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NEGOTIATED CONTRACTS—TWO-STEP PROCUREMENT, COST AND PRICING DATA REQUIREMENTS AND PROTESTS TO THE COMPTROLLER GENERAL

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I. INTRODUCTION†

Negotiated purchases vary in form from a five dollar purchase by the contracting officer over the telephone to the letting of a billion dollar contract which may involve a detailed written solicitation and a procedure similar to that of formal advertising for bids. All negotiated purchases have elements in common which distinguish them from formally advertised contracts. Most important of these is that negotiation permits greater flexibility of action than is possible under the statutory requirements governing formal advertising. For this reason negotiation is extremely popular with the Department of Defense.

Five years ago a specialist in the office of the Assistant Secretary of Defense for Supply and Logistics stated that over eighty per cent of the dollars (and over ninety per cent of the transactions) involved in procurement by the Department of Defense was spent under negotiated contracts.[1] The figures today are approximately the same.[2] Regardless of the fact that some of this bulk fits into categories which

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[1] Pilson, Negotiated Contracts, 18 Fed. B.J. 126, 127 (1958). Mr. Pilson diminished somewhat the dramatic effect of these problems by saying that over 75 per cent of the transactions involved less than $1,000 and that all or most of all aircraft, guided missiles, ships and research and development were purchased by negotiation.

[2] In fiscal year 1962 out of over 7.5 million transactions entered into by the Department of Defense, 95 per cent were negotiated under one of the 17 exceptions set forth in 10 U.S.C. §§ 2304(a)(1)-(17) (1958). Contracts involving less than $2,500 (80 per cent) and purchases outside the United States (9 per cent) accounted for most of this bulk. Turning from number of transactions to dollar figures, out of 28.1 billion dollars spent via defense contracts, 87 per cent was spent through the medium of negotiated contracts. Of this latter figure, purchases where formal advertising is impractical (15 per cent), contracts involving experimental, developmental or research work (22 per cent) and purchases of technical supplies requiring substantial initial investment or an extended period of preparation for manufacture (33 per cent) are the principal avenues of spending by negotiation. Of the two categories listed above which comprise the bulk of the transactions by *number*, each accounts for about four per cent of the money spent by negotiated contracts as does the category "otherwise authorized by law" of which the bulk is small business set-asides.

are not of general interest to the everyday contractor,[3] the fact cannot be ignored: the government does most of its business by negotiation.

That fact, running, as it does, contrary to the popular conception that advertising for bids is the principal method of procurement, means that the problems of procurement by negotiation merit some current analysis. Accordingly, this article will, after a brief resumé of the statutory background, discuss negotiation generally and then three important, but not necessarily related, problems within this area: two-step procurement, cost and pricing data requirements and protests to the Comptroller General.

II. Statutory Background

Even before an 1861 statutory enactment,[4] it has been the strong desire of Congress that the various executive departments procure by advertising for bids except where personal services are involved or immediate delivery is necessary.[5] This meant that, until the requirements of that Act were suspended by the President during World War II,[6] the majority of procurement was carried on by the use of solicited competitive bids and formal award to the lowest bidder. As a general rule, formal advertising has been preferred because it gives all interested persons a chance to contract with the government and usually guarantees a low price to the government. Allowing administrative officials, subject to all the weaknesses and pressures of men in high places, to place contracts where they wish opens a Pandora's Box.[7] However, World War II showed that a major power in time of crisis generally turns to negotiation. A hard and fast rule of advertised procurement is no longer acceptable.

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[3] Supra note 1.

[4] Rev. Stat. § 3709 (1875). This statute provided:

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

As amended, the Act is found in 63 Stat. 400 (1949), 41 U.S.C. § 5 (1958) and it now adds these exceptions: "contracts involving less than $500, when there is only one source of supply or when the services are to be performed by the contractor in person and are (1) of a technical and professional nature or (2) under government supervision and paid for on a time basis."

[5] Congress limited the military departments to purchases in the open market or by advertising as early as 1809. 2 Stat. 536 (1809). In an opinion letter to the Secretary of the Navy, the Attorney General limited this to publicly advertised proposals. 2 Ops. Att'y Gen. 257 (1829).

[6] By Exec. Order No. 9001, 6 Fed. Reg. 6787 (1941), the President emancipated the War and Navy Departments from these restrictions pursuant to the authority granted him in Section 201 of the First War Powers Act of 1941, 55 Stat. 839. During this war virtually all procurement was done by negotiation. See King, Procurement by Negotiation, 12 Fed. B.J. 256, 257 & n.6 (1952).

[7] See United States v. Brookridge Farm, 111 F.2d 461 (10th Cir. 1940).

Even before the conclusion of World War II, the Procurement Policy Board of the War Production Board came forward with the recommendations which led to the passage of the Armed Services Procurement Act of 1947.[8] This statute, enacted in February 1948, defines the scope of advertising and negotiation[9] for the Department of Defense.[10] A little over a year later, Congress enacted the Federal Property and Administrative Services Act of 1949.[11] This Act[12] sets forth in statutory form the procurement procedures for the General Services Administration and all other executive agencies not covered by the Armed Services Procurement Act of 1947. In structure and language it follows the latter Act.[13]

The present statutes now represent a compromise and allow for both advertising and negotiation. It is interesting to note, however, that there were, at the very beginning, differences of opinion as to the proper emphasis of the statutes. The Senate report states that the Armed Services Procurement Act of 1947 returns the government to procurement by formal advertising while allowing for negotiation in certain instances.[14] The Acting Secretary of the Navy who drafted the bill said, however, that the purpose was to allow the military during peacetime to procure by negotiation wherever the need was felt.[15] The former statement undoubtedly reflects the intent of Congress; the latter is more in accord with reality.

The Armed Services Procurement Act demands formal advertising when contracting for the purchase or construction of most property,[16] with the exception that negotiation may be utilized in seventeen

[8] 62 Stat. 21 (1948). The Act now appears in 10 U.S.C. §§ 2301-14 (1958), as amended, 10 U.S.C. §§ 2304, 2306, 2310, 2311 (Supp. IV, 1959-62).

[9] The Act also: declares a policy of treating small business concerns fairly, bans cost-plus-percentage-of-cost contracts, delegates functions and responsibilities, deals with advance payments and spells out the role of the Comptroller General.

[10] 10 U.S.C. § 2303 (1958).

[11] 63 Stat. 377 (1949) (codified in scattered sections of 5, 40, 41 U.S.C. (1958)).

[12] 63 Stat. 393 (1949), as amended, 41 U.S.C. §§ 251-60 (1958).

[13] See H.R. Rep. No. 670, 81st Cong., 1st Sess. (1949).

[14] The bill, as amended, provides for a return to normal purchasing procedures, through the advertising-bid method on the part of the armed services . . . . It capitalizes on the lessons learned during wartime purchasing and provides authority, in certain specific and limited categories, for the negotiation of contracts without advertising. It restates the Rules governing advertising and making awards as well as fixing the types of contract that can be made.

S. Rep. No. 571, 80th Cong., 1st Sess. 2 (1948).

[15] The primary purpose of the bill is to permit the War and Navy Departments to award contracts by negotiation when the national defense or sound business judgment dictates the use of negotiation rather than the rigid limitations of formal advertising bid and award procedures.

Hearings on H.R. 1366 Before the House Committee on Armed Services, 80th Cong., 1st Sess., 425 (1947).

[16] See 10 U.S.C. § 2303(b) (1958) where 10 non-exclusive categories are set out. Note that personal services and technical research and assistance do not seem to be included in the term "property."

specified situations.[17] The most important of these exceptions, in the absence of a declaration of national emergency, are contracts which fall in the tenth, eleventh and fourteenth exceptions.[18] By far, the largest number of negotiated contracts prior to December 1956, however, were negotiated pursuant to the first exception, that is, where the public interest demands negotiation during a national emergency.[19] The Comptroller General, however, seems to claim the right to oversee the exercise of this authority by the heads of the procuring agencies.[20] Though the use of this category has since declined markedly, it is interesting to note that a Bill has been introduced in Congress to declare an end to the national emergency which has existed since the Korean War.[21] Under Title III of the Federal Property and Administrative Services Act, there are listed fifteen similar exceptions to the advertising requirement.[22] It should be noted that under both of these acts the authority to negotiate construction contracts is much narrower than in the case of those for supplies and services.[23]

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[17] 10 U.S.C. §§ 2304(a)(1)-(17) (1958), as amended, 10 U.S.C. § 2304(a)(14) (Supp. IV, 1959-62). Briefly, these exception categories are: (1) national emergencies; (2) public exigency; (3) purchases not in excess of $2,500; (4) personal or professional services; (5) services of educational institutions; (6) purchases outside of U.S.; (7) medicines or medical supplies; (8) supplies purchased for authorized resale; (9) perishable subsistence supplies; (10) formal advertising impracticable; (11) experimental, developmental, or research work; (12) classified purchases; (13) technical equipment requiring standardization; (14) technical supplies requiring substantial initial investment or extended preparation for manufacture; (15) negotiation after unsuccessful advertising; (16) needed for industrial mobilization or preparation to meet emergencies; (17) otherwise authorized by law. For a detailed analysis of the scope of, and the reasons for, each exception, see ASPR, 32 C.F.R. §§ 3.200-.217 (Supp. 1963); S. Rep. No. 571, 80th Cong., 1st Sess. 6-15 (1947); H. Rep. No. 109, 80th Cong., 1st Sess. 7-17 (1947); Cuneo, Government Contracts Handbook 23-27 (1962); I McBride & Wachtel, Government Contracts §§ 9.30-.190 (1963).

[18] 10 U.S.C. § 2304(a)(10)(11) and (14) (1958). See note 2, supra, for a more detailed breakdown.

[19] For a detailed analysis of the meaning and use of the first exception for national emergencies (10 U.S.C. § 2304(a)(1) (1958)) see I McBride & Wachtel, supra note 17, at §§ 9.10[3], 9.30; and King, supra note 6, at 259-64.

[20] See 33 Decs. Comp. Gen. 441 (1954); 30 Decs. Comp. Gen. 441 (1951) (reserved right to determine presence of collusion or other improprieties). Upon finding any improprieties in the use of this exception, the Comptroller General has stated he will report it to Congress. See 31 Decs. Comp. Gen. 279 (1952). The Department of Defense has issued regulations limiting the use of this exception to "set-asides" for labor surplus and small business programs. ASPR, 32 C.F.R. § 3.201-2, 28 Fed. Reg. 2093 (1963).

[21] H.R. 7408, 88th Cong., 1st Sess. (1963) states:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the national emergency proclaimed to exist by Proclamation Numbered 2914, dated December 16, 1950 (15 F.R. 9029; 64 Stat., part 2, A454) is hereby terminated.

[22] See 63 Stat. 393 (1949), 41 U.S.C. § 252(c) (1958). Exceptions 14 and 16 set forth in 10 U.S.C. § 2304(a) (1958), as amended, 10 U.S.C. § 2304(a)(14) (Supp. IV, 1959-62), and listed briefly in note 17 supra, are not allowed under this Act.

[23] 10 U.S.C. § 2304(c) (1958); 63 Stat. 393 (1949), 41 U.S.C. § 252(e) (1958).

III. Negotiation Generally

As the figures showing the percentage of procurement done by negotiation illustrate, the exceptions have proven the rule. It behooves the contractor to know negotiation procedures. However, since, with respect to their creation, negotiated contracts are not generally subject to restrictive Comptroller General rulings to the same extent as are advertised contracts, general statements are more apropos than extended discussion.

Having passed the first hurdle of statutory authorization, the next problem is the existence and scope of the power of the head of an agency to negotiate a contract under each exception. Under the Armed Services Procurement Act, the head of the agency may delegate to lower officials his discretionary power to make the decisions and determinations called for in exception categories one through ten.[24] In categories eleven through seventeen his right to delegate is limited, or nonexistent. However, in these categories, as well as in exception category one, the decision of the head of the agency is final[25] and should be binding on the Comptroller General.[26] As an additional caveat, when the authority has been delegated and yet the contracting officer must, by regulation, go back up the line and get approval from superiors, the contractor encounters what is often called a "business clearance."[27]

Leaving the realm of authority and turning to the practical side, the contracting officer must pay for his greater flexibility in the coin of more preliminary work. Before a contracting officer can negotiate a contract, he must locate potential suppliers. Solicitation of sources of supply may be done by telephone, telegraph or any other means of communication. If considerable information must be given to prospective suppliers, a request for proposal form may be sent out. This form is very similar to the invitation for bids. The contracting officer will solicit proposals or quotations from as many qualified sources of supply as are needed to assure full and free competition, and thus procure the best quality for the government at the most favorable price.

It is particularly important for the contractor to note at this point that there is operative an amendment to the Armed Services Procurement Act which in many instances requires: (1) that "proposals be solicited from the maximum number of qualified sources

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[24] 10 U.S.C. § 2311 (Supp. IV, 1959-62). The comparable power in the Federal Property and Administrative Services Act is found in 63 Stat. 396 (1949), 41 U.S.C. § 257(b) (1958).

[25] See 10 U.S.C. § 2310 (Supp. IV, 1959-62); 63 Stat. 396 (1949), 41 U.S.C. § 257 (1958).

[26] 37 Decs. Comp. Gen. 72, 75 (1957); 37 Decs. Comp. Gen. 430, 435 (1957).

[27] E.g., ASPR, 32 C.F.R. § 1.403(b) (1961).

which is consistent with the nature and requirements of the supplies and services to be procured"; and (2) that written or oral discussions be conducted with all the responsible offerors who are in the competitive range.[28] The first requirement puts into statutory language that which has always been the intent of Congress. The second point has a tendency to make negotiation both more competitive and more like the bargaining table. The amendment does not apply, however, wherever the contract involves less than $2,500, the prices are fixed by law or regulation or the time for delivery is too near at hand. Furthermore, the second requirement applies neither to the "set-aside" programs nor to the acceptance of an initial proposal which will result in a fair price because of the existence of active competition or accurate prior cost experience, if at the outset the offerors are informed of the possibility of an initial acceptance.

Unlike the formal advertising procedure, in negotiation each proposal may be opened and examined immediately upon its receipt. The contracting officer records and keeps confidential such information. He selects those bids which appear to be most advantageous to the government, price and other factors being considered. He then studies the proposals, considering the same various factors which are used as guidelines under the formal advertising procedure to determine acceptability. If the formal advertising procedure were being followed, the contracting officer would now have to accept the bid of the lowest responsible bidder most advantageous to the government considering allocations, or else reject all bids. The negotiation procedure offers him considerably greater flexibility. He may select a few of the best proposals and bargain with those who submitted them. He must negotiate to give the government the best bargain possible.

It is obvious that the negotiation and decision functions may take some time. The situation is ripe with possibilities for "carrying a contractor along" as an insurance factor even though it is known that his proposal will not be accepted. One comparatively recent addition to the Armed Services Procurement Regulations (ASPR) has been made to alleviate this situation.[29] It states that wherever, with contracts involving more than $10,000, it is likely that more than thirty days will be required for evaluation of proposals, the contracting officer will promptly notify all those who have submitted unacceptable proposals. He is not required to give this notice, however, where it will prejudice the government's interest and in certain other specific instances set forth in the regulation. The notice informs the contractor in general terms of the reason the proposal was unacceptable. Of course, after the making of an award, with the same specific limitations, all un-

[28] 10 U.S.C. § 2304(g) (Supp. IV, 1959-62).
[29] ASPR, 32 C.F.R. § 3.106, 28 Fed. Reg. 4882 (1963).

successful offerors are to receive notice telling them the number of contractors solicited, the number of proposals, the names of all award recipients, the items, quantities and unit prices of each award and the reason for not accepting the offeror's proposal if the information above does not reveal it.

Once the proposal is accepted, the next problem is that of using the proper contract form for the situation. Sections 3-400 to 3-410 of ASPR deal with types of contracts available and state generally that the fixed-price contract is preferred. However, where the nature of the procurement is such that the cost of performance cannot be estimated with substantial accuracy, the contracting officer may negotiate a contract on other than a firm fixed-price basis. Some of the other bases are cost, cost-plus-a-fixed-fee, cost-plus-an-incentive-fee, fixed-price with price redetermination and escalation incentive provisions generally. Under formal advertising, a fixed-price contract is required.[30]

There is, unfortunately, a cloud on the horizon in regard to the flexibility of a negotiated contract. In its recent decision in *G. L. Christian & Associates v. United States*,[31] the Court of Claims has enunciated a doctrine that may render non-existent the contracting officer's (or even the Secretary of Defense's) ability to negotiate a contract form. In that case the Assistant Secretary of Defense for Properties and Installation drafted, with the concurrence of the Federal Housing Commission, a complicated Housing Form Contract for Capehart Housing Act projects.[32] He had the statutory authority to put in any terms he saw fit[33] and chose to leave out the "Termination for the Convenience of the Government" clause. He did this because Capehart projects are specifically long-range projects and there was

[30] Most of the forms used in connection with negotiated contracts of the military departments are those of the Department of Defense. The request for proposals and the proposal is DD Form 746. The schedule which describes the supplies or services and contains information pertaining to delivery is DD Form 746-1. The acceptance of the proposal is made on DD Form 746-2, which, together with the other two above-mentioned documents, make up the contract documents. The general provisions set forth in U.S. Standard Form 32 are attached or incorporated by reference in these documents. In the case of: (1) most cost-reimbursement contracts; (2) negotiated fixed-price type supply contracts not exceeding $10,000 which are for standard or commercial items; and (3) when proposals lead to further negotiations, DD Form 1261 should be used to execute the contract.

[31] 312 F.2d 418, motion for rehearing denied, 320 F.2d 345 (Ct. Cl. 1963). Part II of the first opinion and the entire second opinion on the motion for rehearing are pertinent. [Ed. note. Mr. Gilbert A. Cuneo, co-author of this article, was counsel of record for the petitioner on both the motion for rehearing and the petition for writ of certiorari.]

[32] Capehart Housing Act is the popular name for Title IV of the Housing Amendments of 1955, 69 Stat. 646, as amended by Title V of the Housing Act of 1956, 70 Stat. 1096, 12 U.S.C. §§ 1720(f) (1958), 1748-1748(h)(3) (Supp. IV, 1959-62), and 42 U.S.C. §§ 1594-1594(j) (Supp. IV, 1959-62). For an explanation of this act as well as its relation to the Miller Act see Note, 49 Va. L. Rev. 174 (1963).

[33] 69 Stat. 652 (1955), as amended, 42 U.S.C. § 1594a (1958).

no need felt for such a clause. Further, the absence of the clause made the private mortgage financing easier to obtain and the eventual contract price lower.

Unexpectedly, the Secretary of Defense closed down the army fort where one of the projects had commenced and he cancelled the contract. The contractor sued for his costs and the anticipated profit, *i.e.*, common law damages. Had the above mentioned Termination Clause been in the contract, the contractor would have been entitled only to a specified limited profit on the work done. Section 8-703 of ASPR,[34] promulgated as an internal regulation governing contracting officers and other agency officials, states that the Termination Clause should be put in all contracts of this type. The Court of Claims held that the Termination Clause should be incorporated into the contract "as a matter of law." That the possible future effect of this ruling is awesome is only slowly becoming obvious. All the regulations promulgated by the Secretary of Defense which deal with types of contracts pose as a trap for the unwary who contract with the government. Regardless of the fact that a duly empowered agency head draws up and signs a solemn contract of a certain type to fit a certain factual situation, the contractor may find, unless the Supreme Court reverses the *Christian* case, all the rules promulgated by that same agency head (ASPR is hundreds of pages long!) incorporated into the contract.

IV. Two-Step Procurement

> And step by step, since time began,
> I see the steady gain of man.[35]

Two-step procurement is properly called two-step formal advertising,[36] but a discussion of the subject in this article is desirable because this technique partakes of two worlds. Despite the dichotomy between negotiation and advertising, emphasized earlier, here is an area where the best of both are incorporated into one procedure. Two-step procurement was placed into effect by the Department of the Air Force in 1957 at the suggestion of the Subcommittee for Special Investigation of the House Armed Services Committee.[37] It was devised "to increase the use of *advertising* procedures in situations where *negotiation* would ordinarily be required because technical specifications are not sufficiently definite to assure that all bidders will offer to supply items meeting the particular need of the Government."[38] (Italics in original.)

[34] ASPR, 32 C.F.R. § 8.703 (Supp. 1963).

[35] Whittier, The Chapel of the Hermits.

[36] ASPR, 32 C.F.R. § 2.501 (1961).

[37] Subcommittee for Special Investigations of House Armed Services Committee, 85th Cong., 1st Sess., Study of Armed Services Procurement Act 652 (1957). (Hereinafter cited as Subcommittee.)

[38] 2 Government Contractor ¶ 386 (1960).

From that statement, it can readily be seen that two-step procurement has tremendous potential.[39] There are complicated and technical areas where the government knows what it wants in terms of result or performance and where there are several contractors who are technically qualified to do the job.[40] Normally, because the procuring agency has not had prior experience and does not have sufficient definitive specifications and requirements and/or because the agency's technical people wish to make engineering evaluations and discuss the requirements with the bidder, formal advertising would not be used. Accordingly, the benefits of the competition inherent in that method are not available to the government.

Now, by conducting the procurement in two phases, the procuring agency can have its cake and eat it too. The agency simply sends out a solicitation for technical proposals to all possibly interested and technically capable firms. This "request for technical proposals" usually contains a stricture against including prices and a notification of the intent to conduct the procurement in two steps. Among other things, it should also give the best practical description of what is desired, an outline of what form the proposal should take and what details are desired and the criteria to be used in evaluating the technical proposals.[41] A new addition to the regulations urges contracting officers to include an invitation for multiple proposals from each source.[42]

After receiving the proposals,[43] the agency hands them to its engineering personnel and asks them to decide which ones are technically acceptable. The regulations specifically urge the agency not to find a proposal unacceptable if a reasonable *effort by the government* could make the proposal acceptable.[44] This means the proposal should not be found unacceptable for superficial or hyper-technical inadequacies when the government actually knows what is intended. Even more important, the same section also provides for discussions, additional information and clarification. This has led to the practice of accepting "marginal" proposals which can be made acceptable by a minimum and reasonable *effort on the part of the offeror*. Materially defective proposals, however, are found to be unacceptable and are rejected.

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[39] The Department of the Air Force has recently authorized the procedure for construction contracts. AFPI, 32 C.F.R. §§ 1002.500-1002.503-1 (Supp. 1962).

[40] ASPR, 32 C.F.R. § 2.502(c) (1961). Obviously, this method has no advantage over negotiation if there is only one qualified contractor who can be expected to bid.

[41] ASPR, 32 C.F.R. § 2.503-1(a) (1961), as amended, 32 C.F.R. § 2.503-1(a)(8) (Supp. 1963), 28 Fed. Reg. 4882 (1963).

[42] ASPR, 32 C.F.R. § 2.503-1(a)(10), 96 Fed. Reg. 4882 (1963).

[43] The government reserves the right to receive and consider late proposals but does not have to do so and can hold the offerors to a firm due date if time is of any importance. See Subcommittee, supra note 37, at 660.

[44] ASPR, 32 C.F.R. § 2.503-1(b)(5) (1961).

This distinction causes some disagreement over the question of how far the agency must go in permitting and helping the offeror to achieve an acceptable proposal.[45] The answer by the Comptroller General is that the procurement officials must be able to reasonably circumscribe the area of consideration wherever it is necessary to enter the second step and complete the procurement within their time limitations.[46] Accordingly, barring an unreasonable determination which does not have factual support, the procurement official's determination that a proposal is materially deficient is final. It is obviously in the best interests of the country, as well as being the intent of the regulation, that every opportunity be given to the offerors to come within the scope of the government's needs and desires. Any firm rule would be inadvisable, however, because such a move would drive the agency back to using straight negotiation.[47]

Step two consists of inviting each firm submitting an acceptable technical proposal to submit a bid on its own proposal. Here, price is mentioned for the first time and data as to credit and responsibility first become relevant. The regular formal advertising procedures are followed and the contract must be awarded to the lowest responsible bidder. A firm fixed-price contract or a fixed-price with escalation clause contract must be used. Thus the two-step procurement consists of step one, similar to negotiating a contract, and step two, similar to formal advertising. With it the military departments receive the benefit of the best of both worlds, retaining the necessary flexibility of negotiated procurement and also retaining the congressional approval of competitive bidding.

As the *Christian* case[48] has thrown confusion into the realm of negotiated contract provisions, so a recent decision of the Comptroller General has thrown confusion into the two-step procurement procedures.[49] In answer to a recent protest, the Comptroller General stated that in a two-step procurement a military department need not follow its own established procedures.[50] Therefore, a responsible contractor not only has no firm guide-line to what clauses will be incorporated into his negotiated contract, but does not even know what policies will be disregarded in a two-step procurement.

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[45] This problem was anticipated by the Air Force. See Subcommittee, supra note 37, at 660.

[46] 40 Decs. Comp. Gen. 40 (1960); 40 Decs. Comp. Gen. 35 (1960).

[47] An aggrieved contractor may always protest to the Comptroller General the failure of the contracting officer to consider his proposal acceptable.

[48] G. L. Christian & Associates v. United States, 312 F.2d 418, motion for rehearing denied, 320 F.2d 345 (Ct. Cl. 1963).

[49] Ms. Comp. Gen., No. B-151787 (1963) (unpublished).

[50] Id. at 6.

V. Cost and Price Certification

> Truth will work wonders. All this section requires is that the truth be made known at the time of the bargaining. Who can object to telling the truth?[51]

Although little has been written or published on this subject, no briefing conference, institute, seminar or series of lectures on government contracts in the past year has failed to include a section devoted to the so-called truth in negotiations law.[52] The law requires that the contractor must submit, under certain circumstances, cost or pricing data prior to the award of a negotiated contract, which cost or pricing data shall be certified to be "accurate, complete and current"[53] as of a certain date. This certification applies to a contract change or modification,[54] as well as to the original contract, when it is expected that the price adjustment will exceed $100,000; it also applies to subcontracts of any tier if the price of such subcontract is expected to exceed $100,000 and the prime was required to furnish such a certificate.[55] The Act has been implemented by regulations[56] effective as of December 1, 1962 and incorporated into ASPR.[57]

The regulations provide that a certificate[58] must be submitted

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[51] Statement of Representative F. Edward Hebert on H.R. 5532, Hearings Before the Senate Committee, 87th Cong., 2d Sess. 57 (1962) (hereinafter cited as Hearings).

[52] 10 U.S.C. § 2306(f) (Supp. IV, 1959-62). For discussion see, for example, May 2-3, 1963, George Washington University, Federal Bar Association Tenth Annual Government Contracts Institute, Lecture by Louis A. Cox, Vice Chairman, ASPR Committee, Office of the Assistant Secretary of Defense (I & L); June 11-12, 1963, Machinery and Allied Products Institute, Seminar on Government Contracts, Discussion by K. K. Kilgore, Deputy Comptroller for Audit, Department of Defense and James A. Robbins, Deputy Chief, Army Audit Agency; July 8-19, 1963, Southwestern Legal Foundation, Short Course on Government Contracts, Lecture by Gilbert A. Cuneo; August 11, 1963, American Bar Association Annual Meeting, Administrative Law Section, Public Contracts Division, Remarks by Lawrence E. Chermak, Counsel, Office of the Comptroller, Department of the Navy; Sept. 12-13, 1963, University of Minnesota, Seminar on Government Contracts, Lecture by Col. Wm. W. Thybony, Chairman, ASPR Committee, Department of Defense and Maynard O. Panser, Assistant to Comptroller, Minneapolis-Honeywell Regulator Company.

[53] 10 U.S.C. § 2306(f) (Supp. IV, 1959-62).

[54] 10 U.S.C. § 2306(f)(2) (Supp. IV, 1959-62).

[55] 10 U.S.C. § 2306(f)(3) (Supp. IV, 1959-62).

[56] ASPR, 32 C.F.R. §§ 3.807-3 (Cost and Pricing Data), 8.807-4 (Certificate), 7.104-29 (Price Reduction for Defective Data), 7.104-41 (Audit), 7.104-42 (Subcontractor Cost and Pricing Data) (Supp. 1963), as amended by 28 Fed. Reg. 2095, 2098, 4884, 4886, 6068 (1963).

[57] The new regulations require the certificate, when applicable, for all contracts entered into after December 1, 1962.

[58] ASPR, 32 C.F.R. § 3.807-4, 96 Fed. Reg. 2095 (1963). This is to certify that, to the best of my knowledge and belief:

(i) complete pricing data or cost data current as of _____ (Date) have been considered in preparing the _____ [Describe the proposal, quotation, request for price adjustment, or other submission involved giving appropriate identifying

prior to the award of any redeterminable, cost reimbursement or incentive contract, regardless of the dollar amount, or prior to the award of any firm fixed-price or fixed-price with escalation negotiated contract expected to exceed $100,000 in amount. The certificate must also be submitted in the case of contract modifications which are expected to exceed $100,000 independent of whether or not cost or pricing data was required under the initial contract and regardless of whether the contracts were formally advertised or negotiated. In addition, the contracting officer may require the obtaining of a certificate in contracts or modifications of less than $100,000 if he so believes circumstances warrant.

Quite naturally, the importance of the certificate is the proviso in the truth in negotiations law[59] that the contract price shall be adjusted to exclude sums based upon inaccurate, incomplete or noncurrent data. The truth in negotiations law is really an outgrowth of an earlier Congressional bill[60] which omitted a price certificate requirement upon assurances that such a requirement in regulation form was sufficient for the purposes envisioned by Congress.[61] Previously, the ASPR had provided for a certificate in those cases which met the requirements of section 3-807.10.[62] However, there never was issued a section of the regulations denoted 3-807.10 up to and including the time the Bill was introduced on March 31, 1961.[63] According to the General Accounting Office, the departments as of 1962 had not made as much use of the certificates as the Congress felt they should. Representative Carl Vinson stated:

> Now listen to these figures: Of 364 prime contracts entered into since the regulations were adopted, 121 of them having a total value of $253 million had no certified-cost-data as the regulations require.[64]

_____ and submitted to the Contracting Officer or his representative; number.]

(ii) all significant changes in the above data which have occurred since the aforementioned date through _____ have been similarly submitted;
(Date)

and no more recent significant change in such data was known to the undersigned at the time of executing this certificate; and

(iii) all of the data submitted are accurate.

NAME _____
TITLE _____
FIRM _____

(Date of Execution)

59 10 U.S.C. § 2306(f) (Supp. IV, 1959-62).

60 H.R. 12572, 86th Cong., 1st Sess. (1959).

61 S. Rep. No. 1960, 86th Cong., 1st Sess. (1959).

62 32 C.F.R. §§ 3.807-3, 3.807-7, 7.104-29 (1961), now amended by 28 Fed. Reg. 4884-86 (1963).

63 Hearings, supra note 51, at 55.

64 Hearings, supra note 51, at 18.

The failure of the Department of Defense to include the cost certificate in more contracts caused Representative F. Edward Hebert to be less charitable than Representative Vinson. Representative Hebert believed that this failure was a deliberate policy of evasion by the Department of Defense. He stated:

> The many-tentacled squid and the multifaced Pentagon have the same defensive mechanism—each expels quantities of black ink to throw off its pursuer.
>
> That seems to be just what we have had all along on this bill.[65]

Adding fuel to the fire was the *Boeing* renegotiation case,[66] decided prior to the Senate hearings on this bill. The court stated: "Eighty-eight and eight-tenths per cent of the profit here under consideration was derived from performance of what are here termed incentive contracts. Such contracts are based upon estimated cost of production."[67] Both Representatives Vinson and Hebert referred in several instances to the *Boeing* case as showing the obvious need for a statutory requirement for the certificate and not merely an administrative regulation which made the insertion of the certificate only at the discretion of the Department of Defense.[68] In any event, the Act was passed by both Houses of Congress and became law on September 10, 1962.

It is astonishing, in view of the tremendous interest of the business community in this law, that not one single individual company or trade association appeared before either committee of Congress to vigorously oppose the enactment of this legislation.[69] The Senate report accompanying the Bill stated in succinct language the reasons for the certificate requirement of current, accurate and complete cost data. It said:

> In determining the price under many types of negotiated contracts the Government must rely, at least in part, on cost and pricing data submitted by the contractor or his subcontractor. In recent years the General Accounting Office submitted several reports to the Congress on cases in which contractors received unwarranted profits because the data used

[65] Hearings, supra note 51, at 56; the Department of Defense specifically opposed this section of the proposed bill (Hearings, supra note 51, at 9), as did National Aeronautics and Space Administration (Hearings, supra note 51, at 15).

[66] Boeing Co. v. Renegotiation Bd., 37 T.C. 613 (1962). The Boeing Airplane Company took an appeal from a Renegotiation Board assessment of excessive profits of $10 million for 1952. Upon appeal by Boeing the Tax Court raised the assessment to $13 million.

[67] Id. at 647.

[68] See, e.g., Hearings, supra note 51, at 16, 17, 57.

[69] Representatives of the Electronics Industries Association appeared at the hearing, but did not vigorously oppose the legislation in oral testimony (Hearings, supra note 51 at 92 et seq.), and in fact made suggestions for only minor changes.

> in establishing target costs or prices were inaccurate, incomplete or out of date.[70]

The report added: "The objective of these provisions is to require truth in negotiating."[71]

There are four principal exemptions from the provisions of the regulations. They are: (1) Formally advertised contracts; (2) Negotiated fixed-price contracts under $100,000; (3) Negotiated fixed-price contracts over $100,000 when the price is based upon "adequate price competition"; (4) Negotiated fixed-price contracts over $100,000 when the price is based upon "established catalog or market prices of commercial items sold in substantial quantities to the general public."[72] There are also two minor exemptions which will probably not be available generally to contractors. They are those instances in which the prices are set by law or regulation (such as public utilities) and "exceptional cases where the head of the agency determines that the requirements . . . may be waived . . . ."[73]

The first two exemptions are self-explanatory. Obviously, Congress did not feel it was necessary for the government to obtain accurate, complete and current cost data for formally advertised contracts. In the second exemption, Congress felt that it would have been administratively too burdensome for the government to obtain such information in connection with negotiated fixed-price contracts under $100,000 when the price is based upon adequate competition. In the third exemption, "adequate price competition" has not been defined, but it certainly could be argued that adequate competition could be obtained simply by a second source of supply for the particular item in question.[74]

The fourth exemption is concerned with those negotiated fixed-price contracts where the price is based upon established catalog or market prices. The Comptroller General has recently indicated that the department should not accept the price of a catalog item if the latter happens also to be a proprietary item. In its report to Congress dated May 20, 1963, entitled "Report to The Congress of the United States; Examination of Catalog Prices Charged for Airborne Radar Beacons Developed With Government Funds and Supplied to the Military Departments and Their Prime Contractors Under Noncompetitive Procurements With ACF Electronics Division, ALF In-

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70 S. Rep. No. 1884, 87th Cong., 2d Sess. 3 (1962).

71 Id. at 4.

72 10 U.S.C. § 2306(f) (Supp. IV, 1959-62).

73 Ibid.

74 See Russellville Canning Co. v. American Can Co., 87 F. Supp. 484 (W.D. Ark. 1949); Merchant's Nat'l Bank v. Dawson County, 93 Mont. 310, 19 P.2d 892 (1933); cf. United States v. Aluminum Co. of Am., 91 F. Supp. 333 (S.D. N.Y. 1950); 15 Ops. Att'y Gen. 226 (1872).

dustries Incorporated, Paramus, New Jersey,"[75] the General Accounting Office severely criticizes the military negotiators for failing to demand and receive from ACF cost and pricing data. The Comptroller General specifically stated:

> ACF's use of commercial catalog pricing, however, provided no assurance that its prices were fair and reasonable and was inappropriate for unique military hardware sold exclusively to the Government in noncompetitive procurements.[76]

He went on to point out that under the new law, a catalog product procured without competition is exempt from the requirement to furnish adequate cost data *only if* the product is sold in substantial quantities to the general public.[77] It is clear that the General Accounting Office will adopt a strict interpretation of the existing law and will demand that catalog pricing be a result of a substantial commercial volume of sale. The Comptroller General is placing much emphasis upon the new Act. In another recently issued report entitled "Non-competitive Procurement of Military Aircraft Forgings From Aluminum Company of America at Prices Substantially Higher Than Current and Expected Costs of Production," dated July 31, 1963, the Comptroller General states:

> Due to the lack of genuine effective competition when procurements of this nature are made from single source suppliers, sufficient information is required from the contractor to evaluate the company's price proposals to assure that the Government's interest is adequately protected in price negotiations. Since the chief subject of such negotiations is the costs that the contractor may incur in the performance of the work under the contract, adequate, accurate, and timely cost information [similar to the language of the statute] is essential. It is particularly important that the Government secure the latest cost data since production costs tend to decline as a contractor and his suppliers gain additional production experience on a particular item manufactured.[78]

This is not just a slap on the wrist from the General Accounting Office, since once the certificate is signed criminal penalties may ensue. The certificate on its face calls attention to a statutory provision[79] prescribing criminal penalties for knowingly making false representations to the government. The question before the military agencies at this

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[75] Ms. Comp. Gen., No. B-146781 (1963) (unpublished).
[76] Id. at 2 (covering letter to report).
[77] Ibid.
[78] Ms. Comp. Gen., No. B-146784, 4 (1963) (unpublished).
[79] 18 U.S.C. § 1001 (1958).

time is whether an honest mistake in judgment or an incorrect estimate would subject the contractor to this criminal provision. It is submitted that the better view would be that the contractor would not be subject to a price reduction if he did not *"knowingly and willfully"* make incorrect statements to the government.[80] This view is supported by the statement of the Senate report that the object of the law is to require truth in negotiations. If the contractor does make statements which are, to his own best knowledge and belief, true, then he should not be criminally liable. Should the statements later prove to be false, in some instances the contractor may reap a so-called windfall profit. However, it is difficult to see a scheme by which such a windfall could logically be voided under the present law; this is the purpose of the Renegotiation Act.[81]

As further evidence of this interpretation,[82] Representative Hebert introduced a Bill on August 1, 1963, which clarifies the language and intent of the previous Bill by declaring that the price shall be adjusted when it is determined that the cost or pricing data which the contractor or subcontractor "knew, as of a date agreed upon between the parties (which date shall be as close to the date of the agreement of the negotiated price as is practicable), was inaccurate, incomplete, or noncurrent . . . ."[83]

Another problem, in addition to the problem of the windfall profit, is the problem of the degree of increase which is sufficient for a contracting officer to reduce the price. The Act states that the price shall be adjusted to exclude "any significant sums" by which the price was increased because of the defective data. It is reasonable to assume that a significant increase should be at least ten per cent. Unfortunately, the regulations are of no help in determining the extent of the variation required for a price reduction.[84] It must be assumed that both the General Accounting Office and the agency involved will be reasonable in their interpretation and that a reasonable interpretation would allow a ten per cent increase in the data furnished before action would be taken by the department or agency involved.

The Act and the regulations seem to be a one-way street, that

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80 18 U.S.C. § 1001 (1958) provides:
Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

81 Renegotiation Act of 1951, 65 Stat. 7, 50 U.S.C. App. §§ 1211-1233 (1958).

82 For a contrary opinion, see 5 Government Contractor ¶ 214 (1963).

83 H.R. 7909, 88th Cong., 1st Sess. (1963).

84 See ASPR, 32 C.F.R. § 7.104-29, 28 Fed. Reg. 4886 (1963).

is to say, the price is not increased if the data furnished prove to be significantly underestimated. Also open to question is whether or not there will be any attempt at balancing overestimates and underestimates in the same contract. At the hearings before the Senate Armed Services Committee it was emphasized that the Act would also serve to curb some contractors' predilection to underbidding on the hopes that recovery could be made through the means of various changes.[85]

Still another problem area is the question of a subcontractor furnishing cost information to his prime.[86] In many instances, the subcontractor may be in direct competition with the prime contractor and will, therefore, not desire to give cost information in connection with the making up of his bid to the prime contractor. It is submitted that the most logical method of handling this problem would be for the subcontractor to give such information directly to the government.[87] It obviously would be too much to ask of a major subcontractor to give all of his cost data to his most fierce competitor who happened to be the prime contractor. Another way of obtaining the desired result sought would be for the subcontractor to deal directly with the government.

Many contractors feel that the actual thrust of the Act and the regulations is to reduce profit. This, of course, is not the announced purpose of the Act, nor of the regulations issued pursuant to it. This is also not the purpose as announced by authorities at the Department of Defense.[88] However, as was pointed out by Representative Hebert: "A proper application of section (g) [the data section] will almost certainly reduce the work of the Renegotiation Board. It will catch the padded profit before it is paid, and not years later."[89] This Act may not be intended to be an anti-profit statute; it might reasonably result in an anti-too-much profit statute. The problem areas are many; the answers are few. Representative Hebert stated that "truth will work wonders"; but will it also solve tough problems?

VI. Protest to the Comptroller General

> I'll be judge, I'll be jury, said cunning old Fury; I'll try the whole cause, and condemn you to death.[90]

An important avenue of relief in recent years for the aggrieved contractor is the protest to the Comptroller General of the United

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85 See, e.g., Hearings, supra note 51, at 50.

86 ASPR, 32 C.F.R. § 7.104-42, 28 Fed. Reg. 6068 (1963).

87 For a discussion of the various remedies presently available see Penne, Legal Remedies of the Government Subcontractor, 32 So. Cal. L. Rev. 1 (1958).

88 Chermak, supra note 52.

89 Hearings, supra note 51, at 57.

90 Lewis Carroll, Alice's Adventures in Wonderland.

States.[91] The contractor may feel that he was badly abused because his proposal, even though it most nearly met the requirements of the government, was not the proposal the government stated it intended to accept. He may feel he was badly abused in not being invited to submit a proposal in the first step of a two-step procurement or a bid in the second step, or he may feel he is about to be mistreated because of some threatened action by the government which will do violence to the established procurement regulations. In such situations, the avenue for the most prompt action is the Comptroller General and his General Accounting Office.

The use of the General Accounting Office in these areas has substantially increased in recent years,[92] in spite of the fact that the contractor has several important hurdles to surmount and that there are areas of legal confusion in dealing with the General Accounting Office. If the Court of Claims can be termed "keeper of the nation's conscience,"[93] then certainly the Comptroller General can be termed "keeper of the nation's purse strings." He has stated: "It is our duty to resolve the doubt in favor of that course which will result in the conservation of appropriated funds . . . ."[94]

In bid protests and allied cases, the Assistant General Counsel of the General Accounting Office has stated:

> In these cases G.A.O. acts as a sort of referee to see to it that bidders are treated fairly and the Government receives the benefits contemplated by the applicable procurement statutes which require, either expressly or impliedly, that award be made to that responsible bidder whose bid conforms to the invitation, specifications and will be most advantageous to the Government.[95]

The protest made by the contractor need not be made just because of a threatened award of a negotiated or advertised contract to another contractor. A protest may also be made in the event the agency or department involved is threatening to use the contractor's proprietary data in a competitive negotiated procurement.[96] In that

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[91] See, Whelan, A Government Contractor's Remedies: Claims and Counterclaims, 42 Va. L. Rev. 301 (1956); Birnbaum, Government Contracts: The Role of the Comptroller General, 42 A.B.A.J. 433 (1956).

[92] See Welch, The General Accounting Office in Government Procurement, 14 Fed. B.J. 321, 327 (1956). For an interesting and informative discussion of the past performance audit responsibilities of the General Accounting Office with regard to negotiated contracts see, Powers, Contract Audit and Internal Audit Responsibilities of the Procurement Agency and of the General Accounting Office, 18 Fed. B.J. 269, 275 (1958).

[93] Ellison, The United States Court of Claims: Keeper of the Nation's Conscience for One Hundred Years, The Centennial Banquet, 132 Ct. Cl. 1 (1955).

[94] Ms. Comp. Gen., No. B-147131 (1960) (unpublished).

[95] Welch, supra note 92, at 327.

[96] Ms. Comp. Gen., No. B-150369 (1963) (unpublished).

event, the General Accounting Office will direct the agency or department involved to withdraw the material from the bid documents which contain the proprietary data. A protest may also be lodged because the contractor believes some other aspect of the negotiation procedures has been violated to his detriment.

The Assistant General Counsel of the General Accounting Office has stated that one of the purposes of the review of bid protest cases by the agency is to assure fair treatment of the contractor. The other side of the coin is assuring that the government receives the benefits contemplated by the applicable procurement procedures. In what appears to be an aberration from this announced policy of fair treatment of bidders, the Comptroller General has recently held that the departments need not solicit bids in strict accordance with its own procedures. He has stated:

> [A] failure to solicit bids in strict accordance with procedures which are prescribed for the purpose of implementing a departmental policy will not invalidate the solicitation or preclude the award of a valid and binding contract based upon bids received.[97]

This statement does not comport with the traditional attitude of the Comptroller General in insisting that announced procedures be followed; nor does it comport with the Supreme Court's insistence that a department follow its own announced procedures.[98] The Court of Claims, however, has recently in effect stated in the *Christian* case[99] that implementing regulations may be incorporated in contracts even against the specific intention of the department or agency involved.[100]

No special form is prescribed for use in filing claims with the Comptroller General.[101] However, in practice, a telegram is frequently sent with a copy to the contracting officer to forestall any threatened action until a decision has been reached by the Comptroller General. Then the formal claim letter and brief may be submitted. Although there is no formal rule to this effect, it is always preferable to have the protest lodged with the Comptroller General prior to the time the contract award has been made. The facts upon which the claim is based should be set forth as fully as possible and a brief in support of the claim is usually advisable.

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97 Ms. Comp. Gen., No. B-151787 (1963) (unpublished).

98 Service v. Dulles, 354 U.S. 363, 372 (1956).

99 G. L. Christian & Associates v. United States, 312 F.2d 418, motion for rehearing denied, 320 F.2d 345 (Ct. Cl. 1963).

100 In its decision just cited, supra note 97, the Comptroller General fails even to mention the G. L. Christian & Associates case. Because of the notoriety of the case this omission must be deliberate.

101 Cuneo, Government Contracts Handbook 213 (1962).

The contractor may also request a conference, but there is no formal or informal hearing. The Comptroller General's representatives usually allow a full discussion of all facets of the claim, but impressions gained from such a conference are not necessarily a guide as to what the ultimate decision will be. As a practical matter, it is important to note that the Comptroller General's representatives will usually allow the contractor or his representative to examine the reply of the agency or department to the protest. It should be borne in mind and emphasized that the Comptroller General will accept as true the facts as given to him by the department or agency involved unless he is presented with very clear and convincing evidence to the contrary.[102]

Claims against the government which are to be considered under the Budget and Accounting Act of 1921[103] must be received in the General Accounting Office within ten years after the date when the claims first accrued.[104] There is no statute setting a limit on the time within which a contractor or claimant may seek to have the General Accounting Office review its prior decision. In the *Raylaine Worsted* case,[105] the General Accounting Office in 1957 reversed in favor of the contractor a decision it had rendered in 1942. However, contractors should be cautioned not to rely upon that case as a general precedent since the facts therein were most unusual.

Perhaps the best summary made of the function of the General Accounting Office in this area of protest was made by its Assistant General Counsel when he stated:

> The corrective action which has been and can be taken by G.A.O. in this class of cases is an important factor in the preservation and maintenance of the competitive-bidding system, which the Office believes to be essential to good Government procurement.[106]

Therefore, it is important for the contractor to remember that if he is aggrieved, he may protest immediately to the Comptroller General, who will then determine whether a correction of the grievance will be a factor in the preservation and maintenance of the competitive bidding system. In this sense of the word, this also includes the preservation and maintenance of proper procedures in negotiated contracts. The most important caveat in matters dealing with the General Accounting Office is one of timing; it is essential that notification to the Comptroller General be made prior to the award of a contract.

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102 38 Decs. Comp. Gen. 413, 416 (1958).

103 42 Stat. 24 (1921), 31 U.S.C. § 71 (1958).

104 54 Stat. 1061 (1940), 31 U.S.C. § 71a (1958).

105 Ms. Comp. Gen., No. B-130131 (1957) (unpublished).

106 Welch, supra note 92, at 329.

VII. Conclusion

In spite of all Congressional protestations, the military departments, which enjoy the great preponderance in dollar amount of federal procurement, continue to use more and more negotiated contracts. In an increasingly complex, technical and sophisticated world, this trend will undoubtedly continue. The two-step procurement program and the cost or price certification program are outgrowths of this increased use of negotiated procurement. Apparently Congress feels that if it cannot force more formal advertising on the military departments, the least it can do is to attempt to perfect, control and modify negotiated procurement. Two-step procurement is one step in that direction. It provides for negotiation in its preliminary and first step procedure, followed by a competitive price system in the second step. The cost or price certification law and the regulations pursuant thereto are an attempt to control negotiated procurement and also to get "truth in negotiation." It is an effort by Congress to require the military departments to be more careful in their procurement policy.

Finally, the Comptroller General is becoming more active in the areas of negotiated procurement, both in his role as guardian of the purse strings before money is spent and as investigator of costs already incurred in contracts. He is also active in his role as guardian of proprietary data and other areas to assure that the contractor is treated fairly and that the government obtains that to which it is rightfully entitled.