

worth noting that at least one, a NASA program, may have become open to Canadian firms as a result of the FTA."<sup>71</sup>

ii) Implicit Rules Affecting Procurement Practices

In terms of federal procurement, U.S. government R&D contracting is subject to the Federal Acquisition Regulations (FARs) of the Code of Federal Regulations, with most of the major departments having their own set of supplementary regulations. Proposed federal expenditures on R&D, including both procurement and investment in facilities (civilian and defence), is US \$75.6 billion for FY 1994. The FARs distinguish between:

- a) government contracts for R&D which are used to support the acquisition of goods or services for the direct benefit or use of the Federal Government, and
- b) grants and cooperative agreements, when the principle purpose of the transaction is to stimulate or support research and development for another public purpose.

Contract-type restrictions related to government procurement exist in the form of small business set-asides and, in some cases, federal funding comes with "Buy America" restrictions which arise out of federally sponsored research projects. A recent case involved a Canadian participant in a consortium who complained that a "competitiveness clause" in the procurement contract precluded any manufacture in Canada.<sup>72</sup>

An investigation of this case was pursued with the legal counsel of the consortium. The most relevant legislation cited appears to be the "National

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<sup>71</sup> The NASA Industrial Applications Centre is available to Canadian companies irrespective of location as a result of the Canada-U.S. Free Trade Agreement.

<sup>72</sup> The legislative authority for this restriction is contained in Title 18 of the U.S. Code, Chapter 18, Part 204 "Preference for United States Industry". Chapter 18 deals with patent rights in inventions made with federal assistance. Part 204 states: "Notwithstanding any other provision of this chapter, no small business firm or nonprofit organization which receives title to any subject invention and no assignee of any such small business firm or nonprofit organization shall grant to any person the exclusive right to use or sell any subject invention in the United States unless such person agrees that any products embodying the subject invention or produced through the use of the subject invention will be manufactured substantially in the United States. However, in individual cases, the requirement for such an agreement may be waived by the Federal agency under whose funding agreement the invention was made upon a showing by the small business firm, nonprofit organization, or assignee that reasonable but unsuccessful efforts have been made to grant licenses on similar terms to potential licensees that would be likely to manufacture substantially in the United States or that under the circumstances domestic manufacture is not commercially feasible."