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FOREWORD

The ever-increasing importance of government contracts has enhanced the need for a comprehensive discussion of the problems connected with their use. Continuing this discussion, as commenced in the preceding part of this symposium, part two begins with an examination of the extent to which federal procurement policies are either internally consistent or consistent with other policies outside the procurement field, such as those embodied in the antitrust laws or in "free trade."

Placing "emphasis on government" in the study of government contracts, the second article calls attention to the importance of "interior" government relations—for example, the interaction between Congress and its committees, on the one hand, and the executive departments and agencies, on the other. The courts also are placing "emphasis on government" when, as in the much-discussed *G. L. Christian* case,[1] they have given federal procurement regulations the force of statutory law and have read the provisions of these regulations into government contracts from which they had been omitted by the parties. Such judicial holdings lend greater plausibility to the argument presented here in one article that government contracts are contracts of adhesion, as to which the excuse of impossibility of performance should be generously applied by boards of contract appeals and by the Court of Claims.

Since procurement costs are a major item in the federal budget, efforts to control and reduce these costs loom large in campaigns for governmental economy. In one such effort Congress passed the defective pricing law, which, however, seems to have touched off a storm of controversy and to have resulted in some inequities in procurement. The Department of Defense, relying on competition as a cost-saving pricing technique, has increased efforts to "break out" specifications that would be subject to competitive bids; also, in many instances it has replaced cost-plus-fixed-fee with incentive contracts. On the other hand, the Atomic Energy Commission, distinguishing its problems from those of Defense, is continuing its use of management contracts and seeking cost reduction through other means.

By reason of the oft-heard criticism that federal procurement has discriminated against small business, the symposium contains two articles which center on the

[1] G. L. Christian & Associates v. United States, 312 F.2d 418 (1963), *motion for rehearing and reargument denied*, 320 F.2d 345 (1963), *cert. denied*, 375 U.S. 954 (1963), *rehearing denied*, 376 U.S. 929 (1964).

participation by small businessmen in government contracts. One takes the view that small businessmen are getting a fair share of such contracts and that in some respects the governmental efforts to help them—as by the strong preference for advertising bidding methods—runs counter to their own preferences. The other article points to the governmental assistance available to small business through the set-aside program and certificates of competency. That other forms of assistance may also be available appears from the article on financing defense contracts.

In some industries, such as aerospace, government contracts play a major role in determining the utilization of manpower; and often this utilization has involved a waste which can no longer be afforded. Elimination of one barrier to efficient manpower utilization should result from the vigorous federal program to provide equal employment opportunity—a program discussed in both parts of the symposium. Federal concern with labor conditions is also reflected in legislation designed to assure that insistence on competitive bidding for government contracts will not become a lever for depressing wage levels. And the Miller Act seeks to assure payment of laborers working on federal construction projects, as well as payment of the persons furnishing material for such projects.

A businessman's most valuable asset is often his technical "know-how"; and naturally he does not want to lose that asset by entering into a government contract. On the other hand, from the government's standpoint one purpose of the contract may be to obtain free and easy access to this "know-how," including the contractor's proprietary data and trade secrets. Two articles in the symposium discuss the proper adjustment of these conflicting viewpoints.

The government relies heavily on business and educational organizations to generate new ideas and perform basic and applied research. But to what extent and in what manner should the government underwrite these activities? One article urges that improvements be made in integrating independent research and development into the government's total program of support for research.

Procurement of basic research is especially difficult to fit into the format of a government contract; and so Congress authorized grants to nonprofit institutions for "basic scientific research." Unfortunately, as pointed out in the final article, the term "grant" and the relative absence of restrictions may have induced some misinterpretation of the responsibilities of the grantee.

The brief reference in this foreword to some of the topics covered in part two of the symposium does little justice to the detailed and thoroughgoing analyses in the various articles. However, perhaps it will indicate the potentiality of this symposium in helping to achieve a more comprehensive understanding of the contemporary role of government contracts.

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