ORIGINS AND HISTORY OF COMPETITION REQUIREMENTS IN FEDERAL GOVERNMENT CONTRACTING

There's Nothing New Under the Sun

By Patricia H. Wittie[1]

*"Competitive procurement, whether formally advertised or negotiated, is beneficial to the government. First, competition in contracting **saves money**…. In addition, agencies have been able to promote significant innovative and technical changes through negotiated competition for contract awards…. Lastly, and possibly the most important benefit of competition, is its inherent appeal of '**fair play**.' Competition **maintains integrity** in the expenditure of public funds by ensuring that government contracts are awarded on the basis of merit rather than favoritism."*

> Report of the Comm. on Governmental Affairs to Accompany S. 2127, S. Rep. No. 97-665 at 3 (1982).

I. A Sampling of Congress' Earliest Thoughts on Competition in Procurement

The idea that fair price and fair play are inherent in competitive procurement is not original to the 20th (or 21st) century. To the contrary, procuring supplies and services through an advertised, competitive process has been a commonly accepted procedure since the days of the Revolutionary War; and Congress has been mindful of the need to avoid favoritism in procurement since the earliest days of the Republic.

A. Fair price: advertising for competitive bids

1. **1775**: Journals of the Continental Cong., Vol. 3, p. 360 (Nov. 20, 1775)

The earliest reference to advertising for proposals in the Journals of the Continental Congress is this one, dated Nov. 20, 1775, referring to procuring supplies for two Battalions that were to be recruited in New Jersey:

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"Resolved, That a Committee be appointed to **advertise and receive proposals**, and contract for supplying said Battalions with the rations allowed them."

Id., available at http://memory.loc.gov/ammem/amlaw/lawhome.html, a superb Library of Congress site that includes the papers of the Continental Congress as well as papers of the first 42 Congresses (through 1873).

2. **1777**: Journals of the Continental Cong., Vol. 8, p. 580 (July 25, 1777)

A more vivid example appears in this resolution from the Continental Congress in 1777, authorizing the colonies' Board of War to procure certain commodities (including beer and "sour-crout") through competitive advertising:

"Resolved, That the Board of War be empowered to contract with proper persons to supply the army with beer, cyder, vegetables, soap, vinegar and sour-crout; and that they be **directed to advertise**, in the several papers, **that all persons whom it may suit to supply the army with those articles, may make their proposals to the Board.**"

It is fun to note that immediately following this resolution, there is another one that says:

> "Resolved, That General Washington be empowered to increase the ration of soap according to his discretion."

3. **1792**: Act of Feb. 20, 1792, ch. 7 § 6

As the new Congress of the United States settled into the business of post-war government, its first direction on public advertising for proposals related to contracts for delivery of the mail:

"Resolved …. That it shall be the duty of the Postmaster General, **to give public notice, in one or more of the newspapers published at the seat of government of the United States, and in one or more of the newspapers published in the state or states where the contract is to be performed, for at least six weeks before the entering into any contract for the conveyance of the mail that such contract is intended to be made,** and the day on which it shall be concluded; describing the places, from and to which such mail is to be conveyed; the time at which it is to be made up; the day and hour, at which it is to be delivered; and the penalty or penalties for nonperformance of the stipulations…."

4. **1809**: Act of Mar. 3, 1809, ch. 28 § 5

This Act is the first broadly-stated requirement for competition in procurement, relating to all supplies or services to be purchased either by the military or the Secretary of the Treasury:

"All purchases and contracts for supplies or services which are or may, according to law, be made by, or under the direction of either the Secretary of the Treasury, the Secretary of War, or the Secretary of the

Navy, **shall be made either by open purchase, or by previously advertising for proposals respecting the same…."**

> This statute was interpreted by the Attorney General in 1829, in response to a question from the Secretary of the Navy. See 2 Op. Att'y Gen. 257 (1829). He began his analysis by referring to a previous statute ("act of the 16th of July 1798") and then compared the two. The analysis is worth quoting:
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> "The act of the 16th July, 1798, had directed that all purchases and contracts for supplies or services for the military and naval service of the United States shall be made by, or under the direction of, the chief officers of the Departments of War and the Navy. Accounts were to be rendered for settlement to the proper department for which such services or supplies were required; subject, nevertheless, to the inspection and revision of the officers of the treasury. So the law remained until 1809, when the act which we are examining was passed. It will be perceived, at once, that the alterations effected by it are important.
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> "The Act of 1798 related to purchases and contracts for the military and naval service only. That of 1809 extends to those made under the direction of the Secretary of the Treasury also. The act of 1798 simply required that these purchases or contracts should be made under the direction of the chief officer of the department. That of 1809 superadds the requisition that they shall be made 'by open purchase, or by previously advertising for proposals respecting the same.'
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> **"It is obvious, then, that Congress intended, by the act of 1809, to throw additional guards around this subject; to prevent favoritism, and to give to the United States the benefit of competition between those who were disposed to render the services or furnish the supplies which the government might require**. Conforming to the policy of the act, all such services or supplies as were to be rendered or furnished at a future day were to be contracted for 'by previously advertising for proposals respecting the same;' but as the exigencies of the government, in its various departments, would often require the immediate delivery of articles wanted for the public use, these were to be obtained by 'open purchase.' It was no longer competent for the Secretaries of War, or of the Navy, as they might have done under the act of 1798, to contract privately; that is, without 'publishing proposals.'" Id. at 259.

Three fundamental principles derive from this Act: first, that advertising for competitive proposals is the preferred method of procurement; second, that one of the principal goals of such competition is avoidance of favoritism; and third, that there are nevertheless some circumstances in which prior advertising may not be possible due to the "public exigencies," although even in that case purchases should still be accomplished, not by private contracting, but by "open purchase."

5. **1815**: H.R.B. 47, p. 1-2 (Jan. 9, 1815)

"[F]rom and after the passage of this act, all contracts for building and otherwise procuring vessels and their equipment's, and supplies of every kind for the service of the navy and the marine corps where the contract or articles of equipment or supplies should exceed the amount of one thousand dollars, the **same shall be procured by public advertisements extensively circulated**, requiring duplicate sealed proposals, one of which shall be immediately forwarded to the office of the accountant of the navy, for his government in the final settlement of the accounts; and no account shall be allowed for higher rates or terms, than the lowest offer thus received, unless it shall be satisfactorily shown, that such could not be safely executed on the conditions hereinafter prescribed."

[Bill not enacted, presumably due to cessation of hostilities.]

6. **1842**: Act of May 18, 1842, ch. 29 § 15

In 1842, competitive advertising requirements were expanded to procurements of printing and stationery by "each of the Executive Departments":

"The following sums be, and are hereby, appropriated …

"For incidental and contingent expenses of the Department of State, including publishing and distributing the laws, twenty-five thousand dollars: *Provided*, That the **job printing, stationery, and binding, of each of the Executive Departments, shall, until otherwise directed by law, be furnished by contract, proposals for which shall regularly be advertised in the public prints**. The classes, character, and description, of the printing being specified in each advertisement as far as that can be done, and it being made a condition in all cases, unless otherwise specifically stated in the advertisement, that the work shall be done in the city of Washington; and the contract shall in each case, so far as the proposals and acceptance shall enable the contract to be made, be given to the lowest bidder, whose bid shall be accompanied with proper testimonials of the ability of the bidder to fulfil his contract."

7. **1844:** Act of June 17, 1844, ch. 105

In 1844, printing for the Supreme Court was also made subject to a requirement for competitive advertising:

"From and after the passage of this act the **printing ordered by or for the Supreme Court** in the city of Washington or any of its officers for the use of said court, **shall be let by contract to the lowest bidder, in the same manner as is now done for the printing of the Executive Departments**."

8. **1852:** Act of Aug. 31, 1852, ch. 108

One of the earliest examples of Congressional directions for advertising in the construction area is this 1852 statute, enacted in apparent frustration over profiteering and cronyism in connection with construction of the Patent Office:

"[There shall be appropriated] For the completion of the east wing of the Patent Office building, one hundred and three thousand dollars; *Provided*, … **that all contracts shall hereafter be advertised at least sixty days before letting**; and that all contracts now existing in relation to building the additions to the Capitol, as well as the Patent Office, not made according to law, are hereby cancelled, at the end of sixty days, and notice of the same shall be given in all the newspapers in the city of Washington; and that all contracts of every description which have been made without public notice having been given, where notice was required, shall be cancelled after sixty days' notice having been given in the newspapers of this city: *Provided, also* ... that **bids shall be opened in presence of the bidders, if they, or any one of them, should be present, and that notice to that effect shall be given in the advertisement for proposals,** to be published agreeably to this proviso…."

B. Fair play: officials shall not benefit

1. **1808** Act of April 21, 1808, ch 48

This original version of the "officials not to benefit" statute was passed in 1808:

"[F]rom and after the passage of this act, **no member of Congress shall, directly or indirectly, himself, or by any other person whatsoever, in trust for him, or for his use or benefit, or on his account, undertake, execute, hold or enjoy, in the whole or in any part, any contract or agreement hereafter to be made or entered into with any officer of the United States, in their behalf, or with any person authorized to make contracts on the part of the United States**; and if any member of Congress shall, directly or indirectly, himself, or by any other person whatsoever, in trust for him, or for his use or benefit, or on his account, enter into, accept of, agree for, undertake or execute any such contract or agreement, in the whole, or in part, every member so offending, shall, for every such offense, upon conviction thereof, before any court of the United States, or of the territories thereof, having cognizance of such offence, be adjudged guilty of a high misdemeanor, and shall be fined three thousand dollars; and every such contract or agreement as aforesaid shall moreover be absolutely void and of no effect…."

The current version of this statute is found in the criminal code at 18 U.S.C. § 431.

2. Legislative history

The Act of April 21, 1808 was vigorously debated over a period of weeks before it was passed. A number of Congressmen argued that it was unconstitutional, depriving Congressmen of their rights as citizens to become contractors if they so choose. In response to an assertion by Congressman Troup that "[t]he people of Georgia once thought their

Legislature could never be corrupted, but they found they were mistaken; their representatives were corrupted by a land speculation," Congressman Rhea asserted that "[merely] because the Legislature of Georgia had been corrupted, it did not follow that congress were liable to corruption."

Congressman Troup and Congressman Bassett provided some of the more colorful arguments in support of the bill, holding up the British government as the supreme example of the evils of favoritism in procurement:

Mr. Troup: "**If some proposition of this kind is not adopted, the time is not far distant when this House will become, what the British House of Commons are, a corrupt, servile, dependent, and contemptible body**. We had better have no Legislature, than one composed of contractors, placemen, and pensioners."

Mr. Bassett: "It has been stated by a member, that the fears of gentlemen who advocate this bill are merely visionary. If he had extended his eyes across the water, and taken into consideration the observations of the gentlemen from Georgia (Mr. Troup), in allusion to the British House of Commons, he would not have suffered the observation to escape him. What, sir, shall we not profit by example? **What is the state of the only Government in Europe now exhibiting a representative body, and what has brought it to this state? It has been caused by their participation in the loaves and fishes of the Government**. Annuities, sinecures, and the endless variety of peculations of that kind, have destroyed its independence."

See Ann. Of Cong., Jan.-Mar. 1808, at pp. 1618-1619, 1648-1649, 1716-1717, and 1719-1720, available at http://memory.loc.gov/ammem/amlaw/lwaclink.html, Vol. 18.

II. Competition Requirements Become Permanent: Section 3709, Revised Statutes

The requirement for advertising became a more-or-less permanent part of U.S. law in 1861 when Congress enacted what eventually became Section 3709 of the Revised Statutes. 18 Stat. 733 (1874). It borrowed heavily on the Act of March 3, 1809 and the Attorney General's 1829 interpretation of that statute.

A. **1861** Original version of Section 3709 (1861, ch. 84 § 10, 12 Stat. 220)

"**All purchases and contracts for supplies or services, in any of the Departments of the Government**, except for personal services, when the public exigencies do not require the immediate delivery of the article or articles, or performance of the service, **shall be made by advertising a sufficient time**

previously for proposals respecting the same. When immediate delivery or performance is required by the public exigency, the articles or service required may be procured by open purchase or contract at the places, and in the manner in which such articles are usually bought and sold, or such services engaged between individuals.…"

B. **Current** version of Section 3709 (41 U.S.C. § 5)

"Unless otherwise provided in the appropriation concerned or other law, purchases and contracts for supplies or services for the Government may be made or entered into **only after advertising a sufficient time previously for proposals**, except

1. when the amount involved in any one case does not exceed $25,000;
2. when the public exigencies require the immediate delivery of the articles or performance of the services;
3. when only one source of supply is available and the Government purchasing or contracting officer shall so certify; or
4. when the purchases are required to be performed by the contractor in person and are –
   a. of a technical and professional nature or
   b. under Government supervision and paid for on a time basis.

"Except

1. as authorized by section 1638 [*since repealed*];
2. when otherwise authorized by law; or
3. when the reasonable value involved in any one case does not exceed $500,

sales and contracts of sale by the Government shall be governed by the requirements of this section for advertising."

The number of exceptions to the competitive advertising requirement has expanded over the years. Instead of a single exception (for emergencies), this law now permits an exception where there is only one source, or where personal services are required in a technical or professional area.

C. Continued applicability and exemptions

Largely as a result of the Armed Services Procurement Act and the Federal Property and Administrative Services Act in 1947 and 1949, as amended, Section 3709 does not currently apply to Executive Branch agencies and departments, including –

1. The Department of Defense, the Coast Guard, or NASA (10 U.S.C. § 2314);

2. Other executive agencies which are bound by the advertising and competition provisions of the Federal Property and Administrative Services Act, as amended (41 U.S.C. § 252);

3. Miscellaneous commissions, councils, committees, bureaus, and other entities that are expressly excluded (see listing of references in 41 U.S.C. § 5, Note, "Section Referred to in Other Sections").

4. Functions authorized by the Foreign Assistance Act of 1961, as amended (see Note to 22 U.S.C. § 2393), pursuant to Executive Order No. 11223 (May 12, 1965) and subsequent amendments to that Order.

Section 3709 continues to apply to entities other than executive branch agencies except where otherwise exempted; and of course, executive branch agencies are subject to stringent competition requirements under various other statutes, including the Competition in Contracting Act of 1984.

III. Antecedents to GSA Schedules: The General Supply Schedule

As the Federal Government expanded, the need for centralized purchasing became apparent.[2] In 1894, Congress created a "general supply schedule" for fuel, ice, stationery, and other miscellaneous supplies, to be purchased by all Executive Departments. It expressly required that contracts awarded for this schedule would be competitively advertised.

A. **1894** Act of January 1894, ch. 22, 28 Stat. 30 and Act of April 12, 1894, ch. 61, 28 Stat. 58

This act amended Section 3709 of the Revised Statutes, to add a requirement that purchases of fuel, ice, stationery, and other miscellaneous supplies to be purchased at Washington for the use of the Executive Departments and certain other governmental entities, be made through **simultaneous advertisements**

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2 During the Revolutionary War, Congress was concerned with the efficient procurement of clothing in particular, and took what steps it could to ensure that the various quartermasters who were charged with buying clothing for the Army did not compete with each other and drive up the price of the goods. In an early example of a sort of reverse "general supply system," Congress arranged for a process to coordinate purchasing of these items through the "Cloathier General." See Journals of the Continental Cong., Vol. 20, p. 664 (June 18, 1781): "Resolved, … That the Cloathing Agents be and they are hereby directed to transmit weekly General accounts of Prices of the articles within their Departments, that the Cloathier General with the concurrence of the Board of War, may so far as may be prevent competition [among them] in purchases and extravagance in prices."

arranged for by a board, to be chaired by an official from the Treasury Department, which would then select any or all of the proposals received in response. **Proposals were also to be opened simultaneously** on a day or days designated by the Secretary of the Treasury.

B. **1909** Executive Order No. 1071 (May 13, 1909)

President Taft issued Executive Order 1071, "to systematize the purchase of supplies needed in common by two or more of the several Departments and Government Establishments…, **to secure such supplies at lower and uniform prices**, and to more effectively carry out the spirit" of the 1894 Act of the 53rd Congress, referred to above.

The Order established the General Supply Committee, composed of one representative from each of the executive Departments plus the Government Printing Office, the Interstate Commerce Commission, the Smithsonian Institute, the Superintendent of State, War and Navy Building, and the government of the District of Columbia. The Committee was responsible for compiling the needs of each entity onto **a single "schedule of supplies", which was to be advertised in accordance with the 1894 Act**.

Although the Order did not say this, the form of Proposal that is attached to the official version of the Order shows that offerors agreed to supply all of the quantities requested by each entity, or such "greater or less quantity of any or all of the articles embraced in this proposal as the wants and exigencies of the service may require." Thus, these were requirements contracts, obtained through advertising and competition.

C. **1910** Act of June 17, 1910, ch. 297 § 4, 36 Stat. 487, at 531

"[H]ereafter all supplies of fuel, ice, stationery, and other miscellaneous supplies for the executive departments and other government establishments in Washington, when the public exigencies do not require the immediate delivery of the article, shall be advertised and contracted for by the Secretary of the Treasury, instead of by the several departments and establishments, upon such days as he may designate. There shall be a general supply committee in lieu of the board provided for in section thirty-seven hundred and nine of the Revised Statutes as amended, composed of officers, one from each such department, designated by the head thereof, the duties of which committee shall be to make, under the direction of the said Secretary, **an annual schedule of required miscellaneous supplies, to standardize such supplies, eliminating all unnecessary grades and varieties, and to aid said Secretary in soliciting bids based upon formulas and specifications drawn up by such experts in the service of the Government as the committee may require**…. *Provided*, That …. No disbursing officer shall be a member of such committee. No department or establishment shall purchase or draw supplies from the common schedule

through more than one office or bureau, except in case of detached bureaus or offices having field or outlying service, which may purchase directly from the contractor with the permission of the head of their department…."

Two things about this statute are notable. First, it directs that "experts" should prepare specifications. The idea that better specifications will result in more effective competition is a theme that resurfaces emphatically in the 1970's and early 1980's, just prior to passage of the Competition in Contracting Act. Second, the proviso included at the end, requiring separation of the disbursing function from the procurement function, is a typical statutory attempt to avoid abuse of the system and maintain standards of fair play.

D. **1933** Executive Order No. 6166

In 1933, President Roosevelt issued Executive Order 6166, which abolished the General Supply Committee and transferred its functions to a Procurement Division of the Treasury Department. This Procurement Division ultimately evolved into the General Services Administration ("GSA") and the Federal Supply System ("FSS").

E. National Supply System

After World War II, the military agencies and GSA worked together to develop a "national supply system" to promote centralized purchasing for use both government-wide and solely for the defense agencies. This system still exists, in parallel with the GSA FSS program, through the Coordinated Acquisition Program and the Integrated Materiel Management Program. See DFAR 208.70 & Appendix B; DoD 4140.26-M. Procurements for these programs are expressly subject to the FAR competition requirements. See, e.g., DFAR 208.7002-2(b)(2), (b)(4).

IV. Negotiation and the Increasing Use of Cost-Based Contracts

A. Abandonment of competitive advertising during wartime

Prior to World War I, "competition" in procurement generally meant advertising for competitive fixed-price bids with award to the lowest bidder. Even this form of competition, however, was routinely abandoned during wartime when the government accommodated military needs by directing purchasing agents to just do the best they could (the Revolutionary War), ignored statutory requirements for competitive advertising such as Section 3709 (World War I), or expressly released the Executive Branch from all legal restrictions on contracting where military necessity required it (World War II). In the latter case, however, lessons learned from previous wars caused Congress to impose certain pricing restrictions

on non-competitive contracts, e.g., imposing profit limitations and barring use of cost-plus-percentage-of-cost contracts.

1. Journals of the Continental Cong., Vol. 4, p. 223 (Mar. 21, 1776)

   "Resolved, That the committee of safety of Pensylvania [sic] be requested to employ some trusty persons in each county, to purchase as many good musquets as will be sufficient to arm the battalions raised in said colony; **and that they exert their utmost diligence in procuring the said arms speedily, and on the most reasonable terms**; that an order be drawn on the treasurers, in favour of said committee, for the sum of 12,000 dollars to enable them to pay for said arms, the committee to be accountable."

2. Journals of the Continental Cong., Vol. 12, p. 1177 (Nov. 30, 1777)

   "Resolved… That it be recommended to the governments of the states, wherein the army or any detachment or part thereof now is, or hereafter shall be, to take such measures, in aid of the forage masters, who shall **first use every endeavor to purchase the same, for the procuring sufficient quantities of forage, at reasonable rates**, as shall, in their opinion, be effectual, and most likely to procure a speedy supply."

3. **1917** "During World War I … formal advertising procedures were too inflexible to mobilize government resources. The War Industries Board, established to control wartime resources, relaxed the requirement for formal advertising and authorized procurement by negotiation. The need for full utilization of the nation's industrial strength was the fundamental reason for this shift to negotiation."

   Report of the Comm. on Governmental Affairs to Accompany S. 338, S. Rep. No. 98-50 at 4 (1983)

4. **1940** An Act to Expedite the Strengthening of the National Defense, Pub. L. No. 76-703, 54 Stat. 712 (1940)

   "(a) In order to expedite the building up of the national defense, the Secretary of War is authorized, out of the moneys appropriated for the War Department for national-defense purposes for the fiscal year ending June 30, 1941, **with or without advertising**, (1) to provide for the necessary construction, rehabilitation, conversion, and installation at military posts, depots, stations, or other localities, of plants, buildings, facilities, utilities, and appurtenances thereto…; (2) to provide for the development, purchase, manufacture, shipment, maintenance, and storage of military equipment, munitions, and supplies…; and (3) to enter into such contracts … and to amend or supplement such existing contracts, as he may deem necessary to carry out the purposes specified in this

section…***Provided further*, That the cost-plus-a-percentage-of-cost system of contracting shall not be used under this section; but this proviso shall not be construed to prohibit the use of the cost-plus-a-fixed-fee form of contract when such use is deemed necessary by the Secretary of War**."

5. **1941** First War Powers Act, Pub. L. No. 77-354, 55 Stat. 838 (1941)

Title II, Sec. 201: "The President may authorize any department or agency of the Government exercising functions in connection with the prosecution of the war effort, in accordance with regulations prescribed by the President for the protection of the interests of the Government, to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made and to make advance, progress and other payments thereon, **without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts whenever he deems such action would facilitate the prosecution of the war**: *Provided*, That nothing herein shall be construed to authorize the use of the cost-plus-a-percentage-of-cost system of contracting: *Provided further*, That nothing herein shall be construed to authorize any contracts in violation of existing law relating to limitation of profits.…"

Note that in 1958 this authority was made permanent whenever the President declares a national emergency. First War Powers Act of 1958, Pub. L. No. 85-804, 72 Stat. 9762 (codified in 50 U.S.C. § 1431 et seq.).

See also Executive Order No. 9001 dated December 26, 1941 in which President Roosevelt declared that the military departments were authorized, within the limits of the amounts appropriated, to enter into contracts without regard to other provisions of law.

B. The beginnings of peacetime negotiation – the Army Air Corps Act of 1926

Over time – particularly after World War I – the government also began to negotiate its contracts rather than advertising for competitive fixed-price bids. An early example of legislative authority for this new process during peacetime appears in the Army Air Corps Act of 1926, Pub. L. No. 69-446, 44 Stat. 780.

Section 10 of the Act established a program for procuring new aircraft. It required advertising for new designs for at least 30 days, followed by no less than 60 days for submission of the competitive proposals. The Secretary of War was permitted to choose one or more winners among the proposals based on what was effectively best value (not price alone), but without negotiations. Following selection of a design, the Secretary could then contract with the winner(s) "on such terms and conditions as he may deem most advantageous to the Government for furnishing or constructing" the items, provided only that the price was

reasonable. If the Secretary determined that the offeror proposing the winning design could not reasonably perform the production contract, he was authorized to buy the design.

Finally, the Secretary was authorized to pick and choose parts of various designs proposed by different offerors, and combine them for purposes of putting out an advertisement for the production contract, subject only to his ability to agree with each offeror on proper compensation for the parts of their designs that he chose to use.

C. Emerging peacetime restrictions on profits

During and after World War I, the government was forced to move to cost-plus contracting as a way of handling what it regarded as profiteering, and also as a way of equalizing the risks that were inherent in both a wartime economy where inflation and labor shortages were rampant, and in the increasing technical complexities of what the government was buying even during peacetime.[3] The later-enacted renegotiations acts (and ultimately the Truth in Negotiations Act) were an outgrowth of this process. See generally vom Bauer, "Fifty Years of Government Contract Law," listed in the Bibliography. The language of these statutes reflected Congress' continued faith in "full, open and unrestricted competition," even while they imposed profit limitations on contracts negotiated during and after war-time.

1. **1934** The Vinson-Trammel Act, Pub. L. No. 73-135, 48 Stat. 503 (1934)

This act authorized construction of aircraft at Government facilities rather than in the private sector if

"(a) It should reasonably appear that the persons, firms, or corporations, or the agents therefore, bidding for the construction of any of said aircraft …

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3 War economies have always been characterized by "extravagant prices" and labor shortages. In 1777, Congress decided that the remedy for the situation was not to negotiate, but rather to stop the work. See,e.g., Journals of the Continental Cong., Vol. 8, p. 581 (July 25, 1777): "The Marine Committee having represented that the extravagant prices now demanded for all kinds of materials used in ship-building, and the enormous wages required by tradesmen and labourers, render the building of the ships of war already ordered by Congress not only excessively expensive, but also difficult to be accomplished at this time, and that it appears, by information lately received, that some of the frigates have been set on the stocks in improper places; Whereupon, Resolved, That the Marine Committee be empowered to put a stop to the building of such of the continental ships of war already ordered by this Congress to be built, as they shall judge proper, and to resume the building of them again when they shall find it consistent with the interest of the United States so to do."

have entered into any combination, agreement, or understanding the effect, object or purpose of which is to deprive the Government of fair, open, and unrestricted competition in letting contracts for the construction of any of said aircraft…, or –

"(b) Should it reasonably appear that any person, firm, or corporation, or agents thereof, being solely or peculiarly in position to manufacture or furnish the particular type or design of aircraft … required by the Navy, in bidding on such aircraft … have named a price in excess of cost of production plus a reasonable profit, as provided in Section 3 of this Act."

Section 3 of the Act provided:

"… [N]o contract shall be made by the Secretary of the Navy for the construction and/or manufacture of any complete naval vessel or aircraft, or any portion thereof, herein, heretofore, or hereafter authorized unless the contractor agrees … –

> "(b) To pay into the Treasury profit, as hereinafter provided shall be determined by the Treasury Department, in excess of 10 per centum of the total contract price, such amount to become the property of the United States…."

This Act was amended several times so that it covered additional types of procurements and to adjust the manner in which excess profits were evaluated. See Act of June 25, 1936, ch. 812, § 3, 49 Stat. 1926; Act of June 29, 1936, ch. 858, § 505, 49 Stat. 1998; Act of April 3, 1939, ch. 35, § 14, 53 Stat. 560.

2. Renegotiation Acts

   a. **1942** Defense Appropriations Act of 1942, Pub. L. No. 77-528, 56 Stat. 219, 244.

      i. Section 401 of this Act required an explanation of the reasons for not using competitive bids:

> "It shall be the duty of the Secretary of War and the Secretary of the Navy, respectively, to file with the Congress, within sixty days after the end of each fiscal year, a complete list of all contracts in excess of $150,000 … showing … (3) the names of the persons who approved the specifications, consummated the making or concluded the negotiation of any such contract on behalf of the Government, and of all persons who participated in the negotiations on behalf of the contractor; [and] (4) if any

such contract was awarded without competitive bidding, a statement of the principal or controlling reason for the selection of the contractor…."

ii. Section 403 required that the government be reimbursed for "excessive profits":

"(b) The Secretary of each Department is authorized and directed to insert in any contract for an amount in excess of $100,000 hereafter made by such Department (1) a provision for the renegotiations of the contract price at a period or periods when, in the judgment of the Secretary, the profits can be determined with reasonable certainty; (2) a provision for the retention by the United States or the repayment to the United States of (A) any amount of the contract price which is found as a result of such renegotiations to represent excessive profits and (B) an amount of the contract price equal to the amount of the reduction in the contract price of any subcontract under such contract pursuant to the renegotiations of such subcontract…."

Id. at 245.

See also, e.g., Renegotiations Act of 1944, ch. 63, 58 Stat. 78; Renegotiations Act of 1948, Pub. L. No. 80-547, 62 Stat. 259; Renegotiations Act of 1951, Pub. L. No. 82-9, 65 Stat. 7 (codified in 50 U.S.C. App. 1211, et seq.)

3. **1962** Truth in Negotiations Act, Pub. L. No. 87-653, 76 Stat. 528 (1962)

In 1962, Congress amended The Aarmed Services Procurement Act to include a requirement for submission of certified cost or pricing data where the contract price (or price of a modification or subcontract) would exceed $100,000. However, cost or pricing data were *not* required where there had been adequate price competition:

"Any prime contract or change or modification thereto under which such certificate is required shall contain a provision that the price to the Government, including profit or fee, shall be adjusted to exclude any significant sums by which it may be determiend by the head of the agency that such price was increased because the contractor or any subcontractor required to furnish such a certificate, furnished cost or pricing data which, as of a date agreed upon between the parties … was inaccurate, incomplete, or noncurrent: *Provided*, That **the requirements of this subsection need not be applied to contracts or subcontracts where the**

price negotiated is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, prices set by law or regulation or, in exceptional cases where the head of the agency determines that the reuqirements of this subsection may be waived and states in writing his reasons for such determination."

V. Comprehensive Procurement Legislation – ASPA and FPASA

A. Armed Services Procurement Act of 1947, Pub. L. No. 80-413, 62 Stat. 21 (1948) (codified in 10 U.S.C. § 2301, et seq.)

The Armed Services Procurement Act (ASPA) was Congress' first effort to provide a comprehensive legislative framework for defense procurement. It applied to "all purchases and contracts for supplies or services made by the Department of the Army, the Department of the Navy, the Department of the Air Force, the United States Coast Guard, and the National Advisory Committee for Aeronautics" for the use of any of these agencies, where payment was to be made from appropriated funds. Not surprisingly, it required competitive advertising in most situations, but allowed for negotiated procurement in certain circumstances – reflecting the increasing complexity of weapons systems as well as lessons learned during wartime.

1. Requirement for competitive advertising

a. Extent of advertising requirements

"All purchases and contracts for supplies and services shall be made by advertising … except that such purchases and contracts may be negotiated by the agency head without advertising" if one of 17 exceptions applied. This was generally regarded as a license to negotiate on a sole-source basis if the situation could be made to fit within one of the 17 exceptions.

b. Full and free competition

"The advertisement for bids shall be a sufficient time previous to the purchase or contract, and specifications and invitations for bids shall permit such **full and free competition** as is consistent with the procurement of types of supplies and services necessary to meet the requirements of the agency concerned.

"All bids shall be publicly opened at the time and place stated in the advertisement. Award shall be made with reasonable promptness by written notice to that responsible bidder whose bid,

conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered…."

2. Authorized exceptions to competitive advertising

Under ASPA as originally enacted, contracts could be negotiated without advertising in a wide variety of circumstances, including when:

1. determined to be necessary in the public interest during the period of a national emergency;
2. the public exigency will not admit of the delay incident to advertising;
3. the aggregate amount involved does not exceed $1,000;
4. for personal or professional services;
5. for any service to be rendered by any university, college, or other educational institution;
6. the supplies or services are to be procured and used outside the limits of the United States and its possessions;
7. for medicines or medical supplies;
8. for supplies purchased for authorized resale;
9. for perishable subsistence supplies;
10. for supplies or services for which it is impracticable to secure competition;
11. for experimental, developmental, or research work, or for the manufacture or furnishing of supplies for experimentation, development, research or test;
12. for supplies or services as to which the agency head determines that the character, ingredients, or components thereof are such that the purchase or contract should not be publicly disclosed[4];
13. for equipment which the agency head determines to be technical equipment, and as to which he determines that the procurement thereof without advertising is necessary in order to assure standardization of equipment and interchangeability of parts and

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4 Congress had accommodated the need for secrecy in procurements since the Revolutionary War. *See*, e.g., Journals of the Continental Cong., Vol. 2, p. 253 (Sept. 18, 1775) ("On motion made, *Resolved*, that a secret Committee be appointed to contract and agree for the importation and delivery of any quantities of gunpowder, not exceeding, in the whole five hundred tons…; [and] That the business be conducted with as much secresy [sic] as the nature of the service will possibly admit."); see also Pub. L. No. 60-112, 35 Stat. 108 at 125 (1908) ("Whenever proposals are invited for the furnishing of articles of ordnance property, the character of which or the ingredients thereof are of such a nature that the interests of the public service would be injured by publicly divulging them, the Chief of Ordnance is authorized to purchase such articles in such manner as he may deem most economical and efficient.")

that such standardization and interchangeability is necessary in the public interest;

14. for supplies of a technical or specialized nature requiring a substantial initial investment or an extended period of preparation for manufacture;
15. for supplies or services as to which the agency head determines that the bid prices after advertising therefor are not reasonable or have not been independently arrived at in open competition;
16. the agency head determines that it is in the interest of the national defense that any plant, mine, or facility or any producer, manufacturer, or other supplier be made or kept available for furnishing supplies or services in the event of a national emergency, or that the interest either of industrial mobilization in case of such an emergency, or of the national defense in maintaining active engineering, research and development, are otherwise subserved; or
17. otherwise authorized by law.

All determinations by the agency head or his delegee were to be in writing.

3. Restrictions on negotiated contracts

"Except as provided in subsection (b) of this section, contracts negotiated pursuant to section 2(c) may be of any type which in the opinion of the agency head will promote the best interests of the Government. Every contract negotiated pursuant to section 2(c) shall contain a suitable warranty … by the contractor that no person or selling agency has been employed or retained to solicit or secure such contract upon an agreement or understanding for a commission, percentage, brokerage or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies….[5]

"The cost-plus-a-percentage of cost system of contracting shall not be used…."

B. Federal Property and Administrative Services Act of 1949, Pub. L. No. 81-152, 63 Stat. 377

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5 The covenant against contingent fees was first introduced during World War I by President Wilson. See Report of the Commission on Government Procurement, USGPO Vol. I, App. G, p. 165 (1972).

ASPA applied to the defense agencies. Two years later, Congress passed nearly identical legislation that applied to the civilian agencies. The Federal Property and Administrative Services Act (FPASA) applied to purchase and contracts for supplies or services made by the GSA (which was established in this Act), and by any other executive agency except those covered by the ASPA.

1. Competitive advertising requirements and authorized exemptions

   FPASA contained (generally) the same requirements for competitive advertising as ASPA, and 14 of the 17 exceptions that permitted non-competitive negotiations. (The omitted exceptions were those relating to supplies requiring substantial initial investments; procurements relating to the industrial base or mobilization; and procurement of perishable subsistence supplies.)

2. Restrictions on negotiated contracts

   FPASA's provisions were generally identical to those in ASPA. A later amendment to ASPA, however, required that proposals for negotiated contracts under ASPA be solicited from **a maximum number of qualified sources**. FPASA did not contain a comparable provision, although eventually the requirement was imposed through regulations.

3. General Services Administration

   FPASA also established the General Services Administration, and transferred to GSA the authority previously lodged in the Bureau of Federal Supply at the Dept. of the Treasury. It then established the "General Supply Fund", so that GSA could continue with the supply schedule program that had been created in 1894. See FPASA §§ 102, 109.

VIII. Post-War Developments, the Concept of "Effective Competition," and Other Precursors to CICA

A. Legislative Activities in the late 1950's

Beginning in the early 1950's, there was a growing concern over the increased use of negotiated rather than formally advertised procurements. Because "negotiated" procurements so often ended up being sole-source negotiations, there was a corresponding increase in pressure for more competition. A number of bills were introduced in the Senate on this subject (S. 500, S. 11383 and SS. 1875). Although these bills were not enacted, S. 500 in particular was important because it "would have given competitive negotiation equal status with formal advertising and removed statutory inhibitions on use of incentive-type contracts." Report of

the Commission on Government Procurement, USGPO, Vol. I, App. G, p. 178 (1972).

Not until CICA was passed in 1984 did this movement to formally tie the concept of negotiated acquisition to the concept of competition succeed. That is, negotiation became a synonym for sole-source procurement; only when CICA was enacted did "competitive negotiation" rise to equivalency with competitive advertising.

B. B-176418, "Use of Formal Advertising For Government Procurement Can, And Should, Be Improved" (GAO Aug. 14, 1973)

GAO prepared this report because of repeated statements in Congress and professional articles suggesting that executive branch agencies were having difficulties in using formal advertising for procurement. GAO's purpose in submitting the report to Congress was to "(1) identify problems that limit competition and increase costs to the Government and (2) offer suggestions to the Government agencies for more effective and less costly use of this method of procurement." (Report at 1.)

After repeating the time-honored maxims that competition reduces costs and avoids favoritism or collusion, GAO offered a number of recommendations for improvement under the heading "Opportunities to Obtain More Effective Competition," including

- reconfiguring bidders' lists to more effectively reach actual competitors;
- soliciting past suppliers or bidders;
- evaluating procurements where a low number of bids were received, so that on subsequent solicitations more competitors were included;
- eliminating use of overly restrictive and incomplete specifications; and
- providing bidders more time to respond, where necessary.

Significantly, although some of these recommendations were designed to encourage more bidders to participate, a large number of them were intended simply to reduce the out-of-pocket costs incurred by the government when it conducts advertised procurements. GAO noted, for example, that agencies routinely printed far more copies of solicitations than they actually needed; and they relied on bidders' lists that were so broad and unspecific that they ended up sending their solicitations out to hundreds of contractors who were not interested in or capable of providing the products in question.

The Report also provided a thumbnail definition of effective competition, which was picked up years later during hearings that led up to CICA:

"The degree of confidence that **effective competition** is being achieved in formal advertising depends on certain conditions.

- A complete, adequate, and realistic specification or purchase description must be available.
- There must be two or more suppliers which are willing and able to compete effectively for the Government's business.
- The selection of the successful bidder can be made on the basis of price alone.
- There must be sufficient time to prepare a complete statement of the government's needs and the terms on which it will do business and sufficient time allowed the bidders to prepare and submit their bids."

(Report at p. 20.)

This definition of "effective competition" was proffered in the context of formal advertising. Negotiated procurements were not discussed in this Report.

C. Report of the Commission on Government Procurement, USGPO, Vol. I, pp. 22-23 (1972)

The real opening shot in the "maximum competition" versus "effective competition" argument came with the Report of the Commission on Government Procurement in 1972. The opening pages of that Report explained why its authors believed that "maximum competition" should no longer be the standard:

> "Under 10 U.S.C. 2304(g), solicitation of proposals is required 'from the maximum number of qualified sources consistent with the nature and requirements' of a procurement. Translating this requirement to practice poses a vexing problem.
>
> "R&D procurements, probably more than any other, embody the two characteristics which give rise to the problem: namely, a large number of firms seeking Government contracts and relatively complex proposals which are costly to prepare and evaluate. Under these circumstances, total solicitation costs may exceed the value of the contract. Moreover, most R&D procurements seek innovative ideas and frequently cannot be considered as essentially cost or price competitive. Therefore, the participation of a maximum number of firms does not necessarily ensure minimum cost to the Government, a primary purpose of the statute. Participation by a 'maximum' number of firms in such situations may unduly complicate the selection process and add considerably to both the procuring agency's and the offerors' costs.
>
> "Several agencies now interpret the statute to permit limiting the initial issuance of requests for proposals (RFPs) to a reasonable number of firms deemed most competent. Others are reluctant to follow this practice. They believe a blanket issuance of the RFP and the evaluation of all

proposals is easier, safer, and possibly less costly than attempting to justify a limited solicitation. Moreover, some consider that the intent of Congress, as reflected in the statute, requires that all doubts be resolved in favor of 'maximum' solicitation.

"Providing in the statute for the solicitation of a 'competitive' rather than a 'maximum' number of sources in negotiated procurements should convey the intent that the desirable number of sources depends on the conditions which prevail in the market at the time the purchase is made. We recognize that this change could foster favoritism for certain contractors: that is, only 'favorites' might be invited to submit proposals. To prevent this abuse, we recommend retaining the statute which requires public announcement of procurements and adding to it a requirement that agencies honor all reasonable requests by uninvited offerors to compete."

Id.

D. Proposal for a Uniform Federal Procurement System, prepared by the Office of Management and Budget and presented to the Congress (February 26, 1982):

This proposal outlined the Reagan Administration's views on how federal procurement should be reformed. It favored "effective competition," which it defined as follows:

> "From the standpoint of Government procurement, competition is a marketplace condition in which two or more independent firms, each with a reasonable expectation of winning, can bid to obtain a contract. To be effective, competition must enable the Government to acquire products or services at reasonable prices, and it must be efficiently and fairly conducted. Since conditions vary from one procurement to another, contracting officers must have the flexibility to capitalize on how best to achieve effective competition in a given case."
>
> See Hearings on S. 338 Before the Senate Armed Services Committee, 98th Cong., at p. 223 (June 7, 9, 1983).

E. Executive Order 12352 (March 17, 1982)

As Congress held hearings on a series of bills that resulted in passage of CICA, President Reagan issued E.O. 12352 "in order to ensure effective and efficient spending of public funds through fundamental reforms in Government procurement." The Order directed the heads of executive agencies to, *inter alia*,

> "…establish criteria for enhancing effective competition and limiting noncompetitive actions. These criteria shall seek to improve competition by such actions as eliminating unnecessary Government specifications and

simplifying those that must be retained, expanding the purchase of available commercial goods and services, and, where practical, using functionally-oriented specifications or otherwise describing Government needs so as to permit greater latitude for private sector response."

IX. Competition in Contracting Act of **1984**

A. Rather than being enacted as a free-standing piece of legislation, the Competition in Contracting Act was included in the massive Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494, 1175, as Division B, Title VII, §§ 2701-2753. This may not have been intentional, but it certainly reinforces Congress' constant refrain that competition saves money.

B. The principal motivation for this major overhaul of the procurement laws was the perception that many agencies – and particularly the Department of Defense – were placing too many sole-source contracts, for reasons that were not justified by the statutory exceptions in the ASPA or FPASA.

> "Despite the emphasis on competition in contracting [in ASPA and FPASA] and the benefits to be derived from its use, noncompetitively negotiated contracts account for the majority of government procurement dollars. According to figures compiled by the Federal Procurement Data Center (FPDC), out of a total of $146.9 billion awarded by government agencies in fiscal 1982 for contracts over $10,000, $54.4 billion was awarded competitively, $79.2 billion was negotiated non-competitively, and $13.3 billion used other methods….
> "The ASPA and the FPASA have two primary shortcomings: first, they do not give proper accordance to negotiation as a legitimate competitive procurement procedure; second, they do not adequately restrict the use of noncompetitive negotiation."
>
> Report of the Comm. on Governmental Affairs to Accompany S. 338, S. Rep. No. 98-50 at 7, 9 (1983).

C. Stated differently, the manner in which ASPA and FPASA were written suggested that the distinction between advertising and negotiation was a distinction between competitive procurement (advertised) and non-competitive procurement (negotiated). Professor Cibinic explained:

> "Under the present statutory scheme, the focus is on the distinction between advertising and negotiation. Apparently this was based on the assumption that negotiated procurement would be noncompetitive. The Armed Services Procurement Act was amended in 1963 to indicate that competition should be obtained in negotiated procurement. The Federal Property and Administrative Services Act never was so amended, similar

requirements being adopted by regulation. However, these provisions merely state a preference for competition. Apparently, this has not been enough to deter the agencies from using noncompetitive procedures. S. 2127 would for the first time make the award of a noncompetitive contract a clear violation of statute unless permitted under one of the specific and limited exceptions stated in the Act."

Hearings on S. 2127 before the Committee on Governmental Affairs, 97th Cong., at 22 (1982) (Statement of Professor John Cibinic, Jr.).

D. Both of the principal committee reports relating to CICA adopted this formulation of the benefits of competition:

"Competitive procurement, whether formally advertised or negotiated, is beneficial to the government. First, competition in contracting **saves money**…. In addition to potential cost savings, competition also **curbs cost growth**…. Competition may also **promote significant innovative and technical changes**… The last, and possibly the most important, benefit of competition is its inherent appeal of 'fair play.' Competition **maintains the integrity in the expenditure of public funds by ensuring that government contracts are awarded on the basis of merit rather than favoritism.**"

S. Rep. No. 98-50, at 3 (1983). See also H.R. No. 97-665, at 3 (1982).

E. The Senate Governmental Affairs Committee made eight "findings":

1. The current procurement statutes are inadequate. The emphasis on formal advertising overshadows negotiation as a legitimate competitive procurement procedure.

2. The exceptions provided for negotiation are used inappropriately, in some cases, to justify sole-source procurement.

3. The rush to spend appropriated funds at the end of the fiscal year, often due to ineffective procurement planning, curtails competition.

4. Market research, used to determine the availability of competition in the marketplace, is often not being done.

5. Over-detailed specifications unnecessarily restrict the procuring agency from considering acceptable alternatives, and often result in only one contractor capable of meeting the agency's needs.

6. In some agencies, there is an institutional bias against competition, or a proclivity for sole-source contracting, which discourages contracting officers from obtaining competition.

7. The more concentrated the marketplace, the less opportunity there is for competition.

8. Legitimate reasons preclude the use of competition for some contracts.

S. Rep. No. 98-50, supra, at p. 9.

F. The Act made the following significant changes in order to address the findings and enhance competition in Federal contracting:

1. Established "full and open competition" as the standard for Federal procurements. (CICA Sec. 2711, 2723, 2732(b)(2).) CICA eliminated the basic requirement for formal advertising in FPASA and ASPA, and substituted a requirement for the use of full and open competition through competitive procedures – including sealed bids and competitive proposals. CICA defines "full and open competition" to mean that "all responsible sources are permitted to submit sealed bids or competitive proposals on the procurement." (CICA Sec. 2731.)

> The Conference Committee rejected use of the term "effective" competition, which was defined as a marketplace condition which results when two or more contractors, acting independently of each other and of the Government, submit bids or proposals in an attempt to secure the Government's business. Hearings on S. 338 Before the Senate Committee on Armed Services, 98th Cong., at 22 (1983).
>
> "The conference substitute uses 'full and open' competition as the required standard for awarding contracts in order to emphasize that all responsible sources are permitted to submit bids or proposals for a proposed procurement. The conferees strongly believe that the procurement process should be open to all capable contractors who want to do business with the Government." Id.
>
> Witnesses who testified in favor of the "effective competition" definition generally followed the logic articulated by the Report of the Commission of Government Procurement. This testimony from Mary Ann Gilleece, DoD Deputy Undersecretary for Acquisition Management, before the Senate Armed Services Committee on June 7, 1983 is illustrative:
>
> > "Senator Quayle: S. 338 uses the term 'effective competition'…. Would it not be better to use the term 'maximum practical competition' to insure that competition

is not limited to as few as two sources, which could be only the prime and the existing subcontractor?

"Ms. Gilleece: Competition among suppliers is necessary to maintain integrity in the expenditure of public funds. However, the phrase 'maximum practical competition' equates to the current statutory requirement for full and free competition, as exemplified by formal advertising, which has been interpreted to require consideration of all sources in every procurement. This is not necessary either to insure integrity in the process or to obtain reasonable prices.

"The problem with 'maximum practical competition' is that the contracting officer has little or no control over the number of prospective bidders who may respond to a given requirement. There are countless instances in which dozens of bids are received for a prospective contract that may only be, for example, $30,000. The Government may spend more in paperwork and resources to evaluate and make such an award than the value of the contract itself. The bidders, in turn, spend many times over what it directly costs the Government.

"The Government has an obligation to spend the taxpayers' money wisely and efficiently through the procurement process. It should be able to purchase, like any other user, prudently, soliciting an adequate number of suppliers commensurate with the need to be filled. In short, it is not reasonable to invite, perhaps, hundreds of suppliers to bid on a contract where the cost to society is more than the value of the contract."

Id. at 141.

The arguments against abandoning the maximum competition standard were ably articulated by Dale Oliver in a 1982 article (see Bibliography):

"The OFPP, in the draft legislation, seeks to define competition as that situation in which at least two offerors respond to the Government's solicitation. This definition, however, is at odds with economic theory and likely will reduce the amount of competition characteristic of the Government contract marketplace….

"An oligopoly is a market situation in which a few firms compete…A true oligopoly situation is characterized in the long run by barriers to entry. The OFPP's action of defining competition for contracting officers as being satisfied with only two offerors helps create an entry barrier for any particular procurement. Indeed, the entry barrier is a perfect one. The contracting officer, when satisfied that the condition of two offerors will be met, can limit the participation of other offerors upon the OFPP's announced rationale that 'too much' competition results in excessive spending by the Government in processing the various proposals. Fewer competitors are also administratively perceived as easier to handle….

"Furthering oligopolistic markets generally portends four adverse consequences. *First*, an oligopoly will result in higher prices:

> 'In oligopolistic industries demand curves faced by individual firms slope downward to the right, or are less than perfectly elastic. This much seems certain, whether or not individual firm demand curves can be located with accuracy. Consequently, marginal revenue for individual firms will be less than price. An individual firm, attempting to maximize profits or minimize losses, seeks the output at which marginal cost equals marginal revenue. Since the purely competitive firm maximizes profit at the output at which marginal cost equals price (and marginal revenue), the oligopolistic firm by comparison restricts output and charges a higher price. Since entry into an oligopolistic industry may be partially or completely blocked, prices may exceed average costs and profits may exist in the long run. To the extent that profits occur, consumers pay more for products than is necessary to hold the resources making them in the industries concerned.' [Citation omitted.]

"*Second*, the automatic tendencies for firms to realize maximum efficiency in a competitive market are reduced in the long run under an oligopoly. *Third*, sales promotional activity is increased generally in an oligopoly as firms seek to expand market share without price competition. This fact may lead to uneconomic use of resources since sales promotional activity does nothing to increase the actual

> utility of the particular resources being purchased. And *fourth*, collusive behavior is encouraged in an oligopolistic situation as the individual firms – being few in number – are able to anticipate and predict the behavior of each other."

2. Equalized sealed bids and competitive proposals. (CICA Sec. 2711, 2723.) CICA clarified that "competitive procedures" includes both sealed bidding and competitive proposals. Congress felt that prior language in the two statutes suggested that competitive negotiation was a less favored form of contracting, while at the same time it encouraged the use of non-competitive negotiation.

3. Prohibited non-competitive negotiations except in narrowly defined circumstances. (CICA Sec. 2711, 2723.) Prior language in ASPA and FPASA did not directly prohibit the use of non-competitive negotiations. Rather, that procedure was permitted provided that it was justified under one of 15 (FPASA) or 17 (ASPA) exceptions to the requirement for sealed bidding. Under CICA, "other than competitive procedures" are prohibited except in seven relatively narrow circumstances, most of which were adapted from previous exceptions in ASPA, FPASA and GAO case law; and use of one of the exceptions must be justified in writing.

4. Added specific procurement planning requirements. (CICA Sec. 2711, 2723.) CICA extends and strengthens the requirement that agencies engage in advance planning and market research so that they are able to write clear, unambiguous, directed specifications that better enable them to obtain full and open competition.

5. Added specific publication requirements. (CICA Sec. 2711, 2723.) Solicitations, unsolicited proposals, and proposed awards must be advertised so that all potential contractors are notified. Exceptions apply where the use of other than competitive procedures is permitted.

6. Established competition advocates in each agency. (CICA Sec. 2732(a).) Among other things, these advocates are required to "challenge barriers to and promote full and open competition," including unnecessarily detailed specifications and unnecessarily restrictive statements of need.

7. Gave protest jurisdiction to GAO and the GSBCA. (CICA Sec. 2713, 2741.) Although GAO had been deciding protests for many years, it had done so on the basis of its own statutory authority to settle the accounts of the Government. CICA gave it independent statutory authority to decide protests. In addition, in order "to provide a fair, equitable and timely remedy" in connection with Brooks Act computer procurements, CICA

gave bid protest jurisdiction to the General Services Board of Contract Appeals.

8. Extended TINA certification requirements to civilian contracts. (CICA Sec. 2712.) Prior to enactment of CICA, submission of certified cost and pricing data under the Truth in Negotiations Act was only required – by statute – for DOD contracts, although it was also required by regulation on certain civilian contracts. CICA made the statutory requirements co-extensive for both defense and non-defense contracts.

D. Some significant comments in the legislative history

1. MAS contracts. CICA includes a provision that preserves the multiple awards schedule programs administered by GSA. According to the Conference Report, "By providing the GSA multiple awards schedule programs with a statutory base, the conferees intend that any responsible vendor wishing to compete for this business is, in fact, allowed and encouraged to compete. As long as the schedule contracts managed by GSA maintain this objective, GSA is complying with the intent of this [provision] and should be supported. The conferees believe, however, that the availability of ADP schedule contracts should not preclude the requirements for agencies to seek lower prices if there are responsible alternative sources available." H.R. Conf. Rep. No. 98-861, at 1423 (1984) (thereafter "Conference Report).

2. R&D contracts. Although the Act itself did not address competition in R&D contracts specifically, the Conference Report did so, recognizing that current procedures qualify as full and open competition. "These basic research procurements are unique in that the agency's solicitations are general in nature, identifying areas of research interest, criteria for selecting proposals (including scientific merit) and the method of evaluating proposals. Proposals received are then competitively evaluated through a peer review process before contracts are awarded. By recognizing such procurement of basic research as competitive, the conferees intend to promote the participation of all individuals or companies capable of supporting the government's needs in this important area. Any agency procurement which cannot meet this standard and, in fact, restricts participation, must be justified and approved under the requirements in this substitute for other than competitive procurement procedures." Id.

3. Pre-qualifications. "The conferees also intend that where competition is conducted among all sources that have been prequalified, in accordance with statute and regulations, and where prequalification is essential to ensure satisfaction of an agency's needs, such procedures shall be

considered full and open competitive procedures, provided all responsible sources are given a reasonable opportunity to qualify." Id.

4. Urgent/national security exceptions. "The conference substitute retains the restrictions imposed on sole-source contracts provided in the Senate amendment, but requires agencies to obtain competition under the second [unusual and compelling urgency] and sixth [national security] exception to the maximum extent practicable….." Conference Report at 1425.

5. Protests. "The conferees believe that a strong enforcement mechanism is necessary to insure that the mandate for competition is enforced and that vendors wrongly excluded from competing for government contracts receive equitable relief." Conference Report at 1435.

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