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GOVERNMENT POLICY AND PRACTICE WITH
RESPECT TO CONTRACTS FOR
TECHNICAL SERVICES

STATUS REPORT

PREPARED BY THE STAFF

OF THE

COMMITTEE ON GOVERNMENT OPERATIONS
UNITED STATES SENATE



MAY 17, 1968

Printed for the use of the Committee on Government Operations

U.S. GOVERNMENT PRINTING OFFICE

WASHINGTON : 1968

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**GOVERNMENT POLICY AND PRACTICE WITH RESPECT
TO CONTRACTS FOR TECHNICAL SERVICES**

STATUS REPORT

U.S. SENATE,
COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, D.C., April 18, 1968.

Hon. JOHN L. McCLELLAN,
*Chairman, Senate Committee on Government Operations, U.S. Senate,
Washington, D.C.*

DEAR SENATOR McCLELLAN: Reference is made to Staff Memorandum No. 90-2-5, dated February 5, 1968, subject: *Government Policy and Practice With Respect to Contracts for Technical Services: Status Report.*

As you will recall, at your request and because of my particular interest in the subject, I served as cochairman for the purpose of conducting hearings on the subject, which were held on March 29, April 13, 14, and 17, 1967. At these hearings, testimony was received from 11 witnesses, representing industry, Government, and labor unions. Government witnesses included representatives of the Department of Defense, the Bureau of the Budget, the Civil Service Commission, and the Comptroller General of the United States. In addition, 13 exhibits and 27 appendixes were incorporated into the hearing record which totaled 632 pages.

The staff memorandum, which was circulated to all committee members early in February, details the issues involved and contains staff conclusions and recommendations. The body of the report is contained in the first 11 pages; the balance consists of three appendixes which summarize the hearings (app. A), supply important supporting materials concerning actions and events subsequent to the hearings (app. B) and review the issues which are still unresolved (app. C).*

I believe that this memorandum represents a fair and accurate summary of the matters under study. In view of the importance of the subject matter, the very large amounts of money which are involved, and the committee efforts devoted to it, it would be in the public interest to make this material available generally.

Accordingly, I would like to recommend that the staff memorandum be published, either as a committee print or a Senate report, whichever you may deem appropriate.

With kindest regards, I am,
Sincerely,

JOSEPH M. MONTOKA.

*Two additional appendixes have been added in order to make certain pertinent materials readily available.

U.S. SENATE,
COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, D.C., April 29, 1968.

Hon. JOSEPH M. MONTOYA,
U.S. Senate,
Washington, D.C.

DEAR SENATOR MONTOYA: In response to your letter of April 18, 1968, relative to *Government Policy and Practice With Respect to Contracts for Technical Services*, I have directed the committee staff to prepare Staff Memorandum No. 90-2-5, dated February 5, 1968, for publication as a committee print.

With kindest regards,

Sincerely,

JOHN L. McCLELLAN, *Chairman.*

JOSEPH M. MONTOYA

GOVERNMENT POLICY AND PRACTICE WITH RESPECT TO CONTRACTS FOR TECHNICAL SERVICES: STATUS REPORT

[Staff Memorandum No. 90-2-5, Feb. 5, 1968]

INTRODUCTION

In June 1965, the Department of Defense announced the Secretary's approval of a program which required the military services to begin an immediate conversion of certain types of contract technical service personnel, later found to involve some 10,500 positions, from contract to civil service, under guidelines set forth in the announcement. The positions affected represented an annual cost of \$117 million out of total annual expenditures of \$3.5 billion for contract support services.

In March 1966, the Bureau of the Budget issued a new policy statement (Circular A-76), the language of which appeared to indicate that the Government's earlier, long-standing presumption in favor of private enterprise had been replaced by a policy of maximum in-house performance. Several months later, the Department of the Army terminated a three-year contract for technical services with RCA at the White Sands Missile Range in New Mexico after 18 months, and began an immediate conversion of all positions to civil service.

Various segments of industry expressed concern over these actions contending that they represented a major change in the Government's long-standing policy of relying upon private industry to the fullest extent possible. In order to afford both industry and Government an opportunity to present their views, particularly with respect to the termination of the White Sands Missile Range contract, and to enable the committee to determine the nature of the policy changes, if any, and their impact upon Government economy and efficiency, as well as industry, public hearings were held.¹ Senator Joseph M. Montoya, who is familiar with events at the White Sands Missile Range, was designated co-chairman of the committee for the purpose of conducting the hearings.

These hearings revealed that although the policies and practices complained of reflected some basic changes, they were found to involve more of a shift in emphasis and procedures, than major policy changes. Thus, the conversion program reflected an emphasis upon improvement of the management of support services, increased in-house capability in certain areas, compliance with applicable personnel laws and regulations, long ignored or disregarded for the most part by some executive agencies, and an attempt to clarify guidelines and policies relative to cost considerations.

The hearings also reflected the Government's failure, over a long period of time, to observe its own stated policies and legal require-

¹ *Government Policy and Practice with Respect to Contracts for Technical Services*, U.S. Senate, Committee on Government Operations, Mar. 22, Apr. 13, 14, and 17, 1967.

ments, thereby generating considerable confusion concerning the use of contract services. This continued course of action, together with vague and ambiguous policy documents, directives and procedures, gave rise to industry's concern over the possible conversion and consequent loss of all support service contracts, involving approximately \$3.5 billion annually. Finally, the hearings revealed an urgent need for a re-examination, revision and clarification of Government policy and procedures in this field in order to provide clear and unambiguous guidelines for both Government agencies and private enterprise.

As a result of these hearings, some progress has already been made. The Bureau of the Budget has issued a new interim policy revision.² The Department of Defense and other affected agencies are revising their regulations, practices and procedures; more adequate attention is being given to further revision and clarification, with particular emphasis upon cost considerations, as related to a determination by an agency to perform in-house or by contract; and the General Counsel of the Civil Service Commission, in October 1967, issued a statement entitled, *The Personnel Laws as an Expression of National Policy*, which details the requirements, purposes and national policies prescribed by the personnel laws, and was designed to furnish specific guidance to executive branch agencies, with particular reference to the use of contractor-furnished personnel. This statement, set forth in appendix E, is discussed in sections 3 and 4 of appendix B.

The question of the legality of the use of contractor-furnished employees, raised repeatedly during the hearings, may ultimately be adjudicated as a result of an action for a declaratory judgment and a temporary injunction brought in the United States District Court for the District of Columbia by the American Federation of Government Employees and a group of civil service employees at NASA's Marshall Space Flight Center, Huntsville, Alabama, which sought to enjoin NASA from carrying out a proposed reduction-in-force or downgrading of approximately 640 civil service employees. One of the principal arguments made by the plaintiffs was that contractor-furnished employees, who were performing and taking over the jobs of the civil service employees proposed to be separated or downgraded under the reduction-in-force, should be laid off prior to the dismissal of civil service employees. The court, on January 11, 1968, issued a temporary injunction enjoining NASA from carrying out the proposed reduction-in-force until the employees involved, who have permanent Civil Service status, have exhausted their administrative remedies or until NASA and the Civil Service Commission reach a final conclusion as to the extent to which such employees may be dispensed with in the performance of the functions of NASA.³

² BOB Circular A-76, as revised, Aug. 30, 1967, is set forth in app. D.

³ On April 9, 1968, the court (Holtzoff, J.) granted a motion to dismiss the complaint for failure to state a valid claim for relief, on the ground that "* * * the court may not enjoin a Government agency from discharging any of its employees, nor may it issue a declaratory judgment." The court noted further that the doctrine of exhaustion of administrative remedies was peculiarly applicable to this case and these remedies must be exhausted by individual employees affected adversely before relief may be requested from the courts.

In concluding, the court stated that the granting of the preliminary injunction was solely for the purpose of maintaining the status quo in view of the extraordinary situation in which one agency, the Civil Service Commission, was objecting to the actions of another, NASA, and should not be regarded as an expression of the court that the complaint stated a cause of action.

The basic issue may still be the subject of adjudication, since the plaintiffs have noted an appeal from this decision.

Despite the progress which has been made, disagreement on basic issues still exists among the Government agencies and between Government and private industry, which will be discussed in detail in subsequent sections of this memorandum.

There follows below a review and status report relative to the principal actions taken and the issues which remain unresolved.

BACKGROUND AND SUMMARY

Over a period of years, the Department of Defense and the Military Services have followed a policy of carrying on their military support services throughout the world by means of (1) active-duty military personnel; (2) civil service employees; and (3) civilian technicians furnished by private contractors. DOD expenditures for these activities aggregate approximately \$8 billion annually of which 57 percent are performed in-house (by military and civil service personnel) and 43% (involving approximately \$3.5 billion) by contract employees.

In general, each military service has, in the past, had considerable flexibility in determining whether to perform certain services in-house or to utilize contract technical personnel services, depending upon operational requirements. Contract personnel services were used under the following conditions: (1) Lack of in-house capability; (2) to handle peak loads; (3) inability to recruit talent; (4) when contract personnel were believed to be less expensive than in-house personnel; (5) lack of adequate personnel due to manpower ceiling authorizations; and (6) it was more expedient to use contract personnel.

Early in 1965, the committee was advised that the Bureau of the Budget was contemplating the release of a new policy directive relative to Government procurement of commercial and industrial products or services for its own use, and the DOD, following the recommendations of a special study board established in 1964, was contemplating changes in policy and practice relative to contract technical and other support services. Industry characterized these contemplated actions as major policy changes which might result in the loss to private enterprise of approximately \$3.5 billion annually in technical and other support services; and alleged that such action, if carried out, would constitute a complete departure from the Government's long-standing policy of relying upon the private enterprise system to supply its needs, to the fullest extent possible.

In June 1965, the Secretary of Defense announced his approval of the recommendations of the special study board, stating that the first recommendation to be implemented was the immediate elimination of contract technical personnel, involving an annual cost of approximately \$117 million, when the use of such personnel is inconsistent with civil service laws and regulations. In addition, the Secretary announced the beginning of an immediate conversion program, later identified as involving some 10,500 positions, from contract to civil service; and stated the policy to be that "conversion of technical personnel services will be deemed necessary when they are determined to be inconsistent with civil service laws and regulations, and it will be considered desirable when it is technically feasible, improves military readiness and is economical."

The cited inconsistency with civil service laws and regulations referred to criteria emanating from a 1964 opinion of the General Coun-

sel of the Civil Service Commission concerning the legality of the use of contractor-furnished personnel at Fuchu Air Force Base in Japan, prepared at the request of the Comptroller General and later concurred in by him. This opinion, which became known as the *Fuchu* decision, reviewed the contracts, applicable statutes and regulations and concluded that the contracts involved a form of personnel procurement which was not authorized by law and violated various Federal personnel statutes. Subsequently the Commission laid down the following guidelines concerning the use of contractor-furnished personnel:

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

In March 1966, the BOB issued a new basic policy document, Circular A-76, the language of which was interpreted by some segments of industry as an indication that the earlier, longstanding presumption in favor of private enterprise to the maximum extent consonant with national security and the public interest had been abandoned in favor of maximum performance in-house, despite a statement therein that "the guidelines in this Circular are in furtherance of the Government's general policy of relying on the private enterprise system to supply its needs." It also contained a specific injunction against any departure from civil service laws or regulations and emphasized the requirement that executive agencies perform for themselves those basic functions of management necessary to retain essential control over the conduct of their programs. This document gave rise to apprehensions by industry that positions involving the entire annual expenditure of \$3.5 billion in support contracts would be lost through conversions to civil service.

These apprehensions were further increased when, as a part of the announced conversion program, the Department of the Army, in June 1966, terminated a three-year contract for technical services with RCA at the White Sands Missile Range in New Mexico, after 18 months, and moved to convert all positions to civil service, allowing an additional six months for complete phase-out. The committee was advised by the Department of Defense that the reason for the termination was illegality rather than cost.

Industrial representatives immediately cited this conversion as additional proof of major policy changes, contending further that such contracts were not illegal. In response to complaints from the New Mexico congressional delegation concerning this action, the chair-

man directed that public hearings be held to examine the entire problem, designating Senator Joseph M. Montoya to serve as co-chairman for the purpose of conducting the hearings.

Testimony received at the hearings covered not only the White Sands Missile Range contract termination, but also included a complete review of Government policies and practices in the entire field.

An analysis of the hearing record revealed that, although the policies and practices complained of reflected some basic changes, they were found to involve more of a reorientation and change in emphasis and procedures, than a major policy change. Thus, the record reflected that the long-standing presumption in favor of Government procurement of products and services from private enterprise, except where certain factors required in-house performance, had been retained and reaffirmed. The earlier policy, however, based this presumption upon benefit to private enterprise because of its importance to the economy, whereas the new policy statement broadened the rationale by emphasizing benefits to the Nation as a whole, to be reflected by the attainment of maximum efficiency and effectiveness. In addition, emphasis was placed upon (a) the need for increased in-house capability in certain national security areas; (b) compliance with personnel laws and regulations, found by the Civil Service Commission and the General Accounting Office to have been ignored or disregarded by the military services as well as other executive agencies; and (c) clarification of the vagueness and ambiguities in existing guidelines and policies relative to cost factors and cost considerations.

Although the hearing record did not reveal major policy changes, it did reveal failures on the part of executive agencies to abide by stated policies and legal requirements over a long period of time; a tendency by DOD and the General Accounting Office to "close their eyes" when confronted with deviations from legal and policy requirements, or failure to enforce these requirements; and a general confusion concerning what could or should be done and what was not permitted.

Thus, the hearings revealed that certain operating agencies contracted for personal services, with no attention to legal aspects and with no prior attempt to determine whether it was more economical to perform in-house or to contract out for needed services. The watchword appears, in many cases, to have been *expediency* rather than compliance with required standards.

These practices and procedures, followed over the years by executive agencies, may have served to mislead private enterprise into believing that such activities were entirely within the scope of an agency's authority. Thus, when executive branch agencies are suddenly being required to adhere to standards which they have long ignored, the interpretation by industry that these actions represent major policy changes, may well be understood.

The hearings revealed that there is an urgent need for clarification of both policy and practice and for clear and unmistakable guidelines for both the public and the private sectors.

Department of Defense testimony concerning the termination and conversion of the RCA contract at the White Sands Missile Range revealed that the contract was terminated (1) because it was found to be personal service in form, involving what was tantamount to an

employer-employee relationship between the Government and the contractor-furnished personnel, making it illegal under the criteria in the *Fuchu* decision; (2) that attempts to restructure the contract so as to eliminate its objectionable features, were found to be difficult, if not impossible; (3) that even if restructuring had been possible, it would have required an increase of some 49 employees at an annual additional cost to the Government of approximately \$1,200,000; and (4) that DOD considered termination only as a last resort, and then, only when a cost study established that savings would be realized by such action.

The Comptroller General, by letter dated April 14, 1967, advised that (1) performance of the contract involved substantial violations of civil service laws which justified its termination; (2) conversion from contract to in-house has resulted in annual savings to the Government of about \$400,000, part of which resulted from a reduction from 202 contract employees to an authorized number of 171 positions, of which the Army had only been able to fill 150; and (3) so far as he was able to ascertain, the mission remained the same and was unaffected by the reduction, other than to defer a certain amount of equipment maintenance. A summary of the hearing record is contained in appendix A.

SUMMARY OF ACTIONS AND EVENTS SUBSEQUENT TO THE HEARINGS

Following the hearings, certain related actions occurred which are detailed in appendices to this memorandum. They are summarized below, as follows:

1. The Comptroller General, on September 6, 1967, submitted a report concerning the comparative cost to the Government of the planned and partially executed DOD conversion program, based upon test studies of 159 converted positions, selected for review, which included 84 of the 599 positions reviewed at the hearings by the National Council of Technical Service Industries (NCTSI). This report indicated that annual savings of approximately \$320,000 had been achieved by the conversion from contractor to civil service, and might ultimately result in annual savings to the Government of \$20 million, as compared with NCTSI's estimated annual increase in cost to the Government of approximately \$2 million, with a projection over the entire program of a total increase of \$34 million. The Comptroller General attributed this wide difference to an understatement by NCTSI of industry costs and an overstatement of civil service costs. Details concerning this study and report are found in section 1 of appendix B.

2. On August 30, 1967, BOB Circular A-76, as revised, was issued in order to clarify some of the provisions of the earlier Circular and lessen the burden of work by agencies in implementing its provisions. Principal changes involved (1) a doubling of the dollar limitations for certain types of "new starts" by the Government; (2) the exclusion of Government-owned, contractor-operated activities (GOCOS); (3) requirements for the conduct of cost studies, not only before starting or continuing a Government activity, but also whenever there is reason to believe that savings would be achieved by discontinuing or avoiding a contractual arrangement and starting a Government activity in its place, unless in-house procurement is clearly justified under other provisions of the Circular; (4) various

modifications in items to be considered in making cost comparisons, with particular emphasis on using the incremental cost approach in conducting such studies; (5) a clarification of the requirements relative to indirect costs; (6) modification of the requirement that "new starts" should not be undertaken by the Government unless the costs of a Government activity would be at least ten percent less than the costs of procurement from commercial sources, designed to clarify the intention that the ten percent cost differential in favor of private enterprise was to be used only as a guide, and may be more or less, depending upon the circumstances in each case; and (7) a requirement that all executive branch agencies furnish BOB with copies of their implementing instructions. These changes and modifications represented a composite of various recommendations made by DOD, GAO and other executive branch agencies. Some of them were adopted by BOB, in whole or in part; other recommendations submitted were rejected entirely. Details concerning the revision are found in section 2 of appendix B; the revised circular is set forth in appendix D.

3. In September and October, 1967, the staff held a series of informal conferences with representatives of BOB, DOD, GAO, the Civil Service Commission and NCTSI, relative to various areas of disagreement among the agencies themselves and as between the agencies and NCTSI. The hearing record, and other pertinent materials examined, revealed numerous differences of opinion and interpretation, relating primarily to fundamental questions of policy, law and accounting practices and procedures, and reflecting, in some measure, the differences between action agencies, charged with the accomplishment of major missions and tasks, such as DOD, and staff agencies, such as BOB, the Civil Service Commission and GAO. The purpose of these conferences was to attempt further to identify and clarify the major issues and problem areas, and to determine which might be reconciled and which required further attention by the committee, using BOB Circular A-76, as revised, as a point of reference.

These conferences revealed, that although the revised Circular incorporated a number of the recommendations made by DOD, GAO and other agencies, either in whole or in part, many recommendations considered basic by DOD and GAO had been rejected by BOB. It appeared further that, although some of the differences among the Government agencies concerned might be reconciled or compromised, the gap between NCTSI and the policies and procedures provided for in the revised Circular, as well as the position of the Civil Service Commission, relative to the legal issues, was so great as to preclude reconciliation or even compromise.

The principal objections to the revised Circular, voiced by representatives of DOD, GAO and NCTSI, their recommendations for further revision, and the position of the representative of the Civil Service Commission, discussed at the conferences, are set forth in detail in section 3 of appendix B.

4. In October 1967, the General Counsel of the Civil Service Commission, at the request of the Comptroller General, reviewed the legality of certain support service contracts entered into by NASA at Goddard Space Flight Center. In a forty-page opinion, which reviewed the applicable contract and personnel laws, regulations, Comptroller General and judicial decisions, he concluded that these con-

tracts, and all like them, were illegal, unless an agency is specifically authorized by law to procure personal services by contract. The basis for his conclusion was that the contracts involved created what was tantamount to an employer-employee relationship between the Government and the contractor-furnished employees, in violation of applicable laws and regulations and of the national policy as expressed in Circular A-76, as revised.

Attached to this opinion as an appendix was the statement entitled, *The Personnel Laws as an Expression of National Policy*, referred to earlier, which purports to state the national policy prescribed by the personnel laws, as embodied in statutes, regulations and administrative and judicial decisions. Designed to furnish specific guidance to executive branch agencies with particular reference to the use of contractor-furnished personnel, the statement contains a comprehensive analysis of these expressions, including their purpose, requirements and the effect of failure to comply therewith, as well as their relationship to Circular A-76, as revised. (The statement is set forth in app. E.)

With respect to unauthorized contracting practices, the General Counsel concluded that (1) in the Commission's experience, the procurement and use of personnel by such practices has an adverse impact upon the civil service system and tends to frustrate the purposes and national policy expressed by the personnel laws; (2) BOB Circular A-76, as revised, which prescribes contracting policy for the executive branch, clearly recognizes such national policy by explicitly negating any intent to alter existing authorities, justify departure from any law or regulation of the Commission, or avoid established salary or personnel limitations; and (3) the fact that an agency may consider the requirements of the civil service laws and policies difficult or tedious in application does not constitute a justification for entering into contracts for personal services which in fact and law depart from such requirements and are therefore in violation of such policy.

On November 1, 1967, the Comptroller General, in a letter to the Chairman of the Civil Service Commission, commenting on the Commission's NASA legal opinion and the policy statement attached thereto (1) expressed agreement with the Commission as to the standards to be applied in determining whether a contract creates a relationship with the Government tantamount to that of employer-employee; and (2) stated that GAO considered the Commission's NASA decision to be consistent with its *Fuchu* decision in 1965, and concurred in both actions. It is interesting to note, however, that concerning the application of the principles involved to the general area of support service contracts, GAO interpreted the NASA legal opinion to mean that no single provision of a contract, such as task assignment or technical direction requirement, may constitute the basis for a determination that the contract is or is not proscribed by the personnel laws; but that the opinion requires, before an adverse determination is made, a realistic consideration of the provisions of the entire contract and the overall substance of the operations thereunder, and a conclusion that each of the stated elements is involved therein to a substantial degree. Details concerning the NASA opinion, the national policy statement, and the Comptroller General's comments, as well as excerpts from these documents, are set forth in section 4 of appendix B.

CONCLUSIONS

It is believed that the hearings and subsequent events contributed much to "clearing the air" and bringing out in the open matters which have long been obscured and neglected. The Bureau of the Budget has issued a new interim policy revision. (Circular A-76, revised, August 30, 1967); DOD and other operating agencies are reexamining and revising their practices and regulations; and the matter is being given further study, with particular emphasis on cost considerations.

It should be noted, however, that disagreement still exists among the Government agencies and between Government and private industry relative to such basic issues as (1) scope and coverage of BOB's policy document; (2) policies and procedures to be followed in determining whether a particular task should be performed in-house or by contract; and (3) cost considerations and items which should be considered in connection with cost comparison studies. These are discussed in detail in appendix C, attached hereto.

It is apparent that due consideration of the element of cost requires that some form of comparative cost studies should be made by executive branch agencies *prior* to determining whether to perform a task in-house or by contract. To this end, clarification of the circumstances under which such studies must be made, and the items and factors to be considered in their computation, are essential. If this is to be accomplished effectively, there is a clear need for substantial improvements in the comparative cost analysis criteria as set forth in BOB Circular A-76, as revised, and in DOD directives and instructions implementing the Circular.

Finally, an important issue raised at both the hearings and the subsequent conferences, which has not been satisfactorily resolved, is whether present policy and applicable law, relative to executive agency utilization of contractor-furnished personnel, afford adequate flexibility to enable operating agencies with major mission responsibilities, entailing annual expenditures of billions of dollars, to accomplish their assigned tasks effectively and economically. For example, it would appear the such agencies as DOD and NASA, often faced with manpower ceilings, difficulty or inability to recruit shortage-type technical personnel, and strict time schedules for the accomplishment of various phases of their respective missions, would require a measure of latitude and flexibility in personnel procurement.

This is particularly true in the case of DOD, where military necessity becomes an additional factor of overriding importance. Accordingly, if the committee determines that present policy and practice are too restrictive to enable effective, efficient and economical accomplishment of vital missions, it may desire to consider legislation to afford such agencies the required flexibility.

ELI E. NOBLEMAN,
Professional Staff Member.

Approved:

JAMES R. CALLOWAY,
Chief Counsel and Staff Director.

APPENDICES

APPENDIX A

HEARINGS AND SUMMARY OF HEARING RECORD

HEARINGS

Hearings were held on March 22, April 13, 14 and 17, 1967. Testimony was received from representatives of industry, Government, and Government labor unions.

In opening the hearings, Chairman John L. McClellan stated:

Today we begin a series of public hearings to review Government policy and practices with respect to contracts for technical services. Since 1949, when I first assumed the chairmanship of this committee, it has been concerned with the nature and extent of Government competition with private enterprise and, with the exception of the 86th Congress, we have had legislation on this subject since the 83rd Congress, some of which I have either sponsored or cosponsored.

The subject before us today, contracts for technical services, is an important aspect of this broad area. The Department of Defense currently spends about \$3.5 billion annually for such contracts. Recent policy changes indicate a reduction in the use of contract employees with a corresponding increase in the employment of additional Federal employees to replace the contract personnel.

The business community is naturally concerned over the potential loss of revenues which such a change portends. This committee is concerned with the relative efficiency and economy of support services, generally, whether performed in-house or by private enterprise.

It will therefore be our purpose to explore current practices to determine whether the vast sums of money spent for these activities are being used prudently and with due regard for the various interests involved.

I want to emphasize that we are starting out with no preconceived notions. Our purpose is to develop the facts in order to determine whether the American taxpayer is receiving full value for his tax dollar and whether the basic policy changes which are occurring are in the best interests of this Nation.

Senator Joseph M. Montoya, in his capacity as co-chairman, said:

* * * the hearings which we begin this morning are designed to review the nature and scope of the new Bureau of the Budget and Department of Defense policies relative to

technical service contracts, in particular, and Government procurement of commercial and industrial products and services for its own use from private commercial sources, in general, with a view to determining (1) their impact upon the business community; (2) their impact upon national security, military readiness and effective and efficient accomplishment of Government programs at the lowest cost possible; and (3) their validity and legal basis.

From the foregoing, it will be seen that the hearings which followed were designed to develop information relative to the changes in the policies and procedures alleged to have been put into effect by the Department of Defense and the Bureau of the Budget, with respect to technical service contracts, which resulted in a planned and partially executed conversion of approximately 10,500 positions from contract to civil service, which, in turn, involved the cancellation or attempted restructuring of numerous contracts between the military services and private contractors of the type cancelled and converted at the White Sands Missile Range.

In summary, the principal matters to which the committee directed its attention at the hearings were:

1. Current Department of Defense and Bureau of the Budget policy with respect to contracting for technical and other support services;
2. The criteria for determining whether products and services shall be procured in-house or by contract, with particular reference to (a) legal considerations, (b) cost, and (c) military readiness; and
3. The cancellation and conversion of the White Sands Missile Range contract.

SUMMARY OF HEARING RECORD

A review of the record of the hearings indicated that,

With respect to policy

(1) The allegation that there have been major changes in executive branch policy and practices, relative to the procurement of commercial and industrial products and services for the Government's own use, was not supported by the record. Although the new policy statement, set forth in BOB Circular A-76, March 3, 1966, as implemented by various DOD directives and instructions, reflected some basic changes, they were found to involve a reorientation and change in emphasis and procedures, rather than a major policy change. Thus, the record reflected that the long-standing presumption in favor of Government procurement from private enterprise, except where certain stated factors make it necessary or advisable for a Government agency to produce goods or services for its own use, has been retained and reaffirmed. However, whereas the earlier policy based this presumption upon benefit to private enterprise based upon its importance to the economy, the new policy (a) broadened the rationale by *emphasizing* benefits to the Nation as a whole, to be reflected by the attainment of maximum efficiency and effectiveness; (b) the need for increased in-house capability in certain national security areas; (c) compliance with personnel laws and regulations, found by a DOD study board to have been ignored or disregarded; and (d) the clarification of ambiguities in connection with cost factors and cost comparisons.

(2) Pursuant to this policy, decisions have been made by the Department of Defense to terminate and convert to civil service all contracts for specified numbers of contract technicians to maintain, install, operate and instruct military personnel on various types of weapons and systems, involving some 10,500 positions. The reasons cited for this conversion program were:

(a) a finding by the Department of Defense that these technical service contracts were costing the Government approximately \$119 million per year and that the same services could be performed directly by the Government for less than \$100 million annually;

(b) a decision by the Department of Defense, based, in part, upon the ruling of the General Counsel, Civil Service Commission, concurred in by the Comptroller General, in the *Fuchu* decision, to terminate and convert all contracts which are "illegal" or "irregular" because private individuals are performing Federal functions under the direct supervision and control of Government employees, creating an employer-employee relationship, outside the civil service systems;

(c) a finding by the Department of Defense that in the large majority of such cases, attempts to restructure the contract so as to eliminate the illegal or irregular features would have resulted in considerably higher costs to the Government; and

(d) a determination that military readiness required the conversion to civil service of all technical service personnel who provide advice, instruction and training in the installation, operation and maintenance of weapons, equipment and systems used by DOD components.

3. DOD testified that the decision to convert such contracts to civil service was based upon military readiness, relative costs and administrative efficiency, as well as the requirements of personnel laws and regulations, and further, that the Department of the Army had initiated its conversion program in 1962. DOD advised further that the Department of the Army had completed its conversions, the Department of the Air Force was between 60 and 70 percent complete, and the Department of the Navy would require approximately nine months for completion of its conversions.

With respect to criteria for determining whether products and services should be procured in-house or by contract

(A) *Legal consideration*

(1) Testimony from the Chairman of the Civil Service Commission and the Comptroller General, as well as long-established practice, appeared to support the position expressed in the *Fuchu* decision, that contracts for personnel services are illegal if selection, work assignment and supervision are performed by the Government and not by the contractor, and employees are integrated into the Federal work force, despite the fact that there do not appear to be any specific decisions of courts of competent jurisdiction holding such contracts illegal.* They also testified that in a number of instances in which

* A United States District Court for the District of Columbia, on Jan. 11, 1968, issued a temporary injunction enjoining NASA from carrying out a proposed reduction in force of some 640 employees until their appeals have been decided by the Civil Service Commission. The legality of retaining contractor-furnished employees, while dismissing civil service employees, was an issue raised at the argument, and may ultimately be decided.

The court dismissed the complaint in this action on Apr. 9, 1968 on the ground that it failed to state a valid claim for relief on the ground that the court may not enjoin a Government agency from discharging its employees nor may it issue a declaratory judgment unless and until individual employees adversely affected have exhausted their administrative remedies and a violation of legal rights is found to exist.

such contracts have been found to be in effect, the Department of Defense has taken steps to terminate them and convert the positions to civil service, unless they can be modified or restructured. It should be noted, however, that this does not affect contracts in which the contractor has the sole responsibility for the performance of the assigned work and exercises complete responsibility, supervision and control over its own employees on the job.

(2) The testimony also demonstrated clearly that, despite the characterization of these contracts as "illegal", they have been and still are being entered into by DOD components and no questions appear to have been raised concerning their illegality. In addition, current DOD Directives, the Armed Services Procurement Regulations (1966), and other pertinent regulations permit these contracts, despite their alleged "illegality", in the event of unusual requirements involving essential mission accomplishment, for an interim period, if authorized by the Assistant Secretary of Defense for Manpower, after consultation with the Civil Service Commission. Both the Chairman of the Civil Service Commission and the Comptroller General testified that even though such contracts are "irregular" or "illegal", they are permitted for a period of time necessary for conversion and transition, as accepted practice and in the interests of good management and the continuation of necessary functions. Finally, a DOD witness testified that he did not believe legislative authority was required to continue this practice, but if deemed necessary, DOD would request it.

(3) In general, industry representatives questioned the validity of the opinion of the Civil Service Commission in the *Fuchu* decision and the criteria upon which it was based, contending that (a) its application by executive branch agencies was a matter of policy and not law; (b) the Commission lacked legal authority to determine the circumstances under which Government agencies may enter into contracts; (c) as a practical matter, the Commission's opinion, concurred in by the Comptroller General, was binding on such agencies until or unless it was overturned by the courts or the Congress; and (d) in any event, its application was strictly limited to the facts of the *Fuchu* case. The National Council of Technical Service Industries (NCTSI), while subscribing, in part, to this position, insisted that the *Fuchu* opinion was directly contrary to existing law, as expressed in applicable statutes, decisions of courts and of the Comptroller General, and long-established practice.

(B) *Cost considerations*

(1) Secretary of Defense McNamara, in a 1964 directive, indicated that cost was a major criteria, after military readiness, in determining whether performance should be in-house or by contract. However, the policy has been to require a comparative cost study to be made *only* if the Government decides to perform the services in-house. No such study is required if it is to be performed by contract; and a new start would not ordinarily be undertaken by the Government unless the cost to the Government would be at least 10 percent less than if the products or services were procured from commercial or industrial sources.

(2) Estimates of the cost of converting 10,500 technical service contract positions to civil service differed widely, although industry

and DOD claimed to be using the same guidelines, with industry claiming substantially increased costs and DOD claiming substantially decreased costs as a result of the conversion. Industry contended that DOD's cost estimates were erroneous because cost elements which industry was required to include were not considered by DOD. DOD was in substantial disagreement with major portions of industry's cost analysis, although admitting that some of its earlier cost studies had been in error with respect to the amount of savings to be realized under the program.

(3) The Comptroller General found that improved cost analysis by DOD is needed and that it should be performed prior to the entry into contracts for services. He testified further that there appears to have been a lack of effective cost studies by DOD when the decision to contract was made, and it is obvious that cost studies were not being fully considered. He suggested that the cost comparison guidelines contained in Circular A-76 be improved.

(C) *Military readiness*

(1) DOD witnesses testified that (a) technical services for instruction, training and advice pertaining to weapons and related systems are considered necessary for reasons of military readiness, particularly when the contractor providing such services is also the manufacturer of a weapon or system; (b) it is often desirable for a manufacturer to have a representative in the field to provide liaison services concerning problems which come to light as the equipment becomes operational and the manufacturer may also be in the best position to provide initial training and instruction concerning any technical problems of installation, maintenance and use of the equipment; and (c) although some of this training may be provided in the manufacturer's plant before the system becomes operational, it may be necessary to provide such services in the field for limited periods of time, and it is DOD's policy to authorize contracts for such training, as necessary.

(2) However, it is DOD's position that for reasons of military readiness, DOD must develop its own capability to provide these training, instructional and advisory services *at the earliest* stage possible in the development and use of a weapon or system. If possible, necessary training of instructors should take place in the manufacturer's plant before the weapon or system is delivered; if this is not possible, DOD's objective is to have military personnel trained as instructors within one year after delivery of a system; and this means that certain of these contracts, which in the past have extended for indefinite periods during the operational phases of weapons and system, are to be converted to direct Federal employment as soon as possible.

(3) The principal advantage in using in-house personnel for certain types of technical services, when military readiness is a factor, lies in the fact that DOD can exercise more direct control over organization, management and performance of civil service personnel than over contractor-furnished personnel.

(4) When national security and over-riding considerations of military necessity are involved, cost considerations are not a primary factor, particularly if the consideration of military readiness is press-

ing. Furthermore, if military readiness requires the continuation of a contract which is illegal or irregular under the rules of the *Fuchū* decision, if the contract cannot be restructured so as to remove such illegality, or if restructuring is more costly than in-house performance, such contracts have been permitted to continue in force, subject to the approval of top-level DOD officials and the Civil Service Commission (in the case of illegality), until such time as conversion to in-house performance is feasible.

With respect to the White Sands Missile Range termination

(1) On December 28, 1964, after competitive bidding, the Department of the Army awarded a contract to the RCA Company to commence on January 1, 1965, and terminate on December 31, 1967. Under the terms of the contract, RCA was to install, operate, maintain, repair and remove, if necessary, communication equipment furnished by the Government. The contract price was \$1,875,800 annually for 4,372 man-months of nonpersonal services which amounted to 152 persons, later increased to a total of 228 RCA employees. On June 23, 1966, the Department of the Army terminated the contract and RCA representatives were advised that all work was to be converted to in-house performance by civil service employees. The notice to RCA stated that this was the first step of a general phase-out of the contract and that complete phase-out was to be accomplished no later than December 31, 1966.

(2) DOD testified that following the concurrence, in March 1965, by the Comptroller General in the Civil Service Commission's *Fuchū* decision, The Army Materiel Command began a review of all personnel service contracts. In May 1965, AMC received a message from the Department of the Army setting forth 12 criteria for reviewing personal service contracts, which required that if three of these criteria were present, the contract had to be referred to the attorney for the head of the appropriate procuring activity for decision as to whether it was for personal services. Shortly thereafter, another Department of the Army message authorized the continuance until June 30, 1966, of such contracts, even if found to be personal service in form, if materiel readiness or troop support required its continuance. Thereafter, the RCA contract was extended under this materiel readiness exception, and, in accordance with a February 1966 message, it was submitted for postreview to the Assistant Secretary of the Army for Installations and Logistics, which, in August 1965, requested the Office of General Counsel, Army Materiel Command, to review both the contract terms and the operational relationship between the contractor and the Government to determine if the contract was actually one for personal services. Following this review, it was concluded that the contract was then personal service in form and would be very difficult, if not impossible, to restructure so as to avoid personal service aspects.

(3) DOD testified further that, although considerable effort was made to eliminate the objectionable features of the contract, because increasing Southeast Asia workloads decreased the possibility of securing necessary in-house personnel, these efforts were unsuccessful and would, in addition, have increased the projected costs to an unacceptable level, which led to the final decision to terminate the

contract. The increase in cost which would have resulted from restructuring was due to the need for inserting in the contract structure a middle management group of RCA employees, who had not previously existed under the contract. In all, restructuring would have required an increase of approximately 49 employees at an additional annual cost to the Government of approximately \$1,200,000. In this connection, DOD emphasized that the review of contracts having personal service aspects was not necessarily directed toward their termination, which was viewed as a last-resort alternative, resorted to only in one or two percent of the cases found, and even then, only when a cost study established that savings could be achieved by such action. Finally, DOD stressed that there was no basic policy of contract termination as evidenced by the fact that, notwithstanding the termination of the RCA contract, involving some 200-plus contract personnel, there was still a net increase of contract personnel at White Sands, from 1,655 in June 1966 to 1,795 in March 1967.

(4) The Comptroller General found that performance of the contract involved substantial violations of civil service and employee pay laws and that the termination action of the Department of the Army was justified.

(5) The Comptroller General found further that the Army's conversion of these contract services to performance in-house by civil service employees has resulted in annual savings to the Government of about \$400,000. Part of the savings, about \$176,500, resulted from a reduction from 202 contract employees to an Army manning authorization of 171 civil service employees; the remaining estimated annual savings represented the contractor's overhead and profit.

(6) The General Accounting Office was unable to identify completely the specific work being performed by the employees whose positions were eliminated. Army officials maintained, however, that the mission remained the same and that the reduction in work force came about through elimination of staff duplications. The GAO noted, however, that at the time of its review, the Army had been able to hire only 150 of the 171 employees authorized; and that so far as they were able to ascertain, "* * * this shortage has not affected mission accomplishment as yet although a certain amount of equipment maintenance has been deferred which may be reflected in future costs of operations."

(7) In a memorandum submitted subsequent to the hearings, the National Council of Technical Service Industries contended that the scope of the work done by RCA was changed because the contractor previously provided vehicles, test equipment, special tools, etc.; and that it had not been established that the costs used in the Government's comparative evaluation included an equivalent amount of equipment which had been provided by the contractor. NCTSI also contended that DOD's testimony relative to the additional cost to the Government of restructuring the contract (dealt with in paragraph 3, above) was based upon a misunderstanding, since the added costs and personnel "* * *" were all for proposed added and expanded responsibilities of the contractor, which were to be provided by the contractor at the Government's request, and where not in any way occasioned by the restructuring "* * *." NCTSI contended further that either the expanded scope or the restructuring could have been undertaken at any time independent of the other; that the restructuring itself would have

saved the Government money; and that the "precipitous action of DOD in canceling the contract * * * prevented the contractor from even bringing these facts to the Army's attention."

CONCLUSIONS BASED UPON THE HEARING RECORD

(1) The policies and guidelines to be applied by executive branch agencies, in determining whether commercial or industrial products or services used by the Government should be procured in-house or from private enterprise through contract, require clarification.

(2) The criteria for determining the legality of certain types of contracts for technical and other support services, held to be illegal or irregular by the Civil Service Commission, and the General Accounting Office, concurred in by the Department of Defense, should be clarified in order to insure that all executive branch agencies have clear guidance concerning the circumstances in which contractor-furnished personnel may be used and the types of contracts which are authorized. It is particularly important that operating agencies, with major mission responsibilities, involving annual expenditures of billions of dollars, and often faced with manpower ceilings, know precisely the circumstances under which military necessity, the accomplishment of the task or mission within a particular time-frame, or the inability of the agency concerned to recruit the needed services through civil service channels, will justify the use of contractor-furnished personnel. If such personnel is required for mission accomplishment, but this form of personnel procurement may not legally be utilized, a decision must be made as to whether legislation is needed to authorize their use. The basic question presented relates to the degree of latitude or flexibility an operating agency, such as DOD should have in carrying out its mission in the most effective, efficient and economic manner. Should the Congress determine that the present practice is too restrictive, and that agency flexibility in the use of contract services should be increased, then it appears that legislation will be necessary.

(3) It is apparent that due consideration of the element of cost requires that some form of comparative cost studies must be made by executive branch agencies *prior* to determining whether to perform a task in-house or by private contract. To this end, clarification of the circumstances under which such studies must be made, and the items and factors to be considered in their computation, are essential. If this is to be accomplished effectively, there is a clear need for substantial improvements in the comparative cost analysis criteria set forth in BOB Circular A-76, March 3, 1966, and in DOD directives and instructions implementing the Circular. (Major changes in this area, made by the August 30, 1967 revision of the Circular, are discussed in section 2 of appendix B; ambiguities, unresolved issues and proposals to remedy them are discussed in sections 3 and 4 of appendix B and in appendix C.)

APPENDIX B

ACTIONS AND EVENTS SUBSEQUENT TO THE HEARINGS

1. *The Comptroller General's report of September 6, 1967, concerning costs involved in the DOD's conversion program*

One of the principal issues at the hearings was whether the planned and partially executed DOD program to convert approximately 10,500 technical service personnel from contract to civil service would be more or less costly to Government. The testimony on this issue generated considerable confusion, due in part, to varying interpretations of the prescribed guidelines and their application in specific cases.

As indicated earlier, representatives of industry (National Council of Technical Service Industries (NCTSI) and representatives of the Department of Defense differed widely in the results of comparative cost studies of the conversion program, although both claimed to be using the same guidelines and criteria set forth in applicable directives. The NCTSI study of 599 positions that they were able to identify as having been converted from contractor to civil service, reflected estimated additional annual costs to the Government of \$2 million, or, if projected over the entire conversion program, some \$34 million annually. DOD, taking sharp issue with these findings, contended that the NCTSI study was based upon various assumptions, accounting procedures and inclusion or omission of various items which were unacceptable to the Department of Defense. In its analysis of these positions (which involved 572 positions rather than 599), DOD found that savings to the Government as a result of the conversion would total \$497,000 annually.

The Comptroller General submitted a report, on September 6, 1967, with respect to comparative costs involved in the conversion program, based upon test studies of 159 converted positions selected for review, which included 84 of the 599 positions reviewed by the National Council of Technical Service Industries at the hearing. According to the Comptroller General, annual savings of approximately \$320,000 had been achieved by the conversion from contractor to civil service, and if similar results are obtained throughout the program, annual savings to the Government may amount to \$20 million.

In the opinion of the General Accounting Office, the NCTSI study had understated industry costs and overstated civil service costs. In further explanation of this finding, the Comptroller General stated:

The council's understatement of industry costs is primarily attributable to two general omissions from the council's study. These omissions include reimbursements by the Government to the contractor for expenses of travel per diem, subsistence, lodging, and overtime. In addition, the council omitted payments by the Government to the contractors for general and administrative expenses based on such costs. In the contracts we examined, this latter factor ranged from 6.1 to 14.3 percent of these expenses.

The council's overstatement of civil service costs is primarily attributable to its estimates for overhead at the installation and at levels above the installation and to its overstatement of the difference in productive time between con-

tract employees and civil service employees. The estimates for overhead were based on the Council's assumption that the Government's overhead would increase proportionately for each position converted to civil service. In contrast the amounts for overhead in our study are based on the principle of incremental cost manifested in Bureau of the Budget Circular A-76 in consideration of the difference between the costs which the Government is incurring or will incur under each alternative.

Our review showed that in some cases no additional overhead costs were incurred at the installation level as a result of the conversions and that in other cases additional support personnel were required. On the basis of the conversions we examined, we do not believe that there would be any measurable increase in Government overhead above the installation level.

Our study showed that significant savings are possible in the Department of Defense conversion program. We have no recommendations to make at this time regarding the conversion program. We have several suggestions, however, which you may wish to consider concerning the broader area of Government policy for determining whether technical services should be performed by contract employees or by Government employees.

On the basis of our rather extensive reviews performed at the National Aeronautics and Space Administration and the Department of Defense, we believe that an executive agency should make a determination on a case-by-case basis as to whether technical services could be more effectively performed by civil service personnel or by contractor-furnished personnel. If it is determined that effective performance could be achieved by either means, we believe that the agency should then make a detailed cost comparison of contractor versus in-house performance of such work. The agency's decision could then be made in full awareness of economic considerations. [Emphasis supplied.]

The criteria generally adopted by the executive agencies in deciding whether such services were to be performed by contract or Government employees are contained in Bureau of Budget Circular A-76. It has become increasingly clear to us that further guidance is needed setting forth specific policy criteria for application in the support services contract area. The services in question are generally performed at a Government installation in the conduct of a function, activity, or operation being carried out under the auspices of the Federal Government. Through the application of the present circular's basic policy to such services, they are treated as "commercial or industrial" activities, and the provisions of the circular, which favor contracting out, are applied.

We believe that manpower ceilings are a factor in the determination by an agency as to whether a service should be performed by contract employees or by Government employees. We do not believe that manpower ceilings were a special

problem in the conversion program; but, elsewhere in the Department of Defense, manpower ceilings appear to play an important role when a decision must be made as to whether services should be performed by Government employees, if an increase in the number of such employees would be necessary, or by contract employees. We are making no recommendations at this time because we have not completed our work in this area.

2. *Revision of Bureau of the Budget Circular A-76 August 30, 1967*

During his testimony before this committee concerning executive branch policies relative to Government acquisition of commercial or industrial products or services for Government use, the Deputy Director of the Bureau of the Budget testified that BOB Circular A-76 was in the process of being revised.

A revision of Circular A-76 was issued on August 30, 1967 (see app. D for full text). According to the Bureau of the Budget, the revision was issued to clarify some of the provisions of the earlier Circular and to lessen the burden of work by the agencies in implementing its provisions. In transmitting the revised Circular, the BOB stated that:

* * * there is no change in the Government's general policy of relying upon the private enterprise system to supply its needs, except where it is in the national interest for the Government to provide directly the products and services it uses.

We intend to keep the provisions of the circular under continuing review. We anticipate that further changes will be desirable in light of experience gained from implementing the circular's provisions, including the required reviews of existing Government, commercial or industrial activities to be completed by June 30, 1968. We intend to give special attention to the adequacy of the guidelines contained in the circular for such matters as comparative cost analyses; the circumstances under which cost differentials in favor of private enterprise are appropriate; and the use of contracts involving support services that require minimal capital investment.

The principal changes made in the revised circular relate to (a) key definitions; (b) cost comparisons; (c) administration of policy; and (d) implementation. They are summarized below, as follows:

(1) The definition of a "new start" has been split into two categories: (a) a newly established Government commercial or industrial activity; and (b) a reactivation, expansion, modernization, or replacement of an activity. Under category (a), the dollar limitations of \$25,000 or more for additional capital investments and \$50,000 or more for additional annual costs of production, have been retained. However, the dollar limitations applicable to category (b) activities have been doubled to additional capital investments involving \$50,000 or more and additional costs of production of \$100,000 or more. Separate definitions applying different dollar limitations to reactivations, expansions, modernizations or replacements, were provided in order to avoid applying "new start" procedures to routine adjustments for handling existing workloads. For example, the replacement of a single machine tool at a shipyard may easily add capital cost of more than

\$25,000, or the addition of only 10 employees at relatively low grade would add more than \$50,000 a year to production costs. This type of change is said to occur several times a year at large facilities and, under the terms of the earlier Circular, each change would have to be treated as a "new start", with detailed cost studies and special approval required.

(2) The definition of a Government commercial or industrial activity has been clarified by specifically providing that a Government-owned, contractor-operated activity (GOCO) is excluded from the application of the Circular. The earlier Circular excluded such activities by definition, but the wording was ambiguous. The change made clarifies the fact that such activities are not to be regarded as Government commercial or industrial activities for the purpose of the circular.

(3) Procedures for conducting cost comparison studies were modified to provide for such studies not only before starting or continuing a Government activity, but also whenever there is reason to believe that savings would be possible by discontinuing or avoiding a contractual arrangement and starting a Government activity in its place. Thus, the revised circular clearly requires that if there is reason to believe that savings can be realized by the Government providing for its own needs, cost comparison studies should be made before deciding to rely upon a commercial source. However, the changed wording also makes it clear that such studies will not be required if in-house provision of the product or service, or commercial procurement thereof, is clearly justified in accordance with other provisions of the circular.

(4) Cost comparison procedures were modified to provide for calculation of Government employees' retirement costs on a full cost basis, rather than basing them entirely on the amounts currently paid into the retirement fund by the Government.

(5) Procedures required for conducting cost comparisons have been modified to provide that costs which would tend to be the same for both Government and industry need not be measured and included in comparative cost analyses, i.e., bid and award costs, and operating costs under lease-purchase alternatives. This has been added in the interest of economy and simplicity in making cost comparisons.

(6) Language has been added to clarify the fact that the incremental method of costing is to be employed in making cost comparison studies, and to emphasize the importance of a realistic recognition of all such additional or incremental costs.*

(7) Language has been added providing that if a discontinuance of a Government commercial or industrial activity will result in premature retirement of Government employees, with a significant increase in retirement costs to the Government, such costs should be added to the cost of procurement from commercial sources.

(8) Language was added to extend the coverage of the circular to include the processes for deciding whether to purchase or lease equipment or construct buildings or to acquire their use under a lease-construction arrangement, with a specific requirement of a prior determination of costs under the alternatives.

* In the context intended, the term "incremental costs are additional costs which would be incurred if a product or service were provided by the Government, but which would not be incurred if obtained from a commercial source.

(9) Language was added to provide for the inclusion of residual or salvage values of facilities to be made available as a result of closing or discontinuing Government activities, in analyses of the costs of discontinuing Government activities and substituting commercial sources. The purpose of this modification was to make clear that appropriate recognition should be given to estimated residual or salvage value of facilities or equipment in computing depreciation.

(10) The basis for computing interest was modified to eliminate distinctions between long term and short term investments and to provide for reductions in amounts computed for interest as the depreciated value of assets is reduced. The purpose of this change is to clarify the rate and source of interest to be charged and to provide guidance as to the principal to which it is to be applied. This is to be accomplished by providing that the computation of interest for any new or additional capital to be invested will be based upon the average rate of yield for long-term Treasury bonds as shown in the current monthly Treasury Bulletin. The suggested rate is a readily available measure of the current cost of money to the Government, and the provision for reducing the balance to which interest is applied is considered reasonable because the interest cost should not go on indefinitely.

(11) Language was added to clarify the requirement that Government costs should include not only agency costs, but also all additional indirect costs incurred for such activities as management and supervision, budgeting, accounting, personnel, legal and other applicable services.

(12) The earlier Circular, although not prescribing precise standards, provided that a "new start" should not be approved unless the costs of a Government activity would be at least 10 percent less than the costs of obtaining the product or service from commercial sources. Experience demonstrated that there had been some misunderstanding about the cost differential in favor of private enterprise due to uncertainties in Government production costs, equipment obsolescence and other factors, including the amount of capital investment involved. A sentence was added to clarify the fact that the 10 percent cost differential in favor of private enterprise is not intended to be a fixed figure, but is to serve only as a general guide; and that the differential may be more or less than 10 percent, depending upon the circumstances in each individual case.

(13) A provision was added which requires all executive branch agencies and departments to furnish the Bureau of the Budget with copies of their implementing instructions.

It may be noted that the changes summarized above represent a composite of various recommendations made by the Department of Defense, the General Accounting Office, and other agencies, submitted at the request of the Bureau of the Budget. Some of the recommendations were adopted in whole or in part by the Bureau, and others were rejected in their entirety.

3. Staff conferences with agencies and National Council of Technical Service Industries

(a) General

A further analysis of the hearing record, the September 6th report of the Comptroller General, BOB Circular A-76, as revised and

additional materials received, revealed numerous differences of opinion and interpretation as between BOB, DOD, the Civil Service Commission and the GAO, relating, for the most part, to fundamental questions of policy, law and accounting procedures and practices to be followed by Government agencies in connection with technical and other support services.

It appeared that although some of the major differences among the Government agencies involved might be reconciled or compromised, the gap between the National Council of Technical Service Industries (NCTSI) and the policies and procedures provided for in Circular A-76, as revised, as well as the position of the Civil Service Commission, relative to legal issues, adopted and agreed to by the principal agencies concerned, was so great as to preclude reconciliation or even compromise with respect to certain major issues. Finally, the staff found that the problems and issues which remained unsolved were complex in nature and required further study and analysis by the principal agencies before appropriate solutions could be found. This was particularly apparent in the differences between action agencies, charged with the accomplishment of major missions and tasks, such as the Department of Defense, and staff agencies, such as the Bureau of the Budget, the Civil Service Commission and the General Accounting Office.

In an effort to further identify and clarify major issues and problem areas, and to determine those which might be reconciled and those requiring further attention by the committee, the staff held a series of conferences with representatives of the agencies involved with NCTSI, using BOB Circular A-76, as revised, as a point of reference. These conferences revealed that the Bureau of the Budget is continuing to give special attention to the adequacy of the guidelines contained in the revised Circular, relative to such matters as comparative cost analyses, circumstances under which cost differentials in favor of private enterprise are appropriate, and the use of contracts involving support services that require minimal capital investment.

(b) *The General Accounting Office*

The General Accounting Office, as indicated earlier, is concerned primarily with whether applicable laws and regulations are properly implemented and observed, and whether an effective means exists for considering the cost aspects when an agency decides whether to contract for services or perform them in-house. Some of their recommendations for revision of A-76 were adopted by the Bureau of the Budget. The principal recommendations which were not, and which they still desire to have incorporated in the circular are:

- (1) The addition of a separate section setting forth the specific policy criteria applicable to service support contracts, based upon the position that the Circular should make a clear distinction between contracts for products or services which are commercial or industrial in character and those in which only services are provided. Industrial or commercial type contracts usually involve risks, responsibility and investment by the contractor which justify the long-standing policy, retained in Circular A-76, as revised, in favor of relying on the private sector to meet the Government's commercial and industrial needs. Support service

contracts, however, are in a different category, since they generally involve either the furnishing of additional contractor personnel to augment a civil service staff, or the complete operation of an activity or function; they are usually performed at a Government installation and involve the performance of functions or operations carried on under the auspices of the Federal Government; and they do not provide for the furnishing of any products. Thus, the nature and extent of the contractor's risks, responsibility, investment and other factors differ drastically from those normally associated with contracting for commercial or industrial products and services. Therefore, according to the GAO, there is no valid basis for applying the presumption in favor of private industry to contracts of this type or for following the comparative cost procedures which the Circular presently applies to both commercial or industrial as well as support service contracts. In this connection, the GAO notes that Circular A-76, as revised, does not require cost comparisons *prior* to a decision to contract out, unless there is reason to believe that savings can be realized by in-house performance.

Citing such support service activities as the DEW line, BMEWS system, NASA tracking and data acquisition network, Apollo mission control center and the Air Force Eastern and Western test range facilities, the GAO position is that whether such services should be contracted out or performed in-house should depend upon which alternative is least costly to the Government, unless there are over-riding reasons for excluding cost as an important factor. However, even in such cases, the GAO states that, in its judgment, "a cost comparison should probably be required in order that the cost implications could be given appropriate consideration in the decision-making process." GAO contends, however, that because Circular A-76, as revised, applies the same standards and procedures to all types of contracts involving the procurement of commercial and industrial products and service, as well as to support services, agencies can and have used the Circular to justify contracting out even though it may be more costly.

Finally, the GAO suggests that the needed revision could be accomplished by modifying the policy now included in paragraph 2 of the Circular, as revised, so that the presumption in favor of contracting out would not apply to support services of the type discussed, and by adding a new section which would provide the necessary definitions and criteria for determining when to contract for support services. One definition of support services proposed is "those services which are (a) used in the performance of an activity of the Government which require little or no investment in facilities or equipment other than that of the Government, and (b) susceptible of being performed by Government employees or on a task or job basis under a service contract. These services would include services frequently performed by Government even though also performed by private industry (e.g., maintaining aircraft engines) or services which are peculiar to Government (e.g., operation of the DEW line)."

(2) Revision of the circular to provide for inclusion of overhead costs as part of the cost of Government activities only to the extent it can be demonstrated in each case that such costs would be incurred if a Government activity is started or continued, but would not be incurred if commercial sources are used.

(c) *The Department of Defense*

Although a number of recommendations made by DOD were incorporated in the revised Circular, seven of these which they consider important, were not adopted:

(1) A change in the definition of "new starts", not only by raising the dollar limitations for those "new starts" involving reactivation, modernization or expansion of existing Government facilities, which was adopted by BOB, but also by excluding increases in expenditures caused by routine changes in workload, not involving any program decisions, which was not adopted by BOB. In this connection, DOD notes that the revised Circular did not go far enough because it fails to recognize individual differences between major facilities and installations and smaller ones. Thus, whereas, a shipyard may be required to add machinery at a cost in excess of \$100,000 as a result of routine changes in workload, but without any change in program decisions, an in-house laundry or bakery, faced with the same situation, might only incur additional capital investments of \$25,000. The revised circular would require observance of all of the costly procedures involved in the case of the shipyard, but not in the case of the laundry. To correct this situation, DOD believes it would be wiser to amend the circular so as to permit flexibility with respect to specific commodities and cases or, as an alternative, to increase further the dollar limitations on reactivations, expansions, modernizations or replacements.

(2) Provisions for minimum differential of total costs between commercial and in-house alternatives should be modified to deal more properly with cases where contractors incur little or no risks or have little or no capital investment, but the Government does not avoid such risks and investment by relying upon contractors. This involves some types of Government-owned-contractor-operated activities referred to as "GOCOS". BOB apparently tried to deal with this recommendation by permitting greater flexibility in the 10 percent differential, i.e., either higher or lower as the agency's judgment indicates. However, DOD believes that this differential is too high and should be changed to a fixed 3 to 5 percent in certain cases. Thus, if the Government will not be able to save at least 3 to 5 percent by performing the work in-house, it should be contracted out. However, as indicated, this would apply only to contracts in which the Government incurs no risks.

(3) The revised circular should provide guidance concerning policies and procedures to be followed with respect to Government-owned-contractor-operated (GOCO) activities or, in the alternative, to issue a separate Circular concerning them. GOCOS were originally included in BOB Directive 60-2, but were excluded from coverage in both the original and revised Circular A-76. This exclusion, denies agencies and contractors the neces-

sary guidance concerning (a) whether a contractor who will use Government-owned facilities should be awarded a contract rather than a contractor who will use privately-owned facilities to provide a product or a service; or (b) whether a contractor who is already using Government-owned facilities should be permitted to provide all products or services needed in performing his contract by further use of Government-owned equipment and facilities, or if he should be required to make cost comparison studies and reviews to determine whether it would be better to subcontract with commercial sources. Further questions arise concerning contractors using mixed facilities (Government and private). Issues concerning reliance upon commercial sources also arise with respect to the use of subcontractors and still lower tiers in the subcontracting structure, when various degrees of utilization of Government-owned facilities are involved.

The DOD representative pointed out that GOCOS comprise the largest part of DOD's dollar contracts; 100 percent of AEC's contracts and 90 percent of NASA's contracts. Policy guidance in this area, for both Government agencies and contractors, is urgently needed, and DOD plans to work with NASA and AEC, as well as other affected agencies, to develop a satisfactory solution to this problem. What is needed is a separate set of rules for GOCOS defining procedures, types of contracts involved, etc. He noted further that there are different types of GOCOS (a) in some, the contractor produces only a product, using Government facilities; (b) in others, the contractor handles large numbers of subcontractors, freeing the Government from this responsibility, and is thus acting in a manner similar to a Government agency; (c) in still other GOCOS, the contractor furnishes both products and services, using a Government facility. He contended that the types of end result should make no difference, i.e., whether products or services are involved, but that a distinction should be made between GOCO contracts involving no risk to the contractor and those which involve risks; and whether or not there was competition in the letting of the contract.

4. Inclusion of language in the circular to provide for consideration of losses in Federal income tax revenues resulting from tax exemptions enjoyed by certain contractor employees stationed in foreign countries, but not enjoyed by Federal civil service employees in the same location.

5. Clarification of the circular to indicate clearly and definitely that it is intended to apply to all United States private business concerns without regard to whether they are performing in the United States, its territories and possessions, or in foreign areas. Under current interpretations of the language in the revised circular, United States business firms are treated in the same manner as are foreign corporations, and do not receive the benefits of the circular. Although foreign business firms should not be entitled to such coverage, there is no reason to exclude United States firms operating in foreign areas.

6. The applicability of the Circular should be limited to exclude those aspects of automatic data processing which involve fundamental Government program and management decisions. It is

noted that BOB has issued other circulars and bulletins concerning the management of such programs which appear to be in conflict with the revised Circular. Although these circulars and directives are still in effect, the definition of Government commercial or industrial activity, contained in revised Circular A-76, clearly includes ADP activities. DOD believes that ADP activities should be completely excluded from the scope of the Circular, although it made no formal recommendation to that effect. This distinction was not made clear in the earlier Circular and no action was taken to clarify it in the revision.

7. The circular should be modified to provide that all costs (fixed or sunk costs as well as incremental) should be considered in determining whether to contract out or perform in-house. BOB followed the GAO's recommendation that only incremental costs should be included. DOD believes that it would be far more appropriate and accurate to consider total costs under in-house or contract performance.

(d) *The National Council of Technical Service Industries (NCTSI)**

The National Council of Technical Service Industries (NCTSI) submitted a memorandum discussing (a) its principal objections to portions of BOB Circular A-76, as revised, (b) the question of legality of technical service contracts, and (c) the review by the GAO of the NCTSI cost study.

NCTSI specifies the following objection to Circular A-76, as revised:

(1) NCTSI asserts that (a) a fully accounted cost system and not just an incremental cost system is the proper basis for cost comparisons, and would be consistent with government accounting systems approved by GAO; (b) industry, under proper accounting principles, uses this approach in making decisions comparable to those contemplated by the revised Circular; and (c) unless comparable accounting systems are employed, no accurate comparison of costs can ever be made. NCTSI suggests that this committee secure the views of independent accountants and auditors as to the adequacy and accuracy of the Budget Bureau's reliance upon incremental costing.

(2) As to the exclusion of Government-owned, contractor-operated activities (GOCOS), NCTSI contends that this can be interpreted to exclude major support contracts of NCTSI members from the provisions of the Circular, and that there is no policy justification to exclude support contracts such as DEW line and BMEWs from the principles of the circular.

(3) NCTSI questions whether the revised Circular which provides that the full costs of retirement systems shall be allocated as an element of the Government's costs, includes the present \$50 billion of unfounded liability under the retirement system, as well as current deficiencies in contributions.

*NCTSI is a nonprofit, membership corporation organized under the provisions of the District of Columbia Nonprofit Corporation Act. It is composed of the following 13 corporations which provide a substantial portion of technical and support services to the Government by contract: Avco Corp., Bendix Corp., Computer Sciences Corp., Computing and Software, Inc., Philco-Ford Motor Co., International Telephone and Telegraph Corporation, Kay and Associates, Litton Industries, Manpower, Inc., Northrop Corp., Radiation, Inc., Radio Corporation of America, and Unitec, Inc.

(4) NCTSI questions the vagueness of language in the revised Circular requiring that cost studies be made where an agency prefers to contract out on non-cost grounds "if there is reason to believe that savings can be realized" by in-house procurement, contending that this could result in expensive cost comparisons being made in all cases.

(5) NCTSI states that there is no justification for BOB's plan to discriminate against support service contracts by considering separate provisions for them, since the ten percent factor is equally applicable to both services and products.

(6) NCTSI reiterates its recommendation to require public disclosure and independent review of decisions under Circular A-76, and notes that this recommendation is further underscored by the provisions of the Freedom of Information Act.

(7) NCTSI contends that state and local taxes, paid by the contractor, but foregone if work is performed in-house, should be considered as an element of cost on the Government's side of the equation.

(8) Finally, NCTSI contends that Government agencies must have full authority to contract as necessary in the interest of efficiency and economy. Because of the continuing ambiguity relative to the legality of technical service contracts, re-emphasized by recent rulings of the Civil Service Commission declaring certain NASA contracts illegal, it recommends the enactment of legislation clearly confirming the legality of such contracts, unless all concerned parties acknowledge their legality.

NCTSI comments on the GAO review of the NCTSI cost study of the DOD conversion program as follows:

(1) NCTSI contends that its cost studies and that of the DOD indicated that the costs of the contractor conversion program were within the 10 percent margin, and the conversions were unjustified under the provisions of Circular A-76; although GAO's study reflected significantly larger savings, it was limited to only 84 of the 599 positions in the NCTSI study; and the three sharply differing results indicate the necessity for and benefits of a detailed discussion among all three participants, of the definition and dimension of the cost elements to be included in such studies.

(2) NCTSI further contends that its review of the GAO study indicates a number of areas requiring clarification by GAO, including (a) reasons for GAO's selection of only a small sample of those persons included in the NCTSI cost study and the basis for the remaining persons in the study; (b) GAO's apparent exclusion from its study of overseas conversions, which are relatively more costly to the Government than domestic conversions, since the exclusion of such high-cost conversions would necessarily understate civil service costs in the comparison; (c) the rejection of DOD's standards for overhead costs above the installation level; (d) the rejection of the NCTSI and DOD position on interest costs; and (e) the finding by DOD that the costs of field supervision, recruiting, etc., were twice as high as those found by GAO, but both estimates were substantially below NCTSI's.

(3) NCTSI contends that cost comparisons will be effective only if benchmarks and percentages can be established to assist field personnel in making them. Otherwise, Government costs which are difficult to identify will be disregarded. NCTSI hopes that discussions

among the parties concerned can be arranged to develop objective standards.

(e) *The Civil Service Commission*

The Civil Service Commission is primarily concerned with the integrity of the Federal public service. Although recognizing the problems confronting operating agencies in the performance of their missions, such as manpower ceilings and personnel shortages, the Commission, quite naturally feels that a meaningful public service is dependent upon strict compliance with the personnel laws and regulations of the United States.

With particular reference to Circular A-76, as revised, the Commission noted that there is a wide range of activities of an industrial or commercial nature which agencies lawfully undertake and are subject to be contracted out in conformity with the revised circular. In this connection, however, it was noted that section 4(a) of the circular emphasizes that it is not to be used as authority to enter into contracts if such authority does not otherwise exist, or to justify departure from any law or regulations, including regulations of the Civil Service Commission or other appropriate authority, or for the purpose of avoiding established salary or personnel limitations.

The circular also recognizes a limitation on the character of services that can be contracted out in expressly providing that it does not alter the existing requirement that executive agencies will perform for themselves those basic functions of management necessary to retain essential control over the conduct of their programs. These include selection and direction of government employees, assignment of organizational responsibilities, planning of programs, establishment of performance goals and priorities and evaluation of performance.

Finally, the Commission's General Counsel noted that whether contracts for services depart from civil service laws or the regulations of the Civil Service Commission is a matter for *its* determination. After the Commission examines specific contracts, in specific cases, usually at the request of the Comptroller General, it is then in a position to determine whether or not they are in violation of the applicable laws and therefore transgress the policy prescribed for the Executive Branch.

In applying controlling laws, regulations and administrative and judicial interpretations, bearing on the issue, the Commission has, through the years, devised a set of criteria to determine whether a contract for personal services, in a specific case, is in violation of these standards. The basic issue involved is whether the contract, either in form or in fact, establishes what is tantamount to an employer-employee relationship between the contract personnel and the Federal Government. These criteria are whether a person is (a) engaged in the performance of a Federal function under the authority of an act of Congress or an Executive Order; (b) performing duties subject to the supervision of a Federal officer or employee; and (c) appointed in the civil service by a Federal officer or employee.*

Stated as an affirmative rule, if a contract is one for personnel procurement, where the agency has the right to approve the persons furnished by a contractor, evaluate their performance and effect their recall for unsatisfactory performance, and the persons furnished per-

*These criteria are now codified in section 2105 of title 5, United States Code.

form their daily tasks under the supervision of a Federal employee, such a contract or arrangement is considered by the Commission to be illegal, since it creates a relationship tantamount to that of employer-employee in derogation of the civil service laws, and such individuals should be employed and paid by the agency in accordance with the civil service, veterans preference, and classification laws. The application of these criteria, however, is confined to the facts involved in each situation which the Commission reviews, and the presence of various elements which will be discussed in section 4 of this Appendix.

It should be noted that the Commission *does not consider cost factors* as material to its determination of illegality. Thus, if a contract, is, in fact, in violation of applicable laws and regulations, the fact that performance in-house may be less costly than by contract, is not the concern of the Civil Service Commission, but is a question of policy for congressional determination.

The Commission's General Counsel has prepared a statement entitled *The Personnel Laws as an Expression of National Policy*, which was issued as an appendix to his opinion concerning the legality of certain technical support service contracts at NASA's Goddard Space Flight Center. It details the requirements, purposes and national policies which are prescribed by the personnel laws and is designed to furnish specific guidance to executive branch agencies. In this connection, the Counsel advised that Circular A-76, as revised, may require additional clarification with respect to national personnel policies, and that the policy review contained in his statement was intended to detail and clarify the policy embodied in the Circular. (This statement is set forth in Appendix E).

In response to allegations that there are situations in which neither the agency nor the Commission are able to furnish certain shortage-type personnel required within the time-frame of the agency's mission, the General Counsel contended that this was not a relevant factor and cannot be used as a basis for violating national policy by entering into illegal contracts. He stated further that (1) the Commission can furnish the required personnel; (2) if it cannot, the agency has authority to recruit; and (3) in extreme cases, flexibility in the use of contract personnel has been permitted, following approval by a top-level official of the agency involved and consultation with and approval by the Civil Service Commission.* In this connection, he emphasized that the Civil Service Commission is responsible for maintaining the integrity of the entire public service. Thus, whereas the private sector is free to recruit required personnel from any source, including other Government contractors as well as other Government agencies, the Commission is not free to procure shortage-type personnel for one agency by raiding other agencies. Admittedly, the supply of certain types of personnel is limited, and the Commission advised that it is making every effort to locate and recruit them.

According to the Commission's General Counsel, one of the problems involved is that Government agencies often go directly to private

* Despite the contention of the Commission's General Counsel that shortage-type personnel can be furnished through the civil service system, either through Commission procedures or by agency recruitment, the staff has been advised that DOD, as well as other operating agencies, have been and still are experiencing difficulties in obtaining the services of such personnel. Further, it appears that additional information is required in order to determine the nature, extent and cause of the recruiting problem, since present indications are that they may be due to a variety of reasons.

contractors for personnel, instead of using normal civil service channels. This places the Government in competition with itself in bidding for shortage-category personnel through the use of personal service contractors—a practice which the Commission feels is highly obstructive to the civil service system and contrary to sound manpower utilization practices. The Commission's representative stated that it is apparent, in many cases, that contractor employees who possess these scarce skills are employed by the contractor solely for the purpose of having their services sold to the Government. In these situations, the contracting officer, who requires only personal services, is actually substituting the contractor who provides such services, for the civil service system. The Commission feels that this hinders the development by the Government of a personnel force with adequate skills in these fields. Finally, the General Counsel contended that if this type of competition by Government agencies would cease, the civil service system would be as fully capable of supplying the needs of Government agencies as is the private sector. He did not indicate, however, whether any further action is contemplated relative to shortage-type personnel.

Finally, the General Counsel stated that there is no merit to the contention that if an agency requires temporary personnel for a brief period of time, it should procure them by contract rather than through civil service. He contended that if the contract is for personal services and is in violation of national personnel policies, the temporary nature of the position cannot be used as a justification by the agency to engage in an illegal practice; and that if temporary personnel are needed, they must and can be obtained through regular civil service channels by means of special procedures established for this purpose. When their services are no longer required, their employment can be terminated; and the Commission advised that its experience has demonstrated that, in many cases, it is no more difficult to terminate temporary civil service personnel than contractor personnel.

4. The opinion of the General Counsel, Civil Service Commission, relative to selected NASA contracts, and the statement of National Policy

(a) The NASA Opinion

In October 1967, responding to a request from the Comptroller General for a review of the legality of certain support service contracts entered into by NASA at Goddard Space Flight Center, the General Counsel of the Civil Service Commission prepared a forty-page opinion, reviewing the applicable contract and personnel laws, regulations, decisions of the Comptroller General and judicial interpretations. He concluded that these selected contracts were illegal, since they created what is tantamount to an employer-employee relationship, in violation of such laws and regulations, and consequently were in violation of national policy as expressed in Circular A-76. Attached to this opinion, as an appendix was the statement of national policy, referred to in the preceding section, which will be discussed in sub-section (b) below.

In a discussion of the responsibilities of the Civil Service Commission, the General Counsel stated that:

The contracts under review present a clear example of the "interface" between what is presumed to be private enter-

prise on the one hand, and government operations on the other. This dichotomy appears upon analysis to be more theoretical than real in many segments of the aero-space field. * * * The exercise of government authority, the management and control of government programs, the limits of official responsibility and of governmental liability in contract and tort, may all be critically affected by the actual employment status of contractor-supplied personnel. These contracts exemplify the need for greater definition and understanding of the status of contractor-supplied personnel and of the criteria and rationale by which that status is determined. At stake are potentially massive claims upon the Treasury of the United States.

* * * * *

Any determination concerning the contracts under review that we may make is strictly for the purpose of administering the personnel laws within the Executive Branch, for the guidance of NASA and other agencies, and in response to a request from the Comptroller General. We are not attempting to determine the employment status of any individual or group of individuals under the contracts. Nor do we purport in any way to affect or resolve private rights or Government liabilities under the contracts.

The General Counsel concluded his opinion, as follows:

* * * It appears * * * that contracting practices identical or similar to those under review are widespread, and are having an increasingly impact upon personnel practices and policies in the Executive branch. The commission deems it essential for the guidance of all agencies therefore to now set forth those elements which we believe result in unauthorized contracts or contract personnel practices which offend the requirements and purposes of the personnel laws.

In so doing, we must emphasize that our responsibilities do not allow nice distinctions as to technical legality of contracts balancing and weighing the myriad of factors, conditions and circumstances in each particular case. We must, of necessity, lay down general guides and ask their observance by the agencies. (Emphasis supplied.)

In the absence of clear legislation expressly authorizing the procurement of personnel to perform the regular functions of agencies without regard to the personnel laws we must insist on scrupulous adherence to those laws and the policies they embody. Accordingly, contracts which, when realistically viewed, contain all the following elements, each to any substantial degree, either in the terms of the contract, or in its performance, constitute the procurement of personnel services proscribed by the personnel laws:

Performance on-site.

Principal tools and equipment furnished by the Government.

Services are applied directly to integral effort of agencies or an organizational subpart in furtherance of assigned function or mission.

Comparable services, meeting comparable needs, are performed in the same or similar agencies using civil service personnel.

The need for the type of service provided can reasonably be expected to last beyond one year.

The inherent nature of the service, or the manner in which it is provided reasonably requires directly or indirectly, Government direction or supervision of contractor employees in order to—

Adequately protect the Government's interest, or
Retain control of the function involved, or

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

Applying these standards, the contracts under review and *all like them* are proscribed unless an agency possesses a specific exception from the personnel laws to procure personal services by contract.

(b) *The Personnel Laws as an Expression of National Policy*

In a section of the NASA opinion dealing with the responsibilities of the Civil Service Commission, the General Counsel stated that:

A statement of the requirements, purposes, and national policies which are prescribed by the personnel laws is set forth as Appendix A. As stated in this Appendix, it has been the Civil Service Commission's experience that the procurement and use of personnel by unauthorized contracting practices has an adverse impact upon the civil service system and tends to frustrate the purposes and national policies expressed by the personnel laws. The extensive use of contractor-supplied personnel for the performance of Government missions poses issues of critical importance to our system of government, to any meaningful concept of "public service" and to the continuing vitality of the civil service system.

Our experience with contracting practices across the Executive Branch convinces us that these practices deserve thoughtful analysis and evaluation to assay their effects and implications to our governmental, economic, and social institutions.

As indicated above, the General Counsel's statement of national policy, relative to personal services, was designed to clarify that policy, as embodied in statutes and regulations and interpretations by the Comptroller General and by judicial bodies. It contains a comprehensive analysis of these expressions, including their purpose, requirements, and the effect of failure to comply with these requirements, as well as their relationship to BOB Circular A-76, as revised.

He concluded his study, as follows:

There is clear recognition of the national policy embodied in the personnel laws in BOB Directive A-76, which prescribes contracting policy for the executive branch. This policy directive explicitly negates any intent to alter existing authorities, or to justify departure from any law or regulation of the Civil Service Commission, or to avoid established salary

or personnel limitations. Contracts for personal services which in fact and in law do depart from civil service laws and regulations, are accordingly in violation of this policy.

That an agency or management official may consider the requirements of the civil service laws and policies difficult or tedious in application is no justification for turning the hiring and management of personnel over to a contractor.

The foregoing findings and conclusions have been distilled from Commission experience and constitute the basis of the Commission's concern in the matter of contract practices. There is no intent or purpose to reflect adversely upon the performance or capability of any contractor or upon the unparalleled contribution of private enterprise to government programs.

It is, however, considered necessary for the full discharge of the Civil Service Commission's duties and responsibilities as the central staff agency for civilian personnel, to clarify and amplify the legal, policy, and factual basis upon which contracts for personal services are proscribed under the national policy expressed in the civil service laws.

On November 1, 1967, the Comptroller General, in a letter to the Chairman of the Civil Service Commission commenting on the NASA Legal Opinion and the Policy Statement attached thereto, stated that the GAO has not had nor does it now have any disagreement with the Commission as to the standards to be applied in determining whether a contract creates a relationship with the Government tantamount to that of employer-employee. He stated further that the elements required by the Opinion of the Commission's General Counsel to be used in determining whether a contract, by its terms, or in its performance, constitutes the procurement of personal services proscribed by the personnel laws would be most useful to his staff in their reviews in this area.

The Comptroller General, after noting that the decision regarding the two Goddard Space Flight Center contracts, was consistent with the position taken by the Commission in 1965, in connection with the contract technicians at the Fuchu Air Force Base, Japan, stated that GAO concurred in the action taken at that time and concurred as well in the action indicated in the NASA situation.

Concerning the application of these principles to the general area of support service contracts, he stated:

I recognize that differences of opinion may sometimes exist as to the relationship created under the terms or operation of particular support service contracts because of differing conclusions as to the application of the general criteria and elements to specific situations. We think it is clear from the Opinion, however, that no single provision of a contract, such as the task assignment or technical direction requirement, may constitute the basis for a determination that the contract is or is not proscribed by the personnel laws. Rather, the Opinion requires, before an adverse determination, (1) a realistic consideration of the provisions of the entire contract and the overall substance of the operations thereunder, and (2) a con-

clusion that each of the stated elements is involved therein to a substantial degree.

My view is that the Civil Service Commission and the General Accounting Office have a continuing responsibility to assure that applicable laws are not bypassed. To that end determinations must of necessity be made that will assure such compliance. Accordingly, as such matters come to our attention during our audit activities, we will continue to consult with representatives of the Commission regarding technical support service and similar contracts which do not appear to meet the general criteria and elements set forth in the Opinion.

The General Accounting Office in the exercise of its responsibilities in this area also will continue to undertake to determine whether agencies are operating in an economical and efficient manner in carrying out their functions.

APPENDIX C

UNRESOLVED ISSUES INVOLVING BOB CIRCULAR A-76

A review of the preceding materials and events reveals that a number of important issues remain to be resolved, relative to Circular A-76, as between the General Accounting Office, the Bureau of the Budget, the Department of Defense, and the private sector. As noted earlier, many of these issues are capable of being resolved or comprised, as between the Federal agencies involved. However, it is extremely doubtful whether solutions may be found relative to cost comparison studies, including the methods used and the items to be considered in the computation, which will be acceptable to the Federal agencies and the private sector.

The specific issues relate to (1) scope or coverage of the circular and policy, (2) the policy to be followed in determinations as between performance in-house or by contract, and (3) items to be considered in cost comparison studies.

Issues involving the scope, coverage and administration of the circular and policy

Should the stated purpose of the circular be modified to indicate that it is intended to foster and promote the private enterprise system?

Comment.—BOB Bulletin No. 60-2 and its predecessors indicated that they were issued "because the private enterprise system is basic to the American economy." While this was not challenged generally, there were instances in which it appeared that actions intended for the benefit of the private enterprise system were not necessarily in the interests of the general taxpayers who are made up of many persons not directly associated with commercial interests, (e.g., school teachers, policemen, retired people, military personnel, housewives, etc.). BOB Circular No. A-76, which replaced the bulletin, does not indicate that its purpose is to protect the private enterprise system, but does state that it is in the National interest for the Government to avoid the unnecessary

capital investments, management responsibilities, losses from obsolescence and reduced tax revenues which result when the Government does things which others are capable of doing economically and effectively. Industry associations, including such organizations as the NICB, have continued to argue that the present language in the circular should be deleted and the language in the old bulletin be reinstated. The argument for this proposal is that the new language is much weaker than the old and represents a "watering down" of the policy. This view has not had much acceptance by the executive branch agencies which do not consider a policy based on the National interest instead of on a particular element of businessmen and stockholders in corporations as a "watering down".

What dollar limitations should be established for control of "new starts?"

Comment.—It is generally recognized that the best opportunity to decide whether a product or service should be provided "in-house" or by contract is before actions are taken and capital investments made. This includes not only complete new installations but also expansions, modernizations and replacements of existing facilities. However, it is not practical to control individually the changes involving very small investments or added costs. The BOB Circular originally established minimum standards of \$25,000 in capital investments or \$50,000 in additional costs. DOD considered these limits too small and BOB has doubled these amounts. However, DOD believes further flexibility may be needed to avoid detailed surveys of routine actions caused by normal increases in workload rather than changes in programs.

Should Government-owned contractor-operated activities be excluded from the scope of the Circular and, if so, what policies should apply to GOCO situations?

Comment.—GAO recommended exclusion and BOB agreed. Industry generally disagrees. DOD staff believes complete exclusion may be questionable and suggests that if GOCOS are to continue to be excluded, there is need to cover these complex situations. The present situation appears to leave the entire GOCO area with no clear policy.

Should activities traditionally performed by civil service personnel be identified and exempted from the general policy favoring reliance upon commercial sources?

Comment.—Proposals have been made that activities which have been performed satisfactorily by civil service personnel should be continued on that basis without being challenged under the BOB Circular. Certain language in a recent legal opinion issued from the Civil Service Commission and endorsed by the GAO seems to support this view. On the other hand, there is considerable pressure from industry groups and strong support within the executive branch for the view that traditional patterns acquire no vested exemptions and should be subjected to challenge.

Should the scope of the Circular include activities of United States firms working for the Government outside the United States, its ter-

ritories and possessions, the Commonwealth of Puerto Rico, and the Panama Canal?

Comment.—Circular A-76 has been interpreted as being limited to activities within the United States, however, there are many United States firms performing contracts for the United States in foreign countries, such as Vietnam. Although there appears to be no reason to protect the interests of *foreign* firms serving the United States in foreign countries, there is no basis upon which to exclude foreign-based U.S. firms from the application of the Circular. Another factor is that if the Circular is to provide for cost studies to justify certain types of service contracts, it would necessarily include foreign areas.

Should the policy guidelines be applicable to decisions on whether to purchase or lease equipment and other property?

Comment.—The circular has been broadened to include lease vs. purchase issues. DOD has not questioned this action but has raised questions concerning whether all features of the circular can be applied to lease vs. purchase issues without qualification.

Should decisions on the part of executive branch agencies to start or continue Government commercial or industrial activities be (a) subjected to independent review by BOB, GAO or some other agency inside or outside of the Government, and (b) be required to be published in the Federal Register in advance of action in order to provide opportunities for challenge and debate by industry?

Comment.—(a) Many industrial groups advocate an independent review of all decisions to adopt in-house alternatives, based upon the theory that Federal agencies are strongly biased in favor of in-house performance. This view is opposed by BOB, GAO and DOD on the ground that it is not feasible, from an operating standpoint, to subject numerous day-to-day transactions to a central review by agencies not acquainted with the circumstances, and that responsibility must be vested in the heads of the agencies involved. They note further that overwhelming Government reliance upon industry not only for ordinary commercial items and services, but also for weapons, research, etc., strongly negates any allegation of bias. It is agreed, however, that proposed “new starts” should be subjected to prior *budget* reviews, thus subjecting them to agency budget controls, the scrutiny of BOB and congressional Appropriations Committees, and ultimately the Congress. BOB instructions (Circular A-11) have been revised to provide for budgetary control of “new starts”.

(b) A requirement of prior publication of decisions to start or continue in-house Government commercial or industrial activities advocated by industry, is opposed by BOB, DOD, and GAO on the ground that agencies must be in a position to proceed with decisions to start or continue required services and products without the disruption or delays in their operations which would result from the subjection of each decision to challenge, extended delays and debate. Affected industries may and do frequently protest such decisions to agencies, to the President and to the Congress, and are subject to review and criticism by the Comptroller General and congressional committees.

Issues involving basic policies in determinations as between performance in-house or by contract

Should cost comparison studies be conducted to justify *contracting* arrangements as well as to support decisions favoring "*in-house* alternatives?

Comment.—The BOB circular requires studies only to justify "*in-house*" alternatives (except when there is reason to believe the contract price is too high or when a contractor builds structures to Government specifications). GAO has challenged this as a one-sided approach, especially with respect to support service contracts where the contractors' principal contribution is manpower. GAO suggests a separate policy statement for support service contracts. BOB has not done this, but has revised the circular slightly to emphasize cost studies when deemed advisable. DOD's implementing directive *requires* cost studies of *contractual* arrangements for support services as well as "*in-house*." However, this has created a very heavy burden of studies ranging over a wide field of contractual arrangements. The DOD staff has indicated the need to narrow the range of cost study requirements in order to focus on areas most in need of attention, e.g., (1) where contracts are awarded on a sole source basis or with very limited competition, (2) where Government's costs are directly affected by contractor costs (as in the case of CPFF contracts), and (3) where the Government does not avoid capital risks or management responsibility by relying on contractors. *This is a key issue.*

What cost differential should be established between contractual and "*in-house*" alternatives in order to allow for Governmental costs which tend to be hidden or unmeasurable.

Comment.—BOB Bulletin No. 60-2 provided that "*in-house*" alternatives would not be chosen unless the cost of relying upon commercial sources was "*disproportionately higher*." This proved too vague a standard. BOB Circular No. A-76 contained language that the differential should vary depending upon capital investment involved, risk of obsolescence, etc., but that in case of "*new starts*" the differential should be at least 10 percent. GAO and DOD criticized the application of this differential to service contracts where the Government retains overall management responsibility and the contractor assumes no risk, and uses Government facilities and equipment. Circular A-76 as revised, permits the use of a lower differential in such cases, but provides no guidance. GAO and DOD are not entirely satisfied with this solution because it seems to provide no policy guidance and is likely to lead to a variety of practices by agencies. Industry is generally opposed to any reduction in differential and some groups are pressing for a much larger differential—at least 20 percent.

Should agencies use the incremental cost method in comparing costs of commercial and in-house alternatives, and should overhead be included in computing incremental costs?

Comment.—BOB, DOD and GAO agree that the incremental cost approach is sound, except that GAO extends the overhead factors in such a way that no overhead is included in Government costs unless it is demonstrated in each individual instance that

such costs would be increased. The DOD staff believes that some exception should be made with respect to overhead factors because the true effect of a conversion from commercial to in-house, or vice versa, upon many overhead factors usually cannot be identified. DOD staff notes further that the nature of overhead costs is such that they cannot be demonstrated in each individual case, with the result that the costs of substantial overhead organizations may not be considered under any estimates and are completely overlooked. Industry generally believes that the incremental approach is incorrect and that its use guarantees that in-house performance will appear to be less costly than commercial alternatives. Industry also disagrees strongly with the GAO position on overhead and questions relative to this point have also been raised within both the executive and legislative branches. *This is a basic issue.*

Issues involving items to be considered in cost comparison studies

In conducting cost comparison studies, should computations of interest on Government capital investments be based on the rates of interest paid by the Government or the amount which commercial sources will be required to pay?

Comment.—Circular A-76 provides for computation of Government interest costs at the rates actually paid by the Government for its long term obligations. Industry groups contend that this places them at a disadvantage because they must pay a higher rate for capital, and that the Government should apply the rate which private companies will pay rather than the lower rate actually paid by the Government. BOB, GAO and DOD have supported the use of the actual Government rates, since they represent the costs incurred by the Government and should not be inflated because industry incurs higher costs.

Should costs of relying on commercial sources include the costs of premature retirement of personnel caused by converting from "in-house" to commercial alternatives?

Comment.—GAO has advocated inclusion of these costs. The DOD staff has questioned whether early retirement actually is more costly to the Government under existing actuarial principles being applied to the Federal Retirement System, as well as the feasibility of determining such costs in actual operating conditions.

Should costs which would be incurred under both commercial and "in-house" alternatives be deleted from cost comparison studies as "wash" items?

Comment.—GAO believes such items should be deleted and BOB has revised its circular in accordance with GAO's views. DOD staff contends that, in theory, this practice should not affect the end result in any way, but deletion of major cost factors could complicate the evaluation and verification of the comparison unless these so-called "wash" items are clearly identified and included in the statement as auxiliary data.

Should the costs of retirement programs include only the amounts currently being paid into such programs from appropriated funds or

should they include the costs of such programs as estimated by actuaries?

Comment.—The Government currently pays 6½ percent of employees' salaries into retirement funds, thus equaling the amounts paid by employees. However, it is claimed that these payments are insufficient to maintain the fund on a sound actuarial basis. Industry has objected to the omission of these additional costs in the original circular. The revised circular provides for a calculation on "a normal cost" basis, which is intended to mean the actuarial costs *currently* being incurred without reference to liabilities incurred as a result of allowing various groups to be covered by the system although they had not paid into it. DOD did not recommend such action and questions the feasibility of requiring field installations to include these costs when they have no knowledge or specialized training for determining the additional amounts. DOD staff also questions whether it is necessary or advisable to recruit a sufficient number of actuaries to make these complex calculations throughout the country, and whether such additional costs should be charged without critical analysis of the actuarial status of the Social Security funds which would be the alternative to "in-house" performance. This is particularly true as payments from Social Security funds are increased without increasing payments into the fund.

To what extent should losses of tax revenues be included as cost factors in determining whether contracts are more or less costly than "in-house" alternatives?

Comment.—When contractors provide products or services to the Government, they pay taxes which are not paid when "in-house" alternatives are adopted. Circular A-76 provides that Federal tax revenues lost through reliance upon "in-house" alternatives should be considered costs of Government operations. This does not apply to State and local taxes as the circular is now drafted. On the other hand, when contract employees remain at posts in foreign countries for more than 17 months they are eligible for very substantial exemptions from payment of Federal income taxes. Government employees in similar situations must pay income taxes the same as if they remained within the United States. The circular makes no provision for considering these tax exemptions as costs when products or services are obtained commercially. GAO, DOD, and BOB are in agreement that Federal but not State or local taxes should be considered as costs of "in-house" alternatives. The principal reasons for excluding State and local taxes from these cost studies are (1) the Federal Government does not pay State and local taxes and, in view of unsuccessful attempts to enact "payments in lieu" legislation, it appears such allowances should not be made without specific statutory authority; (2) there has been no evidence indicating that allowances for State and local taxes are necessary in order for commercial sources to complete successfully; (3) in the absence of demonstrated need, such allowances would become invitations for contractors to bid higher prices than if they were not permitted; (4) there is no assurance that Congress would provide the additional appropriations needed to pay the higher prices which would

result from allowances of State and local taxes and, in the absence of such appropriations, the additional costs would necessarily be paid from funds intended for carrying out agencies' basic programs; (5) it is very difficult to ascertain amounts of State and local taxes, due to the existence of over 90,000 different tax jurisdictions with varying rates and assessment policies and practices, special tax incentives granted by local jurisdictions to attract industries to localities, etc.; (6) the Federal Government is providing for itself many services on its installations for which State and local taxes are assessed, including schools, police patrols, street maintenance, etc., and should not be required to pay again for these services, and (7) where Federal activities create additional workloads for State and local Governments, special payments are made either as payments in lieu of taxes or payments for construction and school operating expenses in so-called "impacted areas." Industry groups continue to press for inclusion of State and local taxes in these cost comparisons and *this must be considered a major issue*. Industry generally has not indicated whether it will object to inclusion as a cost of relying on commercial sources the taxes lost through reliance upon contractors in foreign countries but such objections may be anticipated if a decision is made to include these costs.

APPENDIX D

EXECUTIVE OFFICE OF THE PRESIDENT,
BUREAU OF THE BUDGET,
Washington, D.C., August 30, 1967.

[Circular No. A-76 (Revised), Transmittal Memorandum No. 1]

To: The heads of executive departments and establishments.

Subject: Policies for acquiring commercial or industrial products and services for Government use.

Transmitted herewith is a revision of Bureau of the Budget Circular A-76 dated March 3, 1966. It is issued to clarify some provisions of the earlier circular and to lessen the burden of work by the agencies in implementing its provisions. A brief summary of the changes is attached.

There is no change in the Government's general policy of relying upon the private enterprise system to supply its needs, except where it is in the national interest for the Government to provide directly the products and services it uses.

We intend to keep the provisions of the circular under continuing review. We anticipate that further changes will be desirable in light of experience gained from implementing the circular's provisions, including the required reviews of existing Government commercial or industrial activities to be completed by June 30, 1968. We intend to give special attention to the adequacy of the guidelines contained in the circular for such matters as comparative cost analyses; the circumstances under which cost differentials in favor of private enter-

prise are appropriate; and the use of contracts involving support services that require minimal capital investment.

We welcome your suggestions.

PHILLIP S. HUGHES,
Acting Director.

EXECUTIVE OFFICE OF THE PRESIDENT,
BUREAU OF THE BUDGET,
Washington, D.C., August 30, 1967.

[Circular No. A-76 (Revised)]

To: The heads of executive departments and establishments.

Subject: Policies for acquiring commercial or industrial products and services for Government use.

1. *Purpose.*—This circular replaces Bureau of the Budget Circular A-76 issued March 3, 1966. It is issued to clarify some provisions of the earlier circular and to lessen the burden of work by the agencies in implementing its provisions. The basic policies to be applied by executive agencies in determining whether commercial and industrial products and services used by the Government are to be provided by private suppliers or by the Government itself are the same as those contained in Circular A-76 dated March 3, 1966.

2. *Policy.*—The guidelines in this circular are in furtherance of the Government's general policy of relying on the private enterprise system to supply its needs.

In some instances, however, it is in the national interest for the Government to provide directly the products and services it uses. These circumstances are set forth in paragraph 5 of this circular.

No executive agency will initiate a "new start" or continue the operation of an existing "Government commercial or industrial activity" except as specifically required by law or as provided in this circular.

3. *Definitions.*—For purposes of this circular:

a. A "new start" is a newly established Government commercial or industrial activity involving additional capital investment of \$25,000 or more or additional annual costs of production of \$50,000 or more. A reactivation, expansion, modernization or replacement of an activity involving additional capital investment of \$50,000 or more or additional annual costs of production of \$100,000 or more are, for purposes of this circular, also regarded as "new starts." Consolidation of two or more activities without increasing the overall total amount of products or services provided is not a "new start."

b. A *Government commercial or industrial activity* is one which is operated and managed by an executive agency and which provides for the Government's own use a product or service that is obtainable from a private source. The term does not include a Government-owned, contractor-operated activity.

c. A *private commercial source* is a private business concern which provides a commercial or industrial product or service required by agencies and which is located in the United States, its territories and possessions, the District of Columbia, or the Commonwealth of Puerto Rico.

4. *Scope.*—This circular is applicable to commercial and industrial products and services used by executive agencies, except that it:

a. Will not be used as authority to enter into contracts if such authority does not otherwise exist nor will it be used to justify departure from any law or regulation, including regulations of the Civil Service Commission or other appropriate authority, nor will it be used for the purpose of avoiding established salary or personnel limitations.

b. Does not alter the existing requirement that executive agencies will perform for themselves those basic functions of management which they must perform in order to retain essential control over the conduct of their programs. These functions include selection and direction of Government employees, assignment of organizational responsibilities, planning of programs, establishment of performance goals and priorities, and evaluation of performance.

c. Does not apply to managerial advisory services such as those normally provided by an office of general counsel, a management and organization staff, or a systems analysis unit. Advisory assistance in areas such as these may be provided either by Government staff organizations or from private sources as deemed appropriate by executive agencies.

d. Does not apply to products or services which are provided to the public. (But an executive agency which provides a product or service to the public should apply the provisions of this circular with respect to any commercial or industrial products or services which it uses.)

e. Does not apply to products or services obtained from other Federal agencies which are authorized or required by law to furnish them.

f. Should not be applied when its application would be inconsistent with the terms of any treaty or international agreement.

5. *Circumstances under which the Government may provide a commercial or industrial product or service for its own use.*—A Government commercial or industrial activity may be authorized only under one or more of the following conditions:

a. *Procurement of a product or service from a commercial source would disrupt or materially delay an agency's program.* The fact that a commercial or industrial activity is classified or is related to an agency's basic program is not an adequate reason for starting or continuing a Government activity, but a Government agency may provide a product or service for its own use if a review conducted and documented as provided in paragraph 7 establishes that reliance upon a commercial source will disrupt or materially delay the successful accomplishment of its program.

b. *It is necessary for the Government to conduct a commercial or industrial activity for purposes of combat support or for individual and unit retraining of military personnel or to maintain or strengthen mobilization readiness.*

c. *A satisfactory commercial source is not available and cannot be developed in time to provide a product or service when it is needed.* Agencies' efforts to find satisfactory commercial sources should be supplemented as appropriate by obtaining assistance from the General Services and Small Business Administrations or the Business and Defense Services Administration. Urgency of a requirement is not an adequate reason for starting or continuing a Government commercial

or industrial activity unless there is evidence that commercial sources are not able and the Government is able to provide a product or service when needed.

d. *The product or service is available from another Federal agency.* Excess property available from other Federal agencies should be used in preference to new procurement as provided by the Federal Property and Administrative Services Act of 1949, and related regulations.

Property which has not been reported excess also may be provided by other Federal agencies and unused plant and production capacity of other agencies may be utilized. In such instances, the agency supplying a product or service to another agency is responsible for compliance with this circular. The fact that a product or service is being provided to another agency does not by itself justify a Government commercial or industrial activity.

e. *Procurement of the product or service from a commercial source will result in higher cost to the Government.* A Government commercial activity may be authorized if a comparative cost analysis prepared as provided in this circular indicates that the Government can provide or is providing a product or service at a cost lower than if the product or service were obtained from commercial sources.

However, disadvantages of starting or continuing Government activities must be carefully weighed. Government ownership and operation of facilities usually involve removal or withholding of property from tax rolls, reduction of revenues from income and other taxes, and diversion of management attention from the Government's primary program objectives. Losses also may occur due to such factors as obsolescence of plant and equipment and unanticipated reductions in the Government's requirements for a product or service. Government commercial activities should not be started or continued for reasons involving comparative costs unless savings are sufficient to justify the assumption of these and similar risks and uncertainties.

6. *Cost comparisons.*—A decision to rely upon a Government activity for reasons involving relative costs must be supported by a comparative cost analysis which will disclose as accurately as possible the difference between the cost which the Government is incurring or will incur under each alternative.

Commercial sources should be relied upon without incurring the delay and expense of conducting cost comparison studies for products or services estimated to cost the Government less than \$50,000 per year. However, if there is reason to believe that inadequate competition or other factors are causing commercial prices to be unreasonable, a cost comparison study will be directed by the agency head or by his designee even if it is estimated that the Government will spend less than \$50,000 per year for the product or service. A Government activity should not be authorized on the basis of such a comparison study, however, unless reasonable efforts to obtain satisfactory prices from existing commercial sources or to develop other commercial sources are unsuccessful.

Cost comparison studies also should be made before deciding to rely upon a commercial source when terms of contracts will cause the Government to finance directly or indirectly more than \$50,000 for cost of facilities and equipment to be constructed to Government specifications. Cost comparison studies should also be made in other cases if there is reason to believe that savings can be realized by the Govern-

ment providing for its own needs. Such studies will not be made, however, if in-house provision of the product or service, or commercial procurement thereof, is clearly justified in accordance with other provisions of this circular.

The determination as to whether to purchase or to lease equipment or to construct buildings or acquire their use under lease-construction arrangements, involves a determination of the difference in costs under the alternatives, and the principles set forth in this circular should be applied to the extent relevant in making such determinations.

a. *Costs of obtaining products or services from commercial sources* should include amounts paid directly to suppliers, transportation charges, and expenses of preparing bid invitations, evaluating bids, and negotiating, awarding, and managing contracts. Costs of materials furnished by the Government to contractors, appropriate charges for Government-owned equipment facilities used by contractors and costs due to incentive or premium provisions in contracts also should be included. If discontinuance of a Government commercial or industrial activity will cause a facility being retained by the Government for mobilization or other reasons to be placed in a standby status, the costs of preparing and maintaining the facility as standby also should be included. Similarly, if such a discontinuance is expected to result in premature retirement of Government employees which will cause a significant increase in retirement costs to the Government, such increased cost should be added to the cost of procurement from commercial sources. Costs of obtaining products or services from commercial sources should be documented and organized for comparison with costs of obtaining the product or service from a Government activity.

b. For purposes of economy and simplicity in making cost comparison studies, generally agreed costs that would tend to be the same under either alternative need not be measured and included (for example, bid and award costs and operating costs under lease-purchase alternatives).

c. *Costs of obtaining products or services from Government activities* should include all costs which would be incurred if a product or service were provided by the Government and which would not be incurred if the product or service were obtained from a commercial source. The objectives should be to compute, as realistically as possible, the incremental or additional cost that would be incurred by the Government under the alternatives under consideration. In making such determinations it is important that recognition be given to the full amount of additional or incremental direct and indirect cost to be incurred in providing the products or services required. Under this general principle, the following costs should be included, considering the circumstances of each case:

(1) *Personal services and benefits.*—Include costs of all elements of compensation and allowances for both military and civilian personnel, including the full cost to the Government of retirement systems, calculated on a normal cost basis, Social Security taxes where applicable, employees' insurance, health, and medical plans, (including services available from Government military or civilian medical facilities), living allowances, uniforms, leave, termination and separation allowances, travel and moving expenses, and claims paid through the Bureau of Employees' Compensation.

(2) *Materials, supplies, and utilities services.*—Include costs of supplies and materials used in providing a product or service and costs of transportation, storage, handling, custody, and protection of property, and costs of electric power, gas, water, and communications services.

(3) *Maintenance and repair.*—Include costs of maintaining and repairing structures and equipment which are used in providing a product or service.

(4) *Damage or loss of property.*—Include costs of uninsured losses due to fire or other hazard, costs of insurance premiums and costs of settling loss and damage claims.

(5) *Federal taxes.*—Include income and other Federal tax revenues (except Social Security taxes) received from corporations or other business entities (but not from individual stockholders) if a product or service is obtained through commercial channels. Estimates of corporate incomes for these purposes should be based upon the earnings experience of the industry, if available, but if such data are not available, *The Quarterly Financial Report of Manufacturing Corporations*, published by the Federal Trade Commission and the Securities and Exchange Commission may be consulted. Assistance of the appropriate Government regulatory agencies may be obtained in estimating taxes for regulated industries.

(6) *Depreciation.*—Compute depreciation as a cost for any new or additional facilities or equipment which will be required if a Government activity is started or continued. Depreciation will not be allocated for facilities and equipment acquired by the Government before the cost comparison study is started. However, if reliance upon a commercial source will cause Government-owned equipment or facilities to become available for other Federal use or for disposal as surplus, the cost comparison analysis should include as a cost of the Government activity, an appropriate amount based upon the estimated current market value of such equipment or facilities. The Internal Revenue Service publication, *Depreciation Guidelines and Rules* may be used in computing depreciation. However, rates contained in this publication are maximums to be used only for reference purposes and only when more specific depreciation data are not available. Accelerated depreciation rates permitted in some instances by the Internal Revenue Service will not be used. In computing the depreciation cost of new or additional facilities or equipment to be acquired if a Government activity is started or continued and in determining comparative costs under lease-purchase alternatives, appropriate recognition should be given to estimated residual or salvage values of the facilities or equipment.

(7) *Interest.*—Compute interest for any new or additional capital to be invested based upon the average rate of yield for long-term Treasury bonds as shown in the current monthly Treasury Bulletin. The method of computation should provide for reduction in the capital investment to which interest is applied over the useful life of the asset on a straight-line basis.

(8) *Indirect costs.*—Include any additional indirect costs incurred resulting from a Government activity for such activities as management and supervision, budgeting, accounting, personnel, legal and other applicable services.

7. *Administering the policy.*

a. *Inventory.*—Each agency will compile and maintain an inventory of its commercial or industrial activities having an annual output of products or services costing \$50,000 or more or a capital investment of \$25,000 or more. In addition to such general descriptive information as may be appropriate, the inventory should include for each activity the amount of the Government's capital investment, the amount paid annually for the products or services involved, and the basis upon which the activity is being continued under the provisions of this circular. The general descriptive information needed for identifying each activity should have been included in the inventory by June 30, 1966. Other information needed to complete the inventory should be added as reviews required in paragraphs 7.b. and c. are completed.

b. *"New starts."*

(1) A "new start" should not be initiated until possibilities of obtaining the product or service from commercial sources have been explored and not until it is approved by the agency head or by an assistant secretary or official of equivalent rank on the basis of factual justification for establishing the activity under the provisions of this circular.

(2) If statutory authority and funds for construction are required before a "new start" can be initiated, the actions to be taken under this circular should be completed before the agency's budget request is submitted to the Bureau of the Budget. Instructions concerning data to be submitted in support of such budget requests will be included in annual revisions of Bureau of the Budget Circular No. A-11.

(3) A "new start" should not be proposed for reasons involving comparative costs unless savings are sufficient to outweigh uncertainties and risks of unanticipated losses involved in Government activities.

The amount of savings required as justification for a "new start" will vary depending on individual circumstances. Substantial savings should be required as justification if a large new or additional capital investment is involved or if there are possibilities of early obsolescence or uncertainties regarding maintenance and production costs, prices and future Government requirements. Justification may be based on smaller anticipated savings if little or no capital investment is involved, if chances for obsolescence are minimal, and if reliable information is available concerning production costs, commercial prices and Government requirements. While no precise standard is prescribed in view of these varying circumstances a "new start" ordinarily should not be approved unless costs of a Government activity will be at least 10 percent less than costs of obtaining the product or service from commercial sources. It is emphasized that 10 percent is not intended to be a fixed figure.

A decision to reject a proposed "new start" for comparative cost reasons should be reconsidered if actual bids or proposals indicate that commercial prices will be higher than were estimated in the cost comparison study.

(4) When a "new start" begins to operate it should be included in an agency's inventory of commercial and industrial activities.

c. Existing Government activities.

(1) A systematic review of existing commercial or industrial activities (including previously approved "new starts" which have been in operation for at least 18 months) should be maintained in each agency under the direction of the agency head or the person designated by him as provided in paragraph 8. The agency head or his designee may exempt designated activities if he decides that such reviews are not warranted in specific instances. Activities not so exempted should be reviewed at least once before June 30, 1968. More frequent reviews of selected activities should be scheduled as deemed advisable. Activities remaining in the inventory after June 30, 1968, should be scheduled for at least one additional followup review during each three-year period but this requirement may be waived by the agency head or his designee if he concludes that such further review is not warranted.

(2) Reviews should be organized in such a manner as to ascertain whether continued operation of Government commercial activities is in accordance with the provisions of this circular. Reviews should include information concerning availability from commercial sources of products or services involved and feasibility of using commercial sources in lieu of existing Government activities.

(3) An activity should be continued for reasons of comparative costs only if a comparative cost analysis indicates that savings resulting from continuation of the activity are at least sufficient to outweigh the disadvantages of Government commercial and industrial activities. No specific standard or guideline is prescribed for deciding whether savings are sufficient to justify continuation of an existing Government commercial activity and each activity should be evaluated on the basis of the applicable circumstances.

(4) A report of each review should be prepared. A decision to continue an activity should be approved by an assistant secretary or official of equivalent rank and the basis for the decision should appear in the inventory record for the activity. Activities not so approved should be discontinued. Reasonable adjustments in the timing of such actions may be made, however, in order to alleviate economic dislocations and personal hardships to affected career personnel.

8. *Implementation.*—Each agency is responsible for making the provisions of this Circular effective by issuing appropriate implementing instructions and by providing adequate management support and procedures for review and followup to assure that the instructions are placed in effect. A copy of the implementing instructions issued by each agency will be furnished to the Bureau of the Budget.

If overall responsibility for these actions is delegated by the agency head, it should be assigned to a senior official reporting directly to the agency head.

If legislation is needed in order to carry out the purposes of this Circular, agencies should prepare necessary legislative proposals for review in accordance with Bureau of the Budget Circular No. A-19.

9. *Effective date.*—This circular is effective on October 2, 1967.

PHILLIP S. HUGHES,
Acting Director.

APPENDIX E

*The Personnel Laws as an Expression of National Policy**

All officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it. "It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives. *United States v. Lee*, 106 U.S. 196, 220, 1 S.Ct. 240, 27 L.Ed. 171 (1882).

"No department of the government has any other powers than those thus delegated to it by the people." *Hepburn v. Griswold*, 75

In a Government of delegated powers, where public office is a public trust, the authority to discharge official responsibilities reposes only in those persons duly appointed and vested by law with an office or employment. It is axiomatic that official authority can be delegated only to those properly appointed to exercise it. The Federal civilian service of the executive branch is in this aspect the personification of government by law; it is through the exercise of the powers of public office by Federal employees that the process of self-government is executed. The personnel systems prescribed by Congressional and Presidential authority constitute the exclusive methods of staffing this civilian service; of investing private persons with public authority.

Consistent with the genius of our government, the personnel and related statutes embody certain essential principles which must be observed if our concept of democracy is to be preserved.

Without express statutory authority a government agency cannot accept donated services from an individual, even if freely given.¹ A contrary rule of law would contain the seeds of tyranny and chicanery. Conversely, a Federal employee cannot accept any supplementation of salary from private interests.² To permit this would be to compromise integrity. A Federal employee cannot perform any service other than that for which his salary is appropriated by the Congress. To allow otherwise would permit unauthorized expenditures of public funds and confound accountability.³

Consistent with the notion that ours is a government of the people and by the people, the opportunity to gain public employment must be open to all—without regard to race, religion, color, national origin or political affiliation.

The power to create Federal positions outside the civil service and personnel laws cannot therefore be implied; it exists only if expressly provided by the Congress. For a properly appointed official to create a relationship that by law must be regarded as an employer-employee relationship, in derogation of the laws and regulations controlling Federal employment is *ultra vires*. To the extent the exercise of official authority and responsibility is in actual practice delegated through such acts to private persons or corporations, there is an unlawful delegation or an abdication. To the extent such acts contravene the specific requirements of the civil service laws they are illegal.

Consistent with the notion of a government for the people, only

*Prepared by the General Counsel, U.S. Civil Service Commission, and issued as an appendix to his opinion, October 1967.

¹ R.S. 3679 (1875), 31 U.S.C. 665(b).

² 18 U.S.C. 209.

³ Art. 1, sec. 9, cl. 7, U.S. Constitution, R.S. 3678 (1875), 31 U.S.C. 82(c), 628. Cf. *Converse v. United States*, 62 U.S. 462, 470 (1858).

those whose character, fitness, and loyalty⁴ are considered worthy of a public trust are deemed suitable, and only those willing to accept, under oath,⁵ the responsibilities of public service are appointed. Limitations imposed by law upon the individual's right to strike,⁶ political activity,⁷ and conflicting interests⁸ are strict but essential appurtenances to public office.

The classification law requires that governmental duties and responsibilities be identified and grouped into discrete positions, that positions be classified and that compensation be allotted on the principle of equal pay for equal work. The entitlement to a certain level of pay, to employee benefits, the evaluation of employee performance, accountability for public funds, government liability to third parties, employer-employee rights and obligations, and the ultimate legality of official acts are all affected by compliance or lack of compliance with the civil service and personnel laws.⁹

In addition, certain national policies of inherent social value are prescribed in the personnel laws. That honorable service in the armed forces of the United States deserves recognition through veterans preference is one such policy.¹⁰ Nondiscrimination on the basis of race, creed, color, sex, national origin,¹¹ or politics¹² is another. Official recognition and dealing with employee organizations conditioned upon a no-strike pledge is another.¹³ And economic security through retirement annuities for service or disability¹⁴ is yet another.

It is these principles and policies that are disserved when personnel are unlawfully procured by means of contract to perform duties under circumstances that must under law be regarded as creating an employer-employee relationship with the government. This is particularly acute where the contractor supplies personnel who work on government premises, use government equipment, and are interspersed with and directed by civil service employees. There is, in such situations, an "interface" between the contractor's personnel system and all facets of the civil service system which is abrasive to employee morale, erosive of civil service laws and policies and destructive of efficiency and sound management.

For example, the government and private employer alike know the evils of nepotism, personal favoritism, and patronage, and the perils of incompetence. The civil service system has met this problem with the competitive examining process. This process has stood the test of time and has been effective for a myriad of occupations in all types of labor markets. A civil service examination rating is accepted as evidence of competence by private and public employers alike.

Contractors may also examine their job applicants but the quality of such examinations vary widely. Some of the contracts we have examined call for personnel "competent to perform the work," or for "qualified" personnel. Standing alone, such standards are not especially

⁴ 5 U.S.C. 3333, 7311.

⁵ 5 U.S.C. 3331, 7311.

⁶ 5 U.S.C. 3333, 7311.

⁷ 5 U.S.C. 7321-7327.

⁸ 18 U.S.C. 201-219.

⁹ 5 U.S.C. 5101-5115, 5 U.S.C. 5331, 5 U.S.C. 6301-6324, 5 U.S.C. 8701-8716, 5 U.S.C. 8901-8913, 5 U.S.C. 4301-4308, 28 U.S.C. 2674, see e.g., 26 Op. Atty. Gen. 363 (1907), 32 Comp. Gen. 18.

¹⁰ 5 U.S.C. 3309-3319.

¹¹ 5 U.S.C. 7151. The policy of nondiscrimination applies to government contractors also.

¹² 5 U.S.C. 3303.

¹³ Executive Order 10988, 3 CFR (1959-1963 Comp.).

¹⁴ 5 U.S.C. 8331-8348.

meaningful. Where qualification standards are prescribed in contracts we find they are invariably civil service standards, sometimes slightly modified for the occasion. In our review of operations under contracts over the past two years, we often find in occupation after occupation, where both civil service and contractor employees are involved, that the assignments given civil service employees are the more responsible and difficult and require the greater skill.

In the matter of pay, such as incremental increases for superior performance,¹⁵ time in grade,¹⁶ and promotion practices, the use of contractor personnel sets up countervailing forces at the work site that derogate civil service objectives. Federal pay rates in the General Schedule are predicated on position classification principles. They are interrelated to provide orderly progression from one grade to another and designed to provide in-grade increases for performance at a satisfactory level of competence for periods of one year or longer.¹⁷ Although comparable pay with the private sector is the policy,¹⁸ Congressional action in prescribing General Schedule rates has resulted in compression at the higher levels, so that pay in the lower grades is comparable, and pay in the higher grades lower, than for private enterprise. Cash incentives are awarded only for special individual or group achievements.¹⁹ A minimum of one year must be served in grade before a regular promotion can be made to a higher grade.²⁰ Wage board employees' rates are set at levels equal to average prevailing rates for the same level or skills in private industry in the area involved.²¹ A wage board employee must be hired and compensated at established rates.

These compensation requirements of the public service do not necessarily bind the private contractor's pay, bonus, or promotion policies. For essentially the same work, performed under the same conditions, for the same government, a contractor and civil service employee of comparable skill and proficiency may be compensated and promoted at substantially disparate rates. Both, however, are paid by the government, one directly, the other indirectly.

Overtime work and pay levels are also prescribed by law for the civil servant,²² but subject only to individual contractor policies for the contractor employee. These on-the-job conditions lead to justifiable as well as fancied reasons for employee dissatisfaction. The disadvantage from the civil servant's perspective is often apparent. Where this is so, morale is depressed, motivation is dulled, performance is affected, and in the end the ability of the civil service to function efficiently and effectively is diminished.

Another adverse ramification of these disparities is that the government is in reality generating its own competition for scarce skills. The esoterics of space science and technology, for example, are the results of a national commitment to explore space. There is but one ultimate consumer and one ultimate beneficiary of this effort—the public.

For the government to bid for shortage category personnel against personal service contractors is highly obstructive to the civil service

¹⁵ 5 U.S.C. 5336.

¹⁶ 5 U.S.C. (1958 ed.) 43 note; 65 Stat. 757, § 1310 (1951).

¹⁷ 5 U.S.C. 5335.

¹⁸ 5 U.S.C. 5301–5302.

¹⁹ 5 U.S.C. 4501–4506.

²⁰ 5 U.S.C. (1958 ed.) 43 note; 65 Stat. 757, § 1310 (1951).

²¹ 5 U.S.C. 5341–5344.

²² 5 U.S.C. 5541–5544.

system and contrary to sound manpower utilization practices. It is apparent in many cases that the contractor employees who possess these scarce skills are employed, or become subcontractors to the contractor, solely for the purpose of having their services sold to the government. In these situations, the contractor who provides solely personal services is actually substituted by a contracting officer for the civil service system. The net effect, as has been established by General Accounting Office audits, may well be higher cost to the government for services which should have been, and could have been, provided by regularly appointed Federal employees.

These comparisons, founded upon our investigations of contracting practices at several government agencies, can be shown with the same adverse impact upon the civil service system across the broad spectrum of personnel administration. There are similar disparities between the civil service and contractor employees in the entitlement to, and use of, leave for vacation,²³ sickness,²⁴ military service,²⁵ jury duty,²⁶ voting,²⁷ blood donation, and family deaths; in compensation for on-the-job injuries²⁸; in retirement benefits for disability and old age²⁹; in group life³⁰ and health insurance benefits³¹; in travel and relocation allowances³²; in training and development opportunities³³; and in the rights and entitlements to inventions, patents, and the use of new technology^{33a}, among others.

The extent of these disparities is magnified by the obligations imposed by law and regulation upon the Federal employee. Unlike his counterpart employed by a contractor, the civil servant must proclaim his loyalty to our constitutional form of government,³⁴ under oath. His conduct is circumscribed by strict rules of ethics, prescribed by Executive order³⁵ and Congressional resolution³⁶ and special provisions of the civil and criminal laws relating to bribery,³⁷ graft,³⁸ conflicts of interest,³⁹ partisan political activity and fund raising,⁴⁰ misuse or destruction of government property and records,⁴¹ habitual use of intoxicants,⁴² agency for a foreign principal,⁴³ and the right to strike,⁴⁴ among others.

We must also consider the impact upon employee loyalty. An employee's loyalty to his employer, be it government or private enterprise is essential for efficiency of operations and for protection of the employee's interests. One surmises from our investigations that some contractor employees are sorely perplexed as to where their loyalties

²³ 5 U.S.C. 6303.

²⁴ 5 U.S.C. 6307.

²⁵ 5 U.S.C. 6323.

²⁶ 5 U.S.C. 6322, 5515, 5537.

²⁷ FPM Supp. 990-2, p. 630-51.

²⁸ 5 U.S.C. 8101-8150.

²⁹ 5 U.S.C. 8301-8348.

³⁰ 5 U.S.C. 8701-8716.

³¹ 5 U.S.C. 8901-8913.

³² 5 U.S.C. 5701-5742; 80 Stat. 323.

³³ 5 U.S.C. 4101-4118.

^{33a} Executive Order 10096, 15 Fed. Reg. 389 (1950); Presidential Memorandum and Statement of Government Patent Policy, issued October 10, 1963, 28 Fed. Reg. 10943 (1963).

³⁴ 5 U.S.C. 3331, 3333.

³⁵ Executive Order 11222; 3 CFR (1965).

³⁶ H. Con. Res. 175, 85th Cong. 72 Stat. Pt. 2-B-12.

³⁷ 18 U.S.C. 201.

³⁸ 18 U.S.C. 203.

³⁹ 18 U.S.C. 205, 207, 208.

⁴⁰ 5 U.S.C. 7321-7327.

⁴¹ 18 U.S.C. 2071.

⁴² 5 U.S.C. 7352.

⁴³ 18 U.S.C. 219.

⁴⁴ 5 U.S.C. 7311.

should lie—with the original contractor who hired them, the successor contractor that presently pays them, the future contractor that may hire or fire them, or the civil service supervisor in the unit in which they serve.

Civil service training, career development and merit promotion programs are incentives to motivate the employee to improve his skills, to enlarge his capabilities, and to adopt a public service career. These programs are mutually beneficial; the employee gains new capabilities and the government benefits by the retention of a skilled and experienced career civil servant. The training of contractor employees on the other hand is often at government request and either directly or indirectly at government expense. The government is not assured, however, of any continuing benefit from this investment.

Closely related to employee loyalty and morale is the matter of performance evaluation. Performance evaluation at best is a difficult, sensitive undertaking; however, where civil service and contractor employees are intermixed on the job, it becomes exceedingly difficult, if not impossible. This is particularly true where a contractor employee may be replaced by a civil service employee, or vice versa, on a particular task assignment prior to its completion.

As to on-the-job performance of the contractor employee, government managers have advised in the past that they could get an unsatisfactory contractor employee off the job in 24 hours. However, we are cited one example where separation was delayed three months and accomplished through the quarterly evaluation for determination of the incentive award fee. Presumably at this point, the contractor was informed that the "end product" e.g., the employee's services, were unsatisfactory.

Lastly, the furtherance of national policies through the civil service system may be compromised by unauthorized contracts for personal services. For example, in the Veterans Preference Act, now codified in title 5, United States Code, Congress has provided an absolute preference to veterans for positions of guards, elevator operators and custodians in the competitive service as long as preference eligibles are available.⁴⁵ And what of the policy objectives served by the statutory restrictions on partisan political activity by Federal employees and the prohibitions against the right to strike? By what authority does an administrative officer, perhaps even a minor one, decide in the course of contracting for personal services that veterans shall not be accorded preference for custodial jobs; or that what is tantamount to Federal employee status can be conferred without the concurrent obligations to refrain from exercising the right to strike, or to avoid pernicious political activity?

There is clear recognition of the national policy embodied in the personnel laws in BOB directive A-76, which prescribes contracting policy for the executive branch. This policy directive explicitly negates any intent to alter existing authorities, or to justify departure from any law or regulation of the Civil Service Commission, or to avoid established salary or personnel limitations. Contracts for personal services which in fact and in law do depart from civil service laws and regulations, are accordingly in violation of this policy.

That an agency or management official may consider the requirements of the civil service laws and policies difficult or tedious in appli-

⁴⁵ 5 U.S.C. 3310.

cation is no justification for turning the hiring and management of personnel over to a contractor.

The foregoing findings and conclusions have been distilled from Commission experience and constitute the basis of the Commission's concern in the matter of contract practices. There is no intent or purpose to reflect adversely upon the performance or capability of any contractor or upon the unparalleled contribution of private enterprise to government programs.

It is, however, considered necessary for the full discharge of the Civil Service Commission's duties and responsibilities as the central staff agency for civilian personnel, to clarify and amplify the legal, policy, and factual basis upon which contracts for personal services are proscribed under the national policy expressed in the civil service laws.



ation is no justification for turning the hiring and management of personnel over to a contractor.

The foregoing findings and conclusions have been derived from Commission experience and constitute the basis of the Commission's concept in the matter of contract practice. There is no intent to pass on reflect adversely upon the performance or capability of any contractor or upon the capabilities of any of the personnel engaged in government programs.

It is, however, considered necessary for the full disclosure of the Commission's views and responsibilities as to the matter of contract practice for civilian personnel to state and justify the policy and to state their views upon which contracts for personnel services are awarded under the national policy expressed in the Civil Service laws.



