Y4
G 74/9
Sp
3/2

1037-A

96th Congress
2d Session

COMMITTEE PRINT

GOVERNMENT
Storage

"HURRY-UP" SPENDING

A REPORT

PREPARED BY THE

SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS

UNITED STATES SENATE

KSU LIBRARIES
A11900 798499

DOCUMENTS
AUG 18 1980
FARRELL LIBRARY
KANSAS STATE UNIVERSITY

JULY 23, 1980

Printed for the use of the Committee on Governmental Affairs

U.S. GOVERNMENT PRINTING OFFICE
65-581 O WASHINGTON : 1980

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, D.C. 20402

AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

COMMITTEE ON GOVERNMENTAL AFFAIRS

ABRAHAM RIBICOFF, Connecticut, *Chairman*

HENRY M. JACKSON, Washington
THOMAS F. EAGLETON, Missouri
LAWTON CHILES, Florida
SAM NUNN, Georgia
JOHN GLENN, Ohio
JIM SASSER, Tennessee
DAVID PRYOR, Arkansas
CARL LEVIN, Michigan

CHARLES H. PERCY, Illinois
JACOB K. JAVITS, New York
WILLIAM V. ROTH, JR., Delaware
TED STEVENS, Alaska
CHARLES McC. MATHIAS, JR., Maryland
JOHN C. DANFORTH, Missouri
WILLIAM S. COHEN, Maine
DAVID DURENBERGER, Minnesota

RICHARD A. WEGMAN, *Chief Counsel and Staff Director*
MARILYN A. HARRIS, *Executive Administrator and Professional Staff Member*
HANNAH S. SISTARE, *Chief Minority Counsel and Staff Director*
ELIZABETH A. PREAST, *Chief Clerk*

SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT

CARL LEVIN, Michigan, *Chairman*

DAVID PRYOR, Arkansas

WILLIAM S. COHEN, Maine
DAVID DURENBERGER, Minnesota

LINDA J. GUSTITUS, *Chief Counsel and Staff Director*
SUSAN M. COLLINS, *Minority Staff Director*
STEVEN S. MICHAELS, *Professional Staff, for the Minority*
PEGGY L. WEEKS, *Professional Staff, for the Minority*

DOCUMENTS
AUG 18 1980
FARRELL LIBRARY
KANSAS STATE UNIVERSITY

U.S. SENATE,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT,
Washington, D.C., July 23, 1980.

HON. ABRAHAM RIBICOFF,
Chairman, Committee on Governmental Affairs, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Acting on its mandate to oversee "the efficiency and economy of government operations," the Subcommittee on Oversight of Government Management transmits the following report on wasteful fiscal year-end spending practices—and the management failures that lay behind them—in the Federal government.

Wasteful year-end spending by Executive officials, known colloquially as "hurry-up" spending, has been criticized by the Congress, the White House, and the public for decades.

Yet despite this criticism, the Subcommittee's report is the first attemp to comprehensively catalogue the costs and causes of rushed and needless spending by Federal officials before the close of the fiscal year on September 30, the deadline by which unobligated appropriations revert to the Treasury or are reported to the Congress for review.

In eleven months of investigation and three days of public hearings, the Subcommittee examined ten Federal agencies and departments responsible for tens of billions of dollars in contract expenditures each year.

None of the agencies and departments reviewed by the Subcommittee were found free of hurry-up spending abuses. Based on an analysis of the extent of needless expenditures, unnecessary non-competitive buying practices, inefficient administration and use of public and private resources, and other problems resulting from the year-end spending surge, the Subcommittee was forced to conclude that current management practices responsible for hurry-up spending costs the taxpayer, at a minimum, two billion dollars each fiscal year.

The causes of hurry-up spending are myriad. Inappropriate budgeting techniques, pay and promotion policies that fail to reward civil servants who save, procurement regulations that impose virtually no constraints on the buying habits of Federal officials, the inadequacy of Congress's responses to the problem, as well as other practices, all contribute to the current situation.

By far the most serious of the problems found by the Subcommittee were the failures of the Office of Management and Budget and the Office of Federal Procurement Policy, located within OMB, to oversee the management practices of the Executive branch. A number of agencies and departments have taken steps to control wastful year-end spending practices, but the pattern of reform is (1) haphazard, (2) slow in developing, (3) inconsistent among different agencies, (4) completely absent in others, and (5) proceeding with virtually no management support, coordiantion, guidance, or oversight from the OMB or the OFPP.

Preventing the wasteful practices that are the subject of this report is squarely within OMB's and OFPP's mandates. Accordingly, the Subcommittee has recommended a number of substantial changes in the procedures of the Office of the President that, if implemented, will ensure that these mandates are carried out. The Subcommittee has made other recommendations that are designed to improve the Federal budget process, provide Congress and the President with information necessary to evaluate Federal programs, and increase the incentives for prudent management at all levels in the Executive Branch.

Vigorous implementation of the management procedures recommended by the Subcommittee will, we believe, substantially improve the efficiency of Federal spending programs.

Sincerely,

CARL LEVIN,
Chairman.
WILLIAM C. COHEN,
Ranking Minority Member.

CONTENTS

	Page
I. Introduction	1
II. Findings	5
A. The Costs of Hurry-Up Spending are Immense	5
B. Hurry-Up Spending Results From Failures at All Levels of Government	7
1. The Budget Process Encourages Waste at Year's End	8
a. Appropriations Delays	8
b. The Budgetary "Catch-22"	10
2. Congressional Responses Have Been Inadequate	12
a. "Multi-Year" and "No-Year" Funds as a Solution to the "Use It or Lose It" Philosophy	12
b. Spending Limitations: The Department of Defense Experience	13
c. Proposals for an Expanded Use of the Spending Cap	14
3. Procurement Regulations Grant Discretion That Is Systematically Abused	16
a. Compressed Bidder Response Periods	17
b. Negotiation Under the Crunch	18
c. Lack of Audit Data	20
d. Unnecessary Sole-Source Contracts	21
e. Procurement Regulations: Alice's World	24
4. Federal Managers Neglect to Act to Prevent Year-End Waste	26
5. OMB Has Abdicated Its Responsibility to Oversee Agency Management Practices	27
a. Environmental Protection Agency	27
b. Department of Commerce	29
c. National Highway Traffic Safety Administration	30
d. Department of Interior	30
e. Department of Health, Education and Welfare	33
f. Law Enforcement Assistance Administration	34
g. Summary	36
III. Recommendations	39
A. General	39
B. OMB Should Establish Procedures for Oversight of Agency Procurement Spending	40
C. OMB Should Maintain an Accurate and Relevant Data Base on Government Contracts to Permit Monitoring of Competition	40
D. Substtantial New Restrictions Are Needed on Sole-Source Contracts	41
E. Procedures for Appraising Civil Service Performance Should Provide Strong Incentives for Prudent Management	41
F. The Size of Supplemental Appropriations Requests Should Be Reduced	42
G. Congress Should Not Impose Limitations on the Obligation of Funds at Fiscal Year's End	42
H. Inspectors General and Other Audit Personnel Should Thoroughly Audit Year-end Contracts	43
I. The Subcommittee Requests the Appropriate Officials to Respond to This Report	43
IV. Conclusion	43
V. Additional views of Senator Pryor	43

I. Introduction

As overseer of the Federal budget, Congress is responsible not only for the authorization and appropriation of funds for Federal spending programs, but also for checking wasteful management practices.

For the past 11 months, the Subcommittee on Oversight of Government Management of the Senate Committee on Governmental Affairs has investigated and studied the wasteful management practices that accompany the hasty award of Federal contracts just prior to the close of the fiscal year.

So-called "hurry-up" spending practices were recognized as potentially wasteful as early as 1921, when the first director of the newly established Bureau of the Budget issued a memorandum to the heads of all Executive departments and establishments criticizing "the practice heretofore among some of the departments and establishments of the Government to enter into contracts and obligations involving large amounts during the month of June (the last month of what was then the fiscal year), with the possible purpose and inevitable result of there being no unobligated balance to their credit at the close of the fiscal year." [1]

"As a check against further continuance of the practice," the director wrote, agency heads were to conduct examinations of the year-end contracts to determine "whether or not there has been any abuses (sic) of the discretion given to your purchasing officers," and to report the results of their review to the Budget Bureau.[2]

Whatever the effect of the memorandum and the investigations it ordered, it was not permanent.

In the 1970's, the General Accounting Office (GAO) issued a number of reports which indicated that the abuses of appropriations at fiscal year's end noticed more than half a century earlier had continued unabated. Among other discoveries, the GAO reported that:

> In fiscal years 1969 and 1970, the Community Services Administration, and its predecessor, the Office of Economic Opportunity, awarded 45 and 56 per cent of its contracts in the final month of the fiscal year.[3]
>
> In fiscal year 1975, the Commerce Department's Maritime Administration, the Environmental Protection Agency, and selected agencies within the Department of Transportation spent 65 per cent of their research and development contract funds in the last month of the fiscal year, implying "that funds are obligated to prevent the authority from lapsing or to avoid reductions in future appropriations." [4]

---

[1] U.S. Bureau of the Budget, Circular No. 28 (September 1, 1921).

[2] Id.

[3] Comptroller General of the United States, U.S. General Accounting Office, "Report to the Congress: Contract Award Procedures and Practices of the Office of Economic Opportunity Need Improving" (Dec. 15. 1971), at 2.

[4] Comptroller General of the United States, U.S. General Accounting Office, "Report to the Ranking Minority Member, U.S. Senate Governmental Affairs Committee: Federal Agencies' Contracting for Research and Development in the Private, Profitmaking Sector," (Mar. 24, 1977), at 6–7.

Millions of dollars of funds had been unnecessarily awarded on a non-competitive basis in the final days of fiscal year 1976 in two separate federal agencies.[5]

General Services Administration officials had improperly obligated millions of dollars in alteration contract funds at the end of fiscal year 1977 to eliminate huge unobligated balances discovered after a computer error was eliminated in the agency's accounting system.[6]

Departmental offices of Inspectors General, created by the Congress to ferret out waste of tax dollars, uncovered numerous additional examples of wasteful year-end spending in reecnt years. For example, a 1978 nationwide review of regional office procurement activities by the Department of Housing and Urban Development's Inspector General's office revealed widespread "serious weaknesses in procurement actions processed during the final days of the fiscal year" resulting in hundreds of thousands of dollars of unneeded office furniture purchases.[7]

Newspaper reports and investigations added to the weight of evidence indicating significant waste of tax dollars. During the waning days of the last fiscal year, reports surfaced alleging that agencies throughout the Federal government were spending year-end funds "in a lot of questionable ways," and that managers who could "work fast" or spend "creatively" would be rewarded by being provided with even more funds to spend before the close of the fiscal year on September 30. The accounts indicated that this potentially wasteful activity was taking place in spite of a memorandum issued on August 7, 1979, nearly 58 years after the Budget Bureau's first directive concerning hurry-up spending, by the Director of the President's Office of Management and Budget (OMB) to the heads of Executive departments and agencies cautioning against "unnecessary year-end buying." [8]

In early September, 1979, in response to reports of continued year-end spending abuses, and in recognition of the enormous potential of year-end spending to undercut Congress's best efforts to promote fiscal responsibility, the Subcommittee on Oversight of Government Management intiated an investigation of the problem of hurry-up spending.

---

[5] Comptroller General of the United States, U.S. General Accounting Office, "Report to the Congress: Competition For Negotiated Government Procurement Can and Should Be Improved" (Sept. 15, 1977), at 7.

[6] Comptroller General of the United States, U.S. General Accounting Office, "Report to the Chairman, Committee on Government Operations, U.S. House of Representatives: General Services Administration's Practices for Altering Leased Buildings Should Be Improved" (Sept. 14, 1978), at 23–29.

[7] John G. Yazurlo, Office of Audit, Department of Housing and Urban Development, Letter to William A. Medina, Assistant Secretary for Administration, Department of Housing and Urban Development, concerning "Internal Audit—Financial Aspects of Regional Office Procurement" (May 12, 1978); see also, Office of Inspector General, HUD, "Audit Report: Internal Audit of the Financial Aspects of Regional Office Procurement: San Francisco" (June 20, 1978); Office of Inspector General, HUD, "Audit Report: Internal Audit of the Financial Aspects of Regional Office Procurement: Atlanta" (July 7, 1978); Office of Inspector General, HUD, "Audit Report: Financial Aspects of Regional Office Procurement: Chicago" (June 23, 1978); Office of Inspector General, HUD, "Internal Audit: Financial Aspects of Regional Office Procurement: Denver" (May 12, 1977). Among the obligations criticized by the HUD Inspector General reports were $153,000 in equipment and supply purchases in August and September 1977 in the Chicago regional office. The obligations constituted one-third of the entire fiscal year's non-blanket purchase orders. Similar unjustified purchases totaling $12,700 and $39,000 were found in the Atlanta and San Francisco offices, respectively. Among other wasteful items purchased were 57 typewriters and 333 electronic calculators, according to the reports.

[8] Clyde H. Farnsworth, "U.S. Agencies Rush to Spend Before Cutoff," The New York Times (Aug. 15, 1979), at 1.

The Subcommittee's first analysis of Treasury Department statistics showed that, during fiscal years 1977 and 1978, obligations for September, the last month of the fiscal year, exceeded those for August by an average of $41 billion, a 95 per cent increase.[9]

Realizing the enormity of the task of intelligently evaluating the numerous categories of obligations—entitlements, personnel expenses, grants, cooperative agreements, and contracts—that comprise this massive increase in federal spending commitments, the Subcommittee focused its investigations on abuses in the execution of government contracts. The Subcommittee assumed that if government officials were abusing the Federal procurement process—governed by thousands of pages of law and regulation—in order to award funds by year-end, abuses would be highly likely to occur with other obligational instruments, such as certain types of grants, with respect to which Congress has delegated to the Executive greater discretion in the disbursement of Federal funds.

In its investigations of year-end contracting, the Subcommittee sought to determine: (1) the extent of wasteful year-end spending within Federal agencies and across government as a whole; (2) the precise manner in which hurry-up spending practices are wasteful, inefficient, or otherwise not in the best interests of the government; and (3), above all, to the extent that waste occurred, why current checks, including management of Federal spending by the OMB, Congressional budget oversight, limitations imposed by procurement statutes and regulations, grievance procedures for potential contractors who believe they were treated unfairly in the procurement process, internal audits, oversight by Inspectors General and the GAO, and Civil Service merit pay principles, failed to prevent the abuse of taxpayer funds. With the answers to these questions, the Subcommittee hoped to formulate recommendations concerning remedies to whatever problems it found.

As it undertook these inquiries, the Subcommittee recognized that, to the extent year-end spending problems were similar across the Federal government, general solutions were in order. The Subcommittee, in coming to this conclusion, realized that there had been no study of the problem of hurry-up spending on a government-wide basis. While committees of Congress have periodically criticized year-end spending abuses, this most often has taken place in the larger context of consideration of appropriation requests or of particular types of expenditures, for example, consultants.[10]

In response to evidence of wasteful or unaccountable spending, Congress has at times amended language to appropriations legislation with the stated or apparent intent of reducing year-end spending abuses. The substance of these legislative provisions has varied greatly,

---

[9] These figures were subsequently confirmed by the Office of Management and Budget. See U.S. Senate, Committee on Governmental Affairs, Snbcommittee on Oversight of Government, 96th Congress. "Hurry-Up" Spending Part I: Hearing (Nov. 29, 1979), at 175. All citations in this report are from testimony presented in "Hurry-Up" Spending Part I: Hearing or U.S. Senate, Committee on Governmental Affairs, Subcommittee on Oversight of Government Management, 96th Congress, "Hurry-Up" Spending Part II: Hearings (Apr. 30 and May 1, 1980), unless otherwise noted.

[10] See, for example, U.S. Senate, Committee on Appropriations, 96th Congress, HEW Consultants—Abuse and Mismanagement, (May 22, 1979), at 165–325.

65-581 O - 80 - 2

however, and has been, on occasion, totally contradictory.[11] This led the Subcommittee to believe that a general perspective and general remedies might be needed.

As an initial oversight action, the Subcommittee wrote to the Comptroller General of the GAO on September 26, 1979, noting that, "the President's Office of Management and Budget issued on August 7 of this year a memorandum to the heads of Executive departments and agencies which contained a list defining year-end spending practices that would be considered by OMB to be wasteful." The Subcommittee requested the GAO to "examine, on a random, or other objective basis, the requisitions and other procurement documents generated by Executive departments in the last month of fiscal year 1979 to see if obligations were incurred in accordance with the President's directive." The Subcommittee also asked that "any violations of whatever guidelines the President may have had in effect during fiscal year 1978" be reported to the Subcommittee.

Pending the completion of the GAO report, the Subcommittee initiated its own studies, and, after a three month preliminary investigation, held a public hearing on November 29, 1979, at which testimony was received from representatives of the Department of Commerce, the Department of Justice's Law Enforcement Assistance Administration (LEAA), the Department of Transportation's National Highway Traffic Safety Administration (NHTSA), the Environmental Protection Agency (EPA), the OMB, and the Office of Federal Procurement Policy (OFPP), which is located within OMB. In addition, Joe N. Pate, Chief of the Contracts Branch of LEAA, testified before the Subcommittee as an individual, not as a representative of his agency.

Following further investigations, the Subcommittee held additional hearings, focusing on remedies to year-end spending abuses, on April 30 and May 1, 1980. At these hearings the Subcommittee heard the testimony of John Cibinic, Jr., Professor of Government Contract Law at the George Washington University Law Center; U.S. Representative Herbert E. Harris II of Virginia; officials from the Department of Defense, the Department of Health, Education and Welfare, the Department of Interior, and the Veterans' Administration; the Inspector General of the Veterans' Administration; an Assistant Comptroller General of the GAO; James M. Garrison, an employee of an independent management consulting firm; and Herman Director, Chief Economist for the National Small Business Association.

On November 29, 1979, as he opened the Subcommittee's hearings on the problem of hurry-up spending, Senator Levin said, "In this day and age, with so much public concern over governmental expenditures, we must ferret out all wasteful spending practices. We are not only concerned over problems . . . with wastefulness, however. We

---

[11] An example of this contradiction can be seen by evaluating the effects of provisions in appropriations acts providing extended availability of funds for obligation beyond the close of the fiscal year in which they were enacted and contrasting them with the effects of other provisions which place a limit on the percentage of funds in particular appropriations which may be obligated during the last two months of the fiscal year. One approach seeks to remedy wasteful spending by increasing the discretion of the Executive branch, the other by decreasing such discretion. For examples of the use of both, see U.S. House of Representatives, Committee on Appropriations, Supplemental Appropriations Bill, 1979 : Report, (May 31, 1979), at 177 ; 92 Stat. 1247.

are also concerned that inefficient use of the Federal procurement process may be associated with such wastefulness."

Senator Cohen, in his opening remarks, acknowledged that, "Our preliminary studies show that some of the jump is, in fact, explainable. We would be irresponsible, in my judgment, not to recognize that what shows up on the September books is the culmination of months, perhaps even years, of effort. But I think we would be equally irresponsible not to raise serious questions about the slipshod procedures" that can be used "to spend money before the September 30 deadline."

Senator David Pryor noted his especial concern with a particular area of federal contracting—the procurement of unnecessary consultant services and "its manifestation in year-end spending."

The testimony presented at the Subcommittee's November, April, and May hearings, as well as other information and evidence received during the course of the Subcommittee's intensive investigations, provides the basis for the following findings and recommendations.

II. Findings

A. THE COSTS OF HURRY-UP SPENDING ARE IMMENSE

No one knows how many Federal tax dollars are wasted each fiscal year because of hurry-up spending practices, and it is admittedly easy to be imprecise in one's analysis of the extent to which year-end expenditures serve no public purpose whatsoever.[12] But it is, nevertheless, the belief of the Subcommittee on Oversight of Government Management that the amount of waste that can be attributed to year-end spending is immense.

Testimony, written statements and other evidence received by the Subcommittee indicate that, in recent years, hurry-up procurement practices have resulted in the purchase of millions of dollars worth of goods and services for which the government had no current need.[13] As

---

[12] According to the testimony of Representative Herbert E. Harris II of Virginia, "In fiscal year 1979, seven major federal agencies spent more than 20 percent of their single year appropriations in the last two months of the fiscal year. . . . 47.2 percent at HUD ($16 billion), 41.7 percent at EPA ($2.2 billion), 22.9 percent at HEW ($14.3 billion), 30.3 percent at Commerce ($907 million), 23.1 percent at Interior ($1.3 billion), 22.1 percent at Postal Service ($3.2 billion) and 22.8 percent at DOT ($1.4 billion). If these seven agencies had limited spending to 20 percent in the last two months of the fiscal year, they could have saved $13 billion. A substantial portion of this amount could have been returned to the Treasury with minimal adverse effect on Congressionally mandated programs." The Subcommittee did not find this analysis helpful in estimating the total burden of hurry-up spending to the taxpayer since: (1) expenditures within a 20 percent ceiling totaling billions of dollars could have been wasted; (2) an analytic focus on obligations as a whole instead of on non-entitlement spending and other unfixed spending does not take into consideration the varying distributions of types of spending programs in federal agencies.

[13] Subcommittee investigations found, for example, that a high-level official in the Department of Transportation had purchased an Oriental rug with end-of-fiscal-year funds. In addition to the examples from HUD, discussed in note 7, supra., and accompanying text, the Subcommittee found, in the schools administered by the Bureau of Indian Affairs, Muskogee Area Office, the following wasteful purchases: At the end of fiscal year 1973, two trampolines costing $1,576, six potters' wheels costing $1,200, clothes washers and dryers costing $2,400, $8,000 in colthing, and $20,000 in other goods. None of the purchases was either needed or substantially used. See Office of Audit and Investigation, U.S. Department of Interior, "Review of Selected Administrative Activities: Muskogee Area Office, Bureau of Indian Affairs," (June, 1978), at 8–9. Another review indicated that the Department of Interior's Washington area offices purchased $378,000 worth of furniture—27 percent of the fiscal year 1979 furniture expense total—in September, 1979. The Department, according to the audit report, had $301,882 worth of furniture in storage and paid $203,704 to store it in fiscal year 1979. Office of the Inspector General, U.S. Department of Interior, "Interagency Audit of Property Management," (March 1980), at 1–4. See, also, discussion of waste at the Department of Defense, notes 33–35, infra., and accompanying text.

Professor John Cibinic Jr., Professor of Law at the George Washington University, testified:

> Year-end purchasing of items which are not needed solely to spend the money is triply bad. Not only does the government acquire something which it doesn't need, it may pay an exorbitant price for it due to rushed purchasing procedures and, if a significant number of such purchases are made, they will have a negative impact on the efficiency of legitimate purchases executed during the same time period.

Second, rushed spending techniques have caused the government to pay inflated prices and bear other untold costs and risks on billion of dollars worth of procurements for which bona fide needs existed. Numerous contracting officers, interviewed by the Subcommittee, said that contracts awarded under limited time constraints were inflated in cost by as much as 20 percent.

Third, surges in procurement spending have resulted in unnecessary administrative costs. Statistics gathered by the Subcommittee indicate that the annual cost of unnecessary procurement-related overtime alone amounts to millions of dollars governmentwide.[14]

Fourth, the government incurs additional costs because contracting officers are unable to monitor the billions of dollars of ongoing contracts because they are too busy working on writing new contracts at year-end.

Fifth, the Subcommittee gathered substantial evidence indicating that due to the year-end rush to obligate funds—known among long time contractors as "Christmas season"—government officials often failed to accurately define the work to be performed by contractors and in some cases do not even know exactly what the government intended to purchase. For their part, contractors, also pressed during the "Christmas season," submitted proposals that were markedly inferior to those they had submitted at other times during the year.

Sixth, the Subcommittee also found that hurry-up spending practices have shut out of the procurement process contractors who would have otherwise bid on government projects. The excluded contractors lose the income that would have resulted from a successful bid, but in the long run it is the taxpayer who suffers because the uncertainties engendered by hurry-up contracting discourage some firms with potential cost-saving ideas from taking on government work. In addition, some contractors adjust to the year-end buying binge by increasing their rates to reflect the cost of temporary personnel hired to help them compete during the year-end rush.[15]

Seventh, time constraints at the end of the fiscal year encourage the award of contracts with limited or no competition, such as sole-source procurements. The lack of competition increases the cost to the government because the market is not adequately explored to determine the lowest available price for the desired goods.

---

[14] Based on estimates of savings achieved by the Environmental Protection Agency by improving distribution of purchasing workload and current costs of overtime in Federal agencies. See discussion in pt. II, B, 6, "Role of OMB in Promoting Procurement Planning," infra.

[15] Based on two dozen staff interviews with contractors during January and February 1980. In addition, year-end spending practices have had a devastating impact on Congressionally mandated programs targeted at encouraging the development of small and minority businesses. As Joe Pate, Chief of the Contract Branch at the former Law Enforcement Assistance Administration, testified, "The Congress's objective of setting aside time to familiarize inexperienced businesses with the contracting process has been completely forgotten in the rush simply to make awards.

Based on an analysis of government-wide procurement data, extensive interviews with contracting officers, and the factors discussed above, the Subcommittee believes that hurry-up spending is costing the taxpayer at least two billion dollars each year. This estimate, which the Subcommittee believes to be conservative, is based on the conclusion that at least two percent of contract expenditures are wasted through unnecessary or hurried year-end contracting.[16]

While the Subcommittee's estimate is in accordance with the testimony of OMB that "inappropriate year-end buying is relatively small compared to the totals involved," it nevertheless represents the waste of substantial amounts of Federal funds.

Although agencies varied in their recognition of and response to year-end spending problems, every single one of the ten Executive departments and agencies examined by the Subcommittee manifested one or both of the two principal hurry-up spending abuses (unneeded purchases or inefficient procurements and unnecessary anti-competitive procurement practices).[17] A chart denoting the agencies, and the abuses found, is displayed below.

TABLE 1.—EXTENT OF WASTEFUL YEAR-END SPENDING

Agency	Unneeded items bought	Inefficient or unnecessarily anticompetitive contracting practices
Commerce		X
Defense	X	X
Health, Education, and Welfare	X	X
Interior	X	X
Law Enforcement Assistance Administration		X
National Highway Traffic Safety Administration		X
Environmental Protection Agency	X	X
Veterans' Administration		X
Housing and Urban Development	X	X.
Community Services Administration [18]		X

[18] See Office of the Inspector General, Community Services Administration, "Semi-Annual Report to the Congress" (May 30, 1980), at 153.

Note: HUD and CSA were not directly examined by the subcommittee in public hearings.

B. HURRY-UP SPENDING RESULTS FROM FAILURES AT ALL LEVELS OF GOVERNMENT

Congress, over the years, has established numerous controls and mechanisms to ensure the prudent expenditure of government funds.

It has created an independent budget process and a Congressional Budget Office to assess the spending requests of Federal agencies.[19]

It has authorized the President's Office of Management and Budget (OMB) as the central control point in the Executive Branch for

---

[16] The value of government procurement in fiscal year 1979 was obtained from data supplied to the Subcommittee by the Federal Procurement Data Center.

[17] The Subcommittee also found a number of examples of a third type of year-end spending abuse: the misrepresentation of obligations accounts, e.g., back-dated requisitions, non-binding agreements recorded as obligations, etc. While the Subcommittee believed that these improprieties—found in the Department of Defense, the Department of Health and Human Services, and the Department of Housing and Urban Development—present a significant problem in that they make it difficult, if not impossible, for Congress to accurately assess public needs, the Subcommittee believed these accounting problems to be analytically distinct from the other types of year-end spending abuses the Subcommittee was considering, and not as directly relevant to the waste of taxpayer funds.

[19] 31 U.S.C. 665, 1400–1407.

budget formulation and execution, program coordination, and improvement of management.[20]

It has created an Office of Federal Procurement Policy, within OMB, to provide overall leadership in the development, implementation, and coordination of policies and programs to improve government purchasing.[21]

It has enacted procurement statutes and authorized the promulgation of thousands of pages of procurement regulations to govern the execution of government contracts.[22]

It has required the Executive to establish and maintain a central computerized data bank with up-to-date information on all government contracts.[23]

It has created the General Accounting Office and Inspectors General with wide audit powers to detect waste, should it occur.[24]

And it has established Civil Service merit pay principles that require that waste be punished and prudence be rewarded.[25]

If these controls and mechanisms worked as they were intended to, hurry-up spending practices would be significantly less widespread. Instead, the instruments Congress created to control waste and promote fiscal responsibility—at least as far as hurry-up spending is concerned—have all failed.

1. The budget process encourages waste at year's end

Despite the reorganization of the budget process in 1974, which included a change in the beginning of the fiscal year from July 1 to October 1, Congressional and Executive budgeting practices have, the Subcommittee found, contributed to and created incentives for hurry-up spending abuses.

a. Appropriations delays.—Perhaps the most oft-cited reason by Executive officials for disproportionate spending at fiscal year's end is the late enacment of appropriations measures by the Congress. For example, OMB's W. Bowman Cutter testified that,

> Our examination of the circumstances causing the acceleration (of spending in the fourth quarter of the fiscal year) suggests that the greatest portion of these year-end increases are the result of predictable occurrences and can be explained, for example, by later enactment of appropriations * * *.

While the Subcommittee received testimony which supported the Office of Management and Budget's position, and was convinced that Congressional delays in the enactment of regular appropriations legislation and the use of continuing resolutions perennially exacerbate Executive efforts to spend funds in a prudent manner, the Subcommit-

---

[20] See the Budget and Accounting Control Act of 1921, which established the Bureau of the Budget. 31 U.S.C. 41 et seq. In 1970, the Bureau of the Budget was reorganized into the Office of Management and Budget under the direct jurisdiction of the Office of the President. In his message to Congress, the President said that, "(The President) must . . . have a substantially enhanced institutional staff capability in . . . executive management—particularly in program evaluation and coordination, improvement of Executive Branch organization, information and management systems, and developmet of executive talent. . . . (OMB) will maintain a continuous review of the organizational structures and management process of the Executive Branch, and recommend needed changes. It will take the lead in developing new information systems to provide the President the performance and other data that he needs but does not now get." 35 Federal Register 7959.

[21] 41 U.S.C. 400 et seq.

[22] See, for principal statutes, The Armed Services Procurement Act (10 U.S.C. 2301 et seq.), and the Federal Property and Administrative Services Act (41 U.S.C. 251 et seq.). For regulations see, 41 Code of Federal Regulations and the Defense Acquisition Regulations.

[23] 41 U.S.C. 405(d)(5).

[24] 31 U.S.C. 43 et seq.; P.L. 95–452.

[25] 5 U.S.C. 1101 et seq.

tee was not convinced that funding delays occurring at the beginning of the fiscal year were predominately responsible for wasteful practices.

As Professor Cibinic testified before the Subcommittee,

> I understand that * * * continuing resolutions and late appropriations are problems—but that is not a thing the agencies can't cope with * * *. If that were the only problem they had, they could all testify and show you with figures how it was your problem and not theirs. I don't think they have done that.

Numerous other officials and private individuals testified that, as Professor Cibinic said, it was possible to anticipate and correct for delays in the enactment of regular appropriations.

Some of these same officials, as well as others, testified, however, that untimely enactment of large supplemental appropriations could not be corrected for and resulted in substantial pressures to spend funds in a hurried manner before the close of the fiscal year.

The Deputy Administrator of the Veterans Administration, Rufus Wilson, testified before the Subcommittee that, "the problems incumbent in obtaining supplemental appropriations is one of the major causes of year-end spending. When an agency has been authorized to submit a supplemental budget request, for example to meet specialized expenses such as pay raises or increased energy charges, it is compelled to meet these costs as they occur. In the past several years, while these requests have been made well in advance of the actual enactment of the supplemental appropriation, generally they have not been made available until the fourth quarter of the fiscal year. In this situation, program officials have little option but to defer the expenditure of funds * * * until the supplemental funds are made available. The uncertainty as to the amount or even the assurance that additional funds will be authorized causes management officials at all levels to refrain from buying planned and needed items that can be postponed until late in the year." Wilson went on to testify, however, that even if the agency had plans to buy certain items, the short period of availability of the supplemental funds, and the reserves released when the supplemental funds are enacted, made it practically impossible for those items to be purchased efficiently before the end of the fiscal year.

Wilson's testimony was corroborated by officials from the Department of the Interior, the Department of Defense, and the Congressional Budget Office. According to CBO Director Alice M. Rivlin's statement to the Subcommittee:

> Hurry-up spending problems that do result from supplementals appear to be a result of attempts on the part of agencies to efficiently manage their resources in the light of uncertainty over the amount of pending supplementals. Under current practice, cost of the October (pay) comparability increase for civil servants have been provided through supplementals. The agencies have paid their staff at the increased pay level for approximately seven months prior to knowing whether they would receive all, part, or none of the pay increase in the supplemental. Since the amount of funds available to each agency for pay is not finally determined until the enactment of the supplemental, the agencies defer the obligation of discretionary funds to protect themselves against a shortfall in pay. When the supplemental is finally enacted, the discretionary funds not necessary for pay must then be obligated before the end of the fiscal year. It is the obligation of these funds which presents the possibility of hurry-up spending.

b. The budgetary "catch-22".—In spite of the problems presented for Federal agencies by late enactment of supplemental appropriations, the Subcommittee found that it was more than simply the short period of availability of certain funds that resulted in wasteful expenditures.

If funds released late in the fiscal year could not be obligated efficiently, the Subcommittee assumed, Fedral officials always had the option of returning them to the Treasury or reporting unobligated balance to the Congress.

The core of the hurry-up spending problem, the Subcommittee found, was not only when appropriations measures were enacted, but how appropriations levels were arrived at in the first instance.

Although the creation of the Congressional Budget Office and other tools in 1974 augmented Congress's budgetary information and the reorganization of the Bureau of the Budget in 1970 provided the Executive with new budget tools, budgetary decisions, the Subcommittee found, remain as, if not more, complex than before. Faced with the enormous choices of the budget process, high-level budget officials, from OMB budget examiners to Members of Congress, will always find it easier to resort to arbitrary across-the-board cuts rather than to engage in the rigorous analysis of past performance and future needs necessary to effectuate budgeting.

Those responsible for submitting budget requests to those who act on them know this well, and whether the easy option is exercised or not the mere knowledge that it exists results in a huge incentive for Federal managers to exaggerate their budgetary needs in anticipation of cuts and then to spend their entire allocation of funds so as to have no "savings" to report.

The unfortunate result, as Senator Cohen noted, is that "Federal program managers and budget personnel are faced with a Catch-22 situation. They're supposed to spend the public's money as carefully as possible, but if they plan effectively, budget prudently, spend less, and manage to return tax dollars to the Federal Treasury, they face the prospect of having their budgets slashed for the next year. There is simply no incentive for prudent management, no regard for the saving of tax dollars. The system is commonsense turned upside down." [26]

In statements to the Subcommittee, the GAO explained the devastating consequences of this Catch-22 syndrome on efforts to achieve savings in government programs. Citing the findings of a 1978 study of the Departments of Agriculture, Commerce, Health, Education and Welfare, Interior, Transportation, and Treasury, as well as the General Services Administration, the National Labor Relations Board, the Small Business Administration and the Veterans Administration, GAO said that, "As the budget process now functions, many agency executives and managers believe that demonstrating economy related improvements often results in penalties rather than rewards. Examples given to us include arbitrary across-the-board reductions in staffing and the reduction of next year's budget to force continued econ-

---

[26] For further explanation of the "catch-22" effect, see Aaron Wildavsky, "The Politics of the Budgetary Process," 2d ed., (Boston: Little, Brown and Co.), 1974; Louis Fisher, "Presidential Spending Power," (Princeton, N.J.: Princeton University Press), 1975, at 123–301.

omies. Officials in all agencies we have contacted gave examples of how budget reviewers in both the Office of Management and Budget and the Congress seemed insensitive to what agencies believed were innovative proposals for increasing efficiency. To them, the distressing message was that genuine efforts at improving productivity or efficiency were often met with at best apathy, or at worst, arbitrary budget cuts." [27]

Preliminary results of a current GAO investigation now close to completion indicate that Federal supervisors are reluctant to take measures that would reduce their need for budgetary resources for fear that this will result in their reduction in grade, despite firm policy by the Office of Personnel Management to the effect that grade and pay are not determined by the number of employees a government worker supervises or the size of the budget within an employee's discretion.

Separate Subcommittee investigations revealed not only that prudent spending goes unrewarded, but that wasteful spending goes unpunished.

During the hearings, the Subcommittee discussed the findings of a report by the Inspector General of the Department of the Interior concerning the procurement activities of the Fish and Wildlife Service's Young Adult Conservation Corps Mingo Camp, in Puxico, Missouri. According to the report, the Chief of the Service's Office of Youth Conservation Programs issued a memorandum to his regional coordinator on May 22, 1978, instructing that "all moneys be obligated at the end of fiscal year 1978."

One camp director took the advice in earnest, and obligated more than 60 percent of his fiscal year 1978 procurement funds in the fourth quarter of that fiscal year. The spending spree, which partially continued into the next fiscal year, resulted in the purchase, for fewer than 300 enrollees, of: (1) 1,000 pairs of protective horseback riding chaps; (2) 4,000 pairs of gloves; (3) 10,000 fence posts; (4) 181 chain saws, of which 10 were stolen; (5) more than $120,000, in lawnmowers and lawnmower parts. According to the Inspector General report, "there was no reasonable basis or justification for the purchase of such a large dollar value inventory; and sound judgment, adequate review, or fiscal responsibility were not exercised by the camp director or his staff in the procurement of spare parts or inventories." The Inspector General recommended disciplinary action be taken in response to such blatant waste of taxpayer funds.[28]

However, when the Subcommittee investigated to determine what sanctions had been applied, it found only that: (1) the camp director has been reduced in grade from a GS–12 to a GS–9 and had his salary reduced from $25,526 per year to $22,147; (2) the administrative camp officer was reduced in grade from GS–9 to GS–7 and reduced in salary from $17,603 to $16,700; and (3) the camp work program officer was reduced in grade from GS–9 to GS–7 and reduced in salary from $17,000 per year to $16,700. The Subcommittee found, moreover, that no action had been taken against the official who originally

---

[28] Office of Inspector General, U.S. Department of Interior, "Review of Selected Functions of the Young Adult Conservation Corps Mingo Camp, Puxico, Missouri, Fish and Wildlife Service, Departmental Office of Youth Programs," (January 1980), at 17–30.

[27] Additional material submitted for the record, "Hurry-Up" Spending Part II; Hearings.

65-581 O - 80 - 3

directed that, "all funds be obligated by the end of fiscal year 1978." [29]

During the November 29 hearing, Joe Pate, of LEAA, discussed two potentially wasteful year-end contracts and noted that the management atmosphere at LEAA discouraged workers who sought to stop such expenditures. "You can only go in so many times and get your hand slapped," Pate testified. "Then you learn a lesson. It's the management and if the management says we want this, then we do it."

The Subcommittee found examples where agencies provided direct incentives for workers to spend without regard to cost-effectiveness. Rufus H. Wilson, Deputy Administrator of the Veterans Administration, testified that VA officials are "expected to utilize funds to the maximum extent for which they have been made available."

When asked by the Subcommittee whether this leads to the expenditure of funds without consideration as to the cost-effectiveness of particular purchases, Wilson responded that, indeed, year-end expenditures may be made for "lower priority acquisitions which are feasible to complete within a short time period," and that "contracting officers generally are of the opinion that failure to complete a contract and thus lose fund availability reflects adversely on them." [30]

2. Congressional responses have been inadequate

Congress has recognized the pressures placed on managers to obligate funds before year's end, and has taken a number of steps either expressly or apparently intended to reduce the likelihood of wasteful year-end expenditures.

The Subcommittee found that these measures have not ameliorated pressures to spend funds wastefully at the end of the fiscal year.

a. *"Multi-year" and "no-year" funds as a solution to the "use it or lose it" philosophy.*—Congress has at times extended the "life" of appropriations so as to permit their expenditure during, say, two or five fiscal years, or for an indefinite period barring Congressional rescission. So-called "multi-year" and "no-year" funds are primarily used "where programs or projects are continuing in nature" for the express purpose of achieving "savings by preventing the practices of committing funds at the end of the fiscal year." [31]

OMB officials testified that the existence of multi-year and no-year funds that need not be "used or loosed" would essentially diminish the incentives for agency managers to spend wastefully at year's end, but other testimony indicated that Congress's expectations and OMB's analysis may have been overly optimistic. Discussing the pressures to spend no-year and multi-year funds, Joe Pate of LEAA had the following exchange with Senator Cohen:

Senator COHEN. Now as you know, some appropriations don't expire after a single year. Congress even appropriates money that has no time strings attached, as such.

I think, on the surface, one might expect that multi-year appropriations would ease that so-called year-end crunch.

Is there similar pressure, in your judgment, to spend these no-strings or multi-year funds before the end of the fiscal year as there is for a 1-year appropriation?

Mr. PATE. The * * * attitude toward the expenditure and obligation of funds are the same for 1-year and no-years, sir * * *. The legislation implies that there's no pressure. But if the agencies do not obligate their moneys before the end of the

---

[29] Documents provided to the Subcommittee by the Department of Interior.
[30] Letter from Rufus Wilson, Deputy Administrator, Veterans Administration, to Senator Cohen, June 3, 1980.
[31] See, Supplemental Appropriations Bill, 1979 : Report, note 11, supra.

fiscal year, there is fear that the Congress will not appropriate additional moneys in that subsequent year.

b. *Spending limitations: The Department of Defense Experience.*—In addition to creating multi- and no-year funding, Congress has at times taken a completely opposite approach to controlling year-end expenditures by limiting the percentage of single-year appropriations that may be obligated in the last two months of the fiscal year. A provision preventing the Department of Defense from obligating more than 20 per cent of its Operations and Maintenance account funds in the final two months of the fiscal year has been routinely enacted by Congress each fiscal year since 1953.

Although the legislative history of this provision does not indicate what the limit was intended to achieve, the Subcommittee spent considerable effort examining the efficacy of such a provision in preventing wasteful year-end spending.

Deputy Under Secretary of Defense Dale W. Church testified before the Subcommittee that since Operations and Maintenance functions included both contract and personnel obligations, it was impossible to discern precisely what effect the 20 per cent limit had on the elimination of wasteful year-end contracting at the Defense Department. In his statements, Church said, "the 20 per cent limitation, by itself," does "not improve the quality or timeliness of purchases. Proper planning and management is the key."

In fact, the Subcommittee found, the Department of Defense has continued to demonstrate hurry-up spending abuses, even in accounts that are capped. In fiscal year 1978, according to Professor Cibinic, the Defense Department issued a request for proposals on September 13, closed the proposing period in September 25, awarded a contract on September 29, the last working day of the fiscal year, and even admitted that part of the reason for the rush was the necessity of obligating funds prior to the close of the fiscal year.[32]

Professor Cibinic's contention that substantial amounts of waste occurred within or even because of the 20 per cent cap was substantiated by a number of reports by the Army Audit Agency. Those reports found that:

> On the last working day of fiscal year 1978, the U.S. Army awarded contracts totaling $187,631 for unnecessary construction at a base that was scheduled to be closed; the auditor reported that the expenditure "was wrong and resulted in the waste of nearly $190,000 of the Army's funds"; [33]
>
> Offiicers at Fort Riley, Kansas, ordered, on September 11, 1978, "a year-end buy of 80 color television sets" at a cost of $32,264; nine months after the purchase, 50 sets remained crated in the warehouse; officers also awarded a $35,196 non-competitive contract on September 21, 1978 for 29 electric cookers; according to the review, the procurement was "not in the best interests of the government"; at least four of the cookers were never installed: [34]

---

[32] For a further discussion of the particular procurement, see, U.S. Comptroller General, U.S. General Accounting Office, "Decision B–193124," (Mar. 14, 1979), at 7. According to Navy documents provided to the GAO, the "obligation of . . . funds was required by Sept. 30, 1978."

[33] U.S. Army Audit Agency, Department of the Army, "Report of Audit: Acquisition and Contract Administration, Vint Hill Farms Station, Warrenton, Virginia," (Sept. 26, 1979), at 5–8.

[34] U.S. Army Audit Agency, Department of the Army, "Report of Audit: Acquisition and Contract Administration, 1st Infantry Division and Fort Riley, Fort Riley, Kansas," (Dec. 7, 1979), at 9.

In April 1975, the tenth month of what was then the fiscal year, the Army's Training and Doctrine Command, in violation of Army regulations, obligated $8.4 million through open-market purchasing, bypassing the Army's stock fund, and thereby adding immeasurably to the cost of the purchases; the expenditures were made to avoid the delayed recording of obligations made through the stock fund and thus in order to exhaust fiscal year 1975 Operations and Maintenance funds.[35]

A further audit, by the GAO, of Department of Defense expenditures made under the cap more than 15 years after the cap was first instituted showed that the limit had indeed evened out spending, but it had not eliminated techniques—such as "fill-or-kill" procurement requests—used to waste year-end funds.[36]

c. *Proposals for an expanded use of the spending cap.*—The subcommittee was concerned that, especially in light of growing awareness of the dangers posed by wasteful year-end spending practices, Congress would be tempted to enact broader versions of a year-end spending limitation, notwithstanding the experience of the Department of Defense with respect to its cap on operations and maintenance funds. In the House of Representatives, the Committee on Post Office and Civil Service reported legislation on December 20, 1979, that extended a spending cap to each federal agency on its funds that were "subject to fiscal year limitation."[37] Based on the sequential referral of the legislation, H.R. 4717, to the Committee on Government Operations, the year-end spending provision was modified to include only contract funds, and to permit the Director of the OMB to waive the cap requirements to prevent serious disruptions in the execution of any agency's programs.[38] All such waivers, under the Government Operations Committee language, are to be promptly reported to the Congress and in no event after the agency had exceeded its year-end spending limit.

The Subcommittee received extensive testimony on the likely efficacy of such extensions of the spending limitation.

The GAO, in testimony, was somewhat critical of fourth quarter spending limitations. According to the GAO, a spending limit would "not assure that funds spent under the limitation are spent wisely and that, in the absence of a carefully developed—and carefully monitored—agency spending plan, the surge in spending could just be advanced. . . ." Even if the surge did not occur earlier, GAO said, large pockets of waste could still exist in a large department, even though the department as a whole was in compliance with the limit.

In spite of this negative view, GAO gave its qualified endorsement to a limitation that would prevent the obligation by an agency of more than 20 percent of its total fiscal year funds "available and planned for use" by the agency during the last two months of the fiscal year. The GAO proposal granted OMB the authority to waive the requirement, provided that such waivers were reported to the Congress.

---

[35] U.S. Army Audit Agency, Department of the Army, "Report of Audit: Management of the Operations and Maintenance, Army Appropriation, U.S. Army Training and Doctrine Command, Fort Monroe, Virginia," (Nov. 2, 1976), at 17–18.

[36] "Fill or kill" refers to the practices of buying an item if it is in stock but cancelling the procurement in the subsequent year if the item is not in stock. Its use suggests that the items bought are not needed. See letter from Director, Defense Division, U.S. General Accounting Office, to the Secretary of Defense (Oct. 26, 1971), at 4.

[37] House Report 96–729, pt. I, at 4.

[38] House Report 96–729, pt. II, at 1–3.

GAO justified its position on the grounds that OMB had failed to use its budget execution authority to closely control the amounts of funds available to agencies for expenditure. Representative Herbert E. Harris supported the GAO proposal because it provided "Congress with something to do oversight on, so that we can focus on those things that are happening, and where there is justification, test that justification."

The Department of Defense testified in opposition to applying a 20 percent limitation on no- and multi-year funds in addition to single-year appropriations. According to Deputy Under Secretary Church, "Contracts for defense weapons systems and equipment, which usually take a long time to finalize satisfactorily, might be caught in the process, and would have to be rushed through during the tenth month or postponed until the following year. Either action could be detrimental to the Defense programs involved. . . .An overall 20 percent limitation would be impossible to implement with our numerous purchase offices and large volume of purchases. The record keeping, tracking of award statistics, and centralized control would require a prohibitively costly, complex, and cumbersome system that would serve no useful purpose."

The Subcommittee found a number of problems with the GAO proposal in addition to those already mentioned.

First, by addressing total agency spending, the cap would diffuse the focus on contract and other forms of spending that are highly discretionary. Agencies with disproportionately small contract budgets would, in turn, be able to live well within the 20 percent limitation and still waste exorbitant sums.

Second, the Subcommittee found that, because of the existence of multi-year and no-year funds, it would be impossible to define, legally, the concept of funds "available and planned for use" by an agency. Agencies would therefore be able to circumvent the requirement of OMB review by overestimating funds "planned for use" during the fiscal year. As a GAO official was forced to admit, "in terms of who would enforce it, I would think initially—it would essentially be a political matter, but we would see how (OMB) looked at it, and how we looked at it, and the Congress."

Third, the Subcommittee found that while granting waiver authority to OMB would increase the flexibility of the spending ceiling, it would also permit OMB to create de facto impoundments by deferring agency spending into the fourth quarter and then refusing to grant waivers to the end-of-year spending ceiling. As Senator Cohen remarked at the hearings, "Some years ago President Nixon resorted to the impoundment policy to kill programs for which Congress had appropriated funds. That led to the Budget and Impoundment Control Act. * * * (With the waiver provision) you may well have a situation in which OMB could effectively terminate programs, or impair programs which Congress would like to see work effectively, by refusing to grant exemption. Congress would be giving OMB that kind of discretion to say, "Okay, Defense Department, you can have the exemption from the 20 percent limitation, but not over here in this particular social program." Asked whether he believed there was this danger in providing waiver authority, Representative Harris responded, "Yes, I think there is."

Additional compelling evidence presented to the Subcommittee concerning all types of spending caps indicated that a spending ceiling would send the wrong signals to the Executive Branch. Professor Cibinic testified that, "There is another danger with putting the cap on. That problem is when you address something with a * * * legislative solution, everybody thinks the problem is solved and walks away from it—and I don't think that is going to solve the problem.

Government officials who testified against their agencies' policies of wasteful year-end spending also opposed the spending limitation approach. Asked by Senator Levin whether he believed such a cap would be helpful in promoting orderly procurements, LEAA's Joe Pate testified, "I think, again, it would do more damage than it would good. It's too arbitrary." According to the Director of the Environmental Protection Agency's contracts office, William E. Mathis, "the entire emphasis on controlling obligations is misdirected. The obligation is the result of the procurement process which precedes it." [39]

Professor Cibinic concurred, adding that fixed ceilings would not force managers to "finally look at the problem or to plan more effectively." "Controlling obligations is not the problem," Cibinic testified. "The problem is to award contracts in an efficient manner."

Based on this evidence, the Subcommittee found that all of the end-of-year spending ceilings proposed to date contain substantial flaws in logic, do not address the real problem behind hurry-up spending, and therefore would at best set in motion an oversight process of dubious value to the Congress, and, at worst, would encourage more waste than occurs at present.

3. Procurement regulations grant discretion that is systematically abused

The Subcommittee determined that the year-end spending problem was not one of the timing of obligations, per se, but of the underlying procurement process, and therefore proceeded to examine the relationship between the discretion permitted by the procurement regulations and statutes and concrete examples of year-end spending abuses. The Subcommittee recognized that nothing in the procurement statutes or regulations addresses the determination of whether the purpose of a contract is worthwhile or proper. Once the need for a purchase has been determined, however, the Subcommittee believed it would be the procurement regulations that would assure that the product or service required is purchased in the most efficient manner.

The Subcommittee found, however, that despite the complex instructions given by the procurement guidelines, the rules, in effect, delegate considerable, if not total, discretion to the Executive Branch with respect to determining what is an acceptable level of competition.[40] Such a broad grant of discretion may be wise or not in itself, but, in combination with the enormous pressures to spend funds under a time limitation, Executive discretion clearly redounds to the disadvantage of the taxpayer.

---

[39] Letter from William E. Mathis, Director, Procurement and Contracts Management Division, U.S. Environmental Protection Agency, to Senator Cohen (Apr. 28, 1980), at 2.

[40] According to Federal court decisions, for example, in the absence of a showing of arbitrariness, inadvertence, or falsification on the part of a contracting officer, a court will not upset his determination as to how a particular contract was awarded as expressed in that document. *AMCO Electric* v. *U.S.* Ct. Cl. 1974, 493 F.2d 647. The discretion to use formal advertising or negotiation is completely within the Executive Branch, according to another decision. *Wheelabrator Corp.* v. *Chafee* 455 F.2d 1306 (1971).

Under the Armed Services Procurement Act, which governs purchases by the military and NASA, and the Federal Property and Administrative Services Act, which controls procurement by civilian agencies, products and services may be obtained by one of two methods: (1) formal advertising; and (2) negotiation.[41]

There are critical differences between the two procedures. In formal advertising, bids, once they have been received, are evaluated without further recourse to prospective contractors and, unless all bidders do not meet the government's need, the government awards a contract to "that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the government, price and other factors considered." [42] Once the bids have been opened, there is little the government can do to increase the competition between prospective contractors. For the government, it is a "take-it or leave-it" situation.

Negotiation procedures, on the other hand, permit the government to discuss prices and other items with prospective contractors after proposals have been submitted. While this gives the government greater flexibility and the possibility of lower prices or a more advantageous final package. it also opens the procurement process to greater dangers of collusion than under formal advertising. Accordingly, the procurement regulations provide detailed guidance as to how the government is to determine the accuracy of cost estimates and whether those costs are related to the contract's purpose.[43]

Notwithstanding statutory language establishing negotiation as a procurement technique in "exceptional" cases only, both negotiation and formal advertising are used widely, and, according to procurement and management experts, when used in their proper context, each can place the government in the maximum competitive position vis a vis the marketplace.[44]

Unfortunately, the Subcommittee found, the potential of neither procurement technique is realized during the year-end crunch.

a. *Compressed bidder response periods.*—The military procurement statutes admonish the Pentagon, in the case of formal advertising, to allow "sufficient time before the purchase or contract" for the preparation of bids.[45] So do the civilian statutes.[46] In the case of negotiated procurements, the military procurement law directs that "proposals * * * be solicited from the maximum number of qualified sources." [47] In a similar vein, the civilian procurement regulations command that "proposals should be invited from a sufficient number of competent potential sources to insure adequate competition." [48] While regulations offer advice as to what is a reasonable solicitation period, there is no lower limit on the time agencies may permit contractors to fromulate their ideas or not be considered for the particular award.[49] And, without fail, in every agency the Sub-

---

[41] 10 U.S.C. 2301 et seq. ; 41 U.S.C. 251 et seq.
[42] 41 Code of Federal Regulations 1–2.407–1.
[43] 41 Code of Federal Regulations 1–3 et seq.
[44] Robert B. Hall. "The Armed Services Procurement Act of 1947 should be Reformed," in U.S. Senate. Committee on Governmental Affairs. Subcommittee on Federal Spending Practices and Open Government. 95th Congress, Federal Acquisition Act of 1977: Hearings (July 18, 19. 22, 26 and 28, 1977), at 807.
[45] 10 U.S.C. 2305.
[46] 41 U.S.C. 253.
[47] 10 U.S.C. 2304.
[48] 41 Code of Federal Regulations 1–3.802(b).
[49] See, for example, 41 Code of Federal Regulations 1–202–1 (c).

committee examined, compressing the contractor response time from what even agency officials deemed prudent or "normal" proved to be a classic technique for awarding contracts before the close of the fiscal year.

The consequences of this practice, as evidenced by testimony and other material presented before the Subcommittee, are hardly desirable. As Joe Pate of LEAA testified, "Contractors * * * wanted to participate in the programs of the agency and could have performed a valuable service * * *. By the time they found out about pending requirements and solicitations, they were overbooked, understaffed for the particular requirement, or could not respond to the solicitation in time. This is a result of the rush at the end of the fiscal year."

Associate Administrator for Administration Dana L. Scott, of the National Highway Traffic Safety Administration (NHTSA), noted that, in the last quarter of the fiscal year, "the agencies have less time to solicit proposals * * *. With shorter solicitation periods, they receive fewer proposals, and often find them to be of poorer quality."

William L. Kendig, Deputy Assistant Secretary of the Department of the Interior, asserted that, as currently managed, Interior programs would continue, under "last quarter * * * workload demands," to "impose constraints on response times to solicitations" which "can lead to inflated costs for some procurement transactions."

Officials from the Department of Health, Education and Welfare and the Department of Defense testified, respectively, that "contract offices operated with constricted lead times" during fiscal year 1979, and that "time saving steps may be taken at times, including a reduction in normal formal advertising bid opening time of 20 days for standard commercial items and 30 days for nonstandard items," in order to award contracts at year-end.

Commenting on Department of Defense practices that resulted in an award of a contract on the last working day of fiscal year 1978, Professor Cibinic testified, "They gave the people who were proposing on this job 12 days to submit a proposal. Now can somebody submit a proposal in 12 days? Sure. I've done it, whenever I was in industry. It's not the best proposal you can submit." One contractor, who responded to the Subcommittee's request for information on this question, echoed the concern of the witnesses. Noting one of the "primary problems" experienced during the year-end binge, the contractor stated that, "The amount of time allowed for preparing a quality response is often much too short. It is not uncommon for agencies to require a response within two weeks of the request for proposal release date, a stricture which is unrealistic for a major technical effort." [50] And according to the testimony of Herman Director of the National Small Business Association, "The year-end concentration does shorten considerably the time allowed for responses on government bids and virtually eliminates competition."

b. *Negotiation under the crunch.*—In order to deter collusion, to reduce unnecessary costs, and to avoid unrealistically optimistic cost estimates that may result in cost overruns at a future date, contracting

---

[50] Letter from Jan Shaw, Assistant Secretary/Treasurer, American Institutes for Research in the Behavioral Sciences, to Senator Cohen, April 21, 1980.

officers, in procurements requiring negotiation, are expected to "coordinate a team of experts, requesting advice from them, evaluating their counsel, and availing themselves of their skills as much as possible." [51] Engineers, auditors and other technical staff are assigned considerable responsibilities by the procurement regulations to assure that negotiated contracts are in the best interests of the government. Armed with this array of expertise, the contracting officer is then charged to evaluate proposals, to engage in oral discussions to resolve disputed prices or estimates, and to ensure, before a contract is awarded, that "basic questions * * * not be left for later agreement." [52]

The Subcommittee on Oversight of Government Management found uniformly among Federal agencies that the year-end spending crunch significantly affected—and sometimes crippled—the efforts of contracting officers to obtain goods and services of the highest quality for the lowest prices in negotiation proceedings. Joseph A. Sickon, Director of the Office of Procurement and Automatic Data Processing Management at the Department of Commerce, testified that "disproportionate spending at the end of the fiscal year" resulted in "cursory price and cost analysis"—the central task in negotiation—at his agency. Officials at NHTSA said, "At the end of the year the negotiations that we conduct with all of those who send in their proposals are rushed. If we had more time, our negotiations would probably be more meaningful, overall, and more detailed." Interior's Deputy Assistant Secretary Kendig testified that "quality may suffer or costs may increase as a result of this high pressure environment at the end of the fiscal year."

During the April 30 session the Subcommittee examined negotiation, under the crunch, with respect to five contracts totaling three million dollars that were awarded by the Veterans Administration in the last week of fiscal year 1979 for computers and computer services. The contracts, all of which were let through negotiated procedures, constituted the centerpiece of a package of 20 computer-related contracts with a total pricetag of close to $19 million, the entirety of which was awarded in the closing days of the fiscal year.

In the hearing, Senator Cohen questioned Clyde Cook, Director of the Veterans Administration's Supply Service about the five contracts: (1) an $889,996 contract awarded to Galler Associates, Inc., on September 27; (2) a $745,167 contract awarded to Galler Associates, Inc., on September 27; (3) a $360,945 contract awarded to Galler Associates, Inc., on September 28; (4) a $583,623 contract awarded to Health Data Management Systems on September 28; and (5) a $477,024 contract awarded to Stewart Consultants, Inc., on September 28.

While it was impossible to tell, either from the largely undocumented contract files or from testimony, to what extent VA contract officials questioned or disputed proposed costs during the negotiation of the contracts, questioning by Senator Cohen elicited the following exchange:

Senator Cohen. Do you think that had you had more time, you could have negotiated down the prices on some of these contracts and possibly saved the taxpayers some money?

---

[51] 41 Code of Federal Regulations 1–3–801–2.
[52] 41 Code of Federal Regulations 1–3.804.

Mr. Cook. I have to say that is possible. In some cases, when we negotiate, we do get a better price. On some of the contracts—not the five you mentioned—but on some of the others, we did * * *.

Senator Cohen. * * * What made the difference in these particular cases (where VA did obtain a better price)?

Mr. Cook. We had a little more time.

c. *Lack of audit data.*—Perhaps the most important player on the contracting officer's "team of experts" is the pre-award auditor. Accurate pre-award audit information permits the government to dispute overly optimistic cost projections, which can lead to overruns during the contract performance period, or exaggerated cost projections, which can lead to excessive profits. Under the year-end crunch, however, the star player all too frequently never made it into the huddle, much less the game, as further questioning by the Subcommittee regarding the five Veterans Administration contracts mentioned above revealed.

When asked whether any of the five contracts had been subjected to pre-award audit, Cook responded, "Pre-award audit? No, sir." Asked further whether the lack of a pre-award audit affects the government's bargaining position, Cook answered, "The bargaining position is somewhat diminished by going in after the contractor has a contract in hand; yes, sir." And finally, when queried as to whether the approach of the end of the fiscal year had anything to do with the waiving of the audits in those five cases, Cook said, "I know it did."

Sadly, Cook's response was not unusual with respect to contracts executed in the fourth quarter of the fiscal year. It a contracting officer has any past audit data, regardless of changes in industry-wide prices or circumstances, he can fulfill the procurement regulations' criteria for waiving the use of new audit resources.[53] With nearly every Federal agency awarding a disproportionate share of its contracts at year end, the unavailability of ordinarily scarce audit resources increases. As Interior's Deputy Aassistant Secretary Kendig testified, "Our experience within the Department has been that audits are more difficult to obtain in the fourth quarter than in the first three. We attribute this to the larger number of contracts and transactions awarded and, consequently, the greater number of audits requested in the last quarter." This shortage of audit personnel is exacerbated at year-end by the unavailability of contractor records during non-business hours, therefore limiting, as NHTSA Associate Administrator Scott testified, "the ability of the auditors to effectively use overtime."

Joe Pate, of LEAA, testified to how logistical difficulties and the broad discretion granted by the procurement regulations led him, against his better instincts, to waive the requirement for pre-award audit on a contract for $132,500 he awarded to New Pride, Inc., on September 20, 1979. Pressed by the Chairman, Senator Levin, to explain why he waived the audit requirement, Pate said, "More than likely, my particular auditors may have already had 10, 15, or 20 audit requirements that they were working on and this was just another low priority. * * * I felt in accordance with the Federal Procurement Regulations that I had legitimate grounds to meet the minimum requirements and waive the audit." Those "minimum requirements," Pate said, al-

---

[53] 41 Code of Federal Regulations 1–3.809 (2).

lowed him to get by with using 1976 audit data in spite of "significant" price changes in the field to which New Pride, Inc., belonged.[54]

d. *Unnecessary sole-source contracts.*—Probably the most disturbing abuse of the procurement statutes and regulations was the use of the option available in negotiated procurement procedures of selecting a single prospective contractor for an award without recourse whatsoever to the open market in order to execute a contract by the end of the fiscal year.[55] The procurement regulations place few obstacles between "competitive" and "non-competitive" negotiations, i.e., sole-source contracting. In fact, since all that an agency need prove to justify a sole-source contract is that competition was "not feasible," the need to award the contract by the end of the fiscal year often becomes the motivation for unnecessarily restrictive specifications that make "competition infeasible," thus waiving the administrative burden of obtaining competition. Sole-source contracts are often used to mask what are, at best, procrastinated policy decisions, or, at worst, collusive arrangements between high-level managers and contractors.

Noting the irony in the current regulations, Commerce's Sickon testified that, "since single source procurements are less time-consuming, program managers sometimes delay submission of requirements until sole-source award is the only feasible way of awarding a contract before the end of a fiscal year."

During the November hearing, the Subcommittee explored, in detail, a concrete example of the scenario asserted by Director Sickon: the award of the $132,500 sole-source contract to New Pride, Inc., by LEAA, discussed above with respect to the waiver of audits.

During the hearings, the LEAA's contract office chief, Joe Pate, and the Subcommittee discussed the background of the New Pride, Inc., contract, which Pate described as "Basically * * * a project to enlist private enterprise to help the agency evaluate grant applications." Under questioning, Pate testified that the agency's reason for using the sole-source arrangement was that New Pride, Inc., was "uniquely qualified" because it had performed similar work for LEAA under a sub-grant program, and therefore competition was not feasible. Pate said, however, that the firm was in fact subcontracting for the expert advice that was the purpose of the contract. "They may be 'uniquely qualified,' but so are several other firms in the United States," Pate said. He added that LEAA had plans for the grant program as early as February, 1979, which were published in the Federal Register, and that, had the procurement been initiated at that time, it would have been possible to obtain competition for the contract. Instead, Pate was not notified about the need to execute a contract until August 1, thereby effectively precluding competition. Asked whether some unforeseen contingency may have resulted in the lateness of the procurement's initiation, Pate said, quoting the signed statements of the agency's general counsel, " 'Generally, such program knowledge is not

---

[54] Pate provided the Subcommittee with three other audit waivers he approved in order to execute a contract by September 30, 1979. The waivers applied to the following contracts: (1) a $2 million contract awarded to Arthur D. Little, Inc., on September 27, 1979; (2) a $17,944 contract awarded to American Management Associates on September 19, 1979; (3) a $600,000 contract awarded to Abt Associates, Inc., on September 24, 1979.

[55] 41 Code of Federal Regulations 1–3.102(d).

available in the LEAA or other areas of the Federal government.' * * * Now, if they could sign that statement in August, they must have known that those talents did not exist in February."

Pate's superiors, in testimony and further statements, challenged his characterization of the New Pride, Inc., contract. Most notably, LEAA General Counsel Thomas Madden said, "The Principals of New Pride, Inc., were asked for this assistance because they were the only individuals in the country that had a working knowledge of what New Pride did. They were the only logical choice to perform this project. The sole-source justification in our opinion is one of the strongest examples we have." [56] In rebuttal, Pate reasserted his position that, at the very least, the market for such assistance should have been tested. "According to my information," Pate said, "several major participants in the original New Pride program have left New Pride, Inc., and may have bid on the project themselves, had the requirement not been issued on a sole-source basis. * * * In short, if, as Mr. Madden claims, 'the sole-source justification in our opinion is one of the strongest examples we have,' LEAA is in big trouble." [57]

During the questioning, Senator Cohen noted that it was not the Subcommittee's purpose to determine the propriety of particular contracts. What was at stake, he suggested, was how the regulations, in the context of "the pressures that are generated by the bureaucracy," can result in "a much larger problem."

Indeed, numerous audits by the General Accounting Office and Inspectors General have indicated the relationship between negotiating under the crunch and unnecessary sole-source awards—that there is, in fact, a much larger problem.

For example, a GAO report, "Controls Over Consulting Service Contracts at Federal Agencies Need Tightening," issued at the request of Senator Pryor, a member of the Subcommittee and Chairman of the Subcommitte on Civil Services and General Services of the Committee on Governmental Affairs, noted the tendency of Federal agencies to award consultant contracts both on a sole-source basis and at the end of the year, although the precise relationship between year-end spending and lack of competition was not addressed by the GAO.[58] A September 1978 report by the Department of the Interior's Inspector General said emphatically, however, that the unnecessary delays in the determination of agency needs, combined with pressures to obligate funds before the close of the fiscal year, resulted in numerous examples of unnecessary year-end sole-source contracting in the U.S. Fish and Wildlife Service's Biological Services.[59]

Federal agencies are permitted, under the procurement regulations, to award sole-source contracts in response to "unsolicited proposals." The purpose behind this policy is laudable: to attract the resources of private enterprise to problems that the government itself has not been able to solve. But to award such contracts according to the reg-

---

[56] Additional material submitted for the record, "Hurry-Up" Spending Part I: Hearing, at 216.

[57] Id., at 231.

[58] Comptroller General of the United States, U.S. General Accounting Office, "Report to the Chairman, Subcommittee on Human Resources, Committee on Post Office and Civil Service, United States House of Representatives: Controls Over Consulting Service Contracts at Federal Agencies Need Tightening," (March 20, 1980), at 10, 15.

[59] Office of Audit and Investigation, Department of Interior, "Review of the Procurement Activities of the Office of Biological Services, U.S. Fish and Wildlife Service," (September, 1978), at 8–14.

ulations, the agency must be prepared to prove merely that the proposal was "sufficiently unique" (sic), unavailable without restriction from another source, and would not fall within the scope of a formal pending solicitation.[60] Like that of the ordinary sole-source award, this burden is so easily carried by the agency that the award of noncompetitive contracts in response to unsolicited proposals has become a favorite vehicle at fiscal year's end for covering up agency program delays that have prevented competitive procurements, or, worse, outright waste and fraud.

Such at least appeared to be the case with respect to the $477,024 contract awarded to Stewart Consultants, Inc., on a sole-source basis on September 28, 1979 by the Veterans Administration in response to the firm's unsolicited proposal for management advice concerning VA's computer systems, which the Administration had expressed a strong interest in upgrading.[61]

Veterans Administration documents indicated that the need for a management plan had been established for months and that the VA had "expertise in the development of management plans." Nevertheless, when Stewart's proposal was submitted in August, 1979, "funds became available," and the Director of the Health Care Delivery Systems Support Service, H. J. Mulqueen, certified that funding in the amount of $485,721 was "implicitly included in the agency's fiscal year 1979 budget request" for financing of the Stewart Consultants, Inc., contract.[62]

The documents went on to explain that, in reality, however, the funds had "become available" for the Stewart contract because the VA had fallen behind in spending its appropriated funds for medical personnel to the tune of $40 million that would have reverted to the Treasury on September 30 if not obligated by that date.[63]

In questioning, Deputy Administrator Wilson was asked about the effect such a year-end "surplus" of funds would have on the incentives of VA officials:

> Senator COHEN. Doesn't this kind of situation, with $40 million sitting there, put a great deal of pressure on you during the last two months of the fiscal year to spend that money?
>
> Mr. WILSON. * * * Forty million out of a budget which exceeds $5 billion, while that is an awful lot of money, if it is put in the proper perspective there, I think that one would agree that if we had the plans to spend the money and spend it wisely, this did not put a lot of pressure upon us to spend the money.

The Subcommittee then took up the question of whether the VA did, indeed, have "the plans to spend the money and spend it wisely."

Documents and further questioning of the VA's Clyde Cook suggested that Cook's superiors were intent on spending the funds for the Stewart contract, regardless of whether such expenditures complied with the letter or spirit of the procurement regulations, or simply good judgment. A letter to Mr. Cook from W. R. Martin, said that, "since

---

[60] 41 Code of Federal Regulations 1–4.910.

[61] Contract documents, Veterans Administration contract number P–754, Contract with Stewart Consultants, Inc., Rosslyn, Virginia; (documents may be obtained from the Subcommittee on Oversight of Government Management).

[62] "Veterans Administration ADP and Telecommunications Requirements Checklist for health care systems management consulting and systems coordination," (September 5, 1979), Id.

[63] Veterans Administration "Budget Services Briefing Note re: Sole-Source Contract with Stewart Consultants, Inc.," prepared by V. L. Barile (September 19, 1979); see note 61, supra.

only fiscal '79 funds are available for this effort, your expeditious handling of this request will be most appreciated." [64] In none of the voluminous records the Subcommittee evaluated concerning this contract was any mention made that, notwithstanding the qualifications of Stewart Consultants, Inc., consideration should be given to testing the market to see if the firm's services might have been available from another source. The Subcommittee then sought, in view of this, the opinion of Mr. Cook, whose task it was to obtain the best contract for the government.

Senator COHEN. * * * That need (for a management plan) was recognized considerably sooner in time than when you were (first) contacted (to execute a sole-source contract with Stewart Consultants, Inc.)?

Mr. COOK. Yes, sir; I would assume so.

Senator COHEN. Now, in your opinion, do you think that * * * you might have been able to seek some competition for this requirement for a management plan? I am not asking, or suggesting, whether you would have gotton "a better deal" or "a lower price," but, as a matter of practice, would it have been better, in your judgment, to give you some opportunity to get a more competitive management plan than under the circumstances under which you were required to act?

Mr. COOK. I would have to say "yes" to that.

Senator COHEN. There is no doubt about that in your mind?

Mr. COOK. No, sir.

Senator Cohen then asked VA Deputy Administrator Wilson:

"You say that: 'While work that is performed under the impending deadline of the end of the fiscal year and the lapse of the appropriation is of necessity rushed, we do not believe this had a deleterious effect on the quality of services.' Now in light of what Mr. Cook has said, even though there might not have been any effect upon the quality of services, isn't it true that the VA might not be getting the best deal for the taxpayer for those necessary services, and that the funds that could otherwise be used for taxpayers' benefits are being wasted? Don't you agree with that?" Wilson responded, "Yes, sir, I would have to agree with that."

e. *Procurement regulations: Alice's world.*—The Subcommittee's examination of the VA and LEAA contracts revealed that serious and unnecessary diminution of the government's competitive position can occur without any "violation" of the procurement regulations. A report and the subsequent testimony of the Veterans Administration's Inspector General concerning the computer transactions found, in fact, no violations of the regulations, per se, although the Inspector General did determine that: "The decisions were hurried and some lacked the disciplined planning, coordination and thoroughness appropriate for procurements of this magnitude; the Administrator's guidelines for computer acquisitions were not appropriately interpreted; and significant costs * * * were not fully addressed."

The consequences of this ambiguity and wholesale delegation of discretion to the Executive are numerous.

First, the regulations' reliance on agency determinations provides no incentive for top level officials who have the discretion to approve noncompetitive contracts to familiarize themselves with and explore the market in which their agency purchases. So long as "feasibility of competition" is within the discretion of agency officials, there will be sub-

---

[64] From W. R. Martin, Assistant Administrator, Office of Data Management and Telecommunications, Veterans Administration, to Clyde Cook, Director, Supply Service, Veterans Administration, (September 11, 1979); see note 61, supra.

stantial inducements to avoid the administrative burdens of seeking competition.

Second, and related, the significant discretion which the regulations delegate to agency officials effectively discourages critical audit findings. As the GAO noted in its statement to the Subcommittee, "The Inspectors General can play a role in the surveillance aspect once management has established clear policies." [65] Unless management establishes much stricter criteria for ensuring competition than the procurement regulations provide, the ambiguity of the regulations gives the Inspectors General the difficult task of reporting only technical violations or devising their own criteria of what constitutes competition.

Far too often, the Subcommittee found, procurement audit reports focused on the lack of paperwork and the incompleteness of contract files instead of on the substance of poor decisions made by government managers. Although difficult in the absence of clear guidelines, the vigorous and thorough investigation of year-end expenditures by audit personnel is absolutely necessary to creating the management environment that will discourage wasteful practices; unfortunately, some auditors have been unwilling to take on this burden.[66]

Third, the regulations have discouraged contractors who have been unfairly eliminated from the procurement process by hurry-up spending tactics from formally lodging a "bid protest" with the agency or the General Accounting Office, which makes advisory judgments on procurement complaints brought to its attention. Although GAO testified that, "For over 50 years the GAO has provided an objective, independent, and impartial forum for the resolution of disputes concerning the award of contracts," numerous contractors interviewed during the Subcommittee's investigation reported that GAO's almost exclusive reliance on agency findings and the reluctance of GAO to recommend relief in any case has made the protest route practically useless. As one member of the government contract bar stated to the Subcommittee, "There are essentially two reasons why the Comptroller General's protest function has not provided a satisfactory deterrent to unjustified sole-source contracting. First, many protestors hesitate to antagonize Federal agencies by publicly challenging their actions. Second, and more important, both procedural and substantive protest rules make the likelihood of success very low * * *. Unless clearly arbitrary or in violation of applicable statutes or regulations, an agency decision that public exigency or some other reason requires a sole-source procurement will not be questioned by GAO. . . . In sum, whatever the merits or demerits of the GAO bid protest function, it does not operate as a satisfactory curb on year-end sole-source contracting." [67]

---

[65] Additional material submitted for the record by the General Accounting Office, "Hurry-Up" Spending Part II: Hearings.

[66] Recognizing the complicity of auditors in the lack of oversight of year-end spending, Veterans' Administration Inspector General Allan Reynolds testified, "Twenty-three, twenty-five years ago there was a lot of heat on this area, and the audit agencies used to spend a good deal of time looking at year-end spending. . . . We put heat on it for a time, but there was a lack of interest in it. So we started spending audit resources, which are always scarce, on things that there was more interest in doing something about."

[67] Letter from James Hostetler, Chapman Duff and Paul, to Senator Cohen (May 5, 1980), at 5. In one protest ruled on by the GAO, the agency, the Department of Labor's Mine Safety and Health Administration executed a de facto source procurement by splitting procurements so as to be able to use the non-competitive Federal Supply Schedule source. GAO ruled, in spite of a finding of wrongdoing on the part of the agency, that "it is not feasible to recommend corrective action." See Comptroller General of the United States, U.S. General Accounting Office, "Decision B–193541," (Mar. 27, 1979), at 7.

Fourth, even when the procurements are not awarded on a sole-source basis, substantial curtailment of competition is permitted. Procurements resulting from the solicitation of two sources, compressed response times, and waivers of audit information are recorded as "competitive," yielding the illusion that the government has made the best use of the marketplace. The Office of Federal Procurement Policy's Federal Procurement Data Center, charged with "collecting, developing, and disseminating procurement data which takes into account the needs of the Congress, the executive branch and the private sector," records no data that would allow analysis of the degree to which contracts awarded according to competitive procedures are, indeed, competitive in substance, thus perpetuating the illusion.

In summary, the Subcommittee found the guidance provided by the Federal procurement regulations rooted in an Alice-in-Wonderland logic. As a check against unnecessary non-competitive year-end spending practices, the Federal procurement regulatory structure was found to be in need of significant reform.

4. Federal managers neglect to act to prevent year-end waste

While it was important to document the ineffectiveness of the procurement regulations in preventing wasteful practices, the Subcommittee recognized that wasteful purchases and techniques are executed by individuals, not by regulations. The heart of the hurry-up spending matter, the Subcommittee believed, was why a greater awareness of the costs of year-end spending abuses did not exist within the top management of government, and, in turn, why swift and forceful management action had not been taken in respose to year-end waste.

Ironically, the Subcommittee found, those most aware of the problems involved in year-end spending had the least authority to correct the problem. Those who most vigorously voiced their concern were the so-called "contracting" personnel—the contracting officers, audit, and supporting staff—who are responsible for certifying that the government's purchases are executed within the limits of the law and preferably to the best advantage of the government. Contracting officers do not, in general, have the authority to determine the need for a procurement request.

Contracting personnel were nearly uniform in criticizing the so-called "program" personnel—the program managers and top-level officials charged with deciding what the government needed to buy and when to buy it—for delays that resulted in an annual rush of procurement requests late in the fiscal year.

The Department of Commerce's procurement director, Joseph Sickon, testified that, "The procurement organization historically has had little control over the timing of contract awards. Those with the real power to influence the timing of awards are the program managers and project officers who have the contract requirements." Or, as LEAA's Pate testified, "The contracting officer and the contracting function are usually positioned near the very bottom of the organizational structure. These organizational structures place several layers of noncontracting personnel in managerial positions between the responsible contracting officer and the head of the agency. These agency heads are usually Presidential appointees, who have very little interest

in, or knowledge of, the acquisition process and government contracting * * *. We in the contracting field almost expect this. But it is our job to help political appointees spend tax dollars in the most efficient way."

VA's Clyde Cook, the chief contracting officer in his agency, when asked by the Subcommittee whether he thought, "in general, that the people who are responsible for generating * * * projects, the so-called 'program people,' are not always sympathetic to your responsibilities to ensure that Uncle Sam is getting the best deal for the taxpayer," he responded, "I don't think I characterize it as their not being sympathetic. but perhaps they are not as aware as they should be of the complexity of the procurement process and what we have to do."

In sharp contrast, W. Bowman Cutter of the OMB testified that such program delays were a necessary part of the budget execution process: "The program decision process is necessarily complex because of the need to balance different policy objectives. Program decisions to request procurement actions genrally confine themselves to that process and may well require a peak workload in the procurement office. These peaks are undoubtedly an imposition on procurement offices, but the program officer should not be forced to make hasty decisions on contracts and grants for the sake of producing a smooth work flow later on in the contract and grant award process."

Contracting personnel did recognize the legitimacy of some delays. As Commerce's Sickon testified, "By delaying decisions, various program options can compete against each other and give the manager better informaion upon which to base a decision." But Sickon disagreed with OMB's Cutter, noting that, "Procurement officials must determine a way to provide incentives * * * to bring about an appreciation by the program officials of the many benefits" of orderly procurements.

As Professor Cibinic testified, "My own experience and information indicates that poor planning or execution exists in far too many government agencies.What is distressing is that there is no need for such a condition to exist."

5. OMB has abdicated its responsibility to oversee agency management practices

A major goal of the Subcommittee's investigation was to determine precisely what incentives and management tools had been put into place to ensure, to the maximum extent possible, that program and contract personnel worked cooperatively to execute planned, orderly procurements, instead of relying on "hurry-up" year-end spending practices to accomplish the government's work or otherwise obligate funds before appropriations reverted to the Treasury. Of special concern to the Subcommittee was whether top management—and especially the Office of Management and Budget—was taking the actions necessary to promote such efficiency.

a. *Environmental Protection Agency.*—As a case in point, the Subcommittee considered at length the incentives for good procurement management at the Environmental Protection Agency and the role of OMB in promoting ideas that proved successful.

By 1975, five years after its creation, EPA has developed a significant year-end buying problem, according to William E. Mathis, Director of EPA's Procurement and Contracts Management Division:

We saw that during the first quarter of the fiscal year, only 16 per cent of our contracting workload was received. Since it takes between five and six months to complete a process of awarding a contract competitively, we could tell right away that we were headed for trouble. * * * In the last quarter of fiscal year 1975, requests for some 44 per cent of the total dollars to be obligated arrived in the contracts office. * * * The time available for contract placement was condensed. The contract quality began to decline. Staff workload scheduling was very inefficient. * * * The carryover to the next fiscal year of unexpired appropriations began to increase dramatically. This funded carryover increased from $24 million at the end of fiscal year 1974 to $65 million at the end of fiscal year 1975. We calculated that by 1979, if we kept up at that rate, that we would have to use all of 1979 just to process the work that we carried over from 1978. In other words, we would have had a one-year backlog of appropriations.

In response to this problem, Mathis said, he devised for use in 1976 a system that would "improve the timing of received requirements so that we would have enough time to do an effective job in awarding contracts," even though "obligations would always be larger in the fourth quarter." EPA's budget personnel agreed with Mathis that such a system was desirable, and, although a number of "program" personnel were skeptical, EPA's top management, including the Administrator, gave its support to the system, which took effect in the second quarter of fiscal year 1976, Mathis explained.

Mathis's concept, as implemented and functioning today, works as follows. Before each fiscal year, each office director in EPA is required to submit a plan listing each contact need that is expected to result in a contract award of more than $25,000 during the upcoming fiscal year. Program officials are to inform contracting workers at the beginning of each fiscal year when formal requests for contracts will be made, Mathis said. In no case, except for bona fide emergencies determined by a "senior level program official" are procurement requests accepted for action beyond April 30, five months before the end of the fiscal year. Notwithstanding this exception, however, no more than 15 per cent of a program's contract actions may be submitted on such an emergency basis. "If programs do not follow the plan, they are subject to having their funds redistributed to other programs—within, of course, appropriate guidelines," Mathis testified.

Mathis presented statistics showing that the planning of EPA's contract programs had improved. "We are now receiving significantly more actions in the first half of the fiscal year than we were in 1975: 60 per cent versus 30 percent. * * * The workload receipts in the last quarter of the fiscal year (are) down to 15 percent from 44 percent." Mathis said. Mathis's figures also showed that the percentage of EPA's contracts let on a non-competitive basis decreased from 35 to 21 per cent in the period from fiscal year 1975 to fiscal year 1979. Mathis also testified that the planning system gives top mangement a greater ability to oversee a program's proposed operating plan before it is implemented, has replaced the "frustration of contract and program personnel" with "the team concept and renewed professional spirit," and saved the agency between $750,000 and $1 million in personnel costs alone.

The Subcommittee was especially interested in whether, even with EPA's large responsibilitv to respond to environmental disasters, there were factors that made EPA's programs more subject to a regularized planning process. Mathis responded, "The prime ingredients of a plan-

ning and management system have to start with the commitment of top management. Once you obtain that commitment, no matter what the function of the agency, the system can work. I think that 80 to 90 per cent of the functions of any agency are pretty well determined, pretty well planned, and therefore are susceptible to orderly management programs."

Given Mathis's belief that such a planning system and its incentive structure would be precisely the type of tool that OMB should promote, the Subcommittee inquired as to what interest OMB had expressed in the EPA contract planning system.

In testimony, Mathis said that OMB had not contacted him in the four years his program had been in place, although he did make a presentation to the OMB budget examiner in the spring of 1979, more than four years after EPA's planning system first went into effect.

When OMB's W. Bowman Cutter testified, the Subcommittee attempted to determine what, if anything, OMB had done to evaluate EPA's planning system, to suggest improvements to it, or to promote it across government if it was appropriate to do so. OMB's Cutter was asked: "Why is the initiative coming from EPA? If, in fact, the initiative is coming from there, why isn't OMB taking a look at that? Why isn't the Office of Federal Procurement Policy?" Mr. Cutter responded that he had only just read about the EPA system as a result of EPA's testimony. As he admitted, "I am genuinely curious about what they did. * * * I don't entirely understand it. * * * Those of us who are working * * * didn't have any idea how the process had worked or what it had done, until it had been going for some time. Of course, there are ranges of priorities as to how people spend their time."

Despite Mr. Cutter's interest in the EPA system, the revelation that OMB had been, essentially, paying no attention to an agency's management practices with respect to the expenditure of hundreds of millions of dollars of contract funds each year was especially disturbing to the Subcommittee. Whether the EPA system had reduced inefficiency—and the Subcommittee was presented with evidence that it had at least to some degree—was beside the point. According to the Presidential order creating the Office of Management and Budget, a central element of OMB's mission is to "maintain a continuous review of the organizational structures and management process of the Executive Branch, and recommend needed changes."[68] For at least five of its ten years, OMB had sought no information concerning the details of a significant management process—the process by which billions in federal dollars were spent by contract. With respect to overseeing EPA's spending practices, OMB had flunked the requirements of its own job description.

Unfortunately, the Subcommittee found, OMB had failed to pay attention to the hurry-up spending problems experienced by numerous other federal agencies.

b. *Department of Commerce.*—According to testimony presented by Joseph A. Sickon, the department's director of procurement, Commerce has had "perennial" problems in year-end procurement. For example, the department incurred more than one-third of its annual

---

[68] Message of the President accompanying Reorganization Plan Number 2 of 1970, 35 Federal Register 7959.

procurement related overtime costs in the last month of fiscal year 1979. The number of contracts awarded in September 1979 (337) was more than twice that awarded in any other month except October 1978, the first month of the fiscal year, during which actions left over from the previous fiscal year had been awarded. Sickon stated in testimony that the pattern of spending was often accompanied by, "hasty and poorly conceived project formulation and phasing; a diffusion of responsibility resulting in poor contracting practices or lack of accountability; decreased competition; poorly decided selection of contracting methods," among other problems.

Sikon, who had been named to the director's position in the spring of 1979, testified that when he first arrived in the procurement office the process was out of control and there was "no effective means of achieving planning and a balanced submission of procurement requests across the fiscal year."

When asked whether the Office of Federal Procurement Policy, which is within the Office of Management and Budget, had ever contacted him with respect to year-end spending and the underlying management problems associated with it, Sickon replied, "No; they never contacted me." Instead, with the help of Robert Wright, formerly employed in EPA's contract office, Sickon established a procurement planning system in the Department of Commerce similar to EPA's. To the Subcommittee's knowledge, as based on the hearings, OMB has never expressed approval of the new process at Commerce.

c. *National Highway Traffic Safety Administration.*—Associate Administrator Dana Scott testified that, "All in all, compressing a high percentage of procurement awards into the last quarter of the year impairs the effectiveness of the Federal procurement process." The dollar value of NHTSA's procurement in the last month of fiscal year 1979 was more than three times that of any other month.

Scott testified that the solution for this problem at NHTSA was, as at EPA and Commerce, the implementation of a long-range planning process for the agency's activities that required contracted support.

He added that NHTSA had implemented for the first time in fiscal year 1980 a master plan of activities developed with the comments of private research and development firms, industries, consumers, and other government agencies. The plan effectively notifies potential contractors of what procurements will be forthcoming. To ensure implementation of the plan, NHTSA has conditioned performance appraisals mandated by the Civil Service Reform Act for the so-called "merit-pay" group upon meeting the "milestones" set forth in the plan.

The plan had no apparent relationship to any OMB directive, but, rather, was a result of direct action by the Administrator, Joan Claybrook. As Scott testified, "It's one of the first things that she emphasized upon taking office two years ago."

d. *Department of the Interior.*—For more than five years, the Department of the Interior has recognized that it has problems with wasteful year-end spending. But despite this internal awareness, the department's management actions have been less than effective in reducing hurry-up spending practices.

According to the testimony of Deputy Assistant Secretary William L. Kendig, the number of Department of Interior contracts involving payments of more than $10,000 awarded in September 1979,

(1,692) was more than double that of any other month in the fiscal year. Total fourth quarter procurements amounted to $507 million in fiscal year 1979, more than a third of all procurement dollars obligated during the last fiscal year. The cost of overtime payments to procurement personnel during the last two months of fiscal year 1979 was $141,478—more than 35 per cent of all procurement-related overtime during the fiscal year.

As Kendig testified, "the pattern of obligations does not represent the best allocation of personnel resources. The increase in both overtime hours worked and funds obligated during the last quarter are indications of this. * * * The Government's competitive position is not always best served by a situation in which procurement personnel are pressed hard to obligate a large portion of their agency's funds in a compressed time period."

The Department of the Interior, Kendig said, first studied ways to combat year-end spending abuses in 1975. After reviews revealed significant year-end spending abuses in the Bureau of Mines, and related problems in the Fish and Wildlife Service, the Department issued in 1976 an internal regulation requiring "technical program, budget, and procurement officials in each procuring activity" to "cooperatively prepared advance procurement plans for anticipated procurement requirements for each fiscal year," much as EPA had done through internal administrative action.

The result of the Interior regulation, in terms of reducing year-end spending abuses, was at best marginal.

Reviews by the Department of the Interior's Office of Inspector General revealed numerous failures to plan and execute orderly procurements as required by the internal regulation.

A January 31, 1978, report on the procurement activities of the National Capital Region of the National Park Service found that the region "initiated procurements with little or no preplanning. * * * (E)xtensive year-end procurements were made without adequate compliance with applicable procurement regulations." The audit team found that, in the 15 months prior to October 1, 1976 (FY '76 and the transition quarter), 54 percent of the region's construction contracts were awarded in the last month, September. "Moreover," the report noted, "625 (77 percent) of the purchase orders (against existing contracts) issued during September 1976 were dated September 30, 1976."

"The main reason for the large number of procurements processed through the system in September," the report noted, "was that funds not obligated by September 30, 1976, would expire and be returned to the Treasury. Our audit disclosed that the processing of 21 contracts totaling $1,623,215 was expedited in order to avoid returning funds to the Treasury. In each case, the time allowed for bids was less than the minimum time specified by the Federal Procurement Regulations (FPR) for adequate competition," the Inspector General's report said.[69]

A December 30, 1977, study of the procurement activities of the Geological Survey reported that the survey "has not established an effective advanced procurement planning system. The lack of a plan-

---

[69] Office of Audit and Investigation. U.S. Department of Interior, "Review of Procurement Activities: National Capital Region, National Park Service," (Jan. 31, 1978), at 7–12.

ning system has resulted in (a) noncompetitive procurements because of time constraints, (b) mandatory overtime, and (c) excessive contract requirements at the end of each fiscal year." [70]

As Kendig testified, "We recognized at the close of FY 1978 and the beginning of FY 1979 that our requirement for advance procurement planning had not been effective in curbing the year-end bulge for a variety of reasons. It was not supported strongly, in several cases, by bureau management and it was contained in the Interior Procurement Regulations instead of being integrated into budgeting and planning directives of the department. The highly decentralized nature of the department procurement activities and limited staff resources available for technical assistance within the Office of the Secretary made compliance difficult to monitor. In addition, we assumed that the Department would not have to provide detailed guidance concerning how to conduct advance procurement planning, an assumption which was apparently wrong."

Kendig testified that at the end of fiscal year 1979 the Department of the Interior contracted with a management consulting firm, Sterling Systems, Inc., of McLean, Virginia, to develop "an advance procurement planning system based on an analysis of current bureau problems, identification and analysis of bureau and departmental needs, selection of data elements, and reporting formats to accommodate these needs." The contract with Serling Sysems, Inc., a participant in the Small Business Administration's minority disadvantaged contractor program, was signed on September 28, 1979, the last working day of the fiscal year.

During the April 30 hearing the Subcommittee received the testimony of James M. Garrison, Sterlnig System, Inc.'s project manager for the Department of the Interior consulting contract.[71]

Perhaps most significant in Garrison's testimony was his documentation of the failure of the department's planning efforts. For example, in the wake of the Inspector General reports mentioned above, the National Park Service's capital region and the U.S. Geological Survey promised to implement planning systems to ensure orderly government purchasing. But Garrison's team of interviewers found, he testified, that "In the National Capital Region Office of the National Park Service, advance procurement planning was inadequate. Officials there said that the budget-planning process was neither under control nor effective. * * * It was the National Capital Region Office's opinion that the parks do not have a full grasp of the procurement process." At the Geological Survey, Garrison stated, procurement plans were two months behind schedule. Garrison's statements were corroborated by Deputy Assistant Secretary Kendig, who said, "While several bureaus responded positively to the recommendations made in the audit reports, their actions fell short of their commitments."

Garrison went on in his statement to describe problems in bureaus not covered by formal audits. Among other examples, Garrison ex-

---

[70] Office of Audit and Investigation, U.S. Department of Interior, "Review of the Procurement Activities of the Geological Survey," (Dec. 30, 1977), at 8.

[71] Less than 18 hours before the time of the hearing, the president of Sterling Systems, Inc., after reading Garrison's statement, attempted to block Garrison's testimony on the basis that its findings, critical of the Department of Interior, would jeopardize the firm's relationship with its client. Garrison ultimately testified as an individual, and not as a representative of Sterling Systems, Inc.

plained that, in the Bureau of Mines, "We found that there was no extensive follow-up or management guidance, and, as a result, advance procurement planning was, at the time of the interview (autumn 1979), practically non-existent."

Kendig testified that the Department "hopes" to have "full implementation" of a procurement scheduling system by fiscal year 1982, six years after an initial order to do so was given by agency management. Kendig also said that Interior was about to implement basic educational and experience requirements for individuals who are delegated authority to sign contracts, which would generally improve the efficiency of spending in the department.

Kendig noted in his prepared testimony and in further statements to the Subcommittee that incentive systems mandated by the Civil Service Reform Act could be used to further "departmental goals," but he indicated that the Department of the Interior did not necessarily intend to include procurement planning and execution of orderly procurements as an element in performance appraisals of agency personnel. In contrast, other agency officials, most notably those at HEW and NHTSA, testified before the Subcommittee that the inclusion of these standards in employee job evaluations was essential to the success of programs targeted at eliminating wasteful year-end spending.

Ultimately, Kendig said, until the Department of the Interior's procurement planning system was fully operational, Interior would likely continue to incur unnecessary overtime and inflated contract expenses resulting from hasty procurements.

At it attempted to do with the other agencies it evaluated, the Subcommittee sought to determine the extent to which OMB served as a repository of management information for Interior personnel and the extent to which OMB monitored Interior's procurement problems.

Kendig said that Interior had not contacted OMB or its Office of Federal Procurement Policy concerning procurement planning systems since before 1976. In the hearing, Kendiz was asked whether Interior officials "ever got any complaints from budget monitors over at OMB about your contracting figures when they came out." Kendig replied, "No, sir."

e. *Department of Health, Education, and Welfare.*—Deputy Assistant Secretary Wilford Forbush of the Department of Health, Education, and Welfare, now the Department of Health and Human Services, stated before the Subcommittee that, despite progress in recent years, hurry-up contracting remained a substantial problem at HEW during fiscal year 1979.

According to statistics Forbush provided to the Subcommittee, fourth quarter procurement spending had dropped, for the department as a whole, from 64 per cent of total procurement spending in fiscal year 1974 to 39 per cent in fiscal year 1979. However, some offices continued to manifest a significant compression of procurement activity in the fourth quarter. The Office of Human Development Services, for example, obligated 69.2 per cent of its procurement funds in the last quarter of the fiscal year, and incurred $32,000 in procurement-related overtime—half its yearly total—in the last month of the fiscal year. And, in spite of overall improvements, an Inspector General's report showed that HEW obligated in the last three days

of the fiscal year—Friday, Saturday, and Sunday—$135 million in contract funds, approximately ten per cent of HEW's total contract expenditures for FY 1979.[72]

Forbush spelled out for the Subcommittee the "clear adverse effects" of this compression of contract activity: (1) risk that the government's requirements will be "too generally described" resulting in low quality proposals; (2) "uneven and inefficient utilization of contract office staff resources"; and (3) the straining of contractor resources caused by the agency's requiring responses to "a large number of requests for proposals published at the same time."

Approximately at the same time as the Inspector General's discovery of $135 million in contract obligations recorded during the last three days of the fiscal year, Patricia Roberts Harris, the Secretary of HEW, issued a strongly worded memorandum outlining procedures to control fourth quarter procurement in the current and future fiscal years.

For the upcoming fiscal year, the memorandum required immediate development and submission by program managers of procurement plans so as to make best use of budgetary resources eligible for obligation in fiscal year 1981. Agency officials were also required to justify budget requests for fiscal year 1982 with concrete purchase and aid (grant) packages.

Under the requirements of the HEW planning system, all senior program managers must include annual procurement planning and execution as part of their performance standards. This provision encourages greater compliance with the new procurement planning as civil servants are aware that job performance evaluations will reflect how well they adhere to the system.

The HEW instructions also capped fourth quarter fiscal year 1980 contract expenditures for each major agency within HEW at 30 per cent of total fiscal year procurement obligations and limited procurement in each of the last three months of the fiscal year to not more than 12 per cent of the total for the agency. The heart of the memorandum, however, was the increased emphasis on better planning, as is indicated by the Department's plans to remove the cap on contract obligations in fiscal year 1981.

While Deputy Assistant Secretary Forbush's prepared statement indicated that the moving force behind HEW's self-proclaimed "ambitious" program for reducing year-end spending abuses was OMB's concern with "unnecessary end of year spending," the timing of the new policy with the Inspector Generals finding was viewed as significant by the Subcommittee. Asked whether he thought the Inspector General's discovery "had anything to do with Secretary Harris's desire to reform HEW," Forbush answered, "No question about it." "It is that kind of excess which motivated her?" Senator Cohen asked. "That's right," Forbush said.

f. *Law Enforcement Assistance Administration.*—While other agencies' top management had at least recognized that year-end contracting was producing undesirable results, LEAA's senior financial and legal officers maintained that hurry-up spending was not a problem in their agency. According to LEAA General Counsel Thomas Madden, "The

---

[72] Office of Inspector General, Department of Health, Education, and Welfare, "Annual Report," (March 31, 1980), at I–7.

Law Enforcement Assistance Administration has an excellent financial management and grants and contracts system." Madden later admitted, however that, "I am not in a position where I review the process or the flow of contracts."

Joe Pate, Chief of the Contracts Branch at LEAA, who was in a position to see the contract process at work in his agency, testified that the lack of contract planning in LEAA resulted in the contract officer being placed "in a position of awarding sole-source contracts or limited competition contracts, modifying existing contracts, waiving audit reviews, making letter contracts (that subject the government to increased risk), and more than likely allowing a greater profit incentive to the contractor than normal if more time were permitted to handle the transaction."

Pate testified that he was kept largely uninformed about pending contract actions, which effectively prevented him from obtaining the best contract arrangements for the government at year's end. In the case of one contract, which resulted in a $200,000 sole-source agreement to purchase IBM word-processing equipment, Pate was first notified of the agency's need on September 26, 1979. Pate stated to the Subcommittee that his supervisors were so worried that he would not process the award that they tape recorded a conversation with him and attempted to obtain his promise "to process the * * * contract prior to the fiscal year deadline when no cost-benefit analysis was available to me at the time." [73] The intent behind the contract, Pate said, was "to use a loophole * * * and eliminate the requirement of General Services Administration approval," which was to be required for such purchases beginnig in fiscal year 1980. Pate said that when the contract documents he requested were not ready by the time he was scheduled to leave work on September 28, 1979, he left his office and the contract was signed later in the day by his supervisor, W. W. Hudson. Pate said that he has since refused to handle any requests concerning the word-processing contract.

Pate aid that the word-processing contract was a "typical response" of the agency "to a threat to its purchasing power." He said, "When LEAA saw the GSA deadline, it sped up like a car flying through an intersection seconds before the light turns red."

Pate, who has worked in government contracting for twenty years at five federal agencies, said the IBM contract was a typical "byproduct of the bureaucratic process." He added, however, that "if sound planning practices existed," it would not have been necessary to resort to such hurry-up spending practices.

Pate was critical of planning in LEAA. He said that there was no acquisition plan in LEAA and that "the LEAA management-by-objectives plan, as now written, is simply too vague to meet the needs of an efficient contract office." Pate presented statistics indicating that in fiscal year 1977, when LEAA did have a rigorously enforced procurement planning system in place, contracting in LEAA proceeded on an orderly basis. Pate testified, however, that the diligent enforcement of planning instructions "departed with the installation of a new administration, and consequently the agency has reverted to the old

---

[73] Additional material provided for the record, "Hurry-Up" Spending Part I: Hearing, at 228.

ways of doing business." In fiscal year 1979, LEAA incurred 59 per cent of its contract obligations in the final quarter.

The Subcommittee has learned, since the hearing at which Pate testified, that neither OMB nor the Office of Federal Procurement Policy has communicated with Pate's office to attempt to improve procurement planning at LEAA and thereby reduce the incidence of wasteful year-end spending practices.

g. *Summary.*—The Subcommittee's extensive study of the promotion of management and planning tools within the Executive Branch—the key to eliminating widespread year-end spending abuses—showed that while a number of agencies have recognized that a problem exists and while some corrective actions are being taken, the pattern of reform is (1) haphazard, (2) slow in developing, (3) inconsistent among different agencies, (4) completely absent in others, and (5) proceeding with virtually no management support, coordination, guidance, or oversight from the President's Office of Management and Budget or the Office of Federal Procurement Policy, which is part of OMB.

In failing to address a problem that exists in identical form in virtually every federal agency, OMB, in effect, has abdicated its mandated responsibility to "maintain a continuous review of the organizational structures and management processes of the Executive Branch and recommend needed changes."

The Subcommittee is most disturbed by the apparent lack of concern by OMB about questionable year-end spending practices. In testimony before the Subcommittee on November 29, W. Bowman Cutter, the Executive Associate Director of OMB, stated:

> In September 1978, the increase (in obligations governmentwide) over August was $42 billion, 94 percent. These statistics, I believe, should not be interpreted to mean that widespread and systematic abuse exists. * * * To be sure, some amount of abusive year-end buying occurs. It is my judgment that the extent of the problem has been exaggerated in a way that can cause harm for rational government.

Instead of confronting the serious, underlying management problems of which wasteful year-end spending practices are a symptom, OMB since 1965 has simply issued routine annual memoranda instructing agencies, for example, not to "spend or obligate funds for the sole or even primary purpose of keeping them from lapsing." Cutter described the memoranda as follows: "In each year's guidance, we have made clearer and more specific the kinds of actions we believe are wasteful. * * * Our intent has been to place in the hands of agency officials a clear statement of Presidential policy."

Testimony and other evidence developed by the Subcommittee indicated that the annual OMB memoranda were not, in fact, clear statements of special policy.

For example, the interpretation of the 1979 OMB memorandum varied widely from agency to agency. The National Highway Traffic Safety Administration's Associate Administrator, Dana Scott, testified that "my interpretation of that memorandum is that it's designed to prevent unplanned and unwise spending," while his subordinate, John Clogan, said that one could evade the intent of the memorandum by "seizing upon one of the exceptions that are given." LEAA's Joe Pate testified, "It does not prohibit me from making certain transactions. It's more or less a repeat of what is contained in the Federal Procurement Regulations," which the Subcommittee documented as

permitting substantial amounts of waste. OMB officials did not deny that the fiscal year 1979 memorandum was merely "restating Federal procurement policy."

The confusion inspired by the OMB memoranda was further documented by an interim report by the General Accounting Office in response to Senator Cohen's Stepember 26, 1979, request that GAO investigate fiscal year 1979 obligations to see "if obligations were incurred in accordance with the President's directive." In its interim report of June 18, 1980, GAO discussed numerous examples of wasteful or hurried expenditures from fiscal year 1979. The GAO, however, found no violations, per se, of the OMB memoranda. Rather, GAO said, the purchases violated only the "spirit and intent" of the OMB directive. The conclusion to be drawn from the GAO report, therefore, is that the memorandum was written so as to be unenforceable.

Compounding the ambiguity of what one official called OMB's "broad guidance" was the timing of the memorandum. In fiscal year 1979, the directive was not issued until August 7, which most agency officials conceded was too late to have any practical effect on spending decisions. Some agencies did not receive the memorandum until two weeks before the close of the fiscal year.

More important, OMB made no recognizable efforts to see what actions had been taken in response to its directive. The fiscal year 1979 memorandum did not even require, as had the first year-end spending directive, issued in 1921, agency officials to report any instances of year-end wasteful purchases and steps taken to comply with the directive to the Office of the President. Commenting on the memorandum, Senator Cohen said, "Its said, it's ignored, and the practice goes on and on. * * *"

On June 25, 1980, the OMB issued a memorandum to the heads of executive departments and establishments admonishing agencies to avoid "unnecessary year-end buying." The memorandum once again restated the procurement regulations and failed to require that instances of waste be reported to the Office of Management and Budget. The new memorandum indicated that the fundamental attitude of OMB towards year-end spending abuses had not improved.

In the more than seven months since OMB's testimony, the Subcommittee made repeated attempts to elicit OMB's plans to promote, coordinate, and oversee the implementation of management tool necessary to prevent wasteful and inefficient year-end spending.

At the November hearing, OMB expressed an interest in EPA's procurement planning system. Subcommittee communication with EPA procurement officials revealed, however, that OMB made no efforts to contact them for more than two months after the hearing. After the Subcommittee discovered that OMB had provided no remedies to year-end spending abuses in the President's budget proposals for fiscal year 1981, as was requested by the Second Concurrent Budget Resolution of 1980, the Subcommittee wrote to Budget Director McIntyre on February 20, 1980 to inquire what actions the President had contemplated in this area, and whether OMB had reviewed EPA's procurement scheduling system.[74]

---

[74] Letter from Senators Levin and Cohen to OMB Director McIntyre (February 20, 1980).

On April 4, OMB responded, "We are particularly impressed with the EPA approach as possible means to improve the distribution of the procurement workload. * * * Based on these innovative agency management approaches, we are developing guidance on alternative ways to improve the management of agency procurement workload. * * * We expect this guidance to be issued shortly." [75]

In early May, the Subcommittee obtained a draft of a proposed policy letter of the Office of Federal Procurement Policy concerning "Procurement Plans and Review of End of Year Purchases." The draft letter instructs agencies to develop procurement plans for "all forthcoming procurement requests, in advance of the fiscal year in which the requests are to be submitted." The draft required the plans to allow for "sufficient lead time and to prepare solicitations, obtain and evaluate bids or proposals, audit, negotiate, and make awards by the end of the fiscal year." [76]

While it viewed the draft as a positive step, the Subcommittee was concerned that the proposed policy contained no provisions that would allow OMB to hold agencies accountable, on a regular basis, for the execution of procurement plans, for the granting of exceptions for emergency purchases, or for encouraging agencies that lacked experience in such management systems to build on the expertise of agencies with effective procurement controls. As a result, the Subcommittee wrote to Budget Director McIntyre on May 21 urging that the standards included in the draft letter be strengthened to rectify these omissions.

A second draft of the policy letter received by the Subcommittee in June 1980 indicated no changes from the original draft that would result in the close monitoring of procurement execution deemed necessary by the Subcommittee to effectively prevent wasteful year-end spending practices. Agencies would be required to report the procedures they have implemented to OMB, but they would be free from requirements that the success or failure of those procedures be reported.[77]

As of this writing, the Office of Federal Procurement Policy has yet to issue a policy directive in any way requiring agencies to implement and rigorously enforce procurement schedules. While OFPP's repeated delays raise issues in themselves that are of concern to the Subcommittee, OFPP's reluctance to avail itself of the types of management information—including Inspector General and other audit reports—necessary to keep the President and Congress adequately informed as to the performance of federal programs presents a management failure of the most significant degree.

The Office of Federal Procurement Policy has also failed to make use of perhaps its most powerful audit tool—the Federal Procurement Data Center. Established in October 1978 in the act that created OFPP, the data center has yet to maintain an accurate computerized data base of information on all government contracts. A GAO study revealed substantial inaccuracies in the data that is now collected and a lack of any mechanism by which OFPP monitors the accuracy of the

---

[75] Letter from Hubert L. Harris, Jr., Assistant Director, OMB, to Senator Cohen, (April 4, 1980).
[76] Draft policy letter, Office of Federal Procurement Policy, (May 1980).
[77] Draft policy letter, Office of Federal Procurement Policy (June 23, 1980).

data that is collected.[78] Even if the probems reported by the GAO are remedied, unless substantial changes are made in the type of data OFPP seeks to collect, the data system will remain practically useless to auditors and others who may wish to monitor the extent to which competition—in its real, not legal, sense—is achieved in federal procurements. There is currently no mechanism, short of an expenditure of scarce audit resources, by which the government can separate planned from unplanned spending, or competitive procurements that are truly competitive from those that meet the bare minimum requirements of law and regulation. Currently only a handful of agencies maintain such information, and those that do maintain it for informal purposes only. The lack of such a data requirement, the Subcommittee believes, has substantially diminished the ability of Executive officials and the Congress to oversee the expenditure of Federal funds.

While the Subcommittee by no means excuses the management failures at the departmental, bureau, or program level—and the foregoing discussion indicates that there has been no lack of these—the Subcommittee is convinced that, more than any other factor, OMB's abdication of its management authority is responsible for the significant untold amounts of tax dollars that are wasted each year by hurry-up spending practices. As Professor Cibinic testified at the April 30 hearing, "I see that OMB is probably the one who has dropped the ball more than anybody else has in this area. * * * I don't think that the Office of Federal Procurement Policy has done an effective job of leadership in the procurement area. There is a statutory grant of authority there. There is a responsibility there. Evidently, they either don't recognize it as a problem, or they haven't had time to think about this kind of thing or they are too busy doing other things."

III. Recommendations

A. GENERAL

During the course of its investigations, the Subcommittee identified a number of significant management problems which result in hasty, poorly-conceived, or useless expenditures of Federal funds at the end of the fiscal year. These problems merit concrete and immediate action. In devising remedies to the problems that manifest themselves in hurry-up spending, the Subcommittee on Oversight of Government Management recognized that contractual obligations recorded at fiscal year's end may, indeed, be the result of legitimate, planned, and worthwhile spending processes intended by the Congress. The Subcommittee, in making the following recommendations, believes that remedies which do not distinguish between these legitimate expenditures and those which are the subject of this report cast doubt upon the ability of the Congress to effectively oversee the spending programs it has created. With these views, the Subcommittee presents the problems it has identified, and its recommendations relative to them.

---

[78] Comptroller General of the United States, U.S. General Accounting Office, "Report to the Chairman, Subcommittee on Human Resources, Committee on Post Office and Civil Service, U.S. House of Representatives, "The Federal Procurement Data Center—Making It Work Better," (Apr. 18, 1980), at ii.

B. OMB SHOULD ESTABLISH PROCEDURES FOR OVERSIGHT OF AGENCY PROCUREMENT SPENDING

The President's Office of Management and Budget has failed to establish clear, enforceable guidance to require Executive departments and agencies to plan purchasing activities and execute such plans on a timely basis. The inadequacy and inconsistency of acquisition planning has made it practically impossible for Congress to readily assess whether expenditures were "planned" or not, and has significantly contributed to the costs of government purchasing.

The Subcommittee therefore recommends that OMB immediately issue a directive to all Federal agencies requiring them to: (1) develop procurement agendas in advance of each fiscal year listing, at minimum, all intended purchases exceeding $50,000 and the dates when the agency intends to initiate and complete the procurement process for each such purchase; (2) schedule procurements in the procurement agendas so as to avoid disproportionate procurement activity at fiscal year's end and otherwise to make the best use of the marketplace and the agency's administrative resources; (3) seek approval from OMB of the procedures used to develop such agendas as well as of the substance of the agendas prior to their implementation; and (4) justify, in writing, all deviations from the agenda. OMB should also require periodic reports from Inspectors General and other audit personnel as to the efficacy of the agendas in improving competition for government procurement dollars.

C. OMB SHOULD MAINTAIN AN ACCURATE AND RELEVANT DATA BASE ON GOVERNMENT CONTRACTS TO PERMIT MONITORING OF COMPETITION

The Office of Federal Procurement Policy, within OMB, has failed to maintain, as required by law, an accurate data base of information that is relevant to Congress's interest in promoting competition in government purchasing. The lack of such a data base has made the monitoring of competition for procurement dollars across Federal agencies unduly burdensome. According to OMB's mandate, OMB was intended to "take the lead in developing new information systems to provide the President with the performance and other data that he needs but does not get." [79] Critical information concerning Federal contracting is needed by both Congress and the President, but even after 10 years of existence, OMB still cannot provide it.

The Subcommittee therefore recommends that the Administrator of the Office of Federal Procurement Policy require Federal agencies to record within the computerized Federal Procurement Data System the following information for each government contract involving payments in excess of $10,000: (1) the date of receipt of a request for contract action by the procuring activity; (2) the date of publication of the contract's synopsis in the daily publication, "United States Department of Commerce Synopsis of the United States Government Proposed Procurement, Sales, and Contract Awards"; (3) the date of distribution of solicitations; (4) the dates of closing of bids or the deadline for submission of proposals; (5) the total number of solicitations distributed to potential contractors; (6) the number of proposals

---

[79] See note 68, supra.

or bids received; (7) (in negotiated procurements) the number of proposals in the so-called "competitive range"; (8) (in negotiated procurements) the date of the most recent audit data concerning the contractor as of the date of the contract award; and (9) the date of contract award.

The Administrator of OFPP should also provide the data center with its own audit capability to ensure that the data it receives from federal agencies is accurate and current.

D. SUBSTANTIAL NEW RESTRICTIONS ARE NEEDED ON SOLE-SOURCE CONTRACTS

While the Subcommittee recognizes that government needs cannot always be met through competitive procedures, the numerous abuses by government officials of the discretion to award non-competitive contracts at fiscal year's end have led the Subcommittee to conclude that additional restrictions are needed on so-called "sole-source" procurements.

The Subcommittee therefore recommends that, absent a compelling threat to life, health, property, or national security, as determined by an agency head, or where competition is absolutely precluded by law or government sanctioned monopoly, no non-competitive contracts be awarded by the Federal government without 60 days public notice. The Subcommittee also recommends that an agency be required to use, in cases where during the notice period other contractors demonstrate an ability to perform the work required by the government, competitive procurement procedures. In addition, no non-competitive contract should be awarded unless the agency awarding the contract has made specific plans to insure competition in the future. Inspectors General and other audit personnel should periodically review agency conduct to determine whether such plans have been put into effect, and, if so, whether competition has improved, and should report the findings of such reviews to the Administrator of OFPP. Such restrictions mentioned above need not conflict with government programs designed to promote small and minority businesses or businesses located in labor-surplus areas.

E. PROCEDURES FOR APPRAISING CIVIL SERVICE PERFORMANCE SHOULD PROVIDE STRONG INCENTIVES FOR PRUDENT MANAGEMENT

Throughout its investigations, the Subcommittee gathered evidence indicating that Civil Service performance appraisal systems not only lack incentives for prudent management, but also affirmatively encourage wasteful spending habits found disproportionately at the end of the fiscal year.

The Subcommittee therefore recommends that the Office of Personnel Management issue regulations requiring Inspectors General and other reports which address the conduct of individuals' efforts in promoting competition in government procurement be considered within the meaning of "other indications" of effectiveness and productivity required to be considered in the appraisal of Senior Executive Service and "Merit Pay" groups established by the Civil Service Reform Act. The Subcommittee further recommends that all departments and agencies establish the ability to obtain competition for government

procurement funds as a performance criteria for managers and other officials who make purchasing decisions. In addition, the Subcommittee recommends that the Congressional Appropriations Committees reduce appropriations available for bonuses and cash awards made under the Civil Service Reform Act in programs which demonstrate a history of unnecessarily inadequate competition for procurement dollars.

F. THE SIZE OF SUPPLEMENTAL APPROPRIATIONS REQUESTS SHOULD BE REDUCED

The Subcommittee found that failure to enact supplemental appropriations in a timely manner contributes to wasteful year-end spending. The uncertainty associated with late enactment of supplemental appropriations often result in the release, later in the year, of substantial reserves of funds held in abeyance of Congressional action on supplemental appropriations.

The Subcommittee recognizes that the timing of Congressional action on appropriations legislation is in most cases the responsibility, or fault, of Congress itself. Nevertheless, supplemental appropriations would play a significantly less prominent role in the exacerbation of year-end spending pressures if the Congress were not presented with the necessity of enacting supplemental appropriations for needs that should reasonably have been anticipated. The Subcommittee therefor recommends, in general, that the President improve the forecasting of federal spending needs, and, specifically, that anticipated increased Federal pay costs be included within January budget submissions.

G. CONGRESS SHOULD NOT IMPOSE LIMITATIONS ON THE OBLIGATION OF FUNDS AT FISCAL YEAR'S END

Congressional efforts to control the timing of obligations have had little, if any, proven effect in limiting wasteful spending practices at fiscal year's end. Limitations on the percentage of funds that may be obligated in the latter portion of the fiscal year may result in more waste by encouraging rushed spending in the period just preceding the imposition of the cap on spending. While granting the OMB the authority to waive such spending ceilings allows for greater flexibility in the expenditure of tax dollars, such waiver authority poses the potential for indiscriminate, politically motivated, or ill-considered exemptions from spending ceilings. There are, moreover, such a sufficiently large number of valid reasons as to why obligations may peak in the fourth quarter that reports to Congress justifying the granting of exemptions may be of dubious value.

In light of these factors and the considerable testimony received by the Subcommittee on the subject of such spending limitations, the Subcommittee recommends that Congress refrain from imposing limitations on the portion of funds that may be obligated in the latter portion of the fiscal year.

II. INSPECTORS GENERAL AND OTHER AUDIT PERSONNEL SHOULD THOROUGHLY AUDIT YEAR-END CONTRACTS

If implemented, the foregoing recommendations will establish numerous duties for Inspectors General and similar audit personnel. In the interim, that is, for the next two fiscal years at least, the Subcommittee recommends that Inspectors General and other audit personnel conduct thorough and vigorous audits of year-end contract obligations to determine not only technical compliance with law and regulation, but also whether such expenditures were made as a result of sufficient competition and for *bona fide* needs of the government.

I. THE SUBCOMMITTEE REQUESTS THE APPROPRIATE OFFICIALS TO RESPOND TO THIS REPORT

The Subcommittee directs the Office of Management and Budget, the Office of Federal Procurement Policy, the Office of Personnel Management, all Inspectors General, offices of audit within the Department of Defense, and all heads of Executive agencies and departments, to submit a statement of actions taken in response to the recommendations made in this report.

IV. CONCLUSION

According to public opinion survey results, more than three-fourths of the American public believes that the government "wastes a lot of money we pay in taxes." This figure has grown dramatically in recent years. Whether the result of an actual increase in wasteful government spending or merely a healthy increase in awareness, these statistics serve notice that the American taxpayers will not stand for—and that Congress should not stand for—wasteful hurry-up spending practices.

The fact that hurry-up spending has persisted for sixty years suggests that the remedies to it must impose new burdens on those who spend Federal dollars. This is as the Subcommittee intends. There is no reason why effective instruments of government cannot be brought to bear on a problem that is truly of the government's own making. The magnitude of the problem requires it. The taxpayer deserves it.

V. Additional Views of Mr. Pryor

The subcommittee's report represents a major contribution to Congressional and public understanding of the causes, extent, and results of wasteful year-end spending by federal agencies.

The careful analysis and substantial information provided in the report deserve the attention and study of everyone concerned about the spending of taxpayer dollars. Moreover, the recommendations contained in the report can provide a framework for reform of this costly and pervasive problem and, to a substantial extent, I concur in them.

I must add, however, that I believe immediate legislative action is needed to clearly express Congressional concern about these spending

patterns. Specifically, I believe that a spending limitation should be enacted which would restrict the amount of procurement funds that may be obligated during the final two months of a fiscal year to twenty percent (20%) of the total amount of procurement funds obligated, from any appropriation source, for the entire fiscal year.

I have included such a proposal in the legislation I recently introduced to address problems in the federal government's use of consultant services. The bill's provisions parallel the recommendations of the General Accounting Office and entrust waiver authority to the Office of Management and Budget where the limitation would result in disruption of a program or operation. It would only apply to fiscal years 1981, 1982, and 1983 and would require that the Director of OMB prepare a report for the Congress assessing the impact and results of the limitation and making recommendations concerning its continuation. The pertinent portion of the bill is attached as an appendix to these views.

In my opinion, such a proposal is consistent with the report's recommendations concerning oversight procedures, data collection, performance incentives, sole-source restrictions, supplemental appropriations and auditing activities. Indeed, I believe that Congressional action must accompany the directives to the Office of Management and Budget, the Office of Personnel Management and the Inspectors General which the report recommends. Without legislation providing for a three-year period during which historical spending patterns must be changed, we cannot be certain of genuine progress in the near future.

DAVID PRYOR.

Enclosure.

S. 2880

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Consultant Reform Act of 1980".

LIMITATION OF EXPENDITURES

SEC. 209. Section 3679(c) of the Revised Statutes, as amended (31 U.S.C. 665) is amended by adding at the end thereof the following new paragraph:

"(5) (A) In exercising apportionment authority under this section for the fiscal year ending September 30, 1981, and each of the following two fiscal years, the Director of the Office of Management and Budget shall insure that no more than 20 percent of the total appropriations made available for each agency for any such fiscal year for procurement of goods and services may be obligated during the last two calendar months of such fiscal year.

"(B) The Director may exclude from the requirements of subparagraph (A) funds for procurement of goods and services for any program or operation—

"(i) if and to the extent the Director determines necessary to assure that a serious disruption in the execution of that program or operation would occur in the absence of such exclusion, and

"(ii) if the Director has submitted a written report on such waiver to the Congress as early as practicable.

"(C) The Director shall keep the Congress fully informed of actions taken to carry out subparagraph (A) for each fiscal year involved, and shall promptly report in writing any situation in which an agency's obligations exceed the 20-percent requirement in subparagraph (A) other than pursuant to a waiver under subparagraph (B). Not later than December 31, 1982, the Director shall submit a report to the Congress on the results and impacts of this paragraph and actions taken under this paragraph, including the effects upon procurement and apportionment processes, together with the Director's recommendations concerning the continuation requirements under this paragraph for any provisions of such requirements. Concurrent with the submittal of the report to the Congress under the preceding sentence, the Director shall submit a copy of such report to the Comp-

troller General, who shall promptly review that report and submit to the Congress an analysis of the report and any recommendations which the Comptroller General considers appropriate.

"(D) Any reserves established or other actions taken in connection with the apportionment process solely for the purpose of satisfying the requirements of subparagraph (A) shall be exempt from the last sentence of subsection (c)(2) of this section and from section 1012(a) of the Impoundment Control Act of 1974. Nothing in this paragraph shall be construed to affect the authority of the Comptroller General under section 1015 of the Impoundment Control Act of 1974 to report a reserve or deferral to the Congress if the Comptroller General concludes that the reserve or deferral is not exempt under this subparagraph.".

○