

**The original documents are located in Box 70, folder “10/23/76 S1437 Federal Grant and Cooperative Agreement Act of 1976 (vetoed) (2)” of the White House Records Office:
Legislation Case Files at the Gerald R. Ford Presidential Library**

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THE WHITE HOUSE

ACTION MEMORANDUM

WASHINGTON

LOG NO.:

12

Date: October 19

Time: 945pm

FOR ACTION: Paul Leach
 Max Friedersdorf *Endo* cc (for information): Jack Marsh
 Steve McConahey *Comments* Dick Parsons *Veto* Ed Schmults
 Bobbie Kilberg *dufu* Mike Duval
 Robert Hartmann

FROM THE STAFF SECRETARY

DUE: Date: October 20

Time: noon

SUBJECT:

S.1437-Federal Grant and Cooperative Agreement Act, 1976

ACTION REQUESTED:

- For Necessary Action
- For Your Recommendations
- Prepare Agenda and Brief
- Draft Reply
- For Your Comments
- Draft Remarks

REMARKS:

please return to judy johnston, ground floor west wing



PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

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K. R. COLE, JR.
For the President

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*Disapprove. I have suggested minor
 please return to judy johnston, ground floor west wing
 changes in the Statement of Disapproval,*



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James M. Cannon

THE WHITE HOUSE

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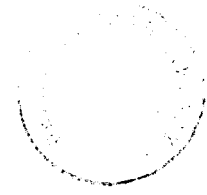
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|---|---|
| <input type="checkbox"/> For Necessary Action | <input type="checkbox"/> For Your Recommendations |
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REMARKS:

please return to judy johnston, ground floor west wing

def to omb

Kilberg 10/20/76



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James M. Cannon

MEMORANDUM OF DISAPPROVAL

I am withholding my approval from S. 1437, the Federal Grant and Cooperative Agreement Act of 1976.

This legislation has a laudable goal -- to clarify and rationalize the legal instruments through which the Federal Government acquires property and services and furnishes assistance to State and local governments and other recipients. The bill would establish three categories of legal instruments which Federal agencies would be required to use: procurement contracts, grant agreements, and cooperative agreements. These categories would be defined according to their different purposes.

S. 1437 would also require the Director of the Office of Management and Budget to undertake a study which would (1) "develop a better understanding of alternative means of implementing Federal assistance programs ...", and (2) "...determine the feasibility of developing a comprehensive system of guidance for Federal assistance programs."

The Office of Management and Budget completed a study, almost a year ago, of the definitions of "grant", "contract" and "cooperative agreement." That study, which has been reviewed by other Federal agencies, public interest groups, and other interested associations and groups, confirmed support for the objectives of this legislation but led to serious questions as to whether at this point legislation is necessary or desirable.

No matter how careful the drafting, a bill which requires thousands of transactions to be placed into one of three categories will probably result, in many cases, in ~~hampering~~ ^{limiting}



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Accordingly, I must withhold my approval of S. 1437.

THE WHITE HOUSE

October , 1976



10/20/76 - 8:55 am

THE WHITE HOUSE

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*to DJS
10/20 11:45*

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sh/mud



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*Back up
log*

11

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10/20 - Copy sent for researching. nmc

10/20 - Researched copy returned. nmc

*with message
ad. fed
AJ*

*no opinion
AJ*



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October , 1976



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503



OCT 18 1976

MEMORANDUM FOR THE PRESIDENT

Subject: Enrolled Bill S. 1437 - Federal Grant and
Cooperative Agreement Act of 1976
Sponsor - Sen. Chiles (D) Florida and 12 others

Last Day for Action

October 23, 1976 - Saturday

Purpose

To provide standards and uniform procedures applicable to the legal instruments through which the Federal Government acquires property and services and furnishes assistance to State and local governments and other recipients.

Agency Recommendations

Office of Management and Budget	Disapproval (Memorandum of disapproval attached)
Department of the Treasury	Disapproval (Informally)
Department of Health, Education, and Welfare	Disapproval
Department of Agriculture	Disapproval (Memorandum of disapproval attached)
Department of Defense	Oppose but defers to OMB
Department of Justice	Defers to OMB
Department of Transportation	Defer
National Science Foundation	No recommendation
Advisory Commission on Intergovernmental Relations	No recommendation
Department of Labor	No objection but defer to OMB
Department of Housing and Urban Development	No objection
Small Business Administration	No objection (Informally)
Department of Commerce	No objection (Informally)
Environmental Protection Agency	No objection





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Department of Housing and Urban Development	No objection
Small Business Administration	No objection (Informally)
Department of Commerce	No objection (Informally)
Environmental Protection Agency	No objection

General Services Administration	No objection
National Aeronautics and Space Administration	No objection
Department of Interior	Approval
Energy Research and Development Administration	Approval

Discussion

The basic provisions of S. 1437 were proposed three years ago as a means of implementing recommendations of the Commission on Government Procurement. The Commission, which reported in 1972, found that there was significant confusion over which Federal transactions should be subject to procurement procedures and which should be subject to assistance policies. The Commission recommended that clear definitions be developed to distinguish between the two types of relationships.

In commenting on the need for legislation to implement the Commission's recommendations, the Senate Government Operations Committee stated that Federal grant making outlays were increasing rapidly, that there were no uniform statutory guidelines to express the sense of Congress as to when grants should be used rather than contracts, and that confusion, inconsistent agency practice, waste and some abuses had resulted. The report concluded that as compared to the procurement system, "... the 'so-called' grant system is primitive and under developed" and that there was a need to "get a handle" on the entire process for Federal assistance.

The bill passed the House and Senate by voice vote.

Summary of S. 1437

Categories of assistance. S. 1437 would establish three categories of legal instruments which Federal agencies would be required to use for certain arrangements with outside entities.

(1) Procurement contracts, to be used when the principal purpose of the legal instrument is the acquisition of property or services for the direct benefit or use of the Federal Government, or when an agency determines that a procurement contract is appropriate.



(2) Grant agreements, to be used when the instrument is to reflect a relationship the principal purpose of which is to transfer money, property, or services to a recipient in order to accomplish a public purpose and when no substantial involvement is anticipated between the Federal agency and the recipient during the performance of the activity.

(3) Cooperative agreements, to be used whenever the principal purpose of the relationship is the same as that specified above in the case of a grant agreement, but when substantial involvement is anticipated between the Federal agency and the recipient.

The bill would authorize the use of all these types of relationships by each agency presently authorized to use any one of them, unless the agency is specifically prohibited by statute from using any one of them. A grant or cooperative agreement would not include "any agreement under which only direct Federal cash assistance to individuals, a subsidy, a loan, a loan guarantee or insurance is provided."

Agencies would also be authorized to vest title to tangible personal property in nonprofit institutions of higher education and certain other nonprofit institutions when the property was purchased with funds, under any of the three relationships, used for the conduct of basic or applied scientific research at such institutions.

Study. Another major provision in the bill would require the Director of OMB, in consultation with Federal agencies, State and local governments, Congress, GAO, recipients of Federal assistance and members of the public, to undertake a study which would (1) "develop a better understanding of alternative means of implementing Federal assistance programs...", and (2) "...determine the feasibility of developing a comprehensive system of guidance for Federal assistance programs."

The report on the study would have to be submitted within two years of the date of enactment of this bill. The report would include, among other requirements, recommendations for changes in the provisions of this bill described above, if such changes were deemed appropriate as a result of the study.



Other provisions. The bill would also:

- repeal, one year after the date of enactment, the Grants Act of 1958;
- provide that its provisions would not render void or voidable any contracts, grants, or cooperative arrangements existing or entered into up to one year after the date of enactment;
- provide that a single relationship (i.e., grant, contract or cooperative agreement) between the Federal Government or a recipient would not be required in a jointly funded project if different relationships would be appropriate for different components of the project; and
- authorize the Director of OMB to except individual transactions or programs from the application of the provisions of the bill for a period ending 180 days after Congress receives the OMB study described above (a point in time that could be 2 1/2 years from the date of enactment).

Agency Views

Several of the agencies which either recommend approval of or have no objection to S. 1437 indicate continuing reservations with the bill's provisions (e.g., the Department of Labor, Energy Research and Development Administration and Environmental Protection Agency).

Certain agencies noted in their attached views letters that they anticipate being exempted from the bill's mandates either under authority of other statutes or by the bill's waiver provision when concurred in by the Director of the Office of Management and Budget (i.e., the National Aeronautics and Space Administration, Department of Labor, and National Science Foundation). None of these agencies viewed the administrative inconvenience that would result from implementing the bill's provisions as sufficient to warrant a veto.



However, the Department of Health, Education, and Welfare (HEW), and the Departments of Agriculture (USDA) and Treasury recommend that the bill be disapproved; the Department of Defense (DOD) opposes the bill, and the Department of Transportation (DOT), while deferring to other agencies, lists a number of provisions in the bill which it believes are "inconsistent and impractical."

The major objections raised by these agencies are summarized below for your consideration:

- The criteria provided in the bill to determine whether or not a contract, grant or cooperative agreement is to be used are inadequate. For example, HEW states that the basic criterion by which to distinguish between procurement agreements and assistance relationships (i.e., whether the object of the instrument is a matter of direct benefit or use to the Federal Government) is insufficient; "the distinction to be derived between cooperative agreements and ordinary grants (i.e., substantial involvement) is also of questionable utility."
- Establishing statutory criteria to govern the selection of the form of Federal assistance would impair the flexibility necessary in administering Federal research programs. In this regard, DOD states: "There are problems of definition which we feel will not allow us to continue the use of grants with universities for research of benefit to the Department of Defense... There are currently about 950 Department of Defense active grants with 150 institutions for a value of 950 million dollars. Changing a program of this magnitude to a contract operation would require a significant increase in administrative workload and a corresponding decrease in the manpower available for technical effort."
- Statutorily mandating major changes in the Federal assistance administrative processes should be preceded, not succeeded, by a complete study of these processes.
(USDA)



- Legislation is unnecessary for uniformity and standardization of Federal assistance procedure. The criteria and procedures mandated in S. 1437 may interfere with and delay ongoing administrative efforts to achieve the same objectives. (HEW)

Recommendation

The objective sought by this legislation is laudable -- to clarify and rationalize the use of the legal instruments for Federal acquisition of property and services from, and assistance to a variety of recipients. We believe, however, that the rigidity and artificiality in the categories of assistance that would be established by the bill could constrain most Federal agencies in carrying out their missions in an efficient, effective, flexible, and sensible manner. Specifically, we believe the enactment of any legislation which would impose statutory criteria for choosing contracts, grants, or cooperative agreements is unwise at this time on the following grounds:

- No matter how careful the drafting, an omnibus bill to force thousands of transactions into one of three categories might impair needed programmatic flexibility and could divert too many work hours into fitting programs into legislative definitions.
- In view of the extremely complex and changing nature of Federal assistance programs, categories of assistance relationships should be left to the Executive branch to determine and implement.
- Cooperative agreements, as used now in actual practice, do not all fit the proposed definitions of the bill.
- There are instances in research programs where it may be difficult to distinguish between procurement and assistance.



-- The development of a comprehensive system of guidance cannot be a one-shot effort. Instead of a requirement for a 2-year study, OMB should carry out this responsibility on a continuing basis and make periodic reports to Congress.

Further, considerable work has already been done by OMB and other agencies in this area. In December 1975, an inter-agency group, chaired by OMB, completed its study of the distinctions between contracts, grants, and other types of agreements. That study has been reviewed by other Federal agencies, public interest groups, and other interested associations and groups. The comments received confirmed our general support for the objectives of the bill, but also lead us to conclude that legislation, such as S. 1437, was not necessary or desirable.

We have issued a Federal management circular which covers standard application forms and administrative requirements for federal assistance programs. A recent OMB circular establishes uniform administrative requirements for hospitals, universities and nonprofit grantees. Finally, we have under development another OMB circular to establish Government-wide criteria for distinguishing between procurement and assistance transactions.

Such OMB circulars can be amended in response to new and changing requirements in administering Federal assistance programs; S. 1437 would lock us in to certain categories for some period of time.

In summary, legislation to implement distinctions between and among assistance and procurement relationships is not essential and could well lead to greater difficulties. The categories of assistance contained in the bill are not well defined and cannot provide the guidance necessary to improve the administration of Federal programs.



Accordingly, we recommend that you withhold your approval of S. 1437. A proposed memorandum of disapproval is attached for your consideration.

(Signed) PAUL H. O'NEILL
Paul H. O'Neill
Acting Director

Enclosures



THE WHITE HOUSE

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Recommend Disapproval. Sen. Weicker has contacted White House with request President sign bill.

Truf



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James M. Cannon

THE WHITE HOUSE

WASHINGTON

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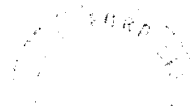
MEMORADUM FOR: JUDY JOHNSTON
FROM: STEVE McCONAHEY *SM*
SUBJECT: S. 1437
The Federal Grants and
Cooperative Agreement Act

S. 1437 is strongly supported by those advocating reform in the intergovernmental system, particularly the National Governors' Conference and the National Association of Counties. These groups believe that a strong Federal directive is needed in our "non-system" of intergovernmental relations.

According to testimony presented by NACo, this bill symbolizes a positive step toward standardizing the operations of Federal grant distribution. They believe that the bill would not only clarify the roles and responsibilities to be assumed at each level but also would enable local governments to use their resources more efficiently without unnecessary federal, administrative requirements. NACo also endorses the proposed OMB study of Federal assistance programs.

The National Governors' Conference has also forwarded their endorsement of this bill.

I concur with the objectives of this bill. I will accept the reasons for disapproval only if we are convinced that OMB has made real changes as a result of their studies thus far. Just because OMB has studied this issue does not mean that they have done anything about it.



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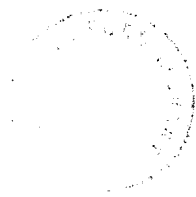
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The Office of Management and Budget completed a study, almost a year ago, of the definitions of "grant", "contract" and "cooperative agreement." That study, which has been reviewed by other Federal agencies, public interest groups, and other interested associations and groups, confirmed support for the objectives of this legislation but led to serious questions as to whether at this point legislation is necessary or desirable.

No matter how careful the drafting, a bill which requires thousands of transactions to be placed into one of three categories will probably result, in many cases, in limiting the flexibility of Federal agencies in administering their programs and creating a large number of technical difficulties for them. Federally supported basic research programs would be particularly difficult to classify in terms of the definitions in this bill.

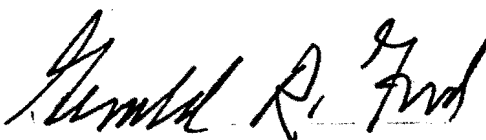
The Office of Management and Budget is continuing to work in this area with the cooperation of other Federal agencies. It plans to issue policy guidance to Federal agencies that would more clearly distinguish between procurement and assistance transactions and to better define patterns of assistance relationships between Federal agencies and funding recipients.

In addition, OMB has been developing more comprehensive guidance for assistance programs, as indicated by the recent circulars issued by the agency establishing uniform administrative requirements for hospitals, universities, and non-profit grantees. I am directing OMB to continue to emphasize such activities.

Subsequent modifications and refinements can be made in these directives when further operating experience and evaluation suggest they are needed. Such an evolving set of activities in the Executive branch, a step-by-step process which learns from experience, is preferable to another lengthy study as required by this bill.

In view of the extremely complex and changing nature of Federal assistance programs, I believe that Congress should not legislate categories of Federal assistance relationships, but leave the number and nature of such classifications to the Executive branch to determine and implement. If experience from the studies and evaluations now underway demonstrates that legislation is required, that experience would also provide a better foundation for formulating legislation than we have now.

Accordingly, I must withhold my approval of S. 1437.

A handwritten signature in cursive script, reading "Gerald R. Ford". The signature is written in dark ink and is positioned below the typed text of the letter.

THE WHITE HOUSE,

FEDERAL GRANT AND COOPERATIVE
AGREEMENT ACT OF 1976

REPORT

OF THE

COMMITTEE ON GOVERNMENT OPERATIONS
UNITED STATES SENATE

TO ACCOMPANY

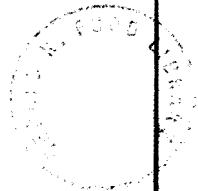
S. 1437

TO DISTINGUISH FEDERAL GRANT AND COOPERATIVE
AGREEMENT RELATIONSHIPS FROM FEDERAL PROCURE-
MENT RELATIONSHIPS, AND FOR OTHER PURPOSES



AUGUST 27, 1976.—Ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1976



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(III)

COMMITTEE ON GOVERNMENT OPERATIONS

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(II)

FEDERAL GRANT AND COOPERATIVE AGREEMENT ACT
OF 1975

AUGUST 27, 1976.—Ordered to be printed

Mr. CHILES, from the Committee on Government Operations,
submitted the following

REPORT

[To accompany S. 1437]

The Committee on Government Operations, to which was referred the bill (S. 1437) to distinguish Federal grant and cooperative agreement relationships from Federal procurement relationships, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

On page 1, line 4, strike out "1975," and insert "1976".

On page 7, between lines 9 and 10, add the following:

(c) The authority to make contracts for the conduct of basic or applied scientific research at nonprofit institutions of higher education, or at nonprofit organizations whose primary purpose is the conduct of scientific research shall include discretionary authority, when it is deemed by the head of the executive agency to be in furtherance of the objectives of the agency, to vest in such institutions or organizations, without further obligation to the Government, or on such other terms and conditions as deemed appropriate, title to equipment or other tangible personal property purchased with such contract funds.

On page 7, line 20, after the word "with" insert "and to the extent practicable, involve".

I. PURPOSE AND SUMMARY OF THE ACT

The Federal Grant and Cooperative Agreement Act of 1976 is an initial step to eliminate ineffectiveness and waste resulting from confusion over the definition and understanding of legal instruments used to carry out transactions and reflect basic relationships between the Federal Government and non-Federal entities.

While approximately one-third of the Federal budget is allocated through outlays in procurement contracts and grants, no uniform statutory guideline exists to express the sense of Congress on when executive agencies should use grants rather than contracts. The requirements contained in the bill are intended to prevent certain abuses, clarify some of the confusions, and reorder inconsistent practices that have resulted from this lack of central guidance.

The bill establishes criteria for selecting the appropriate class of legal instruments to achieve standard terminology and use by executive agencies, and thereby facilitate a better understanding of the roles and responsibilities of the parties. While it does not dictate the specific terms or conditions that should be placed on types of contracts, grants, or cooperative agreements, for the first time it would require that the choice and use of legal instruments reflect the type of basic relationship expected between the Federal government and non-Federal parties.

The bill authorizes executive agencies to enter into contracts, grant agreements, or cooperative agreements. It also imposes consistent discipline in the selection and use of these instruments by executive agencies by requiring that their use reflect basic Federal/non-Federal relationships. Maximum practical competition in the award of all instruments is encouraged.

The bill also gives uniform discretionary authority to vest title to equipment or other tangible personal property when purchased by recipients with grant or cooperative agreement funds.

Authority to make contracts for the conduct of basic or applied scientific research at nonprofit institutions of higher education or at nonprofit organizations whose primary purpose is the conduct of such research will include the same discretionary authority to vest title in recipients.

The bill requires a comprehensive 2-year study to (a) examine alternative means of implementing Federal assistance programs and (b) determine the feasibility of developing a comprehensive system of guidance for the use of grants, cooperative agreements, and other forms of assistance in carrying out Federal assistance programs. The study would include development of an outline and a detailed description of the basic characteristics of a central system of guidance for Federal assistance programs, as well as a plan for developing such a system. Statutory changes or additions to this bill as may be deemed appropriate would also be addressed by this study.

To insure that the legislation does not unintentionally interfere with existing programs, the bill contains the following provisions:

(1) Any existing legal Federal/non-Federal arrangement, or one entered into up to 1 year after enactment, would not be affected;

(2) Nothing in the bill requires the establishment of a single relationship between the Federal Government and a State or local government, or other recipient, on a jointly funded project involving funds from more than one program or appropriation, where different relationships would otherwise be appropriate for different components of a project; and

(3) The Director of OMB would be authorized to exempt individual transactions or programs of any executive agency from

the provisions of the bill. This authority would expire 180 days after the report of the mandated study is received by Congress.

SUPPORT FOR S. 1437

A similar bill, S. 3514 passed the Senate unanimously during the 93d Congress. This bill is supported by the following organizations:

American Bar Association; National Governors Conference; State of Florida; Commonwealth of Virginia; Commonwealth of Pennsylvania; State of Michigan; State of Minnesota; American National Red Cross; American Road Builders Association, Contractors Division; Boy Scouts of America; Camp Fire Girls; The Child Welfare League of America, Inc.; Council of Jewish Federations and Welfare Funds; Family Service Association of America; General Accounting Office; Girl Scouts of the U.S.A.; Girls Clubs of America; Good Will Industries of America; KLRN-TV, Southwest Texas; McGraw-Hill, Inc., National Association of Counties; National Association of Life Sciences Industries; National Association for Mental Health; Stanford Research Institute; University of Tennessee; National Association of State Budget Officers; National Board of YMCA's; National Board of YWCA's of U.S.A.; National Conference of Catholic Charities; National Council of Professional Services Firms; National Federation of Settlements and Neighborhood Centers; National Security Industrial Association; National Urban League; The Salvation Army; Travelers Aid International Social Service of America; and United Way of America.

II. LEGISLATIVE HISTORY

The provisions of S. 1437 are substantially based on recommendations F-1 and F-2 of the report submitted to the Congress in December 1972 by the Commission on Government Procurement after a 2½ year review of Federal spending practices. The Commission was created by Public Law 91-129 in November 1969 to study and recommend to Congress methods "to promote the economy, efficiency, and effectiveness" of procurement by the executive branch of the Federal Government.¹

BASIS FOR THE COMMISSION'S RECOMMENDATIONS F-1 AND F-2

Thirteen study groups were organized by the Commission to study designated parts of the procurement process. As the Commission's study program proceeded, grant-type activities clearly impinged on procurement issues. Because of the importance of Federal grant activities and the growing uncertainty of their relationship to procurement, the Commission chartered a grants task force to continue an analysis of the grants area.

The original purpose of the review undertaken by the task force was to gain an understanding of the significance of the interchangeable use of grants and contracts and the extent to which procurement rules and regulations are or should be applied to grant-type assistance. As

¹The Report of the Commission on Government Procurement, vol. I, pp. vii-viii, December 1972.

data on Federal grant-type programs were examined, the focus was enlarged to include questions such as:

What is the nature of the grant-type relationships that exist between the Government and the recipient?

Can and should grant-type assistance be distinguished from procurement?

Can the confusion which seems to beset grant-type programs be reduced by giving relationship-based definitions for Government-wide use to terms such as contract, grant, and grant-in-aid?

The task force efforts, coupled with findings of the other study groups, led to the Commission's recognition of critical problems and two recommendations to deal with them.

Recommendation F-1 of the Commission's report reads:

Enact legislation to (a) distinguish assistance relationships as a class from procurement relationships by restricting the term "contract" to procurement relationships and the terms "grant," "grant-in-aid," and "cooperative agreement" to assistance relationships, and (b) authorize the general use of instruments reflecting the foregoing types of relationships.

Recommendation F-2 of the Commission's report reads:

Urge the Office of Federal Procurement Policy to undertake or sponsor a study of the feasibility of developing a system of guidance for Federal assistance programs and periodically inform Congress of the progress of this study.

EXECUTIVE BRANCH CONSIDERATION OF RECOMMENDATIONS

After the Report of the Commission on Government Procurement was transmitted to Congress in December 1972, separate interagency task groups were convened by the executive branch to review the Commission's F-1 and F-2 recommendations.

Reports favorable to both recommendations were issued by the task groups. The F-1 Task Group report was issued on September 19, 1973;² the F-2 Task Group report was issued on March 1, 1974.³ These reports represented the first stage of review needed for formal executive branch positions on the recommendations. On June 23, 1975 notice was given that the executive branch had formally accepted the Commission's F-1 and F-2 recommendations.⁴

93d Congress, Bills Introduced, House of Representatives

Legislation (H.R. 9060) to distinguish Federal procurement and grant-type assistance transactions, standardize use of legal instruments for procurement and grant-type assistance transactions, and authorize use of a procurement or grant-type instrument, as appropriate, was introduced in the House on June 28, 1973 by Congressman Frank Horton. H.R. 9060 incorporated recommendation F-1 of the Commission on Government Procurement.

A hearing was held at the close of the 93d Congress, November 25, 1974 on H.R. 9060 and S. 3514 before the Subcommittee on Legislation

² Hearings before the Subcommittee on Federal Spending Practices, Efficiency and Open Government and the Subcommittee on Intergovernmental Relations of the Committee on Government Operations on S. 1437, 94th Cong., 2d sess., Mar. 23 and April 5, 1976, p. 221.

³ *Ibid.*, p. 230.

⁴ *Ibid.*, p. 112.

and Military Operations of the Committee on Government Operations but neither bill was reported by the subcommittee.

Legislation to create an Office of Federal Procurement Policy (H.R. 9059) was also introduced by Congressman Holifield, for himself and Congressman Horton on June 28, 1973. Section 14 of H.R. 9059 embodied recommendation F-2 of the Commission on Government Procurement. H.R. 9059 was the subject of 6 days of hearings before the House Legislation and Military Operations Subcommittee, July 11, 12, 16, 17, 20, and 30, 1973.

93d Congress, Bills Introduced, Senate

S. 3514, The Federal Grant and Cooperative Agreement Act of 1974, was introduced by Senator Chiles for himself and Senators, Roth, Muskie, Gurney, and Brock on May 20, 1974. S. 3514 embodied recommendations F-1 and F-2 of the Commission on Government Procurement. Hearings on S. 3514 were held jointly by the Ad Hoc Subcommittee on Federal Procurement and the Subcommittee on Intergovernmental Relations of the Government Operations Committee on June 25 and 27 and July 10 and 18, 1974.

On September 24, 1974, the Government Operations Committee unanimously approved an amendment in the nature of a substitute bill. The report of the committee was ordered printed on October 7.⁵ On October 9, 1974, S. 3514 passed the Senate without dissent.

94th Congress, Bills Introduced, Senate

S. 1437, The Federal Grant and Cooperative Agreement Act of 1975, was introduced on April 15, 1975 by Senator Chiles and is cosponsored by Senators Weicker, Nunn, Brock, Roth, Muskie, Glenn, Moss, Percy, Hart of Michigan, Hartke, Hathaway, and Tunney.

S. 1437 is essentially a reintroduction of 93d Congress' S. 3514. To update the legislative record, hearings on S. 1437 were held jointly by the Subcommittee on Federal Spending Practices, Efficiency, and Open Government and the Subcommittee on Intergovernmental Relations of the Committee on Government Operations on March 23 and April 5, 1976. On August 3, 1976 the Committee on Government Operations reported the bill as amended.

III. NEED FOR LEGISLATION

In its 1974 Report on S. 3514, the Federal Grant and Cooperative Agreement Act of 1974, the Committee on Government Operations noted the need for the legislative action contemplated by S. 1437.⁶

The need for this legislation has grown rather than diminished in the 21 months that have passed. Federal procurement outlays now amount to some \$70 billion a year. Federal grants to State and local governments alone will exceed \$60 billion in fiscal year 1977, a total which will reflect an annual average increase of 14 percent since 1967.⁷ When grants to non-governmental institutions such as nonprofit organizations, universities, and individuals are added to these figures, the growth is even more apparent.

⁵ 93d Cong., 2d sess., Report No. 93-1239.

⁶ *Ibid.*, p. 6.

⁷ Special Analysis O, Budget of the United States, fiscal year 1977.

No uniform statutory guideline exists to express the sense of Congress on when executive agencies should use grants rather than contracts. The confusions, inconsistent agency practices, abuses, and waste that have resulted from this lack of central guidance are increasing.

The committee's work on this legislation has revealed examples of abuses and wasteful practices in addition to those detailed in its report on S. 3514. Data provided by the Department of Health, Education, and Welfare demonstrated that HEW issued about three grants for each contract over the course of one fiscal year. But in June that ratio jumped to 7 to 1 while total outlays in grants and contracts exploded 800 percent, from an average of \$300 million per month to over \$2.4 billion in June alone. With the lack of congressional guidance and under circumstances such as these, the potential for the misuse of grants is enhanced.

HEW has also acknowledged that agencies use grants to obtain goods and services in direct support of agency operations. Specifically, grants are being used instead of procurement contracts to obtain consulting studies, technical assistance, collect data, perform surveys, studies and training programs for agencies. These practices allow agencies to avoid the competitive requirements of the procurement system.

Failure to distinguish between procurement and assistance relationships has also led to unnecessary red tape and administrative requirements in grants. The Department of Labor, for example, has ceased managing some of its manpower programs to State and local governments as procurement contracts and now manages them as grants.

Another specific example of the administrative chaos and headaches which present confusion over "grants" and "contracts" creates among local governments was provided by the National Association of Counties.

Metropolitan Dade County in Florida receives approximately \$250 million in Federal assistance each year. Recently, the county was required by a Federal agency to submit a listing of all handicapped persons employed in programs receiving financial assistance through Federal contracts. A new Federal law requires a separate affirmative action program on all Federal contracts. The county's staff spent several months of calls and letters to Federal officials asking what Federal assistance was through contracts. The Federal officials could not tell them. The wasted money and effort spent as a result of the confusion was still continuing at the time of the testimony.

The need to make the Federal assistance system rational and understandable was accentuated by the testimony on S. 1437. The need for a governmentwide system of guidance for Federal assistance programs is analogous to the need for the Office of Federal Procurement Policy for procurement.

The primary concern is to "get a handle" on the entire process for Federal assistance and to promote better understanding, guidance, and control. Compared to the Federal procurement system, the so-called "grant system" is primitive and underdeveloped. The study required by the bill should lead to additional improvements in the overall management of assistance programs.

It has now been over 3½ years since the Commission on Government Procurement submitted its report to Congress recommending the

actions embodied in S. 1437. Further delay means increased costs to the taxpayer.

IV. COST ESTIMATES

In accordance with section 252 (a) of the Legislative Reorganization Act of 1970 (Public Law 91-510), the committee estimates that there will be no expenditure of additional Federal funds required by enactment of S. 1437.

V. CHANGES IN EXISTING LAW

In compliance with subsection 4 of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill as reported, are shown as follows. Existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman:

TITLE 42—THE PUBLIC HEALTH AND WELFARE, UNITED STATES CODE

* * * * *

CHAPTER 16A—GRANTS FOR SUPPORT OF SCIENTIFIC RESEARCH

[§ 1891. Authorization to make grants.

[The head of each agency of the Federal Government, authorized to enter into contracts for basic scientific research at nonprofit institutions of higher education, or at nonprofit organizations whose primary purpose is the conduct of scientific research, is authorized, where it is deemed to be in furtherance of the objectives of the agency, to make grants to such institutions or organizations for the support of such basic scientific research.]

[§ 1892. Same; title to equipment.

[Authority to make grants or contracts for the conduct of basic or applied scientific research at nonprofit institutions of higher education, or at nonprofit organizations whose primary purpose is the conduct of scientific research, shall include discretionary authority, where it is deemed to be in furtherance of the objectives of the agency, to vest in such institutions or organizations, without further obligation to the Government, or on such other terms and conditions as the agency deems appropriate, title to equipment purchased with such grant or contract funds.]

[§ 1893. Annual report to Congress; contents.

[Each agency or department of the Federal Government exercising authority granted by this chapter shall make an annual report on or before June 30th of each year to the appropriate committees of both Houses of Congress. Such report shall set forth therein, for the preceding year, the number of grants made pursuant to the authority provided in section 1891 of this title, the dollar amount of such grants, and the institutions in which title to equipment was vested pursuant to section 1892 of this title.]

VI. SECTION-BY-SECTION ANALYSIS OF THE BILL

Section 1 states the short title of the bill, the "Federal Grant and Cooperative Agreement Act of 1976."

FINDINGS AND PURPOSE

Section 2(a) states that there is a need to distinguish Federal assistance relationships from Federal procurement relationships and thereby standardize usage and clarify the meaning of legal instruments which reflect such relationships; that uncertainty as to the meaning of such terms as "contract," "grant," and "cooperative agreement" and the relationships they reflect causes operational inconsistencies, confusion, inefficiency and waste for recipients of awards as well as for executive agencies; and that the Commission on Government Procurement has documented these findings and concluded that a reduction of the existing confusions, inconsistencies, and inefficiencies is feasible and necessary through legislative action.

These findings derive from work of the Commission on Government Procurement and can be specifically found in the Commission's report on Federal grant-type assistance programs.⁸ As stated in the report, the Commission discovered that Federal grant-type activities are a vast and complex collection of assistance programs, functioning with little central guidance in a variety of ways that are often inconsistent even for similar programs or projects. This situation gives rise to inappropriate practices by Federal agencies, including the use of grants to avoid competition and certain requirements that apply to procurement contracts.

The remaining provisions of the bill give statutory expression to the initial steps needed to correct the problems in Federal grant-type activities described by the Commission.

Section 2(b) says that the purposes of the bill are: to characterize Federal/non-Federal relationships in the acquisition of property and services and in the furnishing of assistance by the Federal Government so as to promote a better understanding of Federal spending and help eliminate unnecessary administrative requirements on recipients of Federal awards; to establish governmentwide criteria for the selection of appropriate legal instruments, a clearer definition of the relationships they reflect; and a better understanding of the responsibilities of the parties; to promote increased discipline in the selection and use of contracts, grant agreements, and cooperative agreements; to encourage competition, as appropriate, in the award of contracts, grants, and cooperative agreements; and to require a study of Federal/non-Federal relationships in Federal assistance programs that should lead to the development of a comprehensive system of guidance for Federal assistance programs.

This legislation will provide an initial framework for improvement of Federal assistance activities and increased discipline and order to over \$65 billion expended annually through these activities. Use of this framework to establish the desired relationships between the Federal Government and its recipients will result in more careful delineation of respective responsibilities, greater acceptance of respective roles, and more effective performance.

DEFINITIONS AND EXCLUSIONS

Section 3 defines "State government," "local government," "other recipient," and "executive agency," and qualifies the terms "grant or

⁸ *Op Cit.* Report of the Commission, vol. 3, pp. 153-175.

cooperative agreement" to exclude direct Federal cash assistance to individuals, subsidies, loans, loan guarantees, or insurance.

The term "other recipient" means any person or recipient, other than a State or local government, who is authorized to receive Federal assistance, and includes any charitable or educational institution. The term "other recipient" is intended as an inclusive term that does not exclude any otherwise authorized and legitimate recipient of Federal assistance. The provisions of this bill do not restrict the eligibility of any organization or individual to receive a Federal contract, grant, or cooperative agreement.

The term "executive agency" serves to delineate the applicability of the criteria for the use of types of contracts, grants, and cooperative agreements set forth in sections 4, 5, and 6, and of the authorizations provided for in section 7. The U.S. Postal Service and the Postal Rate Commission were removed from the original bill to make it consistent with Public Law 93-400, the Office of Federal Procurement Policy Act.

The use of a grant agreement or cooperative agreement, for the purposes of this bill, excludes direct Federal cash assistance to individuals. Direct Federal cash assistance is financial assistance provided by the Federal Government directly to eligible beneficiaries without imposition of spending restrictions on the recipient. Other types of assistance not covered by the requirements of sections 4, 5, and 6 of the bill are subsidies, loans, loan guarantees and insurance.

USE OF CONTRACTS, GRANTS, AND COOPERATIVE AGREEMENTS

Section 4, 5, and 6 set forth the criteria that require the use of either a type of procurement contract, grant agreement or cooperative agreement as the legal instrument between the Federal Government and recipients of Federal awards. The intent of these sections is to require that the legal instruments employed in transactions between Federal agencies and non-Federal recipients of awards reflect the basic character of the relationships established. The exact terms, conditions, and clauses that are contained in these type of instruments are not necessarily determined by these criteria.

These sections identify the following three basic relationships found in transactions between Federal agencies and recipients of contract and, Federal assistance awards:

(1) The principal purpose of the relationship is the acquisition, by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government. This is Federal purchase for Federal use.

(2) (a) The principal purpose of the relationship established is the transfer of money, property, services, or anything of value to the recipient to accomplish a public purpose of support or stimulation and (b) no substantial involvement occurs between the Federal agency and the recipient during performance of the activity.

(3) (a) The principal purpose of the relationship established is the transfer of money, property, services, or anything of value to the recipient to accomplish a public purpose of support or stimulation and (b) substantial involvement occurs between the Federal agency and the recipient during performance of the activity.

Accordingly, the bill provides that:

(1) A type of "contract" be used in the first relationship described above.

(2) A type of "grant agreement" be used in the second situation in which passive or no substantial agency involvement occurs during performance.

(3) A type of "cooperative agreement" be used in the third situation in which active or substantial agency involvement occurs during performance of the assisted activity.

Certain points concerning the meaning and intent of these three sections should be made. The Commission recommended distinguishing between "grant" and "grant-in-aid" by restricting the term "grant-in-aid" to transactions with units of State and local government. The Executive Branch Interagency Task Force reviewing this Commission recommendation explored alternatives to a separate definition of "grant-in-aid" and concluded that a productive solution would be to discard the term "grant-in-aid" in favor of the term "grant." This legislation embodies that change.

The phrases "type of procurement contract," "type of grant agreement," and "type of cooperative agreement" are used respectively in sections 4, 5, and 6. The term "type" recognizes that agencies may employ different types of contracts, grants, and cooperative agreements. As examples, "planning grants," "facilities construction grants," "formula grants," and "project grants," are all types of grants that reflect grant relationships. "Training (cooperative) agreements," "research (cooperative) agreements," and "demonstration (cooperative) agreements" are examples of types of cooperative agreements that reflect cooperative agreement relationships. It is expected that, as a result of the study envisioned by section 8, the executive branch will issue directives to assure that all executive agencies use standard terminology to designate the same basic relationships.

Subsection 4(2) reads, "whenever an executive agency determines in a specific instance that the use of a contract is appropriate." This subsection accommodates situations in which an agency determines that specific public needs can be satisfied best by using the procurement process. For example, subsection 4(2) would cover the two-step situation in which a federal agency may procure medicines which it then "grants" to non-Federal hospitals. This subsection does not allow agencies to ignore sections 5 and 6. Compliance with the requirements of sections 4, 5, and 6 will necessitate deliberate and conscious agency determinations of the choice of instrument to be employed.

Subsections 5(2) and 6(2) do not attempt to define "substantial involvement." Guidelines on what constitutes substantial involvement should be developed by the executive branch. The intent is to require executive agencies to make conscious decisions on the choice of instruments and the basic relationships they reflect. In anticipation of governmentwide guidelines, all that is required is that the agency be able to reasonably justify its choices.

The following are examples of relationships that entail substantial involvement during performance. These are situations which require Federal agency participation because:

Federal "project management" or Federal program or administrative assistance would be helpful due to the novelty or complexity involved (for example, in some construction, information systems development, and demonstration projects);

Federal/recipient collaboration in performing the work is desirable (for example, in collaborative research, planning or problem solving);

Federal monitoring is desirable to permit specified kinds of direction or redirection of the work because of interrelationships among projects in areas such as applied research; and

Federal involvement is desirable in early stages of ongoing programs, such as Health, Education, and Welfare (HEW) welfare activities or Law Enforcement Assistance Administration programs, where standards are being developed or the application of standards requires a period of adjustment until recipient capability has been built.

These reasons for substantial agency involvement during performance illustrate when substantial Federal involvement during performance is needed and a type of cooperative agreement should be employed.

The distinctions provided for in sections 4, 5, and 6 provide a basic structure that expresses existing relationships between the Federal Government and non-Federal entities. It is a structure which will enable the Federal agencies to make disciplined choices and decisions on their roles and responsibilities and on the roles and responsibilities of recipients. Terms such as "contract," "grant," and "cooperative agreement" will come to mean more than they now do.

Taken together, sections 4, 5, and 6 permit and require the executive agencies to specifically consider the implementation of Federal transactions and their aggregation into Federal programs in terms of the framework established in this bill and to achieve consistency in terminology. Thus, executive agencies, recipients of Federal awards, the Congress, and the public will to the maximum extent practicable be speaking the same basic language.

The agencies do have the flexibility of determining whether a given transaction or class of transactions is procurement or assistance and, if assistance, whether the transaction or class of transactions is to be associated with a type of grant or cooperative agreement relationship. The mission of the agency will influence the agency's determination of which it should be. But the agency's classification of its transactions will become a public statement for public, recipient, and congressional review of how the agency views its mission, its responsibilities, and its relationships with the non-Federal sector.

AUTHORIZATIONS

Section 7(a) declares that notwithstanding any other provision of law, each executive agency authorization by law to enter into contracts, grants, cooperative agreements, or similar arrangements is authorized and directed to use contracts, grant agreements, or cooperative agreements as required by this bill. The purpose of this authorization is to overcome the problem many agencies now face if their choice of instrument is statutorily restricted to a particular instrument. This authorization will provide the executive agencies with needed flexibility in their efforts to use appropriate legal instruments to reflect the relationships established with non-Federal recipients of contract, grant, or cooperative agreement awards.

If an agency is presently authorized only to enter into either contracts, grants, cooperative agreements, or other arrangements, this

authorization enables that agency to enter into any or all three types of agreements, subject to the criteria set forth in sections 4, 5, and 6. However, if an agency is specifically proscribed by a provision of law from using a type of agreement, this authorization would not affect that prohibition.

This bill would affect some existing program authorization statutes by superseding provisions, if any, dealing with the required use of particular instruments to implement programs. In addition, this legislation would have another effect. When an agency, complying with the criteria established herein, changed the award mechanism for a particular activity from a type of grant to a type of procurement contract, then the procurement regulations would apply. Conversely, when an agency changed the award mechanism from a type of procurement contract to a type of grant, the regulations and statutes applying to procurement contracts would no longer apply. The regulations and statutes applying to transactions of Federal assistance would apply.

The proposed legislation does not automatically change the type of instrument authorized by statute but rather authorizes the agencies to use other instruments if appropriate and consistent with this bill. The legislation is not intended to nor will it eliminate specific program or administrative requirements placed by the Congress in individual program statutes. It also will not eliminate specific requirements applying, for example, to grants in such organic statutes as the Work Hours Standards Act. Given the foregoing understanding, it is not practical or necessary to identify all of the statutes which might be somewhat affected.

Section 7(b) provides discretionary authority to vest in State or local governments or other recipients title to equipment or other tangible personal property. Section 7(b) continues the special authority contained in Public Law 85-934, (72 Stat. 1793; 42 U.S.C. 1891, 1892, 1893), permitting agencies in assistance transactions to vest title to equipment in institutions of higher education and certain nonprofit organizations, and extends the authority by permitting agencies to vest title in other than basic research projects and to all recipients of grant and cooperative agreement types of assistance.

Section 7(c) continues the authority contained in Public Law 85-934 permitting agencies authorized to make contracts for basic or applied scientific research at institutions of higher education, or at nonprofit organizations whose primary purpose is the conduct of scientific research to vest title in such institutions and organizations for equipment or other tangible personal property purchased with contract funds.

The authorizing provisions of sections 7(a) and 7(b) wherein discretionary authority is granted to the heads of executive agencies is not intended to preclude or inhibit the executive branch from developing governmentwide executive guidance on the use and application of such authority.

STUDY OF FEDERAL ASSISTANCE PROGRAMS

Section 8 mandates a study of Federal assistance programs. The intent of section 8 is to provide a basis for further action to be taken to improve assistance processes. The criteria established in sections 4,

5, and 6 of this bill are a beginning in clarifying the meaning of the terms "contract," "grant," and "cooperative agreement" and in providing a framework of relationships for governmentwide guidance in assistance programs.

Section 8 declares that the Director of the Office of Management and Budget, in cooperation with the executive agencies shall undertake a study and that the Director shall consult with and to the extent practicable involve representatives of the executive agencies, the Congress, the General Accounting Office, State and local governments, other recipients, and other interested members of the public. The listing of entities with which the Director shall consult and to the extent practicable, involve is intended to insure that the study include appropriate participation from a wide range of interested parties.

Section 8 also declares that the objectives of the study are to develop a better understanding of alternative means of implementing Federal assistance programs, and determine the feasibility of developing a comprehensive system of guidance for Federal assistance programs. The study shall include a thorough consideration of the findings and recommendations of the Commission on Government Procurement relating to the development of such a system. In addition, the report on the study shall include: (1) detailed descriptions of the alternative means of implementing Federal assistance programs and of the circumstances in which the use of each appears to be most desirable, (2) detailed descriptions of the basic characteristics of and an outline of such a comprehensive system of guidance for Federal assistance programs, the development of which may be determined feasible, and (3) recommendations concerning arrangements to proceed with the full implementation of such comprehensive system of guidance, including such administrative or statutory changes as may be deemed appropriate. Federal assistance programs to be examined by the study include all kinds of assistance programs and do not exclude those transactions such as loans, direct payments to individuals, subsidies, insurance, and loan guarantees that are excluded from the scope of sections 4, 5, and 6 of the bill.

The requirement for thorough consideration of the findings and recommendations of the Commission on Government Procurement will insure that the Commission's previous work on and discussion of its F-2 recommendation will be considered in the conduct of the study.

The results of the study shall be reported to the Committee on Government Operations of the Senate and the House of Representatives at the earliest practicable date, but in no event later than 2 years after the date of enactment of the bill. This provision requires the executive branch to proceed forthrightly in accomplishing the study and the Congress to give timely attention and consideration to the study results.

REPEALS AND SAVINGS PROVISIONS

Section 9(a) repeals the act entitled "An Act to authorize the expenditure of funds through grants for support of scientific research, and for other purposes." This is Public Law 85-934, the "Grants Act," approved September 6, 1958 (72 Stat. 1793; 42 U.S.C. 1891, 1892, and 1893). The repeal is effective 1 year after the date of enactment of this bill. The more general authorization for the use of grants in section 7(a) and the authorities provided in section 7(b) and 7(c) overlap Public Law 85-934, hence the latter authorities are unnecessary.

NATIONAL GOVERNORS CONFERENCE

A panel testified on behalf of the National Governors Conference. The panel consisted of Mr. Carl Blackwell, from the Florida Governor's Office; Mr. Maurice Rowe, Secretary of Administration and Finance from the Commonwealth of Virginia; Mr. Charles Griffiths, aide to the Governor of the Commonwealth of Pennsylvania; and Mr. James Martin, Director of State-Local Relations for the National Governors Conference.

Mr. Blackwell stated that S. 1437 was a step in the right direction and that Florida was in complete agreement with the purposes of the act and the need to clarify the relationships and responsibilities of Federal, State, and local governments. He further stated:

We feel that the proposed study is one of the most important parts of the act, and that it offers a vehicle to consider the possible solutions to the total problem. Because of the substantial interest and involvement of State and local governments in the Federal/State/local partnerships, we feel that the involvement of State and local representatives should be substantial.

Mr. Rowe commented that:

* * * many of our operating agencies are concerned with the lack of an overall framework to standardize, simplify and improve the relationships between the Federal agencies and recipients of Federal programs. We are also concerned about the general lack of concern at the Federal level for actually managing the Federal Government and the failure to enforce Executive orders designed to simplify grant administration and Federal-State relations in general. * * * Definition of the legal instruments used to carry out the Federal programs will assist our central agency review program. However, I do find the most interesting part of the bill to be the requirement for a study of alternative means of implementing Federal assistance programs. This study should present the opportunity for the States to express their views on the States' role in the various Federal programs.

In response to a question Secretary Rowe commented on how the section 8 study requirement could be strengthened:

Mr. Chairman, it would seem like OMB would have the logical thrust to conduct the study, but I think that the Congress, through this committee possibly needs to develop some objectives and goals for this study, and certain criteria for feedback, and also certain rules for embodying the States in the conduct of this type of study.

Concerning whether detailed regulations and monitoring and reporting requirements are any less stringent in block grant as opposed to categorical programs, Mr. Rowe noted:

* * * We continue to struggle with pretty much the same type of problems in dealing with block grants as we do with categorical grants, to be quite frank, in terms of our relationship with the agencies of the Federal government.

Mr. Griffiths endorsed the criteria contained in sections 4, 5, and 6 of the bill as follows:

There can be no question that this kind of definition clarification is badly needed today. At its best, the transfer of Federal moneys, particularly within the grant-in-aid field, is a blurred and inconsistent process. At its worse, this process can be inequitable. Common sense would seem to mandate that order be brought out of this confusion. But more importantly, effective intergovernmental relations requires a common basis of understanding and expectation. The criteria established in these first few sections will be a valuable contribution to this end.

Mr. Griffiths supported the section 8 study requirements but did not feel that the language of the section went far enough:

We have all seen impressive figures about the growth of Federal assistance. We have also heard about some of the problems that have arisen because of this growth. Although there have been some studies related to the Federal assistance process, these have been partial in nature with very few initiated for the purpose of congressional review and action.

This fact astounds me. * * * All of this is to say that I firmly believe that the Federal assistance system will never receive the proper attention and reform unless this comes from a congressional initiative and mandate. This initiative is critical because the problems with Federal assistance are growing rather than lessening. Properly reworded, section 8 of this bill could serve as a first step toward this comprehensive look at the Federal assistance system and hopefully, toward the eventual resolution of its problems.

Mr. Martin reinforced the testimony of the three State officials:

We think the definitions that you have in the first part of the bill will give a much clearer understanding of what is expected of recipients. We support the section 8 study, and would hope that it would include—and be very clear that it includes—much more than just an OMB study of the first part of the designations.

THE AMERICAN BAR ASSOCIATION

Mr. Robert D. Wallick, cochairman, Grants Committee of the Public Contract Law Section of the American Bar Association testified on behalf of the American Bar Association.

Mr. Wallick stated that the American Bar Association supports Senate bill 1437 in principle, but recommends that section 8 be amended to provide for a study by an independent commission rather than by the Office of Management and Budget:

. . . We note that one of the fundamental policy issues involved is the question of what kind of arrangement is appropriate for use by the Government. Should the Government contract directly for highways, sewage plants and medical research, or use the grant and assistance techniques? The answers are not simple, and no doubt vary from program to pro-

gram. However, there is good reason to hope that requiring an agency to analyze its intended relationships in advance, so as to place a transaction in one of the three categories prescribed by S. 1437 would be a significant first step in the right direction. Moreover, use of meaningful labels would facilitate useful comparisons among programs and agencies.

Mr. Wallick cited the bar association's rationale for proposing a Commission, as opposed to OMB, to perform the study:

The American Bar Association sees a need for the proposed study, but favors one modeled upon the study by the Commission on Government Procurement. A remarkably large number of the recommendations of the Commission have been implemented, and there is every reason to believe that others will be adopted in whole or in part. . . . We believe this successful model would be more effective than a study by an agency of the executive branch. It would lead to higher visibility and likely attract more widespread views. We feel that the present approach has not demonstrated similar progress or effectiveness in direction of grant and assistance programs.

Mr. Wallick further elaborated on the reasoning in response to a question:

I think all of us recognize that the Office of Management and Budget potentially has the power and the ability to proceed . . . and it seems to me being realistic—that the Office of Management and Budget is really a budgetary operation, that the management function has not received the attention it should have and, therefore, this Office of Federal Procurement Policy, which has been created, is rather unique in terms of creating a true management function within OMB. There is no counterpart for grants. . . . I would personally agree . . . that OMB has the potential for doing it. We believe that it may not. And when we compare that to the successful functioning of the Commission on Government Procurement, out membership has come out strongly in favor of going in that direction.

Mr. James T. Lynn, Director of the Office of Management and Budget, presented the administration's position on S. 1437. Despite interim events between the Senate's passage of S. 3514 in the 93d Congress and the Senate hearings on S. 1437, wherein the Director had stated that OMB would not oppose similar legislation, Mr. Lynn did express opposition to S. 1437:

Frankly, when I read the objectives of the bill, I have a heck of a time disagreeing with them. I herald them, I think they are great. But I really do believe if we take an order or priorities of our time—and by "our" I mean as a Federal Government—as to the things that require attention, although these are important things, their importance is warped by the need to get on with some other things that very much related to the management of government programs . . . To say that we are going to make some kind of remarkable

progress by cataloging some programs as procurement contracts and the rest as either cooperative agreements or grant agreements, to me is really dealing at the edge . . . It seems to me a first step should be to see how many of these programs in this huge, fat book we can consolidate or get rid of. Then we have a reasonable chance of putting something into effect by way of uniform requirements for procurement uniform requirements for grants and uniform requirements for cooperative agreements.

Mr. Lynn recommended against passing legislation and proposed that the executive branch undertake administrative actions to achieve the objectives of the bill:

* * * Now, with this background, let me say to you, if we really need a bill in this area, I am sure we can work out with the committee a bill that will give the needed flexibility to do this job and do it well. I will be the first one to admit you can really get someone's attention by passing legislation. And I will be the first to admit that in the past the passage of a bill gets action done that hasn't been done before. . . . As I have dug into this more, my own feeling is that I would appreciate the opportunity to try on a more limited basis to do it by commitment to you, with commitment to this committee, with commitment to your counterpart in the other body, and see what we can do.

In his prepared statement, Mr. Lynn discussed several reservations that OMB has with the bill which are summarized below:

No matter how careful the drafting, an omnibus bill to force thousands of transactions into one of three categories may impair needed programmatic flexibility and will divert too many work hours into fitting programs into legislative definitions.

In view of the extremely complex and changing nature of Federal assistance programs, categories of assistance relationships should be left to the executive branch to determine and implement.

Cooperative agreements, as used now in actual practice, do not all fit the proposed definitions of the bill.

There are instances in research programs where it may be difficult to distinguish between procurement and assistance.

The development of a comprehensive system of guidance cannot be a one-shot effort. Instead of a requirement for a 2 year study, OMB should carry out this responsibility on a continuing basis and make periodic reports to Congress.

NATIONAL ASSOCIATION OF COUNTIES

Mr. Ralph Tabor, Director of Federal Affairs, National Association of Counties, testified on behalf of the Association.

Mr. Tabor recounted a specific case example in Dade County, Florida to illustrate the present confusion that exists at the local level in absence of the broad statutory guidance contained in S. 1437:

I would like to describe the situation faced by Dade County, Florida, which has a full-time intergovernmental coordinator in the county manager's office. Metropolitan Dade

County receives approximately \$250 million in Federal assistance each year. This year Dade County was required by a Federal agency to submit a listing of all handicapped persons employed in county programs receiving financial assistance through Federal contracts. This was necessary because a new Federal law requires a separate affirmative action program for the handicapped on all Federal contracts. It took the county's affirmative action staff several months of telephone calls and letters to Federal officials asking what Federal assistance was through contracts. The basic answer given was that they did not know which of the programs were in the contract mode. And, in fact, the county is still trying to make the determination so that they will be in compliance with the new law. This lack of understanding about the different types of aid has meant that local governments such as Dade County are being subjected to unnecessary administrative requirements that are both time consuming and result in no apparent improvement in program performance.

Mr. Tabor stated that S. 1437 would help standardize and simplify the administrative requirements for recipients of Federal moneys:

The structure outlined in S. 1437 whereby basic Federal-non-Federal relationships based on the level of Federal involvement will be clearly spelled out in distinguishing between contract, cooperative agreement and grants would be an improvement. A clear understanding at the outset as to what type of assistance a local government is receiving and the Federal requirements it can expect will be a vast improvement over the current arrangement.

Mr. Tabor's comments relating to the section 8 study requirement were:

We further endorse the proposed OMB study to determine alternative means of implementation of Federal assistance programs and to determine the feasibility of developing a comprehensive system of guidance for these programs. Such a study is long overdue and as time goes by, the need for such a study intensifies. We urge that county officials—especially intergovernmental coordinators who are involved in Federal and State assistance—understand what the “non-system” we how have costs all our citizens.

CONCLUSION

In an opening statement to the hearings on S. 1437, Senator Chiles reflected upon the history associated with this legislation:

I truly feel that after all this support, 5 years of work, 5 days of hearings, and 26 witnesses time is up for the executive branch. Based on Mr. Lynn's letter to me and the executive branch action of acceptance, I have been hopeful that the additional time taken would provide a better foundation to improve and build on this legislation. What we are after in these hearings is constructive suggestions. We are not interested in objections without some idea of how to overcome them. I am

more persuaded than ever that we need to move on this legislation. If we hear that old song again . . . “Don't pass a bill; let us fix the problems ourselves”—then I think we should recall the lesson we learned in creating the Office of Federal Procurement Policy. With all that we have before us supporting this legislation, I think it would be unreasonable to sit back, do nothing and let the executive agencies muddle along. That would be a step backward. The words are hollow.

During the course of the hearings, constructive suggestions were made concerning the provisions of S. 1437. Two amendments to the bill were made. The amendments, as well as the major issues raised during committee deliberations are discussed in the next section of this report.

VIII. DISCUSSION OF KEY ISSUES

The principle issues which surfaced during the hearings on The Federal Grant and Cooperative Agreement Act of 1974, the predecessor to S. 1437, were discussed in part VII of the committee report on S. 3514. (Senate Report No. 93-1239). The issues discussed therein were:

Whether legislation is needed;

Whether the criteria in sections 4, 5, and 6 are adequate to achieve the purpose of the bill;

Whether the criteria in sections 4, 5, and 6 will help prevent executive agency use of grants to avoid competition;

Whether repeal of the “Grants Act” (P.L. 85-934) places an undue burden on certain agencies which rely upon that act for authority to use grants for the support of basic research; and

How should the study of Federal assistance programs prescribed in section 8 be conducted and what should be its scope.

The committee discussion of the above issues remain relevant to an understanding of the committee deliberations on S. 1437 and can be found in Appendix A. Additional and related issues which were raised during consideration of S. 1437 are discussed in this part of the report. Issues to be covered here are:

Whether the effect of sections 4, 5, and 6 will impair programmatic flexibility and unreasonably add to the executive branch work load;

Whether categories of assistance relationships should be left to the executive branch to determine and implement;

Whether transactions now being labelled as cooperative agreements can be classified as reflecting either a procurement or assistance relationship;

Whether there are instances in research programs where it is difficult to distinguish between procurement and assistance relationships;

Whether present authority to vest title in recipients of contracts for basic research should be repealed;

How should the study of Federal assistance programs required in section 8 be conducted and what should be its scope.

Whether the effect of sections 4, 5, and 6 will impair programmatic flexibility and unreasonably add to the executive branch workload.

The Director of OMB expressed the fear that no matter how careful the drafting, an omnibus bill to force thousands of transactions into one of the three definitions will often result in impairing needed pro-

grammatic flexibility and would divert too many work hours within the executive branch into efforts to fit particular programs into legislated definitions. He suggested as a preferred alternative to legislation that pursuant to an agreed upon schedule and work plan the executive branch proceed administratively to carry out the objectives addressed in S. 1437. The experience from this effort could then determine whether legislation was needed.

The Director's position is analogous to the position presented by the administration in 1974 in testifying on S. 3514. Then, the executive branch felt that the legislation was not presently needed or appropriate and that ongoing plans to initiate an in-depth study of grant-type activities obviated the need to mandate a study.

For the same reasons cited in the discussion of "Whether legislation is needed" in the 1974 report, the committee did not feel the Director's fears were justified. The need for legislative action was further bolstered by the fact that minimal progress has been made by the executive branch in implementing the Commission on Government Procurement's F-1 and F-2 recommendations in the 2 years that have passed.

The intent of the criteria in sections 4, 5, and 6 is to provide a first step in clarifying the meaning of the terms "contract", "grant", and "cooperative agreement" by requiring that the terms be used consistently Government-wide and that instruments employed by executive agencies in transactions with non-Federal entities reflect the basic character of the relationships established. While the bill will bring some basic discipline to Federal agencies, it also provides them with needed flexibility to select the proper instrument and determine its content.

Based on examples provided to the committee of cases where it was suggested that the criteria would work a hardship on agency programs, the committee decided that the bill would not present unreasonable implementation difficulties. The bill provides the agencies ample flexibility to decide what is most appropriate in light of their purposes. Moreover, section 9(d) authorizes the Director to exempt individual transactions or programs from the provisions of the bill when a careful determination is made that the application of sections 4, 5, and 6 is impractical.

The committee did not feel that the bill would contribute to an added and undue workload for executive agencies. Many agencies already have their own policies concerning the choice of instruments and already perform the work required to meet these policies. However, in absence of Government-wide guidance, the guidelines that do exist have been promulgated on a fragmented basis, agency by agency.

The requirements of the bill will merely insure that choice of instrument decisions will be made on a standard basis. In this regard, the committee notes that the Commission on Federal Paperwork has endorsed the concepts contained in S. 1437 as a means to reduce the causes of Federal red tape and paperwork burdens.

The confusion and added workload that results from the present situation are well illustrated by the case example of Dade County provided by the representative of the National Association of Counties. The Government-wide, disciplined process required by the bill should work to reduce recipient workloads.

Whether categories of assistance relationships should be left to the executive branch to determine and implement.

The Director of OMB urged that categories of assistance relationships not be legislated but left up the executive branch to determine. With experience, it was argued, a clearer pattern of assistance relationships would emerge and guidelines could be modified as needed.

The committee agreed with the assessment of the General Accounting Office made in its 1974 testimony. The GAO concluded that such difficulties as may be encountered in distinguishing between transactions that reflect either grant or cooperative agreement relationships were not significant enough to bar the effective and beneficial implementation of the legislation.

The committee was also mindful of the history of executive branch actions to implement the Procurement Commission's recommendation to distinguish between grant and cooperative agreement relationships. Additionally, State and local governments strongly supported the need to distinguish between assistance relationships.

The criteria of section 5 and 6 are considered as broad, beginning steps in bringing about more government-wide order and understanding to Federal assistance relationships. The committee did not amend the bill to accommodate the administration's position because: (1) section 5 and 6 do not preclude the executive branch from making further distinctions; and, (2) the requirements of the section 8 study insure consideration of executive branch experience with implementing sections 4, 5, and 6.

Whether transactions now being labelled as "cooperative agreements" can be classified as reflecting either a procurement or assistance relationship

Based on his assessment of an interagency study which examined instruments now labelled as "cooperative agreements," the Director of OMB suggested that a separate category of transactions exist which reflect neither procurement or assistance relationships.

The present use of "cooperative agreements" was an issue examined by the Commission on Government Procurement and the executive branch in its development of a formal position on the Commission's F-1 recommendation. The issue was a specific consideration of committee deliberations on S. 3514 in the 93d Congress. No significant problem was seen once the transactions being called "cooperative agreements" were examined. They did in fact reflect either a procurement or assistance relationship.

The committee specifically requested that OMB provide examples of agreements that were considered as falling outside the relationship criteria of the bill. Six examples were provided by OMB and studied by the committee. After examining the statutory authority for these agreements and the contents, terms, and conditions of each agreement, the committee determined that agencies should be able to state whether the agreements reflect a relationship whose principal purpose was either acquisition or assistance. The committee did not agree that a separate category of transactions exist which reflect neither relationship.

Whether there are instances in research programs where it is difficult to distinguish between procurement and assistance relationships

The administration and representatives of the academic community questioned whether all research transactions could be classified as either procurement or assistance.

The concerns expressed were similar to those raised by NASA and DOD during committee deliberations on S. 3514 during 1974. Both agencies employ the authority of the "Grants Act" (P.L. 85-934) in order to use grant instruments to fund basic research. S. 1437 repeals the Grants Act and replaces it with the substantive authority to make grants provided in section 7(a).

The NASA and DOD concerns were considered in the S. 3514 report discussion on "Whether repeal of the existing 'Grants Act' places an undue burden on certain agencies which rely upon that Act for authority to use grants for the support of basic research."

The committee did not agree then with those agencies which felt the bill would prevent them from utilizing grant instruments. The intent of section 7(a) is to enable all Federal agencies to use appropriate instruments, notwithstanding any other provision of law. "Mission-related assistance", a term employed to describe activities where grant agreements are presently used under the authority of the Grants Act, is considered to be consistent with the scope and purpose of Federal assistance, as defined in the bill. If any agency determines that funded research is for the direct benefit of the government then it should use the procurement process and a type of procurement contract.

Two additional observations should be made. The 1964 Civil Rights Act, of 1964, sections 601 and 602 require that each federal department and agency empowered to extend federal financial assistance to any program or activity, is authorized and directed to apply the provisions of the Act which prohibit discrimination under any program or activity receiving Federal financial assistance. Both NASA and DOD state that research grants made under the authority the Grants Act do fall under the purview of sections 601 and 602 of the Civil Rights Act. (32 CFR 300 and 14 CFR 1250). The Committee considers that the term "assistance" as it is employed in sections 601 and 602 of Title VI and interpreted by DOD and NASA is consistent with the term as it is employed in S. 1437.

In effect, NASA and DOD are already required to acknowledge that all uses of the Grants Act to employ grants for basic research constitute instances of financial assistance.

Second, the committee examined the House and Senate Committee reports accompanying the bill which became P.L. 85-934. (Senate Report No. 2044, July 30, 1958 and House Report No. 2640, August 15, 1958). Both reports relied upon an explanation of the legislation submitted by the Director of the National Science Foundation in expressing legislative intent. The following advantage of the grant over the contract is cited:

Where the Government desires to engage the services of an educational or nonprofit organization for the conduct of a specific piece of research directed toward a specific problem, the use of the contract form is obviously in order. On the other hand, where it is the desire of the Government to stipulate and support fundamental research in a given field, with

the perimeters of inquiry limited only to the curiosity and creativity of the scientific investigator, the use of the grant form has several marked advantages.

The committee feels that the legislative intent of the Grants Act was to provide authority for grants in instances wherein the basic relationship established was one of federal assistance. This intent is compatible with the provisions of S. 1437.

Given the two observations above and the previous considerations of NASA and DOD concerns, the committee does not agree that there are instances in research programs which cannot be classified as principally reflecting either a procurement or assistance relationship.

Whether present authority to vest title in recipients of contracts for basic and applied research should be repealed

Section 9(a) repeals the Grants Act, (P.L. 85-934). The intent of S. 1437 is to replace the special authorities provided by the Grants Act with the uniform authority granted in section 7. Representatives of the academic community questioned whether section 7(b) would provide the authority provided by the Grants Act to vest title, whereby agencies entering into contracts for basic or applied research may vest title to property acquired in the project by non-profit institutions. In order to clarify its intent that the authorities provided by the Grants Act be replaced and extended by the Federal Grant and Cooperative Agreement Act, the committee amended section 7 by adding section 7(c).

How should the study of Federal assistance programs prescribed in Section 8 be conducted and what should be its scope

Several comments should be added to the discussion of this issue in the S. 3514 committee report. Repeatedly, representatives of State and local governments, universities and colleges, for-profit organizations, volunteer human service organizations, and other recipients of federal assistance state that steps should be taken to insure their active participation in the study effort contemplated by section 8 of the bill. An in-house executive branch study would be limited in its perspective and would not be able to take advantage of a broad based understanding of the needs of a comprehensive system of guidance for Federal assistance programs.

In order to clarify the committee intent that active participation of recipient groups be included in the study effort section 8 was amended by the addition of the phrase, "and to the extent practicable, involve" after the phrase, "The Director shall consult with . . ."

The committee also intends that the Director of OMB's responsibility to consult and involve representatives of the Congress in the study shall include collaborating on the study objectives, work schedule, and procedures for including participation of recipient groups in the conduct of the study.

An additional issue brought to the committee's attention since Senate passage of S. 3514 and worthy of attention are the problems faced by voluntary human service organizations. Apart from being burdened with unnecessary administrative requirements, many of these recipients suffer from confusion or inequitable treatment in such areas as allowable costs, basic administrative standards, and their rights in the

event of disputes. These concerns are pertinent to all recipients of Federal assistance but are particularly acute among voluntary human service organizations. The development of a comprehensive system of guidance for assistance programs should take these problems into account.

TEXT OF S. 1437 AS REPORTED

A BILL to distinguish Federal grant and cooperative agreement relationships from Federal procurement relationships, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act be cited as the "Federal Grant and Cooperative Agreement Act of 1976".

FINDINGS AND PURPOSE

SEC. 2. (a) The Congress finds that—

(1) there is a need to distinguish Federal assistance relationships from Federal procurement relationships and thereby to standardize usage and clarify the meaning of the legal instruments which reflect such relationships;

(2) uncertainty as to the meaning of such terms as "contract", "grant", and "cooperative agreement" and the relationships they reflect causes operational inconsistencies, confusion, inefficiency, and waste for recipients of awards as well as for executive agencies; and

(3) the Commission on Government Procurement has documented these findings and concluded that a reduction of the existing confusions, inconsistencies, and inefficiencies is feasible and necessary through legislative action.

(b) The purposes of this Act are—

(1) to characterize the relationships between the Federal Government and contractors, State and local governments, and other recipients in the acquisition of property and services and in the furnishing of assistance by the Federal Government so as to promote a better understanding of Federal spending and help eliminate unnecessary administrative requirements on recipients of Federal awards.

(2) to establish Government-wide criteria for selection of appropriate legal instruments to achieve uniformity in the use by the executive agencies of such instruments, a clear definition of the relationships they reflect, and a better understanding of the responsibilities of the parties;

(3) to promote increased discipline in the selection and use of types of contract, grant agreement, and cooperative agreements, and to maximize competition in the award of contracts and encourage competition, where deemed appropriate, in the award of grants and cooperative agreements; and

(4) to require a study of the relationship between the Federal Government and grantees and other recipients in Federal assistance programs and the feasibility of developing a comprehensive system of guidance for the use of grant and cooperative agreements, and other forms of Federal assistance in carrying out such programs.

DEFINITIONS

SEC. 3. As used in this Act, the term—

(1) "State government" means any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any agency or instrumentality of a State, and any multi-State, regional, or interstate entity which has governmental functions;

(2) "local government" means any unit of government within a State, a county, municipality, city, town, township, local public authority, special district, intrastate district, council of governments, sponsor group representative organization, other interstate government entity, or any other instrumentality of a local government;

(3) "other recipient" means any person or recipient other than a State or local government who is authorized to receive Federal assistance or procurement contracts and includes any charitable or educational institution;

(4) "executive agency" means any executive department as defined in section 101 of title 5, United States Code, a military department as defined in section 102 of title 5, United States Code, an independent establishment as defined in section 104 of title 5, United States Code (except that it shall not include the General Accounting Office), a wholly-owned Government corporation; and

(5) "grant or cooperative agreement" does not include any agreement under which only direct Federal cash assistance to individuals, a subsidy, a loan, a loan guarantee, or insurance is provided.

USE OF CONTRACTS

SEC. 4. Each executive agency shall use a type of procurement contract as the legal instrument reflecting a relationship between the Federal Government and a State or local government or other recipient—

(1) whenever the principal purpose of the instrument is the acquisition, by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government; or

(2) whenever an executive agency determines in a specific instance that the use of a type of procurement contract is appropriate.

USE OF GRANT AGREEMENTS

SEC. 5. Each executive agency shall use a type of grant agreement as the legal instrument reflecting a relationship between the Federal Government and a State or local government or other recipient whenever—

(1) the principal purpose of the relationship is the transfer of money, property, services, or anything of value to the State or local government or other recipient in order to accomplish a public purpose of support or stimulation authorized by Federal statute, rather than acquisition, by purchase, lease or barter, of property or services for the direct benefit or use of the Federal Government; and

(2) no substantial involvement is anticipated between the executive agency, acting for the Federal Government, and the State or

local government or other recipient during performance of the contemplated activity.

USE OF COOPERATIVE AGREEMENTS

SEC. 6. Each executive agency shall use a type of cooperative agreement as a legal instrument reflecting a relationship between the Federal Government and a State or local government or other recipient whenever—

(1) the principal purpose of the relationship is the transfer of money, property, services, or anything of value to the State or local government or other recipient to accomplish a public purpose of support or stimulation authorized by Federal statute, rather than acquisition, by purchase, lease or barter, of property or services for the direct benefit or use of the Federal Government; and

(2) substantial involvement is anticipated between the executive agency, acting for the Federal Government, and the State or local government or other recipient during performance of the contemplated activity.

AUTHORIZATIONS

SEC. 7. (a) Notwithstanding any other provision of law, each executive agency authorized by law to enter into contracts, grant or cooperative agreements, or similar arrangements is authorized and directed to enter into and use types of contracts, grant agreements, or cooperative agreements as required by this Act.

(b) The authority to enter into grant or cooperative agreements shall include the discretionary authority, when it is deemed by the head of an executive agency to be in furtherance of the objectives of such agency, to vest in State or local governments or other recipients, without further obligation to the Federal Government or on such other terms and conditions as deemed appropriate, title to equipment or other tangible personal property purchased with such grant or cooperative agreement funds.

(c) The authority to make contracts for the conduct of basic or applied scientific research at nonprofit institutions of higher education, or at nonprofit organizations whose primary purpose is the conduct of scientific research shall include discretionary authority, when it is deemed by the head of the executive agency to be in furtherance of the objectives of the agency, to vest in such institutions or organizations, without further obligation to the Government, or on such other terms and conditions as deemed appropriate, title to equipment or other tangible personal property purchased with such contract funds.

STUDY OF FEDERAL ASSISTANCE PROGRAMS

SEC. 8. The Director of the Office of Management and Budget, in cooperation with the executive agencies, shall undertake a study to develop a better understanding of alternative means of implementing Federal assistance programs, and to determine the feasibility of developing a comprehensive system of guidance for Federal assistance

programs. Such study shall include a thorough consideration of the findings and recommendations of the Commission on Government Procurement relating to the feasibility of developing such a system. The Director shall consult with and to the extent practicable, involve representatives of the executive agencies, the Congress, the General Accounting Office, and State and local governments, other recipients and other interested members of the public. The results of the study shall be reported to the Committee on Government Operations of the Senate and the House of Representatives at the earliest practicable date, but in no event later than two years after the date of enactment of this Act. The report on the study shall include (1) detailed descriptions of the alternative means of implementing Federal assistance programs and of the circumstances in which the use of each appears to be most desirable, (2) detailed descriptions of the basic characteristics and an outline of such comprehensive system of guidance for Federal assistance programs, the development of which may be determined feasible, and (3) recommendations concerning arrangements to proceed with the full development of such comprehensive system of guidance and for such administrative or statutory changes, including changes in the provisions of sections 3 through 7 of this Act, as may be deemed appropriate on the basis of the findings of the study.

REPEALS AND SAVINGS PROVISIONS

SEC. 9. (a) The Act entitled "An Act to authorize the expenditure of funds through grants for support of scientific research, and for other purposes", approved September 6, 1958 (72 Stat. 1793; 42 U.S.C. 1891, 1892, and 1893), is repealed, effective one year after the date of enactment of this Act.

(b) Nothing in this Act shall be construed to render void or voidable any existing contract, grant, cooperative, agreement, or other contract, grant, or cooperative agreement entered into up to one year after the date of enactment of this Act.

(c) Nothing in this Act shall require the establishment of a single relationship between the Federal Government and a State or local government or other recipient on a jointly funded project, involving funds from more than one program or appropriation, where different relationships would otherwise be appropriate for different components of the project.

(d) The Director of the Office of Management and Budget may except individual transactions or programs of any executive agency from the application of the provisions of this Act. This authority shall expire one hundred and eighty days after receipt by the Congress of the study provided for in section 8 of this Act.

APPENDIX A

(Excerpt From Senate Report 93-1239 on S. 3414)

VII. DISCUSSION OF KEY ISSUES

The principal issues which surfaced during the hearings and the committee deliberations on this legislation are discussed in this part of the report. Issues to be covered here are:

Whether legislation is needed;

Whether the criteria in sections 4, 5 and 6 are adequate to achieve the purposes of the bill;

Whether the criteria in sections 4, 5, and 6 will help prevent executive agency use of grants to avoid competition;

Whether repeal of the "Grants Act" (P.L. 85-934) places an undue burden on certain agencies which rely upon that Act for authority to use grants for the support of basic research; and

How should the study of Federal assistance programs prescribed in section 8 be conducted and what should be its scope.

Whether legislation is needed

The administration's position was presented by the General Services Administration. The General Services Administration, whose Office of Federal Management Policy has joint responsibility with the Office of Management and Budget for government-wide policy guidance in the assistance area, expressed the view that:

(1) The review undertaken by the Procurement Commission was limited in scope and effort;

(2) This fact, coupled with reservations recently stated by several executive agencies that the provisions of the bill would impact adversely upon their programs, suggests that the criteria providing for the consistent use of instruments to reflect basic relationships should await the completion of study efforts now progressing in the executive branch; and

(3) The intent of the executive branch to initiate an in-depth study of federal grant-type activities obviates the need to legislatively mandate a study.

In short, legislation is not presently appropriate or needed.

APPENDIX B

FEDERAL GRANT AND COOPERATIVE AGREEMENT ACT OF 1976

Witnesses

March 23, 1976—

- (1) Carl Blackwell, Florida Governor's Office, State of Florida.
- (2) Maurice Rowe, Secretary of Administration and Finance, State of Virginia.
- (3) Charles Griffiths, Aide to the Governor, State of Pennsylvania.
- (4) James Martin, Executive Director of the National Governor's Conference.
- (5) Robert Wallick, Co-Chairman, Grants Committee, Public Contract Law Section, American Bar Association.

April 5, 1976—

- (1) Ralph Tabor, Director of Federal Affairs, National Association of Counties.
- (2) Honorable James Lynn, Director, Office of Management and Budget.
- (3) Paul O'Neill, Deputy Director, Office of Management and Budget.

(32)

APPENDIX C

U.S. SENATE,
Washington, D.C., June 10, 1976.

HON. JAMES T. LYNN,
Director, Office of Management and Budget, Executive Office Building, Washington, D.C.

DEAR MR. LYNN: During your testimony before this Subcommittee on S. 1437, the Federal Grant and Cooperative Agreement Act, you indicated your preference to take administrative steps to carry out the objectives of the bill, and your willingness to work with the committee if it was felt the legislation was necessary.

I am persuaded that the legislation is a constructive step and necessary. Unlike many other recommendations of the Procurement Commission, the F-1 recommendation required statutory enactment. I plan to put the bill before the committee for its consideration in the near future.

I would like to receive from your office any recommended changes that you feel would improve the bill if it were enacted. I would also appreciate being informed about the administrative actions you envision taking to accomplish the objectives of the bill so that I may acquaint my colleagues of your position.

Sincerely,

LAWTON CHILES, *Chairman.*

EXECUTIVE OFFICE OF THE PRESIDENT,
OFFICE OF MANAGEMENT AND BUDGET,
Washington, D.C., June 23, 1976.

HON. LAWTON CHILES,
Chairman, Subcommittee on Federal Spending Practices, Efficiency, and Open Government, Committee on Government Operations, U.S. Senate, Washington, D.C.

DEAR LAWTON: This is in response to your letter of June 10 regarding S. 1437, including your request for recommended changes to improve the bill. Our basic position continues to be that the objectives of S. 1437 should be pursued administratively until there is clear evidence that legislation would be helpful.

We have begun to develop a draft circular that would carry out the basic objectives underlying the bill, and we plan to circulate it for comment to the agencies next month. The circular will promulgate proposed definitions of procurement and assistance-type relationships for agency use and will include a requirement for further analysis of the assistance relationships with respect to the nature and degree of Federal involvement. The work which was done last year by the inter-agency study team on S. 1437 has given us a good start on developing specific criteria for describing and categorizing assistance-type relationships.

(33)

Upon receipt of agency comments, revision, and issuance of the circular later this year, OMB staff will continue to work with the individual agencies on specific problems and issues on this subject. These might include the need for legislative amendments where existing specific statutes already specify the use of a particular instrument for a procurement or assistance-type relationship, and the development of improved methods of communicating the anticipated nature and degree of Federal involvement to potential recipients of Federal assistance.

Unless the proposed bill is limited to a very broad statement of purpose with the development and promulgation of specific definitions and categories of procurement, assistance, and other relationships left to the executive branch, we must continue to differ with the conclusion that detailed legislation is necessary or desirable to accomplish the purposes of S. 1437. I would also repeat our suggestion that the Congress first examine the results of our administrative efforts over the next year before further legislative action is taken. In the interim, we will continue to inform the Subcommittee staff on existing and proposed administrative actions related to the purposes of S. 1437.

Thank you for the opportunity to comment on the proposed bill.

Sincerely yours,

JAMES T. LYNN, *Director.*

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Ninety-fourth Congress of the United States of America

AT THE SECOND SESSION

*Begun and held at the City of Washington on Monday, the nineteenth day of January,
one thousand nine hundred and seventy-six*

An Act

To distinguish Federal grant and cooperative agreement relationships from Federal procurement relationships, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act be cited as the "Federal Grant and Cooperative Agreement Act of 1976".

FINDINGS AND PURPOSE

SEC. 2. (a) The Congress finds that—

(1) there is a need to distinguish Federal assistance relationships from Federal procurement relationships and thereby to standardize usage and clarify the meaning of the legal instruments which reflect such relationships;

(2) uncertainty as to the meaning of such terms as "contract", "grant", and "cooperative agreement" and the relationships they reflect causes operational inconsistencies, confusion, inefficiency, and waste for recipients of awards as well as for executive agencies; and

(3) the Commission on Government Procurement has documented these findings and concluded that a reduction of the existing confusions, inconsistencies, and inefficiencies is feasible and necessary through legislative action.

(b) The purposes of this Act are—

(1) to characterize the relationships between the Federal Government and contractors, State and local governments, and other recipients in the acquisition of property and services and in the furnishing of assistance by the Federal Government so as to promote a better understanding of Federal spending and help eliminate unnecessary administrative requirements on recipients of Federal awards;

(2) to establish Government-wide criteria for selection of appropriate legal instruments to achieve uniformity in the use by the executive agencies of such instruments, a clear definition of the relationships they reflect, and a better understanding of the responsibilities of the parties;

(3) to promote increased discipline in the selection and use of types of contract, grant agreement, and cooperative agreements and to maximize competition in the award of contracts and encourage competition, where deemed appropriate, in the award of grants and cooperative agreements; and

(4) to require a study of the relationship between the Federal Government and grantees and other recipients in Federal assistance programs and the feasibility of developing a comprehensive system of guidance for the use of grant and cooperative agreements, and other forms of Federal assistance in carrying out such programs.

DEFINITIONS

SEC. 3. As used in this Act, the term—

(1) "State government" means any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any agency or instrumentality of a State, and any multi-State, regional, or interstate entity which has governmental functions;

(2) "local government" means any unit of government within a State, county, municipality, city, town, township, local public authority, special district, intrastate district, council of governments, sponsor group representative organization, other interstate government entity, or any other instrumentality of a local government;

(3) "other recipient" means any person or recipient other than a State or local government who is authorized to receive Federal assistance or procurement contracts and includes any charitable or educational institution;

(4) "executive agency" means any executive department as defined in section 101 of title 5, United States Code, a military department as defined in section 102 of title 5, United States Code, and independent establishment as defined in section 104 of title 5, United States Code (except that it shall not include the General Accounting Office), a wholly owned Government corporation; and

(5) "grant or cooperative agreement" does not include any agreement under which only direct Federal cash assistance to individuals, a subsidy, a loan, a loan guarantee, or insurance is provided.

USE OF CONTRACTS

SEC. 4. Each executive agency shall use a type of procurement contract as the legal instrument reflecting a relationship between the Federal Government and a State or local government or other recipient—

(1) whenever the principal purpose of the instrument is the acquisition, by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government; or

(2) whenever an executive agency determines in a specific instance that the use of a type of procurement contract is appropriate.

USE OF GRANT AGREEMENTS

SEC. 5. Each executive agency shall use a type of grant agreement as the legal instrument reflecting a relationship between the Federal Government and a State or local government or other recipient whenever—

(1) the principal purpose of the relationship is the transfer of money, property, services, or anything of value to the State or local government or other recipient in order to accomplish a public purpose of support or stimulation authorized by Federal statute, rather than acquisition, by purchase, lease or barter, of property or services for the direct benefit or use of the Federal Government; and

(2) no substantial involvement is anticipated between the executive agency, acting for the Federal Government, and the State or local government or other recipient during performance of the contemplated activity.

USE OF COOPERATIVE AGREEMENTS

SEC. 6. Each executive agency shall use a type of cooperative agreement as the legal instrument reflecting a relationship between the Federal Government and a State or local government or other recipient whenever—

(1) the principal purpose of the relationship is the transfer of money, property, services, or anything of value to the State or local government or other recipient to accomplish a public purpose of support or stimulation authorized by Federal statute, rather than acquisition, by purchase, lease or barter, of property or services for the direct benefit or use of the Federal Government; and

(2) substantial involvement is anticipated between the executive agency, acting for the Federal Government, and the State or local government or other recipient during performance of the contemplated activity.

AUTHORIZATIONS

SEC. 7. (a) Notwithstanding any other provision of law, each executive agency authorized by law to enter into contracts, grant or cooperative agreements, or similar arrangements is authorized and directed to enter into and use types of contracts, grant agreements, or cooperative agreements as required by this Act.

(b) The authority to make contracts, grants, and cooperative agreements for the conduct of basic or applied scientific research at nonprofit institutions of higher education, or at nonprofit organizations whose primary purpose is the conduct of scientific research shall include discretionary authority, when it is deemed by the head of the executive agency to be in furtherance of the objectives of the agency, to vest in such institutions or organizations, without further obligation to the Government, or in such other terms and conditions as deemed appropriate, title to equipment or other tangible personal property purchased with such funds.

STUDY OF FEDERAL ASSISTANCE PROGRAMS

SEC. 8. The Director of the Office of Management and Budget, in cooperation with the executive agencies, shall undertake a study to develop a better understanding of alternative means of implementing Federal assistance programs, and to determine the feasibility of developing a comprehensive system of guidance for Federal assistance programs. Such study shall include a thorough consideration of the findings and recommendations of the Commission on Government Procurement relating to the feasibility of developing such a system. The Director shall consult with and to the extent practicable, involve representatives of the executive agencies, the Congress, the General Accounting Office, and State and local governments, other recipients and other interested members of the public. The result of the study shall be reported to the Committee on Government Operations of the Senate and House of Representatives at the earliest practicable date, but in no event later than two years after the date of enactment of this Act. The report on the study shall include (1) detailed descriptions of the alternative means of implementing Federal assistance programs and of the circumstances in which the use of each appears to be most desirable, (2) detailed descriptions of the basic characteristics and an

outline of such comprehensive system of guidance for Federal assistance programs, the development of which may be determined feasible, and (3) recommendations concerning arrangements to proceed with the full development of such comprehensive system of guidance and for such administrative or statutory changes, including changes in the provisions of sections 3 through 7 of this Act, as may be deemed appropriate on the basis of the findings of the study.

REPEALS AND SAVINGS PROVISIONS

SEC. 9. (a) The Act entitled "An Act to authorize the expenditure of funds through grants for support of scientific research, and for other purposes", approved September 6, 1958 (72 Stat. 1793; 42 U.S.C. 1891 and 1892), is repealed, effective one year after the date of enactment of this Act.

(b) Nothing in this Act shall be construed to render void or voidable any existing contract, grant, cooperative agreement, or other contract, grant, or cooperative agreement entered into up to one year after the date of enactment of this Act.

(c) Nothing in this Act shall require the establishment of a single relationship between the Federal Government and a State or local government or other recipient on a jointly funded project, involving funds from more than one program or appropriation, where different relationships would otherwise be appropriate for different components of the project.

(d) The Director of the Office of Management and Budget may exempt individual transactions or programs of any executive agency from the application of the provisions of this Act. This authority shall expire one hundred and eighty days after receipt by the Congress of the study provided for in section 8 of this Act.

Speaker of the House of Representatives.

*Vice President of the United States and
President of the Senate.*

Office of the White House Press Secretary

THE WHITE HOUSE

MEMORANDUM OF DISAPPROVAL

I am withholding my approval of S. 1437, the Federal Grant and Cooperative Agreement Act of 1976.

This legislation has a laudable goal -- to clarify and rationalize the legal instruments through which the Federal Government acquires property and services and furnishes assistance to State and local governments and other recipients. The bill would establish three categories of legal instruments which Federal agencies would be required to use: procurement contracts, grant agreements, and cooperative agreements. These categories would be defined according to their different purposes.

S. 1437 would also require the Director of the Office of Management and Budget to undertake a study which would (1) "develop a better understanding of alternative means of implementing Federal assistance programs...", and (2) "...determine the feasibility of developing a comprehensive system of guidance for Federal assistance programs."

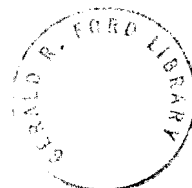
The Office of Management and Budget completed a study, almost a year ago, of the definitions of "grant", "contract" and "cooperative agreement." That study, which has been reviewed by other Federal agencies, public interest groups, and other interested associations and groups, confirmed support for the objectives of this legislation but led to serious questions as to whether at this point legislation is necessary or desirable.

No matter how careful the drafting, a bill which requires thousands of transactions to be placed into one of three categories will probably result, in many cases, in limiting the flexibility of Federal agencies in administering their programs and creating a large number of technical difficulties for them. Federally supported basic research programs would be particularly difficult to classify in terms of the definitions in this bill.

The Office of Management and Budget is continuing to work in this area with the cooperation of other Federal agencies. It plans to issue policy guidance to Federal agencies that would more clearly distinguish between procurement and assistance transactions and to better define patterns of assistance relationships between Federal agencies and funding recipients.

In addition, OMB has been developing more comprehensive guidance for assistance programs, as indicated by the recent circulars issued by the agency establishing uniform administrative requirements for hospitals, universities, and non-profit grantees. I am directing OMB to continue to emphasize such activities.

more



Subsequent modifications and refinements can be made in these directives when further operating experience and evaluation suggest they are needed. Such an evolving set of activities in the Executive branch, a step-by-step process which learns from experience, is preferable to another lengthy study as required by this bill.

In view of the extremely complex and changing nature of Federal assistance programs, I believe that Congress should not legislate categories of Federal assistance relationships, but leave the number and nature of such classifications to the Executive branch to determine and implement. If experience from the studies and evaluations now underway demonstrates that legislation is required, that experience would also provide a better foundation for formulating legislation than we have now.

Accordingly, I must withhold my approval of S. 1437.

GERALD R. FORD

THE WHITE HOUSE,
October 22, 1976

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