

EXTENSIONS OF REMARKS

THE FEDERAL ACQUISITION REFORM ACT OF 1995

HON. WILLIAM F. CLINGER, JR.

OF PENNSYLVANIA

IN THE HOUSE OF REPRESENTATIVES

Thursday, May 18, 1995

Mr. CLINGER. Mr. Speaker, today I am introducing legislation, on behalf of myself and National Security Committee Chairman FLOYD SPENCE, and other members of our committees, to further reform the inefficient and Byzantine Federal procurement process. This legislation will complement the work we started last year with the enactment of the Federal Acquisition Streamlining Act of 1994 [FASA].

Each year, our Government spends about \$200 billion on goods and services, ranging from weapons systems to computer systems to everyday commodities. The current system costs too much, involves too much redtape, and ill-serves both the taxpayer and industry.

From the time the Second Continental Congress established a Commissary General in 1775, the procurement system has commanded the attention of both public officials and the American taxpayer. Unfortunately and all too often, the attention has focused on individual abuses rather than the overall system. Over the years, in response to these horror stories, Congress passed many laws—long and short, significant and trivial, new and old—which standing alone were not overly harmful, but when added together created an increasingly overburdened mass of statutory requirements.

In December 1994, a report prepared for the Secretary of Defense found that, on average, the Government pays an additional 18 percent on what it buys solely because of the requirements it imposes on its contractors. This confirmed the average estimate by major contractors surveyed by GAO that the additional costs incurred in selling to the Government are about 19 percent. While some of the Government's unique requirements certainly are needed, we clearly are paying an enormous premium for them—billions of dollars annually.

And this is only part of the Government's inflated cost of doing business—for it includes only what is paid to contractors, not the cost of the Government's own administrative system. The Government's contracting officials are confronted with numerous mandates of their own, often amounting to step-by-step prescriptions that increase staff and equipment needs, and leave little room for the exercise of business judgment, initiative, and creativity.

FASA was a direct attack on a procurement system that had gone haywire—it applied some common sense approaches to the bureaucracy to reduce the inefficiencies of the system, get some real cost savings for the taxpayer, and reduce the burdens on both Government contracting officials and those who sell to them.

But FASA only went part of the way. In many respects, we still are guided today by the same considerations the Commissary

General faced in 1775: How to provide meaningful competition, obtain quality goods at reasonable prices, and ensure accountability of public officials for public transactions. And too, as in 1775, we are under great budgetary constraints that drive us to look at ways to meet our goals, yet do so in a way that is affordable and uses common sense.

This legislation we are introducing today represents a significant shift in the operation of our Federal procurement system to meet the needs of the American taxpayer. The proposal would:

Establish commercial-like procedures by freeing commercial businesses from remaining Government data and audit requirements; simplifying the sale of commercial items to the Government; promoting the Government's use of commercial sources; and eliminating the guess-work from the current bid protest and dispute resolution maze by creating a single administrative entity to handle such matters with a single set of efficient procedures.

Promote better Government-industry relationships by repealing provisions of law that currently impede communication between the Government and industry.

Foster long-term relationships with quality suppliers—much like commercial businesses do.

Maximize competition by permitting the Government to provide for meaningful competition—not competition for competition's sake—which would allow firms to concentrate their energies and resources on government business that they can realistically meet.

Some may say we should rest on our laurels, and let the system absorb the changes made last year by FASA. But we must never hesitate to do more or do better. The fundamental changes we are proposing today are necessary to move the Federal procurement system into the 21st century.

THE FEDERAL ACQUISITION REFORM ACT OF 1995 SECTION-BY-SECTION ANALYSIS

Title I—Competition

Section 101—Improvement of competition requirements

Subsection (a) would amend 10 U.S.C. 2304(A) governing armed services acquisitions to establish a new standard of competition for the acquisition of goods and services—"maximum practicable" competition. This would replace the current requirement that all sources be given the "right" to be considered for government contracts whether or not the source has a realistic chance of supplying goods or services of the requisite quality at a reasonable price. The new standard would permit the government to focus on a meaningful competition among sources who can meet or exceed the government's requirements. In order to parallel the new competition standard the subsection would also amend 10 U.S.C. 2304(g)(3) which sets forth the standard for the use of competition in the simplified procedures for acquisitions under the simplified acquisition threshold to provide that agencies obtain competition to the "extent practicable" consistent with the particular requirement solicited.

The subsection would eliminate the archaic "preference" accorded the use of sealed bidding in 10 U.S.C. 2304(a)(2).

The subsection would further streamline and modernize the current competition requirements by amending 10 U.S.C. 2304(b)(1) to eliminate from statute the long list of circumstances under which an agency may exclude a particular firm in order to maintain an alternate source for goods or services and would place the discretion for the use of this authority in the contracting agencies.

Similarly, the subsection would eliminate the maze of rules, paperwork-generating approval requirements, and detailed instructions in 10 U.S.C. 2304 (c), (d) and (e) that currently govern the use of "other than competitive procedures" and substitute a simple provision stating that competitive procedures must be used unless such procedures are not feasible or appropriate. The use of "other than competitive procedures" must be justified and approved in accordance with simplified standards to be set forth in the FAR.

Subsection (b) would replicate the above changes in title 41 governing the acquisitions of civilian agencies.

Subsection (c) would amend the Office of Federal Procurement Policy Act (OFPP Act) at section 18 (41 U.S.C. 416) to establish a uniform notice requirement for acquisitions between \$10,000 and \$25,000 and make other conforming changes. Subsection (d) would amend 18 U.S.C. 637 to remove duplicative provisions concerning notice and obsolete provisions regarding the use of other than competitive procedures.

Subsection (e) would amend the OFPP Act at 41 USC 414 to integrate the new competition standard into the enumerated executive agency procurement responsibilities and at 41 USC 418 to remove obsolete language regarding competition advocates.

Section 102—Definition relating to competition requirements

The section would amend the OFPP Act at 41 USC 403 to define the new standard of "maximum practicable competition." According to the definition, the standard is achieved when a maximum number of responsible or verified sources (consistent with the particular government requirement) are permitted to submit offers on the procurement. The section would also provide for other amendments to the OFPP Act, title 10, the Federal Property Act, and other laws to conform them to the new competition standard.

Section 103—Contract solicitation amendments

The section would amend 10 USC 2305 (a) and (b) governing armed services acquisition to eliminate a provision concerning solicitation specifications that is inconsistent with the new competition standard and to further conform the provision regarding the competitive range. The section would provide for amending the Federal Property Act at 41 USC 253a and 253b in the same manner.

Section 104—Preward debriefings

The section would amend 10 USC 2305(b) and the Federal Property Act at 41 USC 253b to augment the new debriefing requirements added by the Federal Acquisition Streamlining Act of 1994 (FASA) to permit a firm removed from the competitive range to request a debriefing after receiving notice of the removal, but before award. The agency may deny the request if it is not in the government's best interest to hold a preaward debriefing when requested, but the request

• This "bullet" symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.

Matter set in this typeface indicates words inserted or appended, rather than spoken, by a Member of the House on the floor.

must be made by the firm or it will lose the right to obtain a post award debriefing.

Section 105—Contract types

The section would amend 10 USC 2306 and 41 USC 254 to provide that the selection of contract type is to be governed by market conditions, established commercial practice and sound business judgement. To further the commercialization of the government's acquisition process, existing fee limits on specified contract types are to be eliminated. The section would also eliminate from title 10 service-specific provisions that set forth a 6 percent fee limit on architect-engineering services contracts. It would add a new section 2332 to title 10 to provide the authority to procure such services for civil works.

Section 106—Contractor performance

The section would add a new provision to the OFPP Act to establish in the FAR an alternative quality-based competition system for meeting the government's repetitive needs. Firms would be included as "verified" contractors after passing a competitive scrutiny based on an assessment of the firm's business practices, level of quality, and demonstrated contract performance. Once in the system, firms would become eligible to compete with other "verified" firms in acquisitions conducted within the system. The "verification" could be revoked for failure to maintain the requisite performance quality. The existing qualification requirements in 10 USC 2319 and 41 USC 253c would be repealed.

Title II—Commercial Items

Section 201—Commercial item exception to requirement for cost or pricing data and information limitations

The section would amend 10 USC 2306a and 41 USC 254b—the so-called "Truth in Negotiations Act" (TINA) provisions—to exempt all acquisitions for commercial items which fit within the definition of commercial item in the OFPP Act at 41 USC 403 from the requirement to submit certified cost or pricing data.

The section would also eliminate the data and audit requirements applicable to some commercial items under the current TINA provisions. The section would conform the TINA provisions regarding the submission of information to be considered in determining price reasonableness when certified cost and pricing data are not required either because a TINA exemption applies or the acquisition is not expected to exceed the \$500,000 TINA threshold. The amended provisions would state that the FAR shall provide appropriate limitations on information that should be considered in determining price reasonableness, including specific limits on information requests relating to commercial items. Finally the section would strike subsections (h) in titles 10 and 41 as no longer needed.

Section 202—Application of simplified procedures to commercial items

The section would amend 10 USC 2304(e), as added by section 101(a) and 41 USC 253, as added by section 101(b), to provide that all acquisitions for a commercial item, no matter what its dollar value, can be conducted pursuant to special simplified commercial-type procedures that currently are authorized for acquisitions below the simplified acquisition threshold. The section would also amend the OFPP Act to conform the notice provisions for commercial items to the use of simplified procedures.

Section 203—Amendment to definition of commercial items

The section would amend the OFPP Act at 41 USC 403(12)(F) to remove the requirement in the definition of commercial services added by FASA that they be sold based on established "catalog" prices. To be consid-

ered "commercial" services under this section they would have to be offered and sold at "established prices" rather than at established "catalog" prices. Since commercial services are often offered at prices that may not fit the strict definition of a catalog (e.g., commercial price lists, advertisements, etc.), the section is intended to more accurately reflect the commercial market, yet ensure that the services are clearly defined and actually available commercially.

Section 204—Inapplicability of cost account standards to contracts and subcontracts for commercial items

The section would amend the OFPP Act at 41 USC 422(f)(2) to make it clear that all contracts for commercial items are exempt from the burdens of the cost accounting standards. This provision would complement sections 201 which exempt all acquisitions for commercial items from the requirement to submit certified cost or pricing data as well as from the accompanying audit requirements.

Title III—Additional Reform Provisions

Section 301—Government reliance on the private sector

The section would amend the OFPP Act by adding a new section 17 providing that it is the policy of the government to rely on commercial sources to supply its needs. The policy that would be set forth in this section has been the policy underpinning the government's acquisition system since 1955 and reflects the language currently in Office of Management and Budget Circular A-76.

Section 302—Elimination of certain certification requirements

The section would provide for the elimination of specified certification requirements currently in statute and would require the removal of current regulatory certifications unless retention is supported by a written justification. The section would also amend the OFPP Act to prohibit the inclusion in the FAR or agency procurement regulations of new certification requirements unless mandated by statute or justified in writing. The provision would retain the underlying prohibitions but eliminate what, in many cases, are non-value added certification requirements which often do more to deter participation in the government market rather than the prohibited conduct.

Section 303—Amendment to commencement and expiration of authority to conduct certain tests of procurement procedures

The section would amend section 5061 of FASA, 41 USC 413 note, to permit the OFPP Administrator to exercise the authority granted in FASA to test "innovative" procurement procedures without having to wait for the implementation of other FASA provisions.

Section 304—International competitiveness

The section would amend 22 USC 2761(e) to eliminate the requirement for recoupment of non-recurring research and development charges for products sold through the foreign military sales program. This fee or tax to be paid the government for products developed under government contracts disadvantages U.S. companies when selling American products in international markets.

Section 305—Procurement integrity

The section would amend the OFPP Act at 41 USC 423 to repeal the current so called "Procurement Integrity" provisions and its complex system of certifications and substitute a direct prohibition against the unauthorized disclosure and receipt of procurement-sensitive information. One who would violate the prohibitions of the section would be subject to criminal and civil penalties and

appropriate administrative actions. The section would contain prohibitions and remedies which would be similar to those regarding the disclosure of procurement-sensitive information contained in the current "Procurement Integrity" provisions. Finally, the section would eliminate the remaining agency-specific post-employment restrictions which became redundant with the passage of the Ethics Reform Act of 1989.

Section 306—Further acquisition streamlining provisions

The section would amend several provisions of the OFPP Act to update and clarify the statement in 41 USC 404 of OFPP's purpose and to repeal unneeded or obsolete provisions at 41 USC 401, 402, 407, 409 and 410.

Title IV—Streamlining of Dispute Resolution

Subtitle A—General Provisions

Section 401—Definitions

The section would set forth the definitions of the terms needed to create and operate the new consolidated United States Board of Contract Appeals for the resolution of the government's contract disputes and review of bid protests. The new Board would replace the current agency boards of contract appeals and the General Accounting Office (GAO) bid protest section. The definitions of "protest," "interested party," and "prevailing party" would parallel those set forth in FASA in connection with the General Services Board of Contract Appeals (GSBCA).

Subtitle B—Establishment of the United States Board of Contract Appeals

Section 411—Establishment

The section would establish the Board in the executive branch as an independent establishment.

Section 412—Membership

The section would provide that the Board consist of judges appointed by the chairman. New judges would be selected and appointed in the same manner as administrative law judges pursuant to 5 USC 3105 with the additional requirement that they have at least 5 years public contract law experience. Current board judges and certain GAO employees would be considered qualified to be Board judges.

Section 413—Chairman

The section would provide for the designation of the Chairman by the President and for the Chairman's executive and administrative responsibilities as well as for the designation of Vice Chairmen by the Chairman.

Section 414—Rulemaking authority

The section would provide that the board may establish necessary procedural rules and regulations and would prohibit the review of such rules and regulations by any other agency or person.

Section 415—Litigation authority

The section would provide that attorneys designated by the board may represent the board in civil actions.

Section 416—Seal of the board

The section would provide for a seal of office.

Section 417—Authorization of appropriations

The section would provide for the authorization of sums to be appropriated for fiscal year 1997 and beyond.

Subtitle C—Functions of United States Board of Contract Appeals

Section 421—Alternate dispute resolution service

The section would provide offer alternate dispute resolution services for any contract-related disagreement.

Section 422—Alternative dispute resolution of disputes and protests submitted to board

The section would provide that a Board judge or attorney shall meet with the parties

to the protest or dispute to attempt to resolve the matter through use of an alternate method of dispute resolution.

Section 423—Contract disputes

The section would provide that the Board have jurisdiction over contract disputes as provided by section 8(a) of the Contract Disputes Act.

Section 424—Protests

The section would provide that the Board shall review contracting officer decisions alleged by an interested party to violate statute or regulation and that in deciding protests the Board may consider all relevant evidence. The section would also provide that facts found by contracting officers and determinations made by them be presumed correct and that the Board may find that a contracting officer decision violates a statute or regulation for the reasons stated in 5 USC 706(2).

Further the section would provide procedures for the suspension by the Board of the agency's authority to conduct a procurement in protests filed before award and for the suspension of performance in protests filed after award. The section would set forth procedures for discovery of relevant material and for Board proceedings, including the use simplified rules for protests of procurements below \$1,000,000 and the dismissal and payment of costs for frivolous protests. Finally, among other things, the section would provide for the corrective actions to be ordered by the Board and for the Board's authority to declare the entitlement of a prevailing party to its protest costs.

Section 425—Applicability to contracts for commercial items

The section would provide that the authority conferred on the Board by this Title is applicable to procurements for commercial items.

Subtitle D—Repeal of Other Statutes Authorizing Administrative Protests

Section 431—Repeals

The section would provide repeal the current statutory authority for the GSBCA and for the GAO bid protest function.

Subtitle E—Transfers and Transitional, Savings, and Conforming Provisions

Section 441—Transfer and allocation of appropriations and personnel

The section would provide for the transfer of assets, etc. and the rules for the transfer of agency boards of contract appeal and relevant GAO personnel to the Board.

Section 442—Terminations and savings provisions

The section would provide the rules for affect on proceedings before the agency boards and GAO.

Section 443—Contract disputes authority of board

The section would provide conforming amendments needed by the establishment of the Board regarding the contract disputes.

Section 444—References to agency boards of contract appeals

The section would provide that any reference to an agency board of contract appeals shall be treated as to the Board.

Section 445—Conforming amendments

The section would provide for the necessary conforming amendments.

Subtitle F—Effective Date; Interim Appointment and Rules

Section 451—Effective date

The section would provide for an effective date of October 1, 1996 for this Title.

Section 452—Interim appointment

The section would provide for the current chairman of the GSBCA to serve as the Chairman of the Board for 2 years.

Section 453—Interim rules

The section would provide for the rules of procedure of the GSBCA to apply to the Board until the Board promulgates its procedural rules and that the rules of the Armed Services Board of Contract Appeals regarding Board judges apply until relevant Board rules are promulgated.

Title V—Effective Dates and Implementation

Section 501—Effective Date and Applicability

The section would provide that the Act would take effect on the date of enactment, except as otherwise provided in Act and that the amendments made by the Act would take effect on the date provided in the final implementing regulations or October 1, 1996, whichever is earlier.

Section 502—Implementing regulations

The section would provide a schedule for the promulgation of the implementing regulations.

EAGLE SCOUT AWARD

HON. ROBERT E. ANDREWS

OF NEW JERSEY

IN THE HOUSE OF REPRESENTATIVES

Thursday, May 18, 1995

Mr. ANDREWS. Mr. Speaker, I rise today to express my congratulations to Armando Lopez, the first Hispanic-American to achieve the rank of Eagle Scout in the Boy Scout Camden County Council of New Jersey. Mr. Lopez is a shining example of the creativity and spirit that exists in our future leaders. He chose as his Eagle Scout project to build a patio around a shrine for Our Lady of Mount Carmel-Fatima Church in Camden. What was supposed to be a brick patio has turned into an enclosed garden and a gathering place for all who live in the area. It is now used by the community for prayer, weddings, school ceremonies, and sanctuary. Armando has spent many months on this project, through the winter and spring and has truly displayed the dedication to become a leader in the community. He will not be ending his scouting career soon, for he has been chosen to represent the United States at the 18th World Scout Jamboree in Holland this August. I commend Armando Lopez on his commitment to the community and I am sure he will succeed in all of his future endeavors.

PROTECT AMERICA'S DEFENSE WORKERS

HON. BOB FILNER

OF CALIFORNIA

IN THE HOUSE OF REPRESENTATIVES

Thursday, May 18, 1995

Mr. FILNER. Mr. Speaker and colleagues, I rise today to urge this Congress to make a major reinvestment in communities hit hardest by the downsizing of America's defense industry.

San Diego is home to a highly skilled and productive work force. A generation of these talented defense workers helped to establish California's dominance in the defense and aerospace industry.

Now defense workers in communities like San Diego are watching their jobs disappear—not only because of relaxing world tensions—

but also because our own Department of Defense is helping to subsidize their transfer to other cities.

Last year, my district saw the relocation of Martin Marietta's Space Systems Division to Denver—with a net loss of 1,800 jobs for my community. But the worst part about this situation is that our own U.S. Air Force rewrote a contract and paid Martin Marietta a \$30 million subsidy to help transfer these jobs out of San Diego and out of California.

To make matters worse, just last month the Defense Department gave away another \$31 million of taxpayer money to the top executives of Martin Marietta and Lockheed.

What did our Defense Department give to those defense workers in San Diego that lost their jobs? Absolutely nothing.

To correct this gross injustice, I recently introduced H.R. 702, the Displaced Workers Defense Act of 1995.

My legislation is very simple: It would require that any cost savings realized by the Federal Government under a defense contract that causes job losses in communities be returned to that community—to help create new jobs and to retrain displaced defense workers so they can take advantage of these new job opportunities.

We must stop this giveaway of taxpayer funds to wealthy corporations.

We must use our scarce resources to help those defense workers that have worked so hard to make America great.

Please join me in this effort to protect our defense workers from being left behind in our changing economy. Join me in supporting H.R. 702, the Displaced Workers Defense Act of 1995.

SAN FRANCISCO LABOR LEADERS CARRY SPIRIT OF AMERICAN LABOR MOVEMENT TO CHINA

HON. TOM LANTOS

OF CALIFORNIA

IN THE HOUSE OF REPRESENTATIVES

Thursday, May 18, 1995

Mr. LANTOS. Mr. Speaker, I rise today to call to the attention of my colleagues an upcoming visit of considerable importance by Ms. Josie Mooney, president of the San Francisco Labor Council. She will embark on a good will journey to meet with labor leaders in China.

Mr. Speaker, Josie Mooney and the San Francisco Labor Council represent the best of the American labor movement—free-working men and women, who are organized to seek better wages, improved working conditions, and a better standard of living for working men and women in our area and around our Nation.

As the official representative of the San Francisco Labor Council, Josie Mooney will meet with leaders of the Shanghai Municipal Trade Union Council and other labor leaders. I wish her great success in those meetings as she works to build bonds of brotherhood between the working men and women of the United States and China.

It is my sincere desire that the spirit and example of the San Francisco Labor Council and of the United States union movement will inspire labor leaders in China to emulate the high standards set by American unions and their outstanding leaders.