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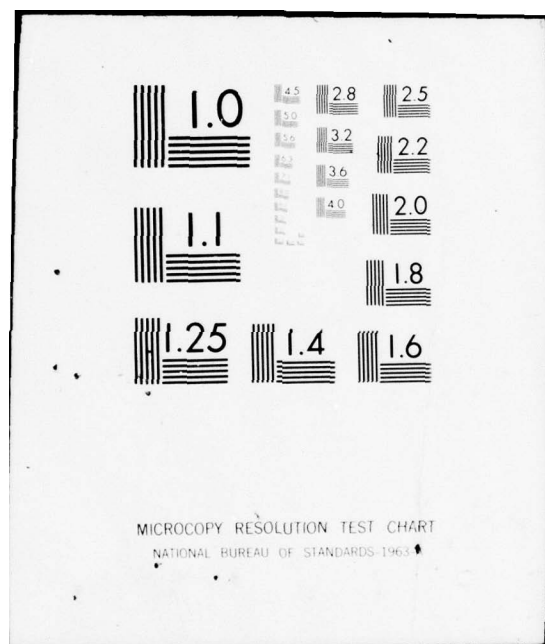
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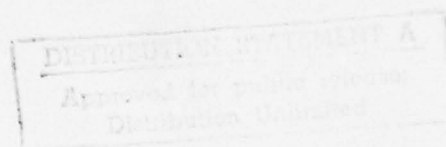
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AN OVERVIEW OF CONTRACT SERVICES IN THE DEPARTMENT OF DEFENSE



**DEPARTMENT OF DEFENSE
OCTOBER 1976**

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Appendices provide:

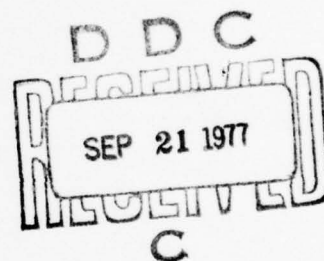
A glossary, a discussion of the laws relating to contracting-out for services, a chronology of important decisions concerning the legal aspects of contract services, and an annotated bibliography, are contained in appendices to the report.

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AN OVERVIEW OF CONTRACT SERVICES
IN THE DEPARTMENT OF DEFENSE



Prepared By
Office of the Assistant Secretary of Defense
(Manpower and Reserve Affairs)

October 1976

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INTRODUCTION AND SUMMARY

OBJECTIVE OF THIS REPORT

The purpose of this report is to provide an overview of service contracts within the Department of Defense (DoD) which can be used in the future as a basis for the development of options for improving the use and management of this significant component of the defense labor force.

The definition of service contracts used as the basis for this overview is the one contained in the current edition of the Armed Services Procurement Regulation (ASPR):

A service contract is one which calls directly for a contractor's time and effort rather than for a concrete end product. For purposes of this definition, a report shall not be considered a concrete end product if the primary purpose of the contract is to obtain the contractor's time and effort and the report is merely incidental to this purpose.¹

ORGANIZATION

This report is divided into five sections. The first section presents some basic facts and statistics that describe the major components of the defense labor force and that put into perspective service contract manpower. The second section contains a discussion of the current policy with respect to obtaining contract services. In the third section, some of the other important aspects that must be considered in addition to policy are discussed. These include Congressional concerns, legal issues, etc. Section IV highlights DoD's experiences concerning contract services. Systems used to

¹Department of Defense, Office of the Assistant Secretary of Defense (Installations and Logistics), Armed Services Procurement Regulation, (ASPR), October 1, 1975, Section 22, Part 1, Paragraph 22-101.

report information concerning service contracts are discussed in the fifth section.

A glossary, a discussion of the laws relating to contracting-out for services, a chronology of important decisions concerning the legal aspects of contract services, and an annotated bibliography are contained in appendices to the report.

SUMMARY OF MAJOR FINDINGS

The following are the major findings of this overview of service contracts within DoD.

1. Since 1955 it has been national policy that the Government should rely upon the private enterprise system to supply its needs, except where it is in the national interest not to do so.

2. Current guidelines are stated in OMB Circular A-76, "Policies for Acquiring Commercial or Industrial Products or Services for Government Use."

3. The DoD has implemented OMB Circular A-76 by establishing the commercial or industrial activities program for identifying and reviewing opportunities for the use of contractors to provide support services.

4. With regard to implementing the general policy to making the in-house vs. contract-out decision, considerable interest is shown in DoD's actions by various committees of Congress, the Civil Service Commission, the General Accounting Office, government employee labor unions, trade organizations and other groups affected by the outcome.

5. Under the current policy, cost comparisons are required only when the decision on method of performance is based on economic considerations. Since the cost comparisons are generally very time consuming, they tend to be avoided by the Services if at all possible. Hence, the method

of performance is generally justified on a basis other than cost. Consequently there is wide variation across the Services regarding the extent to which they contract for support services.

6. There are questions concerning the legal aspects of service contracts that remain to be resolved.

7. The DoD maintains detailed information identifying prime contract awards of \$10,000 or more for services as part of the Procurement Management Reporting System. This reporting system indicates that since 1970, the DoD annually has procured an average of \$7.5 billion of services including maintenance and repair, housekeeping services, automatic data processing, salvage services, medical services, transportation services, etc.

8. The primary source of information about the extent of DoD's use of contract services manpower, is the "Annual Inventory of Commercial and Industrial-Type Activities and Contract Support Services", maintained by the Office of the Assistant Secretary of Defense (Installations and Logistics). This report indicates that since 1972, DoD has purchased about 100,000 manyears of contract support services annually.

9. Within DoD opinions differ with respect to the amount and extent of data that is necessary to effectively manage contract manpower.

10. A significant expenditure of time, effort, and resources would be required to develop and maintain comprehensive man-year or manpower cost data for all DoD service contracts.

I. SERVICE CONTRACTS

BACKGROUND

Over the years, the Department of Defense (DoD) has relied upon the use of a mix of military, Federal civilian and contract manpower for the accomplishment of its missions and functions throughout the world. The mix is influenced by policy; cost; the availability of products or services from the private sector; Congressional, union, and budgetary pressures; and departmental parochialism and inertia. With respect to the first two components of the defense labor force; i.e., military and Federal civilians, DoD is the largest employer in the Federal Government. Excluding the postal service, over half of the Government's total workforce is employed by DoD.

During the past few years, both active military and Federal civilian manpower programs have been subjected to intense scrutiny. Nevertheless, even with a 295,000 reduction in total active military and civilian end-strength during the three fiscal years 1973 - 1975, manpower costs still amounted to about 55 percent or more of Defense outlays in all three of those years.

Until recently, however, virtually no management attention or in-depth study has been concentrated on the third component of the defense labor force--manpower employed by private industry. The escalating cost of manpower and its consequences upon the composition of recent Defense Manpower programs has drawn attention to contract manpower as a potential alternative to achieve cost reductions. On the other hand, members of the Committee on Appropriations questioned DoD's use of contract manpower

to replace civil service employees as a potential way of artificially reducing manpower cost as a percentage of budget outlays.²

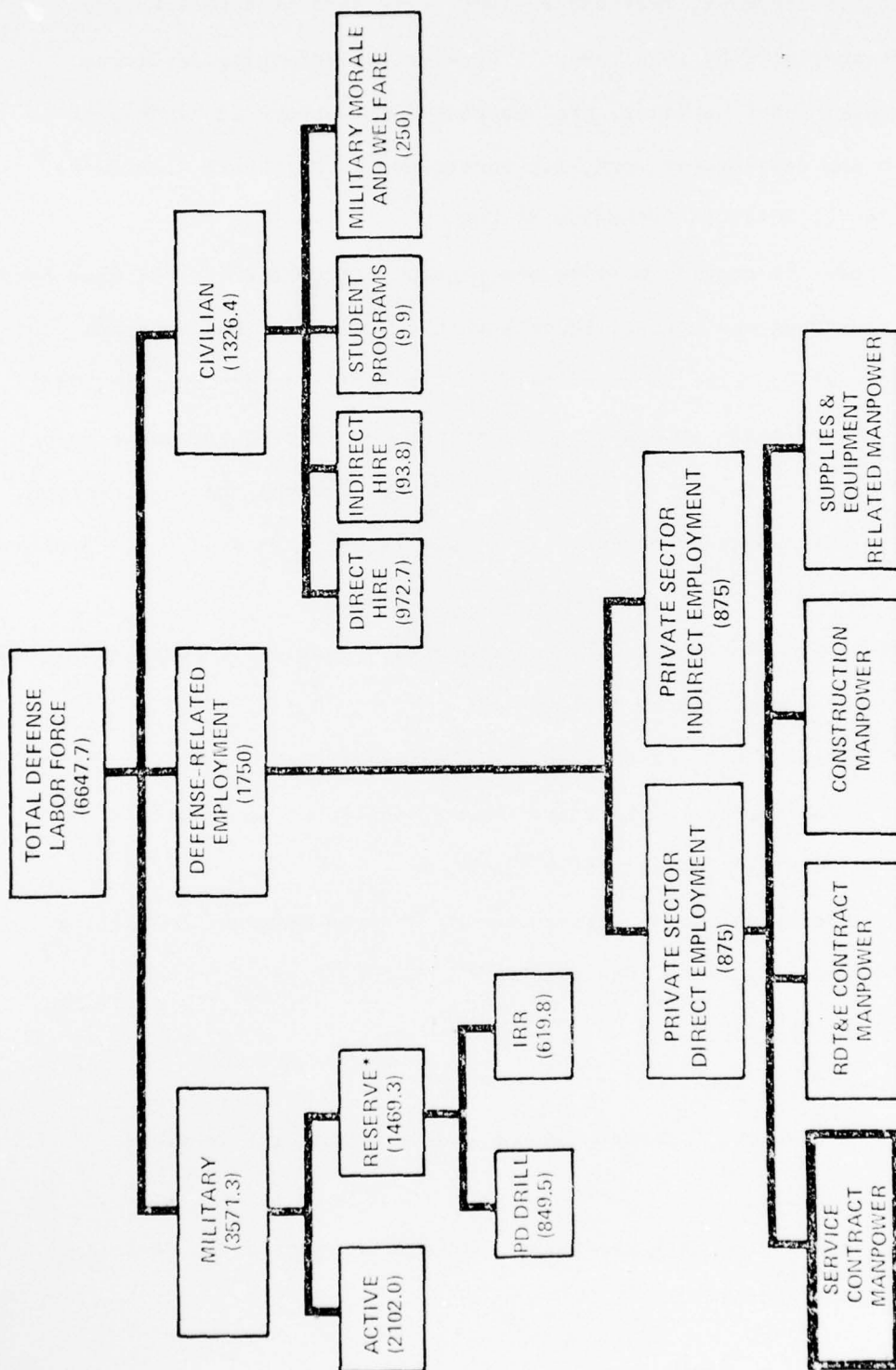
SERVICE CONTRACT MANPOWER

Figure 1 places into perspective the portion of the defense labor force addressed by this overview. The DoD estimates that Defense-related employment of wage and salary workers in United States private industry attributable to DoD military expenditures will be 1.6 million at the end of FY1976.³ The Bureau of Labor Statistics estimates that about one-half of this is for direct employment necessary to produce the final goods and services purchased; an equal portion accounts for indirect employment required in all levels of industries which provide materials, components, transportation, and distribution services ultimately embodied in the final purchase.⁴ This overview focuses upon the manpower employed by firms having defense contracts to provide services (the box at the bottom left of Figure 1). Since providing a service does not call for a concrete end product but rather calls directly for an individual's time and effort, this is a type of operation that could be performed either by in-house personnel or by civilians furnished by private contractors. Construction and purchases of supplies and equipment are procurements that do call for concrete end products and thus are excluded from this overview.

² Congress, House, Committee on Appropriations, Department of Defense Appropriations for 1976, Hearings, before a Sub Committee of the Committee on Appropriations, House of Representatives, 94th Cong., 1st sess., 1975, Pt. 3, pp 371-373.

³ Department of Defense, Office of the Assistant Secretary of Defense (Public Affairs), FY1977 Department of Defense Budget, News Release No. 12-76, January 21, 1976.

⁴ Oliver, Richard P., "Increase in defense-related employment during Viet Nam buildup," Monthly Labor Review, February 1970, p. 5.



* Does Not Include Standby or Retired Reserve

Figure 1. FY 77 DoD Labor Force (End Strength in Thousands)

Research, Development, Test and Evaluation (RDT&E) procurements are also not addressed by this report. However, housekeeping services, maintenance, guard services, etc. purchased in support of "in-house" research and development work, are considered to be service contracts.⁵

CATEGORIES OF SERVICES PURCHASED BY DOD

In order to provide uniform procurement statistics for the many required recurring and special reports to the President, the Congress, and other Federal agencies, components of DoD maintain data concerning individual actions taken in connection with the contracting for three major classes of procurement: (1) RDT&E, (2) other services and construction, and (3) supplies and equipment. This data is maintained in DoD's Procurement Management Reporting System.⁶

Under this system all services procured by DoD are further classified in one of 14 categories as follows:

- 1) Maintenance and/or Repair of Equipment
- 2) Modification, Alteration and/or Rebuild of Equipment
- 3) Technical Representative Services
- 4) Operation and/or Maintenance of Government-Owned Facilities
- 5) Installation of Equipment
- 6) Salvage Services
- 7) Medical Services
- 8) Architect, Engineer, Expert and/or Consultant Services

⁵This agrees with ASPR guidance. (See ASPR; Section 21, Part 1, Paragraph 21-116.

⁶ASPR, Section XXI.

- 9) Housekeeping Services
- 10) Photographic, Mapping, Printing and Publication Services
- 11) Training Services
- 12) Transportation Services
- 13) Lease or Rental, Except Transportation Equipment
- 14) Maintenance, Repair & Alteration of Real Property

Within each of the 14 categories there are even further subdivisions, as shown in Table 1, thereby facilitating the reporting of data for approximately 120 individual classes of services.

Table 1
SERVICES⁷ PROCURED BY DOD

Description	Description
MAINTENANCE AND/OR REPAIR OF EQUIPMENT	OPERATIONS AND/OR MAINTENANCE OF GOVERNMENT-OWNED FACILITIES (Cont'd)
Aircraft	Utility System
Aircraft Engines	Ammunition Facility
Missiles	Layaway - Standby Facility
Vessels	Government Facility - (Other)
Combat Vehicles	
Non-Combat Vehicles	INSTALLATION OF EQUIPMENT
Electronic & Communication Equip.	Installation of Equipment
Furniture	
Office Machinery	SALVAGE SERVICES
Railway Equipment	Preparation & Disposal of Surplus and Excess Property
Tires	Vessel Salvage
ADP/EAM Equipment	Aircraft Salvage
Equipment - (Other)	Salvage - (Other)
MODIFICATION, ALTERATION AND/OR REBUILD OF EQUIPMENT	
Aircraft	MEDICAL SERVICES
Aircraft Engines	Dependent Medicare
Missiles	Contract Surgeon
Vessels	Medical Service - (Other)
Combat Vehicles	
Non-Combat Vehicles	ARCHITECT, ENGINEER, EXPERT AND/OR CONSULTANT SERVICES
Electronic & Communication Equip.	Advertising Service of a Technical Nature
Railway Equipment	Architect - Engineer Service
Equipment - (Other)	Consultant Service
TECHNICAL REPRESENTATIVE SERVICES	Drafting - Engineering
Aircraft	Inspection
Aircraft Engines	Management Engineering Service
Missiles	Material Testing
Vessels	Personnel Testing
Combat Vehicles	Production Engineering
Non-Combat Vehicles	Programming Services (for ADP or EAM Equipment)
Electronic & Communication Equip.	Card Punching Services (for ADP or EAM Equipment)
Railway Equipment	Management Improvement Services (Studies, surveys or reviews for the purpose of developing or improving organization, methods procedures or systems)
Equipment - (Other)	
OPERATIONS AND/OR MAINTENANCE OF GOVERNMENT-OWNED FACILITIES ⁸	
Aircraft Facility	
Missile System Facility	
Electronic & Communication System Facility	

⁷ Excludes RDT&E actions

⁸ Includes operation of government-owned plants used for production purposes.

Table 1 (Continued)

Description	Description
ARCHITECT, ENGINEER, EXPERT AND/OR CONSULTANT SERVICES (Continued)	PHOTOGRAPHIC, MAPPING, PRINTING AND PUBLICATION SERVICES (Cont'd)
Management Assistant (Specific tasks undertaken for management separate and apart from studies, surveys and reviews)	Photographic Photo, Map, Printing or Publication Services - (Other)
Fueling & Other Petroleum Services Excluding Storage	TRAINING SERVICES
Testing Cloth	Factory Training
ADP Systems Development Services	Scientific and Management Education
Service (Other)	Reserve Training
	Lectures for Training
HOUSEKEEPING SERVICES	Tuition Fees
Gas	Billeting Costs for School Training
Electricity	Faculty Salaries for Dependents Schools
Telephone and/or Communication Service	Training of Government Personnel - (Other)
Water	
Utility - Other	TRANSPORTATION SERVICES
Installation Bus Service	Air Passenger Transportation Service
Chaplain Service	Air Cargo Transportation Service
Laundry and Dry Cleaning Service	Vessel Charter
Custodial - Janitorial Service	Cargo Space - Vessel
Insect and Rodent Control	Passenger Space - Vessel
Packing and Crating	Cargo & Passenger Space - Vessel
Garbage Collection	Vessel Operation
Food Service	Tug Service
Fueling Service	Stevedoring Services
Fire Protection	Vehicle Hire
Landscaping Service	Railway Equip. Charter
Recruiting Services for Civilians (including meals and/or lodging for recruits)	Transportation Services - (Other)
Surveillance Services	
Care of Remains and/or Funeral Service	LEASE OR RENTAL, EXCEPT TRANSPORTATION EQUIPMENT
Guard Services	ADP and/or EAM Equipment
Installation Housekeeping Service - (Other)	Hotel & Motel
	Storage Services
	Lease or Rental - (Other)
PHOTOGRAPHIC, MAPPING, PRINTING AND PUBLICATION SERVICES	MAINTENANCE, REPAIR & ALTERATION OF REAL PROPERTY
Film Processing Service	Painting
Cataloging	Building Maintenance, Alteration & Repair
Charting	Grounds Maintenance & Repair
Reproduction	Roads Maintenance & Repair
Technical Writing	Drainage, Fencing, Pipeline Maintenance & Repair
Art	Maintenance & Repair - (Other)
Printing	

II. CURRENT POLICIES REGARDING CONTRACTING-OUT

BACKGROUND

Predating any such pronouncements by other Executive Agencies of the Federal Government, the Department of Defense has had since 1952 a formally promulgated policy to be applied by its components in determining whether products and services used by DoD are to be provided by private enterprise or by DoD itself. The DoD Directive of that year opposed continued operation and retention of in-house facilities that produce goods and services similar to those available in the private sector; i.e., commercial and industrial-type activities.⁹ Further, it stipulated that justification was required for the continued operation of in-house commercial and industrial-type facilities and restricted the initiation of new activities of this type.

A few years later, the Bureau of the Budget¹⁰ was charged with the task of coordinating on a government-wide basis a program of providing to the Executive Agencies guidance concerning which of the government's products and services should be provided in-house and which should be obtained from private enterprise. OMB's original publication, issued in 1955,¹¹ has been revised in 1957, 1959, 1966 and in 1967. The current guidelines (set forth in OMB Circular A-76) are based on the general principle of relying on private enterprise to supply the Government's needs except "where it is in the national interest for the Government to provide directly the products

⁹ Department of Defense, Directive No. 4000.8, 1952.

¹⁰ Changed to the Office of Management and Budget (OMB) in 1970.

¹¹ Bureau of the Budget, Commercial-Industrial Activities of the Government Providing Products or Services for Governmental Use, Bulletin No. 55-4, 1955.

and services it uses."¹² The provisions of Circular A-76 further require that each agency compile an inventory of its commercial and industrial-type activities and that they periodically conduct a systematic review of these in-house activities to determine whether continued in-house operation is justified. The "compelling reasons" under which in-house commercial or industrial-type activities may be continued in operation or initiated as "new starts"¹³ are only when one or more of the following exist:

- a. Procurement of a product or service from a commercial source would disrupt or materially delay an agency's program.
- b. It is necessary for the Government to conduct a commercial or industrial-type activity for purposes of combat support or for individual and unit retraining of military personnel or to maintain or strengthen mobilization readiness.
- c. A satisfactory outside source is not available and cannot be developed in time to provide a product or service when it is needed.
- d. Procurement of the product or service from a an outside source will result in higher total cost to the government.

¹² Office of Management and Budget, Policies for acquiring commercial or industrial products or services for government use, OMB Circular No. A-76, August 30, 1967, p. 1.

¹³ A "new start" includes the following:

- a newly established DoD commercial or industrial activity involving additional capital investment of \$25,000 or more, or additional annual production costs of \$50,000 or more.
- A reactivation, expansion, modernization or replacement of an activity involving additional capital investment of \$25,000 or more, or additional production costs of \$100,000 or more.
- Construction, replacement, or reactivation of bakery, laundry, and dry cleaning facilities and scrap metal facilities subject to the provisions of DoD Directives 5126.8 and 5126.15.

Although considerable effort was expended during 1968 to draft a supplement to Circular A-76 specifically applicable to support services, it was never issued.

CURRENT DOD POLICY REGARDING CONTRACTING-OUT

DoD Directive 4100.15 implements Circular A-76. It prescribes DoD policy concerning reliance upon the private sector as follows:

The Department of Defense will depend upon both private and Government commercial or industrial sources for the provision of products and services, with the objective of meeting its military readiness requirements with maximum cost effectiveness...¹⁴

The directive further states that:

...DoD components will be equipped and staffed to carry out effectively and economically those commercial and industrial activities which must be performed internally to meet military readiness requirements. All other required products or services will be obtained in the manner least costly to the Government (by contract, by procurement from other Government Agencies, or from DoD commercial or industrial activities).¹⁵

In addition, DoD components must not rely upon private enterprise for those basic functions of management necessary to retain essential control over the conduct of their programs, including:

- selection, training and direction of Government personnel,
- assignment of organizational responsibilities,
- planning of programs,

¹⁴ Department of Defense, Office of the Assistant Secretary of Defense (Installations and Logistics), Commercial or Industrial Activities, DoD Directive 4100.15, July 8, 1971, p. 3.

¹⁵ Ibid., p. 3-4.

tion agreements involving a determination of the difference in costs.

4. When additional personnel authorizations are required by the Military Departments and Defense Agencies for the purpose of converting uneconomical contracts.

Both Circular No. A-76 and DoD Instruction 4100.33 (which translates the general policy of Circular A-76 and DoD Directive 4100.15 into specific procedures for use by DoD Components) specify the principles and cost elements (See Table 3) that are to be used in making the cost comparisons. Since the cost comparisons are generally very tedious they tend to be avoided by the Services if at all possible. This means that the method of performance is generally justified on a basis other than cost (or not at all). Table 2 illustrates this.

Table 2

ONLY 10.9% OF DOD TOTAL A-76 PROGRAM MAN-YEARS IN FY75
WERE JUSTIFIED ON ECONOMIC CONSIDERATIONS

Justification For Method Of Performance	Man-Years (000)	Percent of Total Man-Years
<u>In-House</u>		
Disruption would delay	109.5	23.6
Military essentiality	162.0	34.9
No alternative source	27.8	6.0
Least costly in-house	16.9	3.6*
No reason given	52.2	11.2
<u>Contract</u>		
Less costly	33.9	7.3*
Other than cost	45.5	9.8
No reason given	16.7	3.6
TOTAL	464.6	100.0
* Percent of total justified on Economic Basis		10.9

Table 3

COST ELEMENTS USED TO ESTIMATE
IN-HOUSE AND CONTRACT COSTS¹⁸

A. Cost elements involved in the estimation of the cost of procurement from commercial sources are:

- contract cost; i.e., "going contract price" in the local or regional area
- transportation charges
- contract administration and related costs
- material and supplies furnished to the contractor by the Government including any costs for transportation, storage, etc.
- costs associated with contractor use of Government-owned equipment and facilities
- costs to the Government of rehabilitating, modifying or expanding Government-owned equipment or facilities provided the contractor
- incentive or premium costs
- standby maintenance costs
- other costs, e.g. cost for premature personnel retirement; severance pay, home-owner's assistance, and moving/relocation expenses which will be paid solely because a Government in-house activity is discontinued, etc.

B. Cost elements involved in the estimation of in-house costs include:

- military personnel costs (computed using DoD Handbook 7220.9H, Accounting Guidance Handbook)
- in-house civilian personnel costs (including gross annual pay plus the Government's contribution for civilian retirement and disability, health insurance, and life insurance)
- other personnel costs, e.g. travel, per diem and moving expenses, living and uniform allowances, initial and recurring costs of personnel training, etc.
- materials, supplies, utilities and other services including initial start-up costs for new activities
- maintenance and repair
- overhead costs including finance and accounting, personnel, legal, local procurement, medical, police, fire, management, etc.
- federal taxes
- depreciation
- interest, using as a rate of interest, the current interest for long term Treasury obligations
- insurance
- other indirect costs

¹⁸ Source: Department of Defense, Commercial or Industrial Activities-Operations of, DoD Instruction 4100.33, July 16, 1971, Encl. 3, Att. 1.

ADDITIONAL POLICIES OF SIGNIFICANCE

Audiovisual Productions and Motion Picture Processing

In January 1974, an Interagency Study Group under the direction of the Office of Telecommunications Policy, published a report containing 10 recommendations for improved management of Federal audiovisual activities.¹⁹ These recommendations were subsequently approved by OMB. In June 1974, the Director of OMB assigned responsibilities for implementation of those recommendations and specifically requested the Administrator of General Services to exert leadership in formulating Government-wide policy for audiovisual activities and to monitor compliance with all applicable policies in this area.²⁰ Subsequently, the General Services Administration issued Federal Management Notices (FMN) 75-1 and 75-2. FMN 75-1 states that government personnel shall not appear as performers in government audiovisual productions except in certain specific instances. FMN 75-2 established policies for a particular Circular A-76 commercial or industrial-type activity i.e., motion picture processing by the Federal Government. It calls for executive departments and establishments to phase out all in-house motion picture processing operations and facilities except those involving:

- time-critical audiovisual documentation in remote locations and at locations where follow-on tests are dependent upon photographic results of film data recording;
- military combat contingency requirements; or
- intelligence operations.²¹

¹⁹ Office of Telecommunications Policy, Interagency Study Group, Audiovisual Communications in the Federal Government, January, 1974.

²⁰ Director, OMB, Memorandum to heads of executive departments and establishments, June 20, 1974.

²¹ General Services Administration, "Audiovisual Productions and Motion Picture Processing," Federal Register, Vol. 40, No. 164, August 22, 1975.

The basis for this policy pronouncement stems from the Interagency Study Group's findings that motion picture processing services were widely available commercially; that these sources were almost totally relied upon by some Federal agencies, and that in cases where in-house capability was defended on the basis of comparable cost, the cost benefit could not be satisfactorily substantiated.

Material Maintenance

DoD has issued additional policies and criteria governing the use of contractor and DoD resources for material maintenance.²² The general policy stated in DoD Directive 4151.1 is one of very limited use of contractual services for the accomplishment of organizational and intermediate maintenance for combat-related material. Specifically, the directive states that "combat and combat support activities of the Military Departments will be self-sufficient insofar as possible in providing direct...maintenance support for assigned weapons systems and equipment."²³

With regard to depot maintenance, the directive states that maintenance should be accomplished through the use of a manpower mix of contractual resources and organic (in-house) capability "in order to establish and sustain a flexible maintenance production base capable of expansion to accommodate emergency military needs within a limited time frame."²⁴

According to Directive 4151.1, each military department should plan

²²Department of Defense, Use of Contractor and Government Resources for Maintenance of Material, DoD Directive 4151.1, June 16, 1975.

²³Ibid. paragraph 1.b.

²⁴Ibid.

organic depot maintenance²⁵ capacity to accomplish no more than 70 percent of the gross mission-essential depot maintenance workload. However, the directive currently provides a great deal of flexibility to the Services concerning how they are to determine the percentage; for example, they can compute the percentage as a:

- Percentage of all depot maintenance for their particular Military Department
- Percentage by type of weapon system undergoing depot maintenance; e.g., aircraft, missiles, vessels, etc.
- Percentage by commodity class; e.g., fighter aircraft, destroyer escorts, etc.

Further, the relationship between planned workload versus accomplished workload is not considered. This directive is currently being revised to eliminate ambiguities.

Specific Installation Services

The Office of the Chief of Naval Operations has issued an instruction which announces goals established by the Secretary of Navy for the use of contractors to perform three particular commercial or industrial-type functions; i.e., custodial, refuse collection, and guard services.²⁶

These services are ones which, based upon past Navy assessment, have a strong probability of being more economically accomplished by contract.

The goals for each service are:

²⁵Organic depot maintenance is performed by a military department using Government-owned or controlled facilities and military or Federal civilian personnel.

²⁶Department of Navy, Commercial or Industrial Activities Program; use of Contractors to provide support services at Naval shore activities, OPNAVINST 4860.6A, June 24, 1975.

- custodial services - at least 70 percent contracted-out
- refuse collection and disposal services - at least 60 percent
- guard services - at least 30 percent

These goals are stated as percentages of annual operating costs reported. Table 4 shows the Navy's record over the FY1972-75 period for these three services. The total man years reported against these three functions accounted for less than 8 percent of the Navy's total man years reported in the OASD(I&L) "Annual Inventory of Commercial or Industrial Activities and Contract Support Services".

Table 4

EXTENT OF NAVY RELIANCE UPON PRIVATE SECTOR
FOR THREE SELECTED SERVICES

SERVICE	FISCAL YEAR								
	1972		1973		1974		1975		75-76
	(Percent of Contracting - Out ²⁷)								Goal
	A	B	A	B	A	B	A	B	A
Custodial Services	38.6	43.3	46.3	48.3	42.3	43.2	46.4	52.7	70
Refuse Collection Disposal Services	29.8	27.6	34.0	30.5	39.5	33.9	38.4	39.4	60
Guard Services	0.5	0.5	1.3	1.5	2.2	1.9	2.7	2.7	30

Other Policies

Each year in the DoD appropriation Act the Congress has imposed limitations on "the construction, replacement, or reactivation of any bakery, laundry or dry cleaning facility" and on "the operation, acquisition, or

²⁷ Percent of total annual operating costs (In-House + Contract) for that function that were expended on contract = A; percent of total man-years (In-house + contract) for that function that were expended on contract = B; as reported in the "Annual Inventory".

construction of new facilities or equipment for new facilities...for metal scrap baling or shearing or for melting or sweating aluminum scrap...".

Accordingly there are several other documents stating DoD policy regarding the restrictions upon the use of appropriated funds associated with these and other services obtained from the private sector.

A list of many of these documents is contained in DoD Instruction 4100.33.

III. ADDITIONAL ASPECTS OF CONTRACT SERVICES

INTRODUCTION

In Section I private sector manpower associated with contract services was put into perspective within the defense labor force; in Section II current policies concerning reliance upon the private sector and the "compelling reasons" for not using contractors were discussed.

However, there are other aspects in addition to policy considerations that should be regarded in determining which alternative is the more appropriate for satisfying a service requirement that might be performed with equal efficiency either in-house or by contract. Among the additional factors that come to play in the decision-making process are: Congressional concerns; legal aspects, especially those concerning "personal" services and non-personal services contracts; concerns about the objectivity and accuracy of the cost comparisons; and personnel policy considerations. This section discusses these factors.

CONGRESSIONAL INTEREST²⁸

The subject of contract services has engaged the attention of the legislative branch of Government for many years, and this interest is current and continuing. The first extensive Congressional study on this issue was made in 1932 by a Special Committee of the House of Representatives appointed to investigate Government competition with private industry. Their report stated that:

The evidence in general indicates that the operations of the Federal Government in the field of private

²⁸ A detailed treatment of this subject is contained in the Final Report of Study Group #1 - The U.S. Commission on Government Procurement, December 1972.

enterprise have reached a magnitude and diversity which threatens to reduce the private initiative, curtail the opportunities, and infringe upon the earning powers of tax-paying undertakings while steadily increasing the levies upon them.²⁹

The Special Committee went on to recommend that the House create a standing committee on Government competition with private enterprise.

With regard to the formulation of a policy, the Special Committee stated that the Government should procure the commodities and facilities of all kinds which it requires for its use from the commercial and industrial world.

Since 1932 numerous studies and hearings concerning this subject have been conducted by other special and standing committees in Congress. Among these are:

- The Senate and House Appropriations Committees
- The House Armed Services Committee
- The Senate and House Committees on Government Operations
- The Senate Select Committee on Small Business
- The House Committee on Post Office and Civil Service

The most recent hearings are those held in May 1969 by the Military Operations Subcommittee of the House Committee on Government Operations.³⁰

Numerous reports have been issued by these committees as well as the first and second Hoover Commissions, generally expressing concern over the

²⁹Congress, House, Special Committee Appointed to Investigate Government Competition with Private Enterprise, Government Competition with Private Enterprise, H. Rept. No. 1985, 72d Cong., 2d sess., 1933.

³⁰Congress, House, Committee on Government Operations, Government Procurement and Contracting, Hearings, before the Military Operations Subcommittee of the Committee on Government Operations, House of Representatives, on H.R. 474 (the bill to establish a Commission on Government Procurement), 91st Cong., 1st sess., 1969.

extent to which the Government is engaged in activities which can be handled by private enterprise. The House Committee on Post Office and Civil Service, however, has generally taken exception to this, claiming that it is more cost-effective to do the work in-house with civil servants.

LEGAL ASPECTS - PERSONAL VS. NONPERSONAL SERVICE CONTRACTS

There are numerous laws which have a potential bearing on the procurement of contract services (See Appendix B). During the past decade considerable attention has been focused on the interplay of the Federal personnel laws, the civil service laws and the Federal procurement laws (see Appendix C). Of particular concern to the General Accounting Office and the Civil Service Commission have been situations in which contract manpower has been furnished to the Government for the purpose of performing certain services subject to the complete supervision of Government personnel under a contract, in which there has been a circumvention of the process of appointment procedures and the circumvention of the payment of compensation and fringe benefits. In a series of decisions over a period of more than twenty years, the General Accounting Office developed the following position concerning the interaction of the personnel laws:

The general rule is that purely personal services for the Government are required to be performed by Federal employees under Federal supervision. However, the requirement of this rule is a matter of policy rather than law. When it is administratively determined that it will be substantially more economical, feasible and necessary by reason of unusual circumstances to have the work performed by nongovernment parties that is clearly demonstrable, we would not object to the procurement of such work under proper contractual arrangements.³¹

³¹General Accounting Office, Comptroller General, Decisions of the Comptroller General, 1963, Vol. 43, pp. 390 and 392.

However in 1965, the General Counsel of the Civil Service Commission rendered an opinion that an Air Force contract with the Capehart Corporation for work at the Fuchu Air Force Base, Japan resulted in a form of personnel procurement which was not authorized by law and which violated the personnel laws.³² In reviewing the contract, the General Counsel found that the contractor provided technical personnel who worked with Federal employees under the direction of a military or Civil Service supervisor, and that the Government reserved the right to accept or reject individuals assigned by the contractor. Based upon these observations, the General Counsel concluded that the positions filled under the contract should be Federal positions and that the incumbents should be Federal employees appointed and compensated in accordance with Federal personnel statutes. In reaching this conclusion, the General Counsel stated three criteria for determining whether or not an employer-employee relationship exists for purposes of the personnel laws (see Table 5). (This decision is known popularly as the "Fuchu Opinion".)

In 1967, the General Counsel of the Civil Service Commission set forth six additional elements designed to assist agencies in determining the legality of support service contracts³³ (see Table 5). (This decision, because it was made by Mr. Leo Pellarzi is known popularly as the "Pellarzi Opinion". Similarly, the six elements are popularly termed the "Pellarzi

³²Civil Service Commission, Opinion of the General Counsel, letter to GAO dated February 12, 1965, reprinted in House Report No. 188, 89th Cong., 1st sess. (1965).

³³Civil Service Commission, Opinion of the General Counsel, Legality of Selected Contracts at Goddard Space Flight Center, National Aeronautics and Space Administration, October 17, 1967.

Standards".) In 1968, the next General Counsel of the Civil Commission issued a brief statement supplementing the Pellarzi Opinion. It indicated that personal service contracts were not per se illegal and that evaluation of the legality of a support service contract was to be based on a realistic view of the provisions of the entire contract as well as the manner in which it is administered and carried out.³⁴ In order for the contract to be declared illegal, each of the "Pellarzi Standards" must be involved to a substantial degree. The supplement, however, highlighted governmental supervision of contractor employees as the key test of the validity of a service contract. These opinions are summarized in Table 5.

In August of this year another major decision regarding the legality of support service contracts was rendered. Judge Joseph C. Waddy of the U.S. District Court for the District of Columbia ruled 22 specific contracts illegal under the "Pellarzi Standards". Judge Waddy's judgement takes issue with the CSC's earlier conclusion that all six of the Pellarzi elements must be present, each to a substantial degree, before a support service contract can be adjudged illegal. Waddy declared that it is the overall substance of the contract operations which must be looked at in order to determine whether the proscribed relationship exists, not the presence or absence of standards which are only the means to such a determination.

Additionally Waddy ordered that 425 NASA scientists, engineers and administrative employees who suffered loss of their jobs or downgradings as a result of the contracts must be reinstated to their lawful positions with

³⁴ Civil Service Commission, Supplement to the Opinion of the General Counsel, U.S. Civil Service Commission, on the Legality of Selected Contracts at the Goddard Space Flight Center, July 5, 1968.

Table 5

CHRONOLOGY OF IMPORTANT DECISIONS CONCERNING LEGAL ASPECTS
OF SERVICE CONTRACTS

YEAR	OPINION	CRITERIA FOR DETERMINING WHEN A CONTRACT IS ILLEGAL
1964	Fuchu	<p>An individual is considered to be a Federal employee when the person is:</p> <ol style="list-style-type: none"> (1) engaged in performance of a Federal function under authority of an act of Congress or an Executive order, (2) appointed in the civil service by a Federal Officer or employee, (3) subject to the supervision and direction of a Federal Officer or employee. <p>If the individuals performing the work meet one of these three criteria, the work should not be contracted; Federal employees should be used to do the job in-house.</p>
1967	Pellerzi	<ol style="list-style-type: none"> (1) Performance on site (2) Principle tools and equipment Government-furnished (3) Services are applied directly to integral effort of agencies or an organizational subpart in furtherance of assigned function or mission (4) Comparable services, meeting comparable needs, are performed in the same or similar agencies using civil service personnel (5) The need for the type of service provided can reasonably be expected to last beyond one year (6) The inherent nature of the service, or the manner in which it is provided reasonably requires directly or indirectly, Government direction or supervision of contractor employees in order: <p style="margin-left: 40px;">To adequately protect the Government's interest, or to retain control of the function involved, or to retain full personal responsibility for the function supported in a duly authorized Federal Officer or employee</p>
1968	Supplement to Pellerzi	Support-service contracts are not <u>per se</u> proscribed by the Federal personnel laws.

back pay and employee benefits, retroactive to the date of the unlawful reduction-in-force. (The decision is retroactive to 1967.)

CONCERNS ABOUT COST COMPARISONS

Another noteworthy aspect of the in-house versus contract decision involves the estimation of relative economy of contract vs. in-house performance. Although both, Government agencies and industry, agree that cost comparisons are beneficial to the Government's procurement decisions, opinions as to how one should determine what the Government's real cost would be and how to compare and evaluate that cost against the cost of having the work accomplished under contract are very disparate. Consequently there has been considerable debate over the technique and cost factors called for under the current policy. This is largely because the cost comparison guidelines in Circular A-76 involve very fundamental pricing differences between Government and private industry, from which it is very difficult to arrive at universal rules.

In this regard the Office of Federal Procurement Policy (OFPP) has been investigating, for the past year, the desirability of making certain procedural changes to the A-76 cost analysis techniques. One of the items of concern is the cost that should be attributed to the retirement benefits for Federal employees. Federal employees pay 7 percent of their salaries into the retirement fund, but the remaining cost is made up by Government contribution to the fund. Until recently DoD's A-76 implementing instructions, charged 7 percent of base pay as the Government's contribution. However, people in industry challenged this as an understatement. In October 1976, after

working with the Civil Service Commission, OFPP published a Transmittal Memorandum to A-76 calling for use of 24.7 percent of base pay as a more appropriate factor. This same memorandum increased the life insurance factor from 0.3 to 0.5 percent of base pay and the health insurance factor from 1.0 to 3.5 percent of base pay.

Another item of concern regards how DoD handles the continuing growth in the cost of Federal employment. It is realized that a private businessman has to project any inflationary increase he may encounter when he makes his bid to perform a service for DoD. It seems equitable that DoD should project the possible inflationary costs that would result from Federal pay increases. Hence, OMB has been investigating this area in order that there be a uniform figure for use throughout the government.

A third area of concern in conducting cost analyses is the handling of the concept of "taxes foregone." When a function is contracted, the Federal Government gets back from that contractor an amount of money equal to his Federal taxes. DoD has proposed to the OFPP that they seek from Internal Revenue a figure updated periodically which would indicate the approximate percentage of the total dollar intake from a government contract that would come back to the government through the taxation process. This may vary from industry to industry and probably by geographic area.

Additional examination is currently focused on the following issues:

- the size of the cost differential between the in-house and

contract-out alternatives.³⁵

- objectively estimating the cost of obtaining the service by contract.

With regard to this last item, the procedure currently employed by the Army, Marine Corps, and Navy is to have the potential user or current activity prepare the estimate of costs for both in-house and contract-out operation. This means that the individuals conducting the analysis need to know not only all the potential contractor's costs but the method that would be employed to do the job. In addition, it may have the estimate prepared by an activity whose existence depends on not contracting-out.

The Air Force, rather than estimating contract costs, employs a procedure by which bid solicitation is part of the decision process. Once it has been determined that the method of performance is to be based on cost, the Air Force prepares an estimate of the cost of in-house operation. Bids for performance of the function are then solicited from potential contractors. If a qualified contractor's bid is less than the estimated in-house cost, and the contractor's proposal is otherwise satisfactory, the contract is awarded.

In the near future DoD plans to institute a new uniform procedure providing for a firm bid or proposal similar to that currently used by the Air

³⁵ Circular A-76 states:

...Generally, an in-house operation should not be approved unless costs of a Government activity will be at least 10 percent less than costs of obtaining the product or service from commercial sources. The 10 percent differential is not intended to be a fixed figure. The differential may be more or less than 10 percent depending upon the facts of each individual case.

Further, the A-76 states that savings associated with in-house operation should be "substantial" if a "large" new or additional capital investment is involved.

Force. Under the new procedure in-house people will prepare a bid as to the cost of their performance of the function. This will then be validated by audit, sealed and opened along with bids from the private sector. The contract will be awarded to the low bidder--either the private sector or continued in-house. The in-house bid will also be open to challenge. This will introduce the element of competition within the in-house side of the operation and will encourage them to be more productive lest they lose the opportunity to perform the functions.

PERSONNEL POLICY CONSIDERATIONS

The final area of major concern regarding DoD's use of contract manpower discussed in this report is that of personnel policy considerations. The most significant of these concerns are best summarized in a recent statement by the Deputy Assistant Secretary of Defense (Civilian Personnel Policy). Among the items of concern he included:

- "...substantial numbers of minorities, disabled veterans, handicapped and mentally retarded and Vietnam Era veterans, many of whom are long-term civil service employees, will lose their jobs as a result of a contracting-out decision..."
- "...the private employer can submit a low bid by [under]cutting the wage and fringe benefits of Federal employees and then rehire the [same people] at lowered rates and benefits..."
- "...the continual review of support services for contracting-out opportunities as required by Circular A-76 has a destabilizing and adverse morale effect on the work force..."³⁶

³⁶ Carl W. Clewlow, Statement of Deputy Assistant Secretary of Defense (Civilian Personnel Policy), before the Defense Manpower Commission,

The Deputy Assistant Secretary also expressed concern with regard to the potential disruption of support services supplied by contractors in the event of strikes or the disruption that can take place when contractors are changed.

IV. DOD EXPERIENCES INVOLVING IN-HOUSE VS. CONTRACT-OUT DECISIONS

INTRODUCTION

In taking into consideration the previously discussed aspects involved in making the in-house/contract decision, it is also helpful to have an awareness of the situations that have occurred or the programs in-process concerning DoD's efforts to implement the policy of reliance upon the private sector. This section highlights some of these.

THE CONTRACT SUPPORT SERVICES PROJECT

In September 1964, Secretary of Defense Robert S. McNamara ordered a comprehensive study of DoD service contracts. This study consisted of reviews and individual cost studies of about 40 different activities and analyses of about 2200 different contract and technical services positions. The final report³⁷ of the project concluded that: (1) many of the services that were being performed in-house could be performed at less cost by contract; (2) there were situations where DoD's use of contractor support was inconsistent with the Civil Service personnel laws and regulations and (3) there were many situations involving a particular kind of service contract for technical and engineering services³⁸ where it would be significantly less expensive to perform that work in-house.

With regard to the third conclusion, the report identified about 7,100 contract engineering and technical services personnel and estimated

³⁷ Department of Defense, Contract Support Services Project, March 31, 1965.

³⁸ These were contracts generally to obtain technical engineering people for the maintenance, the installation, and the operation of weapon systems and equipment and particularly the training and instruction of military people in those fields.

that they were costing the Government approximately \$120 million annually. The study group also estimated that it would cost about \$21 million less, or about \$99 million annually, to perform the work in-house.

The study group recommended that all contracts which required contract personnel to work under the direct supervision of Government representatives be converted to Civil Service. This conclusion was based on the legality question raised by the "Fuchu Opinion", as well as on anticipated cost savings. Accordingly, DoD initiated a program in 1965 (which required several years to complete) to convert 10,500 contract technical support positions to Civil Service status, proselyting the contract incumbents whenever possible. Representatives of private enterprise, through the Council of Defense and Space Industries Association, and the Defense Industry Advisory Council (DIAC) rebutted the legality criticism and predicted higher costs for the in-house conversion rather than cost savings.

After the conversion program was well underway (April, 1967) DoD compared the costs of approximately 1,000 technical personnel whose positions had by then been converted from industry to the Government payroll. This study³⁹ showed a significant (but smaller than expected) cost saving was being realized. A short time later (in September, 1967), GAO published its own independent cost analysis of the DoD conversion program which estimated a savings to the Government nearly twice that projected by the April DoD analysis.⁴⁰

³⁹ Congress, Senate, Committee on Government Operations, Government Policy and Practice with Respect to Contracts for Technical Services, Hearings, before the Committee on Government Operations, Senate, 90th Cong., 1st sess., 1967, p. 173.

⁴⁰ General Accounting Office, Congressional Request for Review of DoD Contractor Conversion Program, Memorandum B-146824, September 6, 1967.

ARMY CONVERSION PROGRAM AT WHITE SANDS MISSILE RANGE

In June 1966 the Department of Army, as part of the DoD conversion program discussed above, announced the termination (after 18 months) of a three-year contract with RCA for technical services at the White Sands Missile Range, New Mexico and a program to convert all positions to civil service, allowing an additional six months for the complete phase-out. In response to strenuous complaints from various segments of industry and the New Mexico congressional delegation, hearings concerning this action were held by the Senate Committee on Government Operations.

DoD testimony⁴¹ concerning the termination and conversion of the RCA WSMR contract revealed that the contract had been terminated:

(1) because it was found to be personal service in form, involving what was tantamount to an employer-employee relationship between the Government and the contractor-furnished personnel, making it illegal under the criteria in the "Fuchu" decision;

(2) that attempts to restructure the contract so as to eliminate its illegal features, were found to be difficult, if not impossible;

(3) that even if restructuring had been possible, it would have necessitated an increase of approximately 49 employees (mostly supervisory) and an associated \$1.2 million annual increase in Government cost; and

(4) that DoD had decided upon termination only as a last resort, and then, only when a cost study established that savings would be realized by such action.

⁴¹ Congress, Senate, Committee on Government Operations, Government Policy and Practice with Respect to Contracts for Technical Services, Hearings, before the Committee on Government Operations, Senate, 90th Cong., 1st sess., 1967.

The Comptroller General subsequently advised the Army that performance of the contract involved substantial violations of civil service and employee pay laws and that the termination action was indeed justified. The Comptroller General also advised that conversion of these contract services to in-house performance by civil service employees resulted in annual Government savings of about \$400,000, part of which resulted from a reduction from 202 contract employees to an authorized number of 171 positions, of which the Army had only been able to fill 150.⁴² Hence, the conversion was carried out.

THE NAVY'S ATTEMPT TO CONTRACT-OUT AT THE PACIFIC MISSILE RANGE

In 1973, as part of a shore establishment realignment (SER) program, the Navy approved an action for the Pacific Missile Range, Pt. Mugu, California, calling for the conversion of certain appropriate test range functions from Government to contractor support. The contract administration; range operations planning, scheduling, control and safety; range management; and flight support functions were to be retained by the Government. The action called for eliminating 1,448 government employees and 225 military personnel with a one time cost of \$8.2M. Annual savings anticipated were about \$1.5M commencing in FY 80. The conversion was to be completed by 1 December 1974. This action was approved by SECDEF on 14 April 1973.

Strenuous objections to this action were voiced to DoD and Congress by the civil service employees involved and their representatives. Sub-

⁴²Congress, Senate, Committee on Government Operations, Government Policy and Practice with Respect to Contracts For Technical Services: Status Report, 90th Cong., 2d sess., 1968, p. 8.

sequently, the Defense Appropriation Bill, containing the following statement was approved by the House of Representatives:

The Managers are in agreement that none of the funds provided in this act shall be available for efforts to contract out the operation of the Pacific Missile Range. The Managers are in agreement with the House position that the Navy shall continue to operate the Pacific Missile Range with government military and civilian personnel.⁴³

Thus, the conversion to contract was congressionally prohibited and the Navy was directed to take "no further actions...to convert the Range to contractor operations".⁴⁴

AFGE UNFAIR LABOR PRACTICE CHARGE AGAINST THE NAVY

As was mentioned in Section II, in June 1975 the Navy published goals regarding contracting-out for custodial services, refuse collection and guard services.

The following article indicates what the American Federation of Government Employees thinks of the Navy's attempt to use the least costly form of defense manpower for these services.

WASHINGTON - The American Federation of Government Employees has filed an unfair labor practice charge against the Navy for failing to inform the union before ordering the increased contracting-out of custodial, refuse collection and guard services.

In a January 23 letter, Clyde M. Webber, AFGE president, warned Navy Secretary J. William Middendorf II to cease "further implementation" of the contracting plan and to rescind "any actions already taken...as null and void because of the failure to notify and consult with AFGE over such activities."

⁴³ Congress, House, The Defense Appropriation Bill, Amendment 79 to H.R.1157, December 20, 1973

⁴⁴ Memorandum for Assistant Secretary of Navy (I&L) from Assistant Secretary of Defense (I&L), January 2, 1974.

Webber said the Navy attempted to mislead the union and "cover up its plans."

He quoted a January 16 letter from the Navy stating that the November 28 and December 10 directives that ordered the contracting out of "at least" 70 percent of the custodial services and 30 percent of the guard services were intended merely to "provide procedures and assign responsibility to insure carrying out the established program...where cost effectiveness is indicated.

The 'possibility' of 15,000 jobs being affected as a result of contracting out impacts upon the employees AFGE represent," Webber wrote, adding that the Navy's failure to consult with the union prevented "AFGE from effectively representing its bargaining units."⁴⁵

In spite of AFGE's action, the Navy has not reduced its goals for these functions.

CONTRACTING-OUT LARGE PORTIONS OF BASE OPERATING SUPPORT

In 1973, a preliminary OMB investigation indicated considerable savings might be realized by contracting-out large portions of Air Force base operating support (BOS). Although the OMB investigation was never formalized, information concerning it caused considerable backlash from the Government employee unions, the press and from some members of Congress. Former Congressman Jerome Waldie of California said about the unpublished OMB investigation:

It is clear that OMB, headed by a former magnate of the military industrial complex is thoroughly ingrained with the philosophy of 'big business should run the government.'⁴⁶

The OMB investigation never went any further than the preliminary

⁴⁵ Sheila Hershow, "Navy's 'Contracting-Out' Plan Brings Charge from Union", Navy Times, February 23, 1976, p. 31.
⁴⁶ Congressional Record, December 1973.

stage; hence no strong efforts were made to convert large portions of base operating support to the private sector.

In 1974, the Rand Corporation conducted a study at Vance AFB and Reese AFB. Both bases are undergraduate pilot training bases of similar size and output. Vance is contractor operated; Reese is not. The findings were that 26 percent fewer people at 87 percent of the cost were used at Vance to accomplish approximately the same mission under the same circumstances as at Reese.⁴⁷ The savings were not because of lower salary levels but were due to the contractor's management approach: the way he organized for the task, the ratio of supervisors to employees, and his cost consciousness.

Within the DoD, there are several Air Force installations that are operated and maintained by contractors. DoD has often also relied upon contractors to provide BOS overseas including installations in Canada, Alaska, Spain, Turkey and Ethiopia.

In FY1975 each Service was asked by OSD⁴⁸ to nominate two installations as candidates for having Base Maintenance Functions placed under a single contract. The Army initially had 4 candidates: Fort Eustis, Virginia; Fort Gordon, Georgia; Fort Chaffee, Arkansas; and Carlise Barracks, Pennsylvania. The Air Force initially had two candidates: Lowry AFB, Colorado and McClelland AFB, California. The Navy's candidates are

⁴⁷ Robert M. Paulson and Arnold Zimmer, An Analysis of Methods of Base Support: Contractor Operations versus Standard Operations at Two Undergraduate Pilot Training Bases, The Rand Corporation, Report No. R-1563-PR, March, 1975.

⁴⁸ For example: Assistant Secretary of Defense(I&L), Memorandum to Assistant Secretary of Air Force(I&L), Subj: Base Support Services Contracting Project, January 8, 1975.

the new Trident support facility in Bangor, Washington and the Naval Support Activity in New Orleans, Louisiana.

Because this was a DoD directed program, Air Force deferred any further action pending a DoD-wide consolidated announcement. No decisions have been announced and the Air Force has dropped McClellan as a nominee. The Army has narrowed its nominees to only one base--Fort Gordon. The other Services have indicated a reluctance to go ahead with a conversion program in which all Services are not involved.

SUMMARY

From the foregoing discussion, it appears that some additional contracting of existing in-house services could realize savings in manpower costs without compromising mission effectiveness. However, the extent to which each Service can expand their use of contract services depends upon their assessment of the total force manpower requirements in support of the national strategy scenario.

V. CONTRACT SERVICES INFORMATION SYSTEMS

INTRODUCTION

There are a wide variety of information systems that provide data concerning specific pieces of the DoD contracting-out universe, but none of these provides a comprehensive answer to the question: How many man-years are bought from private industry to work in the Department of Defense to do jobs that could be done by civil service and military personnel? Further, since DoD does maintain very detailed information concerning the costs of contract services, it is not obvious that DoD should expend the amount of time, effort and resources that would be required to establish and maintain an information system that could answer this specific question. This section discusses the major reporting systems that currently satisfy the needs of DoD.

ANNUAL INVENTORY OF COMMERCIAL OR INDUSTRIAL ACTIVITIES AND CONTRACT SUPPORT SERVICES

Information Collected

Circular A-76, DoD Directive 4100.15 and DoD Instruction 4100.33 (discussed in Section II) not only prescribe policy regarding reliance upon the private sector, but also call for specific measures to be taken for administering the policy. Those measures include compiling and maintaining an inventory of commercial and industrial-type (C/I) activities, conducting triennial reviews of these activities, and evaluating "new starts" to determine whether the product or service can be obtained from the private sector. DoD Instruction 4100.33 requires military installations in the United States and its territories and possessions to report

each fiscal year to Military Department headquarters on the status of C/I activities having annual in-house operating costs and/or contract costs for products or services totalling \$50,000 or more, or a capital investment of at least \$25,000. The instruction also lists the functions to be reported under the C/I program (see Table 5 for the services covered), and the reporting format. For each of the 85 services listed, each installation in DoD reports the following for C/I activities: the justification ("compelling reason") for in-house operation, civilian and military man-years applied directly to the functions, personnel payroll costs, costs to the Government for supplies and material used for the function, and acquisition and rehabilitation costs for facilities and equipment. Contract man-years and contract cost (personnel costs + other costs) as well as the reason for contracting-out (lower cost or other reason) are reported for services obtained from the private sector. In addition, a separate list is prepared identifying in-house C/I activities and contract support services which have been discontinued, curtailed (15 percent or more) or converted to another method of performance during the fiscal year.⁴⁹

The Military Departments and Defense agencies summarize and correlate installation reports and provide copies of their inventories to OASD (I&L) and OMB. OASD(I&L) publishes the consolidated data as the "Annual Inventory of Commercial and Industrial-Type Activities and Contract Support Services". The information contained in the "Annual Inventory" is the only readily

⁴⁹ Note that PL 93-365, section 502 calls for "a full justification of any conversion from one form of manpower to another...[to]... be contained in the annual manpower requirements report to Congress..." The list of discontinuances, curtailments and conversions may be useful in meeting the P.L. 93-365 requirement.

Table 6

SERVICES CURRENTLY REPORTED IN OASD(I&L) "ANNUAL INVENTORY"

I. Maintenance and/or Repair of Equipment (Intermediate/Direct/General)

- aircraft
- aircraft engines
- missiles
- vessels
- combat vehicles
- non-combat vehicles
- electronic and communications equipment
- railway equipment
- special equipment
- armament
- mess hall equipment
- medical and dental equipment
- containers; textiles, tents and tarpaulins
- metal containers
- industrial plant equipment

II. Nonmission-Essential Repair, Maintenance Modification, Alteration and/or Rebuild of Equipment (Depot/Indirect)

Includes same categories as I.

III. Mission-Essential Repair, Maintenance Modification, Alteration and/or Rebuild of Equipment (Depot/Indirect)

Includes same categories as I and II, except mess hall equipment, medical and dental equipment, containers, and industrial plant equipment.

IV. Installation Services

- bus services
- laundry, dry cleaning
- custodial services
- insect and rodent control
- refuse collection and disposal services
- food services
- furniture
- office equipment
- motor vehicle operations
- motor vehicle maintenance
- guard service
- government-owned utility systems

Table 6 (Continued)

V. Other Non-Manufacturing Operations

- packing and crating
- cataloguing
- acceptance testing
- training and consultant services
- operation of bulk liquid storage
- printing and reproduction
- photographic, film and TV services, including CATV
- mapping and charting
- administrative telephone service
- air transportation services
- water transportation services
- rail transportation services
- contractor engineering and technical services
- fueling service
- scrap metal operation
- communication and electronic systems

VI. Automatic Data Processing

- data processing services
- maintenance of ADP equipment
- systems design, development and programming services

VII. Repair, Alteration, and Minor Construction of Real Property

- buildings and structures
- grounds (improved and other)
- surfaced areas
- railroad facilities
- waterways and waterfront facilities

available source of DoD contract services manpower data. Hence, the Military Department headquarters, OASD(I&L), and OMB use it for managerial and information purposes. A summary of the contract manpower data contained in the FY1972 through FY1975 inventories is displayed in Tables 7 and 8.

Table 7

DOD CONTRACT SUPPORT SERVICES MANPOWER
IN THE UNITED STATES BY MAJOR FUNCTION ⁵⁰
(Man-Years)

Major Function	Fiscal Year			
	1972	1973	1974	1975
Intermediate Maintenance Repair of Equipment	2,790	3,516	3,663	2,725
Non-Mission Essential Depot Maintenance/Repair	8,616	10,800	10,621	8,692
Mission-Essential Depot Maintenance/Repair	33,207	32,688	32,194	33,093
Installation Services	20,783	25,302	27,599	29,104
Other Non-Manufacturing Operations	17,396	8,475	11,024	10,698
ADP	2,674	2,897	2,916	2,994
Real Property	11,419	13,302	9,442	8,562
TOTAL	96,885	96,980	97,459	95,868

⁵⁰ Source: "Annual Inventory"

Table 8

DOD CONTRACT SUPPORT SERVICES⁵¹ MANPOWER
IN THE UNITED STATES BY DOD COMPONENT⁵²

SERVICE	Fiscal Year			
	1972	1973	1974	1975
ARMY	28,423	32,320	30,741	30,304
NAVY	18,661	22,215	29,023	29,584
MARINE CORPS	496	989	1,134	599
AIR FORCE	48,219	40,578	35,512	34,060
DOD AGENCIES	1,086	878	1,049	1,321
TOTAL	96,885	96,980	97,459	95,868

Congressionally Recognized Shortcomings Of The "Annual Inventory"

In a 1974 statement in which he was speaking of the "Annual Inventory", Congressman David N. Henderson, stated: "we believe that this report is close enough to a working document,...that there is a real possibility that...this report might be looked at very carefully by the Department and be of real value to us in our deliberations next year."⁵³ Mr. Henderson went on to identify two limitations of the "Annual Inventory" that he was especially interested in having eliminated; i.e. the \$50K limitation and the omission of contracts for construction.

With regard to these limitations, Congressman Henderson apparently

⁵¹ Excludes Fabrication

⁵² Source: "Annual Inventory"

⁵³ Congress, House, Committee on Armed Services, Military Posture and Department of Defense Authorization for Appropriations for Fiscal Year 1975, Hearings, before the Committee on Armed Services, House of Representatives, on H.R. 12564, 93d Cong., 2nd sess., 1974, Pt. 3, p. 3180.

felt that DoD would make improvements to the "Annual Inventory" prior to the FY76 HASC hearings. However, DoD made no changes to the "Annual Inventory". Consequently, in the FY76 hearings Congressman Henderson stated:

Last year I pointed out the inadequacies of the only source report apparently available, which was a limited annual inventory of industrial or commercial contract support services...I was sure that with the sense of the Congress provision in the compromise bill as agreed upon between the two Houses last year, the Defense Department would more vigorously pursue a more adequate reporting system in order to be in a position to justify and evaluate future changes in their workload from in-house military and civilian to contract support services, or vice versa.

I believe it is imperative that the Department of Defense identify and report to Congress the man-years and costs associated with contracting-out if a complete picture of the total defense manpower requirements is to be considered during the authorization and appropriation hearings.⁵⁴

With regard to the \$50,000 limitation, the Army and Marine Corps collect data for C/I activities regardless of cost for their own purposes under their Service's program established for the preparation of their input to the "Annual Inventory". Since they are not requested, these data are not included in the submission to OASD(I&L) made by these two Services.

With regard to construction, no manpower data is currently collected.

Other Shortcomings

There are other shortcomings associated with the "Annual Inventory" that could be corrected were a program undertaken to create a contract

⁵⁴Congress, House, Committee on Armed Services, Military Posture and Department of Defense Authorization for Appropriations for Fiscal Year 1976 and 1977, Hearings, before the Committee on Armed Services, House of Representatives, on H.R. 3689 [H.R. 6674], 94th Cong., 1st sess., 1975, Pt. 2, pp. 2761-2762.

manpower report of the type suggested by Congressman Henderson. However, in speaking of deficiencies in the "Annual Inventory", it should be recognized that it was not created to be a comprehensive report of contract manpower. Its fundamental purpose is to be a management-by-exception report indicating progress made with regard to the shifting of C/I functions from in-house to contracted-out. The following are some of the other shortcomings:

a) The scope of the "Annual Inventory" is limited. Commercial and Industrial activities and contracts in foreign countries are excluded. However, the Air Force does not have this limitation on the data it collects for its Contract Services Report. Air Force worldwide contracting-out is approximately twice that reported by the "Annual Inventory".^{55,56}

Further, the "Annual Inventory" does not include functions always contracted-out (stevedoring, tire recapping, mortuary services, etc.) and does not include any of the contracts at Air Force installations where a small contractor provides most of the support services, e.g., Vance A.F.B.

b) It is not evident that there is any way of policing the report; i.e., how can one be certain that all military installations submit reports

⁵⁵ Strictly speaking the Air Force estimates are not contract man-years but rather an estimate of the man-years that would be required in-house were the function not being performed by contract; i.e. RMILOCS-- Required Inservice Man-Years in Lieu of Contract. The extent to which this also applies to the other Services is uncertain.

⁵⁶ OASD(I&L) "Annual Inventory" reports 35,600 man-years for Air Force in FY74.

or that all functions at all installations are reported? Further, how can the accuracy of the reports be validated? A 1972 OSD audit of the DoD C/I program revealed that "reported personnel and operating costs for FY1971 were incomplete." The report further stated that:

We estimate that certain Army installations did not report 2,800 personnel and operating costs totaling \$24 million for guard services in FY1971. Several installations did not completely report the magnitude of functions such as food service and custodial services where these functions were managed by more than one installation office. Reported costs were also over and understated for different installations...From discussions with installation personnel, we concluded that they were not always making a conscientious effort to accurately determine and report costs and man-years for C or I functions.⁵⁷

Regarding the reporting of contract man-years, an analysis of the OASD(I&L) "Annual Inventory" for FY1972 through FY1975 revealed that approximately 20 percent of the instances where a reason was reported for contract operation reported contract man-years were zero. Data for FY75 are shown in Table 9.

c) With regard to the desirability increasing the coverage of the "Annual Inventory" to include man-year data and manpower costs for all DoD service contracts, there are differing opinions within DoD. Many DoD representatives interviewed are of the opinion that since contractors bid and are hired on a "total job" basis, DoD ought to be interested in how well the contractor did the job and at what cost and not how many people or man-hours were used. Further, many of these individuals question the value of this additional man-year data in view of the significant expenditure of time, effort and resources that would be required to accomplish this

⁵⁷ Department of Defense, Office of the Assistant Secretary of Defense (Comptroller) (Audit), Report on Review of the Commercial or Industrial Activities Program, Report No. 344, July 28, 1972, p. 23.

Table 9

FY75 CONTRACT MAN-YEAR REPORTING

SERVICE	A	B	C
	Number of activities for which a reason for contracting-out is reported	Number of activities included in A where reported contract man-years = 0	Percent: (B/A) X 100
ARMY	1,614	316	19.6
NAVY	919	328	35.7
MARINE CORPS	89	31	34.8
AIR FORCE	613	0	0
DEFENSE AGENCIES	136	64	47.1
TOTAL DOD	3,371	739	21.9

task. On the other hand, other DoD representatives strongly believe that a comprehensive system is needed to account for manpower in order to determine the manpower impact should the function be brought in-house and to be able to tell Congress how much manpower is contracted. It should be noted that OASD (I&L) is currently considering eliminating contract information from the "Annual Inventory" because it is not required by A-76.

DEPARTMENT OF DEFENSE MILITARY PRIME CONTRACT AWARDS

There are several reports published under the Procurement Management Reporting System. One of these contains a four year distribution of military prime contract awards categorized into three general classes of procurement: (1) RDT&E awards, (2) other Services and Construction, and (3) Supplies and Equipment.⁵⁸ The reported data represent the total of all contracts awarded by DoD except those of \$10,000 or less. All data are

⁵⁸Department of Defense, Office of the Assistant Secretary of Defense (Comptroller)(Directorate for Information Operations) Military Prime Contract Awards By Service Category and Federal Supply Classification.

presented in dollar amounts; there is no information concerning contract manpower. The report covers procurement from all sources including:

- U.S. Business Concerns
- U.S. Educational and Non-Profit Institutions
- Federal Government Agencies Outside Defense
- Contractors in Foreign Countries

Table 10 highlights some of the data contained in this report concerning service contracts. Although a great amount of detail is provided, it is not possible to correlate these data with those in the "Annual Inventory", because of different categorization. Further, the "Annual Inventory" covers only about one-quarter of the dollar amount of support service contracts included in this report.

PROGRAM/BUDGET EXHIBIT FOR SERVICE SUPPORT CONTRACTS

In response to the House Appropriation Committee's continuing interest in DoD's contracting-out, OSD has required⁵⁹ since 1970 that the Military Departments include in their budget request, information concerning a group of procurement actions called Service Support Contracts. This information is submitted as Program/Budget Exhibit PB-23. Data are presented in dollar amounts identifying fiscal year obligations for the following:

a) Technical/engineering services: - Including contracts relating to the furnishing of advice, instruction, and training of DoD personnel in the installation, operation, and maintenance of weapons, equipment and systems. Examples are service engineering, ADP software, preparation of

⁵⁹ Department of Defense, Office of the Assistant Secretary of Defense (Comptroller), Budget Guidance Manual, DoD Manual 7110-1-M, June 15, 1973

Table 10

TREND OF DOD SERVICE CONTRACT AWARDS

CATEGORY OF SERVICE	AMOUNTS IN MILLIONS OF DOLLARS						
	FISCAL YEAR						
	1964	1968	1971	1972	1973	1974	1975
Maintenance and/or Repair of Equipment	543	977	719	813	767	942	916
Modification, Alteration and/or Rebuild of Equipment	576	879	860	710	790	572	1,059
Technical Representative Services	156	124	115	108	183	169	199
Operation and/or Maintenance of Government-Owned Facility	456	2,061	1,271	1,476	1,374	1,224	1,276
Installation of Equipment	88	69	12	45	3	20	25
Salvage Services	2	4	3	7	4	5	9
Medical Services	*	1	1	1	319	383	357
Architect, Engr, Expert and/or Consultant Services	423	753	813	948	884	1,038	1,590
Housekeeping Services	442	695	854	926	992	1,165	1,358
Photographic, Mapping, Printing, and Pub. Serv.	38	50	40	36	46	66	60
Training Services	46	74	114	109	88	116	333
Transportation Services	581	1,732	1,172	1,063	930	671	733
Lease or Rental	221	262	327	279	272	264	328
Maintenance, Repair and Alteration of Real Property	103	247	280	385	470	523	728
TOTAL	3,674	7,867	6,582	6,907	7,119	8,258	8,973

*Less than \$500K

technical data, field service representatives, contractor technicians architectural engineering services, contract training, etc.

b) Non-personnel services: - Including contracts with private firms for specific tasks to be performed in specific places, free of government direction, supervision, and control over the contractors' employees at a fixed price for the work to be performed. This category includes contracts for guard services, food service, billeting, motor pool operation and maintenance, etc.

c) Contractor operated and maintained facilities: - Including contracts providing for the coverage of the operation of a complete facility or operation, the preponderance of the effort being the responsibility of a contractor.

d) Management Study Contracts: - Including studies specifically designed to evaluate organizational structures and distribution of functions. Also includes studies which may be used as a tool for management in the decision-making process.

Copies of the Program/Budget PB-23 submissions of the Air Force and Navy for FY76 are included as Tables 11 and 12, respectively.⁶⁰ The Army has never submitted a PB-23 exhibit.

THE BUREAU OF LABOR STATISTICS ESTIMATES OF DEFENSE GENERATED EMPLOYMENT

As a result of the 1958 Interindustry Relations Study, the Office of Business Economics of the U.S. Department of Commerce periodically prepares a set of interindustry (input-output) tables as part of an integrated system of national accounts. From this, BLS creates an interindustry model which provides a means of calculating the production requirements levied on all supplying industries throughout the economy by a purchase of final

⁶⁰ Congress, House, Committee on Appropriations, Department of Defense Appropriations For 1976, Hearings, before a subcommittee of the Committee on Appropriations, House of Representatives, 94th Cong., 1st sess., 1975, Pt. 7, pp. 553 and 416, respectively.

Table 11
DEPARTMENT OF THE AIR FORCE
SERVICE SUPPORT CONTRACTS
(THOUSANDS OF DOLLARS)

<u>Appropriation/Type Contract</u>	<u>FY 1974 Actual</u>	<u>FY 1975 Estimate</u>	<u>FY 1976 Estimate</u>
<u>Operation and Maintenance, AF</u>			
Management Services.....	\$ -0-	\$ -0-	\$ -0-
Technical/Engineering Services.....	142,156	115,745	132,865
Contractor-operated Facilities.....	125,691	107,653	131,753
Non-personnel Services.....	402,650	430,295	467,051
Total Operations & Maintenance, AF.....	<u>\$670,497</u>	<u>\$653,693</u>	<u>\$731,669</u>
<u>Research, Development, Test & Evaluation, AF</u>			
Management Services.....	\$ -0-	\$ -0-	\$ -0-
Technical/Engineering Services.....	10,419	6,726	8,359
Contractor-operated Facilities.....	86,705	93,131	106,120
Non-personnel Services.....	20,868	21,847	23,612
Total RDT&E.....	<u>\$117,992</u>	<u>\$121,704</u>	<u>\$138,091</u>
<u>Operation & Maintenance, AF Reserve</u>			
Management Services.....	\$ -0-	\$ -0-	\$ -0-
Technical/Engineering Services.....	929	960	977
Contractor-operated Facilities.....	-0-	-0-	-0-
Non-personnel Services.....	2,007	2,949	3,039
Total O&M, AF Reserve.....	<u>\$ 2,936</u>	<u>\$ 3,909</u>	<u>\$ 4,016</u>
<u>Operation & Maintenance, Air National Guard</u>			
Management Services.....	\$ -0-	\$ -0-	\$ -0-
Technical/Engineering Services.....	2,638	3,010	2,569
Contractor-operated Facilities.....	-0-	-0-	-0-
Non-personnel Services.....	-0-	-0-	-0-
Total O&M, ANG.....	<u>\$ 2,638</u>	<u>\$ 3,010</u>	<u>\$ 2,569</u>
<u>Total Obligations</u>			
Management Services.....	\$ -0-	\$ -0-	\$ -0-
Technical/Engineering Services.....	156,142	126,441	144,770
Contractor-operated Facilities.....	212,396	200,784	237,873
Non-personnel Services.....	425,525	455,091	493,702
Total Obligations.....	<u>\$794,063</u>	<u>\$782,316</u>	<u>\$876,345</u>

Table 12
NAVY
SERVICE SUPPORT CONTRACTS
(THOUSANDS OF DOLLARS)

<u>Appropriation/Type Contract</u>	<u>FY 1974 Actual</u>	<u>FY 1975 Estimate</u>	<u>FY 1976 Estimate</u>	<u>FY 1977 Estimate</u>
<u>Operations and Maintenance, Navy</u>				
<u>Management Services</u>	\$ 500	\$ 135	\$ 135	\$ 33
Technical/Engineering Services	74,763	85,052	80,565	20,177
Contractor Operated Facilities	83,854	19,850	20,622	5,162
Non-personnel Services	32,401	30,674	37,915	9,478
<u>Operation and Maintenance, Navy Reserve</u>				
<u>Non-personnel Services</u>	<u>1,352</u>	<u>1,651</u>	<u>1,746</u>	<u>436</u>
TOTAL Operation and Maintenance	\$192,870	\$137,362	\$140,983	\$ 35,286
<u>Procurement</u>				
<u>APN</u>				
Technical/Engineering Services	12,471	-	-	-
OPN				
Technical/Engineering Services	<u>10,177</u>	<u>11,498</u>	<u>11,202</u>	<u>2,800</u>
TOTAL Procurement	\$ 22,648	\$ 11,498	\$ 11,202	\$ 2,800
<u>RDT&E</u>				
Technical/Engineering Services	4,096	6,587	6,993	1,740
Contractor Operated Facilities	<u>3,960</u>	<u>6,760</u>	<u>9,680</u>	<u>2,634</u>
TOTAL RDT&E	\$ 8,056	\$ 13,347	\$ 16,673	\$ 4,374
<u>Management Services</u>	500	135	135	33
Technical/Engineering Services	101,507	103,137	98,760	24,717
Contractor Operated Facilities	87,814	26,610	03,302	7,796
Non-personnel Services	<u>33,753</u>	<u>32,325</u>	<u>39,661</u>	<u>9,914</u>
Total Obligations	\$223,574	\$162,207	\$168,858	\$ 42,460

products. This is illustrated in the following example:

Purchase of aircraft, for example, implies a demand for engines, air frames, electronics, and other components. The production of each of these components generates requirements for their inputs, each of which, in turn, generates further chains of input requirements back through the more basic stages of production, distribution, and transportation.⁶¹

Using the interindustry model and other techniques the BLS periodically conducts analyses which provide estimates of the employment⁶² generated in each industry by DoD military expenditures.⁶³

The procedure employed by the BLS consists of three general stages:

1. The detailed examination of DoD military expenditures to identify goods and services actually purchased,
2. The processing of the data on these purchases through the interindustry model to determine total generated production for each of 77 different industries, and
3. The conversion of industry production levels to employment.

Table 13 summarizes the estimates reported by the BLS to date.

⁶¹Oliver, Richard P., "The Employment Effect of Defense Expenditures," Monthly Labor Review, September, 1967, p. 13.

⁶²Employment attributable to military expenditures includes both direct and indirect employment as described previously.

⁶³Defense expenditures are considered as covering only the military expenditures of DoD and the Military Assistance Program, excluding DoD civilian functions and other Government expenditures such as purchases of atomic energy defense activities in the National Defense functions of the President's Budget.

Table 13

BLS ESTIMATED DEFENSE-RELATED EMPLOYMENT OF WAGE AND
SALARY WORKERS IN THE PRIVATE SECTOR (FY1965 - 1974)

FISCAL YEAR	THOUSANDS OF INDIVIDUALS
1965	2,102
1968	3,217
1969	2,999
1970	2,589
1971 (Preliminary est.)	2,128
1974 (Factor estimate)	1,756

OASD (COMPTROLLER) ESTIMATES OF DEFENSE-RELATED EMPLOYMENT IN INDUSTRY

The OASD (Comptroller) uses the BLS's analyses to develop estimates of Defense-related employment of wage and salary workers in industry for the out-years. These estimates are based on the same data for military expenditures and address the same kind of people, as those used by the BLS. Table 14 shows the OASD(Comptroller)'s most recent estimates. The two sets of estimates are identical for years prior to FY1975.

Table 14

DOD COMPTROLLER ESTIMATED DEFENSE-RELATED EMPLOYMENT
OF WAGE AND SALARY WORKERS IN THE PRIVATE SECTOR ⁶⁴
(FY1975 - 1977)

FISCAL YEAR	THOUSANDS OF INDIVIDUALS AT END-YEAR
1975	1,635
1976	1,610
197T	1,630
1977	1,750

⁶⁴

Source: Department of Defense, Office of the Assistant Secretary of Defense(Public Affairs), FY1977 Department of Defense Budget, News Release No. 12-76, January 21, 1976.

DEFENSE INDICATORS

The Department of Commerce, Bureau of Economic Analysis publishes a monthly report the purpose of which is to "bring together the principal time series on defense activity which influence short term changes in the national economy."⁶⁵

Included among the data presented are those indicating total employment in "defense product industries".⁶⁶ The September 1975 issue reports the average 1973 and 1974 employment in these industries as 1.161 million individuals. These data, however, include all employees in these companies whether or not they are working on defense-related contracts. Further, it excludes any employee working on a defense-related contract in a company whose largest percentage of annual sales precludes it from being classified as a defense product industry.

THE DOD AND NASA ECONOMIC INFORMATION SYSTEM (EIS)

During the 1965-1972 period there existed a jointly sponsored DoD/NASA Economic Information System, the purpose of which was to collect and analyze data to assist in the assessment of the impact of DoD and NASA procurement on local economies. Under EIS, 600-700 large (\$5 million or more of annual business) defense contractors voluntarily reported at six month intervals employment related to Defense, NASA and other Government agency and commercial contracts. Subcontract employment was included in EIS only to the extent reported by the plants or facilities surveyed.

⁶⁵ Department of Commerce, Bureau of Economic Analysis, Defense Indicators, September, 1975, p. 1.

⁶⁶ "Defense product industries" - companies and establishments included in the three SIC (Standard Industrial Classification) codes: (1) ordnance and accessories, (2) communications equipment, and (3) aircraft and parts.

The data collected by EIS were analyzed by OASD Comptroller and reported in a publication entitled "Defense Generated Employment" issued by the Directorate for Information Operations.

Although EIS had a "floating" data base and it encompassed only about one-third of the total employment determined to be defense related through a Bureau of Labor Statistics (BLS) interindustry model approach, the trends, relating to the country as a whole, shown by these two methods generally paralleled each other during the periods addressed.

EIS is the only DoD information system that was found during this effort other than the "Annual Inventory" that contained detailed man-year data concerning contracting-out. DoD discontinued its support of EIS in 1972.

APPENDIX A

GLOSSARY

GLOSSARY

ADVANCED DEVELOPMENT - All effort directed toward projects which have moved into the development of hardware for experimental or operational test. It is characterized by line item projects and program control is exercised on a project basis. A further descriptive characteristic of this area of "research and development" lies in the design of such items being directed toward hardware for test or experimentation as opposed to items designed and engineered for eventual Service use. (ASPR 4-101)

COMMUNICATIONS SERVICES - Those services provided by all types of systems and facilities connected therewith that employ electric or electromagnetic signals to transmit information between two or more points by means of radio, wire, cable, satellite, and other media. (ASPR Section 22)

CONTRACT FIELD SERVICES (CFS) - A subdivision of CETS. Those engineering and technical services provided on site at defense locations by the trained and qualified engineers and the technicians of commercial or industrial companies. (ASPR Section 22)

CONTRACT MAINTENANCE - Any maintenance performed under contract by commercial organizations (including original manufacturers). (DoD Dir 4151.1)

CONTRACT PLANT SERVICES (CPS) - A subdivision of CETS. Those engineering and technical services provided by the trained and qualified engineers and technicians of a manufacturer of military equipment or components, in the manufacturer's own plants and facilities. (ASPR Section 22)

CONTRACT SERVICES - All services of a non-manufacturing nature which the Army could provide for itself if one or more compelling reasons specified in AR 235-5 were applicable. (AR 570-3)

CONTRACT SERVICES - Services obtained from non-Air Force sources to perform Air Force work. (AFP 25-6 Apr. '63)

CONTRACT SERVICES - Procurement by contract of personal and non-personal services, including research, development, test, professional, technical, and scientific services from Government, commercial, non-profit, and educational sources. (OSD Administrative Instruction No. 54)

CONTRACT SUPPORT SERVICES - Services procured from private commercial sources in support of DoD functions. (DoD Dir 4100.15)

CONTRACTING-OUT - The government practice of obtaining goods and services from private industry. ("Contracting-Out: A Case for Realistic Contract vs. In-House Decision-Making" by Major John G. Wildermuth)

CONTRACTOR ENGINEERING AND TECHNICAL SERVICES (CETS) - Consist of the furnishing of advice, instruction, and training to DoD personnel, by commercial or industrial companies, in the installation, operation, and maintenance of DoD weapons, equipment, and systems. This includes transmitting the knowledge necessary to develop among those DoD personnel the technical skill required for installing, maintaining, and operating such equipment in a high state of readiness. (ASPR Section 22)

DEFENSE PRODUCTS INDUSTRIES - Companies and establishments classified into the following industry categories in accordance with the "Standard Industrial Classification (SIC) Manual", 1967 edition, Executive Office of the President, Bureau of the Budget:

<u>Industry</u>	<u>SIC Code</u>
Ordnance and accessories	19
Communication equipment	366
Aircraft and parts	372

(Defense Indicators, Sept. 1975)

DEFENSE-RELATED EMPLOYMENT (BLS) - Employment attributable to DoD military expenditures. Includes both the direct employment necessary to produce the final goods and services purchased and the indirect employment required in all levels of supporting industries which provide materials, components, transportation, and distribution services ultimately embodied in the final purchase. ("The Employment Effect of Defense Expenditures" Sept. 1967 by Richard P. Oliver, Division of Economic Growth, BLS)

DOD COMMERCIAL OR INDUSTRIAL ACTIVITIES - Activities operated and managed by DoD components which provide products or services for Government use which are obtainable from a private source. (DoD Dir. 4100.15)

ENGINEERING DEVELOPMENT - All effort directed toward those development programs being engineered for Service use but which have not yet been approved for procurement or operation. This area of "research and development" is characterized by major line item projects and program control will be exercised by review of individual projects. (ASPR 4-101)

EXPERTS AND CONSULTANTS - Those persons who are exceptionally qualified, by education or by experience, in a particular field to perform some specialized service. (ASPR Section 22)

EXPLORATORY DEVELOPMENT - All effort directed toward the solution of specific military problems, short of major development projects. This area of "research and development" may vary from fairly fundamental applied research to quite sophisticated bread-board hardware, study, programming and planning efforts. The dominant characteristic of this category of effort is that it be pointed toward specific military problem areas with a view toward developing and evaluating the feasibility of proposed solutions and determining their parameters. (ASPR 4-101)

FIELD SERVICE REPRESENTATIVES - A subdivision of CETS. Those employees of a manufacturer of military equipment or components who provide a

liaison or advisory service between their company and the military users of their company's equipment or components. (ASPR Section 22)

MANAGEMENT AND SUPPORT - All effort directed toward support of installations or operations required for general research and development use. Included would be military construction of a general nature unrelated to specific programs, maintenance support of laboratories, operation and maintenance of test ranges, and maintenance of test aircraft and ships. Cost of laboratory personnel, either in-house or contract-operated would be assigned to appropriate projects or as a line item in the Research, Development, or Advanced Development Program areas, as appropriate. (ASPR 4-101)

MANAGEMENT STUDY CONTRACTS - Includes studies specifically designed to evaluate organizational structures and distribution of functions. Also includes studies which may be used as a tool for management in the decision-making process. Categories include:

- Management Studies
- Manpower and Personnel Studies
- Concepts and Plans Studies
- Operations and Force Structure Studies
- Logistics Studies, and
- Science and Technology Studies

(AF letter giving instructions re PB-23 exhibit)

MILITARY OUTLAYS - Outlays for DoD military functions plus military assistance. (The Budget of the United States Government - DoD Extract for FY76)

MISSION-ESSENTIAL MATERIEL - a. That materiel which is authorized and available to combat, combat support, combat service support, and combat readiness training forces to accomplish their assigned mission.
b. For the purpose of sizing organic industrial facilities, that Service-designated materiel authorized to combat, combat support, combat service support, and combat readiness training forces and activities, including Reserve and National Guard activities, which is required to support approved emergency and/or war plans, and where the materiel is used to: (1) destroy the enemy or his capacity to continue war; (2) provide battlefield protection of personnel; (3) communicate under war conditions; (4) detect, locate, or maintain surveillance over the enemy; (5) provide combat transportation and support of men and materiel; and (6) support training functions, but is suitable for employment under emergency plans to meet purposes enumerated above. (DoD Dir 4151.1)

NON-PERSONAL SERVICES - Contracts with a private firm for specific tasks to be performed in specific places, free of government direction, supervision, and control over the contractor's employees at a fixed price for the work to be performed. This category includes contracts for guard services, food service, billeting, motor pool operation and maintenance, etc. (AF letter giving instructions re PB-23 exhibit)

NATIONAL DEFENSE OUTLAYS - Military outlays plus outlays for Atomic Energy Commission (ERDA), stockpiling, selective service, and other Defense-related activities. (The Budget of the United States Government - DoD Extract for FY76)

NEW START - A newly established Government commercial or industrial activity involving additional capital investment of \$25,000 or more or additional annual costs of production of \$50,000 or more. (OMB Cir A-76)

OPERATIONAL SYSTEM DEVELOPMENT - All effort directed toward development, engineering, and test of systems, support programs, vehicles and weapons that have been approved for production and Service development. All items in this area are major line item projects which appear as RDT&E Costs of Weapons Systems Elements in other programs. Program control will thus be exercised by review of the individual research and development effort in each Weapon System element. (ASPR 4-101)

OUTLAYS - "Following the enactment of budget authority, obligations are incurred by government agencies...Obligations generally are liquidated by the issuance of checks or the disbursement of cash; such payments are called outlays...Outlays during any fiscal year may be payments of obligations incurred in prior years or in the same year." (The Budget of the United States Government - DoD Extract for FY76)

PERSONAL SERVICES CONTRACTING - The procuring of services by contract in such manner that the contractor or his employees are in effect employees of the government. (ASPR Section 22)

PRIVATE COMMERCIAL SOURCE - A private business concern which provides a commercial or industrial product or service required by agencies and which is located in the U.S., its territories and possessions, the District of Columbia, or the Commonwealth of Puerto Rico. (OMB Cir A-76)

RESEARCH - All effort directed toward increased knowledge of natural phenomena and environment and efforts directed toward the solution of problems in the physical, behavioral and social sciences that have no clear direct military application. Includes all basic research and that applied research directed toward the expansion of knowledge in various scientific areas. (ASPR 4-101)

RESEARCH AND DEVELOPMENT - Encompasses research, exploratory development, advanced development, and engineering development as defined in ASPR 4-101.

(RIMILOC) "REQUIRED IN-SERVICE MAN-YEARS IN LIEU OF CONTRACT" - represents the man-years that would be required if the contract workload were to be performed in-service. (AFR 26-12)

SERVICE CONTRACT - A service contract is one which calls directly for a contractor's time and effort rather than for a concrete end product. (ASPR Section 22)

SERVICE CONTRACTS - Contracts for those activities classified as services in Volume II of the Standard Industrial Classification Manual, Division I, Group Numbers 70-89 inclusive. (BoB Bulletin 57-7)

STANDARD INDUSTRIAL CLASSIFICATION CODES - The classification of establishments reporting to the BLS on the basis of their principal product or activity as determined from information on annual sales volume. The entire employment of an establishment making more than one product or engaging in more than one activity is included under the industry accounting for the largest percentage of the annual sales of that establishment. (Defense Indicators, Sept. 1975)

STEVEDORING - The loading of cargo from an agreed point of rest on a pier or lighter and its storage aboard a vessel, or the breaking out and discharging of cargo from any space in the vessel to an agreed point of rest dockside or in a lighter. (ASPR Section 22)

SUPPORT SERVICES - Those operations ancillary to the function of a government agency, which do not involve a product and can be performed either by "in-house personnel (active duty military and civil service employees) or by civilian personnel furnished by private contractors. (Hearings on a Cost Profile for Support Services Before a Subcomm. of the House Comm. on Government Operations, 90th Congr. 2nd Sess.)

SUPPORT SERVICES (PREFERRED PHRASE FOR COMMERCIAL SERVICES) - Secondary or supportive functions necessary to the management control, efficiency, and effectiveness with which the primary agency functions are carried out to meet broad agency management responsibilities to employees engaged to carry out such primary functions. (American Federation of Government Employees)

TECHNICAL/ENGINEERING SERVICES - Contracts in this category relate to the furnishing of advice, instruction, and training of DoD personnel in the installation, operation, and maintenance of weapons, equipment, and systems. Examples are service engineering, ADP software, preparation of technical data, field service representatives, contractor technicians, architectural engineering services, contract training, etc. (AF letter giving instructions re PB-23 exhibit)

APPENDIX B
SERVICE CONTRACT
PROCUREMENT RELATED LAWS

APPENDIX B

MAJOR PROCUREMENT - RELATED STATUTES RELEVANT TO DOD SERVICE CONTRACTS

INTRODUCTION

The members of the Commission on Government Procurement went to considerable lengths to identify and examine all procurement-related statutes. The first step in their examination involved the preparation of a "Preliminary Compilation of Laws Pertaining to Government Procurement," published in October 1970. Next the Commission obtained the assistance of the Air Force to conduct a search using the Air Force's LITE (Legal Information Through Electronics) system. This search, plus a poll of the procurement agencies, enabled the Commission to then examine the entire United States Code and the latest Statutes at Large. The efforts of the Commission members resulted in the identification of approximately 4,000 statutory provisions relating to procurement scattered throughout the U.S. Code together with nonprocurement laws. Brief digests of these statutes were then prepared and processed through the Air Force Systems Command's computer facilities to produce a "Table and Digest of Procurement-Related Laws", June 1971 and a "Key-Word-In-Context Preliminary Index - Digest of Procurement-Related Laws", July 1971. The computer tapes for these are retained with the Aeronautical Systems Division, Air Forces Systems Command, Wright-Patterson Air Force Base.

Included in this appendix are those laws that have a major influence on contracting for services. Much of this information is taken from the 1969 testimony of the Comptroller General before the House Committee on Government Operations.

1. The Armed Services Procurement Act of 1947, as amended (ASPA)
Title 10, United States Code, sections 2301-2314, contains the basic procurement laws to be followed by the Department of Defense (DOD) and the National Aeronautics and Space Administration (NASA). The act contains the following important provisions.

Title 10, United States Code, section 2301, provides the policy that a fair proportion of purchases and contracts shall be placed with small business concerns.

Title 10, United States Code, section 2304, provides that purchase and contracts for property and services shall be made by formal advertising in all cases in which such method is feasible and practicable under the existing conditions and circumstances. It enumerates the situations in which procurement by negotiation is appropriate as an exception to the general requirement for procurement by form advertising and provides guidelines for soliciting proposals, including price, when negotiation is used.

Title 10, United States Code, sections 2304-2305, set out a basic statutory statement of procedures requisite for formal advertising such as the requirement for full and free competition, the public opening of bids, the necessity for reasonable promptness in making awards, the necessity for responsiveness of bids to the invitation for bids, the considerations in making an award and the requirement that if any bid violates the antitrust laws, the head of the procuring agency shall refer the bid to the Attorney General for appropriate action.

The legislation further: (i) requires the inclusion of the covenant against contingent fees into contracts; (ii) prohibits the cost-plus-a-percentage-of-cost system of contracting; (iii) requires a determination and finding before a cost contract, cost-plus-a-fixed-fee contract, or an incentive contract is awarded; (iv) limits the amount of fee payable under a cost-plus-fixed-fee contract; (v) requires approval of certain subcontracts; (vi) requires the submission by prime contractors and subcontractors of accurate, complete, and current cost or pricing data with respect to negotiated contracts and changes, as prescribed, in the absence of adequate price competition, established catalog or market prices of commercial items, prices set by law or regulations, or where such requirement is waived by a written determination by the head of the cognizant agency; (vii) authorizes advance, partial, or progress payments; (viii) provides for multipyear (sic) procurement for specific types of services and items of supply related to such services where the contract is to be performed outside the 48 contiguous States and the District of Columbia (10 U.S.C. 2306(a)-(g)); (ix) provides for the remission of liquidated damages on an equitable basis (10 U.S.C. 2312); and (x) requires the right to examine books and records of contractors under cost-type contracts and of subcontractors thereunder, and the right of the Comptroller General or his representatives to examine the books and records related to negotiated contracts, with limited exception (10 U.S.C. 2313).

2. The Federal Property and Administrative Services Act of 1949
Title 40, United States Code, section 471-524 and title 41, United States Code, sections 251-260, which created the General Services Administration (GSA), provides for the management and disposal of Government property, for procurement contracting and property management activities of civilian executive agencies, and supplements contracting requirements and procedures for those civilian agencies not within the purview of the Armed Services Procurement Act.

3. Major-procurement law other than above two statutes
Title 41, United States Code, section 5 (revised Statute 3709) requires that 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 for a sufficient amount of time previously for proposals, except (1) when the amount involved is less than \$2,500; (2) when public exigencies require immediate delivery of the articles or performance of the services; (3) when the Government purchasing or contracting officer certifies only one source of supply is available; and (4) when the services required are to be performed by the contractor in person and are of a technical or professional nature or are under Government supervision and paid for on a time basis.

This was the only general procurement law prior to the Armed Services Procurement Act and the Federal Property Act and is still applicable to some extent, although the General Services Administrator pursuant to 41 United States Code, 252(a)(2) has made a blanket delegation of authority to all agencies to use the Federal Property Act authority.

ANCILLARY STATUTES AFFECTING PROCUREMENT

1. The Budget and Accounting Act of 1921, as amended
Title 31, United States Code, sections 1-60, 71, 471, 581-581d created the Bureau of the Budget and established the General Accounting Office (GAO) under the direction of the Comptroller General of the United States. Under this legislation, the Comptroller General is required to investigate all matters relating to the receipt, disbursement, and utilization of public funds and to make recommendations to the Congress to achieve better procurement practices. Provisions are included therein for the settlement and adjustment by the General Accounting Office of all claims and demands by or against the United States and of all accounts in which the United States is concerned either as a debtor or creditor.

2. The Small Business Act of 1963, as amended
Title 15, United States Code, sections 631-647 created the Small Business Administration (SBA), which together with the Government procurement agencies has the responsibility of promoting policies and taking actions to assure that small businesses obtain their fair share of Government procurements. These small business functions of

the SBA which are most closely related to procurements are (1) the determination of whether a company is a small business; (2) the issuance of a certificate of competency; (3) procedures for setting aside procurements for small business; (4) procedures aimed at increasing subcontracting to small business. The Administrator of the SBA, in coordination and cooperation with the heads of other Federal departments and agencies, is required to take such steps as may be necessary and appropriate so that contracts, subcontracts, and deposits made by the Federal Government in connection with programs aided with Federal funds, are placed in such a way so as to further the purposes of the Economic Opportunity Act (Public Law 90-222, 81 Stat. 713, enacted Dec. 23, 1967).

3. Freedom of Information Act, as amended

Title 5, United States Code, section 552, requires each agency covered by the act to facilitate efforts by the public to obtain from the agencies public records and documents which are in the category of records and documents not exempted specifically by the initial legislation. The agencies are required to publish the manner in which and from whom the public information may be obtained. The act also enforces the right of the public to obtain the information by enabling individuals to seek a district court order directing the agencies to produce the information which is improperly withheld. It, in addition, empowers the district court to punish an employee for contempt in the event the employee does not comply with the court order.

4. Legislation requiring appropriations

Title 41, United States Code, section 11a-b. provides that no contract or purchase on behalf of the United States shall be made unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the Departments of the Army, Navy, and Air Force for specific enumerated items which, however, shall not exceed the necessities of the current year. The Secretary of Defense is required to immediately advise the Congress of the exercise of his authority granted in this statute and is required to report quarterly on the estimated obligations incurred pursuant to the authority granted in this legislation.

5. Public Law 85-804

Title 50 United States Code, sections 1431-1435, authorizes extraordinary contractual acts to facilitate the national defense. The President is granted the authority to authorize any department or agency exercising functions in connection with national defense, to enter into contracts or into amendments or modifications of contracts and to make advance payments, without regard to other provisions of law relating to the making, performance, amendment, or modification of contracts, whenever he deems that such action would facilitate the national defense.

6. The Wunderlich Act

Under 41 United States Code, sections 321-322 the decision of the head of any department or agency or of his duly authorized representative or board is final and conclusive, pursuant to a contract provision, in any dispute involving a question of fact arising under a contract, unless said decision is fraudulent, capricious, arbitrary, so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence. Under the legislation no Government contract shall make the decision of any administrative officer, representative, or board final on a question of law.

7. The Miller Act

Under title 40, United States Code, section 270a-270b, there is a requirement that before any construction contract in excess of \$2,000 is awarded the contractor must furnish a performance bond adequate for the protection of the Government and a payment bond adequate for the protection of all persons supplying labor and materials in the prosecution of the work in the amounts prescribed by the statutes. Provisions in the act require persons who bring suit under the bonds to file notice of claims with respect to labor and materials furnished within a prescribed period as well as a time limitation for the commencement of an action to recover under the bonds.

8. Renegotiation Act of 1951, as amended

Title 50, United States Code, Appendix 1211-1233, applies to annual sales in excess of \$1 million under contracts and subcontracts made by the Department of Defense (including all of the military departments), the Maritime Administration, General Services Administration, National Aeronautics and Space Administration, Atomic Energy Commission, Federal Aviation Agency, and any other agency designated by the President. The act is not permanent legislation but has been periodically extended since its inception. The last extension was for 6 months until September 30, 1976. A new bill has recently been introduced to make it permanent legislation.

The Government has the right under these statutes to recover excessive profits made by the contractor, subcontractor, or sales agent under Government procurements. The legislation does contain exemptions from renegotiations which are classified either as mandatory or permissive.

Decisions of the Renegotiation Board are subject to de novo review by the Tax Court. The United States Court of Appeals then has exclusive jurisdiction to review decisions by the Tax Court in renegotiating cases in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury, except as otherwise provided within the act. In no case shall the question of the existence of exclusive profits or the extent thereof be reviewed, and findings of facts of the Tax Court shall be conclusive unless such findings are arbitrary or capricious. The United States Court of Appeals shall have only

the power to affirm the decisions of the Tax Court or to reverse such decisions on questions of law and remand the cases for such further action as justice may require, except where the error of law involved was immaterial to the decisions of the Tax Court.

9. Davis-Bacon Act, as amended

Title 40, United States Code, section 276a, et seq., provides that construction contracts in excess of \$2,000 must contain a provision to the effect that no laborer or mechanic employed directly upon the site of the work shall receive less than the prevailing wages as determined by the Secretary of Labor which are to be paid at the site of the work at least once a week. Sanctions include termination of the contract, being debarred from obtaining Government contracts, as well as monetary penalties.

10. Service Contract Act of 1965

Public Law 89-286, 79 Stat. 1034 (1965), provides for the payment of minimum wages (including fringe benefits) and the observance of safety and health requirements on all contracts of the Federal Government [in excess of \$2,500] the principal purpose of which is the performance of maintenance services (such as guards, janitors, etc.). The Secretary of Labor under the act has the major role in implementing and administering the provisions of the act.

11. Copeland Act

Title 18, United States Code, section 874, and 40 U.S.C. 276c (Anti-Kickback Act) provide criminal sanctions to be imposed against anyone who intimidates or threatens or otherwise induces any person working on a construction project to give up part of his compensation to which he is entitled under his contract or employment. The act further provides that the Secretary of Labor shall make reasonable regulations for contractors and subcontractors engaged in construction work, including the requirements for weekly sworn affidavits on employees' wages.

12. Convict Labor

Title 18, United States Code, section 436 (1964), was originally passed by Congress in 1887 and was implemented by Executive Order 325a, May 18, 1905. It requires that all contracts to be performed within the United States entered into by an executive agency contain a clause prohibiting employment of convict labor.

13. Buy American Act, as amended

Title 41, United States Code, section 10 (a)-(d), permits the utilization of only articles, materials, and supplies which have been made or produced in the United States and only articles, materials, and supplies manufactured in the United States unless the head of the department or independent establishment concerned determines that the purchase of domestic source materials or supplies is inconsistent with the public interest or the cost is unreasonable.

In addition to the Buy American Act, there are other statutory provisions which restrict procuring agencies from purchasing foreign products. The Department of Defense Appropriation Acts have regularly included a section governing the foreign purchase of food, clothing, cotton, silk, or wool (for example, see section 523, DOD Appropriations Act of 1964, 77 Stat. 254). Another example of a provision of this nature is section 604 of the Foreign Assistance Act of 1961 (22 U.S.C. 2354a (1964)), which was concerned with procurements not resulting in adverse effects upon the economy of the United States or the Industrial immobilization base.

14. Communications Act of 1934

This act applies to any contract for the furnishing of services by radio, telephone, telegraph or cable companies.

15. Public Law 93-365; Section 502

Title 10 U.S.C., section 138(c)(3) requires that DoD submit to Congress an annual military requirements report. PL 93-365 states that a full justification of any conversion from one form of manpower to another be contained in the manpower requirements report. The law further states that ".It is the sense of Congress that the Department of Defense shall use the least costly form of manpower that is consistent with military requirements and other needs of the Department of Defense."

16. Public Law 93-400 - Office of Federal Procurement Policy Act

This statute establishes in the Office of Management and Budget an Office of Federal Procurement Policy, to provide overall direction in procurement policies, regulations, procedures and forms for executive agencies in accordance with applicable laws.

17. Public Law 91-379 - The Uniform Cost Accounting Standards Amendment to the Defense Production Act of 1950

In 1970 this statute amended the Defense Production Act of 1950 to establish a Cost Accounting Standards Board to promulgate cost accounting standards that must be used by Defense contractors and subcontractors.

APPENDIX C

A CHRONOLOGY OF IMPORTANT DECISIONS

CONCERNING THE LEGAL ASPECTS OF CONTRACT SERVICES

The "Fuchu Opinion"

In 1963, in the course of auditing Air Force operations at Fuchu Air Force Base, Japan, the General Accounting Office discovered a group of contracts for the services of technicians. In 1964 the GAO made a detailed study of the Air Force's use of contractor-furnished personnel at Fuchu. In reviewing one of the associated contracts, which called for the Capehart Corporation to furnish engineers to assist the Ground Electronics Engineering Installation Agency (GEEIA) in systems engineering and preparation of installation plans, the GAO concluded that it would be more economical to the Government to have this work performed solely by Civil Service employees.¹

Concerned about the propriety of these contracts, GAO asked the Civil Service Commission to rule on the legality of the Capehart contract. After extensive investigation the General Counsel of the Civil Service Commission gave his opinion in early 1965 (popularly referred to as the Fuchu Opinion) that the Air Force contracts involved a form of personnel procurement which was not authorized by law and violated various Federal personnel statutes.²

The Comptroller General, in commenting on the Fuchu legal opinion, indicated that GAO was in general agreement with the statements and

¹ General Accounting Office, Comptroller General, Excessive Costs Incurred in Using Contractor-Furnished Personnel Instead of Government Personnel by the Pacific Region of the Ground Electronics Equipment Installation Engineering Agency, Air Force Logistics Command, Department of the Air Force, Report B-146823, March 19, 1964.

² Civil Service Commission, Opinion of the General Counsel, letter to GAO dated February 12, 1965.

conclusions therein,³ and forwarded it to Congress.

Subsequently, the following guidelines concerning the use of contractor-furnished personnel were issued by the Commission:

Where an agency has entered into a contract or arrangement with an organization or individual whereby the contractor is paid for furnishing its personnel to work for the agency under the following conditions: (1) the agency reserves the right to approve or disapprove the individual referred and/or the right to judge the performance of the individual and to call upon the contractor to recall the individual assigned if the agency determines the individual is not performing satisfactorily; and (2) the individual performs his daily tasks under the supervision of a Federal employee, the contract or arrangement is illegal since it is tantamount to an employer-employee relationship. The services of those individuals should be employed by the agency under the Civil Service Act and paid as provided for in the Classification Act.⁴

In reaching this conclusion, the General Counsel noted that what is proscribed is an employer-employee relationship which is established by means other than the applicable Federal personnel laws. As guidance in determining this illegal employer-employee relationship three criteria were cited. These were: whether a person is--

- (1) engaged in the performance of a Federal function under authority of an act of Congress or an Executive order,
- (2) appointed in the civil service by a Federal officer or employee, and
- (3) performing duties subject to the supervision and direction of

³General Accounting Office, Comptroller General, Decision of the Comptroller General of the United States Regarding Contractor Technical Service, Comptroller General Manuscript Opinion B-146824, March 4, 1965.

⁴Civil Service Commission, Opinion of the General Counsel, letter to GAO dated February 12, 1965.

a Federal officer or employee.⁵

The Air Force disagreed with the GAO determination of relative cost, contending that the actual net cost to the Government was less by contracting-out. They also dissented sharply on the legal opinion, citing the consistent position of the Comptroller General on contracts of the type described in this case, which have been considered to be "personal" rather than "non-personal" services.

Dissenting opinions were also voiced by industry representatives. The Washington law firm of Arnold and Porter, counsel to the National Council of Technical Service Industries, issued a comprehensive analysis of the Civil Service Commission opinion, citing numerous statutes and decisions upholding the legal authority of Government agencies to contract for services.⁶ Their document also points out that persons doing work under contract are specifically excluded from the Classification Act of 1949, 5 U.S.C. 5102(c)(20).

The far-reaching legal opinion from the Civil Service Commission and its endorsement by the Comptroller General were debated in Government and industry circles and a short time later various directives were issued by Government agencies to implement its provisions. DoD issued Section 22 of the Armed Services Procurement Regulation on service contracts, which includes:

⁵These criteria have since been adopted by Congress as the statutory definition of a Federal employee in the codification of personnel laws. (P.L. 89-554, 1966, 5 U.S.C. 2105).

⁶Arnold and Porter for NCTSI, Critical Analysis of Opinion of Civil Service Commission Relating to Legality of Hiring Contract Technicians by the Department of Defense and Applicability of that Opinion to Support Contracts, December, 1966.

22-102 "Personel Services."

22-102.1 Policy. The Civil Service laws and regulations and the Classification Act lay down requirements which must be met by the Government in hiring its employees, and establish the incidents of employment.

In addition, personnel ceilings have been established for the Department of Defense. Except as otherwise authorized by express statutory authority [e.g., 5 U.S.C. 55a as implemented by the annual Department of Defense Appropriation Act--expert and consultant services (see Part 2)], these laws and regulations shall not be circumvented through the medium of "personal services" contracting, which is the procuring of services by contract in such a manner that the contractor or his employees are in effect employees of the Government. The contracting officer is responsible for assuring the implementation of this policy by considering the criteria in 22-102.2 below before entering into any service contract, and by obtaining a legal opinion in any doubtful case and in any case where express statutory authority for a personal service contract is to be invoked.⁷

The "Pellerzi Opinion"

In June 1967, upon review of certain support service contracts entered into by NASA at the Marshall and Goddard Space Flight Centers, GAO concluded, as it had in the Fuchu Air Base report, that such contracts could be performed more economically by Civil Service employees.⁸ Six of the Goddard service support contracts were referred by GAO to the Civil Service Commission for determinations as to their legality. In October 1967, the General Counsel of the Civil Service Commission, Mr. Leo M. Pellerzi gave a forty-page opinion, which reviewed the applicable contract and personnel laws, regulations, Comptroller General and judicial

⁷Commission on Government Procurement, Final Report of Study Group #1, 1972, p. VII-159.

⁸General Accounting Office, Comptroller General, Potential Savings Available Through Use of Civil Service Rather Than Contractor-Furnished Employees for Certain Support Services, National Aeronautics and Space Administration, Report No. B-1333961, June, 1967.

decisions, concluding that these contracts and "all other like them are proscribed unless an agency passes a specific exception from the personnel laws to procure personnel services by contract."⁹ As a result of his in-depth study which covered some 2500 contract employees including masons, laborers, welders, carpenters, mechanics, warehousemen, electronic technicians and assemblers and laboratory technicians, Pellerzi concluded that it was "clear that what Goddard has done in this situation is to create Federal positions"--with contract-supplied, not Civil Service Commission-supplied people. This opinion (popularly referred to as the "Pellerzi opinion") expanded the principles set forth earlier in the "Fuchu opinion", supplementing them with additional criteria as follows:

contracts which, when realistically viewed, contain all of the following elements, each to any substantial degree, either in the terms of the contract, or in its performance, constitute the procurement of personnel services proscribed by the personnel laws:

- Performance on-site.
- Principle tools and equipment Government-furnished.
- Services are applied directly to integral effort of agencies or organizational subpart in furtherance of assigned function or mission.
- Comparable services, meeting comparable needs, are performed in the same or similar agencies using civil service personnel.
- The need for the type of service provided can reasonably be expected to last beyond one year.
- The inherent nature of the service, or the manner in which it is provided reasonably requires directly or indirectly, Government direction or

⁹Civil Service Commission, Opinion of the General Counsel, Legality of Selected Contracts at Goddard Space Flight Center, National Aeronautics and Space Administration, October 17, 1967, p. 40.

supervision of contractor employees in order:

To adequately protect the Government's interest, or

To retain control of the function involved, or

To retain full personal responsibility for the function supported in a duly authorized Federal officer or employee.¹⁰

Both the GAO cost study and the "Pellerzi opinion" were rebutted by NASA, but the Comptroller General gave a qualified endorsement to the "Pellerzi Opinion" in November 1967.¹¹

Supplement to the "Pellerzi Opinion"

The 1967 "Pellerzi Opinion" caused widespread concern in industry and among the many Government agencies which contract for support services. A series of discussions were held between the Civil Service Commission, the General Accounting Office, the Bureau of the Budget, NASA and the Department of Defense to establish more realistic guidelines for the legal boundaries of service contracts. In July, 1968, a supplement to the Pellerzi opinion was issued by the new General Counsel, the purpose of which was to clarify the meaning of the six elements identified by the Pellerzi opinion as ones designed to assist in determining the legality of support service contracts as well as to clarify the scope of the opinion. This Supplement indicated that support service contracts were not illegal per se, and presented a more moderate view of the application of the criteria.¹²

¹⁰ Ibid., p. 40.

¹¹ Comptroller General, letter to Chairman of the Civil Service Commission, commenting on the Commission's NASA legal opinion and policy statement attached thereto, November 1, 1967.

¹² Civil Service Commission, Supplement to the Opinion of the General Counsel, U.S. Civil Service Commission, on the Legality of Selected Contracts at the Goddard Space Flight Center, July 5, 1968.

The Supplement went on to emphasize that the key point in determining legality was the existence of an employee-employer relationship between contractor personnel and the Government, and repeated the criteria from the "Pellerzi Opinion" as factors which, if present, might indicate the existence of such a relationship. However, the Supplement did little to clarify the relationship between the procurement laws and the personnel laws, and by implication has left the determination of the supervisor-employee relationship subject to many interpretations and assumptions.

Updated Position of the Civil Service Commission?

Since the issuance of the Supplement to the "Pellerzi Opinion", there has been no formal, official statement from the CSC, specifically regarding the legality of service contracts. However, there have been several related comments by CSC officials which have made the situation even more confusing.

In a 1967-68 meeting with members of the U.S. Commission on Government Procurement Mr. Anthony Mondello, then General Counsel of the Civil Service Commission, stated that the Civil Service Commission is not vested with the authority to fix policy on contracting-out and has no power over Executive Branch agencies to reverse a decision to contract a specific function. He indicated that he considered it a primary mission of the General Counsel's Office to serve as the "guardian" of 5 U.S.C. 2105(a) and to ensure that contractor personnel are not handled in a manner which would make them Federal employees de jure in regard to the benefits, and privileges which accrue to a Civil Service employee.¹³

¹³ Commission on Government Procurement, Final Report of Study Group #1, 1972, p. VII-159.

It is also quite significant that the General Accounting Office, which endorsed the earlier legal opinions, and the agency which has the responsibility for determining that payments under all contracts are proper and legal has not formally commented on the 1968 supplement.

APPENDIX D

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This is a report prepared by AIA's Aerospace Research Center. It discusses a study which analyzed the trends in federal R&D support and O&M contracting in support of federal programs. These analyses were conducted to determine whether there is any long-term trend towards a growth of in-house R&D and to determine the degree of deviation from the long-term trend for O&M contracting with private industry. The report concludes that the current practice has been to reduce the share of total budget outlays that are available to industry. Further it concludes: "without question, the government's stated policy of 'relying on the private enterprise system to supply its needs' is not practiced by contract officers responsible for implementing that policy."

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- (2) Provided by Army-operated in-house activities (commercial or industrial-type activities)
- (3) Obtained from other Federal departments and agencies (interservice/department/agency support), or
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