Negotiated Procurement and the Rule of Law: The Fiasco of Public Law 87-653

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I. INTRODUCTION

A SENATOR from a large eastern seaboard state recently remarked on the floor of the Senate that he did not hold that there have been any irregularities in the awarding of defense contracts. He attributed the failure of his state to get more of them to the continued use of negotiated in lieu of formally advertised procurement, notwithstanding Public Law 87-653. He stated that when the Department of Defense (hereinafter referred to as DOD) seeks bids (proposals) for developmental, experimental and research contracts, it "asks several firms to submit bids and these firms tend to be confined to the west coast—often in the State of California." The Senator's remarks are important for several reasons. They are an example of many similar expressions of concern arising from continuous reports of persistent unemployment and its accompanying hardships in various districts, as well as from business constituents who want a fair chance to compete for the award of Government contracts. The remarks do not include a demand for justification in relation to applicable law nor a showing of facts to demonstrate the existence of good (or bad) faith in the determination to use negotiation. They thus show an insufficient basis for knowledge of whether any irregularities actually are involved. They overlook the obligation of the member's own branch of the Government to keep informed, to state the law and to declare the illegalities, as later explained in this article. The remarks disclose an unawareness that on the basis of the facts presented, there is no law authorizing less competition in negotiated procurement than in formally advertised procurement. This means, of course, that such a limitation on the solicitation of bids, as described by the Senator, is without authority of law and therefore involves a serious irregularity.

The seriousness of the irregularity is not limited to the lack of

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* Public Law 87-653 was the enactment of H.R. 5532, in 76 Stat. 528 (1962), amending §§ 2304 (modifying § 2304(a) and adding § 2304(g)), 2306 (modifying § 2306(a) by substituting “subsections (b)-(f)” for “subsections (b)-(e),” and adding § 2306(f)), 2310(b), 2311 of the Armed Services Procurement Act of 1947, as amended, 10 U.S.C. §§ 2301-14 (1958), as amended, 10 U.S.C. §§ 2304-11 (Supp. IV, 1963).

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authority in law. Unwarranted limitations on competition in public procurement violate the most basic requirement in all public procurement that all parties be given equal opportunity to compete for any awards. Establishment of such an irregularity enables members of Congress to insist that competitively limited and noncompetitive contracts be declared invalid and that a close surveillance be maintained over procurement officials to see that they understand the illegality sufficiently not to repeat it. To indicate on the floor of Congress that no impropriety is involved is to encourage more of the precise procurement which its members deplore, to prolong the misunderstanding, and to give constituents the erroneous impression that something other than actions without authority of law is involved.

Congress and the public taxpayer have no established check on the observance of the law and exercise of good judgment in DOD's use of $24 billion in public funds annually in the award and administration of defense contracts unless, and except to the extent that, the General Accounting Office (hereinafter referred to as GAO), a part of the legislative branch of the Government and the "watchdog of the Treasury," discharges the obligations imposed upon it by the Armed Services Procurement Act of 1947 and other law. Thus the importance of evaluating the soundness and validity of the concept of GAO and its discharge of its obligations appears clear. The Committee on Government Operations has the responsibility to do so, but it has furnished the public no evaluation of GAO's position on its statutory obligations in negotiated procurement.

The law obligates the GAO to make a continuous comprehensive review and evaluation of the facts relied upon in all cases of negotiated procurement with limited or no competition. These facts are essential to determine in what types of cases awards are actually justified with something less than full and free competition, so that authority in law may be provided to the extent necessary. However, GAO's avowed reasons for not discharging its statutory obligation to review are most irrelevant.

5. "GAO" is used in the article to refer to both the General Accounting Office and its head, the Comptroller General.
It believes that the findings of fact in procurement determinations are stereotyped, and that it has no authority to overrule.\textsuperscript{10} It is clear, however, that one congressional purpose in providing for GAO review was to preclude stereotyped determinations by the agencies. Indeed, any trace of stereotyping would appear to be evidence of lack of good faith, which GAO is obligated to find in order to uphold any negotiated procurement action. Notwithstanding its disclosure that it does not perform its statutory obligation of independent review \textit{after} the procurement becomes an actual fact, GAO has declared that effective control of negotiated procurement practices must also include authority (obligation) to make such a review \textit{before} the fact.\textsuperscript{11} But because the facts have not been reviewed in any substantial number of cases, there is no basis on which to make a significant evaluation of competitively limited and noncompetitive procurement. True, GAO has indicated that the DOD could use much more formal advertising in its procurements and could obtain much more competition in its negotiated procurement, \textit{i.e.}, where there is no formal advertising.\textsuperscript{12} But GAO's disclosure of nonperformance of its review and evaluation obligation shows that it actually has not assembled the facts and pointed out to DOD and Congress the cases demonstrating DOD irregularity. On the other hand, DOD in effect has chided GAO for never questioning its determinations and findings filed with GAO as required by law in support of its negotiated procurement, and for not, in a period of over thirteen years, producing more than twenty-five reports on Air Force procurement covering five years in which approximately five million procurement actions were initiated.\textsuperscript{13} What few cases GAO has reviewed have not received the GAO evaluation required by law. The GAO made no mention of good faith or the lack of it, and took no position on the question of legality. Congress has failed to recognize the seriousness of the deficiencies in the GAO reviews. Rather, it has generally seemed more interested in upholding an irregular procurement, in the interest of so-called expediency to protect the contractor as well as the Government. In so doing Congress perpetuates the injustice to many contractors who are deprived of opportunity to compete, to many unemployed, and to the Government which must pay

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\item Id. at 17. See also Hearings on Procurement Before a Subcommittee of the Senate Committee on Armed Services, 86th Cong., 2d Sess., pt. 2, at 271 (1960); Hearings on Weapons System Management Before a Subcommittee of the House Committee on Armed Services, 86th Cong., 1st Sess. 673 (1959).
\end{enumerate}
much more than items would be worth in a competitive market. Congress also, instead of demanding the surveillance and enforcement of existing procurement law by those who have that obligation, merely enacts more procurement law without regard to its efficacy.

On September 10, 1962, an amendment to the Armed Services Procurement Act became law, based upon House bill H.R. 5532, which on June 7, 1962, was represented on the floor of the House as one to restore the rule of law to the military procurement processes and to increase competitive purchasing. Actually, the one provision which would have restored the rule of law to a certain type of procurement—for years made, and still being made, without legal authority—was dropped from the bill after it reached the Senate and therefore failed of passage as part of the new amendment. At the time the bill was presented to the House, one member noted that it had issued from Committee with a minority report by three members, whereas it was his recollection that “all previous bills from the great Committee on Armed Services have always been reported unanimously by that committee.” He expressed doubt “that this particular measure is a step in the right direction” and expressed the view “that while [one section] . . . has a constructive sound . . . [it] uses rubber terminology and will likely increase administrative costs and delay procurements,” and that the “ideas behind the bill explain some of its provisions better than the provisions themselves.”

These statements on the bill, which is now law, appear valid from a close examination of the language of the new law. It has nomenclature which no one, including its sponsor, GAO, has defined. Its history fails to show how some of its provisions would actually be applied, thus leaving matters to personal discretion, which is the antithesis of rule by law. To the six procurements previously provided, it adds four more, in which the agency finding as to the justification is expressly made final, if in good faith and not fraudulent, whereas one objective of GAO and the House Armed Services Committee (hereinafter referred to as HASC) in

14. The terms “rule of law” and “government by law” are used in the usual sense—the evaluation and resolution of matters in the light of applicable law and case precedent.


18. Ibid.

19. Ibid.

20. Ibid.


enacting the new law was to eliminate the finality provision entirely.\textsuperscript{23} It will be shown that instead of requiring more procurement by formal advertising in order to increase competition and reduce the use of negotiated procurement, the language of the new law suggests opposite results. It modifies the general policy statement of prior law which declared that purchases "shall be made by formal advertising."\textsuperscript{24} Most serious of all its defects, the new law provides certain express, general authority to negotiate purchases without competition. No such broad authority existed previously. The new law also fails to come to grips with the real problems which must be solved to "restore the rule of law to the military procurement processes,"\textsuperscript{25} especially with respect to requiring GAO to do its job of fact finding, so as to furnish Congress a sound basis for determining what steps should be taken. Its history is persuasive to show that there still is no accord, and only more confusion, within and between agencies, including GAO, and within Congress as to the various aspects and requirements of procurement law.

The new law provides no authority for the so-called weapon system method of procurement, which annually involves many billion dollars of procurement. On April 16, 1959, GAO expressed its disapproval\textsuperscript{26} of the Saltonstall bill,\textsuperscript{27} which sought to provide a legal basis for that method. The Office proposed no alternative bill to provide such a basis. Later, GAO referred to Sections 3 and 9 of the Department of Defense Reorganization Act of 1958\textsuperscript{28} as explicit authority for that method. Yet neither that act nor its legislative history contains any language to provide such authority, or authority sufficient to enable DOD "to make its procurements in the manner that it feels proper," as testified by GAO. In substance both merely provide authority to the Secretary of Defense to enter into contracts with the Government, or with outside agencies and institutions, for research and development. Neither provides any authority for the delegation of controls, award, administration and numerous contracting office functions, and other responsibilities of the executive branch, or to waive competition in procurement because it may delay deliveries\textsuperscript{29} as is found in the functioning of the weapon system

\textsuperscript{23} Hearings on H.R. 5532, supra note 21, at 75-91; 108 Cong. Rec. 9977-78 (1962) (remarks of Congressman Hébert).
\textsuperscript{24} 70A Stat. 128 (1956).
\textsuperscript{25} 108 Cong. Rec. 9967 (1962) (remarks of Congressman Thornberry).
\textsuperscript{26} Hearings on S. 500 Before a Subcommittee of the Senate Committee on Armed Services, 86th Cong., 1st Sess. 16 (1959).
\textsuperscript{27} S. 500, 86th Cong., 1st Sess. (1959).
\textsuperscript{28} Hearings on S. 500, supra note 26, at 662; 72 Stat. 514, 516, 520-21 (1958).
\textsuperscript{29} Hearings on Government Procurement, supra note 10, at 401.
method. And there was no statutory authority for the use of that method prior to 1958. Also, the fact alone that the method involves procurement without competition renders the method illegal. Yet there is no record that GAO ever reported its use to Congress as an illegal practice during the years it was used before 1958. It is no wonder that one congressman experienced difficulty in reconciling its practice with the Armed Services Procurement Act. Its illegality is clear from certain portions of that act which restrict delegation of procurement powers to officials of Government agencies only.

II. GAO’s “Feasible-Practicable” Test

Subsection (a) of Public Law 87-653 (H.R. 5532) requires procurement by formal advertising “in all cases in which the use of such method is feasible and practicable under the existing conditions and circumstances.” It is based upon a GAO theory that it will cause more purchases to be made by formal advertising than were made under prior law. Prior law, however, unlike 87-653, contained no exceptions in its statement that purchases “shall be made by formal advertising.” As a procurement law, it was a clearly stated implementation of the policy desired by Congress that formal advertising shall be the rule. By adding the “feasible and practicable” exception language to that clause, the new law qualifies it and gives the erroneous impression that the policy rule has been relaxed. How GAO expects an increase in formal advertising is not clear. Thus, the logic of the GAO theory, on which the new law is based, appears insupportable.

To “assure compliance” with the feasible-practicable requirement, GAO stated that a further amendment to existing law would be necessary, requiring written documentation, and an “effective” review of facts, clearly and convincingly establishing justification for purchasing, not pursuant to the general rule, but pursuant to certain of the exceptions to that rule, as provided in clauses (2) and (4) to (14) inclusive.

30. Hearings on S. 500, supra note 26, at 545-59; but see Hearings on Weapons System Management, supra note 13, at 27-30.


35. 70A Stat. 128 (1956).

However, the amendment does not provide for adequate written documentation or an effective review because of the clauses of exception which GAO omitted from its coverage. GAO first omitted clauses (1), (3), (15), (16) and (17) and later excluded (4), (5), (9), (11) in part, (13) and (14). Since GAO did not provide in at least 11 of "all [17 possible] cases" what the sponsor itself declared necessary to "assure compliance," the prospect of section (a)'s being an effective amendment to foster more formal advertising appears further questionable.

Other serious deficiencies of the new law are that the qualifying language, "feasible and practicable," is not defined in the law nor in its legislative history, and there is no indication of the identity of the official who is to determine feasibility and practicability. The meaning intended is left uncertain. It appears that both words mean "possible," and the legislative history is no help, for it fails to show that the two words were used to provide two different meanings. Thus, the new law is redundant in its language.

Establishment of the meaning "possible" as that which must be attributed to the words "feasible and practicable" does not remove the uncertainty as to how the new law is to be observed. For example, in the past GAO has stated that it was necessary first actually to use formal advertising to determine whether that method could be successful to procure an item which might be thought to be available from only one source because of quality, quantity or type involved. But as to the feasible-practicable test in the new law, GAO said that the Defense Department should establish the criteria. However, since the law was proposed by GAO, it would seem that that office should be the one to make it clear in the legislative history how it wants the defense agencies

38. "We therefore recommend favorable consideration of section (i)." S. Rep. No. 1884, supra note 11, at 26.
40. Black, Law Dictionary 1335 (4th ed. 1951), defines "practicable" as "that which may be done, practiced, or accomplished, that which is performable, feasible, possible ...." See also 33 Words & Phrases ("Practicable") 172. Webster, New International Dictionary 926 (3d ed. 1961), defines "feasible" as "capable of being done, executed, or effected: possible of realization ...."
42. 41 Decs. Comp. Gen. 484-90 (1962); 39 id. 566 (1960); 37 id. 524 (1958); 30 id. 34 (1950); 23 id. 395 (1943); 18 id. 579 (1939); 16 id. 318 (1936).
43. Hearings on Procurement, supra note 13, at 155-57.
to determine, in each procurement whether it is possible to use formal advertising.

In 1947, Congress used what were, in effect, five criteria in determining the impossibility of procurement by formal advertising in the situations involved in the seventeen exceptions to the formal advertising requirement in the 1947 act. The criteria were price, quality, quantity, time (including time to draft specifications or to await delivery under a contract awarded pursuant to formal advertising), and type (including multiple source availability). These criteria appear to be the basis for the statement by the cognizant House committee in 1947 that the public interest requires that purchases be made without advertising in the situations excepted. The Committee stated that it had thoroughly examined the need for authorizing the seventeen exceptions. The provision for those exceptions in the 1947 act was in effect a legislative predetermination that in the enumerated situations, it would not be possible for the agencies to accomplish their procurement demands by formal advertising. Even as to exceptions (3) and (9), covering, respectively, small purchases and purchases of perishables, it is clear from the legislative history that the cost of formal advertising was considered so high as to render it impossible by that method to secure the goods at the price at which, in the public interest, they should be procured. Also, an examination of exceptions (11) through (16) and their legislative history will disclose that they involve situations in which (rightly or wrongly) it was considered impossible to procure by formal advertising.

But by the language of subsection (a) of the bill proposed by GAO—now enacted into law—GAO and Congress in effect have rejected the 1947 predeterminations of impossibility reflected in the seventeen exceptions to the formal advertising rule. In effect they declare that there is no situation under the various exceptions, or, in other words, no exception, which of itself precludes the use of formal advertising. Thus they declare in substance that predeterminations of impossibility may not be made. Instead, a determination must be made "in all cases." The effect is to negate the existing law's exceptions to formal advertising and to relegate the exceptions to the status of a regulatory list of circumstances which might justify waiver of formal advertising, thus reverting.

46. S. Rep. No. 1900, 86th Cong., 2d Sess. 10 (1960). As for perishables, the cost of the delay incidental to advertising appears to have been persuasive.
to pre-Civil War status when the sole recognized exception was one created by construction only—a public exigency which did not admit of the delay incident to advertising. In addition to including within its terms procurements during a national emergency, the new law enacted pursuant to GAO recommendation, in order to insure a determination with respect to every procurement as to whether it is possible to use formal advertising, is stated so broadly that it even includes the procurement of personal services and procurements during a public exigency which does not admit of the delay incident to advertising. Yet authority to make procurement by negotiation in these latter situations has been recognized since at least 1860, irrespective of whether the facts in a given case actually show that it is possible to accomplish procurement by formal advertising. Notwithstanding the effect of the requirement, in the new law, of a determination of impossibility "in all cases," the reports and testimony of GAO, and certain congressional reports, show that the scope of subsection (a) is stated much more broadly than it should be. Perhaps that is because no one asked GAO to demonstrate how its feasibility-practicability test would operate when actually applied to each of the various situations involved in the seventeen clauses of exception. In any event, it is clear that if those who placed the final stamp of approval on the draft of subsection (a) had associated the draft with the applicable reports and testimony, they would have discovered that of the seventeen situations in which the GAO feasible-practicable test ostensibly operates under the language of subsection (a), there remained not more than two of "all cases," as referred to in the subsection.

In its testimony as recorded in the legislative history, GAO actually referred to "'any exception which does not of itself preclude the use of formal advertising,'" and mentioned exceptions (3) and (12) as examples of those which do. Similar examples indicated by GAO are (1), (2), (10), (13), (15) and (16). Most of the remainder of the seventeen exception situations which GAO does not, and some which it does, acknowledge as in themselves precluding the use of formal advertising are declared by the Senate Armed Services Committee as making formal advertising impossible, confirming across-the-board determinations of impossibility by the Department of Defense. Only two exceptions (7) and (8), out of "all cases," appear to remain subject to

48. Id. at 52, 54.
50. Ibid.
51. Hearings on Military Procurement, supra note 10, at 381.
the GAO-sponsored subsection (a). Thus, while the language of subsection (a) on its face negates the 1947 predeterminations of impossibility, the references in its legislative history to across-the-board determinations and to self-exclusions in effect uphold those predeterminations.

The conflict between the all-inclusive language of subsection (a) and the exclusions acknowledged by GAO, DOD and the Senate Armed Services Committee appears to a substantial extent to be due to one fact alone. Because of its inaction with respect to its statutory review and evaluation responsibility, GAO had comparatively few facts on which to base the language used in subsection (a). Nevertheless, in all negotiated procurement actions the burden remains with GAO to decide whether the determinations to negotiate are supported by the facts necessary to show that the determinations were made in good faith. And if unable “to reconcile the determinations made to support the negotiation”—for M-113 personnel carriers, for example, as GAO testified in the sole source procurement hearings it may be that the determinations are so erroneous as to invalidate them. In those hearings GAO advised that the M-113 contract must be recognized as a valid and binding obligation of the United States. In support of that advice GAO cited 10 U.S.C. § 2310 and certain portions of the pertinent legislative history “which indicate that determinations to negotiate under 10 U.S.C. 2304(a)(16), and contracts awarded pursuant to such negotiations, are final and not subject to invalidation or challenge by the Comptroller General or the courts.” But GAO failed to mention another part of that legislative history containing a statement by GAO that “both the accounting officers and the courts have recognized that determinations and decisions fraudulently made, or so grossly erroneous as to imply bad faith, have no finality.” GAO promised to report to Congress any abuses of the finality authority. Despite its commitment of many years to do so, GAO did not report as to whether it considered the determination to negotiate for the M-113 carriers to have been made in good faith. It should have done so, and there should not have remained unchallenged by the hearing subcommittee the GAO statement that it could not question the validity of the contract. It has the authority and the responsibility to do so even if there is no ground, such as fraud or bad faith, on

54. Ibid.
56. Ibid.
which it may ignore the finality of the administrative action.\textsuperscript{57} In advancing the enactment of 87-653, GAO ignored these anomalous aspects of its position. Yet, the actual language of subsection (a) of the bill proposed by GAO, and now enacted into law, constitutes a declaration by GAO that all of the 1947 determinations of impossibility were unwarranted.

Some of the authorized exceptions to formal advertising are probably unjustified and are no doubt abused. However, to pass legislation when the record is so replete with evidence that for the most part such legislation not only would not be, but also actually is not intended to be, observed or productive, is a mockery of the rule-by-law doctrine and a cause of more unwarranted public expense arising out of the resultant confusion and time consumed by those trying to observe the law.\textsuperscript{58}

What has been said of the deficiencies in GAO treatment of the M-113 case constitutes the whole issue raised by section (a) of Public Law 87-653. The section appears to intimate that the agencies have not been using good faith in their determinations to use negotiated procurement, in any of the seventeen circumstances waiving formal advertising. But this intimation is not based upon evidence. GAO's disclosure that it does not perform its statutory review responsibility shows that it has not assembled the evidence. The section furnishes no more protection against abuse of negotiated procurement than the law prior to 87-653. That protection remains dependent upon GAO's performance of its review responsibility, to ascertain whether the facts clearly show that the agency determinations were made in good faith. Therefore, there was and is no need for section (a). The only need is for GAO to perform its statutory responsibility.\textsuperscript{59} Especially apropos is a statement made recently by a member of Congress with respect to another legislative bill that "all we are doing in this instance is taking great credit to ourselves for having reworded some language, to the effect that we are going to control this program... when in reality we are not."\textsuperscript{60} It appears appropriate at this point to note the existence of a GAO-approved procedure which conflicts with GAO's professed objective of controlling the procurement program. The procedure was approved by GAO at approximately the same time that Office was advancing its legislative amendment.


\textsuperscript{58} Hearings on Procurement Practices of the Department of Defense, supra note 34, at 677.


\textsuperscript{60} 107 Cong. Rec. 17682 (1961) (remark of Senator Capehart).
III. The So-called Two-Step Formal Advertising Procedure

In June 1960, the Fairchild Camera and Instrument Corporation protested to GAO the award of a contract for cameras under a two-step procurement, on the ground that the two-step formal advertising procedure is so unreasonably restrictive as to violate the concept of full and free competition required in ordinary formal advertising.61

GAO first reviewed the background and meaning of the two-step procurement method, which had been instituted at the suggestion of the Subcommittee for Special Investigations of the House Armed Services Committee.62

The procedure employed in two-step advertising was likened to that followed in the procurement of qualified products,63 whereby award is restricted to manufacturers who have previously qualified their products. This procedure was approved on the ground that the principles enunciated with approval in a GAO decision on qualified products procurement are applicable to two-step procurement. The “principles” relied upon by GAO were that “[administrative] agencies are vested with a reasonable degree of discretion to determine the extent of competition which may be required [in particular cases and] . . . legitimate restrictions on competition in Government procurement have been determined to be valid when the needs of the agency require it.”64 Students of Gertrude Stein65 may be able to explain the value of a “principle” that “legitimate” restrictions are “valid” restrictions, but its value in the context of the GAO decision purporting to establish the validity of two-step formal advertising as a method of procurement is not apparent.

Under the government- (or rule-) by-law doctrine, the validity of any procurement method must be determined—as was not done in the GAO decision—on the basis of applicable law, which in this respect provides that purchase of goods and services shall be by formal advertising unless the circumstances of the procurement qualify for procurement by negotiation under one of the seventeen clauses of exception to the formal advertising requirement;66 that is to say, in the event a government agency wishes to avoid the formal advertising method of procurement required by law, it must be able to equate the circumstances of the procurement with one of those clauses of exception, if the government-by-law doctrine is to be observed. If the doctrine is ignored, an

62. Id. at 41-42.
63. Id. at 42.
65. “Rose is a rose is a rose is a rose.” Gertrude Stein, Sacred Emily.
executive agency or GAO will fall into the human error, which the advancement of the government-by-law doctrine was designed to avoid, of conjuring up some other basis, such as the qualified products analogy used by GAO—which is unwarranted, not only because it violates the doctrine but because it actually is not analogous. There is a vast difference between regulations which provide ample time for competing businesses to demonstrate their entitlement to receive a copy of the formal advertisement of the Government's needs—as was involved in the GAO decision on qualified products, and a procurement method requiring an administrative determination that it is impossible to obtain competition by formal advertising—as was importantly involved, but not mentioned, in the GAO decision in the Fairchild case. While the procedure in both cases restricted competition, that was not the basic legal issue in Fairchild, notwithstanding the fact that the GAO decision treated it as the sole legal issue. The basic legal issues in the Fairchild case were whether the procurement method used was authorized by law and whether the facts showed that the procurement determinations had been made in good faith. The decision failed to state this, and in attempting to negate the issue as Fairchild presented it, GAO overlooked the real issues and the need to resolve them by relating them to applicable law. These failures were not mitigated by the decision's references to the views of HASC on the method involved and, in view of the infringement of the rule-of-law doctrine involved, the case was no occasion for GAO to confine itself to the issue presented by Fairchild. HASC's views are in the same category as the GAO decision. Both are in direct conflict with the government-by-law doctrine.

GAO referred to the circumstance that "specifications are not sufficiently definitive to permit full and free competition without negotiation [discussion] as to the technical aspects of the requirement to obtain an acceptable basis of understanding between the individual bidders and the Government." It also referred to the need for officials to achieve their evaluation and consummate their commitments within their time limitations. Such circumstances disclose no facts related to any of the clauses of exception, with the possible exception of clause (10): impracticability (impossibility) of obtaining competition (by formal advertising). Actually, the facts presented in the GAO decision fail to qualify the Fairchild case for the use of clause (10). The legislative history contemplated that clause (10) should be used when it is "impossible" to draft specifications, whereas the effect of the GAO decision

is to permit its use merely on a showing that the specifications were not in fact drafted, without regard to whether it was possible to draft them. It is no secret that administrative failure to have specifications drafted is not always justified. Only the facts relied upon could show whether that failure in the *Fairchild* case was justified and whether the determination not to use the formal advertising method required by law was made in good faith. GAO's failure to mention those facts or to relate the decision to them in any way is completely contrary to its insistence on a formal advertising possibility determination in every procurement before attempting to use one of the seventeen exceptions.\(^7^0\)

The case is another example of the fact that GAO is not fulfilling its commitment and statutory obligation\(^7^1\) to find the facts, and to report them when they fail to show good faith in procurement determinations. Also, in another important respect GAO again did not relate its rationale to applicable law. GAO's reference to "time limitations" as a justification for the procurement action was not related to any law permitting consideration of such limitations. When the decision issued, time was a permissible consideration *only* when related to a public exigency which requires immediate performance. That was not shown to be the situation in that case. Therefore the GAO rationale is untenable.

If the purpose of the procedure designated as "two-step formal advertising" rather than by the more accurate term, "two-step negotiated procurement," is to definitize the specifications—as GAO indicated in the *Fairchild* decision—full and free competition, required by law, would seem to demand that once the specifications have become definite on the first step of the procedure, the Government have the privilege of accepting the bid of any one approved in the pre-award survey or by a certificate of competency.\(^7^2\) There is no indication that the procedure has eliminated either the pre-award survey or certificates of competency. A pre-award survey very conceivably might disclose that a firm qualifying on the first step should be excluded, and that another firm, too busy with other work at the time of the proceedings under the first step, was eminently qualified to perform on the basis of the specifications produced at that time, and at a price substantially below all other competitors. The law or the logic on which GAO and HASC deprive the Government of the more economical source is not apparent. What seems most apparent is that both are unwittingly developing a foundation for more potential

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70. See pp. 416-18 supra.
sole source purchases, for they do not indicate that the nonparticipating first-step sources would have an opportunity to bid on any subsequent purchase; and it might become not uncommon for an opportunist-participant to eliminate the other participants by an under-cost bid in order to gain a monopoly position after the first purchase.

It is thus appropriate at this point to consider generally the matter of procurement without competition, and then to proceed to certain specific factors mitigating against obtaining the competition required by law. These factors include legislative-approved devices such as compulsory discussions and "truth-in-contracting" certificates, which result in the submission of something much less than a firm proposal and therefore eliminate the sharpness of competition normally engendered by the knowledge that an offer may be accepted upon receipt by the Government. Other factors are competition lost by misuse of exceptions to applicable law, such as exceptions (11) and (14) to the formal advertising rule, and restrictions on the solicitation of bids and proposals, as in set-aside procurements, which result in something less than the fulness of competition required by law. But first, procurement without competition.

IV. Procurement Without Competition—Unauthorized by Law

Officials in both the executive and the legislative branches of the Government, including GAO, are in agreement that competition is required in negotiated procurement.73 No record has been found to show that any official has ever cited any general authority in law to warrant procurement without competition. The law removes formality only in the means by which public procurement for the national government is achieved.74 The requirement of competition remains, since the law expressly recognizes no exception in the case of negotiated procurement, and GAO has held that formal advertising should be used rather than prior experience, or hearsay or opinion, to establish whether any competition exists, before using the impracticability exception to formal advertising.75 Nevertheless, while responsible officials in both the executive and the legislative branches of the Government pay lip service to the fact that competition is required by law, and periodically express concern that there is not


74. General Services Administration, Federal Supply Service, Reg. Chap. 8, p. 36. See also GSA Reg. 1-11-211.05.

75. See decisions cited note 42 supra.
more competition in procurement, they appear to make no effort to challenge the legality of, or to take exception to, payments made pursuant to awards specifically acknowledged as having been made without competition, and therefore in contravention of law. Whatever the explanation, we find GAO, notwithstanding its acknowledgment that the Armed Services Procurement Act waived only formal advertising,\(^7\) suggesting that under the law purchases not exceeding $2,500 may be made without any competition but failing to cite any law authorizing such procurement without competition,\(^7\) raising no question concerning weapon system procurement procedures generally, which involve no competitive purchases,\(^7\) or concerning weapon system procurement without competition if required system deliveries will be delayed,\(^7\) and reporting a noncompetitive purchase of a radar system as unviolative of statute or regulation.\(^6\) We further find GAO reporting noncompetitive purchases of oscillators without noting the violation of law involved,\(^8\) failing to point out the contravention of law involved in the Collins Radio case where the purchase was without competition,\(^8\) and failing to remind the Senate Judiciary Subcommittee on Patents, Trademarks and Copyrights, in April 1960, that there was no law authorizing the Army to award a contract to Fruehauf for 500 vehicles, without competition, either for lack of drawings or for any other reason.\(^8\)

Also, without advising Congress that such procurement involves another example of purchasing without competition, in contravention of law, GAO reported and testified at great length on the evils of sole source procurement of over a billion dollars of aeronautical replacement spare parts, where failure to use competitive buying increased the cost to the Government by about fifty per cent.\(^8\) It was GAO's duty to inform Congress of the legal basis of the purchases which increased the cost to the taxpayer by about a half billion dollars and, if none existed, as is the fact, so to inform Congress. GAO stated that with few exceptions, the

\(^7\) Hearings on H.R. 7995 and H.R. 8499, supra note 73, at 5091 (1956).

\(^8\) Hearings on S. 500, supra note 26, at 306-07.

\(^7\) Id. at 305.

\(^9\) Hearings on Military Procurement Before a Subcommittee of the Senate Select Committee on Small Business, 86th Cong., 2d Sess. 401 (1960).


\(^8\) Id. at 16.


\(^13\) Hearings on Sole Source Procurement, supra note 53, pt. 1, at 872.
procurements were negotiated under the authority contained in 10 U.S.C. § 2304(a)(10).\footnote{85} But that section provides no authority for not obtaining competition. GAO's failure to state that the purchases were illegal implies that GAO construes section 2304(a)(10) as authority to waive competition, whereas it is merely one of seventeen exceptions permitting a waiver of formal advertising only. Moreover, GAO's references in its report to "little effort to find or develop competitive sources of supply" and to "unnecessary noncompetitive procurement"\footnote{86} suggest that section 2304(a)(10) was not applied in good faith. This suggestion is further fortified by the fact that the GAO report failed to show that the determinations of sole source were based upon the results of formal advertising rather than on speculation. GAO has held many times that such determinations must not be based upon speculation.\footnote{87} Yet it failed to associate those decisions with its sole source report. GAO should have advised Congress as to whether the agency determinations were or were not made in good faith, as Congress expected GAO to do\footnote{88} and as GAO long before its report promised to do.\footnote{89}

Also, GAO should have advised Congress of another act, enacted at the same time as the Armed Services Procurement Act,\footnote{90} which authorizes the secretary of any military department to buy designs, aircraft, airplane parts and aeronautical accessories considered necessary for experimental purposes, "with or without competition and by contract or otherwise," and to contract for procurement of any of those items in quantity without competition.\footnote{91} GAO gave Congress the erroneous impression that the Armed Services Procurement Act is the only law to be considered with respect to the procurements involved. By not informing Congress, as it is obligated by statute to do, as to whether it found the procurements to be in contravention of law, or that it could not determine whether they were in contravention of law, together with its reasons, GAO indicated that it actually made no effort to discharge its statutory responsibility to determine whether contraventions of law occurred in the use of the tenth exception. If some or many of the procurements reported by GAO qualified as noncompetitive procurement under 10 U.S.C. § 2274, the fact that the purchasing officer cited the tenth exception to 10 U.S.C. § 2304(a), rather than 10 U.S.C. § 2274, would not render invalid any

\footnote{85}{Id. at 7.}\footnote{86}{Id. at 872.}\footnote{87}{See decisions cited note 42 supra.}\footnote{88}{S. Rep. No. 571, 80th Cong., 1st Sess. 3 (1947).}\footnote{89}{Id. at 26.}\footnote{90}{10 U.S.C. §§ 2301-57 (1958), as amended, 10 U.S.C. §§ 2304-11 (Supp. IV, 1963).}\footnote{91}{10 U.S.C. § 2274 (1958).}
which qualified under 10 U.S.C. § 2274. Since it was GAO's duty to
determine the legality of the purchases and report its conclusion to Con-
gress, it also was its duty to consider 10 U.S.C. § 2274 and to report
to Congress its evaluation of the purchases in the light of 10 U.S.C.
§ 2274. It clearly did not constitute responsible reporting to fail to relate
the report in any way to 10 U.S.C. § 2274, and it was clearly in contempt
of government by law as well as of its statutory duty for GAO to fail to
state whether the law had been violated.

In the case of the M-113 personnel carrier, referred to in the sole source
procurement hearings, GAO, whose statutory duty is to insist on com-
petition in all procurement unless authority to procure without competi-
tion is provided by law, stated that it "seems inconsistent . . . to then
go out and get competition" where exception (16) is used.92 It seems
inconsistent for GAO to suggest that it is inconsistent to observe the law.
Also, logically as well as legally, it would appear consistent to seek
competition. It is in the Government's interest to have the same ad-
vantages of selection and of sources competing against each other as
it has in other procurement situations. The fact that unlimited competi-
tion raises a question of good faith in not using formal advertising does
not alter the lack of authority to make procurements without any com-
petition. GAO did not state, and no one asked GAO to state, the authority
it relied upon in suggesting that procurement under exception (16) may
be made without competition. Since such authority does not exist, such
a suggestion by GAO would seem to encourage more procurement without
competition.

Such a GAO posture may account for the Navy's over-simplification
of the matter of noncompetitive procurement, as reported in the Federal
Bar News. The substance of the report indicates that the Navy indulges
in noncompetitive procurement on a large scale because of its conviction
that it is only human to deal with an older, proved source of supply in
order to assure quality and timely delivery and to save effort and expense,
or where specifications, drawings and technical data are not available for
more than one source of supply.93 The Department appears unconcerned
that the law provides no authority to purchase without competition and
that therefore its rationale of the matter, especially its reliance on the
"human nature element" rather than on the law, is the antithesis of the
rule of law which Congress declares.

The error in the GAO position in the case of the M-113 personnel
carriers is not limited to the foregoing. It is important at this time to
refer briefly to another error. In the same hearings in which GAO ap-

92. Hearings on Sole Source Procurement, supra note 53, at 1003.
peared to construe the law authorizing exceptions to formal advertising, as exceptions to the competition requirement, GAO sent a letter to the hearing chairman construing the same law as providing an exception to the law which requires the use of Government-owned facilities. GAO advised the chairman that 10 U.S.C. § 2304(a)(16) authorizes the Secretary of the Army to negotiate a contract with a particular supplier in the interest of national defense and industrial mobilization, notwithstanding the existence of other private or Government-owned production facilities.\footnote{44. Hearings on Sole Source Procurement, supra note 53, at 1267.}

GAO therefore concluded that 10 U.S.C. § 2304(a)(16) supersedes 10 U.S.C. § 4532(a), and "that contracts negotiated under 10 U.S.C. § 2304(a)(16) may be regarded as authorized exceptions to the provisions of 10 U.S.C. § 4532(a)."\footnote{45. Id. at 1268.} GAO clearly is in error. 10 U.S.C. § 2304(a)(16) is only an authorized exception to the law requiring that procurement shall be made by formal advertising. It relates only to a \textit{method} of procurement, whereas 10 U.S.C. § 4532(a) relates to the \textit{source} of procurement. The method becomes involved only \textit{after} it has been determined that the supplies to be procured cannot be produced "on an economical basis" and "in factories or arsenals owned by the United States." Thus there is no basis for GAO's conclusions as to 10 U.S.C. § 2304(a)(16), and to describe it as GAO has only adds to the existing abundant confusion about negotiated procurement.

Perhaps the most persuasive evidence that GAO and Congress are badly confused and are each pursuing conflicting courses with respect to competition in procurement is the enactment of Public Law 87-305.\footnote{46. 75 Stat. 666 (1961), 15 U.S.C. § 631 (Supp. IV, 1963).} Only ten days after the enactment of Public Law 87-653\footnote{47. 10 U.S.C. §§ 2304(a), (g), 2306(f), 2310(b), 2311 (Supp. IV, 1963).} as a means of obtaining more competition in procurement, Congress enacted 87-305. GAO had raised no question on one of the sections involving procurement.\footnote{48. Hearings on S. 836 Before the Senate Select Committee on Small Business, 87th Cong., 1st Sess., at 47-49 (1961).} It is clear that section 8 furnishes the executive agencies a basis for concluding that a waiver of competition is authorized in many procurements, because the section patently is based upon a theory that competition is not required in the ten circumstances enumerated in that section.\footnote{49. "[P]rocurements (1) which for security reasons are of a classified nature, or (2) which involve perishable subsistence supplies, or (3) which are for utility services and the procuring agency in accordance with applicable law has predetermined the utility concern to whom the award will be made, or (4) which are of such unusual and compelling emergency that the Government would be seriously injured if bids or offers were permitted}
and Congress have unwittingly established a means for making innumerable and varied procurements without competition, at practically the same time they were declaring great anxiety over the volume of noncompetitive procurement and advancing 87-653 as necessary to reduce the volume.

Other indications that GAO's policies are operating at cross-purposes are its promulgation and endorsement of standard forms which preclude, without authority of law, the use of competition and firm offers, while at the same time it associates itself with those who declare no law authorizing any purchase without competition and declare the urgent need for much more competition and greater adherence to rule by law! The existence of the forms involved is a contravention of law in itself. Yet they were promulgated and endorsed by the very office required to report contravention of law to Congress.

Disregard of the law and failure to enforce it because certain individuals in the executive and legislative branches of the Government believe the law is improper or inadequate is the very antithesis of government by law. It seems clear that no single failure to enforce the rule of law in procurement matters is more responsible for other failures in such matters than the failure to enforce the law requiring competition in all procurement and to come to grips with the question of just what exceptions are justified. It is an open invitation to waive formal advertising, which is designed to secure competition, and to resort to negotiated procurement, on the theory that the law does not require competition in the latter method of procurement. It is also an open invitation to make excessive use of exception (10) as a justification for sole source procurement without regard to the fact that the context in which exception (10) appears in the act makes it clear that it refers to impracticability (impossibility) of obtaining competition by formal advertising, since it is stated as an exception to formal advertising and not as an exception to the law requiring competition. Failure to enforce the law requiring competition is also a natural inducement to experiment with what has become known

to be made more than 15 days after the issuance of the invitation for bids or solicitation for proposals, or (5) which are made by an order placed under an existing contract, or (6) which are made from another Government department or agency, or a mandatory source of supply, or (7) which are for personal or professional services, or (8) which are for services from educational institutions, or (9) in which only foreign sources are to be solicited, or (10) for which it is determined in writing by the procuring agency, with the concurrence of the Administrator, that advance publicity is not appropriate or reasonable. 75 Stat. 668 (1961), 15 U.S.C. § 637(e) (Supp. IV, 1963). Most of the circumstances have no basis in prior law for waiving competition.

100. H.R. Rep. No. 1224, 82d Cong., 1st Sess. 8, 13, 15 (1951); Standard Form No. 1143a, 7 GAO 5200.
as the weapon system procurement method, which has been shown to include noncompetitive as well as competitive procurement. Further, such failure encourages the procurement of research and development work under exception (11) without obtaining competition, which in turn places the Government in the position of not being able to secure competition in the ultimate production contract. This situation is developed in more detail in a later part of this article.

If, notwithstanding its declarations on the matter, GAO actually believes that the law, without reference to Public Law 87-653, authorizes procurement without competition, and thereby relieves it from any obligation to take exception to payment made pursuant to awards without competition, Congress and the public should be informed of that belief and of its source in law, if any. If the Armed Services Committees do not share the GAO belief, they should explain how they justify GAO's practice of not declaring noncompetitive procurement to be in contravention of law. It is a mockery of logic for GAO and those committees to expect the public to take seriously their declarations of interest in increasing competition in public procurement if they fail to furnish forthright answers to these questions.

The problem of reconciling official declarations of desire to restore the rule of law and to secure more competition in procurement, with official approval of express disregard of the law requiring competition in all procurement is compounded by the GAO-HASC legislative proposal, which was included in the enacted amendatory bill H.R. 5532 and which, it is said, will increase the use of competitive procurement:

In all negotiated procurements in excess of $2500 in which rates or prices are not fixed by law or regulation and in which time of delivery allows proposals shall be solicited from the maximum number of qualified sources consistent with the nature and requirements of the supplies or services to be procured . . . . 101

The law prior to Public Law 87-653 conferred no general authority upon procurement officials to obtain less than "consistent," "maximum" competition in procurement actions merely because of "time of delivery," or for any other reason. The prior law only waived the procurement of such competition by formal advertising if the procurement qualified under one of the seventeen exceptions to that method of procurement. If the procurement so qualified and the negotiated method was used, it was still necessary under prior law to solicit "maximum" competition. Thus, instead of increasing competition, as it has been represented to do, Public Law 87-653 decreases competition by requiring less than was required before its enactment. Also, in none of the seventeen exceptions to the

competition-by-formal-advertising requirement expressly provided by law can GAO and HASC find any authority to purchase without formal advertisements for competition merely because of "time of delivery."\(^{102}\) Only under the circumstances of a public exigency requiring immediate delivery and not permitting of the delay incident to formal advertising does the law permit a waiver of formal advertising;\(^{103}\) but even in that situation the law before Public Law 87-653 provided no authority to purchase without "consistent," "maximum" competition. The mere fact that time of delivery would not permit the use of formal advertising was and remains insufficient to waive formal advertising.\(^{104}\) The necessary circumstance is a public exigency requiring immediate delivery or performance.\(^{105}\) Under Public Law 87-653, however, once a procurement qualifies under the public exigency exception to formal advertising, procurement officials no longer are required to solicit "consistent," "maximum" competition. Nor are they required to solicit such competition under any of the other sixteen exceptions to the formal advertising requirement if "time of delivery" will not permit. In view of the foregoing and of the recognized abuse of the "urgency" excuse by executive agencies over the years,\(^{106}\) it remains for the sponsors to explain how the new law accomplishes the GAO-HASC objective of increasing competition, or the HASC objective of restoring the rule of law to defense procurement.

Undismayed by the inconsistencies in declaring their intention of restoring the rule of law, including competitive purchasing, while at the same time failing to report as contraventions of law purchases made without competition, GAO and HASC would add further roadblocks to genuine competition by having the law require that written or oral discussions be conducted with all responsible offerors who submit proposals within a competitive range, price and other factors considered. Some analysis is demanded of the attempts to achieve that requirement.

V. Compulsory Discussions in Lieu of Firm Bids

Cases of record\(^{107}\) show the problems inherent in discussions with bidders after receipt of bids and the importance of maintaining the

\(^{102}\) Exception (14) provides for only undue delay in procurement.


\(^{104}\) To waive it for that reason is to ignore the express language in the applicable law.


\(^{106}\) Hearings on S. 1084 and S. 1176, supra note 83, at 176.

\(^{107}\) 31 Decs. Comp. Gen. 378 (1952); Committee Print, Report on Study of Armed Services Procurement Act, Title 10 U.S.C. Chapter 137, by Special Investigations Subcommittee of the House Committee on Armed Services, Subcommittee Proceedings No. 3, 85th
Government's bargaining position through observance of the law requiring solicitation of firm offers in the first instance. Notwithstanding those problems, GAO and HASC reactivated in the Eighty-sixth and again in the Eighty-seventh Congress the controversy, which had appeared settled by the exchange of correspondence with GAO in 1957, with respect to the administrative regulation permitting acceptance of a bidder's initial offer without further discussion. GAO first proposed legislation which would require discussions with all bidders in the lowest price range and, with limited exception, to prohibit acceptance of any offer without further discussion:

In all negotiated procurements in excess of $2500 in which rates or prices are not fixed by law or regulation and in which time of delivery will permit, proposals shall be solicited from the maximum of qualified sources consistent with the nature and requirements of the supplies or services to be procured and written or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range, price and other factors considered: Provided, however, That the requirements of this subsection with respect to written or oral discussions need not be applied to procurements in implementation of authorized set-aside programs.

The Department of Defense objected to the requirement of written or oral discussions. It expressed the view that such a requirement would preclude award from being made on the basis of the initial proposals without written or oral discussions even in situations where a substantial number of clearly competitive and responsible proposals have been obtained and where the contracting officer is satisfied that the most favorable proposal is fair and reasonably priced. Such an inflexible requirement in law, said the Department, could have a result not in the best interests of the Government in that it would be "an open invitation to offerors not to quote their best prices initially because of a statutory requirement that there be bargaining in every procurement."

Such a procedure as that proposed by GAO would reduce requests for

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108. Hearings Before the Special Investigations Subcommittee of the House Armed Services Committee, under authority of H.R. Res. 112, Study of Armed Services Procurement Regulations, Sections 1-605 and 2-302 and Navy Procurement Directive 3-002.1, 84th Cong., 2d Sess., at 644-48 (1957), in which proposals were said to have been solicited on a "competitive basis" but in which it appears doubtful that the Government obtained genuine competition, since the procurement agency reported that the proposals were submitted with the distinct understanding that they were subject to withdrawal at any time; and the M-3 air conditioner case with respect to which HASC itself declared the whole procedure open to serious question. Id. at 648-51.

109. Id. at 3259.


price proposals to requests for price information and would perpetuate the GAO-McShain rationale,\textsuperscript{112} which destroys the important option position of the Government in negotiated procurement, desired by such members of HASC as Congressman Kilday.\textsuperscript{113} It would compel negotiation upward as well as downward.\textsuperscript{114} It would prolong the consummation of a contract and would not produce the full and free competition required by law. Obviously, if bidders know they can equivocate on the prices submitted, there can be little, if any, of the genuine competition which the Government is obligated by law to secure in the public interest.\textsuperscript{115} GAO stated that it felt that "when the offerors come in with their offers, . . . at least they should be given a second chance, or . . . some discussion should be had with them, to see if they might not give the Government a better price, or a better contract."\textsuperscript{116} It has been said that there is no question of courtesy in such public matters, and that there is involved only a question of right and duty.\textsuperscript{117} The duty is plain. The Government has no right to abort the traditional competitive process of securing the benefit of the sharp competition engendered by the solicitation of firm prices. It has no authority in law to make a game of the serious business of public procurement, and to expose itself and the public purse to the artifices, caprices and whims obviously invited by binding itself to give those with whom it must bargain a second chance.

\textsuperscript{112} That notwithstanding (1) the lack of any law authorizing any representative of the Government to solicit other than a firm bid, under the circumstances of the case, and the lack of any documentary evidence that the Government sought anything but a firm proposal, (2) the McShain unqualified promise in its firm proposal, to execute a more formal contract in 30 days after opening, and (3) McShain's pressing for acceptance of its proposal until termination of a prior contract on which it had depended to reduce its costs—informal advice by the Government, at a conference before submission of proposals, that negotiations would be conducted with the three lowest bidders to determine the final conditions and price, transformed a form proposal into mere price information, subject to increase or decrease by the contractor (McShain) at its option. 31 Decs. Comp. Gen. 378 (1952). The later decision on the case in the Court of Appeals for the District of Columbia, United States v. John McShain, Inc., 258 F.2d 422 (D.C. Cir. 1958), demonstrates that the facts failed to support the GAO conclusions and the error in the meaning of negotiation as implied in the GAO decision. While the court subsequently failed to question a contrary jury verdict in the district court to which the case was remanded, United States v. John McShain, Inc., 288 F.2d 165 (D.C. Cir. 1961), the errors of the GAO decision remain on the basis of the facts before GAO as discussed in its decision.

\textsuperscript{113} Hearings on Procurement Practices of the Department of Defense, supra note 111, at 717.

\textsuperscript{114} An inevitable result of treating proposals as something other than firm.


\textsuperscript{116} Hearings on Procurement Before a Subcommittee of the Senate Committee on Armed Services, 86th Cong., 2d Sess., pt. 2, at 160 (1960).

\textsuperscript{117} Proceedings, supra note 107, at 651.
NEGOTIATED PROCUREMENT

It has fully adequate authority under existing law to reject any and all proposals, for price or for other reasons, and if it needs the advice of the trade to assist it in determining a reasonable price, it should seek price information as such before requesting proposals. Rather than law based upon the theory that offerors "should be given a second chance," as proposed by GAO, it appears manifest that what is needed is uniformity in understanding that the Government has the right and duty to offer bidders another chance if the prices offered are not in the best interests of the Government—and only in those circumstances.

Since bidders would not be required to commit themselves to follow through on their quotations (price information), a law unqualifiedly compelling discussions would encourage some bidders to attempt arbitrarily to submit bids low enough to place them in the lowest price range where they would be entitled to a discussion. Or, being sufficiently well acquainted with the price potentialities of the item involved to be certain of being within the lowest price range, such bidders would be encouraged to quote prices padded sufficiently to allow concessions at the negotiation table and yet be reasonably certain of being the lowest bidder at a price still above the most economical and just price for the Government. The vulnerability and destructive effects of the GAO proposal are mitigated little, if any, by the coordinated effort in that direction with the Department of Defense, which produced revised language as a part of the amendment to existing law, enacted on September 10, 1962:

(c) Section 2304 is amended by adding a new subsection as follows:

"(g) In all negotiated procurements in excess of $2,500 in which rates or prices are not fixed by law or regulation and in which time of delivery will permit, proposals shall be solicited from the maximum number of qualified sources consistent with the nature and requirements of the supplies or services to be procured, and written or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range, price, and other factors considered: Provided, however, That the requirements of this subsection with respect to written or oral discussions need not be applied to procurements in implementation of authorized set-aside programs or to procurements where it can be clearly demonstrated from the existence of adequate competition or accurate prior cost experience with the product, that acceptance of an initial proposal without discussion would result in fair and reasonable prices and where the request for proposals notifies all offerors of the possibility that award may be made without discussion."

The italicized language of the proviso is clearly intended to meet the objections of the Department of Defense to compulsory discussions.

118. Such as GAO attempted but failed to have enacted.


while attempting at the same time to enact into law GAO's recommendation. However, as to actually fulfilling GAO's recommendation of compulsory discussions or altering the status quo as it existed prior to the amendment, the new subsection, like most other parts of the amendment, is for the most part an illusion. The Department of Defense does not appear to have been given any limitation on the solicitation of firm offers in all cases or on placing all its potential offerors on notice that discussions in any procurement are at its option. For it can never determine whether competition is, in the language of the proviso, "adequate," until it opens all proposals received. Therefore, it can under the amendment, and should, always place offerors on notice "that award may be made without competition." GAO itself has declared that the Government cannot speculate but must solicit to determine the extent of competition, and the Department's testimony shows that its determination of adequacy is made after it receives the proposals solicited, rather than on the basis of its information on available competition known at the time it prepares its request for proposals. Therefore, not only did prior law not confer authority to solicit anything less than a firm bid, which would justify such procurement action, but subsection (c) of the new law cannot be construed to contain such authority. And there are other aspects to be noted which show a number of weaknesses in the language used to describe the circumstances excepted from the discussion requirement.

Since both GAO and HASC acknowledge that the decision as to which bids are "within a competitive range" should be "left to the contracting officer," and since other factors in addition to price influence the decision, the subsection seems as pointless as it appeared in the bill stage to three members of the hearing subcommittee—including the chairman, who expressed this view clearly. One member stated the opinion "we are doing a lot of talking about a lot of nothing." "So we wind up pretty much where we are, anyway." Such views appear very persuasive when considered in the further light of pertinent portions of the DOD regulation which would implement that subsection of the new law. It provides that "award of a contract may be properly influenced by the

121. The option privilege of the Government is of the essence in firm offers.
122. 41 Decs. Comp. Gen. 484, 490 (1962); 39 id. 566 (1960); 37 id. 524 (1958); 30 id. 34 (1950); 27 id. 737 (1947); 23 id. 395 (1943); 18 id. 578 (1939); 16 id. 318 (1936).
124. Id. at 717.
125. Id. at 717-18.
126. Id. at 716.
127. Id. at 718.
proposals which promises the greatest value to the Government in terms of possible performance, ultimate productibility, growth potential and other factors rather than the proposal offering the lowest price or probable cost and fixed fee.\textsuperscript{128} It seems crystal clear that the regulation permits consideration of so many different and speculative "other factors," as referred to in subsection (c), that the contracting officer may continue, as before the enactment of subsection (c), to deal with a very restricted number of bidders, even but one or two, despite what the sponsors of the subsection may have hoped to accomplish by the requirement to deal with "all . . . within a competitive range." Irrespective of how many bidders may have proposed prices "within a competitive range," the permissible "other factors" are so broad, indefinite and speculative in character as to negate the advantages of fair competition to both the contractor and the Government, traditionally sought by such estimation of the Government's needs as will assure a uniform, nonarbitrary evaluation of all proposals solicited. Regardless of whether or not the procurement is one which may, or should,\textsuperscript{129} be the subject of proper specification, the regulation permits such broad discretion in evaluation of the proposals as to permit new specifications to be imposed after receipt of proposals, arbitrarily, without uniformity, and in such manner as to exclude many, if not most, from the "competitive range." But most important, on the constructive side, the wide discretion permitted by the regulation allows the contracting officer to accept a bid or proposal without any discussion, and thus makes it clear that all requests for proposals should seek firm bids. But the Armed Service Procurement Regulation shows that the Defense Department is construing subsection (c) of the new law as doing precisely what the Department indicated in the hearings and reports preceding its enactment\textsuperscript{130}—placing a restriction on the solicitation of firm bids. If GAO and HASC had repudiated the Department's position, as should have been done in the legislative history,\textsuperscript{131} the Department would have no basis for its omission from the regulation of a statement that all solicitations for proposals shall notify the offerors of the possibility that award may be made without discussion. Since firm bids are the spark of genuine competition, this is a most serious deficiency in the regulation, and such subcommittee members as Congressman Kilday\textsuperscript{132} should insist

\textsuperscript{128} Armed Services Procurement Reg. 3-805.1(d), 32 C.F.R. 3.805-1(d) (1961).

\textsuperscript{129} It is common knowledge that frequently there is no persuasive justification for the failure to have specifications.

\textsuperscript{130} 107 Cong. Rec. 1655-57 (1961).

\textsuperscript{131} Both should have made it clear to DOD that the subsection could only affect the procedure after solicitation and receipt of proposals.

\textsuperscript{132} Hearings on Procurement Practices of the Department of Defense, supra note 111, at 717.
that the regulation be revised to require solicitation of firm bids in all procurement. This would still not interfere with whatever GAO accomplished in the new law, if anything, with respect to compelling discussions, and would at the same time bring the regulations in line with the law as it is and always has been with respect to the solicitation of firm bids as a *sine qua non* of the legal requirement of competition in public procurement. Since the GAO does not report failure to have competition in procurement as contravention of law, it is not to be expected that that Office will make any report on DOD’s failure to solicit firm bids as a contravention of law.

Other indications that the “merits” of the new subsection are illusory appear in GAO’s testimony on the principal portion of the subsection. It shows that notwithstanding the fact that GAO authored the language, it had no formula in mind to determine whether proposals are “within a competitive range,” and that it had no definition of “responsible offerors.” With no understanding of its own language, it is not clear how GAO expects to have any uniformity in its audit of the new amendment or how it can fulfill its statutory obligation to report to Congress contraventions of law with respect to the amendment.

What, then, is GAO’s justification for representing that compulsory discussions will produce more of the kind of competition which the Government should have, and that it is possible to achieve it without subjecting the Government to procurement evils in the process? It has cited no cases which Congress could embrace as proving GAO’s proposal meritorious. It thus remains for GAO and HASC to cite any advantage to be gained by compulsory discussions, and to furnish the facts on which they have determined that those advantages “clearly and

134. *Id.* at 63.
135. In an apparent effort to convince one doubtful subcommittee member of the soundness of its proposal to require discussions with bidders (and thus prohibit solicitation of firm offers), GAO finally related the facts of a case, *Hearings on Procurement Practices of the Department of Defense, supra note 111,* at 721-23, which it considered illustrative of the need of adopting its proposal. But the procedure in that case provides no facts to establish the wisdom or the validity of the GAO proposal. Therefore, the member appeared unimpressed. GAO seemed to be attempting to legislate competence or good judgment which, as one subcommittee member stated, “you just cannot do.” *Id.* at 723. Unless consideration of all the facts, which GAO did not appear to have assembled, compelled a conclusion that the administrative estimate was not accurate and valid, GAO’s argument for a discussion to obtain the price on the negotiated bid, which was 7% below that estimate, does not appear persuasive. The full facts might demonstrate knowledge by the contracting officer that the negotiated bid must be in error and that acceptance of it would only result in allegation of error in bid, or default.
convincingly" exceed the disadvantages, including the detriment to the Government's bargaining position resulting from not requesting firm price proposals, price padding, unfair and irresponsible competition, secrecy, and substitution of individual responsibility for the rule of law. Consideration of another illusory part of the new law is now in order.

VI. ILLUSIONS IN SUBSECTION (e)—THE "TRUTH-IN-NEGOTIATING CERTIFICATE"\textsuperscript{136}

Subsection (e) of the new law provides that a prime contractor shall be required, prior to the award of any negotiated prime contract in excess of $100,000, to certify that to the best of his knowledge and belief, the cost or pricing data he submitted was accurate, complete and current.\textsuperscript{137} But it is to be noted that the subsection does not require the contractor to furnish a certification in support of his cost or pricing data at the time he submits his proposal, or to agree to furnish one if he is notified an award will be made to him upon the submission of such certification. The subsection only provides what he shall be "required" to do if he is to be awarded the contract. Therefore, subsection (e) enables the contractor (bidder) to avoid becoming contractually obligated to perform pursuant to the offer contained in his proposal, as accepted by the Government, by merely refusing to certify his data. In other words, the subsection provides bidders with a means of withdrawing a bid which was, or should have been, submitted for acceptance by the Government, at the Government's option, when opened, without discussion, if the price and other factors qualified it for such acceptance. Thus, the destruction of firm bids is the "joker" in subsection (e), and it apparently was overlooked in the legislative processing because of the abandon with which both GAO, and HASC as a whole, treated the lack of any authority in law to solicit other than firm bids. In view of such official indifference toward the importance of firm bids, and under the present language of subsection (e), the bidder need feel but mildly the pressures of competition when he figures his bid price, because he knows that he will not have to certify his cost data in support of that price, and that if and when the Government finally decides to make the award to him, he may have learned much about the other bid prices and decide to withdraw or to alter his price considerably before certifying his cost data. Such permissible equivocation by the bidder and the relief from the full pressures of competition means, of course, that the Government is deprived of the benefits which the law contemplates that the Government shall


derive from the existence of such pressures when the bidder is preparing his response to the request for proposals.

The discrepancy between subsection (e) and the absence of authority to solicit anything but a firm price, with the resultant diminution in genuine competition for public procurement—in direct conflict with the increased competition which the new law purportedly was to accomplish—is not the only weakness in that subsection. As happened in the case of subsection (c), the language contributed by DOD to subsection (e) as an addition to the GAO language defeats its purpose. The views of the subcommittee members that subsection (c) is pointless are equally applicable to subsection (e), notwithstanding the value attributed to it by the chairman; for like subsection (c), the proviso confers such broad discretion in applying the certification requirement as to render the subsection substantially if not almost entirely ineffective. It provides that:

the requirements of this subsection need not be applied to contracts or subcontracts where the price negotiated is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, prices set by law or regulation or, in exceptional cases where the head of the agency determines that the requirements of this subsection may be waived and states in writing his reasons for such determination.

"Adequate competition" appears from the Regulation of the Department to be that which produces "fair and reasonable prices calculated to result in the lowest ultimate overall costs to the Government." But determination of the "lowest ultimate overall costs" is "left to the contracting officer"—even more so than determination of "competitive range" under subsection (c)—because neither GAO or HASC appears to have objected to the other pertinent part of the Regulation, which permits consideration of cost to be influenced by such speculative matters as "possible performance, ultimate productibility, growth potential and other factors" in addition to the actual price figure available. Since GAO's procedure on auditable matters, in spite of its statutory responsibility with respect to agency determinations, is not to review, evaluate and report, because of its theory that it cannot overrule, it is clear that the agencies involved have even less occasion to fear surveillance of their

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141. Armed Services Procurement Reg. 3-801.1(a), 32 C.F.R. § 3.801-1(a) (1963).
143. See note 128 supra.
actions under subsection (e), so long as those actions may be taken on the basis of the speculative matters above mentioned. And in view of the tendency of procurement officials to exercise their exceptional authority rather as the rule, these is little more that DOD could have added to the GAO language to “wind [us] up pretty much where we [were]. . . .”

Whether or not effective as enacted, subsection (e) is but another example of attempts to add more law to fully adequate but unenforced existing law. In effect it is an underwriting of executive and legislative agency incompetency and inefficiency, in that it substitutes a document to be issued by the contractor for the auditing and documentation required by law both before and since Public Law 87-653. Many if not most of the cases to which the subcommittee chairman attributed the need for subsection (e) were cases in which the executive agency had made little or no attempt to check the prices proposed by the contractors, notwithstanding the fact that the agency could not therefore make a proper determination, as required under 10 U.S.C. § 2306(b) and other parts of the Armed Services Procurement Act. All that was and still is needed is for GAO to discharge its statutory duty to review, evaluate and report on those determinations and refuse to recognize those not made in good faith. The burden would be and still is upon both the executive agency and GAO to show that the agency determinations required by law are made in good faith, if the agency does not establish for itself, without regard to the contractor’s certification, that “the cost or pricing data he submitted was accurate, complete and current.” The issue is as simple as that, and therefore the justification for the time and expense of legislating subsection (e) remains as enigmatic as many other aspects of procurement law enforcement. And since GAO and HASC appear unaware of the ineffectiveness of the subsection for the purpose for which they designed it, GAO and DOD presumably will continue to ignore the law with respect to “good faith” executive agency determinations.

The chairman of the House subcommittee which approved the subsection indicated on the House floor that Congress could stop the withholding of accurate, complete and current prices by requiring the securing of the certificate provided for under subsection (e) and an audit of the

144. Hearings on Procurement Practices of the Department of Defense, supra note 111, at 718.
prices “before final payment.” But the chairman referred to no part of the subsection or to any other part of the new law as requiring such an audit. And he is very familiar with the fact that both the executive agency’s and the GAO’s audits are very selective, covering as few as one per cent of all defense contracts in the case of GAO. But even if most if not all of the contracts involved were audited, as the subcommittee chairman, by his remark, intimated they would be, performance of the audit at any time “before final payment,” and thus not necessarily before the Government committed itself to a contract, would mean that the head of the agency would have no significant basis for the determination required by 10 U.S.C. § 2306(b), since he would be relying entirely on the veracity and business acumen of the contractor. The contractor might be truthful in his certification but at the same time may unwittingly have made a considerable error in transposition of figures, or in some other respect, or may not have been sufficiently thorough in determining whether the data he furnished the Government actually was accurate, complete and current. Against these deficiencies in the subsection (e) certificate the Government is provided no protection, because the contractor certifies only “to the best of his knowledge and belief.” The subsection therefore leaves the Government completely unprotected from any contractor who chooses, as an excuse, to rely on error, oversight, or the general carelessness of his staff in investigating the reliability of price data. Under existing law and procedures, that state of unprotection will exist at least until final payment is to be made, and perhaps beyond that time, either because of the long period of time frequently occurring before final payment which may make it virtually impossible to check the contractor’s veracity or because the audit is so selective that no representative of the Government ever attempts to make such a check. With such audit selectivity and with so many exceptions to excuse the agency from obtaining the certificate, the subcommittee chairman’s statement of the great value of subsection (e)—“When it is law, no contract will be enforceable without it”—clearly lacks persuasion. Audit selectivity alone obviously means that the enforicibility of practically all contracts, and the contractors’ legal entitlement to be paid from public funds, are never questioned, and that therefore there are many requirements in the law that may be ignored without fear by both contractor and executive agency. As bad as the Government’s situation is, where such an audit at best takes place so long after the certification is proffered by the contractor, it is still no more reassuring for the Government to con-

148. See note 136 supra.
149. Hearings on Weapons System Management, supra note 146, at 380.
NEGOTIATED PROCUREMENT

template the results that would be occasioned by an audit before acceptance of the certification and award, for in that event the Government's almost simultaneous verification of the contractor's veracity might appear unreasonably offensive to many contractors, and complicate contracting relationships to the detriment of the Government.

In view of all of the deficiencies and weaknesses in subsection (e) which have been noted there appears to be little justification for the subcommittee chairman's description of it as "one of . . . [the] most important provisions"\(^\text{151}\) of the bill which became Public Law 87-653. Instead, what appears much more apropos is a statement made by him some years before, that "sometimes in our anxiety to legislate, . . . we do not accomplish what we seek to do,"\(^\text{152}\) and the remark of that other Congressman who said, in connection with another legislative matter, "So all we are doing . . . is taking great credit to ourselves . . . to the effect that we are going to control this program . . ., when in reality we are not."\(^\text{153}\)

It appears that the same may be said of the ineffectiveness of Public Law 87-653 to correct the misuse of exceptions (11) and (14) in Section 2304(a) of the Armed Services Procurement Act.

VII. CONTRAVENTIONS OF LAW IN EXCEPTIONS (11) AND (14)

The Armed Services Procurement Act permits the procurement of experimental, developmental or research work, including design work, without formal advertising but not without competition.\(^\text{154}\) Therefore, if the act is observed, awards of the same design work for the ultimate production model will be made to several contractors.\(^\text{155}\) Such awards establish a number of contractors with the necessary experience and familiarity to qualify as competitors for quantity production from the chosen model. In other words, since there is no general law authorizing award of the production contract without competition, those multiple awards for the same design are the means to avoid contravention of law. But Congress provided another clause which has been erroneously construed as authority to solicit a contractor for quantity production, without competition, despite the conflict of that construction with the express official view that authority to negotiate is not authority to waive competition. That clause only permitted a waiver of formal advertising where "formal advertising and competitive bidding might require duplication of invest-

\(^\text{151}\) Ibid.

\(^\text{152}\) 102 Cong. Rec. 2908 (1956) (remarks of Congressman Vinson).


\(^\text{155}\) Hearings on S. 500 Before a Subcommittee of the Senate Committee on Armed Services, 86th Cong., 1st Sess. 299 (1959).
ment or preparation already made or would unduly delay the procure-
ment . . . 

The legislative history shows that clause to be the result of representations in substance that procurement by the negotiated method in lieu of formal advertising was necessary for essentially two reasons: only one source would be experienced and familiar with what was to be procured, and it would be too time-consuming and otherwise wasteful to use formal advertising.

Congress appears to have accepted those reasons without considering their validity. The facts demonstrating the invalidity of the representations are not hard to find. And no evidence was furnished to support the representation that formal advertising would be too time-consuming. On the contrary, it appears reasonable to conclude that the Government would benefit by the keenness of competition in which bidders have to sharpen their pencils and figure closely on their own time rather than on the Government's time as in negotiated procurement. Assurance of proper quality should be more certain from a production contract awarded on the basis of formally advertised competition than from one which the contractor has obtained without the challenge of competition. And contrary to the representations in the legislative history, the Government has the right by implication and express provision of the law to reject any and all bids when they are based upon miscalculation or unreasonable prices.

It is clear from its language and its legislative history that clause (14), covering production contracts, was drafted on the erroneous theory that clause (11), covering pre-production (design) contracts, permits awards without competition as well as without formal advertising. If there were competition, as the law requires, for awards for work under clause (11), the duplication of investment and preparation would have occurred before the production stage covered by (14). Only a comprehensive evaluation of pertinent cases could establish that competition is not appropriate in most developmental experimental and research contracts. It appears reasonable to conclude that duplication of investment in the competitive design model stage could not be as unduly expensive and time-consuming as the non-competitive procurements of Army tanks.

and Navy demon fighters.\textsuperscript{161} Some idea of the enormity of the unwarranted cost of such noncompetitive procurement can be gathered from an examination of the reports in those two cases in the light of the enormity of the items covered by clause (14), such as "aircraft, tanks, radar, missiles, rockets and other items of specialized equipment."

Competition, which embraces both methods of procurement—formally advertised and negotiated—was not waived in the Armed Services Procurement Act. Therefore clause (14), which that act related to both formal advertising and competition, provides no legal basis for limiting solicitation for negotiated procurement to one source, notwithstanding GAO's statement to the contrary.\textsuperscript{162} This makes it mandatory for contracting officials to determine whether other qualified suppliers are willing to make the necessary investment and compete for the award. GAO has overlooked the fact that the mandate exists and has suggested that it be established.\textsuperscript{163} In that connection, it is important to note that the GAO suggestion is further evidence that GAO is erroneously construing the authority in the law to waive formal advertising as authority to waive competition. Since the law does not authorize a waiver of competition, the GAO suggestion was inappropriate, regardless of the fact that it suggested a mandate already in existence.

But the basic reason for the inappropriateness of the GAO suggestion is equally as serious. The suggestion should have been directed to clause (11) rather than clause (14). As previously indicated, the real need is to be certain that competition is obtained, as the law requires, in awards for work under clause (11). Competition in the developmental and experimental design stage, as required by clause (11), should establish more than one qualified supplier able and willing to make the necessary investment of money and time to eliminate the problem in the production contract as described in clause (14). Good faith determinations under (14) should therefore be very rare, if not nonexistent. GAO has speculated that in some cases, at least, it would not be able to agree that determinations under clause (14) had been made in good faith.\textsuperscript{164} But the law imposes an obligation on GAO to examine and evaluate, rather than speculate on, those determinations and report if it does not agree. And, in view of the foregoing, it is obvious that there would be no sound basis in most, if not all, cases for GAO to agree if it observed the law applicable to the use of clause (11) as well as to clause (14). In any event, the facts needed by Congress—and expected when the clause was

\textsuperscript{162} Hearings on Procurement, supra note 158, pt. 2, at 150.
\textsuperscript{163} Id. at 160.
\textsuperscript{164} Ibid.
enacted—to learn whether the use of clause (14) actually is justified, are
not available because GAO has not performed its statutory obligation to
assemble them.

The hearings contain another disturbing example of GAO's willingness
to accept agency determinations without performing its statutory obliga-
tion to examine them to learn whether the supporting facts justify such
acceptance. GAO stated that it had "no quarrel" with the reasoning that
clause (14) was necessary "because adherence to formal advertising
procedures in the procurement of aircraft, missiles, etc., would consist-
tently result in the United States being 1 to 2 years behind latest develop-
ments."While the apparent misuse of clause (11) provides ample
ground for "quarreling" with that reasoning, GAO referred to no case
facts on which it based its acceptance of such reasoning. On the present
record, it would appear that GAO has no justification for not question-
ing the reasoning to which it referred.

The prevailing practice of speculation in lieu of ascertaining the facts
as to the justification for the use of clause (14), and the abuse of clause
(11), could have been avoided soon after the enactment of the Armed
Services Procurement Act of 1947 if GAO had fulfilled the promise
it made and the obligations imposed by Congress upon it under that act,
and approximately twenty-seven years earlier, to "carefully scrutinize
agency activities," which included agency determinations and findings
under those clauses, and to "report . . . to the Congress." That pro-
cedure would have protected the public from the extravagance of non-
competitive procurement and would have given many more businesses,
large and small, an opportunity to share in the profits from Government
procurement activities.

It is not clear on what rational basis Congress supported the retention
of clause (14) or dignified it by approving substitute language, since its
language as originally enacted and under the amendatory modifications,
and its legislative history, show that it is designed to facilitate the precise
situation which GAO challenged in 1959. By illegally confining pro-
duction contracts to the development contractor, clause (14) implements
the illegal practice of the defense agencies of awarding contracts for
experimental, developmental or research work without competition, and

165. Id. at 159.
§§ 2304-11 (Supp. IV, 1963)).
167. See note 147 supra.
169. Id. at 26.
170. Hearings on S. 500, supra note 155, at 299.
would seem necessarily to increase the number of failures to secure effective design competition and, therefore, to secure any competition for the subsequent production contract. The insertion of the word "additional" and a few other word changes in clause (14) by GAO and HASC, as a part of the legislative processing of Public Law 87-653 said to be necessary to restore the rule of law to defense procurement, are perhaps no better example of the fact that what was and remains most urgently needed to restore the rule of law is not more law but enforcement of existing law by those responsible for its enforcement. This would require GAO's discharge of its statutory duty to provide constant, comprehensive surveillance of executive agency compliance, evaluation, reports of contraventions of law and of related incompetence, and refusal to uphold expenditures of public funds paid out pursuant to agency action in contravention of law. Only by such dogged, unerring daily action by GAO can HASC and Congress as a whole eliminate the very substantial encouragement which the two clauses, (11) and (14), provide in prior law and in Public Law 87-653 for use of a procurement method unauthorized by law and for abuse of the executive agency determination prerogative.

It cannot be overemphasized that if Congress is not going to require GAO to maintain a compliance staff to perform the surveillance imposed upon it by statute, it should establish another arm to accomplish the necessary surveillance. That is well illustrated in a case presented on the House floor by Congressman Wilson. The case involved an article, called a transducer, used in the hull of naval vessels, in conjunction with other equipment, to detect the presence of enemy submarines; the Navy Department proposed to buy it without competition on the basis of a determination by that Department that it was in the best interests of the United States that no firms other than one referred to as company A be allowed to bid or compete for the work. Mr. Wilson stated that he was told by GAO that the Department's action was justified under 10 U.S.C. § 2304(a)(14). As heretofore indicated, clause (14) is not authority for procuring without competition, because the clause merely authorizes procurement without formal advertising. But what appears equally as serious as that GAO error is that GAO—presumably because of its theory that it does not have to discharge its statutory responsibility to review, based on its belief that it has no authority to overrule—apparently would not have evaluated the Department's determination unless Mr. Wilson had directed GAO's attention to it. For Mr. Wilson reported that had it not been for company D's forcing competition in spite of the Department's determination that it was in the best interests

of the United States not to have competition, $1 million more than necessary would have been spent for the transducers. Either Mr. Wilson or GAO is in error. Mr. Wilson’s report clearly raises a serious question as to whether the Department’s determination was not so grossly erroneous as to raise an implication of “bad faith.” GAO’s report to Mr. Wilson that the Department’s action was justified under clause (14) not only overlooks the fact that clause (14) is no justification for procurement without competition, but apparently was made without evaluating, as Mr. Wilson did, the actual facts related to the determination, to find whether those facts were sufficient to support such a determination even if the clause did authorize noncompetitive procurement. It appears from his rather extensive remarks before the House that the case documents much more than Mr. Wilson realized. It is a sad but most effective documentation of the fact that if funds were not otherwise available for a properly trained GAO compliance staff to discharge the duty of that office with respect to executive agency decisions and determinations, such a staff should have been established by the use of some part of the funds involved in the exceedingly expensive legislative process that culminated in Public Law 87-653. However GAO and HASC, the proponents of that law, may extol its virtues, neither it nor any significant part of the law which it amended can operate in the best interests of the Government without such a GAO compliance staff as will enable GAO to discharge its statutory obligations, and to perform the scrutiny it committed itself to in 1947 and which Congress indicated it expected GAO to make. Mr. Wilson could accomplish much more if he would press for a full-scale debate on GAO’s functioning which, as the transducer case so well illustrates, is the real issue. In the meantime, the public can only conclude that GAO and HASC have merely accomplished a few language changes rather than any effective control over the defense procurement program. It now remains to note the one part of the procurement program for which H.R. 5532 sought but failed to provide legal authority.

VIII. THE ILLEGALITY OF SET-ASIDE PROCUREMENT

In January 1952, the Director of the Office of Defense Mobilization (ODM) requested GAO to advise him whether the national emergency exception\(^\text{172}\) would permit the expenditure of public funds to cover the award of contracts to a labor surplus area to accomplish certain stated objectives, when it is known at the time that the services or supplies are obtainable elsewhere at a lower price. GAO noted in its reply that there was nothing in the Defense Production Act of 1950, as amended, which, of

NEGOTIATED PROCUREMENT

itself, authorizes generally the negotiation of Government contracts. GAO further stated, however, that if the military establishments determined it were necessary in the public interest (under the national emergency exception of the Armed Services Procurement Act) that awards be made in specific instances at prices other than the lowest which might be obtainable, GAO would not be required to object to otherwise proper payments under contracts so awarded.  

In short, GAO held, in effect, that if it were administratively determined to be in the public interest to negotiate the award of contracts to labor surplus areas, existing law (i.e., the national emergency exception of the Armed Services Procurement Act) permitted such an award. In its opinion GAO made no reference to the legislative history of the national emergency exception, which clearly shows that its use could not be justified for the purpose approved by GAO and that it is designed not to permit the payment of price differentials or to promote socio-economic objectives, as implied in the GAO opinion, but solely to provide procedures in a precipitate situation requiring such commensurate procurement action at the time the emergency is declared as not to permit the delay incident to advertising:

With the prospect that any future war may start with great suddenness, minimum preparedness requires that legislation be available to permit the shedding of peacetime requirements simultaneously with the declaration of any emergency by the President. The bill would empower the War and Navy Departments, in such an event, to procure by negotiation rather than by advertising.

The situation considered by GAO in its reply to ODM was of no precipitate nature. Over a year had transpired since the declaration of the emergency and there was nothing to show that the procurements involved would not permit the delay of formal advertising. Accordingly, GAO appears clearly in error in informing ODM that it (GAO) would not be required to object to ODM's proposed use of the national emergency exception.

Approximately nine months later GAO repeated the same error. Infilco, Incorporated, a small business concern, submitted the lowest bid in response to an invitation issued by the General Services Administration (GSA). Proportioneers, Incorporated, the next low bidder, located in a surplus labor area but not a small business concern, was called in and advised that "if it would lower its bid to meet that of Infilco Incorporated, the award would be made to it." After Proportioneers, Incorporated, agreed to reduce its bid to that of the lowest bidder the contract was

174. See note 172 supra.
awarded to that concern. Infilco contended that the award of the contract to Proportioneers, Incorporated, was illegal and void and demanded that the contract be awarded to Infilco, as required by law.

GAO held that the authority for the negotiation of the contract awarded to Proportioneers, Incorporated, was section 302(c)(1) of the Federal Property and Administrative Services Act of 1949, which provides that contracts for purchases and supplies may be negotiated by the agency head without advertising as "determined to be necessary in the public interest during the period of a national emergency declared by the President or by the Congress";\(^\text{177}\) that the action of GSA in awarding the contract was not an illegal act; and that GAO would not be justified in objecting to the award.\(^\text{178}\) But the GAO decision failed to relate the socio-economic elements of the problem to the purpose for which the national emergency exception was established, as shown in its legislative history. Lacking such relation the decision is unpersuasive; being in fact unsupported by the basis of the national emergency exception, the error of its conclusions appears obvious. The illegality of GSA's action in awarding the contract, the justification for GAO to object to the award, and its duty under the Budget and Accounting Act of 1921 to report the illegality to Congress are manifest.

In November of 1952, GAO rendered a decision involving small business in which its error is equally as obvious as in the cases involving surplus labor areas. GAO went so far as to hold that since the Small Business Act (at that time the Defense Production Act) provided that small business concerns "shall receive any award or contract or any part thereof,"\(^\text{179}\) that act "may be construed as constituting an added exception to the advertising requirements of section 3709, Revised Statutes, as amended,"\(^\text{180}\) and that therefore the procurement "legally may be negotiated in the manner proposed without resort to formal advertising."\(^\text{181}\) The most noticeable error in the GAO holding is that it fails to make any distinction between the solicitation of bids on the one hand, as provided for by the various "formal advertising" statutes—section 3709 of the Revised Statutes,\(^\text{182}\) the Armed Services Procurement Act,\(^\text{183}\) and the

\(^{181}\) Ibid.
\(^{183}\) See note 166 supra.
Federal Property and Administrative Services Act of 1949—\textsuperscript{184}—and the award of contracts on the other hand, as provided for by the Small Business Act.\textsuperscript{185} It is clear from the language and the legislative history of the latter act that it applies to the identity of those who shall receive the government business after the bids or proposals solicited have been opened. Neither the act nor its legislative history contains any language to show that it applies to the solicitation of those bids or proposals, and it appears reasonable to expect that GAO would be the last to read into that act an implied amendment to another act, especially another act which has been the subject of as much misuse as the formal advertising statutes, with which GAO is well familiar.

There is nothing to show that the functioning of the Small Business Act of itself would be inconsistent with the operation of the "formal advertising" statutes. Yet GAO held that the Small Business Act, relating to award of contracts, was an implied amendment of the act relating to the solicitation of contracts. It is well established that the Legislature will not be held to have changed a law it did not have under consideration while enacting a later law, unless the terms of the subsequent act are so inconsistent with the provisions of prior law that they cannot stand together.\textsuperscript{186} The Small Business Act provides that small business concerns shall receive the awards, where this is determined "(1) to be in the interest of maintaining or mobilizing the Nation's full productive capacity, (2) to be in the interest of war or national defense programs, (3) to be in the interest of assuring that a fair proportion of the total purchases and contracts for property and services for the Government are placed with small business concerns, or (4) to be in the interest of assuring that a fair proportion of the total sales of Government property be made to small business concerns . . . ."\textsuperscript{187} These four determinations are nothing more than a specification of what may constitute circumstances "most advantageous to the United States, price and other factors considered," as provided in the Armed Services Procurement Act.\textsuperscript{188} If those determinations are made competently and in good faith, they cannot be made without first soliciting "free and full" competition,\textsuperscript{189} by formal advertising or negotiation, as the facts warrant, from both large and small

\begin{enumerate}
  \item See note 179 supra.
  \item 3 Sutherland, Statutory Construction § 6102 (3d ed. Horack 1943).
  \item See note 179 supra.
  \item 10 U.S.C. § 2305 (1958) provides standards for awards pursuant to formal advertised bids, but there is no basis for concluding that those standards are not for application in negotiated procurement. See 10 U.S.C. § 2304(g) (Supp. IV, 1963).
  \item 10 U.S.C. § 2305(b) (1958).
\end{enumerate}
business—because the difference, in price or other factors, between the
bids of the two might be too great to justify any one of the determina-
tions referred to in the Small Business Act. The determinations should
be based on a written finding by the person making them, setting out the
facts and circumstances relied upon, and properly related to established
criteria for making such determinations uniformly and justifiably so as
to demonstrate that the determinations are lawful and logical and hence
fully persuasive. Since the four circumstances specified in the Small
Business Act appear to involve highly conjectural and speculative factors,
especially if not supported by considerable statistical material and com-
petent analyses of that material, it seems clear that without constant
review and evaluation by GAO, the determinations would very soon
become stereotyped as others to which GAO has referred, and there-
fore not entitled to be considered as final by GAO and the courts. But
GAO has indicated that it does not discharge its statutory duty to review
determinations.

It is no secret that a record of attentiveness to small business interests
is a political asset. Therefore, Congress as a whole does not appear dis-
turbed over the lack of GAO surveillance of the Small Business Act
determinations or over the erroneous GAO decisions on small business
and other set aside procurement, since, as has been shown, those decisions
and the lack of surveillance make it much easier for small business and
distressed areas to secure Government contracts. But such an attitude
by GAO and Congress is not government by law, which Congress declared
to be the objective in enacting Public Law 87-653, but an indulgence in
expedience involving the whims and caprices of those in both the execu-
tive and legislative branches of the Government—government by men in
its worst form. GAO could achieve much more enduring status in history
if it took the position it did some years ago on another political expedient
adopted by Congress: GAO told Congress that if it wished to assist
those in certain areas of the economic community, it should do so directly

191. S. Rep. No. 4, 87th Cong., 1st Sess. 17-18 (1961); Hearings on Military Procure-
ment Before a Subcommittee of the Senate Select Committee on Small Business, 86th Cong.,
2d Sess. 399 (1960).
193. Hearings and Report on Navy Department Procurement of AN/PRC-41 Radio Sets
Before a Subcommittee of the House Committee on Armed Services, 87th Cong., 2d Sess. 176
(1962).
1257 (1951). See Exec. Order No. 9001, 6 Fed. Reg. 6787 (1941); Exec. Order No. 10210,
rather than through a subterfuge.\textsuperscript{195} In the case of small business the indulgence of Congress has apparently influenced GAO—the office expected, by virtue of its statutory responsibility, to be aggressive in preventing, investigating and reporting contraventions of law—to make no investigations, to issue decisions upholding contraventions of law, and to declare statutes amended without the requirement of established legislative processes. Such a stance on the part of GAO negates any reassurance the public might otherwise have obtained from GAO's statement in 1952 that it would report to Congress whenever "this Office feels that there has been an improper exercise of authority to negotiate contracts and make awards for the purpose indicated . . . ."\textsuperscript{196}

The error of its 1952 decisions appears to have been tacitly acknowledged in hearings in 1960, when GAO testified that while it has no reason to disagree with the justification or necessity for negotiating such procurements, such necessity could not properly be based in such cases upon the existence of a national emergency which at the time, "serves no purpose other than administrative convenience"\textsuperscript{197} in the negotiation of unilateral small business set-asides. GAO suggested that statutory authority might be obtained by specifically providing for it in section 2304(a) (17) of the act.\textsuperscript{198} GAO gave no reason, and no persuasive one appears to exist, for its conclusion that the negotiation of such area procurements is necessary and justified. Also, GAO, and the Committee as well, apparently ignored the fact that in November 1952 GAO had approved the illegal use of the national emergency exception, and that GAO is responsible for the issuance of Manpower Policy No. 4 on which the military departments basically rely in construing the national emergency exception as authority for the use of negotiation in the three special procurement areas involved in the policy.\textsuperscript{199}

No legal authority exists to waive formal advertising or competitive bidding in procurement awarded on the basis of set-asides for small business or for surplus labor or other distressed areas.\textsuperscript{200} Neither the national emergency exception nor any of the other exceptions in section 2304(a) of the Armed Services Procurement Act, and no other law,

\textsuperscript{196} 31 Decs. Comp. Gen. 279, 282 (1952).
\textsuperscript{197} Ibid.
\textsuperscript{198} Ibid.
\textsuperscript{199} Hearings on the Implementation of Defense Manpower Policy No. 4 Before a Subcommittee of the Senate Select Committee on Small Business, 82d Cong., 2d Sess. 514-16 (1952).
permit any agency or department of the Government either (1) to restrict the solicitation\textsuperscript{201} of Government business to small business firms or to firms in labor surplus or other distressed areas, or (2) to restrict the award of Government business to labor surplus or other distressed areas, or (3) to make awards to firms in those areas or to small business firms by negotiation rather than pursuant to established formal advertising procedures. This fact was recognized, in 1960 hearings before the House Armed Services Committee, by a member who stated: "Under existing law there is no provision under which the military departments could procure within these three areas [small business, labor surplus, and major disaster] by a negotiated contract.\textsuperscript{202}

While its 1960 testimony appears to show GAO in accord with that Congressman that existing law does not permit such awards by negotiation, it is not clear at what precise time between 1952 and May 1960 GAO became convinced that such awards are illegal. In published decisions in 1959\textsuperscript{203} and as late as February 2, 1960\textsuperscript{204} GAO considered matters, including protests, involving the negotiation of awards to small business and surplus labor firms, and raised no question as to their legality. And in June 1960, a few weeks after it had testified that there is no legal authority for negotiating awards to small business, GAO advised that it would not be required to object to the reinstatement of an invitation to bids which advised that a contract for the portion set aside to small business firms would be negotiated.\textsuperscript{205}

If a purchase does not require immediate action (no exigency) and the facts show that delivery can be accomplished by the required date even with the use of formal advertising, the mere fact that the Government wishes to observe a socio-economic policy of Congress of setting aside certain purchases for delivery by small business concerns,\textsuperscript{206} or of relieving distressed or labor surplus areas, does not establish either that it is not possible (feasible, practicable) to make the purchase by formal advertising or that there is any exception which would authorize purchase by negotiation if formal advertising were not possible (feasible, practicable). The Department of Defense testified before the Senate Armed Services Committee that it relies on the national emergency exception as its authority to purchase by negotiation rather than by formal


\textsuperscript{202} Hearings on Procurement Practices, supra note 200, at 749.


\textsuperscript{204} Id. at 553.

\textsuperscript{205} Id. at 834.

\textsuperscript{206} See note 179 supra.
NEGOTIATED PROCUREMENT

advertising, "because restricting competition [to small business concerns] is inconsistent with a cardinal principle of formal advertising, namely that there be full and free competition." But the Department of Defense implies, and we agree, that formal advertising is needed to accomplish "full and free competition" among the whole business community, that is, when the purchase is not restricted to small business. The Department failed to show, however, that formal advertising is not necessary to secure full and free competition among a selected class of that community, namely, the small business class.

In its report of April 30, 1962, on H.R. 5532, HASC included "the three unilateral set-aside programs" among "all that remains without statutory authority," and reiterated that "we must [sic] restore the 'rule of law' to defense procurement" which, it stated, "is the purpose of this bill [H.R. 5532]." Section (d) of the bill was designed to achieve that purpose. The bill with that section intact passed the House, but the Senate struck the section before favorably acting on the bill. Thus, the statutory authority for set-asides was not achieved, the rule of law was not restored, and the number of contraventions of law increases with each set-aside procurement.

It is ironical, to say the least, that even if subsection (d) of H.R. 5532 had not been stricken and had become a part of Public Law 87-653, its purpose would have been defeated by subsection (a), which requires formal advertising if it is possible (feasible, practicable). As previously noted, the mere fact that the Government wishes to observe a socio-economic policy of Congress by setting aside certain purchases for delivery by small business does not establish that it is not possible (feasible, practicable) to make the purchase by formal advertising. Thus, with or without subsection (d), the agencies would not have had, just

207. Hearings on Procurement, supra note 158, pt. 1, at 44.
209. Id. at 3.
210. Id. at 2.
211. "(d) Subsection 2304(a)(17) is amended to read as follows: '(17) otherwise authorized by law, or when in furtherance of small business, labor surplus area, or major disaster area programs, the agency head determines that supplies or services are to be procured from small business concerns as defined by the Administrator of the Small Business Administration, from concerns which will perform the contracts substantially within labor surplus areas as determined by the Secretary of Labor, or major disaster as determined by the President: Provided however, That no contract in furtherance of small business, labor surplus area or major disaster area program shall be awarded, pursuant to the authority herein contained, at prices higher than obtainable from other sources.'"
as previously, any legal authority to waive formal advertising and competitive bidding in procurement awarded on the basis of set-asides for small business or for surplus labor or other distressed areas. Such procurement is clearly in contravention of law and in direct conflict with the avowed purpose of the legislation to "restore the 'rule of law' to defense procurement," and GAO again appears responsible for the situation and its continuance.