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1ST SESSION

S. 314

To require that the Federal Government procure from the private sector the goods and services necessary for the operations and management of certain Government agencies, and for other purposes.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 12, 1997

Mr. THOMAS (for himself, Mr. HAGEL, Mr. KYL, Mr. ENZI, Mr. BROWNBACK, and Mr. CRAIG) introduced the following bill; which was read twice and referred to the Committee on Governmental Affairs

A BILL

To require that the Federal Government procure from the private sector the goods and services necessary for the operations and management of certain Government agencies, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Freedom From Gov-
5 ernment Competition Act of 1997”.

6 **SEC. 2. FINDINGS.**

7 Congress finds and declares that—

1 (1) private sector business concerns, which are
2 free to respond to the private or public demands of
3 the marketplace, constitute the strength of the
4 American economic system;

5 (2) competitive private sector enterprises are
6 the most productive, efficient, and effective sources
7 of goods and services;

8 (3) government competition with the private
9 sector of the economy is detrimental to all busi-
10 nesses and the American economic system;

11 (4) government competition with the private
12 sector of the economy is at an unacceptably high
13 level, both in scope and in dollar volume;

14 (5) when a government engages in entre-
15 preneurial activities that are beyond its core mission
16 and compete with the private sector—

17 (A) the focus and attention of the govern-
18 ment are diverted from executing the basic mis-
19 sion and work of that government; and

20 (B) those activities constitute unfair gov-
21 ernment competition with the private sector;

22 (6) current laws and policies have failed to ad-
23 dress adequately the problem of government com-
24 petition with the private sector of the economy;

1 (7) the level of government competition with the
2 private sector, especially with small businesses, has
3 been a priority issue of each White House Con-
4 ference on Small Business;

5 (8) reliance on the private sector is consistent
6 with the goals of the Government Performance and
7 Results Act of 1993 (Public Law 103–62);

8 (9) reliance on the private sector is necessary
9 and desirable for proper implementation of the Fed-
10 eral Workforce Restructuring Act of 1994 (Public
11 Law 103–226);

12 (10) it is in the public interest that the Federal
13 Government establish a consistent policy to rely on
14 the private sector of the economy to provide goods
15 and services that are necessary for or beneficial to
16 the operation and management of Federal Govern-
17 ment agencies and to avoid Federal Government
18 competition with the private sector of the economy;
19 and

20 (11) it is in the public interest for the private
21 sector to utilize employees who are adversely af-
22 fected by conversions to use of private sector entities
23 for providing goods and services on behalf of the
24 Federal Government.

1 **SEC. 3. RELIANCE ON THE PRIVATE SECTOR.**

2 (a) GENERAL POLICY.—Notwithstanding any other
3 provision of law, except as provided in subsection (c), each
4 agency shall procure from sources in the private sector all
5 goods and services that are necessary for or beneficial to
6 the accomplishment of authorized functions of the agency.

7 (b) PROHIBITIONS REGARDING TRANSACTIONS IN
8 GOODS AND SERVICES.—

9 (1) PROVISION BY GOVERNMENT GEN-
10 ERALLY.—No agency may begin or carry out any ac-
11 tivity to provide any products or services that can be
12 provided by the private sector.

13 (2) TRANSACTIONS BETWEEN GOVERNMENTAL
14 ENTITIES.—No agency may obtain any goods or
15 services from or provide any goods or services to any
16 other governmental entity.

17 (c) EXCEPTIONS.—Subsections (a) and (b) do not
18 apply to goods or services necessary for or beneficial to
19 the accomplishment of authorized functions of an agency
20 under the following conditions:

21 (1) Either—

22 (A) the goods or services are inherently
23 governmental in nature within the meaning of
24 section 6(b); or

25 (B) the Director of the Office of Manage-
26 ment and Budget determines that the provision

1 of the goods or services is otherwise an inher-
2 ently governmental function.

3 (2) The head of the agency determines that the
4 goods or services should be produced, provided, or
5 manufactured by the Federal Government for rea-
6 sons of national security.

7 (3) The Federal Government is determined to
8 be the best value source of the goods or services in
9 accordance with regulations prescribed pursuant to
10 section 4(a)(2)(C).

11 (4) The private sector sources of the goods or
12 services, or the practices of such sources, are not
13 adequate to satisfy the agency's requirements.

14 **SEC. 4. ADMINISTRATIVE PROVISIONS.**

15 (a) REGULATIONS.—

16 (1) OMB RESPONSIBILITY.—The Director of
17 the Office of Management and Budget shall pre-
18 scribe regulations to carry out this Act.

19 (2) CONTENT.—

20 (A) PRIVATE SECTOR PREFERENCE.—Con-
21 sistent with the policy and prohibitions set forth
22 in section 3, the regulations shall emphasize a
23 preference for the provision of goods and serv-
24 ices by private sector sources.

1 (B) FAIRNESS FOR FEDERAL EMPLOY-
2 EES.—In order to ensure the fair treatment of
3 Federal Government employees, the regula-
4 tions—

5 (i) shall not contravene any law or
6 regulation regarding Federal Government
7 employees; and

8 (ii) shall provide for the Director of
9 the Office of Management and Budget, in
10 consultation with the Director of the Office
11 of Personnel Management, to furnish in-
12 formation on relevant available benefits
13 and assistance to Federal Government em-
14 ployees adversely affected by conversions to
15 use of private sector entities for providing
16 goods and services.

17 (C) BEST VALUE SOURCES.—

18 (i) STANDARDS AND PROCEDURES.—
19 The regulations shall include standards
20 and procedures for determining whether it
21 is a private sector source or an agency that
22 provides certain goods or services for the
23 best value.

1 (ii) FACTORS CONSIDERED.—The
 2 standards and procedures shall include re-
 3 quirements for consideration of analyses of
 4 all direct and indirect costs (performed in
 5 a manner consistent with generally accept-
 6 ed cost-accounting principles), the quali-
 7 fications of sources, the past performance
 8 of sources, and any other technical and
 9 noncost factors that are relevant.

10 (iii) CONSULTATION REQUIREMENT.—
 11 The Director shall consult with persons
 12 from the private sector and persons from
 13 the public sector in developing the stand-
 14 ards and procedures.

15 (D) APPROPRIATE GOVERNMENTAL ACTIVI-
 16 TIES.—The regulations shall include a meth-
 17 odology for determining what types of activities
 18 performed by an agency should continue to be
 19 performed by the agency or any other agency.

20 (b) COMPLIANCE AND IMPLEMENTATION ASSIST-
 21 ANCE.—

22 (1) OMB CENTER FOR COMMERCIAL ACTIVI-
 23 TIES.—The Director of the Office of Management
 24 and Budget shall establish a Center for Commercial

1 Activities within the Office of Management and
2 Budget.

3 (2) RESPONSIBILITIES.—The Center—

4 (A) shall be responsible for the implemen-
5 tation of and compliance with the policies,
6 standards, and procedures that are set forth in
7 this Act or are prescribed to carry out this Act;
8 and

9 (B) shall provide agencies and private sec-
10 tor entities with guidance, information, and
11 other assistance appropriate for facilitating con-
12 versions to use of private sector entities for pro-
13 viding goods and services on behalf of the Fed-
14 eral Government.

15 **SEC. 5. STUDY AND REPORT ON COMMERCIAL ACTIVITIES**
16 **OF THE GOVERNMENT.**

17 (a) ANNUAL PERFORMANCE PLAN.—Section 1115(a)
18 of title 31, United States Code, is amended—

19 (1) by striking “and” at the end of paragraph
20 (5);

21 (2) by striking the period at the end of para-
22 graph (6) and inserting “; and”; and

23 (3) by adding at the end the following:

24 “(7) include—

1 “(A) the identity of each program activity
 2 that is performed for the agency by a private
 3 sector entity in accordance with the Freedom
 4 From Government Competition Act of 1997;
 5 and

6 “(B) the identity of each program activity
 7 that is not subject to the Freedom From Gov-
 8 ernment Competition Act of 1997 by reason of
 9 an exception set forth in that Act, together with
 10 a discussion specifying why the activity is deter-
 11 mined to be covered by the exception.”.

12 (b) ANNUAL PERFORMANCE REPORT.—Section
 13 1116(d)(3) of title 31, United States Code, is amended—

14 (1) by striking “explain and describe,” in the
 15 matter preceding subparagraph (A);

16 (2) in subparagraph (A), by inserting “explain
 17 and describe” after “(A)”;

18 (3) in subparagraph (B)—

19 (A) by inserting “explain and describe”
 20 after “(B)”;

21 (B) by striking “and” at the end;

22 (4) in subparagraph (C)—

23 (A) by inserting “explain and describe”
 24 after “infeasible,”; and

25 (B) by inserting “and” at the end; and

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

2 “(D) in the case of an activity not performed
3 by a private sector entity—

4 “(i) explain and describe whether the activ-
5 ity could be performed for the Federal Govern-
6 ment by a private sector entity in accordance
7 with the Freedom From Government Competi-
8 tion Act of 1997; and

9 “(ii) if the activity could be performed by
10 a private sector entity, set forth a schedule for
11 converting to performance of the activity by a
12 private sector entity;”.

13 **SEC. 6. DEFINITIONS.**

14 (a) AGENCY.—As used in this Act, the term “agency”
15 means the following:

16 (1) EXECUTIVE DEPARTMENT.—An executive
17 department as defined by section 101 of title 5,
18 United States Code.

19 (2) MILITARY DEPARTMENT.—A military de-
20 partment as defined by section 102 of such title.

21 (3) INDEPENDENT ESTABLISHMENT.—An inde-
22 pendent establishment as defined by section 104(1)
23 of such title.

24 (b) INHERENTLY GOVERNMENTAL GOODS AND
25 SERVICES.—

1 (1) PERFORMANCE OF INHERENTLY GOVERN-
 2 MENTAL FUNCTIONS.—For the purposes of section
 3 3(c)(1)(A), goods or services are inherently govern-
 4 mental in nature if the providing of such goods or
 5 services is an inherently governmental function.

6 (2) INHERENTLY GOVERNMENTAL FUNCTIONS
 7 DESCRIBED.—

8 (A) FUNCTIONS INCLUDED.—For the pur-
 9 poses of paragraph (1), a function shall be con-
 10 sidered an inherently governmental function if
 11 the function is so intimately related to the pub-
 12 lic interest as to mandate performance by Fed-
 13 eral Government employees. Such functions in-
 14 clude activities that require either the exercise
 15 of discretion in applying Federal Government
 16 authority or the making of value judgments in
 17 making decisions for the Federal Government,
 18 including judgments relating to monetary trans-
 19 actions and entitlements. An inherently govern-
 20 mental function involves, among other things,
 21 the interpretation and execution of the laws of
 22 the United States so as to—

23 (i) bind the United States to take or
 24 not to take some action by contract, policy,

1 regulation, authorization, order, or other-
2 wise;

3 (ii) determine, protect, and advance
4 its economic, political, territorial, property,
5 or other interests by military or diplomatic
6 action, civil or criminal judicial proceed-
7 ings, contract management, or otherwise;

8 (iii) significantly affect the life, lib-
9 erty, or property of private persons;

10 (iv) commission, appoint, direct, or
11 control officers or employees of the United
12 States; or

13 (v) exert ultimate control over the ac-
14 quisition, use, or disposition of the prop-
15 erty, real or personal, tangible or intangi-
16 ble, of the United States, including the
17 control or disbursement of appropriated
18 and other Federal funds.

19 (B) FUNCTIONS EXCLUDED.—For the pur-
20 poses of paragraph (1), inherently governmental
21 functions do not normally include—

22 (i) gathering information for or pro-
23 viding advice, opinions, recommendations,
24 or ideas to Federal Government officials;

1 (ii) any function that is primarily
2 ministerial or internal in nature (such as
3 building security, mail operations, oper-
4 ation of cafeterias, laundry and house-
5 keeping, facilities operations and mainte-
6 nance, warehouse operations, motor vehicle
7 fleet management and operations, or other
8 routine electrical or mechanical services);
9 or

10 (iii) any good or service which is cur-
11 rently or could reasonably be produced or
12 performed, respectively, by an entity in the
13 private sector.

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