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*REPORT OF THE
COMPTROLLER GENERAL
OF THE UNITED STATES*



Executive Branch Actions On
Recommendations Of The
Commission On Government
Procurement

This is the sixth GAO report monitoring actions on the Procurement Commission's 149 recommendations. The executive branch is adopting most recommendations; about 10 percent of them are now in effect.

Although considerable progress has been made, special attention is needed by the executive branch or the Congress on about one-third of the recommendations.

For example, early congressional consideration is needed on a modern, unified statutory framework for some \$70 billion in Federal procurement annually.

PSAD-76-39

DEC. 19, 1975

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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-160725

The Honorable Jack Brooks, Chairman
Committee on Government Operations
House of Representatives

Dear Mr. Chairman:

This is our sixth report replying to your Committee's request that GAO monitor executive branch actions on the 149 recommendations of the Commission on Government Procurement.

Although considerable progress had been made, special attention is needed by the executive branch or the Congress on about one-third of the recommendations. Several suggested for early congressional consideration include (1) enacting a modern, unified statute for Federal procurement, (2) adopting new research and development budgeting, authorizing, and funding procedures for Federal systems acquisition, (3) streamlining application of socioeconomic programs in the procurement process, and (4) mandating a policy guidance study for Federal grant-type assistance programs.

We are sending copies of this report to other congressional committees having an interest in procurement matters; the Director, Office of Management and Budget; the Administrator for Federal Procurement Policy; the Administrator of General Services; heads of the 14 lead agencies involved in the executive branch program; and to each member who served on the Commission on Government Procurement.

Sincerely yours,

A handwritten signature in cursive script that reads "Thomas B. Stenta".

Comptroller General
of the United States

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ABBREVIATIONS

ADPE	Automatic Data Processing Equipment
AEC	Atomic Energy Commission
ASPR	Armed Services Procurement Regulation
B&P	Bid and Proposal
CSC	Civil Service Commission
DCAS	Defense Contract Administration Services
DDR&E	Director of Defense Research and Engineering
DOD	Department of Defense
DOJ	Department of Justice
DOL	Department of Labor
DOT	Department of Transportation
DSARC	Defense Systems Acquisition Review Council
FMC	Federal Management Circular
FMN	Federal Management Notice
FPMR	Federal Property Management Regulation
FPR	Federal Procurement Regulation
GAO	General Accounting Office
GSA	General Services Administration
HEW	Department of Health, Education, and Welfare
IR&D	Independent Research and Development
NASA	National Aeronautics and Space Administration
NSF	National Science Foundation
NSF/OST	National Science Foundation, Office of Science and Technology
OASD	Office of Assistant Secretary of Defense
OFMP	GSA's Office of Federal Management Policy
OFPP	Office of Federal Procurement Policy
OMB	Office of Management and Budget
SBA	Small Business Administration
TSARC	Transportation Systems Acquisition Review Council
USDA	U.S. Department of Agriculture

COMPTROLLER GENERAL'S REPORT TO
THE COMMITTEE ON GOVERNMENT
OPERATIONS
HOUSE OF REPRESENTATIVES

EXECUTIVE BRANCH ACTIONS
ON RECOMMENDATIONS OF
THE COMMISSION ON
GOVERNMENT PROCUREMENT

D I G E S T

This is the sixth GAO progress report monitoring executive branch actions on the 149 recommendations of the Commission on Government Procurement. 401

Policy actions are completed on all but 30 percent of the Commission recommendations, and actions on the remaining are in advanced stages. (See pp. 14 and 15.)

Results to date indicate a majority of the recommendations will be adopted. (See p. 18.)

About 10 percent of the actions to put the recommendations into effect are complete; most others are underway or are awaiting enabling legislation. (See pp. 18-20.) GAO is recommending special attention by the executive branch or the Congress for 46 of the recommendations. (See pp. 22-24.)

In the executive branch, the Director, Office of Management and Budget, should take specific steps to:

- Obtain operating agency top management support in resolving some complex implementing issues and developing implementing proposals.
- Analyze further whether a number of proposed actions will, in fact, implement the recommendations.
- Reconcile different agency regulatory treatment of the same recommendation.
- Set deadlines for completing some actions.

In response to congressional oversight hearings and GAO's last progress report, the Office of Federal Procurement Policy established a followup program on implementing actions. It also delegated some followup responsibility to

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the General Services Administration's Office of Federal Management Policy.

If, as it now appears, the General Services Administration's supporting role is not funded, GAO recommends the Director, Office of Management and Budget, assure that these followup responsibilities are transferred elsewhere. (See pp. 11 and 21-23.)

The Office of Federal Procurement Policy became fully operational in mid-1975 and has made progress in some critical areas. These areas include developing Government-wide policy on major systems acquisition and establishing a program to carry out the national policy of relying on private enterprise when appropriate. (See pp. 8-10 and 17.)

The Congress has enacted legislation on 6 of the Commission recommendations, and bills are pending on 25 others. (See pp. 2-5.) Bills to create a modern, unified statutory framework for Federal procurement have been introduced or are being drafted.

Early congressional consideration of this new statutory framework is needed because

- present statutory guidance on some \$70 billion in Federal procurement annually is fragmented, out of date, and inconsistent;
- 3 years have elapsed since the Commission made its recommendations; and
- other important actions on Commission recommendations hinge on this legislation. (See pp. 2 and 23.)

In terms of priorities, other Commission recommendations deserving early congressional consideration are (1) adopting new research and development budgeting, authorizing and funding procedures for Federal systems acquisition, (2) streamlining application of socioeconomic programs in the procurement process, and (3) mandating a policy guidance study for Federal grant-type assistance programs. (See p. 23.)

CHAPTER 1

INTRODUCTION

The legislatively created Commission on Government Procurement published in early 1973 its 149 recommendations to improve Federal Government procurement. Soon after, the executive branch set up a program to act on the recommendations. Also the House Committee on Government Operations asked GAO to check the program's progress. This is our sixth progress report. 1/

In the present report, we first outline pertinent congressional legislation. Next, we review the operational status of the Office of Federal Procurement Policy (OFPP) created in response to the Commission's first recommendation. Finally, we summarize executive branch actions on the Commission recommendations as of November 1, 1975, and identify those requiring special attention by the executive branch or the Congress.

1/These reports are dated June 19 and September 19, 1973; January 31 and July 31, 1974; and March 17, 1975. See also "Better Followup System Needed to Deal with Recommendations by Study Commissions." (RED-76-33, December 1975.)

CHAPTER 2

PERTINENT CONGRESSIONAL LEGISLATION

Among its 149 recommendations, the Commission designated 63 of them as requiring legislation. So far, 6 of these have been enacted into law, and another 25 incorporated in current House and Senate bills.

The first legislative recommendation called for an Office of Federal Procurement Policy to provide executive leadership and direction in procurement matters and to be responsive to the Congress. This office is in operation. (See ch. 3.)

A group of legislative recommendations to create a coherent and relevant statutory framework was next. These recommendations seek to modernize and unify the two basic procurement statutes--the Armed Services Procurement Act and the Federal Property and Administrative Services Act--both enacted some 25 years ago.

House members in 1973 introduced a bill to create the new statutory framework. Shortly before the Congress adjourned, the executive branch submitted comments endorsing the bill. The executive branch also officially announced adoption of the related Commission recommendations. This year Senator Charles Percy, at the request of OFPP, introduced a revised version of the House bill not heard in the last Congress. Senator Lawton Chiles and Congressman Frank Horton are also drafting bills.

Enactment of a modern, cohesive statutory framework deserves early congressional consideration because (1) it will lay the foundation for policies and procedures governing all Federal procurement (some \$70 billion or more annually) and (2) it will help carry out other Commission recommendations, particularly, a system of Government-wide regulations.

Table 1, lists the Commission's legislative recommendations and actions to date.

TABLE 1
STATUS OF PERTINENT CONGRESSIONAL LEGISLATION (note a)

<u>Purpose</u>	<u>Commission recommendation (note b)</u>	<u>Bill or law number</u>	<u>Date introduced or enacted</u>	<u>Sponsored by</u>	<u>Committee of jurisdiction</u>	<u>Status</u>	
						<u>93d Congress</u>	<u>94th Congress</u>
Create OFPP with statutory requirements for Government-wide regulatory system, private sector participation and procurement data system	A-1, 10, 11; D-1	Public Law 93-400	Aug. 1974	Reps. Hollifield, Horton Sens. Chiles, Roth	House and Senate Government Operations	Enacted into law; Administrator confirmed by Senate Dec. 1974	
Modernize and consolidate basic procurement statutes	A-2 through A-6, A-8, A-9; E-1, 4; J-2	S. 2309	Sept. 1975	Sen. Percy	Senate Government Operations	H.R. 9061 introduced June 1973 and referred to the House Judiciary Committee; no further action.	S. 2309, a refined version of H.R. 9061, introduced at the request of OFPP; Rep. Horton and Sen. Chiles, working on draft bills to accomplish similar objectives.
Raise ceiling for use of simplified small purchase procedures from \$2,500 to \$10,000	A-7	Public Law 93-356	July 1974	Reps. Hollifield, Horton Sens. Chiles, Roth	House and Senate Government Operations	Enacted into law.	
Establish national policy of reliance on private sector for needed goods and services	A-22					No legislation introduced as yet but policy referred to in OFPP Act above.	
Eliminate executive and congressional delays in making procurement funds available	A-27	Public Law 93-344	July 1974	Several Congressmen	House and Senate Government Operations	Measures to reduce funding delays incorporated in Congressional Budget Reform Act (Public Law 93-344; July 1974.)	
Authorize negotiated sale of surplus elephantine tools	A-36					H.R. 14289 introduced Apr. 1974 and referred to the House Armed Services Committee; no further action.	
Establish program for legislative and executive reexamination of socioeconomic objectives implemented through procurement process	A-43					No legislation introduced as yet.	
Raise threshold to \$10,000 for application of socioeconomic requirements	A-44					No legislation introduced as yet.	
Provide uniform sanctions for socioeconomic requirement violations	A-46					No legislation introduced as yet.	

TABLE 1

STATUS OF PERTINENT CONGRESSIONAL LEGISLATION (note a) (continued)

Purpose	Commission recommenda- tion (note b)	Bill or law number	Date intro- duced or enacted	Sponsored by	Committee of jurisdiction	Status	
						93d Congress	94th Congress
Provide discretionary use of Federal laboratory funds to support national research and development objectives	B-2					No legislation introduced as yet.	
Eliminate research and development cost-sharing except where performers benefit	B-8					No legislation introduced as yet.	
Provide uniform Government-wide treatment of independent research and development and aid and proposal costs as necessary costs of doing business	B-10					No legislation introduced as yet but OFPP has authority to establish uniform treatment.	
Revise executive branch budgeting to national needs, agency missions, and programs; strengthen congressional control	C-2, 5					Partially incorporated in Congressional Budget Reform Act (Public Law 93-344, Sec. 6011). (See analysis of recommendations C-2 and C-5.)	
Establish policies for use of commercial sources in lieu of Government supply systems for procurement storage, and distribution of U.S.-made commercial products at home and overseas on an economic cost basis	D-6					No legislation introduced as yet.	
Authorize multiyear leasing of automated data processing equipment	D-13	S. 1260	Mar. 1975	Sen. Chiles, et al.	Senate Government Operations	S. 2785 introduced Dec. 1973 and referred to the Senate Government Operations Committee; passed Senate Sept. 1974 and referred to House Government Operations Committee; no further action.	Reported out of Senate Government Operations Committee June 1975; passed Senate July 1975 and referred to House Government Operations Committee.
Establish central agency management coordinator for Federal food-quality assurance programs	D-17					No legislation introduced as yet but OFPP has assumed role under Public Law 93-400.	

TABLE 1

STATUS OF PERTINENT CONGRESSIONAL LEGISLATION (note a) (continued)

Purpose	Commission recommendation (note b)	Bill or law number	Date introduced or enacted	Sponsored by	Committee of jurisdiction	Status	
						93d Congress	94th Congress
Clarify distinction between contract and grant-type assistance transactions; authorize study of Government-wide system of policy guidance for Federal assistance programs	F-1, 2	S. 1437	Apr. 1975	Sen. Chiles, et al.	Senate Government Operations	S. 3514 introduced May 1974 and passed Senate Oct. 1974 and referred to House Government Operations Committee; H.R. 9060 introduced June 1973; House hearings held Nov. 1974 on both S. 3514 and H.R. 9060; no further action.	S. 1437, virtually identical to S. 3514, pending before Senate Government Operations Committee.
Establish integrated system of legal remedies for contract performance disputes	G-2 through G-12	H.R. 6085	Apr. 1975	Rep. Rodino	House Judiciary	H.R. 9062 introduced in June 1973 and H.R. 16423 in Aug. 1974; referred to House Judiciary Committee; no further action.	Comments requested from DOD, OMB, GSA, other executive agencies and GAO April 1975; comments received from GAO July 1975 favoring enactment.
Establish regional small claims boards	G-4					S. 3610 introduced June 1974; no further action.	See G-2 through G-12 above.
Establish Government catastrophic insurance program to compensate victims and indemnify contractors under Government-connected programs	H-4, 5					No legislation introduced as yet.	
Establish uniform Government-wide policies on patents, technical data, and copyrights	I-2, I-4 through I-9, 11, I-13 through I-15					No legislation introduced as yet.	
Organize, consolidate, and codify procurement statutes as appropriate under U.S.C. 41, public contracts	J-1					No legislation introduced as yet.	
Extend and expand Renegotiation Act to cover all Government contracts, raise jurisdictional amount, and clarify profit criteria used	J-3 through J-6	H.R. 5940 c/H.R. 9534	Apr. 1975 Sept. 1975	Rep. Burton Rep. Minish, et al.	Banking, Currency and Housing Banking, Currency and Housing	No legislation introduced.	No action on H.R. 5940; hearings held on H.R. 9534 by Subcommittee on Oversight and Renegotiation in Sept. 1975 and mark-up bill referred to full committee in October; both bills would implement only J-3 recommendation. (note c)

a/This table shows the status of all Commission-related legislation enacted into law or pending in the Congress at November 1, 1975, and identifies the bills that were pending at the expiration of the 93d Congress. The source for recommendations requiring legislation is either the Commission report, see ch. 7, vol. 4, "Legislative Action Recommendations," or a subsequent congressional decision to introduce legislation.

b/See ch. 4 schedules for text of these recommendations.

c/In mid-November 1975, the Subcommittee Chairman introduced and submitted to the full Committee for mark-up a revised bill, H.R. 10680, which would implement recommendation J-3 and, in part, recommendation J-5.

CONGRESSIONAL JURISDICTION

Traditionally, jurisdiction over procurement matters has been split in both houses between the Government Operations Committees and other particular committees having agency oversight, such as the Armed Services Committees. But, in July 1973, the Senate established an Ad Hoc Subcommittee on Federal Procurement within its Government Operations Committee. The subcommittee became a focus for Senate procurement matters during the last Congress and developed and expedited several pieces of legislation.

The new Senate subcommittee has been made permanent and is now called the Subcommittee on Federal Spending Practices, Efficiency and Open Government. It is assigned consolidated jurisdiction over the efficiency and economy of spending practices in Federal agencies and programs. The subcommittee continues to play a leading role in Federal procurement matters and in activities of the new OFPP, which is discussed in the next chapter.

In October 1974 the House decided to reform the structure, jurisdiction, and procedures of its own committees. A resolution 1/ gives legislative jurisdiction over multiagency procurement matters to the Committee on Government Operations. The Speaker can also refer a new procurement bill to one or more other House committees or split it among interested committees.

1/H. Res. 988, Rept. 93-916, Pt. II, 93d Cong., 2d sess.

CHAPTER 3

OFFICE OF FEDERAL PROCUREMENT POLICY

In response to the Procurement Commission's first recommendation, Public Law 93-400 created the Office of Federal Procurement Policy within the Office of Management and Budget (OMB). The President appointed an OFPP Administrator, and the Senate confirmed him in December 1974. 1/ The legislative background and hearings on this legislation are summarized in previous GAO progress reports and elsewhere. 2/

STATUTORY RESPONSIBILITIES

OFPP is to provide overall direction of Federal procurement policy and prescribe Government-wide policies and regulations for procuring goods and services. Its specific statutory functions are to:

1. Establish an executive agency system of coordinated, uniform procurement regulations.
2. Establish an effective and timely method of soliciting interested party viewpoints in formulating regulations.
3. Monitor and revise policies and procedures to carry out the national policy of relying on private enterprise to provide goods and services.
4. Promote and conduct procurement research.
5. Establish a procurement data system useful to the Congress, executive branch, and private sector.
6. Recommend and promote Civil Service Commission and executive agency programs for recruiting, training, career development, and performance evaluation of procurement personnel.

1/Nomination of Hugh E. Witt to be Administrator of the Office of Federal Procurement Policy, Hearings before the Senate Committee on Government Operations, 93d Cong., Dec. 19, 1974.

2/See Herbert Roback and Charles Goodwin, "Office of Federal Procurement Policy: The Legislative Background," National Contract Management Journal, vol. 8, No. 2, Fall 1974, pp. 15 to 36.

According to House and Senate reports, the OFPP Administrator's functions are not limited to those specified in the legislation but also include other procurement-related matters.

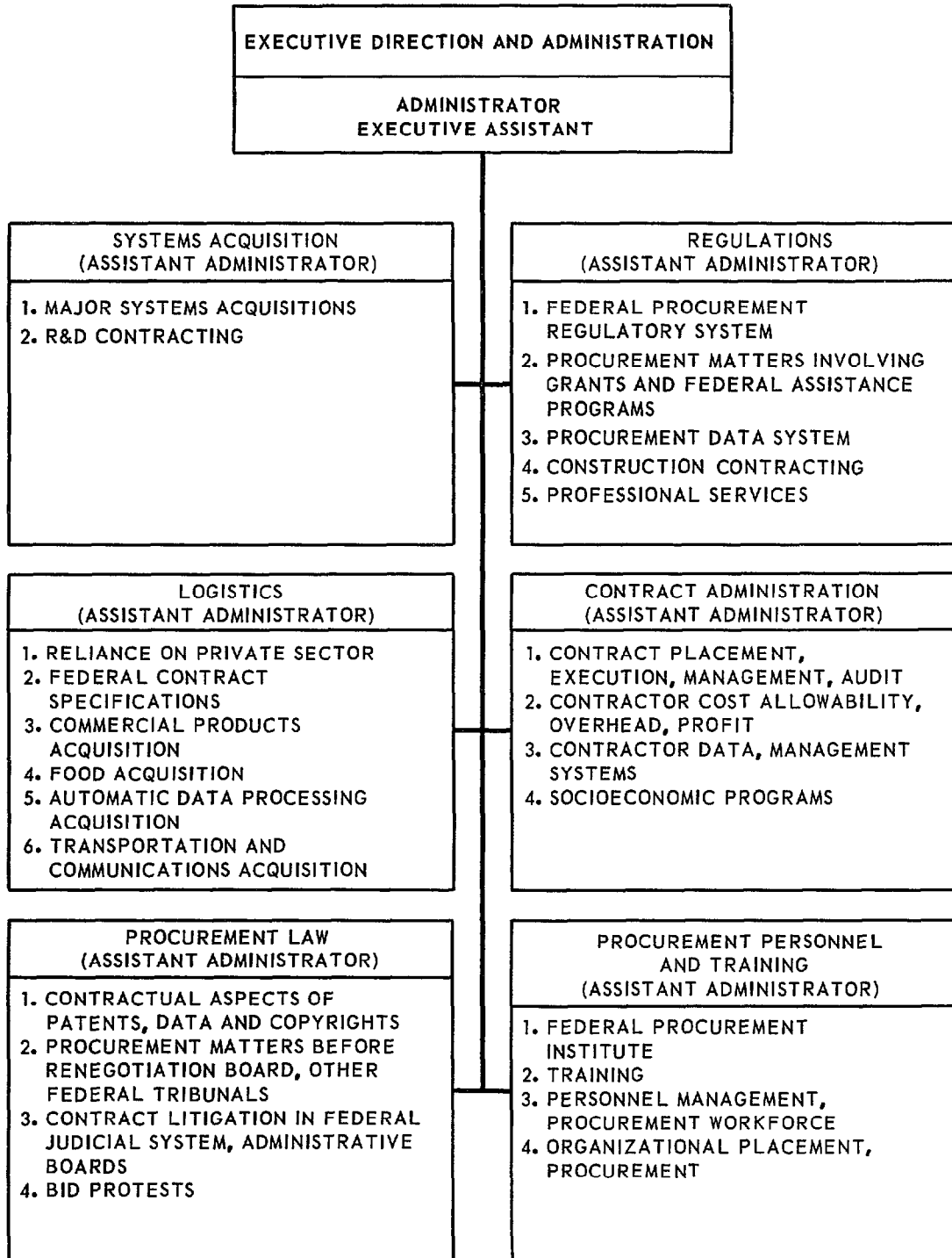
The Administrator is required to keep the Congress and its committees informed of major OFPP activities. He is to submit an annual report and other reports as necessary to the President of the Senate and the Speaker of the House of Representatives, with his legislative recommendations. Although OFPP, as a subdivision of OMB, is under the OMB Director, the Administrator is directly accountable to the Congress for effective performance of his statutory duties and responsibilities.

OPERATIONAL STATUS

The Administrator has organized OFPP to correspond to six key procurement areas. Chart 1 identifies the key areas of responsibility and representative functions of each.

CHART I

**OFPP – KEY PROCUREMENT AREAS
AND REPRESENTATIVE FUNCTIONS**



In April 1975 the Subcommittee on Federal Spending Practices, Senate Committee on Government Operations, held its first oversight hearings on OFPP.^{1/} The purpose was to review OFPP progress, identify any problems encountered, and confirm that OFPP has the full backing and support of the subcommittee in exercising aggressively its reform mandate. The Administrator said OFPP's initial efforts would be to:

- Establish Government-wide policy for major systems acquisition which the Administrator said was being given top priority. (See analyses of recommendations C-1 through C-12.)
- Complete work on bill to create a modern, unified procurement statute. (See analyses of recommendations A-2 through A-9.)
- Implement the policy to rely on private enterprise which the Administrator said was being accorded high priority. (See analyses of recommendations A-22 through A-26.)
- Establish a single system of uniform procurement regulations (although the Administrator said it was being temporarily deferred until the responsible staff member came on board). (See analyses of recommendations A-10 and A-11.)
- Establish a followup program to insure that adopted Commission recommendations are being put into practice. (See ch. 4.)

By July 1975 the Administrator had filled the six key positions heading up OFPP policy functions (see chart 1), and he submitted a mid-year progress report to the Congress. By November 1975 all but one staff position had been filled.

In its first year OFPP participated in two major procurement policy hearings: the first on major systems

^{1/}Oversight Hearing on OFPP before the Senate Subcommittee on Federal Spending Practices, Efficiency, and Open Government of the Committee on Government Operations, 94th Cong., 1st sess., Apr. 21, 1975.

acquisition reform; 1/ the second on contractors' independent research and development costs. 2/ OFPP is developing Government-wide policies in these two matters, and these policies should be published in the next few months.

EXECUTIVE AGENCY SUPPORTING ROLES

Congress intended for OFPP to have a small professional staff and to delegate to the executive agencies supporting roles in policy development. As described in the next chapter, 14 agencies have participated in developing Government-wide policy and implementing actions on the Procurement Commission recommendations. GSA, through its own Office of Federal Management Policy, has been coordinating this effort for OFPP. A June 1975 OFPP delegation continues this responsibility and includes other supporting roles.

1/Hearings on Major Systems Acquisition Reform, before the Senate Subcommittee on Federal Spending Practices, Efficiency, and Open Government of the Committee on Government Operations, 94th Cong., 1st sess., May, June, and July 1975.

2/Hearings on Contractors' Independent Research and Development, before the Subcommittee on Research and Development, Senate Committee on Armed Services, and the Subcommittee on Priorities and Economy in Government, Joint Economic Committee, 94th Cong., 1st sess., September 1975.

CHAPTER 4

EXECUTIVE BRANCH ACTIONS ON COMMISSION RECOMMENDATIONS

About 2-1/2 years ago, OMB formalized a program to act on the Procurement Commission's 149 recommendations. Our previous reports described how this program evolved, how executive policy positions are reached on the recommendations, and how they are followed through with implementing actions.

ACTION PROGRAM

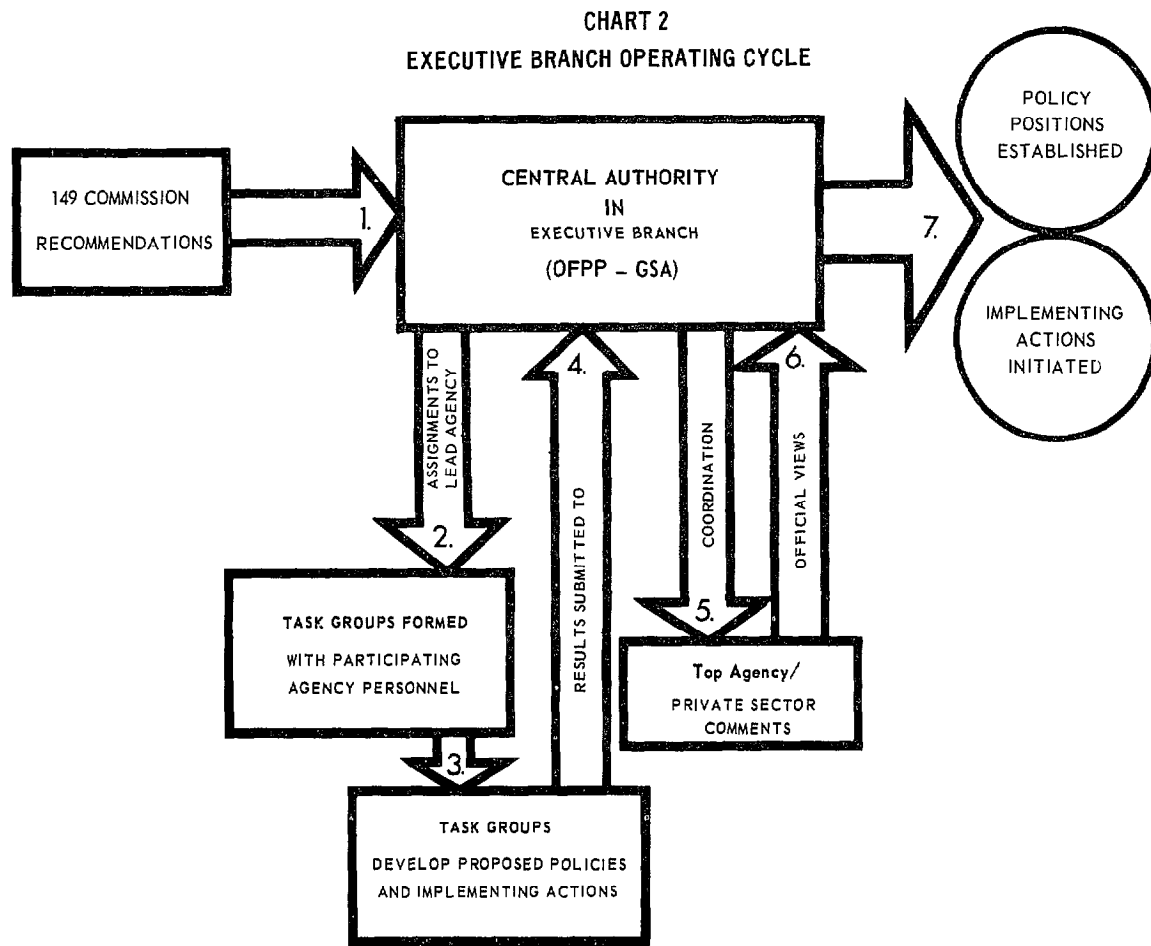
In brief, OMB assigned executive responsibilities for each recommendation or group of recommendations to those agencies having particular experience or interest in the subject matter. These lead agencies were charged to head up interagency task groups. The task groups were asked to do two things: (1) develop an executive branch position on each recommendation and (2) propose how the recommendation should be put into effect.

The total program consisted of 14 lead agencies and 74 task groups. OMB designated the General Services Administration, through its Office of Federal Management Policy, to act as program coordinator. A group of top policy officials from the larger procurement agencies have been advising GSA throughout the program.

The executive branch program requires the interagency task groups to submit proposals and supporting rationale for accepting, modifying, or rejecting the Commission recommendations. When the task group submits a satisfactory proposal, GSA analyzes and forwards it to all affected Federal agencies for their official comment. GSA also seeks private sector comments if appropriate. After considering these comments, an official executive policy is formed to accept, modify, or reject a recommendation. Major policies, such as those involving legislation or controversial matters, go to OFPP for final policy decision.

The next phase of the program involves putting the policy positions into effect. These implementing actions include drafting legislation (unless the Congress has already introduced legislation) or developing a Government-wide circular or regulation. Implementing actions also require coordination with the affected agencies and the private sector.

Chart 2 shows the executive branch operating cycle.



OFPP is now responsible for completing the executive branch program. (See ch. 3.)

OVERVIEW OF PROGRESS, STATUS

Table 2 shows current status and progress of the executive branch program since our last report.

TABLE 2
PROGRESS, STATUS OVERVIEW

	<u>Number of recommendations</u>	
	<u>Jan. 1, 1975</u>	<u>Nov. 1, 1975</u>
Executive branch policy positions:		
In process (task group level)	12	2
In process (executive branch level)	60	45
Positions established	<u>77</u>	<u>102</u>
Total	<u>149</u>	<u>149</u>
Disposition of recommendation:		
Adopted	57	71
Adopted modified	<u>7</u>	<u>14</u>
Rejected	<u>13</u>	<u>17</u>
Total	<u>77</u>	<u>102</u>
Implementing actions:		
Not begun	2	1
Not provided for	2	2
Awaiting legislation	12	14
In process	41	55
Completed	<u>7</u>	<u>13</u>
Total	<u>64</u>	<u>85</u>

As table 2 shows, the executive branch established positions on 102 of the 149 recommendations at November 1975, compared with 77 positions 10 months ago.

Of those 102 positions established to date, the executive branch has adopted or modified 85 recommendations and rejected 17.

Implementing actions have begun on most adopted recommendations; some are awaiting enabling legislation. Implementing actions are complete on 13, compared to 7 reported 10 months ago.

The remainder of this chapter discusses these activities in more detail. Analyses at the end summarize executive branch actions to date on each of the 149 recommendations and identify 46 of them as requiring special attention by the executive branch or the Congress.

Policy positions in process

All but two interagency task group proposals have been submitted on the Commission's 149 recommendations.^{1/} On the remaining 45, policy positions on most of them are in advanced stages as shown in table 3.

TABLE 3
POLICY POSITIONS IN PROCESS

	<u>Number of recommendations</u>
Positions in GSA Office of Federal Management Policy:	
For review	0
Out for agency/private sector comments	1
Comments under review	5
Positions referred to OFPP for final decision	<u>39</u>
Total	<u>45</u>

Analyses of the 149 recommendations at the end of this chapter identify:

- The executive branch positions still in process.
- What the proposed position is and the review stage reached.
- Major agency-private sector comments and dis-sents on these positions.
- Positions referred to OFPP for final decision and reasons why.

^{1/}These are recommendations H-4 and H-5. An interagency proposal will not be submitted on 5 recommendations. (See analysis of A-22 through A-26 at end of this chapter.)

Positions referred to OFPP for final decision usually involve major policy matters or important agency dissents. The following table identifies each referral awaiting OFPP decision and the month of referral.

TABLE 4
REFERRALS TO OFPP AWAITING DECISION

Recommendations	1974					1975				
	May	June	Aug.	Sept.	Nov.	Jan.	Apr.	June	Oct.	Nov.
A-18 reconciling grade levels							•			
A-22 through A-26 relying on private enterprise				•						
A-30, A-31 establishing profit guidelines						•				
A-35 modernizing contractor production facilities										•
A-43, A-44, A-45 reassessing socioeconomic policies										•
A-47 creating new small busi- ness standards								•		
A-48 testing mandatory sub- contracting		•								
B-1 through B-4 establishing Federal R&D policy	•									
B-10 treating contractor IR&D-B&P costs								•		
C-1 through C-12 acquiring major systems						•				
D-6 acquiring commercial products					•					
G-3, G-7, G-8 establishing contract dispute remedies						•				
G-21 through G-24 extending Public Law 85-804			•							

AS shown in the later analyses of actions on individual recommendations, OFPP has taken some important steps on several referrals and has set deadlines for policy positions on most of them.

As to relying on private enterprise for goods and services when appropriate, OFPP has initiated several actions to improve OMB Circular A-76 implementation. When OFPP gains enough knowledge on individual agency experience with the circular, it intends to establish a position on Commission-recommended changes to the circular. It has not set a date for this action. According to our analysis, OFPP needs top-level operating agency attention to get a more complete picture of the circular's implementation and any weaknesses in its guidelines. OFPP should then be in a better position next year to decide what improvements are needed and what the executive branch position should be on the Commission recommendations. (See analyses of recommendations A-22 through A-26.)

As to major systems acquisition, OFPP has made considerable progress in developing a Government-wide policy circular and expects to issue the circular officially in January 1976. Our analysis identifies several aspects of the proposed circular requiring attention. (See analyses of recommendations C-1 through C-12.)

OFPP is also developing Government-wide policy on contractors' independent research and development and bid and proposal costs. It expects to issue an official policy statement by mid-1976. (See analysis of recommendation B-10.)

As to the Commission-recommended system of contract dispute remedies, OFPP has offered alternative approaches to Federal agencies and to the private sector for comment and has scheduled an open public meeting for December 1975. After examining these views, OFPP will establish executive branch positions on the recommendations--including reconsidering positions on some recommendations previously established. (See analyses of recommendations G-1 through G-12.)

Policy positions established, extent
implemented

The executive branch has established policy on 102 recommendations--adopting 71, modifying 14, and rejecting 17. The disposition of each recommendation is discussed at the end of this chapter. If the recommendation was modified or rejected, the reasons why are noted. Some of the rejections are judgmental, on which opinions may reasonably differ as to appropriate Government policy. 1/

Table 5 reports on the progress of putting the adopted or modified recommendations into effect. It identifies the recommendations involved and shows that implementing action on 1 has not begun, 2 were not provided for in the executive branch position, 14 others are awaiting legislation, 55 more are in process, and 13 are completed.

1/The rejected recommendations are A-32, A-41, A-42, B-9, D-8, D-9, D-10, G-2, G-4, G-6, G-9, G-10, G-12, I-4, I-8, J-4, and J-6.

TABLE 5

STATUS OF IMPLEMENTING ACTIONS

Recommendation	Executive Branch Implementing Action				
	Not begun	Not provided for	Requires legislation first	In process	Completed
A-1, creating OFPP					●
A-2 through A-6, A-8, A-9, enacting modern, unified statutory framework			●		
A-7, raising ceiling to use simplified purchase procedures					●
A-10, A-11, establishing Government-wide regulatory framework				●	
A-12 through A-17, A-19, A-20 improving procurement work force				●	
A-21, creating Federal Procurement Institute				●	
A-27, financing procurement timely					●
A-28, establishing Government-wide cost principles				●	
A-29, making single overhead settlements				●	
A-33, A-34, establishing Government-wide criteria for contractor data, management systems				●	
A-36, disposing heavy machine tools				●	
A-37, relying on contractor procurement system				●	
A-38, competing professional services				●	
A-39, using interagency contract support services				●	
A-46, making debarment treatment uniform and equitable				●	
A-49, enhancing small business participation		●			
B-5, using federally funded R&D centers				●	
B-6, monitoring experimental R&D incentives					●
B-7, eliminating restraints on unsolicited proposals				●	
B-11, using basic agreements				●	
B-12, resolving organizational conflicts of interest				●	
D-1, providing Government-wide procurement data				●	
D-2, satisfying user with commercial supply support systems				●	
D-3, limiting commercial Federal specifications				●	
D-4, assigning OFPP specifications policy responsibility					●

TABLE 5
STATUS OF IMPLEMENTING ACTIONS (CONTINUED)

Recommendation	Executive Branch Implementing Action				
	Not begun	Not provided for	Requires legislation first	In process	Completed
D-5, training decentralized purchasing activities					●
D-7, procuring U.S. commercial products overseas		●			
D-11, reevaluating ADPE acquisition procedures				●	
D-13, authorizing multiyear ADPE leasing			●		
D-14, establishing ADPE evaluation benchmarks				●	
D-15, amending ADPE late proposal clause					●
D-16, D-17, coordinating food acquisition policy, quality assurance					●
D-18, using commercial forms in utility procurement				●	
D-19, using innovative transportation procurement techniques					●
E-1, E-4 competing A-E services			●		
F-1, clarifying procurement v. assistance relationships			●		
F-2, creating policy guidance system for Federal assistance program				●	
G-1, clarifying contracting officer authority				●	
G-5, using "All Disputes" clause				●	
G-11, allowing interest on claims					●
G-13 thru G-16, G-18, G-19, improving bid protest procedures				●	
G-17, recommending termination for Government convenience					●
G-20, review of agency bid protect procedures					●
H-1 thru H-3, making Government self-insurer				●	
I-1, I-2, I-3, I-5, I-6, I-7, I-9 through I-12, I-14 through I-16, revising patents, technical data, and copyright policies				●	
J-1, consolidating, recodifying procurement statutes	●				
J-2, extending Truth-in-Negotiations Act			●		
J-3, J-5, modifying Renegotiation Act			●		
Totals	1	2	14	55	13

Analyses at the end of this chapter identify for all adopted and modified recommendations:

- The type of implementing action being used or planned.
- Whether action is completed and, if not, how far it has progressed and whether a deadline has been set.
- Which actions require special attention and why. (See also table 6.)

Our last report highlighted the small number of completed implementing actions and showed slippages in others. We suggested to the Director, Office of Management and Budget, that the Administrator for Federal Procurement Policy (1) establish priorities and deadlines and (2) establish clear responsibility in the executive branch for approval and periodic followup on each implementing action to insure conformity with earlier agreed-upon policy.

In a May 1975 report to the Congress, the OMB Director responded to our suggestions. In answer to the first, he provided the current status or target dates for the recommendations lacking deadlines. In answer to the second suggestion, the Director said that OFPP would establish a followup program to insure conformity with established policy and implementing guidelines. Under the program the OFPP Administrator assigned each of the 149 recommendations to one of his Assistant Administrators (see chart 1) who will verify the consistency of implementing actions with the approved executive branch policy positions.

Under the followup program, the OFPP Administrator also delegated certain support responsibilities to GSA's Office of Federal Management Policy. The OFPP Administrator would look to that Office to carry out a number of support responsibilities, except where another agency (such as DOD) has lead responsibility for an interagency study, policy development, or implementation project.

Since this followup program has been underway for only a few months, it is too early to gage its effectiveness. The supporting role of GSA's Office of Federal Management Policy, however, is in question because the continued need for the Office is under congressional challenge and requested budgetary funds are being withheld. Therefore, responsibility for followup actions on a number of the Commission recommendations may need to be transferred elsewhere or absorbed within OFPP.

COMMISSION RECOMMENDATIONS REQUIRING
SPECIAL ATTENTION

We made an overall evaluation of executive branch actions on the 149 recommendations to identify those requiring special attention. In our evaluation we considered whether:

- Progress was being made in reaching an executive branch policy on the recommendation based on sound rationale.
- Progress was being made in developing an action that would effectively implement the recommendation.

As in the past, GSA staff analyses helped our evaluation by summarizing task group reports and official agency comments and identifying issues requiring resolution at higher executive branch levels.

Our evaluation identified 46 recommendations needing special attention by the executive branch or the Congress. Such special attention primarily concerns implementing actions.

Some cases need high-level operating agency attention to resolve complex issues and expedite development of the implementing action. Other cases require further analysis by OFPP to insure that a proposed action will, in fact, implement the Commission's recommendation. In several cases, different agency regulatory treatment of the same recommendation needs to be reconciled. Finally, in a few cases deadlines need to be set for completing the implementing action.

A number of recommendations require congressional attention either because executive branch action awaits enabling legislation or because congressional participation would help resolve major policy issues. The recommendations requiring special attention, as well as the underlying reasons, are summarized in table 6 and discussed individually in analyses following the table.

RECOMMENDATIONS TO DIRECTOR, OMB

The Director, OMB, through the Administrator of Federal Procurement Policy, should insure

- that actions on the particular Commission recommendations identified in table 6 receive special attention and

--that timely transfer is made of followup responsibilities from GSA's Office of Federal Management Policy if that Office is dissolved.

MATTERS FOR CONGRESSIONAL CONSIDERATION

Several matters requiring special congressional consideration are:

- Enacting a modern, unified statute for Federal procurement. (See ch. 2 and analyses of Commission recommendations A-2 through A-6, A-8, A-9 and also A-10, A-38, E-1, E-4, and J-2.)
- Authorizing and appropriating Federal R&D funds for solving agency mission problems by agency function to insure that technological efforts (1) are tied to affirmed needs to strengthen agency functions and (2) are directed to creating, exploring, and demonstrating competing solutions. (See analysis of Commission recommendation C-5 and also "Overview Of Executive Branch Action" on Commission recommendations C-1 through C-12 as well as analysis of recommendation C-2.)
- Reassessing jointly with the executive branch effective application of socioeconomic programs in the procurement process in order that legislation may be updated and administration streamlined. (See analyses of Commission recommendations A-43, A-44, A-45, and also A-46.)
- Mandating a study of policy guidance for Federal grant-type assistance programs to insure comprehensive coverage, adequate Federal, State, and local participation and timely completion of the study. (See analysis of Commission recommendation F-2 and also F-1.)

TABLE 6
RECOMMENDATIONS REQUIRING SPECIAL ATTENTION

Recommendation	By the Congress	By operating agencies	Further analysis needed	Differing agency regulations	By OFPP Implementation issues complex	Target completion date not yet established	
						For policy position	For implementing action
General procurement considerations A-2 through A-6, A-8, A-9, enacting modern, unified procurement statute	●						
A-12, 13, 14, raising level procurement management function; strengthening contracting officer qualifications and roles		●			●		●
A-22 to A-26, implementing policy of relying on private enterprise		●			●	●	
A-38, competing professional services	●			●			
A-39, promoting interagency use of field contract support services		●			●		●
A-43, 44, 45, reassessing socioeconomic programs applied through procurement process	●				●		
A-47, creating new standards of measuring small business participation					●		
A-49, enhancing small business participation			●				
Acquisition of research and development B-7, eliminating restraints on unsolicited proposals				●			
B-12, resolving organizational conflicts of interest				●			
Acquisition of major systems C-1, establishing needs and goals			●				
C-5, revising budget submissions, congressional funding procedures	●		●				
C-8, controlling noncompetitive system selection, development			●				
C-9, performing test and evaluation			●				
C-11, unifying management process			●				
Acquisition of commercial products D-3, using commercial specifications		●			●		
D-6, decentralizing procurement in U.S.		●			●	●	
D-7, decentralizing procurement overseas			●				
F-2, making policy guidance study for Federal grant-type assistance programs	●				●		●
I-1, I-2, I-3, I-6, I-7, I-9 through I-16, revising patents, technical data, and copyright policies		●	●	●	●		

ANALYSIS OF
EXECUTIVE BRANCH POSITIONS AND IMPLEMENTING ACTIONS ON COMMISSION RECOMMENDATIONS AS OF NOVEMBER 1, 1975

Short form Statement of Commission Recommendation	Executive Branch Policy Position				Executive Branch Implementing Action		
	Task group led by	Task group report to GSA	Referred to OFPP for decision	Position established (target)	Legislation if applicable	Type	Executive Action Completed (target)

PART A--GENERAL PROCUREMENT CONSIDERATIONS:

Establishment of OFPP:

- | | | | | | | |
|---|-----|------|-------------------|-----------------------|------------------|-----------|
| 1. Establish by law a central OFPP to provide executive direction and coordination and to be responsive to the Congress | OMB | None | Adopted July 1974 | P.L. 93-400 Aug. 1974 | Establish Office | July 1975 |
|---|-----|------|-------------------|-----------------------|------------------|-----------|

Statutory framework:

- | | | | | | | |
|---|-----|-----------|-------------------|--------------------|--|--|
| 2. Consolidate existing legislation to provide a common statutory basis for establishing fundamental procurement policies and procedures applicable to all executive agencies | DOD | Nov. 1973 | Adopted Dec. 1974 | S. 2309 Sept. 1975 | | |
| 3. Authorize competitive negotiation as an acceptable, alternative to formal advertising, but require documented reasons for its use in procurements over \$10,000 | DOD | Nov. 1973 | Adopted Dec. 1974 | S.2309 Sept. 1975 | | |
| 4. Extend competitive negotiated procurement provisions to all agencies, provide for competitive rather than maximum number of solicitations, facilitate use of clarifying discussions, and require evaluation criteria in solicitations if basis of expected award is other than lowest cost | DOD | Nov. 1973 | Adopted Dec. 1974 | S. 2309 Sept. 1975 | | |
| 5. Require debriefings when requested by unsuccessful proposer in negotiated procurement | DOD | Nov. 1973 | Adopted Dec. 1974 | S. 2309 Sept. 1975 | | |

[X] Requiring Special Attention

In August 1974 the President signed into law legislation introduced by the Congress to create an Office of Federal Procurement Policy. The Senate confirmed the OFPP Administrator in December 1974. By July 1975 the Administrator had filled the key positions for OFPP's policy functions. Current operations of the Office are discussed in chapter 3.

[X] In the last Congress the House introduced H.R. 9061 to modernize, unify, and simplify all Federal agency procurement statutes in accordance with Commission recommendations A-2 through A-9. Shortly before Congress adjourned, the executive branch submitted its comments on the bill with an overall endorsement. It also officially announced acceptance of the recommendations in the Federal Register. In September 1975 at the request of OFPP, Senator Percy introduced S. 2309, a refined version of the House bill not heard in the last Congress. Members of the House and Senate Committees on Government Operations (Horton and Chiles) have been working on draft bills to accomplish similar objectives. Enactment of this important legislation provides a new statutory foundation for policies and procedures for some \$70 billion or more annually in Federal procurements and, therefore, deserves priority attention of the Congress.

[X] See A-2 comments.

[X] See A-2 comments.

[X] See A-2 comments.

ANALYSIS OF

EXECUTIVE BRANCH POSITIONS AND IMPLEMENTING ACTIONS ON COMMISSION RECOMMENDATIONS AS OF NOVEMBER 1, 1975

Short form Statement of Commission Recom- mendation	Executive Branch Policy Position			Executive Branch Implementing Action			
	Task group led by	Task group report to GSA	Referred to OFPP for decision	Position established (target)	Legislation if applicable	Type	Executive Action Completed (target)

PART A--GENERAL PROCUREMENT CON-
SIDERATIONS: (continued)

6. Authorize sole-source pro- curement when competitive procedures cannot be used, but require appropriate documentation for procure- ments over \$10,000 and agency approval at higher administrative levels	DOD	Nov. 1973		Adopted Dec. 1974	S. 2309 Sept. 1975		
7. Raise \$2,500 ceiling for use of simplified purchase procedures to \$10,000; OFPP reexamine at least every 3 years	DOD	Nov. 1973		Adopted Feb. 1974	P.L. 93-356 July 1974	FPR 1-3.6 ASPR 3-600	Oct. 1975 July 1975
8. Authorize use of multiyear contracts with annual appro- priations for clearly speci- fied, firm requirements	DOD	Nov. 1973		Adopted Dec. 1974	S. 2309 Sept. 1975		
9. Repeal contractor's subcon- tract notification require- ment	DOD	Nov. 1973		Adopted Dec. 1974	S. 2309 Sept. 1975		
Regulatory framework:							
10. Establish a single Government-wide coordinated system of procurement regulations under control of OFPP	DOD	May 1974		Adopted Aug. 1974	P.L. 93-400 Aug. 1974	OFPP Circular	(May 1976)
11. Establish criteria for in- dustry and public participa- tion in procurement policy	DOD	May 1974		Adopted Aug. 1974	P.L. 93-400 Aug. 1974	OFPP Circular	(May 1976)

[X] Requiring Special Attention

[X] See A-2 comments.

The executive branch adopted this recommendation to increase the limit from \$2,500 to \$10,000 for use of simplified purchasing procedures and submitted proposed legislation in April 1974. The House and Senate introduced bills which resulted in enactment of P.L. 93-356 in July 1974. The executive branch implemented this law through temporary FPR and ASPR regulations issued the following month. Permanent regulatory changes were incorporated in 1975.

[X] See A-2 comments.

[X] See A-2 comments.

The OFPP Act imposed as statutory mandates, recommendation A-10 to establish a Government-wide coordinated system of procurement regulations and recommendation A-11 to establish effective and timely industry and public participation in the regulatory process. In June 1974 GSA asked the interagency task group assigned to these two recommendations to develop an implementing approach for OFPP. The task group, unable to reach agreement on a draft proposal, reported back to GSA in March 1975 as follows:

"The efforts of the task group have resulted in four divergent positions. DOD preferred a less detailed treatment of the coordination of procurement policy changes with the OFPP and the private sector than that proposed by GSA. NASA objected because the proposed system did not recognize NASA's authority to issue procurement regulations. TVA states that authority for TVA procurement must remain with the TVA Board."

In view of the impasse reached by the task group on implementation, GSA referred the matter to OFPP. OFPP plans to issue a circular that provides (1) a Federal Procurement Regulatory System (FPRS), including a framework to bridge the existing regulatory processes of the Federal agencies and (2) means of public participation in the regulatory process. The OFPP circular is expected to be issued in draft form this fall for comment. The target date for formal issuance of the circular is May 1976. A draft of the unified Federal procurement statute now under study by the Senate Subcommittee on Federal Spending (see A-2) contains a requirement that, within 2 years after enactment, OFPP publish a single, set of Federal procurement regulations.

In addition to the OFPP circular which is discussed under A-10 and which will cover public participation in regulatory formulation, OFPP plans to issue a draft circular for comment this fall to implement its statutory requirement for holding public meetings. The target date for formal issuance of the circular is May 1976.

ANALYSIS OF

EXECUTIVE BRANCH POSITIONS AND IMPLEMENTING ACTIONS ON COMMISSION RECOMMENDATIONS AS OF NOVEMBER 1, 1975

Short form Statement of Commission Recom- mendation	Executive Branch Policy Position				Executive Branch Implementing Action		
	Task group led by	Task group report to GSA	Referred to OFPP for decision	Position established (target)	Legislation if applicable	Executive Action Type	Completed (target)

PART A--GENERAL PROCUREMENT CON-
SIDERATIONS: (continued)

Procurement work force:

12. Make procurement an operational priority with other managerial functions in all agencies	NASA	Oct. 1973	Apr. 1974	Adopted Nov. 1975		Not Yet established
13. Strengthen role of contracting officer; allow business judgment latitude	NASA	Oct. 1973	Apr. 1974	Adopted Nov. 1975		Not yet established
14. Delegate contracting authority to qualified individuals; clarify understanding of authority	NASA	Oct. 1973	Apr. 1974	Adopted Nov. 1975		Not yet established
15. Establish through OFPP agency responsibilities and standards for procurement personnel improvement programs and monitoring systems.	CSC	Oct. 1973	June 1974	Modified Oct. 1975	Assigned to FPI	Interim Milestones Established
16. Establish procurement recruitment and training program with special attention to college recruitment	CSC	Oct. 1973	June 1975	Modified Oct. 1975	Assigned to FPI	Interim Milestones Established
17. Provide better balance between employee tenure and promotion rights and agency needs	CSC	Oct. 1973	June 1974	Modified Oct. 1975	Assigned to FPI	Interim Milestones Established

[X] Requiring Special Attention

[X] The interagency task group proposed, and the Federal agencies generally concurred in, the adoption of recommendations A-12, A-13, and A-14. These recommendations would raise the level of agency procurement management functions and strengthen qualifications and roles of contracting officers. In April 1974 GSA forwarded to OMB a draft memorandum for issuance to agency heads that would require those agencies who rely extensively on the contracting function to report on corrective measures planned or taken on the three recommendations.

OFPP officially adopted the three recommendations in November 1975 but decided on a different approach to implementation. The first step to be taken late this year will be to send a questionnaire to selected Federal agencies to collect current information on contracting personnel roles, qualifications, level of reporting, where these personnel are located in procurement organizations, and how the procurement organization fits into overall agency operations. OFPP has asked GSA to prepare, distribute, and review results of the questionnaire. Following evaluation of the data, OFPP plans to hold discussions with the agencies to develop concrete suggestions for implementing the recommendations. Target dates for implementing the recommendations have not been established.

[X] See A-12 comments.

[X] See A-12 comments.

The interagency task group concluded that responsibility to develop personnel management programs was an agency role that needed higher priority rather than an OFPP role. In October 1975 OFPP adopted the recommendation in modified form and assigned its implementation to the soon to be created Federal Procurement Institute (FPI). The modification calls for FPI to recommend and monitor, in cooperation with Civil Service and the procuring agencies, the development, implementation, and exchange of personnel management ideas that enhance the procurement career field. The recommendation was modified to conform with OFPP's statutory responsibilities for procurement personnel matters.

Recommendations A-16, A-17, A-19, and A-20, to upgrade procurement recruiting and training programs, were reworded by the task group to change the manner of implementation. The key change was to have agencies fulfill existing personnel management responsibilities instead of instituting new requirements. To obtain the necessary priority attention, the task group proposed sending agencies the recommendations and implementing action with a special message signed by the President. In June 1974 GSA referred the proposed position and implementing action to OMB. They were turned over to the newly created OFPP because one of its functions calls for recommending and promoting programs of the Civil Service Commission and executive agencies for recruitment, training, career development, and performance evaluation of procurement personnel.

In October 1975 OFPP officially adopted these recommendations in modified form to conform to its public law and assigned their implementation as operating functions of the soon to be created Federal Procurement Institute. Modified A-16 provides that FPI assist the agencies in determining quantitative and qualitative manpower needs for recruiting, training, and development programs. Interim milestones for implementing FPI are discussed under recommendation A-21.

See A-16 comments. Modified A-17 provides that FPI assist the agencies in designing and implementing plans to help employees develop and advance in accordance with their capabilities and interests and agency long-range needs.

ANALYSIS OF
EXECUTIVE BRANCH POSITIONS AND IMPLEMENTING ACTIONS ON COMMISSION RECOMMENDATIONS AS OF NOVEMBER 1, 1975

Short form Statement of Commission Recom- mendation	Executive Branch Policy Position			Executive Branch Implementing Action		
	Task group led by	Task group report to GSA	Referred to OFPP for decision	Position established (target)	Legislation if applicable	Type

PART A--GENERAL PROCUREMENT CON-
SIDERATIONS: (continued)

18. Reconcile grade levels to responsibilities and professionalism required	CSC	Dec. 1973	Apr. 1975	(Mar. 1976)			
19. Establish rotation program	CSC	Oct. 1973	June 1974	Modified Oct. 1975		Assigned to FPI	Interim Milestones Established
20. Structure longer range personnel programs	CSC	Oct. 1973	June 1974	Modified Oct. 1975		Assigned to FPI	Interim Milestones Established
21. Establish a Federal procurement research and training institute	CSC	July 1974	June 1975	Adopted June 1975		Create Institute	Interim Milestones Established

[X] Requiring Special Attention

The executive branch concurs in this recommendation to reconcile procurement grade levels to degree of responsibilities and professionalism required. However, proposed implementation is not acceptable to some agencies, including CSC, which has been concerned with the grade creep problem in Government generally. CSC said, "We cannot agree * * * grades * * * too low, nor * * * that present grades have resulted in any specific personnel management problems, such as recruiting difficulties." In mid-1974 OMB asked GSA to explore the matter further with CSC to resolve the implementation approach. Due to an impasse reached with CSC, GSA finally referred this recommendation to OFPP in April 1975. GSA's referral commented on CSC's audit finding that the procurement field was the third highest overpaid of eight occupations surveyed. GSA expressed disagreement with CSC's limited sample, CSC's inclusion of staff rather than operationally oriented people, and CSC's omission from its standards of the role and responsibility of the contracting officer function. OFPP believes that the misunderstanding over grade levels must be resolved and will review classification standards with CSC. An executive branch position on this recommendation is expected by Spring 1976.

See A-16 comments. Modified A-19 provides that FPI assist the agencies in carrying out their responsibility for executive development. This is to include identifying, developing, and rotating those employees with executive potential in procurement management.

See A-16 comments. Modified A-20 provides that FPI assist the agencies in designing and implementing long-range personnel management programs for staffing, training, development, utilization, and retrenchment.

The interagency task group favored adopting this recommendation to create a Federal Procurement Institute and proposed that it have a leadership and coordinating role in procurement research, education and training with 10 operating functions. Official agency views which followed supported creation of the Institute, but a consensus could not be reached over whether the Institute should be located administratively in GSA or DOD. Following a number of interagency policy meetings, GSA referred this recommendation to OFPP in June 1975 suggesting that (1) it be accepted by the executive branch, (2) the Institute be under the overall responsibility of OFPP, and (3) OFPP chair an interagency group to design the Institute in final form. In its analysis GSA said the Institute "must be independent, have research and academic freedom and build on the best of what has been accomplished, and pioneer into various new aspects of procurement teaching, management, research, and career development." The executive branch adopted the recommendation in June 1975.

OFPP has designed a plan to create the Institute, which is expected to be released for comment by December 1975. The plan is for FPI to operate on an interagency basis but be administered by DOD under policy-program guidance and direction of a multiagency board of advisors.^a The board would be chaired by the OFPP Administrator. FPI staff would be assisted by an interagency working committee and work groups. It would also have a board of visitors from the academic-business community to annually review organization, management, and methods of instruction. FPI would not duplicate existing agency programs but would certify them if they meet predetermined standards. In addition to the 10 FPI operating functions suggested by the Commission on Government Procurement and the interagency task group, OFPP has added 5 others which include the procurement career development recommendations contained in A-15, A-16, A-17, A-19, and A-20. These recommendations are considered an integral part of FPI's mission to provide leadership in the development of an effective procurement workforce. If final agreement among the agencies were reached on this plan, the FPI would be formally created and organized by the end of 1976 by setting up the board of advisors, selecting the staff, and organizing an interagency working committee. It would begin work early in 1977 on 11 of its 15 functions. A plan for implementing the remaining functions would be designed in its second year of operation.

^a Agency Assistant Secretary, or equivalent.

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EXECUTIVE BRANCH POSITIONS AND IMPLEMENTING ACTIONS ON COMMISSION RECOMMENDATIONS AS OF NOVEMBER 1, 1975

Short form Statement of Commission Recommendation	<u>Executive Branch Policy Position</u>				<u>Executive Branch Implementing Action</u>		
	Task group led by	Task group report to GSA	Referred to OFPP for decision	Position established (target)	Legislation if applicable	Type	<u>Executive Action</u> Completed (target)

PART A--GENERAL PROCUREMENT CONSIDERATIONS: (continued)

Government make or buy decision							
22. Establish through legislation a national policy of reliance on private enterprise for needed goods and services (with dissent)	OMB	None	Sept. 1974	Not yet established			
23. Increase \$50,000 threshold for the cost comparison requirement to \$100,000 (with dissent)	OMB	None	Sept. 1974	Not yet established			
24. Establish through OFPP criteria for making cost comparisons on fully allocated, rather than incremental, cost basis when work is significant part of workload and Government investment is not substantial (with dissent)	OMB	None	Sept. 1974	Not yet established			

[X] Requiring Special Attention

[X] OMB assigned to itself, the task of developing an executive branch position on recommendations A-22 through A-26. These recommendations concern implementing the national policy of reliance on the private sector--a policy for which OMB has had responsibility for many years under Circular A-76. Events of the past 2 1/2 years are pointed up in earlier GAO progress reports, including the inability of the OMB task group to develop a proposed executive branch position, the subsequent GSA deferral of these recommendations to OFPP, and OFPP's decision to use its limited resources during the first year to strengthen the existing circular implementation. During April 1975 congressional oversight hearings, OFPP announced it would take certain actions to improve Circular A-76 implementation. These actions are outlined below, together with OFPP's status.

- Meet with key agency officials to discuss past noncompliance and methods of achieving better compliance with Circular A-76. These meetings have been held.
- Review current agency instructions implementing A-76. Most agencies have furnished their A-76 implementing instructions to OFPP. Some of the instructions are extensive and others are quite limited in guidance to operating officials. As time permits, OFPP is reviewing with the agencies weak spots in their instructional guidance.
- Obtain a summary report from each agency by June 30, 1975, on the status of commercial-industrial activities operated by them and agency actions with respect to these activities. Such agency summaries have been obtained. They include capital investment and annual operating cost of agency operated commercial-industrial activities, the number of these activities reviewed in the past 3 years, and the number terminated, approved, or exempted under the Circular (including new starts).
- Review agency implementation. In some cases the agency summaries of status referred to above indicate an absence of new starts for several years. OFPP review of implementation has concentrated in this area. Its approach has been to identify new agency (construction) activities which may eventually provide products and services obtainable from the private sector. OFPP then inquires of the agency as to whether the new activities have been reviewed as a new start under A-76.
- Apply A-76 to telecommunications, automatic data processing services and Government-sponsored R&D. OFPP has two actions underway to expand application of A-76; one to phase out in-house audio/visual activities and the other to issue a supplementary ADP circular. This circular would encourage agencies to contract out ADP services as opposed to acquiring or leasing the equipment.

In summary, OFPP has made progress towards improved implementation of Circular A-76. Such progress could be accelerated if the individual agencies themselves would direct increased attention to overcoming identified weaknesses. For example, the agencies could strengthen their reviews of new starts, develop more complete inventories of existing commercial-industrial activities, increase the effectiveness of their reviews of these activities, and improve written guidance implementing A-76.

OFPP feels it has not yet developed enough information on agency implementation of A-76 to establish target dates for executive branch positions on these Commission recommendations.

[X] See A-22 comments.

[X] See A-22 comments.

ANALYSIS OF

EXECUTIVE BRANCH POSITIONS AND IMPLEMENTING ACTIONS ON COMMISSION RECOMMENDATIONS AS OF NOVEMBER 1, 1975

Short form Statement of Commission Recom- mendation	Executive Branch Policy Position				Executive Branch Implementing Action		
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PART A--GENERAL PROCUREMENT CONSIDERATIONS: (continued)

25. Increase threshold for new starts from \$25,000 new capital investment or \$50,000 additional annual operating cost to \$100,000 (with dissent)	OMB	None	Sept. 1974	Not yet established			
26. Increase cost differential to justify new in-house starts from 10 percent maximum to 25 percent maximum (with dissent)	OMB	None	Sept. 1974	Not yet established			
Timely financing of procurement:							
27. Initiate measures to eliminate executive and congressional delays in submitting and considering procurement fund requests and to make funds appropriated available promptly to procuring activities (with dissent)	OMB	Dec. 1973		Adopted July 1974	P.L. 93-344 July 1974	See Comments	
Selected areas in acquisition process:							
28. Establish Government-wide principles on cost allow-ability	DOD	May 1974		Adopted May 1975	P.L. 93-400 Aug. 1974	Interagency Committee	(May 1976)

[X] Requiring Special Attention

[X] See A-22 comments.

[X] See A-22 comments.

OMB, the lead agency responsible for this Commission recommendation, has taken the position that the Congressional Budget and Impoundment Control Act of 1974 constitutes a full response to the recommendation. The act, by revising the date for Presidential budget submission, time-phasing key congressional budget decisions, and controlling executive branch deferrals and rescissions of appropriated funds, is expected to reduce delays in making such funds available to procuring activities.

Federal agencies have endorsed the task group's proposed adoption of this recommendation for Government-wide cost principles with the understanding that different sets of principles may be necessary for different organizational classes, such as commercial and educational institutions. The task group and the Federal agencies did not agree on implementation: some favored using existing organizations; others favored creating a new interagency committee under OFPP. Under Public Law 93-400, OFPP has the authority to establish uniform regulatory cost principles, where feasible.

Following adoption of the Commission recommendation in May 1975, GSA submitted to the interagency policy group an implementing proposal to establish a standing interagency committee advisory to the OFPP. The committee would develop and coordinate Government-wide cost principles with the chairman to be appointed by OFPP on a rotational basis among the agencies. Civil agencies generally supported this approach. However, DOD opposed, preferring to retain within its ASPR Committee responsibility to set cost principles for commercial organizations. Civil agencies objected to the DOD approach because their views may not be fully considered in the ASPR Committee. In June 1975 GSA referred the implementing alternatives that had surfaced during the process to OFPP for decision and stated a strong preference for the OFPP-interagency committee approach for all organizational types of cost principles.

The OFPP Assistant Administrator for Contract Administration matters informed GAO in September 1975 that the manner of implementing this recommendation has not yet been resolved. A target date for completing its implementation is set for May 1976 to coincide with the establishment of a Federal Procurement Regulatory System (see A-10). The use of common cost principles among the Federal agencies also relates to the next recommendation (A-29) which calls for use of single overhead rates with contractors doing business with more than one agency.

ANALYSIS OF

EXECUTIVE BRANCH POSITIONS AND IMPLEMENTING ACTIONS ON COMMISSION RECOMMENDATIONS AS OF NOVEMBER 1, 1975

Short form Statement of Commission Recom- mendation	Executive Branch Policy Position			Executive Branch Implementing Action		
	Task group led by	Task group report to GSA	Referred to OFPP for decision	Position established (target)	Legislation if applicable	Type

PART A--GENERAL PROCUREMENT CON-
SIDERATIONS: (continued)

29. Make single final overhead settlement binding on all Federal contracts at a given contractor location	DOD	Sept. 1974		Adopted Oct. 1975		FMC	(Jan. 1976)
30. Establish uniform guidelines for equitable profit objectives in negotiated contracts, emphasizing consideration of capital, risk, complexity, management performance	GSA	Nov. 1974	Jan. 1975	(Oct. 1976)			
31. Evaluate procurement negotiation procedures to compare completed contract results with original profit objectives	GSA	Nov. 1974	Jan. 1975	(Oct. 1976)			
32. Establish a contract payment office for all Federal agencies in each of 10 regional areas	DOD	Apr. 1974		Rejected Aug. 1974			
33. Establish criteria for estimating costs and benefits of data requirements; make selective after-the-fact reviews to eliminate unnecessary requirements	DOD	Aug. 1974		Adopted July 1975		Circular	(Mar. 1976)

[X] Requiring Special Attention

Noting the proliferation of separate agency overhead settlements with contractors, the task group favored executive branch adoption of recommendation A-29 that would make an overhead rate binding on all Federal agencies doing business at a particular contractor location. Agency responses concurred in the task group position, including applying single overhead rates to grants as well. A number of questions arose, however, as to how the policy would be implemented, such as whether agencies impacted by the single overhead rate would participate in the negotiated settlements, the extent to which such settlements would be binding on the participating agencies, and who would handle later contract disputes. In a June 1975 meeting of the interagency policy group, it was decided to defer establishing an executive branch position until satisfactory means of implementation had been worked out. To accomplish this, GSA obtained agency and private sector comments on a draft Federal Management Circular. Based on the comments received, GSA has substantially improved the circular and resolved most issues. In an October 1975 interagency meeting, OFPP accepted the Commission recommendation as executive branch policy. The GSA Federal Management Circular is scheduled for release in January 1976 but the type of implementing document to be used is not firm in view of ongoing GSA organizational changes.

The task group proposed that the executive branch adopt this and related recommendation A-31. However, GSA staff analysis suggested that, before going on record as accepting the two recommendations, the executive branch should be reasonably certain that Government-wide profit guidelines acceptable to both the agencies and their suppliers can be developed within a reasonable time, particularly in view of failure of DOD's profit test on capital employed. At a December 1974 meeting with the interagency policy group, it was decided that the executive branch would defer action until a satisfactory approach to implementation had been developed. OFPP has taken over responsibility for the recommendation and will monitor an alternative DOD approach. In mid-1975 DOD announced its "Profit '76" study. The purposes of the study are to (1) find out what are industry earnings on DOD versus commercial business by major product groups, (2) ascertain companies' policies as to cost reducing investments in plant and equipment, and (3) solicit suggestions for policy changes that would minimize constraints on such investments. OFPP's target date for establishing an executive branch position on this recommendation is October 1976.

See A-30 comments.

After a detailed survey, the task group proposed rejecting this recommendation to consolidate contract payment offices. Two reasons given were (1) difficulty in separating agency disbursement from related accounting functions and (2) deterioration of personalized, timely service to contractors. Publication in the Federal Register resulted in only three private sector comments, two of which also favored rejection of the recommendation. In August 1974 the executive branch officially rejected the recommendation. OFPP is taking another look at this recommendation, however, to see if there are other means of speeding up agency payments and contract closeouts and plans to initiate a Government-industry dialogue.

The interagency task group favored adoption of recommendations A-33 and A-34 to control requirements placed on contractors for product data, management data and management systems. The two recommendations were redefined into four parts:

1. Control development and approval of new data and management system requirements.
2. Control application of requirements on specific contracts.
3. Establish guidance for estimating and analyzing costs versus benefits of such requirements.
4. Establish policy for selective after-the fact reviews to eliminate unnecessary requirements.

The task group also developed a draft OMB circular and a cost benefit analysis guide to implement the two recommendations. The circular calls for (1) specifying Government requirements in terms of output (what is required) rather than detailed procedures (how to achieve), (2) relying on contractor management system and data outputs wherever possible, (3) confining management system and data requirements to those authorized, approved and analyzed by an independent authority as necessary, (4) providing cost effective

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	Task group led by	Task group report to GSA	Referred to OFPP for decision	Position established (target)	Legislation if applicable	Type

PART A--GENERAL PROCUREMENT CON-
SIDERATIONS: (continued)

34. Establish Government-wide criteria for management systems prescribed for contractor use, including standards for mission-essential data	DOD	Aug. 1974		Adopted July 1975		Circular	(Mar. 1976)
35. Stimulate contractor acquisition of production facilities through increased profit and guaranteed amortization of facilities specially acquired for Government programs	DOD	July 1975	Nov. 1975	(Oct. 1976)			
36. Authorize by law negotiated sale to using contractor of surplus heavy machine tools and production equipment not needed on full-time basis--with future availability to Government when needed	DOD	Feb. 1974		Modified Mar. 1974		See Comments	
37. Establish Government-wide policy for review/approval of cost-type prime contractor procurement systems and transactions	DOD	Nov. 1973		Modified Feb. 1974		FPR Part 1-7 ASPR	Partial (Feb. 1976)
Procurement of professional services:							
38. Competitively negotiate procurement of professional services with selection based primarily on technical competence and merits of proposed end product rather than fee	HEW	Feb. 1974		Adopted June 1974	S. 2309 Sept. 1975	FPR/ASPR	(Feb. 1976)

[X] Requiring Special Attention

justifications for special Government requirements, and (5) deferring delivery of data until time of actual need. The circular would complement OMB Circular A-40, which controls Federal reporting requirements.

The draft circular and cost benefit guide have been revised for comments of Federal agencies and the private sector. In July 1975 OFPP accepted the two Commission recommendations as executive branch policy and asked GSA to convert the proposed OMB circular to a Federal Management Circular. This Circular is now under OFPP review. In view of ongoing internal GSA organizational changes, OFPP is not sure what form the final implementing document will take but expects a policy issuance of some kind by the end of the first quarter in 1976.

See A-33 comments.

The interagency task group concurred with this recommendation to stimulate contractor acquisition of production facilities but noted that past attempts have failed to attract support or have been counter-productive. It cited examples of such attempts as the DOD test to tie contractor profits to capital employed and the consideration given to charging contractors rent across the board to discourage their reliance on Government facilities. The task group also cited Cost Accounting Standard 409 as further inhibiting contractor investments in facilities by lengthening depreciation writeoffs. The task group concluded that additional efforts to stimulate investments in facilities should be tied to the ongoing efforts under recommendations A-30 and A-31 to develop an alternative approach for Government-wide profit policy. GSA's staff analysis concurred, and in November 1975 this recommendation was referred to OFPP so that all three recommendations could be considered jointly. (See A-30 comments for status of these recommendations.)

The task group proposed and the executive branch initially agreed to accept this recommendation in modified form. The modification would have limited authority for negotiated sales of surplus heavy machine tools to DOD and NASA on the basis that other agencies have not yet experienced a heavy machine tool disposal problem. The modification also would have relied upon prior DOD legislative proposals to implement the recommendation. Congress has not acted upon these proposals and previous GAO progress reports have questioned whether legislating piecemeal agency authority satisfies the Commission's intent that all agencies be covered. The executive branch is reconsidering its position and exploring whether authority already exists within GSA's Federal Property Act to negotiate disposals of agency heavy machine tools with future availability of these tools to the Government when needed. GSA is currently obtaining from its own agency and DOD a position on this legal issue as well as an updated position on the Commission's recommendation.

The executive branch accepted this recommendation but broadened it to include contractor procurement system approvals under both cost and noncompetitive fixed price-type business. The DOD has a procurement system review program and has an ASPR revision in process to revise that program. FPR partially implemented the recommendation in February 1975 by confining advance review of subcontracts to those which the contractor does not have procurement system approval for. The FPR staff suspended further regulatory development pending outcome of the ASPR case which is expected in February 1976.

[X] The executive branch adopted this recommendation which would strengthen competitive negotiation of professional services, but sufficiency of coverage in a proposed implementation document was questioned by some agencies and GAO. One agency said a "broad brush treatment * * * does not take aim on the specific problems discussed by COGP [Commission on Government Procurement]." In July 1974 the executive branch requested the FPR staff and ASPR Committee to amend existing coverage and provided them with a list of areas not sufficiently treated in the task group's proposed implementation. These areas are:

- Review-validation of professional services requirements.
- Criteria on when such services may be contracted out and when not.
- Synopsizing sources.

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PART A--GENERAL PROCUREMENT CONSIDERATIONS: (continued)

Field contract support:

39. Establish program to promote interagency use of field contract administration, audit, and other support services	DOD	Apr. 1974	Adopted Sept. 1974	FMC	Not yet established
40. Transfer to Defense Contract Administration Services military service cognizance of plants not exempted by Secretary of Defense	DOD	Feb. 1974	(Dec. 1976)		
41. Separate Defense Contract Administration Services from Defense Supply Agency	DOD	Jan. 1975	Rejected Mar. 1975		

[X] Requiring Special Attention

- Presolicitation screening.
- Quality of the solicitation document to insure intelligent responses.
- Criteria for evaluating proposals.
- Qualifications of evaluators.
- Technical monitoring of contract performance.
- Utilization of results.

DOD regulations on professional services are contained in ASPR section 22. The ASPR Committee is opposed to amending these regulations believing that they are adequate for professional services. The FPR staff (1) has developed specific coverage on procurement of professional services, (2) will coordinate it with Federal agencies and the private sector and (3) expects to have this effort completed by February 1976. The draft FPR coverage is substantially different from the DOD coverage. Neither treats with the full range of areas listed in the executive branch request.

Senate bill 2309, introduced in September 1975 to modernize and unify all Federal procurement statutes (see A-2), contains statutory provisions for competitive negotiation of professional services similar to the Commission recommendation.

[X] The task group proposed adoption of this recommendation to promote and coordinate interagency use of contract administration and audit services. Responsibility for implementing the program would be assigned to GSA. In June 1974 the task group report, with a proposed Federal Management Circular, was sent to the executive agencies for official comment. Fourteen agencies generally concurred in the proposed position and implementing circular, whereas three agencies (Commerce, Environmental Protection Agency, and TVA) were reluctant to relinquish administration of their contracts. Two other agencies (AEC and NSF) wanted participation to be voluntary rather than mandatory.

A later communication from the Department of Transportation indicated that it also did not intend to relinquish administration of its contracts. In September 1974 the executive branch officially accepted this recommendation and assigned GSA implementation responsibility but made compliance with the circular voluntary.

Because of the limited knowledge of contract administration capability in civilian agencies, action to implement the recommendation has been delayed for about 1 year. After reviewing various courses of action with OFPP, GSA has decided as a first step to survey civil agency field contract administration and audit services. At the same time, it will obtain comments from all agencies on a revised circular. After evaluating results of these efforts, a decision will then be made to do one of the following.

- Publish a Government-wide circular and directory for the purpose of obtaining better use of contract support activities including their consolidation where warranted.
- Perform a special study of civil agency contract support activities similar to the project 60 study done in DOD during the 1960s, with a view toward coordinated use of all contract support services by all Federal agencies.
- Determine that implementation of the recommendation is not feasible.

The Commission perceived a reluctance by the Army, Navy, and Air Force to turn over to the Defense Contract Administration Services (DCAS) those plants which no longer meet the criteria for military plant cognizance under DOD instruction 4105.59. The DOD task group report proposed that the executive branch reject this recommendation to transfer military service cognizant plants to DCAS. The group substituted instead an alternative which essentially reflects the DOD program already in existence. In May 1974 GSA requested official DOD views on the task group position. As of November 1975, more than a year later, DOD had not responded. OFPP advises that DOD has two extensive studies of contract administration underway and that an executive branch position on this recommendation is being deferred until late in 1976 pending the outcome of these studies.

In January 1975 DOD informed GSA it did not agree that the A-41 recommended separation of the Defense Contract Administration Services from the Defense Supply Agency could be justified on the basis of the findings in the Commission's report. DOD said that the separation of these two activities would (1) require establishing separate management and support organizations and (2) create a potential for growth in

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PART A--GENERAL PROCUREMENT CONSIDERATIONS: (continued)

42. Consolidate Defense Contract Administration Services and Defense Contract Audit Agency into one Agency reporting directly to Secretary of Defense (with dissent)	DOD	Jan. 1975		Rejected Mar. 1975
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National socioeconomic policies implemented through procurement process:

43. Establish program for legislative and executive reexamination of socioeconomic objectives implemented through procurement process	Labor	Nov. 1973	Nov. 1975	(Jan. 1976)
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44. Raise threshold to \$10,000 for applying socioeconomic programs to procurement process	Labor	June 1975	Nov. 1975	(Jan. 1976)
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[X] Requiring Special Attention

overhead costs. DOD also opposed the A-42 recommended merger of the Defense Contract Audit Agency with the Defense Contract Administration Services. It said this question has been considered at the highest levels in the past and that reexamination has convinced DOD that contract audit should remain as a separate organization. While agreeing with the Commission that a close working relationship is needed between contract audit and administration, DOD said any problems in this area can be resolved without recourse to organizational change. In January 1975 GSA referred recommendations A-41 and A-42 to OFPP, questioning the need for proceeding further to develop an executive branch position since these were matters "inherent to the organizational responsibilities of the Secretary of Defense." In March 1975 OFPP concluded that "the decision to reject recommendations A-41 and A-42 is sound and is acceptable as the executive branch position."

See A-41 comments.

[X] The task group and executive agencies agreed in substance to recommendation A-43 that would establish a program for legislative-executive branch reexamination of socioeconomic programs being implemented through the procurement process. Three agencies (HEW, AEC, GSA) questioned whether the procurement process was an effective means to implement socioeconomic programs. One agency thought priorities should be established for choosing one socioeconomic program over another when they are in conflict. The Department of Justice objected to the task group position that legislative branch participation be deferred until the executive branch had submitted results of its reexamination. Justice said "it is the duty and responsibility of the Congress to study the present statutory framework upon which the various social and economic programs are founded and to endeavor to modernize and harmonize them to meet current social needs." A referral of this recommendation to OFPP for determination of a proper course of action has been held up since May 1974 so that it can be handled on an integrated basis with other socioeconomic recommendations (A-44 and A-45) below. These three recommendations were combined and referred to OFPP in November 1975. (See A-44 comments.)

[X] An interagency task group led by the Department of Labor examined 39 socioeconomic (S&E) programs to assess the impact of raising the contract value to \$10,000 for applying S&E requirements. The task group rejected an automatic raise to \$10,000 for all S&E programs but did propose a \$10,000 minimum on six of them (Buy American, Balance of Payments, Use of Excess or Near-Excess Currency, Transportation of Ocean Carriers, Preference for U.S. Goods (Military Assistance), and the Service Contract Act). In November 1975 GSA combined the recommendation language of A-43, A-44, and A-45, suggested it be adopted as an executive branch position and referred the matter to OFPP for final decision. The position would call for establishing a program for legislative and executive branch reexamination of S&E programs and administrative practices applied through the procurement process, including setting proper dollar thresholds and analyzing costs against benefits of the programs. GSA recommended also that action proceed on those six S&E programs on which the task group had agreed dollar thresholds should be raised to \$10,000. As to the other S&E programs, GSA staff analysis observed that, as part of the reexamination program, subsequent surveys may yield results contradicting the task group position.

A comprehensive minority report, prepared by DOD and DOT representatives, takes issue with majority report for not raising the dollar threshold for application of the Davis-Bacon Act. The minority report documents the great burden of this Act on small contracts and points out that due to inflationary effects, more than \$10,000 is required today to buy the \$2,000 worth of construction that was exempted by the Congress in 1935. It also challenged the majority report conclusion that 8 percent of the workforce would lose minimum wage protection because many of these employees would still be protected by union agreements and by uniform pay scales covering both larger and smaller jobs. The minority report concluded that the majority report on Davis-Bacon was not supported and that much of it was irrelevant and lacked objectivity.

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PART A--GENERAL PROCUREMENT CON-
SIDERATIONS: (continued)

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|-----|---|-------|--------------|--------------|-----------------------|----------------------------|--|
| 45. | Find means to make more visible the socioeconomic costs incurred in procurement process | Labor | Oct.
1973 | Nov.
1975 | (Jan.
1976) | | |
| 46. | Revise policies to provide for uniform debarment treatment and broader sanctions for comparable violations of socioeconomic requirements. | Labor | Mar.
1975 | | Modified
Oct. 1975 | Legislation,
Regulation | Interim
mile-
stones to
be estab-
lished |

[X] Requiring Special Attention

As indicated by Justice Department comments under A-43 above, priority attention by the Congress will be needed to achieve real progress in updating and streamlining socioeconomic programs applied through the procurement process. The DOD-DOT minority report would seem to support giving priority of this reexamination program to the Davis-Bacon Act.

- [X] Executive agencies generally questioned the feasibility of measuring the costs of implementing social and economic goals through the procurement process and how meaningful the results would be without measuring the benefits as well, although the benefits are often intangible. In November 1975 GSA combined this recommendation with related socioeconomic recommendations A-43 and A-44 and referred them to OFPP for final action. (See A-44 comments.)

The task group favored adopting recommendation A-46 to provide uniform agency treatment of contractors for comparable statutory violations of socioeconomic requirements. Its report, however, dealt primarily with administrative rather than statutory type debarments and proposed:

- Establishing one set of standards and procedures for administrative debarment or suspension.
- Consolidating various agency debarred-suspended lists and debarring a contractor Government-wide, who is placed on that list.
- Conforming ASPR to FPR to permit contractors due process hearings on proposed debarment actions.
- Limiting debarment to a period of not more than 3 years.
- Submitting, with respect to statutory causes of debarment, a consolidated Department of Labor statute which will include uniform debarment procedures.

With respect to the Commission's recommended broader range of sanctions, the task group opposed the suggested use of fines. The group believed the fines would be highly subjective, punitive, and not protective of the Government's interest. It did endorse the Commission's suggested reinstatement of contractor's eligibility for awards upon demonstrated compliance.

A DOT dissenting opinion maintains (1) that it is necessary to review statutory and administrative debarment together rather than separately to arrive at optimum Government-wide uniformity, (2) that only minor amendments to the various socioeconomic acts is required as opposed to the task group's suggested total consolidation of these acts, and (3) that due process should be accorded the contractor for all debarment actions irrespective of whether these actions relate to legislative, executive order or regulatory requirements or whether the alleged violations are socioeconomic or administrative in nature.

Agency and industry degree of concurrence with the task group proposal varied considerably, with some noting that the task group report had ignored socioeconomic causes of debarments. A GSA-OFPP analysis of agency-industry comments resulted in the following proposed actions.

- Modify the recommendation to include both statutory and administrative causes of debarment and to include contractor reinstatement of eligibility for awards upon demonstrated compliance.
- Establish task forces to develop uniform statutory and administrative debarment and suspension treatment as follows:
 - Written notice to contractor of reasons with opportunity to be heard in trial-type hearings and to appeal.
 - Establishment of uniform standards for regulatory suspension.
 - Opportunity to reduce or terminate time of debarment upon proper showing.
 - Mandatory debarment or suspension by all agencies when such action is taken by one agency and issuance of a consolidated list by a central authority.

In October 1975 the executive branch accepted the Commission recommendation as modified above. OFPP plans to establish a task group to develop statutory-regulatory uniform treatment of contractor violations following the approach suggested above and to establish interim milestones for completion of the task.

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PART A--GENERAL PROCUREMENT CONSIDERATIONS: (continued)

Procurement from small business:

47. Establish new standards for measuring agency and prime contractor performance in using small business	SBA	Sept. 1973	June 1975	(Dec. 1975)		
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48. Test feasibility of mandatory small business subcontracting	SBA	Dec. 1973	June 1974	(Dec. 1975)		
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49. Initiate executive branch procurement review, with guidance from SBA and OFPP, to enhance small business participation	SBA	Dec. 1973		Adopted Apr. 1974		None
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[X] Requiring Special Attention

[X] During mid-1973 Senate Small Business Committee hearings, several witnesses took the position that the calculation of small business participation as a percentage of total contract dollars did not reveal the mix of products and services for which small business could compete. The Committee concluded as did the Commission that "there is indeed a need for new standards." The report specifically recommended using a standard of comparing, within individual industries, Government and commercial ratios of small business awards "at least on a temporary limited test basis." If Government small business awards were substantially lower than commercial in a particular industry, then the causes would be investigated and an improvement program initiated, if warranted. The SBA-led task group assigned to this recommendation reported late in 1973 that it was unable to suggest any new standards to measure agency and contractor performance in promoting small business. GSA requested the task group to reevaluate its position and suggested several approaches for developing new standards, including the standard recommended for testing by the Senate Subcommittee. The task group made a limited analysis of these suggestions and in a July 1974 revised report responded negatively to the suggested approaches.

In October 1974 GSA asked the private sector, through the Federal Register, to comment on the Commission recommendation. Several companies and two associations responded. They concurred in the need for new standards based on determinations of small business potential. Such an approach is contained in Public Law 93-438 which established the Energy Research and Development Administration. The act states that small business participation should hinge on a reasonable opportunity to participate and the availability of qualified companies to perform rather than on some mathematical formula. One major company informed GSA that it has developed the means to determine (1) how much of its requirements are within the potential of small business concerns, (2) how much opportunity small business had to compete for that potential, and (3) the amount of small business awards as a percentage of that potential.

As a result of Senate Committee followup late in 1974, SBA has explored with the Bureau of Census, GSA and DOD the idea of comparing commercial and Government small business participation on an industry-by-industry basis. Conclusions thus far are that the cost of obtaining the data would be prohibitive and the comparison would not be relevant because of differences in commercial/Government buying practices. To date the approach has not been tested. In June 1975 GSA referred final action on this matter to OFPP. At the request of OFPP, GSA drafted a Federal Register Notice to reject this recommendation with the justification that no new standards can be developed at this time. As a result of a meeting with Congressman Corman and staff members of the House Small Business Committee, OFPP and SBA have agreed to reconsider their position and to discuss it with another Congressman (Horton). An executive branch position on the Commission recommendation is expected in December 1975.

The interagency task group noted the decline in small business subcontracting and proposed adopting this recommendation to test the feasibility of mandatory subcontracting. The SBA representative wanted the test to include the early design phase because eventual production sources were often determined during that phase. DOD opposed this idea because sufficient data would not be available to set goals. The executive agencies, in commenting on the task group report, generally favored a test program to be performed by DOD and GSA and monitored by OMB. In June 1974 GSA referred this case to OMB (before OFPP established) for final action noting that the Senate Small Business Committee report of March 1974 had endorsed this and other alternatives, such as prime contractor profit incentives and subcontract set-asides. OFPP expects to have an executive branch position on this recommendation by December 1975. At the present time OFPP feels that a test program will in all likelihood be initiated with DOD taking lead agency responsibility, and with participation by NASA, ERDA and NSF.

[X] The executive branch accepted the recommendation to establish a program to enhance small business participation but did not provide an action to accomplish it, alleging that existing programs were adequate. Previous GAO progress reports have questioned the responsiveness of such a position. In a May 1975 letter OMB indicated further action would be taken. It said "results of the joint efforts of OFPP and SBA will be included in OFPP's next annual report to the Congress."

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PART B--ACQUISITION OF RESEARCH
AND DEVELOPMENT (R&D)Federal R&D objectives and
organization:

1. Conduct R&D procurement to be responsive primarily to agency mission needs and then, when possible, to needs of other Federal activities	NSF	Dec. 1973	May 1974	(Dec. 1975)		
2. Allow discretionary use of Government laboratory R&D funds in limited amounts for any national research and development objective	NSF	Dec. 1973	May 1974	(Dec. 1975)		
3. Encourage agencies with R&D missions to generate associated long-range basic research and advanced studies programs	NSF	Dec. 1973	May 1974	(Dec. 1975)		
Performance of R&D:						
4. Strengthen in-house procurement-related technical and management capabilities to support technology advancement in private sector	NSF	Dec. 1973	May 1974	(Dec. 1975)		
5. Continue optional use of federally funded R&D centers to satisfy needs outside organizational resources; reassess need periodically and give special attention to termination provisions when need ceases	DOD	Oct. 1973		Adopted Mar. 1974	OMB Circular	(June 1976)
6. Monitor NSF and NBS experimental R&D incentives program; translate results into practical application	OMB	No Sub- mission		Adopted Mar. 1974	OMB Budget review	Contin- uing

[X] Requiring special attention

The task group report proposed adopting recommendations B-1 through B-4 with minor modifications. These recommendations call for developing long-range research programs, for strengthening laboratory technical and management capabilities to support private sector technology advancement, and for providing limited support to national research objectives outside an agency's normal mission. The task group concluded that these recommendations generally represent established Government practice. Several of the Federal agencies concurred but three (NASA, NSF, and TVA) favored some implementing action. For example, NASA suggested a general R&D policy document to reinforce current practices and to incorporate principal points of the task group proposal. In an interagency policy meeting, it was decided that GSA would refer B-1, B-2, B-3, and B-4 to OMB and recommend adoption with implementation responsibility being assigned to NSF or the Federal Council for Science and Technology. Action has been deferred for the past year pending OFPP reaching operational status and resolution of related recommendations on acquisition of major systems. An executive branch position is targeted for December 1975.

See B-1 comments. The task group proposed a modification of this recommendation to require the Federal agency benefiting from another agency's research "to provide at least partial support on a cost reimbursable basis." Subsequent DOT comments in May 1975 opposed the B-2 recommendation because giving laboratory directors the discretion to do research outside the agency's normal mission would undercut the agency head's authority to control funds and congressional authority to determine at what levels agency activities should be funded.

See B-1 comments.

See B-1 comments.

The task group favored adopting this recommendation and drafted preliminary Government-wide guidelines to use for establishing the need for federally funded research and development centers (FFRDCs), for periodically reviewing the status of FFRDCs, and for phasing them out when necessary. Comments obtained from six agencies who use FFRDCs concurred with the task group, some noting additional areas warranting coverage in the guidelines. The executive branch accepted the recommendation, and in September 1974 GSA sent the guidelines in the form of a draft Government-wide circular to Federal agencies for comment. GSA has revised the draft circular and in July 1975 forwarded it to OFPP with two unresolved issues raised by NSF. The issues concerned (1) differences in the definition of what an FFRDC is and (2) the need for a central focal point of control over creation and termination of FFRDCs to ensure compliance with the new guidelines. GSA suggested that OFPP be the central point of control with an NSF-FCST-appointed executive agent. It suggested further that the implementing guidelines be published in an OMB circular or a NSF-FCST document. OFPP is considering the approach of an OMB circular. It would provide policy guidelines for FFRDCs and GOCOs and would also incorporate current guidance in circular A-49 for use of management and operating contracts. Target date for developing the draft is December 1975 and for releasing the final is June 1976.

An OMB March 1974 letter requested GSA to record adoption and completed implementation of recommendation B-6. OMB said periodic review of the planning and executing the NSF-NBS experimental R&D incentives program is now part of OMB's regular budget review and apportionment process.

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PART B--ACQUISITION OF RESEARCH AND DEVELOPMENT (R&D):
(Continued)

R&D procurement policy:

7. Eliminate restraints on submission of unsolicited proposals by private sector in R&D procurements to encourage flow of creative and innovative ideas	NASA	Nov. 1973	Adopted Apr. 1974	FPR	(Dec. 1975)
				ASPR 4-107	July 1975

8. Eliminate R&D cost sharing except when performers clearly benefit	NASA	Mar. 1974	(Dec. 1975)		
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[X] Requiring Special Attention

[X] The task group proposed acceptance of recommendation B-7 to eliminate restraints which discourage submission of unsolicited innovative proposals. Of 23 executive agencies, 21 concurred in the task group position; several suggested constructive changes to proposed implementing guidelines. The executive branch accepted this recommendation, and in May 1974 GSA asked the FPR staff and ASPR Committee to coordinate their regulatory coverage. GSA's request noted that negative treatment of unsolicited proposals in the past had diminished the flow of innovative ideas to the Government. DOD has made a minimal change to ASPR, incorporating a brief statement encouraging submission of unsolicited proposals. (See ASPR, July 1975 edition, 4-107.) The ASPR Committee opposed stronger coverage that would forbid an agency representative from converting unsolicited proposals into requests for proposals and sending them out for competition. In August 1975 the FPR sent out for agency and private sector comment a draft regulation which stated that Government policy is to "inform organizations and individuals of the research and development areas encompassed by each agency's mission, and to actively encourage the submission of unsolicited proposals in support of these missions." In addition to the policy, the regulation covered advance consultations; content and timing of proposals; receipt, review, and evaluation of proposals; method of procurement; prohibition against using the information in Government solicitations; interagency coordination when the proposal was outside the recipient's mission; and restrictions on use and disclosure of data in unsolicited proposals. In a previous progress report, GAO contrasted the minimal DOD coverage with the comprehensive treatment contemplated by the FPR staff and recommended that management attention be given to this matter. OFPP's position on our last progress report is that the two regulatory bodies will try to work out their differences.

The Commission recommended eliminating all cost sharing by R&D performers except when they would clearly benefit from the project. The Commission made the recommendation because it found cost sharing had not increased the research yield but had increased the cost to the performer and the cost to agency of administration. Initially, the task group proposed eliminating required cost sharing but continuing voluntary cost sharing whenever cost is a factor in competitive awards. NSF dissented, believing that agencies should have the flexibility to require cost sharing in specific instances, such as when supporting rather than procuring research. Several other agencies agreed with the NSF dissent. SBA went the other way, opposing voluntary cost sharing, because small businesses could not match the cost sharing of large firms and, therefore, would be at a competitive disadvantage. GSA then asked the task group late in 1974 to consider opposing agency views and alternatives. New guidelines subsequently developed by the task group would have allowed each agency to follow almost any cost sharing practice it preferred and were strongly opposed by the private sector, including many universities.

In June 1975 GSA formed a new interagency task group under the leadership of NIH to examine objectively agency and private sector views and to formulate a new executive branch position. The new task group report is expected this fall. A draft position indicates the group will suggest cost sharing be imposed only

- When required by statute.
- When the R&D performers will receive a significant and measurable benefit.

Truly voluntary cost sharing will be permitted but is not to be considered in the placement of R&D agreements. Cost sharing therefore would not be sanctioned to stretch agency budgets or to encourage "buyin" to a program.

ANALYSIS OF

EXECUTIVE BRANCH POSITIONS AND IMPLEMENTING ACTIONS ON COMMISSION RECOMMENDATIONS AS OF NOVEMBER 1, 1975

Short form Statement of Commission Recommendation	Executive Branch Policy Position			Executive Branch Implementing Action	
	Task group led by	Task group report to GSA	Referred to OFPP for decision	Position established (target)	Legislation if applicable

PART B--ACQUISITION OF RESEARCH AND DEVELOPMENT (R&D):
(Continued)

9. Eliminate recovery of R&D costs from Government contractors and grantees except those costs related to unusual and expensive programs and approved by agency head	DOT	Sept. 1974		Rejected Oct. 1974		
10. Establish a policy recognizing that independent R&D and bid proposal costs should receive uniform Government-wide treatment as necessary costs of doing business, with agency policy exceptions approved by OFPP. For contractors more than 50 percent cost-type contracts, use present DOD approach with trade-offs permitted between IR&D and B&P dollar ceilings and make amounts allowable relevant to agency function; for contractors less than 50 percent cost-type contracts, accept IR&D and B&P without question as to amount (with dissent)	DOD	Nov. 1974	June 1975	(April 1976)		OMB Circular (July 1976)

[X] Requiring special attention

Recommendation rejected based on August 1974 Presidential decision (Council on International Economic Policy) which provides for:

1. Proportionate recovery of the Government's investment in development as product sales are made.
2. Fair market recovery on technology sales; that is, recovery of technology value, perhaps exceeding the Government's investment in the technology.
3. Reasonable agency flexibility and discretion in implementation that would permit exceptions because of national interest, foreign policy, and overriding public interest.

An interagency group under NSF-FCST leadership has been created to assist in developing criteria and guidelines for exceptions and waivers to this general R&D recoupment policy.

Task group position

Commission recommendation B-10 would recognize contractor indirect expenses of independent research and development (IR&D) and bid and proposal (B&P) efforts as necessary costs of doing business and would remove Government detail surveillance when a contractor's business activity is predominantly fixed price or commercial. A DOD-led interagency task group proposed the alternative of adopting as a Government-wide standard, those policies and procedures presently contained in Armed Services Procurement Regulations (ASPR 15-205.3 and .35)--but with two policy changes.

1. Commission recommended that IR&D and B&P efforts be recognized as necessary costs of doing business because it is in the Nation's best interest to promote competition, advance technology, and foster economic growth. Task group proposed a policy change to broaden the cost allow-ability test from individual buying agency relevancy to Government-wide relevancy. Task group reasoned that, by not restricting IR&D programs to DOD relevancy, its contractors could look toward other areas as DOD business was phased down. Task group observed that DOD contractors, with their systems background and facilities, might make substantial contributions to resolving such national problems as public transportation, energy, and pollution. It said strict require-ments for relevancy work against the best interest of the Nation by prohibiting development of needed technology by those most capable of doing so. Task group concluded that the present relevancy requirement "is vague in concept, difficult to administer, and against the best interest of the Nation."
2. Commission recommended that, if more than 50 percent of the contractor's business was competitive, commercial, or fixed price in character, IR&D costs should be accepted without question. Task group did not take a firm stand on changing existing policy, believing that insufficient data existed to determine its impact on IR&D cost negotiations.
3. Commission recommended that IR&D and B&P costs receive uniform treatment Government-wide, with exceptions authorized by OFPP. Task group concurred. It believed a uniform Government-wide standard should be made applicable to all agencies which rely on a competitive industrial base. AEC dissented on this point but its successor agency, ERDA, has since modified its regulations to allow IR&D costs whenever using the competitive industrial base to meet its needs.

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Short form Statement of Commission Recom- mendation	<u>Executive Branch Policy Position</u>			<u>Executive Branch Implementing Action</u>		
	Task group led by	Task group report to GSA	Referred to OFPP for decision	Position established (target)	Legislation if applicable	Type

PART B--ACQUISITION OF RESEARCH
AND DEVELOPMENT (R&D):
(Continued)

[X] Requiring special attention

Agency-industry comments (note a)

Defense industry associations concurred with the task group report but called for a stronger position on reducing Government IR&D controls of fixed price, commercially-oriented companies. A few civil agencies concurred also in the DOD-led task group position, but others expressed a number of divergent views or recommended additional study. For example, Commerce said supporting IR&D may promote technology advancement and growth of certain firms of an industry without contributing to overall strength of the national economy. It noted possible subsidizing of topheavy administrative, inefficient and downhill organizations. Commerce concluded that, if Government has a requirement, it should define the need and solicit offers and, if private business had some new or innovative idea, it could submit an unsolicited proposal to interested agencies. HEW, also nonconcurring, observed that IR&D did not have to pass the same tests as directly sponsored (contracted) research and development; that is, it is not subject to competitive evaluation and review by qualified experts in the field. HEW said to reimburse IR&D under these circumstances would be unfair to those organizations whose contract proposals were rejected because they did not meet established standards for meritorious research. On the other hand, DOT wanted to go further than the task group in relaxing controls. It said other normal, indirect business costs of contractors did not have to relate directly to an individual agency or Government-wide interest to be allowable and questioned why IR&D should be treated any differently. Finally, as noted in GSA's analysis of agency comments, some of the civil agencies "don't want to be saddled with the relevancy requirement or other meticulous provisions of the ASPR cost principles governing the determination of allowable IR&D and B&P costs."

OFPP Position

In June 1975 the GSA Office of Procurement Management sent to OFPP its analysis of efforts to date to develop an executive branch position on this recommendation with several alternatives for consideration. In September 1975 joint Senate Committee hearings OFPP said it was considering issuing an OMB circular next spring to establish executive branch policy on management of IR&D and B&P. It outlined 11 criteria (and 4 possible others) that would be considered in drafting such a policy. The criteria would include the essential elements of the Commission's Dissenting Position No. 1. This position differed from the majority position in that controls would not be removed from those contractors with more than 50-percent Government fixed price and commercial business. In addition, the minority position would permit access to contractor records on commercial IR&D. OFPP criteria did not call for such access but required a contractor certification that IR&D overhead did not include costs incurred in performance of commercial or other contracts. OFPP expects to request agency and industry comments on its new policy circular and to release the circular officially in July 1976.

^aCongressionally requested study by GAO suggested that if financial support of IR&D by Congress is intended, it should clarify the purpose and amount of such support as well as the degree of administrative control to be exercised. The report favored Dissenting Position No. 1 of the Commission on Government Procurement with some additional steps such as Government-wide advance agreements, joint technical reviews and single overhead rates.

The Defense Science Board study concluded that IR&D has an important role in maintaining the Nation's technological base and a competitive industry posture but its role must be considered in conjunction with direct contract/grant R&D and in-house R&D. The study recommends using competitive marketplace controls over IR&D and less judgmental pre and post audit-type controls, including minimizing the use of advance agreements and eliminating relevancy requirements.

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PART B--ACQUISITION OF RESEARCH
AND DEVELOPMENT (R&D):
(Continued)

11. Encourage use of standard terms and conditions through master (basic) agreements for contracts and grants	AEC	Jan. 1974	Adopted May 1974	Partial FPR 1-3.410.2 ASPR 4-118.5	June 1975 Oct. 1975
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[X] Requiring special attention

Relationship to major system acquisition policy

The task group did not interrelate IR&D pricing policy with major systems acquisition policy, as suggested by a companion DOD task group on major systems. The task group also did not address reasons for the increase in IR&D and B&P costs of defense contractors in the 1960s which gave rise to present policies. In addition to inflationary effects, the Commission found the increase in such costs were symptomatic of some very basic underlying problems in the systems acquisition process. This process encouraged contractors to maintain IR&D activities for several years until a baseline system solution on which to submit a proposal emerged from the agency. A highly complicated and lengthy source selection then followed, which required contractors to undertake expensive bid and proposal efforts and maintain design teams in a holding pattern until an award was finally made. Recommendations to alleviate these unnatural pressures on IR&D and B&P expenditures and correct underlying problems in the early acquisition process are contained in the Commission's major systems report. (See C-1 thru C-6). These recommendations would open up systems competition to any competent firm and support technological innovation and conceptual design competition by awarding exploratory R&D contracts to firms offering the most promising solutions.

OFPP, during its testimony referred to above, recognized that new emerging major systems policy would impact IR&D and would drive IR&D expenditures toward increased research, applied research, advanced technology, and conceptual studies and away from supporting agency subsystem and fullscale development efforts.

The task group proposed adopting recommendation B-11 to encourage multiagency use of prenegotiated standard terms and conditions (basic agreements) with R&D performers. Most executive agencies commenting on the task report concurred but raised several issues; (1) whether basic agreements should extend to grant-type instruments as recommended by the Commission, (2) whether use of basic agreements should be limited to R&D activities, (3) what type of implementation should be used, and (4) whether a pilot program was needed. The executive branch adopted the recommendation, and in July 1974 GSA requested the FPR staff and ASPR Committee to develop appropriate regulatory coverage. FPR and ASPR were amended in 1975. Responsibility for negotiating basic agreements in civilian agencies rests with each individual agency and in DOD it rests with the Office of Naval Research. At the beginning of each year, a consolidated listing of current basic agreements is to be published within DOD and in FPR bulletins so that other purchasing activities can make use of such agreements. This regulatory coverage applies to contracts.

The use of basic agreements for grants, according to OFPP, is being made part of a study to develop policy guidance for Federal assistance program. (See F-2.) Grants are also being used for purposes other than Federal assistance such as for research done by nonprofit institutions. Accordingly, at this time, the recommendation has been only partially implemented.

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	Task group led by	Task group report to GSA	Referred to OFPP for decision	Position established (target)	Legislation if applicable	Type

PART B--ACQUISITION OF RESEARCH
AND DEVELOPMENT (R&D):
(Continued)

12. Require senior procurement agency official to justify degree of restraint placed in contractual hardware exclusion provision when potential organizational conflict of interest exists between Government and R&D contractor	AEC	Nov 1973	Modified Mar. 1974	FPR	(Dec. 1975)
				ASPR 1-113.2	Oct. 1975

History - Status - Comments

[X] Requiring Special Attention

[X] On the basis of a task group report and concurring agency comments, the executive branch decided to adopt this recommendation in modified form. The modification expands the Commission recommendation from requiring senior-level review when a hardware exclusion clause is contemplated to requiring such reviews whenever a procurement action involves potential conflict of interest or unfair competitive advantage. The task group found that NASA and ASPR regulations differed on the subject and that FPR was silent. In addition to the policy guidance, it suggested development of a model hardware exclusion clause for use by all agencies. In May 1974 GSA asked the FPR staff and ASPR Committee to implement the recommendation as modified. The FPR staff has had regulatory coverage on the matter in process for several years. ASPR Committee, on the other hand, has taken a different approach by amending its regulation to agree with the Commission recommendation (before executive branch modification). It amended section 1-113.2 to require, in potential conflicts of interest situations, high-level approval of no restraint, partial restraint or strict use of a hardware exclusion clause.

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PART C--ACQUISITION OF MAJOR
SYSTEMS:

[X] Requiring special attention

OVERVIEW OF EXECUTIVE BRANCH ACTION

The Commission took an integrated view of the total acquisition process using a systems approach. It made 12 interrelated recommendations linked to a structural framework applicable to any agency acquiring major systems. The recommendations were not designed to be applied selectively but rather to work together to control the whole process.

Interagency Task Group Report

An interagency group led by the Department of Defense presented a proposed executive branch position on the recommendations in January 1974. It proposed that each agency adopt the policy intent of the recommendations subject to several modifications and reservations. (See previous GAO progress reports, July 1974 and Mar. 1975.)

Referral to OFPP

After obtaining agency and industry comments on the task group proposal, GSA referred the recommendations and open issues to the Office of Federal Procurement Policy in January 1975. OFPP then obtained from DOD an outline of an implementation plan. From this outline and inputs from civil agencies and the congressional hearings referred to below, OFPP developed a draft OMB circular which would, for the first time, set Government-wide policy for the acquisition of major systems.

Congressional Hearings

The Senate Subcommittee on Federal Spending Practices held hearings in mid-1975 on the Commission's 12 recommendations.^a Most executive, industry, and congressional witnesses supported the recommendations. Agency witnesses, however, wanted flexibility as to how the recommendations would be carried out in their respective agency. At the hearings, OFPP made public a draft OMB circular. A revised circular of August 28, 1975, is now being officially coordinated with Government agencies and industry. The circular will then be subjected to an open public meeting and congressional review, and is expected to be issued officially in early 1976. After that, Federal agencies will have 6 months to submit time-phased implementing plans.

OMB Circular Coverage

The OMB circular permits the agency head to decide what dollar thresholds and criteria will be used to define a "major system." The circular requires the agency head to appoint an acquisition executive who will be responsible for the agency's integrated acquisition management process and for monitoring policy implementation and practice under the circular. The circular represents a major breakthrough in Government policy for systems acquisition and for the most part retains the integrity of the Commission recommendations. The following matters require special attention:

- Clarifying in the circular (1) responsibilities of agency heads for reconciling mission roles and responsibilities of their operating components and (2) the treatment of new technological opportunities in defining mission needs (C-1).
- Refining circular guidance and congressional funding procedures so that technical activities funded in agency budgets to maintain the technology base will be separate and distinct from those which start new programs and explore system solutions (C-5).
- Strengthening controls in the circular over agency use of noncompetitive systems development and selection (C-8).
- Clarifying authority in the circular to waive test requirements and requiring agencies to develop approved criteria for its use (C-9).
- Clarifying intent of the requirement to integrate the agency's systems acquisition management process so that, for example, a fragmented process managed by committee would not qualify (C-11).

These matters are discussed below, together with an analysis of circular coverage on each of the 12 recommendations.

^aHearings on Major Systems Acquisition Reform, Before the Subcommittee on Federal Spending Practices, Efficiency and Open Government of the Senate Committee on Government Operations, May, June, and July 1975.

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PART C--ACQUISITION OF MAJOR SYSTEMS: (Continued)

Needs and goals for new major acquisition programs:

- | | | | | |
|---|-----|--------------|--------------|----------------|
| 1. Start new system acquisition programs with assignment of agency component responsibility for responding to needs and goals which are (1) stated by agency head independently of any system product, (2) reconciled with overall agency capabilities and resources, and (3) specified in terms of anticipated total mission cost, projected capability level, and expected time for achievement | DOD | Jan.
1974 | Jan.
1975 | (Dec.
1975) |
|---|-----|--------------|--------------|----------------|

- | | | | | |
|---|-----|--------------|--------------|----------------|
| 2. Provide appropriate congressional committees with annual review of missions, capabilities, deficiencies, and new acquisition needs and goals as basis for reviewing agency budgets | DOD | Jan.
1974 | Jan.
1975 | (Dec.
1975) |
|---|-----|--------------|--------------|----------------|

Exploring alternative systems:

- | | | | | |
|---|-----|--------------|--------------|----------------|
| 3. Support technology-based activities of agency missions, but do not fund fully designed hardware for subsystems until they are identified as part of system candidates to meet specific operational needs | DOD | Jan.
1974 | Jan.
1975 | (Dec.
1975) |
|---|-----|--------------|--------------|----------------|

[X] Requiring Special Attention

[X] OMB circular paragraph 10 incorporates the essence of recommendation C-1. The paragraph requires that all major acquisition programs be initiated based on analysis of an agency's mission and a determination of program needs and goals reconciled with overall capabilities, priorities and resources. Needs and goals are not to conform to any individual system or product that would foreclose consideration of alternatives. Paragraph 9, on key management decisions, reserves to the agency head approval of the mission need and goals that an acquisition program is to achieve. Two points seem to require clarification in the circular:

1. The circular calls for defining the mission need in terms of the agency components involved. The requirement could be strengthened by having the agency head also clarify overlapping mission roles and relationships of operating components who may sponsor competing system alternatives and formally recognize as purposeful any duplication between the components. (See C-1(b).)
2. The OMB circular defines a mission need as one stated in mission terms rather than in equipment terms and adds that it may be the result of a mission deficiency or a technologically feasible opportunity. As suggested, a technological breakthrough may provide an opportunity to improve mission performance and cost. In this event the Commission cautioned that the system idea should "evolve freely within program limits based on mission goals, not premature product specifications." The Commission said the "need should be separated from any particular system, and goals should be defined independently of the performance, cost and schedule characteristics of any particular system." A technological breakthrough therefore could not in itself dictate the solution but rather be treated as a competing way to solve a problem even if that breakthrough initially helped to identify the problem) In short, the Commission clearly recommended that the evolution of all programs be problem rather than solution oriented.

A recent DOD study endorsed greater agency head involvement in early program policy decision-making (frontend) and lesser involvement in operating component management decisions. As to the earlier frontend involvement, the study suggests that DOD operating components conduct continuing mission function analyses and identify any deficiencies. Formal documentation of the mission deficiency would occur with the agency head's approval. The operating component would also initiate mission concept studies to find ways and means to meet the deficiencies. It is not clear from the study whether the agency head would affirm mission capability, time and cost goals as well as the mission deficiency prior to the component starting the acquisition program. It is also not clear whether as part of this first key decision the agency head will reconcile mission roles and responsibilities of agency operating components and, in particular, those that overlap. Questions as to whether the agency head will affirm mission goals and reconcile component mission responsibilities before a major program is started, become even more critical if another part of the DOD study is implemented. It suggests that about one-half of the major programs in DOD be removed from agency head key decision points and turned back to the agency operating components. The Commission urged that initial policy decisions on mission deficiencies, goals and component responsibilities for all major programs be coordinated at the agency head level and be made visible to the Congress in the budget process, and that operating management decisions thereafter be delegated to agency components.

OMB circular paragraph 14a, "Information to Congress," would implement recommendation C-2 by providing that cognizant congressional committees are informed in the normal budget process about agency missions, capabilities, and deficiencies and the needs and goals for new acquisition programs. The circular says the procedures for doing this are to be worked out with OMB and congressional committees and are to be consistent with section 601(i) of the Congressional Budget Act of 1974. (See C-5 comments for further discussion of this act and the interrelationship of C-2 recommendation to congressional funding procedures.)

OMB circular paragraph 10c would implement recommendation C-3 by providing that agencies maintain a strong technology base. Paragraph 11f limits a particular subsystem development to less than fully designed hardware until an operational system candidate for that subsystem is identified. Exceptions to the policy of limiting subsystem development may be made only if approved by the agency head. Such exceptions would go beyond the Commission recommendation.

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PART C--ACQUISITION OF MAJOR SYSTEM SYSTEMS: (Continued)

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|---|------------|----------------------|----------------------|------------------------|
| <p>4. Create alternative system candidates within stated needs and goals for new acquisition programs by soliciting proposals from industry, including smaller firms with production potential, and by sponsoring most promising ones selected by agency component head using team of experts</p> | <p>DOD</p> | <p>Jan.
1974</p> | <p>Jan.
1975</p> | <p>(Dec.
1975)</p> |
| <p>5. Finance exploration of most promising alternative system candidates by (1) proposing, authorizing, appropriating, and allocating R&D funds according to agency mission area needs and (2) agency monitoring of such funds through annual budget reviews</p> | <p>DOD</p> | <p>Jan.
1974</p> | <p>Jan.
1975</p> | <p>(Dec.
1975)</p> |

[X] Requiring Special Attention

OMB circular paragraph 11a and b would implement recommendation C-4, to create alternative system solutions, by requiring that conceptual designs be solicited from all competent sources but primarily from private industry, including smaller firms. Requests for system concept design proposals would contain explanations of the mission need, time, cost and capability goals, and mission operating constraints, with each offeror free to propose his own technical approach, main design features and subsystems. A team of experts from inside and outside the agency component development organization would select those candidate systems warranting further development.

The circular goes somewhat beyond the Commission recommendation by allowing for system alternatives to be provided by in-house technical activities or those supported by them, such as federally funded research and development centers. In these cases, however, industry would be allowed to submit alternatives which it considered superior.

[X] OMB circular paragraph 13, "Budgeting and Financing," would partially implement recommendation C-5 by providing that R&D budgets be developed and allocated in accordance with agency mission function needs and goals. Because OMB circular guidance as well as congressional action is not complete on the C-5 recommended R&D budget process, the following material, taken from volume 2 of the Commission report, is presented first below to show the purpose and implications of the recommendation.

Background Material Taken from Commission Report

The Commission found that it has been virtually impossible to review and analyze the Department of Defense R&D budget request effectively because:

- There are too many R&D projects for congressional staffs to review.
- They are not explicit as to the purpose for which the R&D activity is to be undertaken.
- There is lack of clear correlation between most of the projects and defense needs.
- Some of the projects forego alternatives and set the course for what later emerges as a noncompetitive major system development with a budget of several hundred million dollars (p. 130).

Present funding categories are identified by the kind of technical activity to be undertaken, not their purpose. This causes a congressional reviewer to concentrate on technical details rather than on the overriding purpose for the request. Technical judgment properly belong to the operating units in the executive branch that are actually managing the work and that are therefore more familiar with the technical values of competing or complementary approaches. For the Congress, an effective approach would be to challenge the purpose of the proposed expenditures. A less effective one would be to challenge the approach taken to meet the purpose (p. 131).

After discussing some examples of new system capabilities buried within hundreds of technical projects, the Commission concluded that technical activities to support the technology base were not separated from those that start new programs and support exploration of system solutions. This situation was causing ineffective review of R&D by congressional authorization committees (p. 132).

The Commission went on to say that Congress has had difficulty overseeing the growth and complexity in agency R&D budgets and that its intensified demands for information and justification leaves Congress burdened with detailed reviews that obscure the overall pattern. It concluded that Congress could better understand where R&D money is to be spent if it reviewed, authorized, and appropriated funds for exploring candidate systems according to mission area. This could be done in conjunction with congressional review of agency missions and the needs and goals for new acquisition programs. This approach would segregate funds for (1) maintaining the technology base, (2) mission related programs to explore alternative system solutions and (3) the final development of systems chosen to meet mission needs. The second category would group together all development projects associated with candidate systems to meet each agency mission need. Congress would then have a more meaningful and convenient basis for reviewing expenditures and a much earlier awareness of the evolution of new systems (p. 80).

The Commission said further that allocations of R&D money according to mission needs would help reduce the pressures for premature commitments to a particular system to gain funding approval. The opportunity to scrutinize individual projects within these mission funds would remain whenever it was needed but, at the same time, a more meaningful level of review and control would be available (p. 80).

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PART C--ACQUISITION OF MAJOR SYSTEMS: (Continued)

Choosing a preferred system:

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|--|------------|----------------------|----------------------|------------------------|
| <p>6. Maintain competition between system exploration contractors by (1) limiting commitments to annual fixed-level awards subject to technical progress reviews, (2) assigning operational agency representatives to advise contractors, and (3) concentrating agency development and technical organization efforts on monitoring, testing, and evaluating contractor efforts</p> | <p>DOD</p> | <p>Jan.
1974</p> | <p>Jan.
1975</p> | <p>(Dec.
1975)</p> |
| <p>7. Limit premature commitments and maintain system-level competition through field demonstration by (1) having selected contractors prove chosen technical approach is sound and system definition of candidate system is practical before final development, production, and operational use commitments, (2) providing them with final operational test, mission performance, and lifetime ownership cost evaluation criteria, and (3) strengthening agency's life cycle cost estimating capability</p> | <p>DOD</p> | <p>Jan.
1974</p> | <p>Jan.
1975</p> | <p>(Dec.
1975)</p> |

[X] Requiring Special Attention

Unresolved Issues

1. The OMB circular took an important step forward by including guidance that agency R&D budgets be developed in accordance with mission function needs and goals. To complete this guidance and insure its proper implementation, the circular should require the agency in its R&D budget to separate clearly those technical activities necessary to maintain the nonapplied technology base from those which initiate new system solutions and programs. The Commission contended that until this separation was accomplished, both top agency management and congressional committees would lack visibility and control over the evolution of new programs and the exploration of system candidates.
2. The balance of this recommendation provides that funds for exploring and demonstrating alternative candidate systems also be authorized and appropriated by agency mission function. Congress has already laid a foundation for this approach by requiring a Presidential budget presentation in the form of a detailed structure of national needs referenced to agency missions and programs.^a The next step, which would complete implementation of recommendation C-5, would be action by the committees with agency oversight responsibility to review, authorize and appropriate the President's R&D funding requests by agency mission functions using the three funding categories identified above. In so doing, the committees could exercise control over the key expenditures that drive new programs and, at the same time, allow the agencies the needed flexibility to explore alternative system candidates competitively before making large scale program commitments to any one system.

OMB circular paragraph 11c would implement recommendation C-6 by having the agencies sustain competition between contractors exploring alternative systems with short-term contracts and planned dollar levels. The purposes of this step-by-step incremental approach are (1) to manage uncertainty inherent in both mission needs and candidate systems early in the acquisition process, (2) permit timely technical reviews of competing candidate systems and (3) allow for orderly elimination of the least attractive ones. Also spelled out in paragraph 11e of the circular is the need for interaction between participating contractors and agency representatives with relevant operational experience. The third part of this recommendation, the use of in-house technical organizations to monitor, test and evaluate contractor system candidates, is not specifically covered in the circular.

OMB circular paragraphs 9d, 11d and 12a would implement recommendation C-7 by providing that agencies establish cost estimating capabilities, conduct system competitive demonstrations, and provide contractors with operational test conditions, mission performance criteria, and lifetime ownership cost evaluation factors to be used in selecting the system(s) for fullscale development and production. At this point mission needs and goals would be reaffirmed, and demonstration results would show whether the chosen technical approach is sound.

^aP.L. 93-344, Section 601(i).

ANALYSIS OF

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Short form Statement of Commission Recom- mendation	Executive Branch Policy Position			Executive Branch Implementing Action		
	Task group led by	Task group report to GSA	Referred to OFPP for decision	Position established (target)	Legislation if applicable	Type

PART C--ACQUISITION OF MAJOR
SYSTEM: (Continued)

8. For systems chosen without competing candidates, obtain agency head approval, integrate technical and management contributions from in-house groups and contractors, establish strong technical and management program control, select contractors for proven capabilities, and estimate program cost within a probable range

	DOD	Jan. 1974	Jan. 1975	(Dec. 1975)
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System implementation:

9. Withhold agency and congressional commitments for full production pending reconfirmation of need and system performance test and evaluation; establish operational test activity separate from developer and user, define scope of operational testing agencywide, and strengthen operational testing capabilities

	DOD	Jan. 1974	Jan. 1975	(Dec. 1975)
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10. Use contracting as system acquisition tool, not management substitute; set guidelines to permit flexibility in applying contracting regulations, including use of simplified final development and production contracts and priced production options when critical test milestones have minimized risk

	DOD	Jan. 1974	Jan. 1975	(Dec. 1975)
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[X] Requiring Special Attention

[X] OMB circular paragraphs 9a (2), 11g, and 12c would partially implement recommendation C-8, the exception to competitive development, demonstration, and selection, by reserving to the agency head special approval of this exception. The circular also requires disclosure to appropriate congressional committees during the normal budget process (par. 14b).

The circular does not address the need for special agency controls over noncompetitive system development and selection. The Commission believed that special controls were necessary because a yet-to-be-demonstrated system had been decided upon, the design and development of which would often take place in a sole-source environment with high-risk technical problems yet to be resolved and with the total cost of the system yet to be determined. Here the contractor works in a cost-type environment, and the Government often shares technical and business decisions with him. On the other hand, in the approach envisioned elsewhere in the circular, such decisions are left mainly to the competing contractors who, in turn, have short-term, limited commitments and whose system is yet to be selected. Another problem with selecting a single system so early is that the Government rather than the contractor tends to have total systems performance responsibility--notwithstanding efforts to shift that responsibility to the contractor through contract terms.

Recognizing the Government's unusual risks and responsibilities for technical and business management in noncompetitive programs, the Commission recommended that such programs be approved by the agency head only under exceptional circumstances and with the understanding that the operating agency component would establish an unusually strong in-house technical and management capability and select participating contractors with proven capabilities. Additionally, the Commission recommended using cost-type contracts for high risk portions of the system development and using probable ranges for system cost estimating purposes until development had been substantially completed. Circular coverage of early system selection needs to be strengthened and needs to include an understanding of the additional Government risks and responsibilities and attendant special controls necessary for noncompetitive system development as contrasted with competitive development and demonstration.

Although specific controls over early noncompetitive system selection can be left to agency implementation, some guidance in the circular as to what is expected of the agency seems essential.

[X] OMB circular paragraph 12b would implement recommendation C-9 by providing that, before approval of full production, mission needs and goals are to be reaffirmed and systems are to be independently tested and evaluated in an environment closely approximating expected operational conditions. The circular says, however, that testing requirements can be waived by the agency head if a cost benefit analysis shows release of the system to production is clearly justified. The circular does not explain why a waiver would even be needed or what circumstances might justify its use. Using the term cost benefit analysis as a justification to use the waiver leaves open a host of circumstances which the agency might use to defer or eliminate test requirements. Some clarification in the circular seems essential in view of the number of past systems that have suffered from late or insufficient testing and evaluation. The circular should also require the implementing agencies to develop criteria for use of waiver.

OMB circular paragraph 8b notes the importance of the contracting process in tailoring an acquisition strategy for individual system acquisitions. The circular does not encourage simplified contracting and flexibility in use of procurement regulations and priced production options, as recommended by the Commission. OFPP said these were matters which were expected to be covered in agency implementation.

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PART C--ACQUISITION OF MAJOR SYSTEMS: (Continued)

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|---|------------|----------------------|----------------------|------------------------|
| <p>11. Unify major acquisition policy and monitoring at agency and component management levels; integrate technical and business management policy; assign program managers upon program initiation; institute career program to insure varied and enlarged personnel experience; and reduce agency and industry management layering, reviews, procedures, reporting, and paperwork</p> | <p>DOD</p> | <p>Jan.
1974</p> | <p>Jan.
1975</p> | <p>(Dec.
1975)</p> |
| <p>12. Delegate technical and program decision authority to operating agency components, except for key agency head decisions for program needs and goals and for approving systems for demonstration, final development, and full production</p> | <p>DOD</p> | <p>Jan.
1974</p> | <p>Jan.
1975</p> | <p>(Dec.
1975)</p> |

[X] Requiring Special Attention

[X] OMB circular paragraph 9a would implement recommendation C-11 by having each agency establish an acquisition executive, appointed by the agency head, who would be responsible for integrating the management process for major systems and for monitoring results of policy. Other recommendation C-11 provisions and related circular coverage are:

--Assignment of program managers at the very outset of program when a decision is made to fulfill a mission need by pursuing design concept alternatives (par. 9b).

--Broad career experience for program managers (par. 9b).

--Early consideration of business aspects of systems acquisition (par. 8b).

--Minimizing management layering, staff reviews, reporting procedures, and paperwork requirements placed on program managers and contractors (par. 9c).

The role of the proposed top-level acquisition executive in integrating the agency's systems acquisition management process requires clarification. For example, the Commission did not envision a fragmented management process run by committee, such as that now used by DOD and DOT. (See Commission report, part C, pp. 87 and 171-176). Instead, it sought with its recommendation to unify the systems related policymaking, monitoring, and evaluating functions throughout the agency and component hierarchy. This was to (1) allow business and technical considerations in systems acquisition to be applied in an integrated fashion on a day-to-day working basis, (2) reduce the number of management entities and eliminate management layering, redundant reviews and excessive paperwork down through the organizational structure, and (3) help restore authority to run programs back to the agency operating components, as reinforced by C-12 below.

OMB circular paragraph 9a would implement recommendation C-12 by having the agencies delegate all technical and program decisions to their operating components except for the four key decisions on (1) mission needs and goals that an acquisition program is to achieve, (2) competitive systems demonstration (or the exception--noncompetitive system development), (3) fullscale development, and (4) full production. (See analysis of C-1 on needed clarification of first key decision point.)

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PART D--ACQUISITION OF COMMERCIAL PRODUCTS:

Commercial products marketplace:

1. Improve collection and dissemination of commodity and agency procurement statistics for congressional, executive branch, and industry needs	GSA	Dec. 1973	Adopted May 1974	P.L. 93-400 Aug. 1974	Data System	(Oct. 1976)
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[X] Requiring Special Attention

In May 1974 the executive branch decided to accept the task group's report endorsing this recommendation and to proceed with implementation. In August the OFPP Act made its implementation a functional responsibility of the Administrator by requiring establishment of a system to collect, develop, and disseminate executive agency procurement data that satisfies the needs of the Congress, the executive branch, and the private sector. Implementation is being pursued through a standing interagency Federal Procurement Data System Committee as executive agent for the OFPP Administrator.

According to its charter, the Committee is to assist the executive branch in designing, developing and recommending a centralized system that will be efficient, economical, and capable of merging, retrieving and producing Federal procurement data. The Committee is also responsible for coordinating, testing, and overseeing implementation of the system and for determining annually the data elements to be collected by the agencies in the ensuing fiscal year. As authorized in the charter, the Committee established a standing executive subcommittee to assist the Committee in matters concerning the direction of the implementation program and two working subcommittees to design the data system and to establish a central data repository and the necessary reporting and processing functions. Subcommittee task orders call for submission of monthly status and progress reports to the Committee chairman. The present target date for an operational system is October 1, 1976.

After a 9-month study of existing procurement management reporting systems and code structures, including those of DOD, HEW, and NASA, the System Design Subcommittee in July 1975 submitted its report to the Committee. The system proposed in the report, which is patterned after DOD's system and recommended by the task group, would require agencies to report, quarterly and annually, individual procurement actions in excess of \$10,000, summaries of procurement actions of \$10,000 or less, and a control summary of all these actions in specified categories, such as advertised and negotiated. According to the subcommittee's report, the system should permit the Central Data Agency (repository) to publish reports showing

- the agencies which were doing the procuring,
- the products or services procured by Federal Supply Classification, Service or RDT&E code, Standard Industrial Classification (SIC), and Budget Object Classification,
- the time periods in which procurement actions were made,
- the place of performance in terms of city, county, state or country, and standard metropolitan statistical area,
- the contractors which provided the products or services, shown by contractor (alphabetically), by industry (SIC), and by location (city, county, state, or country), and
- the negotiation authority, pricing provisions, extent of competition, and set asides.

The subcommittee has recommended that the DUNS number developed by Dun and Bradstreet, Inc., be used to identify contractor establishments at place of performance by geographical locations. Identification of congressional districts involved in procurement actions is also under consideration, although it is recognized such identification may not be possible or practical for the larger cities which have more than one congressional district.

In August 1975, with OFPP's Assistant Administrator for Regulations approval, GSA sent the subcommittee report for review and comment to 21 procuring agencies that accounted for all but 3/10 of 1 percent of the FY 1974 reported procurement dollars, to selected industrial associations, and to GAO. A notice has also been published in the Federal Register inviting comments from any interested party in the private sector.

GSA has requested the agencies to specifically comment on (1) the proposed standard data elements in relation to the procurement data needs of the agency for its programs and its congressional and GAO reports, (2) the dollar threshold for reporting individual data elements, and (3) the feasibility of integrating proposed elements into the agency's existing system and the estimated cost of doing so. OFPP

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PART D--ACQUISITION OF COMMERCIAL PRODUCTS: (Continued)

Commercial products requirements:

2. Provide means for users to communicate extent of satisfaction with centralized supply support system in order to evaluate its effectiveness	GSA	Apr. 1974	Adopted May 1974	FMC 75-1	(Mar. 1976)
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3. Reevaluate commercial-type product specifications every 5 years, limit new Federal specifications for commercial-type products to those specifically justifiable, and use purchase descriptions if Federal specifications are unavailable	GSA	Sept. 1973	Modified Feb. 1974	FMC	(Sept. 1976)
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[X] Requiring Special Attention

will evaluate the subcommittee's proposed system in light of these comments, and will advise the Data Processing Subcommittee on the system's implementation.

In February 1975 the GSA Office of Federal Management Policy initiated implementing this recommendation by issuing FMC 75-1, a circular establishing policies and procedures intended to insure that supply support systems of all Federal agencies provide a positive means for the communication and consideration of users' experience with those systems. The circular requires the head of each agency, operating one or more supply support systems, to establish procedures that provide for

- periodic reviews of existing methods of expressing and producing user satisfaction with the system,
- evaluating effectiveness of those methods,
- determining whether end product user satisfaction is a factor in evaluating performance of the system, and
- taking actions to insure that procedures provide a positive means of obtaining and considering user satisfaction.

If improvements are warranted, then consideration is given to (1) establishing supply liaison programs, (2) coordinating proposed procedures with end-product users before implementation, and (3) conducting meetings and seminars with users to obtain direct feedback regarding the system. Each agency was to advise GSA within 180 days on steps taken to implement the circular.

In an April 1975 memorandum to the Commissioner of the Federal Supply Service and other GSA officials, the GSA Administrator called attention to the circular requirements and directed the addressees to issue supporting procedural guidance in their respective program areas to insure accomplishment of its objectives. He designated the Federal Supply Service as the coordinating office for the Office of Federal Management Policy on the steps taken within GSA to implement the circular. Other agencies operating supply support systems were apprised of this memorandum.

By October 1, 1975, the agencies within GSA, and most of those outside GSA with supply support systems, had responded to the circular. DOD and VA submitted reports which described their policies and procedures to insure responsiveness to users. With regard to the civilian agencies, most have taken action to publish internal procedures to deal with the subject. Notable among these are Commerce, HEW, State and USDA. Because many agencies found FMC 75-1 to be ambiguous in certain aspects, steps are being taken by GSA to review and evaluate agency responses, to ascertain adequacy of agency implementation and to identify revisions needed in the circular. This effort should be complete by the end of December 1975. The final type of implementing document, the issuance of which is targeted for March 1976, is not firm and may not be an FMC due to ongoing organizational changes within GSA.

[X] In February 1974 the executive branch agreed to adopt, in modified form, Commission recommendation D-3 to limit new Federal specifications for commercial products and reevaluate them every 5 years. The executive branch modified the recommendation (1) by substituting purchase specifications for Federal specifications to make the term include all Government specifications rather than just Federal and military specifications and (2) by deleting the use of purchase descriptions, when Federal specifications are unavailable, as being already comprehended within the meaning of purchase specifications.

In a May 1975 letter to the GSA Administrator for Federal Management Policy, OFPP noted that the implications of recommendation D-3 needed to be explored to arrive at an appropriate implementation approach. He requested that GSA establish an interagency task group to develop underlying principles and essential guidelines for the competitive procurement of commercial products on the basis of established market acceptance. He thought it appropriate that, when acquiring commercial products with some level of acceptance by the consuming public in the marketplace, the Government should be able to rely upon those products. He indicated that the use of commercial product specifications should be examined to ascertain the circumstances where such use is justified and to specify policy guidance for other situations. As stated in the letter, the task group's end objective is to provide OFPP "with a proposed policy position that would justify our (GSA) initiating appropriate testing measures to determine the desirability and feasibility of utilizing such an approach on a selected Government-wide basis."

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PART D--ACQUISITION OF COMMERCIAL
PRODUCTS: (Continued)

4. Assign policy responsibility to OFPP for developing and coordinating Federal specifications	GSA	Dec. 1973		Adopted Dec. 1974	P.L. 93-400 Aug. 1974	Policy responsibility	May 1975
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Acquisition of commercial products:

5. Encourage use of headquarters procurement staff to train field procurement personnel on the job in implementing techniques and identifying innovations related to their needs	GSA	Dec. 1973		Adopted May 1974		FMC 74-6	Aug. 1974
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[X] Requiring Special Attention

An interagency task group, led by GSA's Office of Federal Management Policy, has been established and held its initial meeting in October 1975. It includes representatives from GSA's Federal Supply Service, DOD's Defense Supply Agency, and VA, all of which are large users of commercial products. The group is developing a tentative policy statement covering commercial products widely used by the Government and others that have a large annual dollar volume, reflect the needs of using agencies, and have a prior history of being purchased on the basis of Government purchase specifications. The policy statement will distinguish these commercial products from others as being off-the-shelf items, such as food, drugs, nuts and bolts, that are not made to order and do not require their own specifications. It is expected that the group will complete and submit its policy statement to OFPP by March 1976. It is estimated that another 6 months will be required to test the desirability and feasibility of applying this policy on a Government-wide basis. However, because of the ongoing organizational changes within GSA, the final type of implementing document is not firm.

The OFPP Assistant Administrator for Logistics, to whom responsibility for this and other commercial product recommendations is assigned, emphasized the importance of a solution to D-3 as it may also provide the means for dealing with the subject areas involved in D-6, D-16, and D-17. Because of the importance of this recommendation and its interrelationship with other critical recommendations, this recommendation requires priority attention including:

- o establishing a high level policy committee, comprised of supply decisionmakers and to whom the working task group would be responsible,
- o setting the milestones for accomplishing each of the major tasks required for completing the tentative policy statement and the testing of it, and
- o appropriate industry participation.

In a May 1975 letter to the GSA Administrator for Federal Management Policy, OFPP confirmed an earlier decision to accept recommendation D-4. OFPP decided that enactment of P.L. 93-400 had placed responsibility in OFPP for policy relative to the development and coordination of Federal or purchase specifications and that, consequently, this recommendation had been implemented when the Office was established. An announcement to this effect was published in the Federal Register in May 1975.

In August 1974 GSA issued Federal Management Circular 74-6 to implement Commission recommendation D-5. This circular requires that agencies with decentralized purchasing activities improve their operational effectiveness by developing and implementing a continuing program to identify and remove the impediments to innovative cost-saving procuring techniques. In establishing the program, the circular specifies that consideration is to be given to what is called for in recommendation D-5--"the use of headquarters procurement personnel in conducting on-the-job training of field procurement personnel to (a) implement techniques adopted to specific field activity needs and (b) identify possibilities for procurement innovations and technical transfusion."

Each agency head was required to furnish GSA with a copy of the established program within 180 days from the date of the circular. Some of the major agencies with decentralized procuring activities, like HEW, DOT, Treasury, and DOD, have advised that their program would be to coordinate and continue existing practices. Other agencies, like Justice, not being in a position to immediately implement the full program envisioned in the circular, submitted an outline of a program that they intended to establish. Still other agencies, like TVA and NSF, advised that the circular was not applicable because their agency did not have decentralized purchasing activities.

As agency responses to the circular show considerable variances, further followup would seem to be needed to ensure agency implementation. As this recommendation is related to the training function of the soon to be created Federal Procurement Institute (see A-21), OFPP could take the parallel action of assigning its implementation to the Institute's training mission.

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PART D--ACQUISITION OF COMMERCIAL PRODUCTS: (Continued)

6. Authorize OFPP by statute to establish, on a total of economic cost basis, policies and standards for (1) procuring, storing, and distributing commercial products, (2) direct local source buys when consistent with centralized procurement requirements, (3) industrial funding, when practical, of interagency commercial product support activities, and (4) continuous evaluation of agency procurement and distribution systems	GSA	June 1974	Nov. 1974	Not yet established		
7. Require that consideration be given to direct procurement of U.S.-made commercial products from sources available to overseas activities when such sources are cost-effective	DOD	Dec. 1973		Modified May 1974		See comments

[X] Requiring Special Attention

[X] In November 1974 this recommendation was referred to OFPP to resolve differences between GSA and DOD over executive branch action on this recommendation. GSA, VA, and the consensus of official agency comments supported the task group's proposed adoption of the recommendation and approach to its implementation. DOD agreed with what it considered was the intent of the recommendation--to achieve greater economy in the procurement, storage, and distribution of commercial products. But, DOD opposed using industrial funding as a costly and unsatisfactory accounting method for DSA items and, as a principal GSA customer, agreed to GSA using it only if storage and distribution costs were funded by GSA appropriations and DOD had full freedom to use alternate supply sources when more economical. DOD believed that its use of industrial funding would be impractical since it would be applying peacetime techniques to the wartime needs of defense. GSA believed the thrust of the recommendation could be achieved by DSA through some means other than industrial funding, such as the use of a total economic cost basis. DOD also opposed establishing local purchase criteria for equal application to both DOD and civilian agency activities because DOD's supply system is centralized and unique in that it is oriented to be responsive to mobilization planning, military readiness, and mission support requirements.

In resolving these differences between GSA and DOD, GAO recommended in its March 1975 progress report that OFPP direct special attention to this recommendation and explore:

- (1) the issues and questions raised in this report under recommendation D-7 on which an executive branch position has been established, because D-6 and D-7 are conceptually interrelated and
- (2) whether DOD's position is due to a desire not to compete with commercial distribution systems and a reluctance to publicly disclose DSA costs.

In his May 1975 response to the GAO report, the Director of OMB advised that neither DOD nor GSA is able or willing to apply the total economic cost concept in the procurement of commercial products as recommended by the Commission. He said that GSA is studying the changes that would be required in the Federal Supply System to implement the recommendations and that the use of a management consulting firm to explore implementation possibilities is being considered by OFPP. He also agreed that ultimate action on D-6 would call for a review of D-7.

The OFPP Assistant Administrator for Logistics, to whom responsibility for this and other commercial product recommendations was assigned, advised that D-6 could be accepted in modified form by eliminating the reference to industrial funding, because it was only required when practical and was not necessary to arrive at total economic cost. He said that the real problem was determining how this recommendation is to be implemented. He was unable to establish a target date for implementation. He explained that a solution to D-3 was needed before a realistic cost comparison could be made of an item purchased under Government specification with a true commercial item available through established commercial outlets.

[X] In August 1974 the executive branch adopted the Commission recommendation as modified by a DOD-led task group. This modification limited overseas procurements to decentralized management items. As the task group's position is part of the existing regulations and operating practice, no implementing action was believed necessary. In modifying the Commission recommendation, the task group believed that to make it a general practice to locally purchase items that are centrally procured would tend to degrade the supply system which is fed logistic requirements in peacetime so that it will have a ready capability to function in times of national emergency.

In its March 1975 progress report, GAO recommended that OFPP reconsider the executive branch position on D-7 consistent with its ultimate action on D-6 because:

1. D-6 is the primary recommendation calling for establishment of Government-wide policies and standards for the acquisition of commercial products on a total economic cost basis, and it was premature to formulate a position on subsidiary recommendation D-7 before establishing a position on D-6.
2. Limiting the recommendation to decentralized management items was only a continuation of existing operating practice, so the executive branch was actually rejecting the recommendation rather than accepting it in modified form, and the announcement in the Federal Register should have so stated with appropriate justification.

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PART D--ACQUISITION OF COMMERCIAL
PRODUCTS: (Continued)

[X] Requiring Special Attention

3. The so-called modification in effect rejected consideration of cost-effectiveness and the potential for improving logistics support of activities operating overseas, both of which were inherent in the Commission's conclusions that:

"Purchase of U.S.made commercial products by overseas activities from U.S. firms or subsidiaries with overseas distribution systems provides a potential for savings over shipment of these items by the U.S. Government from the United States."

* * * *

"Indefinite delivery contracts can be used to simplify procurement of U.S.-made products from overseas sources."

* * * *

"Overseas activities should not be required to order material from the United States without consideration of alternatives that may be more cost-effective."

4. The following interrelated issues need to be resolved:

- a. Do our commercial distribution systems and inventories represent a national asset which can be called upon through contractual arrangements or mobilized in emergency, when necessary, to fulfill our defense needs more responsively than if we stocked and distributed such readily available commercial items in a Government centralized supply system?
- b. Should the central supply system be limited to spare parts, ordnance, and other items, necessary to support weapons systems and military operations, that are not readily available in commercial distribution systems and that would, therefore, be costly and time consuming to reproduce?
- c. Is DSA's position on D-7 consistent with the views of the military services, including field-level support activities responsible for maintaining the necessary mission support readiness posture?
- d. Does a centralized supply system for readily available commercial products, and the standardization that it entails, result in use of specifications that preclude buying the latest available products, discourage industry innovation, restrain competition, cause the Government to buy in excess of minimum need to satisfy all users and, as pointed out in the Commission report, result in substantial obsolescence and unused inventory?^a
- e. Can cost visibility for making decisions on alternative methods of support be achieved by interagency support activities without a full cost-recovery system?
- f. Should not even greater latitude be allowed to agencies operating overseas to procure locally due to transportation costs and delivery time?
- g. Is the concept of mandatory use of centrally stocked items by all users without regard for cost-effectiveness and responsiveness valid for readily available commercial items?

^aAttention is directed to a 1975 GAO report (LCD-74-430) suggesting that the Congress question DOD about the rationale for continued adherence to rigid food specifications inasmuch as the inability of DOD's central food purchasing agency to depart quickly from such specifications resulted not only in higher costs but also in a lack of responsiveness to solicitations for bids and, quite frequently, in shortages of required food items.

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PART D--ACQUISITION OF COMMERCIAL PRODUCTS: (Continued)

8. Authorize primary grantees the option to use Federal sources of supply to support more than 60-percent federally financed programs, provided Government is fully reimbursed for such use (with dissent)	GSA	Mar. 1974		Rejected May 1974		
9. Require grantor agency to have procedures for insuring appropriate use of Federal supplies and computing total costs for Government reimbursement (with dissent)	GSA	Mar. 1974		Rejected May 1974		
10. Assign OFFP to monitor implementation of recommendations D-8 and D-9	GSA	Mar. 1974		Rejected May 1974		
Special products and services:						
11. Reevaluate ADPE acquisition procedures in light of total economic cost	GSA	June 1974		Adopted July 1974	Contract Study Plan	(Dec. 1975)

[X] Requiring Special Attention

In his May 1975 response to the GAO report, the Director of OMB stated that preservation of a national supply system responsive to the mobility requirements in overseas locations was imperative and that, under such a system, local procurements may be made when, where, and to the extent such practice is warranted. He did agree, however, that ultimate action on D-6 would call for reconsideration of D-7. The executive branch has not established a target date for reaching a position on D-6 because a position on D-3, to which D-6 is interrelated, first must be established.

Late in 1972 the executive branch terminated grantee use of Federal sources of supply due to widespread objections by small business concerns. As publicized in the Federal Register of May 10, 1974, the executive branch rejected recommendations D-8, D-9, and D-10 because it believed that neither the Commission, which was divided on the recommendations, nor the task group introduced new evidence to justify reinstating the use of Federal sources of supply by grantees. Both the House and Senate bills involved in the enactment of OFPP were modified to accommodate views of small business against allowing OFPP to authorize grantee use of Federal sources of supply. In reporting on the law, the Congress specified that nothing in the law was to be construed as giving OFPP any such authority.

See D-8 comments.

See D-8 comments.

In July 1974 the Commission recommendation to use the total economic cost concept in ADPE acquisitions was accepted as the executive branch position. Implementing action has been formulated on the basis of an automatic data processing strategy study on the acquisition, utilization, and management of computers in the Federal Government. The study was conducted by Decisions and Designs, Incorporated, of McLean, Virginia, under a contract awarded in 1974 by GSA's Office of Federal Management Policy. The results of this study are contained in a March 1975 report (GSA/OFMP AMD-74-1). The report identified and examined in detail some 16 strategic ADP policy issues and set forth with respect to these issues findings, conclusions, and policy/procedural recommendations with implementing action plans.

Based on evaluation of the ADP strategy study by an interagency steering group, it was decided that implementation of this recommendation required a study plan that could be used in an evaluation of GSA and other agency ADPE acquisition procedures. In June 1975 GSA awarded a contract to Auerbach Associates, Inc., of Philadelphia, Pennsylvania, to produce such a study plan. The contract specified that the plan is to be useable

- to determine the feasibility of identifying total economic costs for all appropriate elements of the total acquisition cycle and
- to conduct an indepth review of the total economic costs associated with the various phases of the acquisition cycle, from identification of requirements to delivery of an operational system, provided it was determined such a concept was feasible.

The contractor submitted the study plan in October 1975. When the plan has been reviewed, implementation of the recommendation will be regarded by GSA as completed and an appropriate announcement to this effect will be published in the Federal Register. GSA's Automated Data and Telecommunications Service will proceed to make the plan, and any recommendations made by the contractor, available to interagency task group(s) to determine what revisions, if any, should be made in agency ADP procedures.

ANALYSIS OF

EXECUTIVE BRANCH POSITIONS AND IMPLEMENTING ACTIONS ON COMMISSION RECOMMENDATIONS AS OF NOVEMBER 1, 1975

Short form Statement of Commission Recommendation	Executive Branch Policy Position			Executive Branch Implementing Action			
	Task group led by	Task group report to GSA	Referred to OFPP for decision	Position established (target)	Legislation if applicable	Type	Executive Action Completed (target)

PART D--ACQUISITION OF COMMERCIAL PRODUCTS: (Continued)

12. Require GSA to establish ADPE procurement delegation policy to promote effective preplanning of agency requirements and optimum use of manpower	GSA	Dec. 1973		(Feb. 1976)			
13. Revise funding policies for multiyear leasing to permit ADPE procurement on a cost-effective basis in addition to use of ADPE fund	GSA	Dec. 1973		Modified Sept. 1974	S. 1260 Mar. 1975		
14. Develop standard benchmarks to be used in evaluating ADPE proposals	GSA	Mar. 1974		Adopted May 1974		Continuing NBS Publications and/or DOD Studies	

[X] Requiring Special Attention

In May 1974 GSA revised the existing Federal Property Management Regulation (FPMR 101-32.15) to require agencies to submit, annually to GSA, major ADP system requirements plans for each of 5 succeeding fiscal years. A major system is defined as one for which total planned expenditures in any fiscal year for hardware, software, personnel engaged in system development, and related items exceeds \$1 million. The revision is intended to apply only to future planning to enable GSA to determine potential requirements for multiuser computers or communication facilities and to allow advance notification of procurements that GSA will assume and those it will delegate to agencies.

DOD questioned whether the intent of D-12 had been implemented by the revision since it applied only to future planning requirements and did not provide a high enough dollar threshold under which agencies might procure ADP without prior GSA approval. GSA agreed that it was premature to conclude that D-12 had been implemented by the FPMR revision until conclusion of the automatic data processing strategy study discussed in the comments on D-11, since the study included a review of the planning reporting requirements and delegation of procurement authority.

In September 1975 letter to OMB, GSA suggested that OMB establish a series of interagency task groups to explore certain of the ADP strategy study recommendations (see D-11 comments), in whole or in part, or modified in some manner, and to work with the interagency strategy study steering committee in developing policies to be coordinated with affected agencies and ultimately translated into appropriate implementing actions. An executive branch policy position on the Commission recommendation is targeted for February 1976.

The task group majority and consensus of agency views favored adoption of the Commission recommendation. GSA would not accept this position in the belief that it was inconsistent with a single Government ADPE manager concept and that ADPE procurements by any agency should be financed only from GSA's ADPE fund. OMB officially adopted GSA's modified position with implementation through the enactment of S. 2785. This bill would have authorized GSA to enter into firm-term, multiyear leases through the use of the ADP fund without obligating the full amount of the multiyear contract at the outset. This bill passed the Senate in September 1974 but was not acted upon by the House prior to adjournment of the 93d Congress. An identical bill, S. 1260, introduced in the 94th Congress in March 1975, was passed by the Senate and referred to the House the following July. The House Government Operations Committee has requested comments on the bill from OMB, GSA, and GAO. In September 1975, GAO advised the Committee that it favored enactment of the bill.^a

The executive branch considers that the thrust of this recommendation has been adopted and implementation begun in view of two ongoing benchmark feasibility studies presently being made by DOD and the NBS Institute for Computer Science and Technology (NBS-ICST). The executive branch position has been made known to NBS-ICST and published in the Federal Register.

As explained in the last two progress reports, implementation was contingent on the results of these studies. In his May 1975 response to the last GAO report, the Director of OMB recognized the need for more affirmative action in this area and advised that action had been initiated with NBS to obtain a shorter completion time and a specific target date for implementing this recommendation. An initial implementing benchmark publication by NBS is in the process of being published. This publication (FIBS PUB 42) will set forth guidelines for benchmarking ADP systems in a competitive procurement environment. The feasibility studies will continue to apply these guidelines in developing the benchmarks or criteria to be applied to each phase of the ADP process. This is to be a continuous program. After publication of the FIBS PUB 42, it is anticipated that an appropriate announcement will be made in the Federal Register indicating that D-14 implementation is considered a continuing effort. NBS-ICST will be requested to assume responsibility for this project and will issue benchmark publications from time to time as studies in the area progress.

^aSee also Report to the Congress by the Comptroller General "Further Actions Needed to Centralize Procurement of Automatic Data Processing Equipment to Comply with Objectives of Public Law 89-306," LCD-74-115, October 1, 1975.

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Short form Statement of Commission Recom- mendation	Executive Branch Policy Position			Executive Branch Implementing Action		
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PART D--ACQUISITION OF COMMERCIAL
PRODUCTS: (Continued)

15. Conform ADPE late-proposal clause with other procurement practices	GSA	Oct. 1973		Adopted Sept. 1973		ASPR 7-2002.3 & .4 FPR 1-3.802.1 FPMR 101-32.408-4	May 1973 Sept. 1973 Dec. 1973
16. Assign to OFPP or other Presidential-designated agency the responsibility for consistently and equitably implementing the legislative food-acquisition policy	USDA	Mar. 1974		Adopted Aug. 1975	P.L. 93-400 Aug. 1974	OFPP role	Continu- ing effort

[X] Requiring Special Attention

The recommendation was adopted by executive branch in September 1973 and was implemented by issuance of an FPR and FPMR regulation. ASPR had been previously amended in May 1973.

The Department of Agriculture-led task group, with DOD and VA as participating agencies, favored adopting Commission recommendation D-16 to assign OFPP responsibility for the consistent and equitable implementation of legislative food acquisition policy.

The Commission pointed out in its report (vol. 3, pp. 55 to 60) that food legislation to date was the result of efforts by many individual congressional committees to handle specific problems as they arose, and there was no coordinated legislative policy for uniform application by executive agencies. The legislation involves interrelated agency activities on specifications, standards, quality assurance, distribution policies, and procurement techniques. The Commission concluded that:

- Food specifications are the most unusual and confusing of all the Federal specifications in the procurement system * * *. Many food products are purchased by the Government using Government specifications when a suitable commercial product is available to fill the requirement * * * special requirements * * * increase costs and reduce competition.^a
- Food acquisition systems for Federal agency use * * * overemphasize initial price of a food product without sufficient consideration of total cost * * * to the user.
- Commodities procured by DOD and USDA, the two major food purchasers, can result in a shortage for the other because timing of the purchases of similar items can affect the market price of all Government procurements.
- Current procurement reporting systems do not provide industry, the Congress, or the executive branch with the data on food procurement need for effective evaluation of the total system.

In its report, the task group recognized that a single set of consistent policies and guidelines for all executive agencies in food acquisition was necessary to coordinate and implement legislative and executive food policy. Official comments from 3 of the 5 agencies solicited--HEW, VA, and GSA--concurred with the task group. DOD, while concurring with the recommendation, was opposed to establishing a food acquisition policy group in OFPP. USDA did not concur with the recommendation in the belief that coordination of Federal food procurement policies can be achieved within the framework of existing agencies so that an additional layer of Government is unnecessary. The previous GAO progress report said that such a weak response to the recommendation would permit the agencies to maintain the status quo and to continue their own separate ways in food acquisition.

In the belief that the statute creating OFPP (P.L. 93-400) had the effect of vesting in the OFPP Administrator responsibility for food acquisition policy, recommendation D-16 was accepted by the executive branch in August 1975. Subsequently, at the direction of OFPP, an interagency ad hoc task group, consisting of representatives from VA, DOD's DSA, USDA, and GSA, was convened by GSA for purpose of:

- Reviewing food item identification systems, including those within the participating agencies and the basis for interagency communication.

^a Attention is directed to a 1975 GAO report (LCD-74-430) suggesting that the Congress question DOD about the rationale for continued adherence to rigid food specifications inasmuch as the inability of DOD's central food purchasing agency to depart quickly from such specifications resulted not only in higher costs but also in a lack of responsiveness to solicitations for bids and, quite frequently, in shortages of required food items.

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Short form Statement of Commission Recom- mendation	Executive Branch Policy Position			Executive Branch Implementing Action		
	Task group led by	Task group report to GSA	Referred to OFPP for decision	Position established (target)	Legislation if applicable	Type

PART D--ACQUISITION OF COMMERCIAL
PRODUCTS: (Continued)

17. Establish by law a central coordinator of agency management responsibilities for Federal food-quality assurance program	USDA	May 1974		Adopted Aug. 1975	P.L. 93-400 Aug. 1974	OFPP role	Continuing effort
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[X] Requiring Special Attention

--Planning such actions, using marketing information available from USDA and National Marine Fisheries Service.

A number of discussions between OFPP and the ad hoc task group, concerning additional efforts needed for implementing the food acquisition policy, led to a determination that, to achieve greater economies, marketing information should be made available in a more effective manner. Accordingly, OFPP requested the Secretary of Agriculture to assume lead agency responsibility for studies on the feasibility and development of a centralized system for collecting and disseminating timely marketing information to satisfy food procurement needs of the various agencies. OFPP's Assistant Administrator for Logistics, supported by the Office of Federal Management Policy, is responsible for continuing oversight of this study. OFPP believes that efforts under D-3 to improve use of commercial specifications may provide means to help implement this recommendation.

A majority of the USDA-led task group with five participating agencies--DOD, VA, FDA, Commerce, and PHS--favored adoption of Commission recommendation D-17 to establish a central coordinator to identify and assign individual agency responsibilities for management of the Federal food-quality assurance program. The Commission concluded that (vol. 3, p. 60):

- The resources involved in the inspection of food in interstate commerce could be utilized more effectively if each food processor were required to have a quality assurance program.
- Federal inspection and acceptance procedures governing food procurements for Government use should be more closely coordinated with Federal and State procedures governing food procurements for public use that move in interstate commerce.

The task group response proposed substitution of a "central director" for the "central coordinator" suggested by D-17. The need for a central director, the task group believed, was substantiated by the findings reported by the Commission's study group 13A and by GAO in June 1970 (B-168966). The task group listed a number of benefits that could be expected to result from the creation of a central director, including

- a central entity accountable to the President and the Congress,
- an increase in interagency communications and understanding,
- greater coordination of cooperative Federal-State-local food activities, and
- a central policymaking body that could help to bring Federal quality assurance programs for imported food products more in line with those for U.S. products.

Official comments from three of the five agencies solicited--HEW, VA, and GSA--concurred with the task group. However, DOD and USDA did not agree with the task group. DOD believed that the necessary authority to coordinate the Federal food-quality assurance program was already an inherent part of OFPP's mission and that special legislation was not needed. On the other hand, Agriculture believed that the desired coordination could be accomplished within the framework of existing agencies and that an additional layer of Government was unnecessary. In its previous progress report, GAO noted that whoever was assigned management responsibility for a Federal food-quality assurance program--whether called a coordinator or a director--needed authority to see that established policies were carried out or, else, agencies may continue their own independent ways as they are now doing.

Believing that the statute creating OFPP (P.L. 93-400) had the effect of vesting in the OFPP Administrator authority to assign individual agency responsibilities for management of the Federal food-quality assurance program, the executive branch officially accepted this recommendation in August 1975.

The OFPP Assistant Administrator for Logistics, to whom responsibility for this and other commercial product recommendations was assigned, advised that the approach to implementing this recommendation would be similar to that for D-16 in that OFPP would designate an agency, in all probability Agriculture, to head up a task group to carry out the intent of the recommendation. OFPP believes that efforts under D-3 to increase use of commercial specifications may provide means to help implement this recommendation.

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Short form Statement of Commission Recommendation	Executive Branch Policy Position			Executive Branch Implementing Action		
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PART D--ACQUISITION OF COMMERCIAL PRODUCTS: (continued)

18. Encourage acceptance of commercial provisions and forms used for industry and public in agency procurement of utility supplies and services	GSA	Mar. 1974		Adopted Nov. 1974		FPR/ ASPR	(April 1976)
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19. Determine whether more innovative transportation procurement techniques are warranted when alternative sources and modes are available	GSA	Dec. 1973		Adopted May 1974			Ongoing Transportation Programs
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[X] Requiring Special Attention

In November 1974 the executive branch adopted the Commission recommendation to follow commercial practice in procuring utility supplies and services. The FPR Director and ASPR Chairman were requested by the GSA Office of Procurement Management to establish a joint project to review implementation issues raised in the official comments by the agencies and to develop the necessary guidelines and appropriate FPR and ASPR amendments to effect implementation. The resulting regulatory amendment was to be coordinated with the agencies and private sector before issuance.

In a December 1974 letter, the Assistant Secretary of Defense for Procurement advised the Office of Federal Management Policy that the ASPR Committee had determined the current ASPR coverage was in conformity with the intent of the Commission and no further action by DOD was necessary. In the belief that the primary burden for compliance with D-18 rested with GSA, he offered to furnish two utility-service procurement specialists in DOD to work with the FPR staff in an effort to establish uniform, Government-wide regulations for procuring utility supplies and services.

One implementing problem, as pointed out in the last GAO progress report, was selecting one from among five different task group interpretations of what the Commission intended in making the recommendation.

The FPR Director advises that numerous meetings have been held with GSA personnel and DOD representatives and that a general understanding has been reached. The implementing action is being handled in two stages.

The first stage, with which DOD is in agreement, involves the identification of contract clauses which reflect public law requirements. These clauses flow from statutes and executive orders or are otherwise deemed necessary for inclusion in utility contracts. Appropriate amendments to FPR sections 1-1.317 and 1-4.410-5 to implement this stage were announced in the Federal Register during October 1975. The amendments divide the clauses into two classes:

- Those that are mandatory, such as equal opportunity, contract work hours, safety standards, etc.
- Those that are to be used when applicable, such as gratuities, cost accounting standards, etc.

The second stage will involve the issuance of procedures specifically providing for the use of industry forms and provisions in conjunction with Government forms and provisions. It is anticipated that a standard form will be developed that can be used administratively to bring the first stage clauses together and to provide the required uniformity intended by the Commission recommendation. It is anticipated that completing this stage will take an additional six months.

In May 1974 the executive branch adopted the Commission recommendation but requested the task group to submit a supplemental report to justify its position that implementation would be done through ongoing efforts to carry out the Joint Agency Transportation Study (JATS) recommendations. GAO noted in previous progress reports that the JATS recommendations in themselves would not achieve what the Commission desired. In a September 1974 memorandum, GSA questioned the completeness of the supplemental section submitted by the task group and requested the group to submit a new or revised section.

A new supplemental section, submitted by the task group in March 1975, states that:

"Under the leadership of GSA and DOD, and through the Interagency Transportation and Traffic Management Committee, Federal agencies are currently involved in a variety of transportation programs designed to stimulate competition between and within the carrier modes."

The executive branch believes that this supplemental information supports its position that action on this recommendation has been completed since it is being implemented through the continuing consideration being given to competitive transportation sources and modes.

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PART E--ACQUISITION OF CONSTRUCTION AND ARCHITECT AND ENGINEERING SERVICES:

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|--|-----|--------------|----------------------|----------------------|--------------------------------------|----------------|
| 1. Procure architect-engineer services through competitive negotiations, with selection based primarily on technical competence and merits of end products, including cost--fee should not be a dominant factor (with dissent) | GSA | Dec.
1973 | Adopted
Dec. 1974 | S.2309
Sept. 1975 | Guidelines,
selection
criteria | (July
1977) |
|--|-----|--------------|----------------------|----------------------|--------------------------------------|----------------|

[X] Requiring Special Attention

The task group initially recommended in its December 1973 report continuing the existing practice of procuring architect-engineering (A-E) services on the basis of a competitive selection process which focuses on technical competence and performance record of interested firms. This represented the minority rather than the majority position of the Commission on recommendations E-1 through E-3 and was also the historical view of the profession and Federal construction agencies. DOD and a number of Federal agencies concurred with the task group. OMB and a few other agencies favored adoption of the Commission's majority recommendations.

In June 1974 the GSA Administrator announced a plan that would ultimately require GSA to award A-E contracts on the basis of fully developed project proposals. The plan was based on a GSA special study committee report and was to be implemented over a 3 to 5 year period. According to a November 1974 position paper, the project proposal is intended to be the medium through which interested and qualified architects and engineers can compete for selection on GSA projects. The award of a future contract will not depend solely on evaluation of professional competence and reputation, but rather will depend on professional competition based on technical proposals as a means of encouraging new thinking, new solutions, and accelerated modernization of the construction industry. In December 1974, at an inter-agency policy meeting, the three recommendations were returned to the task group to consider the alternative position embodied in the GSA Administrator's project proposal.

The reconvened task group submitted an evaluation report in May 1975. The project proposal concept, as explained in the report, may be visualized as a matrix or structural system consisting of

- various vertical requirements levels increasing in detail, complexity, and sophistication from the simplest A&E requirements at the top to the most demanding at the bottom and
- A-E selection criteria grouped horizontally at each level into 4 broad evaluation elements:
(1) creativity, (2) organization, (3) economics, and (4) community impact.

In addition to defining the levels of selection criteria, the proposal includes

- developing guidelines for relating specific projects to the selection criteria levels,
- establishing the criteria level at which reimbursement of participating A-Es would be required, and
- designating the minimum criteria level at which price could be introduced as a meaningful factor in the selection process.

The task group recognized that technical competition should intensify as the criteria requirements became more demanding and that, at one or more of the highest levels, it may prove feasible to introduce fee as a selection factor. The task group estimated that development and validation testing of the criteria at each successive level would take about 4 months and that completion of the proposal would be accomplished over the next two years. However, as the criteria are validated at each successive level, they could be recommended to the agencies for evaluation and optional implementation of the proposal on a phased basis. The task group recommended:

- Establishing an Interagency Multidisciplinary Study Group (including professional employees and contracting officers) with GSA support and close collaboration with the design professions to
 - thoroughly investigate and develop specific criteria for each of the proposed levels in ascending difficulty,
 - test criteria levels as they are developed on selected projects, and
 - evaluate feedback on level use and then, if appropriate, recommend individual criteria level guidelines for optional agency use.
- During the interim, continuance of the selection procedures established by the Brooks Act (P.L. 92-582), as discussed in the initial task group report.^a

^aHowever unless the existing law (P.L. 92-582) is amended or repealed, implementation of the dollar levels at which fee is introduced as a selection factor would be in conflict with such law.

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PART E--ACQUISITION OF CONSTRUCTION AND ARCHITECT AND ENGINEERING SERVICES:
(Continued)

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|---|-----|-----------|-------------------|--------------------|-------------------|---------------------|
| 2. Provide policy guidance through OFPP for including estimated total life-cycle costs in architect-engineer proposals on projects estimated to cost more than \$500,000 when realistic estimates are feasible (with dissent) | GSA | Dec. 1973 | (July 1977) | | | |
| 3. Consider reimbursing proposal submission costs to architect-engineer when unusual design and engineering problems and substantial work efforts are required | GSA | Dec. 1973 | (July 1977) | | | |
| 4. Repeal statutory architect-engineer fee limitations and authorize OFPP policy guidelines to insure consistency and to protect Government interest | GSA | Dec. 1973 | Adopted July 1974 | S. 2309 Sept. 1975 | Policy Guidelines | Not yet established |

[X] Requiring Special Attention

At a June 1975 interagency policy meeting, the task group's recommendations were reviewed in the light of a revised legislative proposal for modernizing and unifying the two basic procurement statutes that had been sent by OFPP for the group's consideration. The legislative proposal included provisions for the repeal of existing laws, Public Law 92-582 (the Brooks Act), and for competitive negotiation of A-E services (section 8(g)). At the meeting an inter-agency study group was authorized to proceed with the project proposal approach, as recommended, because it would provide knowledge and experience necessary to effectively implement section 8(g) of the unified procurement statute when enacted. To insure that there would be sufficient time after enactment of this section for developing and testing the project proposal selection criteria, levels, and guidelines, the following sentence was added to section 8(g):

"The requirements of this subsection shall apply to architect-engineer services on and after July 1, 1977, or at such earlier time or times, in whole or in part, with respect to one or more Federal agencies, as may be directed by the Administrator for Federal Procurement Policy."

An interagency study group, including representatives from DOD, ERDA, HEW, NASA, VA, AID, GSA, and Justice, is at work on the phased-project plan. Completion of development and validation testing of the selection criteria for level I had been completed and agency compliance became mandatory on October 30, 1975. Testing of level II is underway, and DOD has been requested to participate.

In September 1975 legislative proposal S. 2309 for a uniform procurement statute, including section 8(g) as revised, was introduced by Senator Percy at the request of OFPP and was referred to the Senate Committee on Government Operations.

At a July 1975 interagency policy meeting, it was decided that the previously referred to project proposal inter-agency study group should also develop an implementing action for recommendations E-2 and E-3. When completed, the implementing proposal was to be transmitted through the interagency policy group to OFPP with a recommendation that E-2 and E-3 be adopted as the executive branch position. Transmission of the proposal was targeted for November 1975. However, because of the close relationship between these recommendations and recommendation E-1, the interagency study group will urge that the implementation proposal be developed during the project proposal study effort which is not targeted for completion until July 1977.

See E-2 comments.

In July 1974 the executive branch adopted recommendation E-4 calling for repeal of the various statutory architect-engineer fee limitations and for development of consistent agency policy guidelines that will protect the Government's interest. In August 1975 OFPP forwarded to the Congress a legislative proposal for modernizing and unifying the two basic procurement statutes. (See A-2 through A-9.) It included provisions for the competitive negotiation of A-E services (see E-1) and for repeal of various statutory limitations on A-E fees. In September 1975 this legislative proposal was introduced by Senator Percy at the request of OFPP as S. 2309 and was referred to the Senate Committee on Government Operations. Implementation of the second part of this recommendation--development of fee policy guidelines--has been deferred pending completion of the project proposal study discussed in E-1, 2, and 3 above.

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PART F--FEDERAL GRANT-TYPE ASSIS-
TANCE PROGRAMS:

- | | | | | |
|--|-----|---------------|----------------------|----------------------|
| 1. Distinguish through legisla-
tion the procurement
(contract) and assistance
(grant) relationships and
authorize use of instruments
reflecting these relation-
ships | HEW | Sept.
1973 | Adopted
June 1975 | S. 1437
Apr. 1975 |
|--|-----|---------------|----------------------|----------------------|

[X] Requiring Special Attention

In September 1973 the executive branch task group proposed adopting F-1 as recommended by the Commission, except for eliminating the contemplated distinction between grant and grant-in aid, with implementation to be accomplished through a marked-up version of H.R. 9060 then pending before a House subcommittee. DOD and NASA, however, opposed labeling research grants as an assistance relationship.

In May 1974 Senate bill S. 3514 was introduced, which included definitions for the use of contract and grant-type instruments and a requirement for the Federal assistance guidance feasibility study called for in recommendation F-2. In October 1974 a revised version of S. 3514 was passed by the Senate. The House Committee on Government Operations held hearings in November 1974 on the revised Senate bill. OMB conceded the need for legislation to establish statutory definitions but contended it should wait on the F-2 study because the Commission-developed definitions needed refinement during that study before being made statutory.

The House did not act on S. 3514 before adjournment of the 93d Congress, and in April 1975 this Senate bill was reintroduced as S. 1437. In a May 1975 letter to the sponsor of these bills, Senator Chiles, the Director of OMB, advised that:

- OMB still had some reservations about the proposed definitions but would not oppose enactment of legislation similar to S. 3514.
- An interagency study similar to the one proposed in section 8 of S. 3514 would be started immediately with first order of priority and with a December 31, 1975, target date for completing the first phase--a thorough analysis of the proposed definitions to distinguish clearly between Federal procurement and assistance relationships, and the development of criteria and conditions for their use.
- OMB and GSA would conduct the study jointly and OMB would monitor its overall progress and participate directly in selected areas, particularly during the first phase.

An announcement published in the Federal Register on June 20, 1975, stated that the executive branch had accepted F-1 and F-2, except for a modification that deleted "grant-in-aid" from F-1, and that these recommendations would be implemented by enactment of S. 1437.

At November 1, 1975, the interagency study group authorized by the OMB Director had sampled 52 Federal programs selected to provide a cross section of agencies, activities and dollars. The agencies included the three military services, NASA, ERDA, DOT, HEW, NSF, HUD, DOL, EPA, and the Agriculture and Commerce Departments. The program activities included research and demonstration, operations support, manpower, public assistance, facility improvement and construction, technical assistance, planning, training and education. The legal instruments used for these programs were, for the most part, either contract or grant and, in a few instances, the cooperative agreement. Other instruments used were referred to as award letter, memo of agreement, or project agreement. In examining these programs, the study group developed a questionnaire that covered such matters as the instrument selected in the decision process, the means of selecting the recipient, and the extent of Federal involvement and cost sharing.

The study group has also visited selected recipients--states, cities, universities, and hospitals. A questionnaire developed for this purpose covered such matters as the type of instrument used, the kinds of problems encountered by the recipient because of the instrument, the possible solution, including the impact of S. 1437, and the need for clarification of the Federal role. The study group is now reviewing and evaluating their findings before drafting its report. For purposes of discussion, the study group has developed five models that range from heavy Government involvement down to little or no Government involvement. Submission of the report to the Subcommittee on Federal Spending Practices, Senate Committee on Government Operations, on the first phase of the study is now targeted for December 1975 and the subcommittee plans to hold hearings on S. 1437 during that month.

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PART F--FEDERAL GRANT-TYPE ASSISTANCE PROGRAMS:
(Continued)

2. Urge OFPP to undertake or sponsor a feasibility study on developing a system of guidance for Federal assistance programs	GSA			Adopted June 1974	S. 1437 Apr. 1975	Feasibility Study	Not yet established
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[X] Requiring Special Attention

[X] It is presently expected that the F-2 portion or second phase of the study referred to above will begin in spring 1976 and that this phase will help determine whether it is feasible to develop a Government-wide system of policy guidance for Federal assistance programs.

OFPP's position is that F-1 and F-2 are not completely severable and, therefore, that F-2 cannot be pursued by a separate study simultaneously with F-1 since it is part of and follows on from F-1 and will benefit to some extent from it.

In the tentative study plan for the second phase, the executive branch has, as in the past, directed its efforts toward standardizing selected administration requirements imposed on grantees. This is not the purpose of F-2 recommendation. Rather, F-2 calls for the executive branch to focus on an overall system of Federal policy guidance that would embrace the preaward and postaward phases of Federal assistance type instruments and distinguish between the different degrees of Government involvement. The inter-agency study group confirmed that its efforts would still be directed toward standardizing administration requirements for grantees but, said that, in addition, the second phase would focus on the policy guidance system called for in F-2. As yet, the task group has not reached agreement on a firm plan or target dates for determining the feasibility of such a system. OFPP estimates that completion of the second phase F-2 feasibility study will take approximately 18 months after the first phase is finished.

The F-2 recommendation seems to require priority attention in view of the lack of a firm plan for completing this study, some uncertainty as to its scope, the lapse of 3 years since the Commission made its recommendation, and the need to provide the necessary Federal, state and local resources for such a study. As stated in previous GAO progress reports, getting this job done timely with the necessary resources will probably require a legislative mandate from the Congress.

ANALYSIS OF

EXECUTIVE BRANCH POSITIONS AND IMPLEMENTING ACTIONS ON COMMISSION RECOMMENDATIONS AS OF NOVEMBER 1, 1975

Short form Statement of Commission Recom- mendation	<u>Executive Branch Policy Position</u>			<u>Executive Branch Implementing Action</u>		
	Task group led by	Task group report to GSA	Referred to OFPP for decision	Position established (target)	Legislation if applicable	Type

PART G--LEGAL AND ADMNISTRATIVE
REMEDIES:

[X] Requiring Special Attention

OVERVIEW OF ACTION ON LEGAL REMEDY RECOMMENDATIONS

Initial Executive Branch Position

GSA considered recommendations G-1 through G-10 and G-12 to be interrelated and handled them as a single package because all of them are concerned with a legal or administrative remedies system for resolving contract performance claims and disputes. At a December 1974 meeting, the interagency policy group decided to adopt G-5 as recommended by the Commission and also G-1 with some modification and to reject recommendations G-2, G-4, G-6, G-9, G-10, and G-12. The group also decided to accept recommendations G-3, G-7, and G-8 but, as implementing legislation was required, the recommendations were referred to OFPP in January 1975 with the recommendation that they be accepted through the legislative process. Commission recommendation G-11 had already been placed into effect as part of 1972 FPR and ASPR amendments.

Executive Branch Reconsideration

At the request of OFPP, the disposition of these recommendations was reconsidered at an April 1975 meeting of the interagency policy group. The recommendations were discussed by representatives from OFPP, the task group, Armed Services Board of Contract Appeals, and the General Services Board of Contract Appeals. The discussion centered on the following major points:

- Need for soliciting private sector views.
- Package evaluation of the G-1 through G-12 recommendations.
- The judicial versus management issue.
- Multiple or consolidated boards.
- Composition of boards.
- Right of Government appeal.

In May 1975, notice was published in the Federal Register to make known the task group's proposal on the three recommendations referred to OFPP and to offer the private sector an opportunity to comment on them and others in the G-1 to G-12 series, as appropriate. The notice stated that responses from interested parties would be given careful consideration in the formulation of an executive branch position.

OFPP has reconsidered the announced or recommended executive branch position on each of the 12 recommendations and is now planning to formulate an OFPP position in consideration of three alternatives: the G-1 through G-12 Commission recommendations, the established executive branch positions thereon, and a set of OFPP staff-proposed positions. The staff proposals would:

- Accept recommendations G-5, G-7, G-8, G-11.
- Accept with modification recommendations G-1, G-2, G-3, G-4.
- Reject recommendations G-6, G-9, G-10, G-12.

The Administrator for Federal Procurement Policy has decided to hold a public meeting on these three alternatives on December 10, 1975. An appropriate notice of public meeting and invitation for written comment from agencies and interested persons was published in the Federal Register on October 8, 1975. The notice sets forth OFPP staff-proposed position on each recommendation as well as the rationale for change from the established executive branch position. Those submitting written comment on or before November 28, 1975, with a request to be heard, will be given an opportunity to make an oral presentation at the meeting. The notice further states that, to retain maximum flexibility, OFPP's proposal "inclines toward making changes in this area by administrative action" with authority available to the OFPP Administrator to approve exceptions, deviations, and changes as warranted by experience and to limit statutory changes to those that are necessary. Comments on this aspect were also invited.

ANALYSIS OF

EXECUTIVE BRANCH POSITIONS AND IMPLEMENTING ACTIONS ON COMMISSION RECOMMENDATIONS AS OF NOVEMBER 1, 1975

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PART G--LEGAL AND ADMINISTRATIVE
REMEDIES: (Continued)

Disputes arising in contract
performance:

- | | | | | | |
|--|-----|-------------|-----------------------|------------------------|--------------|
| 1. Clarify to contractor the identity and authority of contracting officer and other designated officials to act for Government in contract disputes | DOD | May
1974 | Modified
Dec. 1974 | | See comments |
| 2. Provide informal review conference of adverse contracting officer decisions with contractor attendance mandatory when dispute exceeds \$25,000 or contractor invokes recommendation G-6 below | DOD | May
1974 | Rejected
Dec. 1974 | H.R. 6085
Apr. 1975 | See comments |

[X] Requiring Special Attention

Legislation

In April 1975 Congressman Rodino introduced the Contract Disputes Act of 1975 as H.R. 6085. This bill is similar to H.R. 9062 and H.R. 16423 introduced but not acted on in the last Congress in that it will implement recommendations G-2 through G-12.

Specific comments on the individual recommendations follow.

The general thrust of the Commission recommendation was to clarify to the contractor the identity and authority of the contracting officer and "other designated officials" acting for the Government. The decision by the interagency policy group to adopt this recommendation was made with the proviso that the phrase "other designated officials" be clarified by including examples of such officials as contracting officer's representative, administrative contracting officer, etc.

OFPP staff now proposes the same modified position with these additions:

- As an appeal prerequisite, contractor must give written notice of his claim to contracting officer.
- Contracting officer's function is not to adjudicate but to investigate and negotiate fair settlement or to give contractor written notice of rejection or final settlement offer.
- After such notice or within a reasonable time, if none is given, dispute may be appealed to board of contract appeals.

OFPP staff believes that a contracting officer cannot be expected to act as other than an agent for the Government and that, through the notice requirements and opportunity for negotiation and settlement before appeal or litigation, the reciprocal interests of the parties are adequately served.

The Commission recommendation provided for informal review conferences on adverse decisions by contracting officers. GSA questioned whether the role and authority of the contracting officer would be downgraded by this approach instead of being strengthened as the Commission intended. The decision at the interagency policy group's December meeting to reject this recommendation was made for two reasons: (1) it undermined and diluted the decisionmaking authority and independence of the contracting officer whose objective was to settle a dispute without litigation by relying generally on legal counsel and other members of his team, and (2) it conflicted with recommendation A-13 made by the Commission to "clarify the role of the contracting officer as the focal point for making or obtaining a final decision on procurement" and to "allow the contracting officer wide latitude for the exercise of business judgment in representing the Government's interest." A notice of rejection was published in the Federal Register on January 8, 1975.

Instead of rejecting the recommendation, OFPP staff now proposes to accept the thrust of it with these modifications:

- Restate it in terms of higher level informal settlement exploratory conference rather than review contracting officer decisions.
- Make it available at contractor's option rather than mandatory.
- Make conference available before rather than after contracting officer's formal decision.
- Gear conference to level loosely above that of active participants in controversy with arrangements left to each agency.

OFPP staff points out that a higher level review is now often granted informally, when requested by a contractor, and many times formalized in such DOD cases as those involving cost audit exceptions and IR&D advance agreements. According to OFPP, this practice would be extended and regularized by its proposal but, to protect the Government's interest, the higher level conference should not be permitted to unduly delay a contracting officer's administrative action.

ANALYSIS OF

EXECUTIVE BRANCH POSITIONS AND IMPLEMENTING ACTIONS ON COMMISSION RECOMMENDATIONS AS OF NOVEMBER 1, 1975

Short form Statement of Commission Recommendation	Executive Branch Policy Position			Executive Branch Implementing Action		
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PART G--LEGAL AND ADMINISTRATIVE
REMEDIES: (Continued)

3. Retain multiagency appeals boards, establish minimum personnel and caseload standards, and add subpoena and discovery powers	DOD	May 1974	Jan. 1975	(Jan. 1976)	H.R. 6085 Apr. 1975	See comments
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4. Establish regional small claims boards for disputes of \$25,000 or less	DOD	May 1974		Rejected Dec. 1974	HR 6085 Apr. 1975	See comments
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[X] Requiring Special Attention

The interagency policy group agreed with the task group in recommending acceptance of G-3 to retain multi-agency appeals boards with added subpoena and discovery powers. As legislation was needed for granting subpoena and discovery powers, the recommendation was referred to OFPP in January 1975 with the recommendation that it be accepted through the legislative process. OFPP staff now proposes to accept the recommendation for added subpoena and discovery powers, but would change the organization of the boards so as to

- Consolidate the boards into either a Government-wide board or two full-time boards, one for the armed services and one for the civilian agencies, with funding and personnel ceilings contributed proportionately by the major agencies and administrative support assigned to either one or two agencies depending on the alternative selected.
- Provide for policy management of the boards and appointment of board managers by the Administrator for Federal Procurement Policy, the board members being selected as administrative law judges in the same manner and with the same tenure and independence from administrative supervision as administrative law judges under the Administrative Procedure Act but with preference for attorneys having procurement experience in Government, industry, or private practice.
- Vest authority to decide appeals in the boards rather than in authorized representatives of the agency head, thereby making it clear that the boards do not "act for" a procuring agency or its head and foreclosing the present legal right of the agency head to direct, overrule, or displace a board in the course of deciding an appeal.

OFPP staff believes that these changes would give the board or boards approximately the same stature, strength, flexibility, efficiency, economy, and manageability as that of the Armed Services Board of Contract Appeals; would preserve the speed, economy and informality of board as compared with court proceedings and would avoid placing an additional burden in the overloaded courts, Department of Justice, and U.S. attorneys; and would enhance the detachment of board members from the procuring agencies and at the same time add to their prestige, stature, and independence, eliminating a contractor's concern that these members are dependent upon procuring agencies for promotion, tenure, performance rating or level of pay.

At its December 1974 meeting, the interagency policy group rejected the Commission recommendation to establish regional small claims boards of contract appeals. The interagency policy group noted that accelerated procedures established by the boards since publication of the Commission report have been quite successful. It was also noted that the number of cases involving claimed amounts of \$25,000, or less, was inadequate to justify the costs associated with the proposed system and that many appeals were handled without a hearing or were heard outside Washington, D. C., at a location mutually agreeable to the contractor and the Government. A notice of rejection was published in the Federal Register on January 8, 1975.

In the same month Senator Hathaway requested background information on the accelerated procedures adopted by the appeals boards as well as justification for the executive branch decision that the number of cases below \$25,000 would not justify the costs of the proposed system. During the 93d Congress, the Senator had introduced S. 3610 to implement the G-4 recommendation but the bill was not acted upon before adjournment. In a March 1975 letter, GSA advised the Senator that the accelerated procedures applied to both the contractor and the Government and encouraged parties to waive pleadings, discovery, and briefs, where possible. Decisions under this method are short, contain only summary findings of fact and conclusions, and opinions are rendered usually within 30 days after decision. The letter points out that the largest board, the Armed Services Board of Contract Appeals (ASBCA), has been successful in using an optional accelerated procedure when the amount in dispute is \$25,000 or less. The Justice Department took the position that "in every case tried under ASBCA's* * optional acceleration procedure, the Board was as fast, more efficient, and much less expensive to operate than would be processing such claims under the system of regional small claims boards proposed by the COGP [and S. 3610]."

ANALYSIS OF

EXECUTIVE BRANCH POSITIONS AND IMPLEMENTING ACTIONS ON COMMISSION RECOMMENDATIONS AS OF NOVEMBER 1, 1975

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PART C--LEGAL AND ADMINISTRATIVE
REMEDIES: (continued)

5. Empower contracting agencies to decide, settle, and pay all contract claims or disputes	DOD	May 1974		Adopted Dec. 1974	HR 6085 Apr. 1975	FPR/ ASPR	(Feb. 1976)
6. Grant contractors option of direct access to Court of Claims or district courts	DOD	May 1974		Rejected Dec. 1974	HR 6085 Apr. 1975		See comments
7. Grant both Government and contractors judicial review of adverse decisions by agency appeals boards (with dissent)	DOD	May 1974	Jan. 1975	(Jan. 1976)	HR 6085 Apr. 1975		See comments

[X] Requiring Special Attention

OFPP's staff proposal concurs in rejecting a separate small claims board of contract appeals but would accomplish other objectives of this Commission recommendation by providing that, in small contracts such as those up to \$100,000, the contractor could elect to appeal under modified expedited procedures. These procedures would limit the appeal to oral or written argument on the record before the contracting officer without any examination or cross-examination of witnesses except in unusual cases where the hearing judge determines that testimony is essential to a fair decision. OFPP's staff proposal would permit the contractor to appeal on a de novo basis and would allow the Government to appeal only when a significant question of law affecting other contract disputes was involved. OFPP believes that such unequal rights of appeal are justified by small business considerations and the dictates of speed and economy.

At a December 1974 meeting, the interagency policy group decided to accept this recommendation to empower contracting agencies to settle all contract claims and disputes. Notice was published in the Federal Register on January 8, 1975. Implementation is to be accomplished through coordinated FPR and ASPR amendments. A paragraph suggested by the Justice Department has been added to the "all disputes" contract clause proposed by the task group to make certain that the clause gives the contracting officer, as well as the contract appeals board, jurisdiction over all contract claims, including those for breach of contract as well as those for reformation or rescission.^a Issuance of the FPR and ASPR amendments is targeted for February 1976.

OFPP's staff proposal would likewise accept this recommendation.

At a December 1974 meeting, interagency policy group decided to reject this recommendation to allow contractors direct access to the Court of Claims and the district courts. The policy group pointed out that the rejection was not intended to preclude contractors from going to the courts on questions of law but was intended to urge contractors to exhaust available administrative forums before turning to the courts for relief. The task group believed implementation of this recommendation would (1) encourage forum shopping by contractors in enabling disputes arising under the same contract to be heard in as many as four different forums at the same time, (2) bring about inconsistencies in the law, (3) overburden the district courts, and (4) leave untapped the expertise developed by members of agency contract appeal boards.

OFPP staff concurs in rejecting this recommendation but, if the boards are not consolidated and enhanced as proposed for recommendation G-3, OFPP staff would accept G-6 in the belief that, where boards do not have independence and authority equivalent to that of a court, contractors should have the option of going directly to court.

At a December 1974 meeting, the interagency policy group decided to refer G-7 to OFPP with the recommendation that it be accepted and implemented through the legislative process. The task group's submission included an implementing legislative proposal needed to overcome a Supreme Court decision and amend the U.S. Code to permit the Government to appeal board decisions to the Court of Claims.

OFPP staff proposes to accept this recommendation, recognizing that as long as a board performs an independent adjudicatory trial function like a court of original jurisdiction, both sides should have substantially equal rights of appeal just as in a case tried in a court. OFPP staff believes, however, because of the financial impact on the contractor of prolonged litigation, Government appeals should be closely controlled at the agency head and Attorney-General level to prevent excessive and unwarranted appeals. OFPP staff points out that, except in the case of small contract claims as proposed in G-4, a de novo review does not appear to be justified and the Wunderlich Act standards of appeal should not be changed. OFPP staff would provide for appeals to be taken merely by filing a notice of appeal instead of initiating a new suit in court.

^aGAO does not agree with the inclusion of claims for reformation and rescission, these being legal remedies for mistakes in bids, involving pre-contractual rather than contractual matters, and, as such, going beyond what the Commission envisioned in making the recommendation.

ANALYSIS OF

EXECUTIVE BRANCH POSITIONS AND IMPLEMENTING ACTIONS ON COMMISSION RECOMMENDATIONS AS OF NOVEMBER 1, 1975

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PART G--LEGAL AND ADMINISTRATIVE
REMEDIES: (continued)

8. Establish uniform, short time limits for judicial review of administrative decisions	DOD	May 1974	Jan. 1975	(Jan. 1976)	HR 6085 Apr. 1975		See comments
9. Modify existing remand practice to allow reviewing court the option to make findings of fact necessary to final disposition	DOD	May 1974		Rejected Dec. 1974	HR 6085 Apr. 1975		See comments
10. Expand jurisdictional limit of district courts from \$10,000 to \$100,000 (with dissent)	DOD	May 1974		Rejected Dec. 1974	HR 6085 Apr. 1975		See comments
11. Pay interest on administrative and judicial claim awards	DOD	Mar. 1974		Adopted June 1974	HR 6085 Apr. 1975	FPR/ 1-1.322 ASPR 7-104.82	July 1972 May 1972

[X] Requiring Special Attention

The Commission had recommended establishing relatively short time periods within which litigants could seek judicial review of adverse decisions by administrative forums. The task group had submitted an implementing legislative proposal to amend the Wunderlich Act and other sections of the U.S. Code to reduce the current 6-year appeal period to 90 days. At a December 1974 meeting, the interagency policy group decided to refer G-8 to OFPP with the recommendation that it be accepted and implemented through the legislative process.

OFPP staff proposes to accept this recommendation by providing a 90-day period for appeal from the contracting officer or board, the period being comparable to the 60 to 90-day period now allowed for taking an appeal from a U.S. district court to a U.S. circuit court of appeals.

At a December 1974 meeting, the interagency policy group decided to reject the recommendation because, in modifying the present remand practice to allow the reviewing court to take additional evidence in making final disposition of a case, it would increase the time and expense of litigation and frustrate the established administrative process for resolving disputes. The task group notes that the recommendation conflicts with a Supreme Court decision holding that, in a suit governed by the Wunderlich Act, the Court of Claims is restricted to reviewing the administrative record and may not receive new evidence, a basic principle of administrative law that the Supreme Court has consistently applied.

OFPP staff also proposes to reject this recommendation and to continue the present remand practices of the U.S. circuit courts of appeals since the proposed reorganization of the boards would recognize the boards, in effect, as trial courts and the Federal courts as appellate courts. However, as OFPP points out, it should be made clear that a court reviewing a board decision is authorized to make supplemental findings of fact which, although not in the board decision, are essential to resolving the case and the existing record is adequate to support such findings.

At a December 1974 meeting, the interagency policy group decided to reject this recommendation to increase the district courts' monetary jurisdictional limit to \$100,000 because it would overload the court dockets and place less reliance on the Court of Claims as the primary forum of Government contract litigation. In addition, the task group felt that implementing the recommendation would result in forum shopping and bring about uncertainty in procurement laws by increasing the probability of diversity of precedent. A notice of rejection was published in the Federal Register on January 8, 1975.

OFPP staff also proposes to reject this recommendation "to avoid further dissipation of the advantages of the expertise and specialization of the Court of Claims."

Recommendation G-11 was adopted and, for new contracts, implemented in ASPR and FPR in 1972 in accordance with GAO opinion B-174001 of October 27, 1971. The recommendation was also incorporated as a provision in H.R. 9062 and H.R. 16423, both of which were introduced in the 93d Congress but not acted upon before its adjournment. The bills proposed that interest be set at 6 percent per annum on administrative and judicial claim awards, whereas FPR and ASPR allow the Renegotiation Board rate fixed by the Secretary of the Treasury--but only on claims arising under contracts entered into after May 1972 that contain a "Disputes" clause allowing payment of such interest. The new Contract Disputes Act of 1975, introduced in April as H.R. 6085, also provides for the payment of interest on successful claims at the established Renegotiation Board rate. Interest would accrue from the date of filing an appeal or filing suit in court, whichever comes first. Unlike FPR and ASPR, this act would apply not merely to contracts that contain the disputes and payment of interest clauses but to all contracts, including those entered into before as well as after the effective date of the act. It specifically provides that "notwithstanding any provision in a contract made before the effective date of this Act, the contractor may elect to proceed under this Act with respect to any claim pending then or initiated thereafter."

OFPP staff likewise proposes acceptance of this recommendation.

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 PART G--LEGAL AND ADMINISTRATIVE
 REMEDIES: (continued)

12. Pay court judgements on con- tract claims from agency appropriations if feasible	DOD	May 1974		Rejected Dec. 1974	HR 6085 Apr. 1975	See comments
Disputes related to award of contracts:						
13. Promulgate adequate informa- tion on contract-award pro- test procedures	AEC	Nov. 1973		Adopted July 1974	FMC/ 74-3 FPR/ ASPR	Aug. 1974 (Jan. 1976)
14. Continue to use GAO as an award protest-resolving forum (with dissent)	AEC	Nov. 1973		Adopted July 1974	FMC/ 74-3 FPR/ ASPR	Aug. 1974 (Jan. 1976)
15. Establish more expeditious and mandatory time require- ments for processing protests through GAO	AEC	Nov. 1973		Adopted July 1974	FMC/ 74-3 FPR/ ASPR	Aug. 1974 (Jan. 1976)
16. Require high-level manage- ment review of any decision to award contract while pro- test is pending with GAO	AEC	Nov. 1973		Adopted July 1974	FMC/ 74-3 FPR/ ASPR	Aug. 1974 (Jan. 1976)
17. Have GAO continue to recom- ment terminations for Govern- ment convenience of improv- erly awarded contracts	AEC	Nov. 1973		Adopted June 1974		See comments

[X] Requiring Special Attention

At a December 1974 meeting, the interagency policy group decided to reject this recommendation to pay court judgments on contract claims from an agency's appropriated funds. The executive branch disagreed with the Commission's contentions that (1) the current procedure of paying judgments from nonagency appropriations provides a procuring agency with an incentive to avoid settlements to protect its own appropriated funds and (2) the current procedure makes it possible for agencies to hide from the Congress the total economic cost of procurements. The executive branch believes that, as to (1) the existing claim review network is adequate and impartial enough to prevent any such avoidances and that, as to (2) the Congress has only to ask to find out the cost of any procurement, including judgments. The task group also noted that the use of indefinite appropriations for judgments exceeding \$100,000 enables successful claimants to be paid promptly and that this would be unlikely to happen if an agency is required to fund judgments from its own appropriations. Such a procedure could disrupt an agency's programs as well as the financing of them. Consequently, unless adequate amounts were appropriated and protected against immediate agency needs, a contractor claimant would be dependent on the success and speed with which the agency could reprogram sufficient money to pay the contractor's judgment. The Federal Register of January 8, 1975, includes a notice of rejection of this recommendation.

OFPP staff likewise proposes to reject this recommendation.

In July 1974 the executive branch adopted recommendations G-13, G-14, G-15, G-16, and G-19 calling for establishing agency award protest procedures, continuing GAO as an award protest-resolving forum, getting more stringent time requirements in the GAO process, and requiring a high administrative level decision to justify an award while the protest is pending before GAO. Implementation was initiated through issuing FMC 74-3 in mid-1974. FPR and ASPR amendments to comply with the circular are in the final drafting stages. The OFPP Assistant Administrator for Procurement Law advised that a restatement of certain amendments was acceptable to GAO and Justice. Joint issuance of the FPR and ASPR amendments, which will be cleared through OFPP, is targeted for January 1976.

Meanwhile, GAO has issued new bid protest procedures to reflect the amended regulatory requirements for the agencies. The new GAO procedures apply to protests received by GAO on or after June 2, 1975, and supersede GAO's December 1971 interim bid protest procedures found in title 4 of the Code of Federal Regulations, part 20. The changes made by the new procedures are based on the GAO's experience under the old procedures. The new procedures give protesters 10 days instead of 5 days within which to file protests with GAO and envision 25 days instead of 20 days for GAO to render a decision after the protest file is complete. Protesters are urged to seek resolution of their complaints initially with the contracting agency and are advised that, when a preaward protest is filed, no award will be made by an agency before GAO's ruling except as provided in the current procurement regulations.

See G-13 comments.

See G-13 comments.

See G-13 comments.

Notice of adoption of this recommendation by the executive branch was published in the Federal Register in July 1974. Implementation is not required as this recommendation is merely a continuation of GAO's present practice.

ANALYSIS OF

EXECUTIVE BRANCH POSITIONS AND IMPLEMENTING ACTIONS ON COMMISSION RECOMMENDATIONS AS OF NOVEMBER 1, 1975

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PART G--LEGAL AND ADMINISTRATIVE
REMEDIES: (continued)

18. Improve contracting agency debriefing procedures	AEC	Nov. 1973		Adopted May 1974		FPR/ ASPR	(Dec. 1975)
19. Establish a preaward protest procedure in all contracting agencies	AEC	Nov. 1973		Adopted July 1974		FMC/ 74-3 FPR/ ASPR	Aug. 1974 (Jan. 1976)
20. Have GAO periodically review agency award protest procedures and practices	AEC	Nov. 1973		Adopted May 1974		See comments	

Equitable and special management powers under Public Law 85-804:

21. Make procurement authority permanent, not limited to periods of national emergency (with dissent)	AEC	July 1974	Aug. 1974	(Mar. 1976)			
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[X] Requiring Special Attention

The executive branch adopted this recommendation to improve its debriefings to losing contractors. In May 1974 letters to the FPR Director and the Secretary of Defense, GSA requested that uniform implementation be effected through coordinated FPR and ASPR issuances. GSA also requested that three issues be resolved: whether debriefing should (1) identify factors on which the successful contractor was selected, (2) take place before or after contract award, and (3) apply to formally advertised and two-step procurements. Resolving these questions has delayed issuance of the required amendments which is now targeted for December 1975.

See G-13 comments.

In May 1974 the executive branch adopted this recommendation to have GAO periodically review agency award protest procedures. The executive branch decided that no specific implementation other than the notice to GAO was necessary because the general thrust of the recommendation was already a matter of interest to GAO. The Comptroller General was notified by letter in July 1974. GAO developed a preliminary program for a survey of award protest procedures and practices at the agency level. The program was tested in November 1974 at several military installations in Philadelphia, Pennsylvania. However, it was decided to defer a Government-wide indepth review to give the agencies sufficient time to complete the implementation of their revised protest procedures and practices in accordance with FMC 74-3 and regulatory changes expected to be issued in January 1976 (See G-13.) Within a reasonable time after the agencies have had an opportunity to implement the revised procedures and practices, GAO will program its review.

In July 1974 the task group unanimously recommended adopting G-21 and G-22 and submitted a proposed implementing amendment to P.L. 85-804. These Commission recommendations would make the procurement authority under this law permanent and not limited to periods of national emergency and would extend the law to all contracting agencies.

The task group also unanimously approved adopting G-23 but disagreed with the Commission that it be implemented by incorporating P.L. 85-804 into the consolidated or primary procurement statute. The task group proposed instead implementing G-23 administratively by reclassifying P.L. 85-804 from title 50 U.S.C. (War and Defense) to title 41 (Public Contracts). According to the GSA staff analysis, such a reclassification would be, in effect, a rejection of G-23 because it would remain a separate statute and not become part of a common statute as the Commission intended.

The task group proposed rejection of G-24. The GSA staff analysis suggested a compromise. It indicated that the Commission-recommended \$1 million threshold requirement was too low for congressional notification, before obligating the Government, and inconsistent with the emergency authority concept granted under P.L. 85-804. On the other hand, the analysis noted that the \$25 million threshold specified in the law needed further examination as it was tailored to national defense actions, whereas the proposed amendment to P.L. 85-804 would make the statute applicable to many smaller actions outside the defense area.

In August 1975 GSA referred the task group's proposed actions to OFPP with the suggestion that because of uncertainty as to when the primary procurement statute would be enacted, it would be more expeditious to amend P.L. 85-804 now and to consider later the need for its incorporation into the primary statute.^a

^aIn its March 1975 progress report, GAO suggested that OFPP consider applicability of a \$25 million defense threshold to procurement actions of smaller civilian agencies and consider the views of one Commission member who opposed the G-21, G-22, and G-23 recommendations. The Comptroller General was opposed on the grounds that (1) contractual modification without consideration was an extraordinary legal remedy and should be reserved for national defense in time of emergency, (2) there was already a statutory provision for correcting mistakes and for formally ratifying informal commitments and, although these actions might be more expeditiously handled under P.L. 85-804, there seems to be little purpose in extending duplication beyond the terms of that law, and (3) implementation of recommendation G-5 (which OFPP was proposing to accept) would broaden the authority of procuring agencies to decide, settle, and pay all breach of contract claims.

ANALYSIS OF

EXECUTIVE BRANCH POSITIONS AND IMPLEMENTING ACTIONS ON COMMISSION RECOMMENDATIONS AS OF NOVEMBER 1, 1975

Short form Statement of Commission Recom- mendation	<u>Executive Branch Policy Position</u>			<u>Executive Branch Implementing Action</u>		
	Task group led by	Task group report to GSA	Referred to OFPP for decision	Position established (target)	Legislation if applicable	Type

PART C--LEGAL AND ADMINISTRATIVE
REMEDIES: (continued)

- | | | | | | | |
|---|-----|--------------|--------------|----------------|--|--|
| 22. Extend law to all contract-
ing agencies under regula-
tions developed by OFPP and
prescribed by the President
(with dissent) | AEC | July
1974 | Aug.
1974 | (Mar.
1976) | | |
| 23. Incorporate law into pri-
mary procurement statute
(with dissent) | AEC | July
1974 | Aug.
1974 | (Mar.
1976) | | |
| 24. Revise law to require report
to Congress before obliga-
ting Government for more
than \$1 million | AEC | July
1974 | Aug.
1974 | (Mar.
1976) | | |

[X] Requiring Special Attention

The OFPP Assistant Administrator for Procurement Law advised that final action on the recommendations was being deferred until a determination was made as to what position is to be taken on G-1 through G-12 (legal remedies) and on H-4 and H-5 (catastrophic accident compensation). He said the extent to which P.L. 85-804 should be amended would probably depend on positions taken with respect to these other recommendations. Such positions are targeted for March 1976.

See G-21 comments.

See G-21 comments.

See G-21 comments.

ANALYSIS OF

EXECUTIVE BRANCH POSITIONS AND IMPLEMENTING ACTIONS ON COMMISSION RECOMMENDATIONS AS OF NOVEMBER 1, 1975

Short form Statement of Commission Recommendation	Executive Branch Policy Position			Executive Branch Implementing Action		
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PART H--SELECTED ISSUES OF LIABILITY--GOVERNMENT PROPERTY AND CATASTROPHIC ACCIDENTS:

Self-insurance of Government property:

- | | | | | | |
|--|-----|-----------|-------------------|----------|-------------|
| 1. Make Government act generally as a self-insurer for Government property loss or damage resulting from defects in finally accepted contractor-supplied items | DOD | Oct. 1973 | Adopted Feb. 1974 | FPR/ASPR | (Mar. 1976) |
|--|-----|-----------|-------------------|----------|-------------|

- | | | | | | |
|---|-----|-----------|-------------------|----------|-------------|
| 2. Apply the same policy in recommendation H-1 to sub-contractors | DOD | Oct. 1973 | Adopted Feb. 1974 | FPR/ASPR | (Mar. 1976) |
|---|-----|-----------|-------------------|----------|-------------|

- | | | | | | |
|---|-----|-----------|-------------------|----------|-------------|
| 3. Limit rights of third-party transferee of Government property for loss or damage from defects in property to rights granted to Government under original procurement contract. | DOD | Oct. 1973 | Adopted Feb. 1974 | FPR/ASPR | (Mar. 1976) |
|---|-----|-----------|-------------------|----------|-------------|

Catastrophic accidents:

- | | | | | | |
|---|-----|-------------|-------------|--|--|
| 4. Establish by law prompt and adequate compensation to victims of catastrophic accidents under Government-connected programs | AEC | (Nov. 1975) | (Mar. 1976) | | |
|---|-----|-------------|-------------|--|--|

- | | | | | | |
|--|-----|-------------|-------------|--|--|
| 5. Provide by law Government indemnification of contractors for liability in excess of available insurance resulting from catastrophic accidents under Government-connected programs | AEC | (Nov. 1975) | (Mar. 1976) | | |
|--|-----|-------------|-------------|--|--|

[X] Requiring Special Attention

In February 1974 the executive branch adopted the general thrust of recommendations H-1, H-2, and H-3 making the Government act as self-insurer of its losses from property damages resulting from defects in contractor-supplied items. Implementation is to be accomplished by appropriate FPR and ASPR amendments.'

An ASPR amendment issued in July, effective September 1, 1974, to implement recommendation H-3, limited third-party transferee rights to sales under the Foreign Military Sales Act, as recommended by the inter-agency task group, although the Commission did not specifically single out such sales or exclude other Government sales. Some agencies recognized that this limited implementation of H-3 was not what the Commission intended. NASA, in particular, believed coverage should be extended to include all sales.

In its July 1974 report, GAO recommended that OMB (before OFPP established) make a policy decision on H-3 and specifically inform the FPR Director and ASPR Chairman as to what sales are to be covered by the implementation action. In September 1974, GSA's Office of Procurement Management called attention to the views of NASA and GAO and requested the FPR Director to give special attention to expanding the H-3 implementation in his coordinated effort with ASPR to implement H-1 through H-3. In its March 1975 report, GAO reiterated its earlier comments and requested OFPP to give these recommendations special attention. In his May 1975 response, the Director of OMB advised that the FPR and ASPR amendments would be closely coordinated and that, before issuance, the amendments would be reviewed by OFPP to assure responsiveness to the Commission's report. He said that GSA had studied the ASPR amendment and had reviewed it with a special Council of Defense and Space Industries (CODSIA) task group.

After several meetings, a combined clause to implement the three recommendations was developed by GSA and sent out for formal comments by the agencies and the private sector. These comments have been received and are now under consideration as the FPR and ASPR staffs try to work out an improved implementing solution. Both staffs recognize that a single contract clause is quite complicated and that, instead of the contract clauses in use or proposed, the solution may be a statement of policy in FPR and ASPR that will incorporate the intent of the Commission. Implementation of the recommendations is targeted for March 1976.

See H-1 comments.

See H-1 comments.

The task group report, which is expected to be submitted in November 1975, proposes adoption of H-4 and H-5 to compensate victims of catastrophic accidents under Government-connected programs and to indemnify contractors for liability from such accidents in excess of available insurance coverage. The report will also include an implementing legislative proposal. An executive branch position is targeted for March 1976.

See H-4 comments.

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EXECUTIVE BRANCH POSITIONS AND IMPLEMENTING ACTIONS ON COMMISSION RECOMMENDATIONS AS OF NOVEMBER 1, 1975

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PART I--PATENTS, TECHNICAL DATA,
AND COPYRIGHTS:

[X] Requiring Special Attention

OVERVIEW OF ACTION ON PATENTS, DATA, AND COPYRIGHT RECOMMENDATIONS

The 16 recommendations in the I series would establish uniform, Government-wide policies and procedures relative to the acquisition and use of patents, technical data, and copyrights. In 1974 the executive branch adopted 13 of these recommendations, deferred action on I-13, and rejected I-4 and I-8.

None of the adopted recommendations has as yet been fully implemented. Recommendation I-1 was partially implemented in March 1974 by amendments to FPR and FPMR. However, these amendments had to be suspended and issuance of a conforming ASPR amendment was deferred because of litigation challenging the constitutionality of the amendments. The FPR and FPMR suspensions were lifted in October 1975 after a district court decision in favor of the plaintiff was reversed by a U.S. circuit court of appeals. ASPR is now being amended and the amendment, as proposed, lists a number of substantial differences with the FPR amendment. Recommendation I-5 is also being implemented by FPR and ASPR amendments.

All of the other 13 adopted recommendations have been referred by GSA to the Federal Council for Science and Technology (FCST) with the request that FCST assume leadership in reviewing the executive branch positions and instituting appropriate implementing actions. Recommendation I-13 was also referred to FCST after resolution of certain issues raised by the Council of Defense and Space Industry Associations (CODSIA). In addition, FCST was requested to review recommendation I-1 for possible needed legislative revision.

In October 1974 FCST established five working groups to develop appropriate implementing actions on the referred recommendations. Each group has been assigned certain recommendations. Each group's report is subject to review and approval of the Committee on Government Patent Policy, its executive subcommittee, and FCST. In February 1975 FCST initially estimated that completion of this review will take from 6 to 8 months following receipt of the report from the working group and provided it is not returned for further revision or modification. On November 13, 1975, FCST furnished a status report on the progress of its five working groups and established revised target dates for further action on the recommendations in the I series. The following table shows the 5 working groups, the recommendations assigned to each group, the actual or target date initially established for submission of each working group's report to FCST for review, and the revised target dates.

<u>Working group</u>	<u>Recommendations assigned</u>	<u>Report submission date (target)</u>	
		<u>at Feb. 1975</u>	<u>at Nov. 1975</u>
Legislation	I-1, I-2	(May 1975)	(Dec. 1975)
	I-6, I-7, I-11	(May 1975)	Deferred
	I-15		pending judicial decision
	I-9	(May 1975)	Dependent on I-10
	I-14	(May 1975)	Dependent on I-16
Licensing	I-2	(May 1975)	(Dec. 1975)
Patents	I-3	Dec. 1974	Report approved Sept. 1975
Technical data	I-9	(Mar. 1976)	(Oct. 1976)
	I-10	(Dec. 1975)	(June 1976)

ANALYSIS OF

EXECUTIVE BRANCH POSITIONS AND IMPLEMENTING ACTIONS ON COMMISSION RECOMMENDATIONS AS OF NOVEMBER 1, 1975

Short form Statement of Commission Recom- mendation	Executive Branch Policy Position			Executive Branch Implementing Action	
	Task group led by	Task group report to GSA	Referred to OFPP for decision	Position established (target)	Legislation if applicable

PART I--PATENTS, TECHNICAL DATA,
AND COPYRIGHTS:
(Continued)

Patents:

- | | | | | | |
|---|---------------------|--------------|----------------------|---------------------------------------|--|
| 1. Promptly and uniformly im-
plement revised Presidential
statement of Government
patent policy | NSF/
OST
1973 | Oct.
1973 | Adopted
Mar. 1974 | FPR
1-9
FPMR
101-4.1
ASPR | Mar.
1974
Mar.
1974
(Dec.
1976) |
| 2. Enact legislation to clarify
authority of all agencies to
issue exclusive licenses
under patents held by them | NSF/
OST
1973 | Dec.
1973 | Adopted
July 1974 | See comments | |

[X] Requiring Special Attention

<u>Working group</u>	<u>Recommendations assigned</u>	<u>Report submission date (target)</u>	
		<u>at Feb. 1975</u>	<u>at Nov. 1975</u>
Technical data (continued)	I-12	(June 1975)	(Feb. 1976)
	I-13	(Mar. 1976)	(Dec. 1976)
Copyrights	I-14	(Mar. 1976)	Dependent on I-16
	I-16	(Mar. 1976)	(Nov. 1976)

Recognizing that the I recommendations referred to FCST require special attention, OFPP officials plan to attend meetings of the FCST Committee.

Specific comments on the individual recommendations follow.

[X] The main thrust of this recommendation--uniformly implementing the President's 1971 Government patent policy statement--had already been implemented through amendments to FPR and FPMR when it was adopted by the executive branch. These amendments had to be suspended because of litigation challenging their constitutionality. The suspension was lifted in October 1975 when a U.S. circuit court ruled in favor of the Government. A conforming ASPR amendment is now being processed but the amendment cites a number of provisions that differ substantially with those in FPR. As some agencies are statutorily restricted from fully implementing the President's patent policies, FCST was assigned responsibility for drafting such legislative revisions as may be necessary to effect Government-wide implementation of these policies.

In September 1975 FCST considered the nature of legislation necessary to further implement I-1 and I-2 and determined that alternate proposals should be developed, including an omnibus bill that would eliminate any conflict between FPR and ASPR. Evaluation of the draft proposals is now targeted for the Committee's meeting in December 1975. The target date for completing executive action is December 1976 to allow time for considering ERDA's patent policy report to the Congress pursuant to P.L. 93-577.

[X] The interagency policy group, and a majority of agencies' official comments, concurred with the task group--the executive subcommittee of the Committee on Government Patent Policy--in adopting this recommendation by the executive branch. The prevailing view was that there is adequate legal authority to support the patent licensing program authorized by the President's 1971 patent policy statement as implemented by FPR and FPMR. However, it was believed that these regulations contained too many restrictions and do not provide sufficient flexibility for a fully effective licensing program. The executive branch concluded that specific legislative authority is needed to give agencies greater administrative flexibility to grant licenses without some or all of the restrictions required by the exclusive licensing regulations.

The executive branch has requested FCST to consider drafting appropriate implementing legislation to make clear the authority of all agencies to issue exclusive licenses under patents held by them. The executive branch indicated that, if FCST determined such legislation was warranted, drafting and processing an appropriate legislative proposal should not await adjudication of the then pending I-1 litigation. Such legislation, the executive branch believed would have constituted regulations "in addition to" rather than "in replacement of" existing rules.

As explained in I-1, in September 1975 FCST considered the nature of legislation necessary to further implement I-1 and I-2 and determined that alternate proposals should be developed. Evaluation of the draft proposals is now targeted for the Committee's meeting in December 1975. The Licensing Working Group's report to FCST was initially targeted for March 1975. It is now targeted for December 1975.

ANALYSIS OF

EXECUTIVE BRANCH POSITIONS AND IMPLEMENTING ACTIONS ON COMMISSION RECOMMENDATIONS AS OF NOVEMBER 1, 1975

Short form Statement of Commission Recommendation	Executive Branch Policy Position			Executive Branch Implementing Action			
	Task group led by	Task group report to GSA	Referred to OFFP for decision	Position established (target)	Legislation if applicable	Type	Executive Action Completed (target)

PART I--PATENTS, TECHNICAL DATA,
AND COPYRIGHTS:
(Continued)

3. Supplement Presidential policy by adopting uniform procedures for exercising rights retained by the Government under the policy	NSF/ OST	Dec. 1973		Adopted July 1974		See comments
4. Amend statute to make authorization and consent automatic except when expressly withheld or withdrawn by agency on a specific patent	NSF/ OST	Dec. 1973		Rejected Aug. 1974		
5. Amend agency regulations and clauses to provide that warranties against patent infringement be specified rather than implied in contracts	NSF/ OST	Dec. 1973		Adopted July 1974	FPR/ ASPR	(Mar. 1976)
6. Authorize agencies to settle patent infringement claims with available appropriations before litigation	NSF/ OST	Dec. 1973		Adopted July 1974		See comments
7. Grant agencies the statutory authority to acquire patent applications, and licenses or other related rights	NSF/ OST	Dec. 1973		Adopted July 1974		See comments

[X] Requiring Special Attention

- [X] The executive branch adopted this recommendation in July 1974. The interagency policy group and a majority of the agencies were in agreement that, in developing an implementing action, FCST should determine how "march-in" rights could be improved and strengthened. March-in rights are those rights reserved by the Government through which it can require a contractor to license others under special circumstances. A December 1974 report of FCST's Patents Working Group on implementing this recommendation was reviewed and approved by the executive subcommittee in September 1975. The subcommittee requested FCST to obtain approval of the Patent Office to insure appropriate response of that office to the working group's recommendations. Implementation is to be accomplished through appropriate amendments to the patents rights clauses in FPR and ASPR. FCST's target date for submission of the report to GSA for its consideration is February 1976.

The task group recognized that certain benefits were to be realized from the two interrelated provisions of I-14 which would make authorization and consent in all R&D and supply-type contracts automatic, unless expressly withdrawn as to specific patents. The task group noted, however, that areas of contractor uncertainty concerning authorization and consent largely arose when the contract was silent or the Government granted only limited authorization and consent. The task group recommended against adopting I-4 because it believed that these areas of uncertainty are relatively few and avoidable by improving administrative practices and that the withdrawal of authority for specific patents would be rare and could disrupt the procurement process. The interagency policy group and the consensus of official agency comments were in agreement with the task group and the recommendation was rejected in August 1974. There was no response to the solicitation of private sector comments by the executive branch.

The executive subcommittee task group believed that the Commission, in making this recommendation, intended to make mandatory the inclusion of a contractual provision to insure the availability to the Government of commercial warranties against patent infringement. This contractual provision will be automatic unless expressly excluded. The task group also believed that implementation could be accomplished without legislation and recommended that it be done by appropriate FPR and ASPR amendments. The executive branch has accepted the task group's recommendation and appropriate amendments to FPR and ASPR are targeted for issuance in March 1976.

- [X] The executive branch adopted this recommendation authorizing agencies to settle patent infringement claims with available appropriations. The task group proposed to implement this recommendation by legislative enactment of sections 6 to 8 of a Commission drafted bill set forth in appendix B to part IV of the Commission report and by concomitantly repealing all existing individual agency legislation. Enactment of this legislation would also implement I-7 by authorizing agencies to acquire patents, licenses, and other related rights. The need for such legislation was recognized by the Comptroller General in his decision B-17104 dated May 4, 1973, because previously existing statutory authority had lapsed. He ruled that, in the absence of express authorization, an agency cannot enter into a license agreement with a patent owner either to settle past unauthorized governmental use or to authorize future governmental use of the owner's patented inventions.

In a recent decision, a trial judge of the U.S. Court of Claims decided that the 1942 statutory authority had not lapsed and the issue is now pending before the full court. If the trial judge is upheld by the full court, FCST believes that the need for legislation to implement I-6 and I-7 would not be necessary. Further action on these recommendations is being deferred pending the outcome of the pending litigation.

- [X] See I-6 comments.

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PART I--PATENTS, TECHNICAL DATA,
AND COPYRIGHTS:
(continued)

- | | | | | |
|--|-------------|--------------|-----------------------|--------------|
| 8. Give Federal district courts concurrent jurisdiction with Court of Claims for patent suits within the statutory jurisdictional dollar limit | NSF/
OST | Dec.
1973 | Rejected
Aug. 1974 | |
| Technical data: | | | | |
| 9. Amend or repeal statutes limiting agency flexibility for rights in technical data | NSF/
OST | Dec.
1973 | Adopted
Aug. 1974 | See comments |
| 10. Develop and evaluate through OFPP and Federal Council for Science and Technology the implementation of a Government policy on rights in technical data supplied under Government contracts including the relationship of prime contractor and subcontractor rights | NSF/
OST | Dec.
1973 | Adopted
Aug. 1974 | See comments |
| 11. Authorize agencies to acquire rights or interest in technical data and information | NSF/
OST | Dec.
1973 | Adopted
Aug. 1974 | See comments |
| 12. Develop and evaluate through OFPP and Federal Council for Science and Technology the implementation of a Government-wide policy on treatment of technical data submitted with proposals or other related documents. | NSF/
OST | Dec.
1973 | Adopted
Aug. 1974 | See comments |

[X] Requiring Special Attention

The executive subcommittee task group was against adopting recommendation I-8 giving Federal district courts concurrent jurisdiction with the Court of Claims in patent suits. It doubted that adoption could achieve the objective of reducing a patent claimant's litigation expenses due to the district court's limited jurisdiction and lack of the expertise possessed by the Court of Claims in this area. The task group believed that the objective could be better achieved by providing for effective administrative consideration of patent claims by all agencies, an initial step being adopting I-6 and I-7 above. The interagency policy group and all of the agency comments, with one exception, concurred with the executive subcommittee. Private sector comments were not solicited by the executive branch. In August 1974 the executive branch decided to reject this recommendation.

[X] In August 1974 the executive branch adopted recommendations I-9, I-10, and I-12, recognizing that repeal of statutory limitations and agency flexibility as to rights in technical data, called for by I-9, was intricately related to development and implementation of the Government-wide data policies called for by I-10 and I-12. This position was based on a belief that development of such policies will necessarily include a review of existing laws and that repeal or amendment of statutes limiting agency flexibility could be considered at the same time.

The three recommendations were referred to FCST for development of appropriate policy statements and amendatory legislative proposals. The Legislation Working Group's report on I-9, initially targeted for May 1975, is awaiting the results of the Technical Data Working Group's report on I-10. The initial December 1975 target date for submission of the I-10 report to FCST has been revised to June 1976. The revised target dates for submission of the Technical Data Working Group's other reports on I-9 and I-12 are shown in the overview table and also indicate a slippage of about 6 months.

[X] See I-9 comments.

[X] The executive branch adopted this recommendation authorizing agencies to acquire rights in technical data and referred it to FCST for implementation with the suggestion that section 6 of the draft bill, proposed by the Commission in appendix B to part IV of its report, be used for this purpose. In view of the litigation pending in the U.S. Court of Claims on the need for specific authority to purchase patent interests and to settle infringement claims (see I-6 and I-7), FCST believes that the need to obtain such authority with respect to data needs to be reassessed. FCST plans to do this when the court renders its decision.

[X] See I-9 comments.

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PART I--PATENTS, TECHNICAL DATA,
AND COPYRIGHTS:
(Continued)

13. Establish a remedy for Govern-NSF/ Dec. (Dec.
ment misuse of confidential OST 1973 1976)
information supplied to it

Copyrights:

14. Amend or repeal statutes NASA Dec. Adopted See comments
limiting flexibility in 1973 May 1974
dealing with publications of
works developed under Govern-
ment contracts

15. Give all agencies the legis- NASA Sept. Adopted See comments
lative authority to acquire 1973 May 1974
private copyrights or interests
therein

16. Establish an interagency task NASA Jan. Adopted See comments
force under OFPP to develop 1974 May 1974
and evaluate implementation
of a Government copyright
policy

[X] Requiring Special Attention

[X] The task group proposed to defer adopting this recommendation to establish a remedy for misuse of information supplied to the Government in confidence. The task group said it found no instance when a remedy was not available to injured parties inasmuch as existing statutes provide criminal penalties for any such misuse, remedies for breach of contract, avenues of timely protest to GAO, etc. The task group believed that legislation of appropriate scope should be enacted only if actual need could be demonstrated and all of the executive agencies supported the task group's position.

After resolution of certain issues raised by the Council of Defense and Space Industry Associations, it was decided at a meeting of the interagency policy group to refer recommendation I-13 to FCST to develop an implementing action in conjunction with implementing actions on I-10 and I-12. It was recognized that, since the need for and scope of any remedy for misuse of data was dependent upon the overall technical data policy called for in I-10 and I-12, the three recommendations should be considered together. The initial March 1976 target date for establishing an executive branch position on this recommendation has been revised to December 1976.

[X] In accepting this recommendation to remove statutory provisions limiting flexibility in publicizing works under Government contracts, the executive branch requested FCST to develop an appropriate legislative proposal to implement I-14 and I-15 and a Government copyright policy to implement I-16. As explained in earlier comments, FCST has also been requested, in the implementation process, to consider the interrelationship of the I series of recommendations on copyrights, patents, and technical data and to determine the extent to which these recommendations should be consolidated in the ultimate implementing action.

Both GAO and GSA staff analyses noted that the task group's position on I-14, which was adopted by the executive branch, failed (1) to consider statutes which inhibit an agency in controlling the publication of works by withholding such works from the public and (2) to determine whether the general statutory prohibition against copyrights for works within the public domain applies to works developed by Government contractors or only to works of Government employees. GAO suggested in its March 1975 progress report that, in developing an implementing legislative proposal and a Government copyright policy, FCST give appropriate consideration to the effect of the inhibiting statutes as well as the general statutory prohibition and the need for legislative revision.

The Legislation Working Group responsible for implementing I-14, is awaiting the results of the Copyright Working Group report on I-16 which is almost complete. In view of the litigation pending in the U.S. Court of Claims on the need for specific statutory authority to purchase patent interests and to settle infringement claims (see I-6 and I-7), FCST believes that the need to obtain such authority with respect to copyrights, as recommended in I-15, should be reassessed. FCST plans to do this when the court renders its decision.

[X] See I-14 comments.

[X] See I-14 comments.

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PART J--OTHER STATUTORY CONSIDERATIONS:

Consolidated procurement title in U.S. Code:

1. Establish a program to develop changes needed to organize and consolidate procurement statutes	DOJ	Mar. 1975	Adopted Mar. 1975	Statutory Recodification	Not yet established
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Statutes of limited application:

2. Extend Truth-in-Negotiations Act to all procurement agencies; develop coordinated regulations for interpreting and applying act	GSA	Sept. 1973	Adopted Feb. 1974	S. 2309 Sept. 1975	
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[X] Requiring Special Attention

A revised task group report, received by GSA from the Justice Department in March 1975, proposed consolidation and recodification of all procurement legislation in four stages.

1. A detailed analysis of the existing structure of procurement laws be made.
2. Technicians skilled in locating and correlating related redundant and overlapping but widely scattered provisions be employed to prepare the title 41 recodification draft without substantive changes in the statutes.
3. The recodification draft be sent to all agencies having substantial procurement roles for suggestions to improve the draft.
4. The new recodification be published under authority of the House Committee on the Judiciary.

Justice believes that "an expert analytical study" of the existing statutory framework is essential to effective recodification, pointing out that much of such a study has already been done by the Commission's Statutory Studies Group in 1972. Justice further believes that this study, when completed, should be a sufficient basis for setting up a recodification program and that this work could be done under contract by a commercial firm such as the West Publishing Company at an estimated price of \$15,000. This company performed similar services for the House Committee on the Judiciary in revising title 28.

At a March 1975 meeting, the interagency policy group decided to accept the recommendation with the responsibility for implementation to be assumed by OFPP in light of its key role in modernizing the procurement statutory framework. Responsibility for implementing the recommendation has been assumed by OFPP.

The OFPP Assistant Administrator for Procurement Law advised that the recodification program would be a long range project that would be considered after progress has been made on higher priority programs.

In February 1974 the executive branch adopted recommendation J-2 to extend the cost and pricing aspects of the Truth-in-Negotiations Act legislatively to all civilian procurement agencies. The other aspects of the act, such as competitive discussions, are considered under recommendation A-4. Although the cost and pricing aspects of this DOD act have been extended administratively through FPR to the civilian agencies, the executive branch has decided that a legislative extension of the act to civilian agencies is needed to provide statutory standing, permanence, consistency, and a greater legal force and effect than is presently afforded by regulatory coverage.

In September 1975 Senator Percy, at the request of OFPP, introduced S. 2309 to modernize and unify the two basic Federal procurement statutes. This bill is essentially the same as H.R. 9061, introduced, but not heard, in the 93d Congress and contains a provision extending the truth-in-negotiations coverage to all agencies. No action had been taken on this bill as of November 1, 1975.

ANALYSIS OF

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PART J--OTHER STATUTORY CONSID-
ERATIONS: (continued)

[X] Requiring Special Attention

OVERVIEW OF ACTION ON RENEGOTIATION BOARD RECOMMENDATIONS

In April 1974 the task group recommended adopting Commission recommendations J-3 through J-6 to extend the Renegotiation Act, to make it applicable to all agencies, to raise the jurisdictional threshold for brokers' fees, and to clarify the profit criteria used in the renegotiation process. In June 1974 GSA referred the task group's implementing legislative proposal to OMB with the recommendation that it be adopted and processed for submission to the Congress.

Later in June 1974 the Congress extended the Renegotiation Act of 1951 to December 31, 1975, to permit a thorough analysis of the renegotiation process by the staffs of the Joint Committee on Internal Revenue Taxation and the Renegotiation Board and to enable the Committee to hold public hearings and thoroughly review the entire process to find out (1) how and to what extent the act should be amended, including how overall administration of the act could be improved, (2) whether changes should be made in the exemption criteria and statutory excessive profits factors to make the act fairer, more effective, and more objective, and (3) whether the Renegotiation Board should be restructured.

A number of legislative and executive branch actions followed.

- In January 1975 legislative responsibility for renegotiation in the House of Representatives was transferred from the Committee on Ways and Means to the Committee on Banking, Currency and Housing and its Subcommittee on General Oversight and Renegotiation.
- In April 1975 a bill to extend the Renegotiation Act of 1951 and to amend procedures for determining excessive profits was introduced in the House as H.R. 5940 and referred to the Committee on Banking, Currency and Housing.
- In June 1975 the Subcommittee on General Oversight and Renegotiation initiated hearings to provide the Subcommittee an overview of the Board's operations and the entire renegotiation process.
- Early in September 1975 the new Renegotiation Board Chairman forwarded to the Congress a legislative proposal to extend and amend the 1951 act.
- The Board's proposal, which had the approval of OMB and OFPP, established executive branch acceptance of recommendation J-3 and, with modification, recommendation J-5, and rejected recommendations J-4 and J-6.
- At about the same time, the Joint Committee on Internal Revenue Taxation staff submitted to the Subcommittee on General Oversight and Renegotiation an advance summary of its recommendations on the renegotiation process so that the renegotiation subcommittee could consider them in drafting amendatory Renegotiation Act legislation.
- Shortly thereafter, another bill to extend and revise the 1951 act was introduced as H.R. 9534 by the Chairman of the Subcommittee on General Oversight and Renegotiation, Congressman Minish, and the subcommittee's hearings were held in September 1975.

Shown below for each recommendation is a comparison of OFPP's position, and the Board's, with that recommended by the Joint Committee on Internal Revenue Taxation staff and that proposed in H.R. 5940 and H.R. 9534.

ANALYSIS OF

EXECUTIVE BRANCH POSITIONS AND IMPLEMENTING ACTIONS ON COMMISSION RECOMMENDATIONS AS OF NOVEMBER 1, 1975

Short form Statement of Commission Recom- mendation	Executive Branch Policy Position			Executive Branch Implementing Action		
	Task group led by	Task group report to GSA	Referred to OFPP for decision	Position established (target)	Legislation if applicable	Type

PART J--OTHER STATUTORY CONSID-
ERATIONS: (continued)

- | | | | | |
|---|-----------------------------|--------------|------------------------|---|
| 3. Extend Renegotiation Act for periods of 5 years | Renego-
tiation
Board | Apr.
1974 | Adopted
Sept. 1975 | H.R. 5940
Apr. 1975
H.R. 9534
Sept. 1975 |
| 4. Extend Renegotiation Act to contracts of all Government agencies | Renego-
tiation
Board | Apr.
1974 | Rejected
Sept. 1975 | |
| 5. Raise Renegotiation Act jurisdictional amount to \$2 million for sales to Government and \$50,000 for brokers' fees (with dissent) | Renego-
tiation
Board | Apr.
1974 | Modified
Sept. 1975 | |
| 6. Expand and clarify profit criteria used by the Renegotiation Board (with dissent) | Renego-
tiation
Board | Apr.
1974 | Rejected
Sept. 1975 | H.R. 5940
Apr. 1975
H.R. 9534
Sept. 1975 |

[X] Requiring Special Attention

<u>OFPP and Board</u>	<u>Joint Int. Rev. Tax Committee Staff</u>	<u>H.R. 5940</u>	<u>HR 9534 (note a)</u>
Would accept recommendation.	Would extend act for 6 years.	Would remove termination date of act.	Would remove termination date of act.
Would reject recommendation.	Would not change existing agency coverage except to include Nuclear Regulatory Commission and ERDA in place of AEC.	No specific extension provision but would eliminate exemptions for standard commercial articles and services, durable productive equipment, and mineral products.	No specific extension provision but would make all contracts and subcontracts completed during year subject to renegotiation, and would eliminate exemptions for standard commercial articles and services, for durable productive equipment, and for products of oil or gas wells.
Would raise brokers' fees floor to \$50,000.	Would raise brokers' fees floor to \$50,000.	No provision.	No provision.
Except for minor language changes, would reject recommendation.	Would revise statutory factors and their application and include a requirement for issuance of written guidelines by Board.	Would change certain items allowable as costs, and, in exercising renegotiation powers, the Board would consider amounts received or accrued by contractor divisions and by major product lines within such divisions.	Would amend statutory definition of excessive profits by striking out "war and peacetime products" and substituting "renegotiable and nonrenegotiable products and services," and would require that, instead of analyzing a contractor's total aggregate renegotiable sales in a given year, renegotiation be by contractor division and by major product line within a division.

^a When testifying in June 1975 before the Subcommittee on General Oversight and Renegotiation GAO favored implementing recommendations J-3, J-4, and J-6, pointing out that the Board's subjective application of statutory factors in determining excessive profits, without any written guidelines for applying and weighting the factors, made it impossible to ascertain whether they were consistently and uniformly applied by the Board. GAO also supported raising the brokers' fees floor to \$50,000 but had reservations about increasing the jurisdictional amount to \$2 million because it would allow about one-third of the contractors currently found with excessive profits to retain the profits.

ANALYSIS OF

EXECUTIVE BRANCH POSITIONS AND IMPLEMENTING ACTIONS ON COMMISSION RECOMMENDATIONS AS OF NOVEMBER 1, 1975

Short form Statement of Commission Recom- mendation	<u>Executive Branch Policy Position</u>			<u>Executive Branch Implementing Action</u>			
	Task group led by	Task group report to	Referred to OFPP for GSA decision	Position established (target)	Legislation if applicable	Type	<u>Executive Action</u> Completed (target)

PART J--OTHER STATUTORY CONSID-
ERATIONS: (continued)

[X] Requiring Special Attention

The customary practice of announcing the executive branch positions in the Federal Register was not followed in this case, and the views of industry were not solicited beforehand. The OFPP Assistant Administrator for Procurement Law advised that the rationale for the executive branch position on each of the recommendations was determined when OMB reviewed the Board's legislative proposal. The Board's proposal explained that recommendation J-6 was rejected because the statutory factors were considered to be essentially sound and the Board had attempted to improve their application by providing contractors with more meaningful opinions on the Board's evaluations resulting from the use of these factors. The Board's proposal did not explain why recommendation J-4 was rejected or why recommendation J-5 was modified. The OFPP Assistant Administrator advised that the decision to reject recommendation J-4 was made because there had been no showing of enough potential in civilian agency procurements to justify the increased costs that would have been incurred through expanding the renegotiation effort. The decision to modify recommendation J-5, he said, was made because the Board did not ask for an increase in the jurisdictional floor and because a good case had not yet been made for releasing an additional \$1 million in company sales from the renegotiation process.

As previously stated, the Chairman of the Subcommittee on General Oversight and Renegotiation introduced H.R. 9534 in September 1975 and hearings on this bill were held in the same month. The marked-up bill was approved and forwarded to the full committee early in October 1975.^a The extent to which the Commission recommendations are implemented, and the Board's operations are extended and revised, is now dependent upon the legislative process and the future action of the Congress.

^aSubsequent to GAO's preparation of the J-3 through J-6 analysis, the subcommittee Chairman introduced and submitted to the full committee in mid-November for mark-up a revised bill, H.R. 10680. The provisions in this new bill relating to J-3 through J-6 are like those in H.R. 9534 except that the new bill would

- repeal the exemptions for commercial services and for oil and gas well products,
- raise the brokers' fees floor from \$25,000 to \$50,000, and
- require that renegotiation by contractor division and major products within a division be determined under the contractor's normal accounting system.

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