contract awards, and to avoid procurement delays, agencies would pay protesters to drop their claims. [FN15] It also followed GAO's study of the Census Bureau's handling of a protests of a multimillion dollars procurement of ADP for then-upcoming census in which \$1.1 million was paid by the agency to settle the claims without a review of the merits. [FN16]

GAO found that nearly half the protests it sampled were settled before the issuance of a decision by the Board. Slightly more than half of that number involved cases where the terms of the settlement were disclosed. Although GAO's sample of cases did not show a high incidence of money changing hands, GAO noted that such settlements should be an issue of concern. [FN17] Indeed, GAO concluded:

[I]f an agency offers monetary settlements solely to avoid operational delays resulting from CICA's suspension procedures, we believe there is no basis for the settlement. Further, we would question the appropriateness of monetary settlements where the agency (1) thought the protest \*\*2571 had no merit or (2) chose not to correct procurement flaws that could be corrected, but settled with money because it would take less time. \*\*\* Because not all settlements are disclosed, the fact that our review did not show a high incidence of Fedmail is not conclusive evidence that there is no problem. \*\*\* [FN18]

GAO recommended that Congress act legislatively to require that settlement terms be disclosed to the Board, and section 1436 would address the issue. [FN19]

#### Performance based acquisition management

The Committee is concerned about the government's record in meeting cost, schedule, and performance goals for acquisition programs. The Deputy Secretary of Defense testified that he was \*11 shocked to find that virtually no major systems were within budget and schedule guidelines. The GAO reported that cost increases on the order of 20 to 40 percent are common on major programs, with numerous programs experiencing much grater cost overruns. During the hearings, the Committee heard consistently that such problems arise because the buying system provides the wrong incentives and managers rely on a complicated web of regulations.

A goal of procurement streamlining is to focus less on detailed regulations and more on guiding principles. The language in Title V of the bill would provide for the Defense Department and civilian agencies to measure the performance of their ac-

quisition programs with a top-level goal of meeting 90 percent of budget and schedule guidelines while fulfilling requirements. In measuring cost, it is the Committee's intent that budgetary estimates are used. The implementing regulations should provide for the consideration of outstanding claims. In addition, the bill calls for the Defense Department to reduce by 50 percent the time it takes to field emerging technologies.

Title V will enable the Congress to view allegations of fraud, waste and abuse within the bigger picture of the overall acquisition management performance at an agency. It should guard against a reemergence of ad hoc statutes that would offset the streamlining gains made by this bill.

The title would direct agency heads to establish a system of incentives to award program performance, and to develop personnel actions, including pay for performance, for the acquisition workforce. The incentives should reward management of programs within budget, schedule, and requirements. The Title would also require agency heads to recommend necessary or enhancing legislation within one year of enactment.

**\*\*2572** Finally, the title would require federal agencies to streamline their acquisition management processes for items developed for the government. It would require that the revised processes focus on results, rather than reports. In response to the GAO's testimony and reports on acquisition system problems, the Administration should streamline decision processes by focusing on objective measures and realistic data on cost, schedule, and performance. The Committee is supportive of efforts at the Pentagon to bring to government such streamlined product development processes.

#### Procurement ethics

Title VI of the bill would substantially streamline the procurement ethics laws, as recommended by the Vice President's National Performance Review and the Section 800 panel. Over the last decade, Congress has enacted a series of new procurement ethics provisions. Although each of these provisions, standing alone, addresses a specific ethics problem, the cumulative impact has been a complex patchwork of overlapping and sometimes redundant requirements.

In 1989, the President's Task Force on Ethics recommended the repeal of all procurement-specific ethics laws except for a narrow provision on the disclosure of inside information. The Senate examined this proposal and decided instead to streamline and consolidate the procurement ethics laws, while retaining needed safeguards. **\*12** Title VI mirrors the provisions adopted by the Senate as an amendment to the National Defense Authorization Act in 1991 and would streamline, consolidate and repeal several superseded, obsolete, or redundant procurement ethics laws.

#### Establishing a uniform procurement system

The bill would make a number of changes to the procurement code to ensure the uniform treatment of DOD and civilian agency procurements, as recommended by the NPR.

Sections 1004 and 1054 would add new provisions authorizing the use of task order contracts for advisory and assistance services and establishing a requirement for the multiple award and competition for task orders where the contract period is to exceed 3 years and the contract is estimated to be \$10,000,000 or more.

S. REP. 103-258, S. Rep. No. 258, 103RD Cong., 2ND Sess. 1994,  
1994 U.S.C.C.A.N. 2561, 1994 WL 188485 (Leg.Hist.)

**(Cite as: S. REP. 103-258, 1994 U.S.C.C.A.N. 2561)**

Section 1251 of the bill would amend the Federal Property Act to codify the definitions and requirements of the Truth in Negotiations Act (TINA) for civilian agencies. TINA is the statute which requires contractors in sole-source procurements to provide the government with "cost or pricing" data to support the validity of their prices. A similar codification was added to Title 10 in 1986, but applied only to the Department of Defense.

Section 2151 would amend the Federal Property Act to establish contract cost principles for civilian agencies identical to those already in effect for DOD. Contract cost principles provide that certain types of costs—such as the entertainment costs, lobbying expenses, advertising costs, and so-called "golden parachute" payments—should not be paid by the taxpayers and are not "allowable" on federal contracts. The new provision would also establish cost certification procedures and penalties identical to those that **\*\*2573** have long been applicable in DOD procurements. The Section 800 Panel recommended repeal of the statutory contract cost principles. This provision would retain these provisions, and ensure uniform treatment of DOD and civilian agency contracts.

Section 2501 would amend [10 USC 2410](#) and repeal [10 USC 2410e](#), which establish DOD-unique requirements for the certification of contract claims. The Contract Disputes Act of 1978 establishes government-wide requirements for the certification of claims, which would remain in effect, and would cover contract claims at both Defense Department and civilian agencies. The section would provide for a separate certification to be applicable to requests for equitable adjustment and for relief under Public Law 85-804 for DOD.

In addition, Section 2002 would repeal [10 USC 2355](#), which creates unique vouchering requirements for DOD, as recommended by the Section 800 Panel. The Committee intends the Office of Federal Procurement Policy to review existing vouchering systems and develop a standard, government-wide vouchering procedure.

#### Defense acquisition pilot programs

Section 809 of the National Defense Authorization Act for Fiscal Year 1991 established the Defense Acquisition Pilot Program to provide a means for testing innovative acquisition concepts. Under the pilot program legislation, the specific acquisition programs that **\*13** will be included in a test, and the statutes proposed for waiver, must be approved by Congress.

Section 5003 of the bill would authorize the Secretary of Defense to designate six programs as defense acquisition pilot programs. The statutory waivers that would be authorized for these programs are directly tied to the streamlining reforms set forth in the Federal Acquisition Streamlining Act and would be implemented 45 days after enactment of the Act.

#### V. REGULATORY IMPACT

Paragraph 11(b)(1) of Rule XXVI of the Standing Rules of the Senate requires that each report accompanying a bill evaluate "the regulatory impact which would be incurred in carrying out the bill."

The enactment of this bill would not have any new significant regulatory impact on the public.

S. REP. 103-258, S. Rep. No. 258, 103RD Cong., 2ND Sess. 1994,  
1994 U.S.C.C.A.N. 2561, 1994 WL 188485 (Leg.Hist.)

**(Cite as: S. REP. 103-258, 1994 U.S.C.C.A.N. 2561)**

#### VI. EFFECT ON CURRENT LAW

Paragraph 12 of rule XXVI of the Standing Rules of the Senate generally requires that all bills reported out of committee include a discussion of changes in existing law made by the bill.

In the opinion of the Committee it was deemed necessary to dispense with the requirements of this subsection to expedite the business of the Senate. Rule XXVI para. 12.

#### VII. COST IMPACT

U.S. Congress,

Congressional Budget Office,

Washington, DC, May 6, 1994.

Hon. John Glenn,  
Chairman, Committee on Governmental Affairs,  
U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has reviewed S. 1587, the Federal Acquisition Streamlining Act of 1994, **\*\*2574** as ordered reported by the Senate Committee on Governmental Affairs on April 26, 1994. The bill would change many laws affecting government contracts, including negotiations, administration, reporting, and product development. CBO cannot estimate the impact this bill would have on the federal budget. The bill would have no effect on the budgets of state and local governments.

Overall, S. 1587 is likely to reduce costs that the federal government would incur for goods and services it would purchase from the private sector. Any such savings would allow agencies to make more efficient use of their appropriated funds, but would affect total spending only if overall appropriations were reduced accordingly.

The greatest potential for budgetary savings rests in the provisions affecting three aspects of federal procurement. First, the bill could lead to budgetary savings by relaxing policies that require government contractors to supply data that they do not have to collect or provide in ordinary business dealings. Firms that bid on federal contracts often have to maintain a separate, government-specific accounting system for information that its other customers do **\*14** not require. Much of the data aim at assuring the government that it is getting the most for its money, but some also are used to verify that certain socioeconomic and domestic production goals are met. By easing many of these requirements, the bill may encourage more firms to bid on government contracts, which might lower prices through increased competition. Reducing the information burden also may lower bids from all firms if bidders can dispense with separate accounting systems for federal and commercial contracts.

Second, S. 1587 would facilitate procurement of commercial items instead of goods developed to unique government specifications. The government often bears added costs when it specifies in unusual detail what a contractor must provide. The literature on government procurement suggests that the government frequently sets stand-

S. REP. 103-258, S. Rep. No. 258, 103RD Cong., 2ND Sess. 1994,  
1994 U.S.C.C.A.N. 2561, 1994 WL 188485 (Leg.Hist.)

**(Cite as: S. REP. 103-258, 1994 U.S.C.C.A.N. 2561)**

ards for its purchases that make them more costly, but not substantially more useful, than other products available through normal commercial channels. Extra development costs and foregone economies of scale increase the cost of products produced uniquely for the government. Increasing reliance on commercially available products would lower costs.

Third, the bill would raise the small purchase threshold from \$25,000 to \$100,000, which would allow contracting officers to use simplified procedures when making purchases under \$100,000. Also, the bill would allow agencies to make purchases under \$2,500 with very few restrictions. Granting agencies greater discretion when making small purchases would reduce the amount of time and paperwork devoted to a large number of contracts involving relatively small dollar amounts, thereby reducing agencies' administrative costs.

There is good reason to expect that a bill that makes accounting simpler, government-specific products less prevalent, and procurement more efficient would yield budgetary savings. However, CBO **\*\*2575** does not have sufficient information to estimate either the extent to which these changes would occur, or the savings that would result. For one thing, it is not clear to what degree government agencies would translate the changes in law proposed by S. 1587 into changes in standard government practice.

Furthermore, estimating the amount of savings that would result from these improved practices is difficult. Empirical analysis on the first two changes have been conducted by the Defense Systems Management College, the Center for Strategic and International Studies, the RAND Corporation, and the Defense Science Board. These studies draw upon surveys and questionnaires, the responses to which may be rooted in subjective judgments that may be correct as to the direction of the budgetary change, but that are probably unreliable as to the amount.

Despite these and other reasons to be conservative on the amount of budgetary savings, the preponderance of the evidence is that the bill would cause savings in government procurement. Any such savings would affect discretionary appropriations and thus would not have pay-as-you-go implications.

**\*15** If you would like further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Michael A. Miller and Mickey Buhl.

Sincerely,

Robert D. Reischauer, Director.

#### VIII. SECTIONAL ANALYSIS

##### Title I-Contract Formation

##### Subtitle A-Competition Statutes

##### Part I-Armed Services Acquisitions

##### Subpart A-Competition Requirements

Sec. 1001 would clarify references to the FAR, as recommended by the Section 800 Panel.

S. REP. 103-258, S. Rep. No. 258, 103RD Cong., 2ND Sess. 1994,  
1994 U.S.C.C.A.N. 2561, 1994 WL 188485 (Leg.Hist.)

**(Cite as: S. REP. 103-258, 1994 U.S.C.C.A.N. 2561)**

Sec. 1002 would amend [10 USC 2304\(b\)](#) to permit an agency to exclude a particular firm for the purpose of maintaining an alternate source to ensure a continuous flow of supplies or services, satisfy a critical need for health, safety or other emergency supplies, or satisfy projected needs resulting from a high demand. The section also makes a technical change, moving a provision prohibiting class determinations to a new section of the code.

Sec. 1003 would clarify the law governing the approval authority for the use of non-competitive procedures within the DOD, as recommended by the Section 800 Panel.

Sec. 1004 would add a new [section 2304a to Title 10](#), governing the use of task order contracts for advisory and assistance services and establishing a requirement that solicitations for such contracts shall ordinarily provide for multiple awards and for fair consideration of each awardee for task orders issued under the contracts **\*\*2576** where the contract period is to exceed 3 years and the contract is estimated to exceed \$10,000,000. Section 1054 would add a new section to the Federal Property Act to address task order contracts for advisory and assistance services for civilian agencies.

The Committee believes that indiscriminate use of task order contracts for broad categories of ill-defined services unnecessarily diminishes competition and results in the waste of taxpayer dollars. In many cases, this problem can effectively be addressed, without significantly burdening the procurement system, by awarding multiple task order contracts for the same or similar services and providing reasonable consideration to all such contractors in the award of such task orders under such contracts. The Committee intends that all federal agencies should move to the use of multiple task order contracts, in lieu of single task order contracts, wherever it is practical to do so. Although the Administration has recommended language providing general authorization for the use of task and delivery order contracts, the Committee notes that such contractual vehicles are now widely used and, consequently, believes that current authorities are sufficient. The Committee believes that the framework established in Sections 1004 and 1054 is a useful model for other types of task order and delivery order contracts.

**\*16** The new provisions added to the procurement code by sections 1004 and 1054 of the bill are intended to give agencies broad discretion in establishing procedures for the evaluation and award of individual task orders under multiple award contracts. They do not establish any specific time frames or procedural requirements for the issuance of task orders, other than that there be a specific statement of work and that all contractors under multiple award contracts be afforded a reasonable opportunity to be considered in the award of each task order (with narrow exceptions). Accordingly, contracting officials will have wide latitude and will not be constrained by CICA requirements in defining the nature of the procedures that will be used in selecting the contractor to perform a particular task order. When contracting officials award task orders they will have broad discretion as to the circumstances and ways for considering factors such as past performance, quality of deliverables, cost control, as well as price or cost. In some cases, all that may be necessary is an oral discussion with each of the contractors, followed by the contracting officer's decision. As far as the concept of multiple award contracts is concerned, the Administrator of OFPP has assured the Committee that incentives would be created to encourage the use of such contracts and competition for orders under

them where practicable.

Sec. 1005 would establish a new exception to the requirement for the use of competitive procedures in [10 USC 2304\(c\)\(3\)](#) when contracting for the services an expert for use in litigation involving the federal government. The intent of the exception is to authorize the use of other than competitive procedures when contracting for the services of experts for use in actual or reasonably foreseeable litigation or disputes involving the United States in any trial, hearing, **\*\*2577** or proceeding before any court, administrative tribunal, agency, or as part of alternative dispute resolution processes, whether or not the expert is expected to testify.

#### Subpart B-Planning, Solicitation, Evaluation, and Award

Sec. 1011 would clarify CICA's solicitation provisions requiring the disclosure of evaluation factors and subfactors and authorizing awards without discussions. Similar language was included in H.R. 3161 and S. 1958 last Congress, and has been included in S. 554 (for civilian agencies) this Congress.

Sec. 1012 is a technical change, which would move a provision regarding the consideration of option pricing to a new section of the code, as recommended by the Section 800 Panel.

Sec. 1013 would require notice to all offerors as soon as practicable after date of contract award. This provision would be a part of the accelerated debriefing and protest schedule established in Sections 1014 and 1401.

Sec. 1014 would require debriefings providing basic information on the award to unsuccessful offerors, to be held promptly, if requested within 3 days after receipt of notification of contract award. Similar language was included in S. 555. The Section 800 Panel also recommended adding a debriefing requirement (with a longer time frame and less detail) to this section.

**\*17** Sec. 1015 would require DOD to maintain protest files in protests to the Comptroller General, as recommended by the Section 800 Panel.

Sec. 1016 would authorize DOD to pay costs and fees in bid protest settlements, as recommended by the Section 800 Panel.

Sec. 1017 would add a new section a to [Title 10](#) to establish two-phase selection procedures where it is anticipated that three or more offers would be received requiring a substantial amount of design work before a cost or price proposal can be developed and involving substantial proposal preparation costs. First step proposals would be evaluated upon technical approach and qualifications while in the second step a specified number of offerors determined to be most highly qualified under step one will submit competitive proposals including appropriate cost or price information.

#### Subpart C-Kinds of Contracts

Sec. 1021 would repeal the requirement for a determination prior to the use of cost or incentive-type contracts, as recommended by the Section 800 Panel. Such determinations are unnecessary in light of the acquisition planning requirements of the Federal Acquisition Regulation. The repeal of this section is not intended to encourage increased use of cost or incentive-type contracts.

Sec. 1022 would make technical and conforming changes recommended by the Section

800 Panel.

**\*\*2578** Subpart D-Miscellaneous Competitive Statutes

Sec. 1031 would repeal [10 USC 2318](#), which requires annual reports by DOD competition advocates. The separate requirement for annual reports on competition by competition advocates or all agencies (in section 20(b) of the OFPP Act) would remain in effect.

Part II-Civilian Agency Acquisitions

Subpart A-Competition Requirements

Sec. 1051 would clarify references to the FAR, in the same manner as Sec. 1001.

Sec. 1052 would amend [41 USC 253\(b\)](#), permitting an agency to exclude a particular firm in order to maintain an alternate source for the purposes set forth in section 1002, and would move a provision prohibiting class determinations to a new section of the code, in the same manner as Sec. 1002.

Sec. 1053 would clarify the law governing civilian agencies with respect to approval of the use of non-competitive procedures, in the same manner as Sec. 1003.

Sec. 1054 would add a new section 393H to the Federal Property Act, to address task order contracts for advisory and assistance services. This provision is identical to the provision added to [Title 10](#) by Sec. 1004.

Sec. 1055 would establish for civilian agencies a new exception to the requirement for the use of competitive procedures in [41 USC 253\(c\)\(3\)](#) for expert litigation services as set forth in section 1005 for [Title 10](#). The section conforms the notice requirements in [41 USC 416\(c\)](#) and [15 USC 637\(c\)](#) and repeals a codified provision that **\*18** exempts from CICA all IRS contracts to hire experts for the examination of tax returns or litigating actions under the Internal Revenue Code.

Sec. 1056 would amend [41 USC 253\(d\)](#) to permit the use of other than competitive procedures for a follow-on lease for continued occupancy by federal agencies of space in buildings on a one-time basis for a period not to exceed 5 years upon a determination that there is a continuous need for the space, the space meets the agency's needs and that the space is offered at a fair market price.

Subpart B-Planning, Solicitation, Evaluation, and Award

Sec. 1061 would clarify CICA's solicitation provisions requiring the disclosure of evaluation factors and subfactors and authorizing awards without discussions. Conforming changes to [Title 10](#) would be made by Sec. 1011.

Sec. 1062 would move a provision regarding the consideration of option pricing to a new section of the code, in the same manner as section 1012.

Sec. 1063 would require notice to all offerors as soon as practicable after date of contract award. An identical change to [Title 10](#) would be made by section 1013.

**\*\*2579** Sec. 1064 would require civilian agencies to promptly conduct debriefings providing basic information to unsuccessful offerors, if requested within 3 days after receipt of notice of contract award. An identical change to [Title 10](#) would be made by section 1014.

S. REP. 103-258, S. Rep. No. 258, 103RD Cong., 2ND Sess. 1994,  
1994 U.S.C.C.A.N. 2561, 1994 WL 188485 (Leg.Hist.)

**(Cite as: S. REP. 103-258, 1994 U.S.C.C.A.N. 2561)**

Sec. 1065 would require civilian agencies to maintain protest files in protests to the Comptroller General, in the same manner as section 1015.

Sec. 1066 would authorize civilian agencies to pay costs and fees in bid protest settlements, in the same manner as section 1016.

Sec. 1067 would add a new section to [41 USC 251](#) to establish two-phase selection procedures having the same features as in section 1017.

#### Subpart C-Kinds of Contracts

Sec. 1071 would repeal the requirements for a determination prior to the use of cost or incentive-type contracts, in the same manner as section 1021. Such determinations are unnecessary in light of the acquisition planning requirements of the Federal Acquisition Regulation. The repeal of this section is not intended to encourage increased use of cost or incentive-type contracts.

Sec. 1072 would amend the Federal Property Act to add a new section 3033J to permit civilian agencies to enter into multi-year contracts where sufficient appropriations are available, the agency head determines that the need for property or services is reasonably firm and continuing and such a contract is in the best interest of the United States.

Sec. 1073 would add to the Federal Property Act a new section 303K authorizing agencies to enter into contracts for severable services which cross fiscal years so long as the base period does not exceed one year.

Sec. 1074 would require the revision of the Federal Acquisition Regulation to govern federal agencies' exercise of authority to purchase **\*19** goods and services under other agencies' contracts under [31 USC 1535](#), the "Economy Act." The new provision would require that each such purchase has appropriate approval and is made only under the appropriate circumstances. Similar requirements were applied to the Department of Defense only by an amendment to the FY 1994 Department of Defense Authorization Act.

#### Part III-Acquisition Generally

Sec. 1091 would amend the OFPP Act to provide that OFPP should prescribe guidance for executive agencies regarding consideration of the past performance of offerors in awarding contracts. The guidance would include evaluation standards, information collection and maintenance policies, and policies to ensure that offerors are provided an opportunity to submit past performance information.

Sec. 1092 would repeal Section 23 of the OFPP Act, which requires an annual report on competition each year through FY 1990, as recommended by the Section 800 Panel. The separate requirement **\*\*2580** for annual reports on competition by agency competition advocates (in section 20(b) of the OFPP Act) would remain in effect.

#### Subtitle B-Truth in Negotiations

#### Part I-Armed Services Acquisition

Sec. 1201 would make permanent the temporary \$500,000 cost or pricing data threshold and would provide for a periodic inflation adjustments for the threshold.

S. REP. 103-258, S. Rep. No. 258, 103RD Cong., 2ND Sess. 1994,  
1994 U.S.C.C.A.N. 2561, 1994 WL 188485 (Leg.Hist.)

**(Cite as: S. REP. 103-258, 1994 U.S.C.C.A.N. 2561)**

Although this provision would also repeal the statutory requirement for a DOD Inspector General report on the test, it is expected that the IG would routinely review and report on the Department's handling of below-threshold procurements.

Sec. 1202 would amend the TINA exceptions, as recommended by the Section 800 Panel, to cover contracts for services that are sold at catalog prices and modifications to commercial item contracts that would not change the commercial item to a non-commercial item.

Sec. 1203 would require a written determination to be made prior to requiring the submission of cost or pricing data in cases where the acquisition is below the TINA threshold or one of the TINA exceptions applies.

Sec. 1204 would add a new subsection (d) to Section 2036a, creating a new TINA exception for commercial items. The new exception shall be used where competition is not practicable and the contracting officer obtains appropriate data on prices charged for the same or similar products in the commercial marketplace under standards and procedures set forth in the Federal Acquisition Regulation that the contracting officer determines is adequate to determine price reasonableness. The Section 800 Panel recommended a similar exemption.

Sec. 1205 would make a technical change, to cross-reference the new consolidated audit provision in section 2313, as recommended by the Section 800 Panel.

**\*20** Sec. 1206 would provide for the issuance of regulations regarding types of information that must be submitted for the contracting officer to consider in determining price reasonableness when cost or pricing data are not required because the acquisition is not expected to exceed the \$500,000 threshold.

Sec. 1207 would authorize the parties to agree upon an appropriate effective date for certifications of cost or pricing data, as recommended by the Section 800 Panel.

Sec. 1208 would provide that the item "subcontract" would include transfers of commercial items within a company to tie in with the definition of commercial items in section 8001.

Sec. 1209 would repeal the uncodified provisions that are codified in section 1206.

## Part II-Civilian Agency Acquisitions

Sec. 1251 would amend the Federal Property Act to add a new Section 304A, codifying TINA for civilian agencies. The new provision **\*\*2581** would raise the civilian TINA threshold to \$500,000, with a provision for a periodic inflation adjustment, require regulations concerning information for price reasonableness determinations for contracts below the new threshold, and add a new TINA exemption for commercial items that would be parallel to the changes made for DOD in Part I.

Sec. 1252 would repeal the obsolete provision replaced by the new Section 304A.

## Subtitle C-Research and Development

Sec. 1301 would amend [10 USC 2358](#), to consolidate the research and development (R&D) authority of the military departments and repeal redundant and obsolete authority, as recommended by the Section 800 Panel.

Sec. 1302 would amend [10 USC 2364](#), to delete specific R&D milestone requirements and give DOD broader discretion over specific implementing methodologies, as recom-

mended by the Section 800 Panel.

#### Subtitle D-Procurement Protests

##### Part I-Protests to the Comptroller General

Sec. 1401 would amend [31 USC 3551](#) to make clear that the definition of protest covers protests of solicitations, cancellation of solicitations, awards or proposed awards of contracts, and the cancellation of an award (where such cancellation is alleged to be based on improprieties in the award process) so as to be consistent with the definition set forth in section 1439 for the GSA Board.

Sec. 1402 would amend [section 3553 of Title 31](#).

Subsection (a) would make technical changes to refer to calendar days instead of working days as recommended by the Section 800 Panel.

Subsection (b) would permit contractors to begin performance unless the contracting officer withholds an authorization to proceed with performance in the first ten days after contract award. A contracting officer could withhold authorization if he or she felt that \*21 a bid protest was likely and that immediate performance would not be in the best interest of the United States. The provision is intended to avoid adding costs to the United States from starting, stopping, and restarting contract performance in cases where protests are considered likely and immediate performance is not necessary.

Sec. 1403 would amend 3554 of Title 31, regarding Comptroller General decisions on bid protests.

Subsection (a) would make technical changes to refer to calendar days instead of working days and to provide that an amendment that adds new ground of protest should be resolved to the maximum extent practicable within the time period for final decision on the initial protest, as recommended by the Section 800 Panel.

Subsection (b) would provide that the Comptroller General may recommend the payment of attorneys fees in bid protest cases, \*\*2582 rather than directing agencies to pay such fees. This provision would address questions that have been raised about the constitutionality of existing law. Similar language was included in H.R. 3161 and S. 1958 in the last Congress and has been included in S. 556 in this Congress. This subsection would also authorize the payment of consultant and expert witness fees as well as attorneys fees in protest cases (as recommended by the Section 800 panel), and would limit all such fees to the levels established in the Equal Access to Justice Act.

Sec. 1404 would authorize the Comptroller General to issue regulations on the calculation of time periods and on electronic filings and disseminations, as recommended by the Section 800 Panel.

##### Part II-Protests in the Federal Courts

Sec. 1421 is a conforming change to Sec. 1422, giving the U.S. Court of Claims exclusive judicial jurisdiction over bid protests.

Sec. 1422 would give the U.S. Court of Claims exclusive judicial jurisdiction over bid protests, and eliminate district court jurisdiction over such protests, as recommended by the Section 800 Panel. The provision would have no impact on the

protest jurisdiction of the GAO and the GSBCA.

#### Part III-Protests in Procurement of Automatic Data Processing

Sec. 1431 would authorize the Administrator of GSA to revoke a delegation of authority after the award of a contract where there is a finding of a violation of law or regulation in connection with the contract award. A similar provision was included in S. 1958 last Congress and is in S. 555.

Sec. 1432 would clarify that at the request of an interested party, the Board shall review any decision by a contracting officer alleged to have violated a statute, regulation, or the conditions of any delegation of procurement authority. A similar provision was included in S. 555 earlier in this Congress.

Sec. 1433 would amend Section 111(f)(3) of the Federal Property Act.

Subsection (a) would conform the schedule for GSBCA hearings on suspension of procurement authority to the time frames established in section 1402 and provide that preaward suspensions need **\*22** not preclude continuance of the procurement process to point of award if the agency head determines such action to be in the best interest of the United States.

Subsection (b) would substitute calendar days for working days and require that an amendment that adds new grounds of protest be resolved, to the maximum extent practicable, within the time limits established for resolution of the initial protest, as recommended by the Section 800 Panel.

Sec. 1434 would authorize the GSBCA to dismiss a protest that is frivolous, brought in bad faith, or does not state on its face a valid basis for protest. Similar provisions were included in S. 555 and recommended by the Section 800 Panel.

**\*\*2583** Sec. 1435 would authorize the payment of consultant and expert witness fees as well as attorneys' fees in protest cases (as recommended by the Section 800 Panel), and would limit all such fees to the levels established in the Equal Access to Justice Act.

Sec. 1436 would require public disclosure of any settlement agreement that provides for the dismissal of a protest and involves a direct or indirect expenditure of appropriated funds. This provision also authorizes agencies to make such payments from the judgment fund. A similar provision was included in S. 555.

Sec. 1437 is a conforming change to Sec. 1422, giving the U.S. Court of claims exclusive judicial jurisdiction over bid protests.

Sec. 1438 would authorize the GSBCA to adopt appropriate rules and procedures which would, at a minimum, address the computation of time periods under the statute; provide procedures for electronic filing and dissemination of documents; and provide for sanctions where a person brings a frivolous or bad faith protest, or willfully abuses the board's process. Similar provisions were recommended by the Section 800 Panel.

Sec. 1439 would amend the definition of "protect" in section 111(f)(9) of the Federal Property Act to clarify that the term covers protests of solicitations, cancellations of solicitations, award or proposed awards of contracts, and the cancellation of an award (where such cancellation is alleged to be based on improprieties in the award process). The same definition is provided for GAO in section 1401.

#### Subtitle E-Definitions and Other Matters

S. REP. 103-258, S. Rep. No. 258, 103RD Cong., 2ND Sess. 1994,  
1994 U.S.C.C.A.N. 2561, 1994 WL 188485 (Leg.Hist.)  
(Cite as: S. REP. 103-258, 1994 U.S.C.C.A.N. 2561)

#### Part I-Armed Services Acquisitions

Sec. 1501 would amend the definitions in [10 USC 2302](#) to cross-reference definitions in the OFPP Act, where appropriate.

Sec. 1502 would consolidate provisions on delegation of procurement functions, as recommended by the Section 800 Panel.

Sec. 1503 would streamline provisions on determinations and decisions, as recommended by the Section 800 Panel, while retaining the requirement that such findings be made in writing and retained for no less than 6 years.

Sec. 1504 would make technical changes to clarify the limitation on undefinitized contract actions, as recommended by the Section 800 Panel.

Sec. 1505 would repeal an obsolete provision regarding production special tooling, as recommended by the Section 800 Panel.

**\*23** Sec. 1506 would clarify, as recommended by the Section 800 Panel, that the authority established in [10 USC 2381\(a\)](#) to issue regulations on bids is vested in the Secretary of Defense, as well as the secretaries of the military departments.

#### Part II-Civilian Agency Acquisitions

Sec. 1551 would amend the definitions in the Federal Property Act to cross-reference definitions in the OFPP Act, where appropriate.

**\*\*2584** Sec. 1552 would consolidate provisions on delegation of procurement functions, in the same manner as section 1502.

Sec. 1553 would streamline provisions on determinations and decisions, while retaining the requirement that such findings be made in writing and retained for no less than 6 years, in the same manner as section 1503.

Sec. 1554 would amend the Federal Property Act to provide that the GSA administrator is to provide, upon request, any of the services he or she performs to other federal agencies, mixed-ownership government corporations, the District of Columbia, or a qualified non-profit agency for the blind or other severely handicapped under the Javits-Wagner-O'Day Act and that the Administrator may provide for the use of federal supply schedules or other contracts by state or local governments, the District of Columbia, Puerto Rico, or Indian tribal governments.

#### Title II-Contract Administration

##### Subtitle A-Contract Payment

#### Part I-Armed Services Acquisitions

Sec. 2001 would consolidate contract financing provisions for DOD in [10 USC 2307](#), provide for performance based payments whenever practical, and repeal obsolete and superseded provisions, as recommended by the Section 800 Panel.

Sec. 2002 would repeal [10 USC 2355](#), which creates unique vouchering requirements for DOD, as recommended by the Section 800 Panel. The Committee expects the Office of Federal Procurement Policy to review existing vouchering systems and develop a standard, government-wide procedure.

S. REP. 103-258, S. Rep. No. 258, 103RD Cong., 2ND Sess. 1994,  
1994 U.S.C.C.A.N. 2561, 1994 WL 188485 (Leg.Hist.)  
(Cite as: S. REP. 103-258, 1994 U.S.C.C.A.N. 2561)

## Part II-Civilian Agency Acquisitions

Sec. 2051 would consolidate contract financing provisions for civilian agencies in Section 305 of the Federal Property Act, provide for performance based payments whenever practical, and ensure uniform requirements for progress payments by civilian agencies.

### Subtitle B-Cost Principles

#### Part I-Armed Services Acquisitions

Sec. 2010 would amend the DOD contract cost principles in [10 USC 2324](#) to raise the threshold for coverage to \$500,000, with a periodic inflation adjustment for the threshold and eliminate the requirement for GAO reports. This bill would not adopt the Section 800 Panel's recommendation to repeal the Statutory contract cost principles.

Sec. 2102 would repeal [10 USC 2382](#), which provides standby profit controls for use during national emergencies, as recommended by the Section \*24 800 Panel. Contractor profits would continue to be negotiated pursuant to the principles established in the Federal Acquisition Regulation.

#### \*\*2585 Part II-Civilian Agency Acquisitions

Sec. 2151 would amend Section 306 of the Federal Property Act to establish contract cost principles for civilian agencies. This provision would ensure uniform treatment of contract costs by civilian agencies and the Department of Defense.

### Part III-Acquisitions Generally

Sec. 2191 would repeal section 24 of the OFPP Act, regarding travel expenses of government contractors, as recommended by the Section 800 Panel.

### Subtitle C-Audit and Access to Records

#### Part I-Armed Services Acquisitions

Sec. 2201 would amend [10 USC 2313](#) to provide a consolidated audit provision, prohibit a contracting agency preaward audit where the contracting officer determines that audit objectives can be met by any federal agency's audit occurring within one year preceding the contracting officer's determination and clarify that no special records need be created or maintained in connection with General Accounting Office access to records. The section also repeals superseded provisions as recommended by the Section 800 Panel.

## Part II-Civilian Agency Acquisitions

Sec. 2251 would add a new section 304B to the Federal Property Act to provide a consolidated audit provision for civilian agencies containing the same provisions as

in section 2201 in order to ensure uniform audit authorities for civilian agencies and DOD.

#### Subtitle D-Cost Accounting Standards

Sec. 2301 would amend [41 USC 422](#) to conform the application of Cost Accounting Standards to the new exemptions in the Truth in Negotiations Act for commercial items provided in sections 1202, 1204 and 1251.

[Sec. 2302](#) would repeal an obsolete deadline for procedural regulations that have already been issued, while retaining the provision authorizing the issuance of such regulations.

#### \*25 Subtitle E-Price, Delivery, and Produce Quality

##### Part I-Armed Services Acquisitions

Sec. 2401 would repeal [10 USC 2383](#), which established special qualification requirements for contractors on spare parts contracts, as recommended by the Section 800 Panel.

Sec. 2402 would amend [10 USC 2403](#), on contractor warranties, to require the Department of Defense to establish guidelines and procedures for negotiating and administering contractor warranties. **\*\*2586** The Department should take steps to test innovative approaches to warranties with a goal of developing a more effective implementation of the requirement, as suggested by the Section 800 report; this provision, however, would not repeal [10 USC 2403](#), as recommended by the Section 800 Panel.

##### Part II-Acquisitions Generally

Sec. 2451 would amend [41 USC 15](#) to expand authority for setoffs against assignees, as recommended by the Section 800 Panel.

Sec. 2452 would repeal an obsolete requirement for deposit of contracts with GAO, as recommended by the Section 800 Panel.

#### Subtitle F-Claims and Disputes

##### Part I-Armed Services Acquisitions

Sec. 2501 would amend [10 USC 2410](#) which establishes DOD-unique requirements for the certification of contract claims to make it clear the provision applies only to requests for equitable adjustment and for relief under Public Law 85-804. Section 2501 would repeal [10 USC 2410e](#), concerning a DOD certification requirement. Provisions of the Contract Disputes Act of 1978 (CDA) regarding the certification of claims would remain in effect and would govern claims on a government-wide basis. Section 2501 would also codify a provision restricting legislative payment of claims.

Sec. 2502 would amend [10 USC 2405](#) to conform the time allowed for the filing of a claim, request for equitable adjustment or demand for payment under shipbuilding

S. REP. 103-258, S. Rep. No. 258, 103RD Cong., 2ND Sess. 1994,  
1994 U.S.C.C.A.N. 2561, 1994 WL 188485 (Leg.Hist.)  
(Cite as: S. REP. 103-258, 1994 U.S.C.C.A.N. 2561)

contracts to 6 years, the time allowed for such actions under such other types of contracts. Subsection (c) of [10 USC 2405](#) concerning corrected certifications would be repealed.

#### Part II-Acquisitions Generally

Sec. 2551 would amend the Little Tucker Act to clarify the concurrent jurisdiction of district courts with the Claims Court over contract disputes, as recommended, by the Section 800 Panel.

Sec. 2552 would amend the Contract Disputes Act to clarify the periods for filing claims. The section would also raise thresholds for certifications, accelerated and small claims procedures; and reduces time period for filing actions in the Claims Court from 12 months to 90 days.

Sec. 2553 would amend the Contract Disputes Act to extend time frame in which agencies have the authority to engage in alternative dispute resolution under that Act.

**\*26** Sec. 2554 would require that a contracting officer make reasonable efforts to respond within 30 days to any written request from a small business for a decision concerning contract administration. This section would create no rights under the Contract Disputes Act.

#### **\*\*2587** Title III-Service Specific and Major System Statutes

##### Subtitle A-Major Systems Statutes

Sec. 3001 would modify requirements for independent cost estimates and manpower estimates, as recommended by the Section 800 Panel.

Sec. 3002 would streamline requirements for program baseline descriptions and deviation reporting, as recommended by the Section 800 Panel. Although these modifications provide DOD with added flexibility, it is anticipated that the Department will continue to establish program baselines and provide essential program cost information.

Sec. 3003 would repeal the requirement to designate Defense Enterprise Programs, as recommended by the Section 800 Panel.

Sec. 3004 would repeal the requirement for competitive prototype in major programs in [10 USC 2438](#), as recommended by the Section 800 Panel. It is anticipated that the Department will continue to consider competitive prototyping as an option in the acquisition planning process and to use competitive prototype strategies where appropriate.

Sec. 3005 would repeal the requirement for competitive alternative sources in major programs in [10 USC 2439](#), as recommended by the Section 800 Panel. It is anticipated that the Department will continue to consider competitive alternative sources as an option in the acquisition planning process, and to use competitive alternative sources where appropriate.

##### Subtitle B-Testing Statutes

Sec. 3011 would amend [10 USC 138\(c\)](#) to provide that DOD Director of Operational

S. REP. 103-258, S. Rep. No. 258, 103RD Cong., 2ND Sess. 1994,  
1994 U.S.C.C.A.N. 2561, 1994 WL 188485 (Leg.Hist.)

**(Cite as: S. REP. 103-258, 1994 U.S.C.C.A.N. 2561)**

Test and Evaluation reports directly to the Secretary of Defense and Deputy Secretary of Defense without intervening review or approval. This restores previous law designed to ensure the independence of the Director from the Office of the Under Secretary of Defense for Acquisition.

Sec. 3012 would amend [10 USC 138](#) by adding a new provision requiring the DOD Director of Operational Test and Evaluation to conduct the live fire testing activities of the Department of Defense provided for under [10 USC 2366](#), and to include live fire testing activities in an annual report summarizing DOD operational test and evaluation activities required pursuant to [10 USC 138\(f\)](#). This provision would reduce duplication between operational testing and live fire testing. In addition, it would provide live fire testing with the same degree of independence from the Office of the Under Secretary of Defense for Acquisition as is otherwise provided in law for operational testing.

Sec. 3013 would amend [10 USC 138\(b\)](#) by adding a requirement that the DOD Director of Operational Test and Evaluation submit \*27 an unclassified version of the annual report on operational test and evaluation concurrently with any such report submitted in classified form.

#### **\*\*2588** Subtitle C-Service Specific Laws

Sec. 3021 would consolidate existing statutes authorizing the services to accept the gratuitous services of reserve officers and repeal superseded statutes, as recommended by the Section 800 Panel.

Sec. 3022 would amend [10 USC 2540](#) regarding the authority of the Secretary of Defense to make use of manufacturing information in the interest of national defense to clarify that such authority extends to renting as well as selling or lending the information, equipment, materials and sources.

Sec. 3033 would streamline and consolidate existing law on the civil reserve air fleet, as recommended by the Section 800 Panel.

Sec. 3024 would add a new [section 2350j to Title 10](#), authorizing international exchange of personnel, similar to the recommendation of the Section 800 Panel.

Sec. 3025 would repeal [10 USC 7203](#), a redundant provision concerning the expenditure of funds for scientific investigations and research.

Sec. 3026 would repeal a prohibition on the assignment of naval vessel conversion, alteration, or repair based on a requirement that parts of the work be assigned to a particular type of shipyard or a geographic area.

Sec. 3027 would repeal a provision requiring the construction of naval vessels on the Pacific Coast as the President determines necessary to maintain shipyard facilities there, as recommended by the Section 800 Panel.

Sec. 3028 would provide authority to transfer by gift a vessel stricken from the Naval vessel register.

Sec. 3029 would consolidate existing provisions regarding naval salvage authority, as recommended by the Section 800 Panel.

#### Subtitle D-DOD Commercial and Industrial Activities

Sec. 3051 would consolidate existing statutes on manufacture at DOD factories and arsenals and repeal superseded statutes, as recommended by the Section 800 Panel.

S. REP. 103-258, S. Rep. No. 258, 103RD Cong., 2ND Sess. 1994,  
1994 U.S.C.C.A.N. 2561, 1994 WL 188485 (Leg.Hist.)  
**(Cite as: S. REP. 103-258, 1994 U.S.C.C.A.N. 2561)**

Sec. 3052 would codify requirements to establish advisory and assistance services as a separate item in budgets submitted to Congress and repeal the uncodified language.

#### Subtitle E-Fuel and Energy-Related Laws

Sec. 3061 would consolidate and streamline statutes regarding contracts for storage, handling, and distribution of fuels, as recommended by the Section 800 Panel.

#### Subtitle F-Fiscal Statutes

Sec. 3071 would amend [31 USC 3321](#) to clarify the authority to designate disbursing officers within DOD, as recommended by the Section 800 Panel.

#### **\*\*2589 \*28** Subtitle G-Miscellaneous

Sec. 3081 would amend a provision regarding production, warehousing, and distribution of supplies to delete unnecessary and redundant language, as recommended by the Section 800 Panel.

Sec. 3082 would repeal an obsolete and redundant provision regarding product evaluation activities, as recommended by the Section 800 Panel.

Sec. 3083 would codify a provision limiting the lease of vessels, aircraft, and vehicles by the Department of Defense. The Section 800 Panel recommended repeal of this provision.

Sec. 3084 would permit the acquisition of U.S. manufactured soft drinks from a military exchange store located outside the U.S., for use outside the U.S., without the current restrictions contained in [10 USC 2424 \(b\)\(1\) and \(b\)\(2\)](#) as recommended by the Administration.

Sec. 3085 repeals certain restrictions relating to the acquisition of recycled toner cartridges.

### Title IV-Simplified Acquisition Threshold and Socioeconomic, Small Business, and Miscellaneous Laws

#### Subtitle A-Simplified Acquisition Threshold

##### Part I-Establishment of Threshold

Sec. 4001 would amend the OFPP Act to establish a new simplified acquisition threshold of \$100,000, as recommended by the Section 800 Panel. This provision would continue data collection requirements on contracts between \$25,000 and \$100,000 until 1999.

##### Part II-Simplification of Procedures

Sec. 4011 would add a new section 29 to the OFPP Act, authorizing the use of simplified procedures for acquisitions under the simplified acquisition threshold, as recommended by the Section 800 Panel. The section would also provide that regula-

tions implementing the new simplified procedures provide that purchases not exceeding \$2,500 not be subject to the Small Business Act reservation requirement, or the Buy America Act, that federal employees who make such purchases are not to be classified as "procurement officials" under the OFPP Act, and that such purchases may be made, as such purchases currently are made, without a requirement to secure competitive quotations.

Under the provision, the regulatory threshold for obtaining competitive quotations-which is currently set at \$2,500-would be required to remain at that level even after the new simplified acquisition threshold at \$100,000 goes into effect.

Sec. 4012 would reserve all contracts under the simplified acquisition threshold, except for those not exceeding \$2,500, for small business, and specifically authorize continued set-asides of all contracts under the simplified acquisition for minority small business, as recommended by the Section 800 Panel.

Sec. 4013 would provide that for any purchase made pursuant to simplified acquisition procedures, payment shall be made in accordance\*29 \*\*2590 with the Prompt Payment Act within 15 days of receipt of invoice in appropriate circumstances.

Sec. 4014 would amend section 18 of the OFPP Act and section 8(e) of the Small Business Act to continue the requirement that a notice of any procurement over \$25,000 be published in the Commerce Business Daily 15 days prior to the issuance of a solicitation. After the issuance of this notice, the agency would be free to pursue any procedures described in the notice; the requirement to allow the 30 days for the submissions of bids and proposals would apply only to contracts in excess of the simplified acquisition threshold.

Sec. 4015 would amend the OFPP Act to provide that the OFPP Administrator in consultation with the appropriate federal agency heads may develop and implement a government-wide architecture or design for interoperable electronic commerce with specified capabilities. The section further provides that the notice provisions in the OFPP Act and Small Business Act shall be phased out for acquisitions below the simplified acquisition threshold as the OFPP Administrator certifies that the procuring agency or agency component has fully implemented a compliant electronic commerce architecture or design that provides for appropriate notice.

#### Part III-Applicability of Laws to Acquisitions not in Excess of Simplified Acquisition Threshold

Sec. 4021 would add a new section 30 to the OFPP Act, authorizing the Federal Acquisition Regulation to waive the applicability of future-enacted procurement laws on a class basis for contracts below the simplified acquisition threshold, unless the provision expressly prohibits such a waiver.

Sec. 4022 would exempt armed services procurements below the simplified acquisition threshold from contingent fees certifications; the prohibition on limiting subcontractor direct sales to the United States; the audit requirements in [10 USC 2313](#); the requirement to identify suppliers and sources of supplies; the requirement to identify suspended or debarred subcontractors; and the prohibition on persons convicted of defense related felonies. Similar exemptions were recommended by the Section 800 Panel.

Sec. 4023 would, in the same manner as section 4022, exempt civilian agency pro-

S. REP. 103-258, S. Rep. No. 258, 103RD Cong., 2ND Sess. 1994,  
1994 U.S.C.C.A.N. 2561, 1994 WL 188485 (Leg.Hist.)

**(Cite as: S. REP. 103-258, 1994 U.S.C.C.A.N. 2561)**

curements below the simplified acquisition threshold from contingent fees certifications, the prohibition on limiting subcontractor direct sales to the United States and audit requirements.

Sec. 4024 would exempt procurements below the simplified acquisition threshold from the procedural requirements of the Anti-Kickback Act; the Miller Act; the Contract Work Hours and Safety Standards Act; the Drug-Free Workplace Act of 1988; the certification requirements of the Solid Waste Disposal Act; and would make technical changes to the Procurement Integrity Act, substituting "simplified acquisition threshold" for "\$100,000," and making conforming changes.

#### **\*\*2591 \*30 Part IV-Conforming Amendments**

Sec. 4071 would make conforming amendments substituting "simplified acquisition threshold" for "small purchase threshold" in [Title 10](#) provisions, as recommended by the Section 800 Panel. The changes in this Part will ensure that agencies have the intended flexibility to utilize streamlined procedures for acquisitions under the new threshold.

Sec. 4072 would make conforming amendments substituting "simplified acquisition threshold" for "small purchase threshold" in [Title 41](#) provisions, in the same manner as section 4071. The section would also provide for an amendment to the Federal Property Act authorizing the use of simplified procedures for acquisitions of leases of real property whose annual rent does not exceed the simplified acquisition threshold.

Sec. 4073 would make conforming amendments substituting "simplified acquisition threshold" for "small purchase threshold" in the OFPP Act, as recommended by the Section 800 Panel.

Sec. 4074 would make conforming amendments substituting "simplified acquisition threshold" for "small purchase threshold" in the Small Business Act, as recommended by the Section 800 Panel.

#### Part V-Revision of Regulations

Sec. 4081(a) would require the FAR Council to review the Federal Acquisition Regulation to identify and amend, as appropriate, regulations that are applicable below the new simplified acquisition threshold.

Sec. 4081(b) would require agency heads to review supplemental regulations, policies, and procedures to identify and amend, as appropriate, regulations that are applicable below the new simplified acquisition threshold.

#### Subtitle B-Socioeconomic and Small Business Laws

Sec. 4101 would make changes that conform to section 4102(c), which would repeal the Walsh-Healey Act.

Sec. 4102(a) would extend the conforming changes in Sec. 4101 to civilian agencies.

Sec. 4102(b) would repeal Section 306 of the Trade Agreements Act of 1979, an obsolete provision requiring a completed report on labor surplus areas, as recommended by the Section 800 Panel.

S. REP. 103-258, S. Rep. No. 258, 103RD Cong., 2ND Sess. 1994,  
1994 U.S.C.C.A.N. 2561, 1994 WL 188485 (Leg.Hist.)

**(Cite as: S. REP. 103-258, 1994 U.S.C.C.A.N. 2561)**

Sec. 4102(c) would repeal the Walsh-Healey Act, as recommended by the Section 800 Panel (except for the purpose of authorizing the Secretary of Labor to define the terms "regular dealer" and "manufacturer," because the definitions authorized under the Walsh-Healey Act have been adopted by a number of other statutes). A conforming amendment would be made to [Section 2304\(h\) of title 10](#).

Sec. 4102(d) is a confirming change to the section which would repeal the Walsh-Healey Act.

Sec. 4103 would amend the Small Business Act by striking [15 USC 644 subsections \(e\) and \(f\)](#) concerning the priority of labor surplus area firms in small business set-asides and would repeal Section 804 of Public Law 103-484 regarding notification of offerers of the certificate of competency process.

**\*\*2592 \*31** Sec. 4104 would amend the Small Business Act to extend government-wide the so-called "Section 1207" program for small business concerns owned and controlled by socially and economically disadvantaged individuals. The section would, among other things, permit agencies to restrict the competition to such concerns and include price evaluation preference of not more than 10 percent for such firms under unrestricted solicitations.

#### Subtitle C-Miscellaneous Armed Services Acquisition Laws

Sec. 4151 would codify a provision from the Department of Defense Appropriations Act of 1991, which prohibits the use of appropriated funds to prepare materials, reports, lists, or analyses on the economic effect of acquisition programs in specific states or congressional districts, as recommended by the Section 800 Panel.

Sec. 4152 would amend [10 USC 2304](#) and [41 USC 253](#) to set forth the policy of Congress that no legislation be enacted which requires a procurement to be made from a specified source.

#### Title V-Acquisition Management

Sec. 5001 would add a new section to [Title 10](#) entitled "Performance-Based Management Acquisition Programs" which would set forth congressional policy for DOD acquisition performance goals that DOD achieve on average, 90% of cost and schedule goals, and reduce to 8 years the average period for converting emerging technology into operational capability, and would direct the Secretary of Defense to approve or define cost, performance and schedule goals for major acquisition programs. The DOD Comptroller would evaluate proposed cost goals.

The section would also direct the Secretary of Defense to identify and consider the continuing need for programs which are behind schedule, over budget, or noncompliant with requirements, considering known agency needs and the state of related technology, estimated costs and schedule, and to identify possible alternatives to these programs. It further would require the Secretary of Defense to include in his annual report to Congress an assessment of the progress made in implementing this policy and would require the Secretary of Defense to provide, within one year, for an enhanced system of incentives which relates pay, evaluation, and promotion to performance, including the extent to which worker performance contributes to achieving the DOD acquisition program cost, schedule, and performance goals established in this section. Finally, the section would require the Secretary of Defense to report

to Congress within one year, of any changes in law which are necessary to further the purposes of the section.

Sec. 5002 would require the Secretary of Defense to establish, by regulation, a simplified, results-oriented acquisition program cycle. In developing the regulations, the Secretary is to consider including: an integrated decision team; prototype development and testing; product integration, development and testing; production; and integration. The section would provide that the Secretary shall also consider acquisition program approval on the basis of one major decision made prior to product integration and development.

**\*\*2593 \*32** Sec. 5003 would amend the National Defense Authorization Act for Fiscal Year 1994 to authorize the Secretary of Defense to designate six programs, certain support commodity contracts managed by Defense Personnel Support Center, the Fire Support Combined Arms Tactical Trainer program, the Joint Direct Attack Munitions program (JDAM I), the Joint Primary Aircraft Training System (JPATS), the Commercial Derivative Aircraft program, and the Commercial Derivative Engine program, as pilot programs under which designated statutes may be waived.

The streamlining reforms authorized by the Federal Acquisition Streamlining Act will not take effect until approximately one year after the bill. To enhance the process of developing implementing regulations during that period, section 5003 authorizes the Secretary of Defense to implement the Act 45 days after the date of enactment for the six pilot programs. The experience gained in issuing the regulations and applying the new concepts to the pilot programs should prove invaluable in the development of government-wide regulations during the year after enactment. Section 5003 also authorizes the Department of Defense to use the six pilot programs to test the use of the commercial buying practices authorized in the Federal Acquisition Streamlining Act for the acquisition of non-commercial products.

The waiver authority could be applied to contracts for the pilot programs that are either: (1) awarded or modified during the period that begins 45 days after the enactment of Act and that ends on September 30, 1998, or (2) awarded or modified before that time but in effect during the period. The waivers will be applied to ongoing contracts only to the extent authorized by the Secretary of Defense and agreed to by the parties. Contracts awarded or modified under the waiver authority prior to September 30, 1998 may continue to operate under such waivers after that date only to the extent authorized by the Secretary of Defense and agreed to by the parties in the contract.

A rule of construction would make it clear that this provision merely authorizes the six programs to be designated as pilot programs and sets forth the statutes that may be waived. It does not constitute an authorization to appropriate or obligate funds. Such authority must be derived from statutory provisions which authorize and appropriate funds for the specific programs.

#### Subtitle B-Civilian Agency Acquisition

Sec. 5051 would add a new section to [title 41](#) entitled "Performance-Based Management" which replicates for civilian agencies the policies and requirements set forth for DOD in section 5001, and extends to the civilian acquisition workforce the policies contained in chapter 87 of title 10.

S. REP. 103-258, S. Rep. No. 258, 103RD Cong., 2ND Sess. 1994,  
1994 U.S.C.C.A.N. 2561, 1994 WL 188485 (Leg.Hist.)

**(Cite as: S. REP. 103-258, 1994 U.S.C.C.A.N. 2561)**

Sec. 5052 requires OFPP Director, in consultation with agency heads, to develop a results-oriented acquisition process analogous to that to be developed by DOD under section 5002.

#### Subtitle C-Miscellaneous

Sec. 5091 would amend the OFPP Act to provide for exceptional performance awards for federal government contractors.

**\*\*2594 \*33** Sec. 5092 would make technical changes to [10 USC 2386](#) for the acquisition by DOD of intellectual property rights.

#### Title VI-Standards of Conduct

##### Subtitle A-Ethics Provisions

Sec. 6001 would amend the Procurement Integrity section of the OFPP Act to streamline the recusal provision; consolidate the revolving door ban with similar provisions applicable only to the Department of Defense; harmonize the gratuities provision with government-wide ethics provisions; revise certification provisions to eliminate unnecessary administrative burdens; and clarify several other provisions. An identical provision was passed by the Senate as an amendment to the National Defense Authorization bill in 1991, but was not enacted into law.

Sec. 6002 would amend the criminal conflict of interest provision in [18 USC 208](#) to expressly cover persons who aid or abet violations. An identical provision was passed by the Senate as part of the 1991 Senate amendment.

Sec. 6003 would repeal several superseded and obsolete procurement ethics laws. These include-

The post-employment and revolving door provisions in [sections 2397, 2397a, 2397b, and 2397c, of title 10; section 281 of title 18, section 801 of title 37;](#) and Part A of Title VI of the Department of Energy Organization Act. Each of these provisions would be superseded by the amended Procurement Integrity provision and would have been repealed by the 1991 Senate amendment. All except for the provisions of the DOE Organization Act was recommended for repeal by the Section 800 Panel.

The DOD contractor gratuities provision in [section 2207 of title 10](#), which has already been superseded by the enactment of the Procurement Integrity law.

Sec. 6004 addresses the implementation of the changes in this Subtitle. Similar provisions were included in the 1991 Senate amendment.

##### Subtitle B-Additional Amendments

Sec. 6051 would add a new section 23 to the OFPP Act, which would prohibit the use of consultants to conduct evaluations or analyses of any aspect of a proposal if qualified federal personnel are readily available to do the job, as determined in accordance with standards and procedures prescribed in the Federal Acquisition Regulation.

The Federal Acquisition Regulatory Council, which is responsible for the Federal Acquisition Regulation, is the appropriate entity to determine what criteria should be considered in determining whether personnel are readily available within an

S. REP. 103-258, S. Rep. No. 258, 103RD Cong., 2ND Sess. 1994,  
1994 U.S.C.C.A.N. 2561, 1994 WL 188485 (Leg.Hist.)

**(Cite as: S. REP. 103-258, 1994 U.S.C.C.A.N. 2561)**

agency or another federal agency to conduct evaluations or analyses of proposals submitted for an acquisition. The Council shall set forth a process for use by federal agencies for determining whether technical expertise is readily available within the federal government that considers the administrative cost and time associated with conducting **\*\*2595 \*34** the search, the dollar value of the proposed contract, other costs such as travel costs involved in the use of such personnel and the needs of the federal agencies to make management decisions as to the best use of available personnel in performing the agency's mission.

Sec. 6052 would repeal a section 17 of the OFPP Act, calling for a study and report that have already been issued.

Sec. 6053 would amend [41 USC 22](#) to eliminate need for a contract clause but would retain the prohibition against any member of Congress benefitting from any contract or agreement entered into by the U.S.

Sec. 6054 would amend [section 22\(a\)](#) of the OFPP Act to clarify that 60 days notice should be provided for significant changes to acquisition regulations unless there are compelling circumstances for an earlier effective date.

#### Subtitle C-A whistleblower Protection

Sec. 6101 would streamline and combine the two existing whistleblower protections for Defense Department contractor employees in [Title 10](#).

Sec. 6102 would amend the Federal Property Act to create identical protection for whistleblowers who are employees of civilian agency contractors.

#### Title VII-Defense Trade and Cooperation

Sec. 7001 would repeal obsolete and redundant provisions in the Buy American Act, as recommended by the Section 800 Panel.

Sec. 7002 would amend [10 USC 2531](#) to replace the term "Memorandums of Understanding" with the broader term "International Cooperative Agreements," and to expand the authorized scope of such agreements to cover logistics support, as recommended by the Section 800 Panel.

Sec. 7003 would provide added flexibility for acquisition, cross-servicing agreements, and standardization under joint and multilateral defense arrangements, as recommended by the Section 800 Panel.

#### Title VIII-Commercial Items

Sec. 8001 would amend the OFPP Act to add new definitions of "commercial item," "nondevelopmental item," "component," and "commercial component." Similar definitions of commercial and nondevelopmental items were recommended by the Section 800 Panel, and were included in S. 260 and H.R. 3161, as amended, in the last Congress. An important aspect of the definition of commercial items concerns the modifications that may be made. In this regard it is the Committee's view that modifications of a type customarily available in the commercial marketplace include customization and tailoring of commercial items to meet federal government requirements, if the customization and tailoring are within the broad category of types of modifications available in the commercial marketplace. For example, a modification to strengthen

S. REP. 103-258, S. Rep. No. 258, 103RD Cong., 2ND Sess. 1994,  
1994 U.S.C.C.A.N. 2561, 1994 WL 188485 (Leg.Hist.)

**(Cite as: S. REP. 103-258, 1994 U.S.C.C.A.N. 2561)**

aircraft flooring and aircraft body structural supports to enable mounting of a military radome on top of a commercial aircraft **\*\*2596 \*35** could be considered of a type customarily available in the commercial marketplace because aircraft undergo structural modifications of the same general type for use as commercial freighter aircraft. On the other hand, the construction of the military radome itself would not be a commercial modification, because items of the type are not built for commercial use.

Factors to be considered in determining whether a modification is minor include the value and size of the modification; the comparative value and size of the final product; and the extent to which the modification would alter the function or essential physical characteristics of the final item. Dollar values and percentages may serve as a guidepost, but are not intended to be conclusive. For example, a government-specified modification to a commercial aircraft to install a notch on the aircraft aileron to accommodate a long trailing wire antenna may appear to be expensive if considered in isolation, but could be a minor modification when the cost of the modification is compared to the overall value and size of the final product, and when appropriate consideration is given to the extent of change made to the function and essential physical characteristics of the final product.

Sec. 8002 would add a new section 33 to the OFPP Act to create a preference for the acquisition of commercial items and, to the extent suitable commercial items are not available, other nondevelopmental items. Similar provisions were recommended by the Section 800 Panel.

Sec. 8003 would add a new section 34 to the OFPP Act to require the issuance of uniform contract clauses for commercial item contracts. This provision would also address market acceptance; the use of firm, fixed price contracts or fixed price with economic price adjustment contracts for commercial items; and reliance on existing quality assurance systems for commercial items. Similar provisions were recommended by the Section 800 Panel, and were included in S. 260 and H.R. 3161, as amended, in the last Congress.

Sec. 8004 would authorize the applicability of future enacted procurement statutes to contracts and/or subcontracts for the acquisition of commercial items to be waived on a class basis, through the Federal Acquisition Regulation. The section would also authorize a waiver in the Federal Acquisition Regulation of the applicability of government-unique procurement requirements to subcontractors under prime contracts for commercial items where the prime contractor substantially transforms the commercial items, and to subcontractor to prime contractors for noncommercial items where the subcontractor furnishes a commercial component.

Sec. 8005 would exempt commercial item procurements from the requirement to identify suppliers and sources of supplies; the prohibition on contingent fees; the requirement to identify suspended or debarred subcontractors; so-called "Fly American" requirements; the procedural requirements of the Anti-Kickback Act; the Federal Water Pollution Control Act; the Clean Air Act; the Contract Work Hours and Safety Standards Act; the certification requirements of the Procurement Integrity provision; the Drug-Free Workplace Act; contractor inventory accounting standards; and the prohibition on persons convicted of defense-contract related felonies. This section would also restrict the applicability to commercial item contracts of **\*\*2597 \*36** the statutory prohibition on limiting contractor direct sales to the government.

S. REP. 103-258, S. Rep. No. 258, 103RD Cong., 2ND Sess. 1994,  
1994 U.S.C.C.A.N. 2561, 1994 WL 188485 (Leg.Hist.)

**(Cite as: S. REP. 103-258, 1994 U.S.C.C.A.N. 2561)**

Similar exemptions were recommended by the Section 800 Panel.

Sec. 8006 would authorize greater flexibility in setting deadlines for the submission of offers in contracts for the purchase of commercial items.

Sec. 8007 would amend the OFPP Act to give agency competition advocates the added responsibility of promoting the acquisition of commercial items and other nondevelopmental items. Similar provisions were included in S. 260 and H.R. 3161, as amended, in the last Congress.

Sec. 8008 would identify certain provisions that are not intended to be affected or modified by this Title. Similar language was included in H.R. 3161, as amended, in the last Congress.

Sec. 8009 would require a Comptroller General review of federal government use of market research. A similar provision was included in S. 260 and H.R. 3161, as amended, in the last Congress.

#### Title IX-Effective Date and Implementation

Sec. 9001 would provide that the Act is effective upon enactment and amendments made by the Act are effective on the date final implementing regulations are prescribed, unless otherwise provided.

Sec. 9002 would provide that proposed changes to the Federal Acquisition Regulation or other regulations as necessary to implement the Act shall be published in Federal Register 210 days after enactment, shall be available for public comment for not less than 60 days and published as final not later than 330 days after enactment. The section would provide the rules for applicability of the Act.

Sec. 9003 would provide for the Comptroller General to evaluate and report to the appropriate committees of Congress on the issuance of the implementing regulations and on the effectiveness of those regulations.

The Committee believes acquisition streamlining requires giving maximum discretion to contracting officers therefore the agency implementing regulations should not add additional requirements to the Federal Acquisition Regulation, and agencies should not restrict the discretion of contracting officers by placing burdensome approval requirements at higher levels.

Sec. 9004 would amend the OFPP Act to provide that the Federal Procurement Data System collect data regarding competitions pursuant to [10 USC 2323](#) or [15 USC 637\(c\)](#), awards to women owned businesses, numbers of offers received under solicitations, task order contracts and contracts for commercial items.

FN1 S. Hrg. 101-249 (May 16 and June 1, 1989); S. Prt. 101-62 (October 30, 1989); S. Hrg. 101-854 (April 26, 1990); [S. Rep. 101-454](#) (September 10, 1990); [S. Rep. 102-137](#) (August 2, 1991).

FN2 Congressional Record, Vol. 139, No. 146, pp. S14426-27 (October 26, 1993).

FN3 "Hearing on S. 1958 and S. 2619 Before the Senate Committee on Governmental Affairs." 102nd Cong., 2nd Sess. (1992) (testimony of Harry Fuchigami, Association for Information and Image Management; John F. McGiver, Jr., Computer and Business Equipment Manufacturers Association; Stephanie Biddle, Computer and Communications Industry Association, Hearing Transcript at 119 to 121.).

S. REP. 103-258, S. Rep. No. 258, 103RD Cong., 2ND Sess. 1994,  
1994 U.S.C.C.A.N. 2561, 1994 WL 188485 (Leg.Hist.)

**(Cite as: S. REP. 103-258, 1994 U.S.C.C.A.N. 2561)**

FN4 Id.

FN5 See [31 U.S.C. 3554\(c\)](#).

FN6 See U.S. v. Instruments S.A., Inc., Civil Action No. 91-1574, D.D.C.

FN7 See [Bowsher v. Synar, 478 U.S. 714 \(1986\)](#).

FN8 Letter from Attorney General Dick Thornburgh to President of the Senate J. Danforth Quayle (June 20, 1991).

FN9 See [40 U.S.C. 759\(f\)\(6\)\(A\)](#); [40 U.S.C. 607\(g\)](#).

FN10 [GSBCA No. 10218-P](#); [906 F.2d 1564 \(Fed Cir. 1990\)](#)

FN11 [40 U.S.C. 759\(f\)\(4\)\(C\)](#) ("The Board may dismiss a protest the board determines is frivolous or which, on its face, does not state a valid basis for protest.").

FN12 [906 F.2d 1564 at 1566](#).

FN13 See [40 U.S.C. 759\(f\)\(3\)](#).

FN14 See "ADP Bid Protests: Better Disclosure and Accountability of Settlements Needed," GAO/GGD-90-13 (March 1990). This report was prepared in response to a request of Senator David Pryor, Chairman, Subcommittee on Federal Services, Post Office, and Civil Service, Committee on Governmental Affairs.

FN15 A practice included among several identified as "Fedmail."

FN16 See "Decennial Census, Microcomputer Procurement Delays and Bid Protests: Effects on the 1990 Census," GAO/GGD-99-70 (June 1988).

FN17 See "ADP Bid Protests: Better Disclosure and Accountability of Settlements Needed," GAO/GGD-90-13 (March 1990) at 22-32. GAO noted that "more [settlements involving payments] that were not disclosed could exist because our follow-up was limited to 13 agencies." Id. at 30.

FN18 Id. at 31.

FN19 Id. at 32.

S. REP. 103-258, S. Rep. No. 258, 103RD Cong., 2ND Sess. 1994, 1994 U.S.C.C.A.N. 2561, 1994 WL 188485 (Leg.Hist.)

END OF DOCUMENT