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THE ROLE OF GOVERNMENT CONTRACTS IN FURTHERING NATIONAL ECONOMIC AND SOCIOECONOMIC POLICIES

THOMAS W. REILLY*

INTRODUCTION

In 1940 the Supreme Court in Perkins v. Lukens Steel Co.\(^1\) stated that

\[\text{[l]ike private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases.}\]  

Most of us generally are aware of the various means the federal government uses to artificially manipulate or stimulate the private sector of the national economy. Among the more publicized interventions in the private sector have been programs established to stem buying or buying power during periods of inflation, projects designed to offset serious localized or nationwide unemployment, and policies adopted to discourage discrimination in employment adversely affecting minority groups. We are generally familiar with the way the federal government fluctuates interest rates and reserve requirements, prescribes minimum wages and import tariff rates, and influences farm production by price supports and subsidies for planting certain crops and not planting others. We are also cognizant of the

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\(^1\) 310 U.S. 113 (1940).

\(^2\) Id. at 127 (footnote omitted).
Government's insistence on nondiscrimination in defense industries and Government employment, and its encouragement of small business by its loan program, in order to further certain well-defined economic and socioeconomic objectives. Not so familiar to the average American is the extent of the role played by the Government's procurement program in furthering these policies. One would naturally expect that when the Government contracts for necessary goods and services, it would not do so in such a way as to vitiate the nation's overall social and economic goals. But the deliberate specificity with which the Government includes these objectives as requirements in its procurement contracts (as well as in subcontracts made by its prime contractors) may not be so generally understood. At the same time, the tremendous volume of Government contracting and subcontracting and, consequently, its substantial impact on the economy in furthering those particular objectives may not be generally perceived.

For some appreciation of the impact this one force—Government procurement—has on the national economy, one need only look briefly at statistics. Total Gross National Product (GNP) in calendar year 1960 was $504 billion; total federal government purchases of goods and services amounted to $53 billion. In 1965, the GNP was $685 billion with Government purchases at $67 billion. In 1967, the GNP grew to $789 billion while total Government purchases rose to $91 billion, almost one-eighth of the total GNP. Needless to say, after 1963, with the tremendous expansion of the effort in Vietnam, the volume of Government procurement increased considerably. Defense spending in 1967 was half again as large as that in 1963. Conversely, after Vietnam the volume decreased somewhat, but it still accounted for large-scale procurement activity and represented the lion's share of the federal dollar. Total GNP in 1973 was $1295 billion, with Government purchases at $107 billion. While post-Vietnam figures indicate a decline in Government purchases as a percentage of GNP, Government defense spending still accounts for over eight percent of the GNP and thus continues to have a substantial impact on the national economy.

In addition to the aforementioned expenditures of the Defense Department, five other federal agencies each procure more than $1 billion of goods and services annually. Nevertheless, since the beginning of World War II, defense procurement has represented an overwhelming proportion of total federal government procurement—21.5 billion out of 25 billion procurement dollars spent in fiscal year 1957, $44.6 billion out of $54.3 billion

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4 ECON. INDICATORS, Sept. 1968, at 2.
6 AEC—$3.4 billion; NASA—$2.4 billion; GSA—$1.6 billion; HEW—$1.2 billion; TVA—$1.0 billion. GSA, PROCUREMENT BY CIVILIAN EXECUTIVE AGENCIES, REP. NO. 2773 (for fiscal year 1974).
spent in fiscal year 1967, and $40 billion out of $54 billion in fiscal year 1974. As these figures indicate, military procurement expenditures represent a greater economic force than any other single procurement activity. In terms of impact on employment, aside from the fact that the Defense Department has over a million civilian employees of an entire federal civilian employment of approximately three million, the number of non-government employees working in defense and defense-related industries was over 3.2 million during the Vietnam War year of 1968, and during the immediate post-Vietnam period remained at over two million. If the foregoing figures fail to impress upon us the widespread impact which could be realized through inclusion of social and economic policy provisions in Government contracts, consider the fact that in fiscal year 1974 alone over 10,338,000 separate procurement actions were effected by the Defense Department.

There are many ways within the contracting scheme by which the Government affirmatively furthers its national economic and socio-economic policies. Some of these procurement devices are:

1. antidiscrimination and equal opportunity clauses in all Government contracts and in subcontracts made by Government prime contractors, pursuant to Executive Order 11,246; forty-hour week and time-and-a-half for overtime clauses pursuant to the Contract Work Hours & Safety Standards Act (construction contracts) and the Walsh-Healy Act (manufacturing contracts);
2. a clause prohibiting the use of convict labor pursuant to the Convict Labor Law, and the

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7 GSA, PROCUREMENT BY CIVILIAN EXECUTIVE AGENCIES, REP. NO. 2773 (for fiscal years 1957, 1967, & 1974); DOD, MILITARY PRIME CONTRACT AWARDS (annual reports for fiscal years 1957, 1967, & 1974).
8 U.S. CIVIL SERV. COMM'N, REPORT ON FED. CIVILIAN EMPLOYMENT (for month ending Sept. 30, 1974).
11 DOD, MILITARY PRIME CONTRACT AWARDS (annual report for fiscal year 1974).
16 Exec. Order No. 325-A (May 18, 1905).
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Walsh-Healey Public Contracts Act;\(^{17}\)
(4) a clause prohibiting child labor pursuant to the Walsh-Healey Act\(^{18}\) and the Fair Labor Standards Act;\(^{19}\)
(5) a clause requiring that construction workers be paid no less than the prevailing wage in a given locality, pursuant to the Davis-Bacon Act,\(^{20}\) and without any unauthorized deductions, pursuant to both the Copeland “Anti-Kickback” Act\(^{21}\) and the Davis-Bacon Act,\(^{22}\) with similar minimum wage requirements for manufacturing and supply contracts by virtue of the Walsh-Healy Act,\(^{23}\) and for service contracts by virtue of the Service Contract Act;\(^{24}\)
(6) partial and total set-asides of contracts for the benefit of small businesses\(^{25}\) and “labor surplus areas” (better known as “depressed areas” or high unemployment areas),\(^{26}\) and a contract clause in large procurements requiring the prime contractor to subcontract a certain amount or proportion of the total contract amount to a specified number of small suppliers or component manufacturers (popular in “weapons system” procurements);\(^{27}\)
(7) provisions for loans, tax assistance, and working capital financing for small businesses and companies in “labor surplus areas,”\(^{28}\) provisions for the use of Government-owned or leased buildings and equipment by private contractors and subcontractors not having their own means of producing what the Government wants to buy,\(^{29}\) provisions for “know-how” or knowledge-sharing by the Government with the contractor and subcontractors or between the prime contractor and other prime contractors already producing for the Government under a separate contract,\(^{30}\) and “pooling arrangements” between several

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\(^{28}\) See Defense Contract Financing Regs., id. pt. 163.
\(^{29}\) See id. §§ 7.706-4, 13.000 et seq.
small firms organized by the Government into a "small business production pool;" 31
(8) "Buy American" clauses 32 which follow the Government's economic and political policies favoring American businesses over foreign manufacturers and the nation's balance of payments position; 33 and
(9) the deliberate awarding of large military prime contracts to selected localities according to both the national interest and the urgent economic needs of the areas receiving the awards. 34

A few of these devices are patently self-explanatory, but a general background discussion of the origin and mechanics of some of them might prove helpful and, hopefully, somewhat interesting. The following discussion utilizes the Armed Services Procurement Regulations (ASPR) 35 as the main regulatory source for the above-mentioned contract clauses due to the dominant economic influence of the Defense Department. ASPR governs all the contracting and procurement activities of the military services. The Federal Procurement Regulations 36 govern the contracting and procurement activities of many of the Government's civilian agencies, although some follow their own internal regulations. Aside from the dominance of military procurement in the federal government, however, the social and economic policy considerations specifically reflected in ASPR clauses are also set forth in similar sections of the procurement regulations governing the other Government agencies.

FAIR EMPLOYMENT PRACTICES REQUIRED BY GOVERNMENT CONTRACTS

During World War II the problem of a short labor supply became

34 The 1968 congressional dispute over the awarding of the TFX F-111 fighter plane contract to General Dynamics in Ft. Worth, Texas is illustrative of the important role which locality needs assume in the making of such awards. Senator Jackson of Washington was fighting hard for Boeing of Seattle to get the disputed contract. At the time, Boeing and the entire Seattle area were suffering from severe unemployment, partially the result of losing an anticipated Government contract to build an SST (supersonic transport). But the Ft. Worth area had similar unemployment problems. Both Admiral Anderson and Senator McClellan, who opposed the award to the Ft. Worth firm, agreed that if the Defense Department's announced purpose was to keep solvent a defense plant like General Dynamics, opposition would probably cease. See U.S. NEWS & WORLD REPORT, Dec. 2, 1968, at 49-50; Washington Daily News, Nov. 19, 1968, at 7.
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acute. One industry after another requested that men on active military
duty be released to perform civilian services otherwise unavailable. Men
were released to work in mines, in the aircraft industry, in the tire industry,
in the forge and foundry industry, and in farm equipment repair. Tempor-
ary releases from active duty were granted to workers in the food canning
industry and agriculture. Boys age thirteen and over were recruited to work
summers on farms as part of a "Victory Farmers" program. Former mer-
chant seamen in the military were allowed discharges to return to work in
the merchant marine. Ninety-day furloughs were granted for military per-
sonnel to work in cotton duck plants and heavy ammunition factories.
Both outright release and furloughs were used to supply military personnel
for railroad work. Discrimination against Blacks aggravated the labor sup-
ply problem, thus quite apart from the moral considerations, discrimina-
tion was a senseless waste of vital manpower resources.27

In June 1941, President Roosevelt signed Executive Order 8802 requiring all procurement contracts of the federal government to contain a
provision committing the contractor not to discriminate against any em-
ployee or applicant for employment because of race, creed, color, or na-
tional origin. Bolstered by this executive order, Black employment in war
industries more than doubled between 1942 and 1945.28 Executive Order
8802 applied only to defense industries but the policy was extended to all
Government contracting agencies by Executive Orders 9001 and 9346.29
Subsequent executive orders issued by Presidents Truman,30 Eisenhower,31
Kennedy,32 Johnson,33 and Nixon34 have kept the policy in continuous ef-
fect. By Executive Order 11,375, President Johnson further extended the
policy to prohibit discrimination based on sex.35

President Roosevelt, in order to ensure compliance with the nondiscri-
mination requirement, established the Fair Employment Practice Com-
mittee (FEPC)36 which functioned during World War II. For a seven-year
period after the war the policy of requiring nondiscrimination provisions
in federal contracts remained in effect, but the executive order continuing
it did not provide for an agency with overall responsibility for compliance.

Prob. 238, 260-61 (1964) [hereinafter cited as Shulman].
29 Shulman, supra note 37, at 261.
(1943).
6485 (1963).
In 1951, however, President Truman created the President's Committee on Government Contract Compliance (CGCC) which operated to the end of Truman's term. In 1953, President Eisenhower signed Executive Order 10,479 creating the President's Committee on Government Contracts (CGC) as the successor to Truman's CGCC. Eisenhower's CGC operated throughout his term of office, to the end of 1960. In 1961, President Kennedy, under a new and much broader executive order created the President's Committee on Equal Employment Opportunity (CEEO). The order stated that discrimination is contrary to both constitutional principles and the policy of the United States to utilize all available manpower efficiently and effectively. The order provided substantial enforcement powers, including the termination of existing contracts, debarment from future Government contract awards, judicial injunctions, and criminal proceedings where proper. The order required government contractors and subcontractors to not discriminate in advertisements for prospective employees; to advise labor unions, the employees themselves and applicants of this policy; and to agree to abide by all the rules and regulations, including compliance reporting, established by the Committee on Equal Employment Opportunity. The same order also directed federal agencies to provide equal employment opportunities in their own hiring practices. This policy applied to contractors doing business directly with the federal government. Two years later, President Kennedy issued Executive Order 11,114, extending the requirements to all firms which contract for construction that is federally assisted by means of grant, loan, or insurance, thus encompassing even those contractors dealing with state or local governments on construction projects totally or partially funded through federal assistance. It was estimated in 1964 that some 38,000 contractors were covered by the original Kennedy Order. That figure did not encompass contractors later covered by the more expansive Executive Order 11,114.

President Johnson extended and amplified the policy by virtue of

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51 Id.
54 For some appreciation of the broadening effect of Exec. Order No. 11,114, consider the fact that federal grants-in-aid to state and local governments totalled $36 billion for fiscal year 1972 and over $45 billion for fiscal year 1973. Most of these funds were for construction of one sort or another, such as National Guard facilities, agricultural and rural development, protection of natural resources and the environment, aid to airports, highway construction, and community development and housing. Taking highway construction alone, the total value of federally aided highway projects, from 1963 through fiscal year 1974, was over $46.5 billion. U.S. OFFICE OF MANAGEMENT & BUDGET, SPECIAL ANALYSIS OF FEDERAL AID TO STATE AND LOCAL GOVERNMENTS (1973). See also U.S. BUREAU OF COMPETITIVE ASSESSMENT AND DO-
Executive Order 11,246, which also transferred to the Secretary of Labor the compliance duties, responsibilities, and authority formerly exercised by the President's Committee on Equal Employment Opportunity (CEEO). This order also delegated to the Civil Service Commission the responsibility for ensuring equal employment and promotional opportunities in Government employment. The CEEO has, in practical working effect, been replaced by the Department of Labor's Office of Federal Contract Compliance (OFCC), insofar as enforcement of equal employment in Government contracting is concerned. The Equal Employment Opportunity Commission (EEOC), however, does have certain overlapping investigative and reporting duties pursuant to its administration of Title VII of the Civil Rights Act of 1964. For example, a report to the EEOC on total employment and ethnic breakdown is required of all holders of federal contracts of $50,000 or more if the firm has at least 50 employees. In 1967, Executive Order 11,246 was amended by Executive Order 11,375 to expressly embrace discrimination based on sex. The equal opportunity policy enunciated by these executive orders is set forth in the Armed Services Procurement Regulations (ASPR) section XII, part 8 which also states that each contracting agency has the responsibility for insuring compliance. ASPR sections 7.103-18 and 12.804 set forth the required equal opportunity clause (a long series of paragraphs that must be included verbatim in all nonexempt prime contracts and subcontracts). ASPR section 12.805 states the exemptions: transactions of

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5 Id. §§ 103-05.
54 30 Fed. Reg. 12,319 (1965). For a case which challenged the Government's right to require nondiscrimination clauses in all Government contracts pursuant to Executive Order 11,246 see Printing Local 604 v. Union Camp Corp., 350 F. Supp. 632 (S.D. Ga. 1972). It was held that such right is based on the inherent or implied power of the executive branch to determine the terms and conditions under which the United States will contract and that it is a valid exercise of presidential authority, possessing the same force and effect as statutory law. Id. at 635.
55 Id. § 12,800 et seq. (1974). There is a similar section in the Federal Procurement Regulations, 41 id. § 1-12.801.
56 An interesting collateral question of whether an employer can plead that collective bargaining agreements with labor unions prevent him from complying with the Government's equal opportunity program requirements was answered in the negative in Southern Ill. Builders Ass'n v. Ogilvie, 471 F.2d 680 (7th Cir. 1972).
57 There is a similar section in the Federal Procurement Regulations, 41 C.F.R. § 1-12.803-2 (1974).
$10,000 or under, work outside the United States, and contracts with state or local governments not participating in work on or under the contract or subcontract. ASPR section 12.805 further provides for contracts to be exempted by the Secretary of Defense in the interest of national security, and for specific exemptions by the Director of the Office of Federal Contract Compliance.

ASPR section 12.804(c) provides that whether or not it is actually included the required equal opportunity clause shall be considered a part of every nonexempt contract and subcontract. ASPR section 12.813 describes the sanctions as including partial or total termination of the contract or subcontract, debarment or suspension from receiving future Government contracts, and referral to the Department of Justice or the EEOC for institution of appropriate civil or criminal proceedings. The latter device is utilized to enjoin whoever is responsible for preventing compliance or to prosecute persons responsible for reporting false information.

By the terms of the required equal opportunity clause, the contractor agrees not only to not discriminate against any employee or applicant for employment, but also to take affirmative action to ensure that applicants are employed and that during employment, employees are treated without regard to race, color, religion, sex, or national origin. The clause encompasses recruitment, selection for training, apprenticeship, promotion, demotion, rates of compensation and layoffs. By the terms of ASPR section 12.806(a), and pursuant to the regulations of the OFCC, all contractors in nonexempt contracts estimated to be for $1 million or more, as well as first tier subcontractors with proposed subcontractors of $1 million or more, are subject to preaward compliance review to assure that they are able to comply with the terms of the required equal opportunity clause.

ASPR section 12.807-1 provides that with regard to all nonexempt contracts, each prime contractor and each subcontractor with 50 or more employees and a contract or subcontract of $50,000 or more is required to develop a written affirmative action compliance program within 120 days of the start of his first Government contract. ASPR section 12.807-2 sets forth factors and ingredients to be included in an acceptable program for contracts other than construction contracts. ASPR section 12.807-3 prescribes that an acceptable affirmative action program for construction contracts meet the requirements of the Secretary of Labor, including the requirement for approved local plans. Such local plans may require that

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41 Id. § 60.1.
43 These requirements are set forth in 41 C.F.R. § 60-1-.40 (1974).
prospective contractors include percentage goals for minority employment in their bids or proposals.47

Provisions for contracting officer clearance, the filing and processing of complaints, the filing of required contractor reports, and enforcement procedures are set forth in ASPR sections 12.808-2, 12.809, 12.810, 12.812, and 12.813, respectively. Sanctions and penalties for violation of the EEOC executive order, regulations of the Secretary of Labor or the required EEOC contract clauses are set forth in ASPR section 12.814.

Following the lead of the federal government, many major American industries such as the automotive industry, have adopted private equal opportunity standards of their own.64

LABOR STANDARDS REQUIRED IN GOVERNMENT CONTRACTS

During the 1930’s this country was in dire economic straits, caught in the grip of a seemingly bottomless depression. Widespread unemployment had a vicious downward-spiralling effect on wages. As competition for limited markets grew more intense while unemployment and available labor supply increased, cost-cutting employers steadily reduced wages to meet the competition of falling prices and falling demand.

One attempt to stop this trend in the economy was the National Industrial Recovery Act of 1933,11 which provided codes of fair competition in wages and prices. To add further impetus to these codes through utilization of its extensive purchasing machinery, Congress worked to require certain “fair labor standards” and practices of government contractors. The Davis-Bacon Act70 requires federal contractors to pay locally prevailing wages to laborers and mechanics performing contracts for construction, repair, and alteration of federal government public buildings and works.71 Another device, the Walsh-Healey Public Contracts Act of 1936,72 was

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47 See Contractors Ass’n v. Secretary of Labor, 442 F.2d 159 (3d Cir.), cert. denied, 404 U.S. 854 (1971), wherein an attack on the much publicized “Philadelphia Plan” was rejected by the Third Circuit. This plan required a contractor to establish goals for utilization of minority manpower in six trades for a five-county area. Plaintiffs complained that the plan violated Title VII of the Civil Rights Act of 1964 which expressly disavowed requiring that employers of a given area give preferential treatment to a particular race because of an existing imbalance between the percentage of employed persons of that race and the number available for the work force. 442 F.2d at 172. It was also contended that the Philadelphia Plan further violated Title VII by interfering with a bona fide seniority plan. Id. The Third Circuit rejected both arguments, holding that the source of the required contract provision was not Title VII of the Civil Rights Act, but Executive Order No. 11,246; and that § 703(j) of Title VII only limited Title VII, and no other state or federal remedies. Id.


51 Id. § 276a(a).

52 41 id. §§ 35-45.
enacted after the National Industrial Recovery Act was declared unconstitutional by the Supreme Court in *Schechter Poultry Corp. v. United States.*

At the time of the *Schechter* case the regulation of labor standards and the alleged use of the commerce power for that purpose were considered beyond the constitutional reach of congressional powers. Nevertheless, the constitutionality of the Fair Labor Standards Act of 1938 was repeatedly upheld in the face of a multiplicity of court challenges. Similarly, both the Davis-Bacon Act and the Walsh-Healey Act have withstood judicial review. It was accepted as clearly within congressional authority to see that the purchasing power of the federal government was not exploited by contractors seeking to profit through the depression of wages and working conditions. Accordingly, the Walsh-Healey Act established the 8-hour day and 40-hour week, set safety standards, prohibited child and convict labor, and authorized the Secretary of Labor to determine prevailing minimum wages for Government contract performance. It is, to that extent, a direct counterpart of the Davis-Bacon Act: Walsh-Healey setting labor standards for Government supply contracts; the Davis-Bacon Act setting labor standards for Government construction contracts. Similarly, the Service Contract Act of 1965 brought service employees within the protection of the minimum wage provisions of the Fair Labor Standards Act of 1938 and required safe and sanitary working conditions. The Walsh-
Healey Act applies to Government contracts for the manufacture or furnishing of supplies and equipment in any amount exceeding $10,000 when the contract is to be performed in the United States, Puerto Rico, or the Virgin Islands. Every contract covered is required by the Act to incorporate certain clauses stipulating to the Act's labor and wage requirements. Expressly exempt from the Act are purchases of such supplies as may usually be procured on the open market, perishables, agricultural and dairy products, contracts for the carriage of freight or personnel when published tariff rates are in effect, and contracts for communications services subject to the Federal Communications Act of 1934. The Secretary of Labor is authorized to administer the Act, to make exceptions in the public interest, and to issue interpretations and to implement regulations. The President is authorized to suspend any or all of its provisions whenever such action would be in the public interest.

Breach or violation of the contract stipulations incorporating the provisions of the Act makes the offending party liable to the United States for liquidated damages (in addition to damages for any other breach of the contract) in the sum of $10 per day for each underage person and convict laborer knowingly employed, and a sum equal to any deductions, rebates, refunds, or underpayment of wages due any employee engaged in the performance of the contract. In addition, the United States may terminate the contract and repurchase the materials or supplies contracted for, charging any excess cost to the violating contractor. Violators are also subject to debarment from subsequent award of Government contracts for three years from the date the Secretary of Labor determines the breach to have occurred.

A contract clause containing by reference the required provisions, representations, and stipulations of the Act is set forth in ASPR section 7.103-17. With regard to the Secretary's prevailing wage rate determinations under the Walsh-Healey Act, however, it should be noted that no new wage determinations other than coal wages have been made since the adverse decision of the District of Columbia Circuit in Industrial Union Department, AFL-CIO v. Barber-Colman. In practical working effect, this has

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83 Id. § 38.
84 Id. § 40.
85 Id. § 36.
86 Id.
87 348 F.2d 787 (D.C. Cir. 1965). This case involved an action to declare void the Secretary's determination of prevailing minimum wages in the machine tool industry and to enjoin the enforcement of such rates. The court of appeals held that, absent findings by the Secretary that the policy of the Walsh-Healey Act would be frustrated by including both blueprint machine operators and draftsmen in a single minimum wage for the machine tool industry,
resulted in the generally applicable Fair Labor Standards Act (FLSA)\textsuperscript{8} minimum wage rates becoming the controlling wage rate standard. The original FLSA section 6(a)(1)\textsuperscript{9} minimums have risen steadily\textsuperscript{10} since the 1965 \textit{Barber-Colman} decision, exceeding the old Walsh-Healey rates. Another required contract clause, relating solely to the prohibition against the use of convict labor pursuant to the Convict Labor Act of 1887 and Executive Order 325-A\textsuperscript{11} is set forth in ASPR section 12.203. This clause must be included in all Government contracts involving the use of labor within the United States except contracts covered by the Walsh-Healey Act (which, of course, already have the convict labor prohibition), contracts for the purchase of supplies from Federal Prison Industries, Inc., and contracts for the purchase of the finished products of state prison industries which are available in the open market.\textsuperscript{12}

The Davis-Bacon Act\textsuperscript{13} applies to Government contracts for construction, alteration, or repair of public works, provided they amount to over $2000 and are to be performed in the United States. Every such contract must contain certain clauses\textsuperscript{14} which generally provide that

1. all laborers and mechanics shall be paid wages not less than those determined by the Secretary of Labor to be prevailing in the area;\textsuperscript{15}
2. such wages shall be paid unconditionally not less than once a week, and without subsequent deductions or rebate;\textsuperscript{16}
3. the wage scale as determined by the Secretary of Labor shall be posted by the contractor in a prominent place at the work site;\textsuperscript{17}
4. the contracting officer has the right to withhold from payments due to the contractor such amounts as are necessary to

\textsuperscript{9}Act of June 25, 1938, ch. 676, § 6(a)(1), 52 Stat. 1060, 1062.
\textsuperscript{10}Fair Labor Standards Amendments of 1974, 29 U.S.C.A. § 206(a)(1) (Supp. 1975), which schedules further minimum wage increases for December 31, 1975, as well as additional increases at other times for newly covered occupations. \textit{Id}.
\textsuperscript{13}40 U.S.C. §§ 276a to 276a-7 (1970).
\textsuperscript{14}\textit{Id.} § 276a(a).
\textsuperscript{15}32 C.F.R. § 18.702-1(a) (1974).
\textsuperscript{16}\textit{Id.} §§ 18.702-1, 18.703-1. \textit{See} 29 \textit{id.} § 3.5 for deductions allowable at the time of payment.
\textsuperscript{17}32 id. § 18.704-2(j).
correct violations (such amounts to be paid to the wronged employees by the Comptroller General); and
(5) if the contractor fails to pay the prescribed rates, the Government may terminate the contractor's right to proceed with the work, and the Government may charge the excess costs of completion to the contractor.19

Breach of any of the foregoing provisions may result in the contractor being placed on the "debarred bidders' list," rendering him ineligible to receive Government contracts for a period of three years.100 The Davis-Bacon Act does not apply to supply contracts, contracts for services or maintenance work which involve only an incidental amount of construction, alteration or repair work, contracts to be performed outside the United States, contracts for dismantling and demolition or exploratory drilling, or contracts requiring construction work so closely related to research, experiment, and development that it cannot be performed separately.101

The McNamara-O'Hara Service Contract Act of 1965102 provides that no contractor or subcontractor holding a contract to furnish services through the use of service employees shall pay any of his employees less than the minimum wage prescribed by the Fair Labor Standards Act of 1938, as amended.103 The Service Contract Act further mandates that federal service contracts for more than $2500 contain provisions relating to minimum wages, fringe benefits, safe and sanitary working conditions, and notification to employees of the compensation required under the Act.104 The Act provides penalties for violations, including withholding of contract payment amounts necessary to make the appropriate payment to the underpaid employees,105 and, in appropriate cases, inclusion on a debarred bidders' list to be maintained and circulated by the Comptroller General.106

Another required contract clause, brought about by the Contract Work Hours and Safety Standards Act107 (CWH&SSA), applies to construction contracts for over $2000108 as does the Davis-Bacon Act, but the CWH&SSA also applies to nonconstruction contracts over $2500.109 The CWH&SSA establishes the 8-hour day, 40-hour week, and time-and-a-half for overtime.110

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100 Id. §§ 7.602-23(a)(6), 18.704-7(b), -13.
101 Id. §§ 7.602-23(a)(1)(e), -23(a)(8), 18.703-1.
102 Id. §§ 7.602-23(a)(8), 18.703-1.
103 Id. § 18.701(a).
106 41 id. § 351(a).
107 Id. § 352(a).
108 Id. § 354(a).
The Fair Labor Standards Act of 1938, as amended, requires that employers pay certain minimum hourly wages and adhere to certain maximum hour standards. In addition, it prohibits oppressive child labor. The Act originally applied only to employees engaged in interstate or foreign commerce, production of goods for such commerce, or any closely related process or occupation essential to such production. By amendment, however, the Act has been broadened to include additional groups such as agricultural employees and domestic service workers. The Act enables an employee to maintain a civil suit against his employer whenever the employee either has received less than the prescribed minimum wage or has not been paid for overtime. There are also criminal penalties for willful violations. There is no mandatory FLSA clause, as such, to be included in Government contracts, but since payments made pursuant to the FLSA are regarded as "reimbursable costs" under cost-reimbursement and cost-plus-a-fixed-fee contracts, the military does have an interest in litigation arising out of employee claims under the Act. Accordingly, there are three sections of the ASPR specifically dealing with the Fair Labor Standards Act, one of which gives the military department concerned the right to approve the contractor's appointment of private counsel to defend such suits as a condition precedent to reimbursement for judgments or litigation expenses.

The Copeland "Anti-Kickback" Act of 1934, as revised in 1948, makes it unlawful to induce, by force or otherwise, any person employed within the United States in the construction or repair of public buildings or public works (including those financed in whole or in part by loans or grants from the United States) to give up any part of the compensation to which he is entitled under his contract of employment. In accordance with

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The broadening of coverage was accomplished primarily by changing certain definitions in § 203 and certain exemptions under § 213. 29 U.S.C.A. §§ 203, 213 (Supp. 1975).

Id. § 216(b).


Id. §§ 12.701-703.

Id. § 12.702.

regulations of the Secretary of Labor\textsuperscript{121} issued pursuant to the Copeland Act, certain contracts entered into by any government department or agency must contain a provision\textsuperscript{122} requiring the contractor and any subcontractor to comply with the regulations of the Secretary of Labor under the Act. Under this statute, the pertinent contract clause need not set forth nor summarize the prohibitions of the statute, but may merely state: "The contractor shall comply with the Copeland Regulations of the Secretary of Labor (29 CFR, Part 3) which are incorporated herein by reference."\textsuperscript{123}

**Government Contract Requirements Designed to Favor Certain Economic Areas and Groups**

In May 1956, President Eisenhower created a Cabinet Committee on Small Business with the duty of "making specific recommendations . . . for administrative actions, and where necessary for additional legislation, to strengthen the economic position of small businesses and to foster their sound development."\textsuperscript{124} The Committee consisted of the Secretary of Defense and the Director of the Office of Defense Mobilization, the Secretaries of Commerce and Labor, the Administrator of the Small Business Administration, the Administrator of the Housing and Home Finance Agency, and the Chairman of the Council of Economic Advisers. In its report to the President on August 7, 1956, the Committee had a fairly pessimistic picture of the long-range outlook for small businesses in this country:

> [T]he pace of technological change has been accelerating in recent years. Large and well-financed firms have been accustomed to undertaking costly research and development programs, which enable them to set the pace or meet the pace of industrial innovation and investment. Small business enterprises cannot normally do this.

Partly because of the needs and problems of small business and partly because the national economy, as a whole, and defense procurement, in particular, would benefit most by a wider dispersion of healthy and prosperous small business enterprises, the federal government developed a program of actively aiding small businesses, not only through the Small Business Administration, but also through procurement programs. Aside from the benefits of a free competitive economy, the military is particularly interested in having available, and readily accessible in times of emergency, a multiplicity of suppliers for each item needed. It is danger-

\textsuperscript{121} 29 C.F.R. §§ 3.1, 3.9 (1974).
\textsuperscript{122} Id. §§ 7.602-23(a)(5), 18.702-1(b).
\textsuperscript{123} Id. §§ 7.602-23(a)(5), 18.703-(e).
\textsuperscript{124} Letter from President Eisenhower to Arthur F. Burns, Chairman, Council of Economic Advisers, May 1956.
ous, impractical, and costly to have only single-source suppliers to turn to when tremendous volume is suddenly essential.

Working at cross-purposes with this desire to nurture and favor small businesses, however, is the difficulty of dealing with the military. Knowing what the military wants usually involves more than just contacting military buyers and glancing at published lists of contracts to be let. Their demands continually press against the outer perimeters of the current state-of-the-art and the anticipated future state-of-the-art. This means that most of the large military prime contracts will go to those vendors who engage in extensive and expensive research and development (R&D) programs. In certain areas the cost of R&D is so expensive that even the largest corporations cannot be induced to make the expenditures, and accordingly the Government "foots the bill." Where private financing has paid for the R&D, however, it has become traditional for the Government to award the huge "follow-on" procurement contracts with the firm that has performed this function. Aside from the reward aspect, technical and financial considerations compel the same result. There are few suppliers who could undertake the delivery of finished weapons, weapons systems, or complex aircraft or space vehicles on the time schedules demanded if they had not already actively participated in the research and development of the subject item, and had not already been "tooled up"—personnel-wise and plant-wise—for the complex production process. Furthermore, pressing to its limits the state-of-the-art involves precise specifications, completely new materials and fabricating processes beyond the capacity of most small firms.

Even more frustrating to the smaller business firm is the complexity of the legal and administrative procedures established for dealing with the Government, and the continuous decision-changes and various levels of decision-making within the Government military procurement structure. To state it as an oversimplification—selling to the military is not a simple and straightforward task.

The military cannot specify the quantity of a new item until it is reasonably assured of its performance. Since no one can know how good the item is until after an extensive test program, decisions to buy are, therefore, a mixture of cautious optimism, some knowledge, a sharing of the risks involved, and a lack of any real commitment to purchase sizeable numbers of the produced items. In any event, it is not easy to get a firm yes or no as to the item or its quantity, and decisions affecting the eventual procurement of the item will vacillate through several levels of the military and Defense Department structure. Consider for example, the Boeing Aircraft Company in the TFX F-111 fiasco.\textsuperscript{125} Boeing had been picked four times by the 250-member Navy-Air Force Board of Experts as the best and

\textsuperscript{125} See note 34 supra.
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most qualified source for the production of the new jet bomber. But who
got the contract? General Dynamics, of course. In addition to exemplifying
the difficulty of forecasting the choice for a particular procurement, the
choice of General Dynamics in Fort Worth over Boeing in Seattle illus-
trates the importance the Government places on maintaining many poten-
tial suppliers, as opposed to relying on only one or two "sole source" giants.
It is unfortunate, however, that implementation of such policy should
prove so timely and costly, as is evidenced by the Boeing experience.

Even beyond the initial award, frustrations are many, and often disas-
trois to the small firm. Requirements for the item may change continu-
ously, and development of a similar but better product elsewhere often
drops the bottom out of expected huge "follow-on" contracts, making pres-
ent machinery and specially trained personnel of the small supplier not
only unproductive, but suddenly useless. Thus, it is readily apparent that
if a company is to survive in the military procurement business, in other
than those production fields for "off-the-shelf" items readily adaptable to
the civilian market, substantial company resources are required. For some
appreciation of the growing magnitude of R&D in procurement of new
military equipment, consider the following data. R&D costs for most World
War II aircraft were ordinarily measured in hundreds of thousands or mil-
ions of dollars, with "follow-on" procurements in tens or hundreds of
millions. In comparison with these World War II figures, R&D on the B-52 ran into millions, with procurement costs in the billions; R&D on the
TFX F-111 ran to two billion, with follow-on procurement estimated to run
$12 to $15 billion; and the ballistic missile development program already
has R&D costs in the billions, with no estimates for a top on the procure-
ment "follow-ons."

To counteract these depressing effects on small firms, so as to both
preserve a widely dispersed diversity of viable, potential suppliers for
emergency needs, and to foster and encourage the prosperity of small en-
trepreneurs and free competition as a stated national economic aim, the
Government contracting program has developed a variety of artificial de-
vices to actively discriminate in favor of small business firms. The Small
Business Act of 1953, after stating the foregoing policy objectives, also
states that in order to further those objectives the federal government is
to take steps "to insure that a fair proportion of the total purchases and

127 Id.
128 See note 34 supra.
129 Novick & Springer, supra note 126, at 124.
contracts for property and services for the Government . . . be placed with small-business enterprises, [and] to insure that a fair proportion of the total sales of Government property be made to such enterprises . . . to maintain and strengthen the over-all economy of the Nation."

The mechanics by which small business receives preference in Government procurement is multifaceted. With respect to procurement by the armed services, there are four principal methods: "set-asides" for small business firms,\textsuperscript{132} either partial\textsuperscript{134} or total;\textsuperscript{135} the Defense subcontracting small business program;\textsuperscript{136} the priorities system when an "equally-low-bidders" situation develops;\textsuperscript{137} and contracting directly with the Small Business Administration, which, in turn, relets contracts and subcontracts with several small business firms.\textsuperscript{138}

\textit{Set-Asides for Small Business}

In set-asides for small businesses,\textsuperscript{139} all or a portion of a procurement is reserved for award solely to small business firms. Because large businesses are not eligible for competition in, or negotiation for, contracts awarded under these set-asides, this procedure is regarded as negotiation rather than the formal advertising method,\textsuperscript{140} although elements of the formal advertising method are involved. Total set-asides for small business are authorized where there is a reasonable expectation that bids or proposals will be received from a sufficient number of responsible small firms to assure that awards can be made at reasonable prices.\textsuperscript{141} The procedure used may be either the conventional negotiation or the preferred special method known as "Small Business Restricted Advertising."\textsuperscript{142} Contracting under this latter technique is the same as other procurements by formal advertising and competitive bidding, except that only the bids of small business concerns are eligible for consideration.\textsuperscript{143}

A partial set-aside involves restricted small business involvement in

\begin{itemize}
  \item\textsuperscript{132} \textit{Id.} § 631. The Defense Department adheres to the Small Business Administration’s definition of “small business concern” as being “a concern that is independently owned and operated, is not dominant in its field of operations, and with its affiliates does not employ more than” a specified number of employees (500, 750 or 1,000, depending upon the type of product). 13 C.F.R. pt. 121 (1974). \textit{See also} 15 U.S.C. § 632 (1970); 32 C.F.R. § 1.701 (1974).
  \item\textsuperscript{133} 32 C.F.R. § 1.706 (1974).
  \item\textsuperscript{134} Id. §§ 1.706-6, 7.2003-3.
  \item\textsuperscript{135} Id. §§ 1.706-5, 7.2003-2.
  \item\textsuperscript{137} 32 C.F.R. § 2.407-6 (1974).
  \item\textsuperscript{139} 32 C.F.R. § 1.706 (1974).
  \item\textsuperscript{140} Id. § 1.706-2.
  \item\textsuperscript{141} Id. § 1.706-5(a)(1).
  \item\textsuperscript{142} Id. § 1.706-5(b).
  \item\textsuperscript{143} Id.
\end{itemize}
only a portion of procurement.144 A partial set-aside is authorized where the procurement is divisible into two or more economic production runs, and several small businesses are believed to have the technical competency and plant capacity to furnish not less than one economic production run.145 The procurement is divided into the non-set-aside portion and the set-aside portion. After the award price for the non-set-aside portion is fixed, negotiations begin for the set-aside portion, and only with those who have submitted offers on the non-set-aside portion.146 Negotiations are conducted with small business firms according to the order of priority set forth in ASPR section 7.2003-3(a),147 except that when equal low bids are received on the non-set-aside portion from firms which are equally eligible for the set-aside portion, the firm which is awarded the non-set-aside portion gets the first priority in negotiations for the set-aside portion. Within the same priority group, offers are requested from firms in the order of their offers on the non-set-aside portion, starting with the lowest responsive offer. Subject to certain exceptions, awards under the set-aside portion are made at the highest unit price awarded on the non-set-aside portion.148

**Defense Subcontracting Small Business Program**

Small business firms make almost as much money on defense subcontracting annually as they do on prime contracts, and in fact small firms get a much larger percentage or portion of total defense subcontracts than they do of prime contracts. In the small business preference under the subcontracting program,149 two contract clauses yield the desired result. First, most prime contracts involving more than $5,000150 must contain a clause entitled “Utilization of Small Business Concerns” by which the prime contractor “agrees to accomplish the maximum amount of subcontracting to small business concerns”151 that is consistent with “efficient performance” of the contract. Second, contracts which contain that clause, if they involve over $500,000152 and which, in the opinion of the procuring activity, offer substantial subcontracting possibilities, shall also include the “Defense Subcontracting Small Business Program” clause.153 This clause requires the prime contractor to establish a detailed program, subject to contracting officer supervision and termination for default or viola-

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144 Id. § 1.706-6(a).
145 Id.
146 Id. § 1.706-6(b).
147 Id. § 7.2003-3(a).
148 Id.
149 Id. §§ 1.707, 7.104-14, 7.602-26(b).
150 Id. §§ 1.707-3(a), 7.104-14(a).
151 Id. §§ 1.707-3(a), 7.104-14.
152 Id. §§ 1.707-3(b), -3(c), 7.104-14(b).
153 Id. §§ 1.707-3(b), 7.104-14(b).
tion, in order to ensure small business an equitable opportunity to compete for the award of subcontracts.\textsuperscript{154}

\textit{Awards Among Equally Low Bidders}

Ordinarily, the award of a contract let by competitive bidding is made to the lowest responsible, responsive bidder. When there are two low bidders, whose bids are equal in all respects, an order of priority has been established for the award.\textsuperscript{155} The highest priority is a small business firm that will perform the contract in a labor surplus area.\textsuperscript{156} The next preference would be to a small business operating in other than a labor surplus area. Next would be a large business firm operating in a labor surplus area. The final preference would be to a large business firm not operating in a labor surplus area. Drawing by lot would resolve the priority situations.\textsuperscript{157} The actual priority list set forth in the ASPR is a bit more complex than that,\textsuperscript{158} but the four categories given illustrate the main divisions.

\textit{Contracting Directly with the Small Business Administration}

Although not as widely utilized as the other three methods employed in the area of military procurement, this method\textsuperscript{159} constitutes a valuable tool for the encouragement of small business participation in Defense Department contracting, with benefits for both the Small Business Administration (SBA) and the military. The SBA gets the opportunity to "farm out" all the contracts and subcontracts from a major procurement to its statutory clients, the small business concerns.\textsuperscript{160} At the same time, the military delegates to the SBA many of the administrative headaches and details of attempting to deal with a multitude of small, relatively inexperienced contractors and subcontractors.\textsuperscript{161}

In contracting with the SBA, any costs to the Defense Department which are greater than the estimated current fair market price anticipated under normal procurement procedures are paid for by the SBA.\textsuperscript{162} These costs include start-up, make-ready, and training expenses, or similar initial investment or learning costs above those that would normally be incurred by established firms engaged in the same type of business.\textsuperscript{163} Consistent with Defense Department capability and resources, SBA contractors


\textsuperscript{156} Id. § 2.407-6(a)(2)(i); 29 id. § 8.8.

\textsuperscript{157} 32 id. §§ 2.407-6(a)(1), -6(b).

\textsuperscript{158} Id. § 2.407-6(a)(2).


\textsuperscript{160} 32 C.F.R. § 1.705-5(a) (1974).

\textsuperscript{161} Id. § 1.705-5(c)(1)(j).

\textsuperscript{162} Id. § 1.705-5(b)(2).

\textsuperscript{163} Id.
under this program are afforded production assistance, including identification of causes of deficiencies in their products and suggested corrective action.\(^\text{144}\)

In contracts for supplies, services, research, and development, it is SBA policy to contract with only those firms which have submitted a written business plan\(^\text{145}\) specifically outlining a reasonable approach for attaining ASPR policy objectives, viz., "that these [small business] concerns . . . become self-sustaining, competitive entities within a reasonable period of time."\(^\text{146}\) Along with other facts submitted regarding the firm,\(^\text{147}\) the business plan, once approved by the SBA, is the basis for the Defense Department's consideration of participation in a section 8(a)\(^\text{148}\) program with the firm.\(^\text{149}\) The military department concerned evaluates the SBA's request for a commitment and if it is approved, notifies the SBA that contracts will be placed with the SBA as requested.\(^\text{150}\) This notification constitutes a firm commitment by the Defense Department with the SBA, provided there is no material change in requirements, availability of funds, or other factors.\(^\text{151}\)

Another device that is beneficial to small business concerns is that of "leader company procurement." It is in the interest of the Government to promote widespread knowledge of industrial skills and techniques necessary for the production of certain complex military end items. Accordingly, the ASPR\(^\text{152}\) provide that the military may, under certain circumstances\(^\text{153}\) (generally for reasons of economy, scarcity of tooling or equipment, shortage of time, etc.) use the device of "leader company procurement." This device enables a prime contractor to subcontract partial quantities of the end item to other manufacturers (follower subcontractors) and to actively assist them in conforming to the Government's specifications.\(^\text{154}\) This is an extraordinary procurement technique, however, with strict limitations on its use.\(^\text{155}\)

Of considerable importance to small business firms dealing with the

\(^{144}\) Id. § 1.705-5(b)(3).

\(^{145}\) Id. § 1.705-5(c)(1)(a).

\(^{146}\) Id. § 1.705-5(b).

\(^{147}\) Considerations include: the background and ownership of the firm; how and when it is expected to become a self-sustaining entity; the extent to which procurement assistance is needed, with identification of the requirements sought from the Defense Department; present production capacity including related facilities; and how any additional facilities needed will be provided. Id. § 1.705-5(c)(1)(a).


\(^{150}\) Id. § 1.705-5(c)(1)(c).

\(^{151}\) Id.

\(^{152}\) Id. § 4.701.

\(^{153}\) Id. §§ 4.701-02.

\(^{154}\) Id. §§ 4.701-03.

\(^{155}\) Id. §§ 4.701-.702.
Government is the fact that the Small Business Administration has statutory authority\textsuperscript{174} to certify the capacity\textsuperscript{177} and credit of any small business concern. Contracting officers must accept SBA certificates of competency as conclusive on the issue of the prospective contractor's capacity\textsuperscript{178} and credit,\textsuperscript{179} subject to certain limited appeals within the SBA.\textsuperscript{180}

Additional assistance to small businesses includes: loans; the use and lease of Government property,\textsuperscript{181} buildings,\textsuperscript{182} tooling and machinery,\textsuperscript{183} and special test equipment;\textsuperscript{184} manufacturing information;\textsuperscript{185} technical and managerial aid;\textsuperscript{186} financing;\textsuperscript{187} assistance in obtaining R&D contracts and in receiving the benefits of Government-sponsored research and development;\textsuperscript{188} and tax assistance.\textsuperscript{189} It should be noted, however, that some of the foregoing benefits are also available to all government contractors, not just the small business firms.

As already suggested by the list of priorities mentioned in the discussion of small business, there are similar preferences,\textsuperscript{190} required clauses,\textsuperscript{191} priorities,\textsuperscript{192} and partial\textsuperscript{193} and combined\textsuperscript{194} set-asides in the case of so-called "labor surplus areas," probably more commonly known as "economically depressed areas," "high unemployment areas," or "areas of persistent unemployment."\textsuperscript{195} However, unlike the case of small business, total set-asides are prohibited for labor surplus area firms.\textsuperscript{196} Combined set-asides are procurements wherein the total required quantity of an item is set aside for exclusive participation by small business firms, and then a

\textsuperscript{177} "Capacity" means the overall ability of a prospective small business contractor to meet quality, quantity, and time requirements of a proposed contract, and includes ability to perform, organization, experience, technical knowledge, skills, "know-how," technical equipment and facilities or the ability to obtain them.
\textsuperscript{178} 32 C.F.R. § 1.705-4(a) (1974).
\textsuperscript{179} Id. §§ 1.705-4(a), 1.903-1(ii), 1.903-2.
\textsuperscript{180} Id. §§ 1.705-4(a), 1.903-1(i).
\textsuperscript{181} Id. § 1.705-4(a), (c), (f), (g).
\textsuperscript{182} Id. § 13.000 et seq.
\textsuperscript{183} Id. § 13.101-8.
\textsuperscript{184} Id. § 13.101-5.
\textsuperscript{185} Id. § 13.101-6.
\textsuperscript{186} Id. § 1.705-3.
\textsuperscript{187} See note 30 and accompanying text supra.
\textsuperscript{190} Tax assistance includes accelerated amortization and depreciation for "emergency facilities" necessary for national defense. INT. REV. CODE OF 1954, § 168.
\textsuperscript{191} See 29 C.F.R. § 8.8 (1974); 32 id. § 1.803(a)(2).
\textsuperscript{192} See id. §§ 1.805-1(a), -3(b), 7.104-20(a), -20(b).
\textsuperscript{193} See id. § 2.407-6(a)(2).
\textsuperscript{194} See id. § 1.804.
\textsuperscript{195} See id. § 1.706-7(a).
\textsuperscript{196} See 32 id. §§ 8.2—4, 8.7.
\textsuperscript{197} See 32 id. 1.803(a)(2).
portion of that is further set-aside for small business firms that are also labor surplus area firms.\footnote{See id. § 1.706-6(a). See also Exec. Order No. 10582, § 3, 19 Fed. Reg. 8723 (1954). Section 3(c) permits rejection of foreign bids in any situation where the domestic low bidder would produce substantially all the materials in areas of substantial unemployment, as determined by the Secretary of Labor, if such preference would be in the national interest, as determined by the President.}

It is the policy of the Defense Department to aid depressed areas by placing contracts with labor surplus area concerns and to encourage prime contractors to subcontract with similar concerns.\footnote{See C.F.R. § 1.800 (1974).} In performing this objective via the priorities system referred to earlier, however, a price differential cannot be paid. The original Defense Manpower Policy No. 4 allowed payment of price differentials in effectuating the labor surplus area policy, but riders attached to subsequent defense appropriations overruled that aspect of the policy, and it was accordingly changed to include an express prohibition against price differentials.\footnote{Shulman, supra note 37, at 264.}

In addition to the labor surplus set-asides program for prime contracts (favoring labor surplus areas in a manner similar to the small business set-asides program) and the “priorities system” in the “equal low bids” situation (which works in combination with the small business prime contracts priorities system),\footnote{32 C.F.R. § 2.407-6 (1974); 29 id. § 8.8.} the labor surplus program includes a major subcontracting program.\footnote{32 id. §§ 1.803(a), (b), 1.805, 7.104-20(b).} The Government’s labor surplus area subcontracting program requires government prime contractors to assume an affirmative obligation with respect to subcontracting with labor surplus area firms.\footnote{Id. § 1.805-2.}

The Secretary of Labor has the authority to designate an area as a “labor surplus area,” an “area of substantial unemployment or underemployment,” a “section of concentrated unemployment or underemployment,” or an “area of persistent unemployment”—all terms having important meaning throughout the ASPR sections prescribing the subject preferences.\footnote{See 41 U.S.C. §§ 10a-d (1970); Exec. Order No. 10,582, 19 Fed. Reg. 8723 (1954); Defense Manpower Policy No. 4, 32A C.F.R. 33 (1974).}

In prime contracts ranging from $5000 to $500,000, the prime contractor undertakes the simple obligation of using his best efforts to either place his subcontracts with firms in labor surplus areas or agrees to perform in a labor surplus area himself. Pursuant to a required contract clause entitled “Utilization of Concerns in Labor Surplus Areas,”\footnote{See 29 C.F.R. §§ 8.2-.4, 8.7 (1974).} this obligation is to be carried out in a manner consistent with the efficient performance of the contract and at prices no higher than those obtainable elsewhere. In
contracts of over $500,000, pursuant to a mandatory contract clause entitled “Labor Surplus Area Subcontracting Program,” the prime contractor is required to undertake a series of specific responsibilities with regard to subcontracting to labor surplus area firms. The clause requires recordkeeping, reporting, and close liaison with the contacting officer regarding progress of the labor surplus area program.

Additionally, with regard to "depressed industries," there are other provisions. When an entire industry is depressed, the Director of the Office of Emergency Planning, under Defense Manpower Policy Number 4, may establish appropriate measures on an industry-wide, as opposed to an area-wide, basis. Such industries will then be given special treatment in the awarding of Government contracts according to a plan of action adopted by the Office of Emergency Preparedness. An express exception to this is the petroleum industry.

"Buy American" Requirements

A congressional purpose favoring the use of American products and labor can be found as early as 1865 in the Naval Service Appropriation Act, and in the Army Appropriation Act of 1876. In 1933, partially as an antidepression device, Congress enacted the "Buy American" Act, which applies to all Government departments and independent agencies, and both construction and supply contracts. The Act requires that purchases of goods and materials for public use be limited to American-manufactured goods and materials, and such American-manufactured goods and materials as have been substantially made from parts and raw materials mined, produced or manufactured in the United States. Goods and materials acquired for use outside the United States are excepted. In addition, where compliance would be either too costly or inconsistent with the public interest, where the goods and materials involved are not

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206 Id. §§ 1.805-3(b), 7.104-20(b).
207 Id. §§ 1.707-4, 1.805-4, 7.104-20(b).
208 Id. § 1.806-1.
209 Id. § 1.806-2.
210 Act of March 2, 1865, ch. 74, § 7, 13 Stat. 462, 467 (Navy could purchase only American bunting).
212 76 Cong. Rec. 2985, 3171 (1933).
214 Id. §§ 10a, b.
215 Id. § 10b.
216 Id. § 10a.
217 Id.
218 Id.
219 Id. §§ 10a, d.
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manufactured, mined or produced in the United States in sufficient quantity, or where the goods and materials involved are not of satisfactory quality, an exception is provided. The Act also requires the inclusion of a clause in all Government construction contracts binding the contractor and all subcontractors, suppliers, and materialmen to abide by the same policy. The “Buy American” Act provides for debarment of contractors and certain subcontractors, materialmen, and suppliers for violation of contract provisions required by the Act. The debarment is for a term of three years from the date the head of the contracting department or agency finds a violation and it bars the contractor from further Government construction contracts.

In addition to the “Buy American” Act, there is a similar recurring provision in military appropriation acts. Unlike the “Buy American” Act, these recurring provisions apply only to purchases by the military departments rather than to all Government agencies. These provisions basically prohibit purchasing foreign food or clothing when American items are available.

CONCLUSION

It is believed that the foregoing, although admittedly broad brush, treatment amply illustrates the Government’s commitment to advancing its national economic and socioeconomic goals through its own contracting and procurement program. Unquestionably, the inclusion of such socioeconomic policies as mandatory requirements in federal contracts has substantially increased the Government’s cost of doing business, but the Government and the courts have long recognized that such additional costs are willingly incurred to effectuate policies in the public interest. Extensive federal purchasing of goods, services, and research projects not only results in a substantial contribution toward furthering those policies in the

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220 Id. § 10a.
221 Id. § 10b(a).
222 Id. § 10b(b).
225 See, e.g., Penn Dairies, Inc. v. Milk Control Comm’n, 318 U.S. 261 (1943), where the Court noted that “Congress has often required the inclusion in government contracts of terms not directly related to the interests of the government as purchaser, which have the effect of increasing cost.” Id. at 273. See also Eastern States Petroleum & Chem. Corp. v. Seaton, 163 F. Supp. 797 (D.D.C. 1958), wherein an oil importer attempted to have the Government’s “Voluntary Oil Import Program” limiting imports of foreign crude oil pursuant to Executive
economy as a whole, but also encourages the private sector to follow the Government's lead by making it clear that implementation of those policies is an accepted norm of fair play, a means of avoiding labor unrest, and a method of achieving sensible long-range industry standards.

Order 10,761 and the "Buy American" Act declared illegal. The district court held, in part, as follows:

The Court is of the opinion that there is a dual legal basis for this order. First is the Buy American Act . . . which requires the Government to buy only such unmanufactured articles . . . as have been mined or produced in the United States . . . . Another legal basis for this order is to be found in the power of the Government to decide what products it will or will not buy for its own use. Ordinarily, the Government, under pertinent statutes, buys supplies from the lowest responsible bidder, but it has a right to reject bids that are not in accordance with the public interest.

Id. at 798.