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signed 12/31/75

APPROVED
DEC 31 1975

ACTION

THE WHITE HOUSE

WASHINGTON

Last Day: December 31

December 30, 1975

Posted 1/1

To Archives 1/2

MEMORANDUM FOR THE PRESIDENT

FROM: JIM CANNON *[Signature]*

SUBJECT: H.R. 5541 - Small Business Emergency Relief Act

Attached for your consideration is H.R. 5541, sponsored by Representative Smith and eleven others.

The enrolled bill would authorize Federal agencies to terminate, modify or extend fixed-price government contracts with small business firms upon application for relief. Its termination and modification provisions would only cover the period from August 15, 1971 to October 31, 1974 and may not be acted upon after September 30, 1976.

This bill was prompted by the severe strain placed on a large number of small businesses with Federal contracts due to wage-price controls, material shortages and high inflation from 1971 to 1974. It passed the House 402 to 0 and the Senate 82 to 10.

Additional discussion of the provisions of the enrolled bill is provided in OMB's enrolled bill report at Tab A.

The Department of Justice recommends that you veto the enrolled bill because it would include reimbursement for more than the cost of work done, it would extend Federal relief beyond the precedent of "defense contractors" and could result in costly litigation.

OMB and SBA recommend that you sign the enrolled bill because it would provide relief to small businesses who were caught in a difficult economic bind and it would involve little cost or litigation. Bill Seidman, Max Friedersdorf, Counsel's Office (Lazarus) and I also recommend approval.



DEC 31 1975

DECISION

Sign H.R. 5541 at Tab B. _____

Disapprove H.R. 5541
and prepare veto message _____



A



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

DEC 27 1975

MEMORANDUM FOR THE PRESIDENT

Subject: Enrolled Bill H.R. 5541 - Small Business Emergency
Relief Act
Sponsor - Rep. Smith (D) Iowa and 11 others

Last Day for Action

December 31, 1975 - Wednesday

Purpose

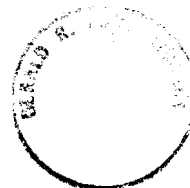
To authorize Government agencies to terminate, modify or extend fixed-price Government contracts entered into with small business firms.

Agency Recommendations

Office of Management and Budget	Approval
Small Business Administration	Approval
Department of Defense	No objection (<u>Informally</u>)
Department of Commerce	No objection
General Services Administration	No objection (<u>Informally</u>)
Department of Housing and Urban Development	Defer
Department of Justice	Disapproval (Veto message attached)

Discussion

H.R. 5541 would provide emergency relief to small business firms that were caught in the economic squeeze between fixed-price Federal contractual commitments and the rising costs of materials, supplies and energy. The bill would authorize the head of any Executive Branch agency, upon application by a small



business, to assist such a firm in three ways:

- terminate for the convenience of the Government any fixed-price Government contract entered into between the agency and a small business firm if it is found that (1) the business suffered or can be expected to suffer serious financial loss due to unanticipated cost increases directly related to the contract, and (2) the cost increases were or are being experienced by other small businesses in general rather than from factors peculiar to that firm such as mismanagement or underbidding.
- modify terms of the contract, in lieu of termination, only if two conditions exist:
 - (1) if the contract were terminated, the agency would have to reprocure the supplies and services at a cost higher than the modified contract, and
 - (2) any modification would be made in compliance with guidelines issued by the Office of Federal Procurement Policy not later than ten days after enactment of the bill.
- extend the contract performance date in order to compensate for delays due to shortages of energy or petroleum (or of products or components made from petroleum or "impacted" by such shortage).

In order to qualify for termination or modification of contracts, the enrolled bill requires extensive documentation about the small business to be filed with the agency. The provisions of the bill relating to contract termination and modification pertain only to uncompleted contracts entered into between August 15, 1971 and October 31, 1974. This was a period when the Administration set voluntary price and wage controls and when escalation clauses were not included in most contracts. No contract may be terminated or modified after September 30, 1976.

A version of H.R. 5541 quite similar to the enrolled bill passed the House 402 to 0 and the Senate 82 to 10.



This legislation has been consistently opposed by the Administration through agency reports to the Congress for several reasons. First, Government agencies have already taken steps to ease the burden of cost increases due to inflation and material shortages through flexible contractual provisions such as price adjustment clauses and short-term contracts. Second, since most of the contracts held by small business firms from August 1971 to October 1974 have been completed by this time, and thus could not be terminated or modified by this bill, enactment may give small business firms a false expectation of financial assistance. Third, the Act unfairly excludes firms outside the category of small business. Finally, the extensive documentation required of small businesses in order to support their requirements for contract termination or modification would probably be prohibitively expensive for many.

In its letter on the enrolled bill, Justice opposes enactment for three reasons. First, under the Standard Termination for Convenience contract clause, the contractor would be entitled to be reimbursed not only for the costs of work performed, but also for the costs of settling subcontractor claims, the cost of materials delivered to the site but not used, the attorneys' and accountants' fees for preparing termination claims, plus profit (unless there is showing a loss would have been sustained).

Second, enactment would be a departure from established legislative policy. Relief to contractors has been limited under the War Powers Act to defense-related contracts and only if it would "facilitate the national defense." Furthermore, case law shows that this statute was passed not for relief of contractors from an unprofitable contract, but rather for the benefit of the nation.

Third, Justice believes the bill would result in costly litigation. In a settlement under a convenience termination, the contractor may appeal an agency decision to the district court or the Court of Claims. Also, if the agency refuses to grant the time extension required by the bill in the case of energy-related delays, but terminates the contract for failure to perform, similar litigation is likely.



We believe that while the Justice Department's objections to the bill are not without weight and the Administration has consistently opposed similar bills, there are offsetting factors which warrant your approval of the enrolled bill. First, very few fixed-price small business contracts would apparently be able to qualify for this type of assistance. In this connection, the General Services Administration informally advises us that to its knowledge, none of its outstanding contracts would be affected. Thus, the costs of settling and litigating contracts which do qualify will probably be smaller than feared by Justice.

Although assistance has never previously been given to contractors for purposes other than national defense, the combination of circumstances that gave rise to this legislation -- a Federal policy of wage and price restraint, a high rate of inflation, and a lack of escalation clauses in government contracts -- was quite unusual. Measures have now been instituted to peg fixed price government contracts to inflation and energy shortages. Hence, we believe the precedential effect of this legislation may be more constrained than it might otherwise be.

On balance, we believe that the effect of the bill on the operations and budget of the Federal Government will be minimal and we recommend you sign the enrolled bill.

James M. Frey
Assistant Director
for Legislative Reference

Enclosures



Department of Justice
Washington, D.C. 20530

December 24, 1975

Honorable James T. Lynn
Director, Office of Management
and Budget
Washington, D.C. 20503

Dear Mr. Lynn:

In compliance with your request, I have examined a facsimile copy of the enrolled bill H.R. 5541, a bill, "To provide for emergency relief for small business concerns in connection with fixed-price Government contracts."

We previously opposed a similar bill in the 94th Congress, S. 1259. Our letter to Senator Ribicoff is attached hereto. The instant bill is, in our view, even more objectionable in that it offers additional gratuitous and preferential relief and will undoubtedly result in much costly litigation.

For the reasons stated in the above-referenced letter and in the attached proposed veto message, the Department recommends against Executive approval of this bill.

Sincerely,


Michael M. Uhlmann





EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET

DATE: 12-31-75

TO: Bob Linder

FROM: Frey

Attached is the DOD views letter on H.R. 5541, for inclusion in the enrolled bill file.

Also, House Reports 94-587 and 94-588 to be included in the files on S. 55 and S. 447, respectively.



GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
WASHINGTON, D. C. 20301

December 24, 1975

Honorable James T. Lynn
Director, Office of Management
and Budget
Washington, D. C. 20503

Dear Mr. Lynn:

This is in response to your request for the views of the Department of Defense on H. R. 5541, 94th Congress, a bill "To provide for emergency relief for small business concerns in connection with fixed-price Government contracts."

The Department of Defense will not oppose H. R. 5541 being signed into law by the President.

Sincerely,

A handwritten signature in cursive script, reading "L. Niederlehner", is positioned above the typed name.

L. Niederlehner
Acting General Counsel



THE UNDER SECRETARY OF COMMERCE
Washington, D.C. 20230

DEC 24 1975

Honorable James T. Lynn
Director, Office of Management
and Budget
Washington, D. C. 20503

Attention: Assistant Director for Legislative Reference

Dear Mr. Lynn:

This is in reply to your request for the views of this Department concerning H.R. 5541, an enrolled enactment

"To provide for emergency relief for small business concerns in connection with fixed-price Government contracts,"

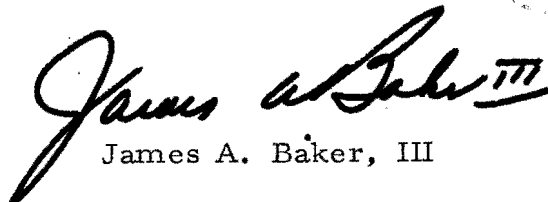
to be cited as the "Small Business Emergency Relief Act".

The purpose of H.R. 5541 is to authorize the head of any executive agency to terminate or modify, for the convenience of the Government, any fixed-price contract between that agency and a small business concern. The authority would be applicable to the contracts of such concerns upon findings that they have suffered, or can be expected to suffer, serious financial loss from the energy crisis or unexpected cost increases. The authority applies only to contracts which have not been completely performed or otherwise terminated, and which were entered into during the period from August 15, 1971, through October 31, 1974. The authority terminates September 30, 1976.

This Department would have no objection to approval by the President of H.R. 5541.

We are unable at this time to provide information concerning the budgetary effect of the legislation on this Department.

Sincerely,

A handwritten signature in cursive script, reading "James A. Baker, III".
James A. Baker, III



U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

OFFICE OF THE ADMINISTRATOR

DEC 23 1975

Mr. James M. Frey
Assistant Director for
Legislative Reference
Office of Management and Budget
Washington, D. C. 20503

Dear Mr. Frey:

This is in response to your Enrolled Bill request asking for the views of the Small Business Administration with respect to H.R. 5541, an Act "To provide for emergency relief for small business concerns in connection with fixed-price Government contracts."

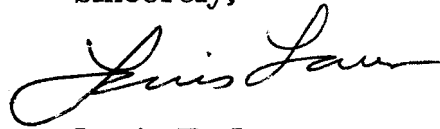
H.R. 5541 would provide a measure of much needed relief to small business concerns having fixed-price Government contracts by granting to procuring agencies the authority to terminate such contracts for the convenience of the Government subject to the specific conditions enumerated in Section 4(a). Upon application by a small business, procuring agencies would also have authority to modify the terms of the contract in lieu of termination for the convenience of the Government subject to specific criteria enumerated in Section 4(b).

Losses on contracts which would fall within the scope of this legislation have decreased working capital, reduced employment, and caused bankruptcies through no fault of the small businessmen involved. Such losses may cause many excellent suppliers and manufacturers to withdraw from Government procurement, thereby depriving the Government of optimum procurement competition and savings which result from such competition.

SBA has explored every available avenue of relief (as have most procuring agencies) for small contractors suffering such losses and has found no solution. Public Law 85-804, authorizing extraordinary contractual action to facilitate the national defense, has very limited applicability and generally will not provide adequate relief: additional help is required.

The Small Business Administration supports the concepts of H.R. 5541 and recommends its enactment.

Sincerely,

A handwritten signature in cursive script, appearing to read "Louis Laun".

Louis F. Laun
Acting Administrator



THE GENERAL COUNSEL OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D. C. 20410

DEC 24 1975

Mr. James M. Frey
Assistant Director for
Legislative Reference
Office of Management and Budget
Washington, D. C. 20503

Attention: Miss Martha Ramsey

Dear Mr. Frey:

Subject: H. R. 5541, 94th Congress
Enrolled Enactment

This is in response to your request for your views on the enrolled enactment of H. R. 5541, the proposed "Small Business Emergency Relief Act".

Section 4(a) and (b) of the enactment would permit Federal executive agencies to terminate for the convenience of the Government -- or, under certain circumstances, to modify -- any fixed-price contract between an agency and a small business concern. Such relief could be granted, however, only if the agency made a finding that the concern has suffered or is expected to suffer serious financial loss due to significant unanticipated cost increases directly affecting the cost of contract compliance, and that the conditions which have caused or are causing such increases were or are being experienced generally by other small businesses in the market at the same time.

The above authorities would terminate on September 30, 1976, and would apply only to contracts which have not been completely performed or otherwise terminated, and which were entered into during the period from August 15, 1971 through October 31, 1974.

Another provision -- section 4(c) -- would require Federal executive agencies to provide an appropriate extension of contract delivery or performance dates where a small business concern will experience delay in the performance of a fixed-price Government contract resulting from shortages of energy, petroleum products, or of products manufactured or derived from or impacted by petroleum products.

The enrolled enactment would have a very limited impact on the overall operations of this Department. We do not enter into direct contractual relationships with building contractors under the various housing programs under our jurisdiction.

This Department does, however, contract directly for repair to properties acquired after foreclosure on a HUD-insured mortgage. If we terminated or modified such a contract and entered into a new or renegotiated contract in a higher amount, the resulting increases in the sales price of the property could have an adverse affect on marketability of the property and, in turn, adversely affect the FHA insurance funds. The enactment wisely makes the termination and modification authorities discretionary, and we would administer these provisions so as to avoid any adverse impact on the sales price of these properties or on the insurance funds.

The provisions of section 4(c) requiring extensions in the case of delays resulting from energy or petroleum shortages would affect contracts for repair of HUD-acquired properties, and may be difficult to administer in view of the absence of guidelines for determining that such a shortage exists. However, we do not believe that a veto of the enactment would be warranted on this basis alone, since this provision would affect a limited area of HUD's operations, and since its impact on the cost of repairing HUD-acquired properties would not in any event be as significant as that of termination or modification.

Instead, the Department of Housing and Urban Development defers to those agencies, such as the General Services Administration and the Department of Defense, which are engaged in direct contracting on a widespread basis and would be more significantly affected by the provision of H. R. 5541.

Sincerely,



Robert R. Elliott

TO THE HOUSE OF REPRESENTATIVES

I return herewith, without my approval, H.R. 5541, a bill to provide for emergency relief for small business concerns in connection with fixed-price Government contracts.

This bill is intended to provide some relief to small business firms faced with a loss caused, without fault of their own, by significant unanticipated cost increases directly affecting their fixed-price Government contracts entered into during the period from August 15, 1971 through October 31, 1974. For such a contractor the contracting agencies are authorized to terminate the contract for the convenience of the Government.

Under the Standard Termination for Convenience contract clause, the contractor would be entitled to be reimbursed for the costs of work performed to the date of termination, the cost of settling subcontractor claims, the cost of materials and articles delivered to the site but not incorporated in the work, and attorney's and accountant's fees for preparing termination claims, plus profit (unless there is a showing that the contractor would have sustained a loss on the entire contract in which event no profit would be allowed). See, Nolan Brothers v. United States, 186 Ct. Cl. 602, 405 F.2d 1250 (1969), appeal after remand 194 Ct. Cl. 1, 437 F.2d 1371 (1971).

Since the Government might still desire the goods or services promised under the terminated contract and would have to procure them by letting a new contract, the agency is given the option of increasing the price of the affected small business contract, in lieu of termination, if it finds that the costs awarded under the proposed convenience termination plus the cost of reprocurement would exceed the amount of the contract as modified; any such modifications would be made pursuant to guidelines promulgated by the Office of Federal Procurement Policy.

While the foregoing gratuitous relief appears to be discretionary, another provision of the bill would make it mandatory for the agency to extend the completion date provided in a small business contract upon a showing that the contractor had been delayed by shortages of energy or petroleum (or of products or components made from petroleum or "impacted" by such shortage).

The Congress has traditionally been reluctant to grant relief when any payment of a private relief claim would amount to a gratuity. See Bennett, Private Claims Acts and Congressional References, 9 A.F. JAG L. Rev. (No. 6, Nov.-Dec. 1967). It is evident that the instant bill amounts to a blanket provision for

gratuitous payments to one class of Government contractors. In view of the broad coverage of the bill, substantial amounts of the taxpayers' money would be given to contractors with no consideration whatsoever being received in return.

In my view, the enrolled enactment would be an unwise and unjustified departure from established legislative policy, in that prior provisions for gratuitous relief to contractors has been limited to defense-related contracts and have required that prior to such relief being granted, a determination must be made that it would "facilitate the national defense." War Powers Act, P.L. 85-804, 72 Stat. 972, 50 U.S.C. § 1431. The case law pertinent to that statute is to the effect that it was not passed for the benefit of contractors or for their relief from an unprofitable contract. Instead, the purpose of that act was for the benefit of the nation and committed to the sole discretion of the President or his delegates the determination of whether or not the contractor should be granted relief. This decision was held not to be subject to review by the courts.

In contrast, the terms of the instant bill indicate that it is enacted solely for the benefit of small business concerns, and not for the benefit of the Government (much less in aid of the nation's defense). Moreover, no reason appears for denying relief to slightly larger contractors (those not meeting the size criteria of the Small Business Administration) who were hurt equally or more than covered contractors by inflation or the energy crisis.

Moreover, unlike the case of discretionary relief under P.L. 85-804, which is not reviewable in the courts, the present bill will undoubtedly result in costly litigation. If the contractor disagrees with the amount of costs awarded under a convenience termination effected pursuant to the bill, it may appeal the decision to the appropriate agency contract appeals board for a full-fledged adversary proceeding. Moreover, if it is dissatisfied with the Board decision, it can then file suit pursuant to the Tucker Act in the district court or the Court of Claims, pursuant to 28 U.S.C. §§ 1346 and 1491. Similarly, if the agency refuses to grant the time extension required by the bill in the case of delays attributed to the energy shortage, but terminates the contract for default, similar prolonged litigation is likely to ensue.

In view of this bill's great potential for causing increased costs for Government procurement, its discriminatory favoring of one class of contractors, its deviation from the long-standing

and sound Congressional policy of not authorizing gratuitous benefits for Government contractors in the absence of a showing that such relief would aid the national defense, and its lack of any provision to insure that any relief offered by the contracting agency would be completely discretionary and not subject to review in any court or administrative tribunal, I believe this bill should not become law.

For these reasons, I return H.R. 5541 without my approval.

THE WHITE HOUSE

December , 1975

THE WHITE HOUSE

ACTION MEMORANDUM

WASHINGTON

LOG NO.: 1572

Date: December 29

Time: 1100am

FOR ACTION: Lynn May
Paul Leach
Max Friedersdorf
Ken Lazarus
Bill Seidman

cc (for information): Jack Marsh
Jim Cavanaugh
Warren Hendriks

FROM THE STAFF SECRETARY

DUE: Date: December 30

Time: 200pm

SUBJECT: H.R. 5541 - Small Business Emergency Relief Act

ACTION REQUESTED:

- | | |
|---|---|
| <input type="checkbox"/> For Necessary Action | <input type="checkbox"/> For Your Recommendations |
| <input type="checkbox"/> Prepare Agenda and Brief | <input type="checkbox"/> Draft Reply |
| <input checked="" type="checkbox"/> For Your Comments | <input type="checkbox"/> Draft Remarks |

REMARKS:

Please return to Judy Johnston, Ground Floor West Wing

No objection. -- Ken Lazarus 12/30/75

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

SEARCHED _____
SERIALIZED _____
INDEXED _____
FILED _____

To-
J. Conaway
12-29-75
10 a.m.



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

DEC 27 1975

MEMORANDUM FOR THE PRESIDENT

Subject: Enrolled Bill H.R. 5541 - Small Business Emergency Relief Act
Sponsor - Rep. Smith (D) Iowa and 11 others

Last Day for Action

December 31, 1975 - Wednesday

Purpose

To authorize Government agencies to terminate, modify or extend fixed-price Government contracts entered into with small business firms.

Agency Recommendations

Office of Management and Budget
Small Business Administration
Department of Defense
Department of Commerce
General Services Administration
Department of Housing and Urban Development
Department of Justice

Approval

Approval

No objection (initially)

No objection

No objection (initially)

Defer

Disapproval (Veto message attached)

Discussion

H.R. 5541 would provide emergency relief to small business firms that were caught in the economic squeeze between fixed-price Federal contractual commitments and the rising costs of materials, supplies and energy. The bill would authorize the head of any Executive Branch agency, upon application by a small



THE WHITE HOUSE

ACTION MEMORANDUM

WASHINGTON

LOG NO.: 1572

Date: December 29

Time: 1100am

FOR ACTION: Lynn May *LM*
Paul Leach *PL*
Max Friedersdorf *MF*
Ken Lazarus *KL*
Bill Seidman *BS*

cc (for information): Jack Marsh
Jim Cavanaugh
Warren Hendrik

FROM THE STAFF SECRETARY

DUE: Date: December 30

Time: 200pm

SUBJECT:

H.R. 5541 - Small Business Emergency Relief Act

ACTION REQUESTED:

- | | |
|---|---|
| <input type="checkbox"/> For Necessary Action | <input type="checkbox"/> For Your Recommendations |
| <input type="checkbox"/> Prepare Agenda and Brief | <input type="checkbox"/> Draft Reply |
| <input checked="" type="checkbox"/> For Your Comments | <input type="checkbox"/> Draft Remarks |

REMARKS:

Please return to Judy Johnston, Ground Floor West Wing

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

K. R. COLE, JR.
For the President

ACTION MEMORANDUM

WASHINGTON

LOG NO.: 1572

Date: December 29

Time: 1100am

FOR ACTION: Lynn May
Paul Leach
Max Friedersdorf
Ken Lazarus
Bill Seidman

cc (for information): Jack Marsh
Jim Cavanaugh
Warren Hendriks

FROM THE STAFF SECRETARY

DUE: Date: December 30

Time: 200pm

SUBJECT: H.R. 5541 - Small Business Emergency Relief Act

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

*Approved
JJS*

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

Box 100

THE WHITE HOUSE

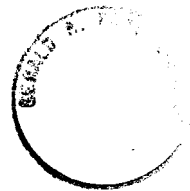
WASHINGTON

December 30, 1975

MEMORANDUM FOR: JIM CAVANAUGH
FROM: MAX L. FRIEDERSDORF *M.L.F.*
SUBJECT: H.R. 5541 - Small Business Emergency Relief Act

The Office of Legislative Affairs concurs with the agencies that the subject bill be signed.

Attachments



SMALL BUSINESS EMERGENCY RELIEF ACT

DECEMBER 12, 1975.—Ordered to be printed

Mr. EVINS of Tennessee, from the committee of conference,
submitted the following

CONFERENCE REPORT

[To accompany H.R. 5541]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 5541) to provide for emergency relief for small business concerns in connection with fixed-price Government contracts, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the Senate amendment insert the following:

SHORT TITLE

Section 1. This Act may be cited as the "Small Business Emergency Relief Act".

POLICY

SEC. 2. It is the policy of Congress to provide relief to small business concerns which have fixed-price Government contracts in cases where such concerns have suffered or can be expected to suffer serious financial loss because of significant and unavoidable difficulties during performance because of the energy crisis or rapid and unexpected escalations of contract costs.

DEFINITIONS

SEC. 3. As used in this Act—

(1) the term "executive agency" means an executive department, a military department, and an independent establishment within the meaning of sections 101, 102, and 104(1), respectively, of title 5, United States Code, and also a wholly owned Government corporation within the meaning of section 101 of the Govern-

ment Corporation Control Act; and

(2) the term "small business concern" means any concern which falls under the size limitations of the "Small Business Administrator's Definitions of Small Business for Government Procurement."

AUTHORITY

SEC. 4. (a) Pursuant to an application by a small business concern, the head of any executive agency may terminate for the convenience of the Government any fixed-price contract between that agency and such small business concern, upon a finding that—

(1) during the performance of the contract, the concern has suffered or can be expected to suffer serious financial loss due to significant unanticipated cost increases directly affecting the cost of contract compliance; and

(2) the conditions which have caused or are causing such cost increases were, or are being, experienced generally by other small business concerns in the market at the same time and are not caused by negligence, underbidding, or other special management factors peculiar to that small business concern.

(b) Upon application under subsection (a) by a small business concern to terminate a fixed-price contract between an executive agency and such small business concern, the head of the executive agency may modify the terms of the contract in lieu of termination for the convenience of the Government only if he finds after review of the application that—

(1) (a) the agency would reprocur the supplies or services in the event that the contract was terminated for the convenience of the Government; and

(b) the cost of terminating the contract for the convenience of the Government plus the cost of reprocurement would exceed the amount of the contract as modified; and

(2) Any such modification shall be made in compliance with cost comparison and compensation guidelines to be issued by the Administrator of the Office of Federal Procurement Policy. Such cost comparison and compensation guidelines shall be promulgated by the Administrator not later than 10 days after enactment of this Act.

(c) If a small business concern in performance of a fixed-price Government contract experiences or has experienced shortages of energy, petroleum products, or products or components manufactured or derived therefrom or impacted thereby, and such shortages result in a delay in the performance of a contract, the head of the agency, or his designee, shall provide by modification to the contract for an appropriate extension of the contract delivery date or period of performance.

(d) A small business concern requesting relief under subsection (a) shall support that request with the following documentation and certifications:

(1) a brief description of the contract, indicating the date of execution and of any amendment thereto, the items being procured, the price and delivery schedule, and any revision thereof, and any other special contractual provision as may be relevant to the request;

(2) a history of performance indicating when work under the contract or commitment was begun, the progress made as of the date of the application, an exact statement of the contractor's remaining obligations, and the contractor's expectations regarding completion thereof;

(3) a statement of the factors which have caused the loss under the contract;

(4) a statement as to the course of events anticipated if the request is denied;

(5) a statement of payments received, payments due and payments yet to be received or to become due, including advance and progress payments, and amounts withheld by the Government, and information as to other obligations of the Government, if any, which are yet to be performed under the contract;

(6) a statement and evidence of the contractor's original breakdown of estimated costs, including contingency allowances and profit;

(7) a statement and evidence of the contractor's present estimate of total costs under the contract if enabled to complete, broken down between costs accrued to date of request, and run-out costs, and as between costs for which the contractor has made payment and those for which he is indebted at the time of the request;

(8) a statement and evidence of the contractor's estimate of the final price of the contract, giving effect to all escalation, changes, extras, and other comparable factors known or contemplated by the contractor;

(9) a statement of any claims known or contemplated by the contractor against the Government involving the contract in question, other than those referred to under (8) above;

(10) an estimate of the contractor's total profit or loss under the contract if required to complete at the original contract price;

(11) an estimate of the total profits from other Government business, and all other sources, during the period from the date of the first contract involved to the latest estimated date of completion of any other contracts involved;

(12) balance sheets, certified by a certified public accountant, as of the end of the contractor's fiscal year first preceding the date of the first contract, as of the end of each subsequent fiscal year, and as of the date of the request together with income statements for annual periods subsequent to the date of the first balance sheet; and

(13) a list of all salaries, bonuses, and all other forms of compensation of the principal officers or partners and of all dividends and other withdrawals, and all payments to stockholders in any form since the date of the first contract involved.

DELEGATION

SEC. 5. The head of each executive agency shall delegate authority conferred by this Act, to the extent practicable, to an appropriate level that will permit the expeditious processing of applications under this Act and to insure the uniformity of its application.

LIMITATIONS

SEC. 6. (a) The authority prescribed in section 4(a) shall apply only to contracts which have not been completely performed or otherwise terminated and which were entered into during the period from August 15, 1971, through October 31, 1974.

(b) The authority conferred by section 4(a) of this Act shall terminate September 30, 1976.

And the House agree to the same.

JOE L. EVINS,
NEAL SMITH,
BOB BERGLAND,
H. B. GONZALEZ,
JAMES CORMAN,
JIM HANLEY,
GUS YATRON,
JOHN BRECKINRIDGE,
WILLIAM L. HUNGATE,
SILVIO O. CONTE,
J. WILLIAM STANTON,
MILLICENT FENWICK,
WILLIAM F. GOODLING,

Managers on the Part of the House.

LAWTON CHILES,
SAM NUNN,
JOHN GLENN,
LOWELL WEICKER, JR.,
BILL BROCK,

Managers on the Part of the Senate.

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE
OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 5541) to provide for emergency relief for small business concerns in connection with fixed-price Government contracts, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

The Senate amendment struck out all of the House bill after the enacting clause and inserted a substitute text.

The House recedes from its disagreement to the amendment of the Senate with an amendment which is a substitute for the House bill and the Senate amendment. The differences between the House bill, and the Senate amendment, and the substitute agreed to in conference are noted below, except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clarifying changes.

(1) SERIOUS FINANCIAL LOSS

The Senate amendment states that it is Congressional policy to provide relief to small businesses which "have suffered or can be expected to suffer" serious financial loss because of the energy crisis or rapid and unexpected escalation of contract costs.

The House bill does not contain any comparable provision requiring serious financial loss.

The Conference substitute adopts the Senate amendment.

The Conference substitute also imposes a similar requirement in section 4 of the bill which authorizes the relief.

(2) DEFINITION OF SMALL BUSINESS CONCERN

The House bill defines a small business concern as having the same meaning as such term is given under Section 3 of the Small Business Act.

The Senate amendment defines a small business concern as any concern which falls under the size limitations of the small business Administrator's definitions of small business for Government procurement or for SBA loans.

The Conference substitute adopts the Senate amendment but deletes the reference to SBA loans.

(5)

(3) TERMINATION AND MODIFICATION

The House bill authorizes the head of any executive agency to terminate for the convenience of the Government "or make appropriate modification in the terms of" any fixed-price contract if certain specified conditions are found to exist.

The Senate Amendment authorizes termination but does not contain any provision authorizing modification.

The Conference substitute adopts the Senate termination authority but provides for limited application of modification to contracts which have not been fully performed or terminated only when the amount of the modification plus the original contract amount would be less than the expense incurred by the Government in reprocuting the item from another source.

The Conferees intend that the authority to modify a contract be used only to save the Government money. Such a savings would result by limiting the amount of the modification plus the original contract amount to a figure not to exceed the cost of terminating the contract for the convenience of the Government plus the cost of reprocutement.

In order to insure consistency and equity in determining which contracts are eligible for modification and compensation thereunder, the Administrator of the Office of Federal Procurement Policy is required to issue appropriate government-wide guidelines not later than 10 days after enactment.

(4) ENERGY SHORTAGE AS AN EXCUSABLE DELAY

The House bill provides that if a small business concern in the performance of a fixed-price Government contract experiences shortages of energy or energy products which result in a delay in the performance of the contract, the delay may be deemed to be an excusable delay.

The Senate amendment contains no comparable provision.

The Conference substitute adopts the House provision except that in the event of such a delay the head of the agency is specifically directed to modify the contract by extending the contract delivery date or period of performance.

(5) EFFECTIVE DATES

The House bill limits the application of the provisions authorizing modification or termination to contracts entered into during the period from August 15, 1971 through October 31, 1974. The House bill also provides that the authority of the agency to grant relief expires December 31, 1976.

The Senate amendment cuts off the date of the contracts to those entered through April 30, 1974 and provides that the authority of the agency to grant relief expires December 31, 1975.

The Conference substitute adopts the House provision applying the authority to contracts entered through October 31, 1974 but terminates the authority of the agency to grant relief on September 10, 1976.

JOE L. EVINS,
NEAL SMITH,
BOB BERGLAND,
H. B. GONZALEZ,
JAMES CORMAN,
JIM HANLEY,
GUS YATRON,
JOHN BRECKINRIDGE,
WILLIAM L. HUNGATE,
SILVIO O. CONTE,
J. WILLIAM STANTON,
MILLICENT FENWICK,
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Managers on the Part of the House.

LAWTON CHILES,
SAM NUNN,
JOHN GLENN,
LOWELL WEICKER, Jr.,
BILL BROCK,

Managers on the Part of the Senate.

○

SMALL BUSINESS EMERGENCY
RELIEF ACT

REPORT
OF THE
COMMITTEE ON GOVERNMENT OPERATIONS
UNITED STATES SENATE

ON

S. 1259

TO PROVIDE FOR EMERGENCY RELIEF FOR SMALL BUSI-
NESS CONCERNS IN CONNECTION WITH FIXED-PRICE
GOVERNMENT CONTRACTS



SEPTEMBER 17 (legislative day, SEPTEMBER 11), 1975.—Ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1975

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(III)

SMALL BUSINESS EMERGENCY RELIEF ACT

SEPTEMBER 17 (legislative day, SEPTEMBER 11), 1975.—Ordered to be printed

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

REPORT

[To accompany S. 1259]

The Committee on Government Operations, to which was referred the bill (S. 1259) to provide for emergency relief for small business concerns in connection with fixed-price Government contracts having considered the same, reports favorably thereon with an amendment and recommends that the bill do pass.

I. PURPOSE AND SUMMARY

The purpose of the bill is to provide relief to small business concerns caught in the economic squeeze between fixed-price Federal contract commitments and soaring costs of material, supplies and energy.

This bill would grant executive agencies the latitude to terminate for the convenience of the government any fixed-price contract between that agency and a small business concern upon a finding that (1) during the performance of the contract, the concern has experienced or is experiencing significant unanticipated cost increases directly related to the contract; and (2) the conditions which have caused or are causing such cost increases were, or are being, experienced generally by other small business concerns in the market at the same time and are not caused by negligence, underbidding, or other special management factors peculiar to that small business concern.

II. NEED FOR THE LEGISLATION

During the period from mid-1971 until early 1974, executive agencies required contractors to submit proposals on the basis of some phase of price controls. Escalation factors were not included in most contracts and material contingencies exceeding the President's guidelines were frowned upon. Since that time all controls have been lifted and,

consequently, material prices have skyrocketed while fixed-price commitments remained. In addition, the unanticipated oil embargo led to severe material shortages and ultimately higher prices for these materials when they do become available.

Notwithstanding the enormous inflationary spiral on material prices, the small businessman has been obligated to perform at the fixed prices appearing in his contract—prices which were established under an entirely different set of ground rules. In many cases, this cost to perform now exceeds the prices set by the contract. Small businesses do not generally have the economic resilience to withstand this type of loss on their government contracts as larger businesses might. Nor do they have the capital backing or the borrowing capacity to ride out this crisis.

It seems clear, therefore, that some form of relief is urgently needed for small business concerns caught between fixed price contract commitments and exploding costs due to inflation, material shortages, and the energy crisis. The procuring agencies of the government recognize the source of the problem and have been sympathetic to the small businessman caught in this bind. However, they are helpless to provide any form of relief absent some authority provided by legislation.

The absence of any relief for existing contracts has resulted in fewer small firms willing to propose on new government contracts. Instead, they are turning away from government procurement opportunities for short term and higher profit contracts with commercial establishments. Others have been forced out of business by their losses. The government simply cannot afford the loss of these valuable suppliers.

III. LEGISLATIVE HISTORY

In March, 1974, the Government Procurement Subcommittee of the Select Committee on Small Business sent a questionnaire to small businesses around the country. The questionnaire was designed to cover their response to all phases of the government procurement process. The returns from 135 small businesses holding 1,349 government contracts indicated that 83 percent were concerned with significantly higher than anticipated prices for supplies—in many instances, high enough prices to put the contractor into the position of performing contracts at a loss.

To look more closely at these problems, the Government Procurement Subcommittee of the Senate Select Committee on Small Business held hearings on May 21, 1974, at which small businesses testified. As a result of these hearings, Senator Hathaway, Subcommittee Chairman, on June 11, 1974, introduced S. 3619, the Small Business Emergency Relief Act for himself, Senator Javits, Ranking Committee Minority Member, and Senators Bible and Scott of Virginia.

The purpose of the bill was to give expeditious relief to small business contractors under fixed price contracts with the Federal Government who are experiencing pricing and delivery problems as a result of the energy crisis and the very rapid rate of inflation.

On July 2, 1974, S. 3619 was referred to the Ad Hoc Subcommittee on Federal Procurement of the Committee on Government Operations. The subcommittee, having undertaken a thorough review of the bill,

concluded that some form of relief was urgently needed for these small businesses. However, after discussions with the General Services Administration (GSA), the Department of Defense (DOD), and the General Accounting Office (GAO), it became apparent that S. 3619, as introduced, was unacceptable.

First, the original bill would have granted the head of an executive agency the latitude to *modify* existing fixed price contracts to provide equitable relief to small business concerns which have encountered these difficulties. The bill envisioned that such relief would be monetary and, as such, could be characterized as a specialized Federal "bailout."

Second, no standards were provided for assessing the merits of a contractor's claim. Consequently, there could have been no assurance that such legislation would be uniformly and equitably implemented.

Finally, as introduced, S. 3619 provided for excusable delays resulting from energy shortages and the incorporation of economic price adjustment clauses in contracts with small business concerns. However, since both of these practices are currently being encouraged within the agencies and departments, such provisions would appear unnecessary. The committee remains concerned, however, that policies to deal with economic fluctuations on future contracts are not being fully implemented, a concern communicated to both the Department of Defense and the General Services Administration.

As a result of these inadequacies with S. 3619, the committee considered and accepted a substitute amendment offered by the Chairman of the Ad Hoc Subcommittee on Federal Procurement on September 24, 1974. Unlike the original bill, this committee substitute would not require any additional outlay of money to contractors seeking relief. Under the provisions of this amendment, the only relief a contractor would be entitled to is a release from his obligations to perform.

The committee substitute was passed by the Senate on October 9, 1974. The House failed to consider the bill before the close of the 93rd Congress.

S. 1259

Senator William Hathaway introduced S. 1259 on March 20, 1975, which is identical to S. 3619. It was referred to the newly established Senate Government Operations Subcommittee on Federal Spending Practices, Efficiency, and Open Government, which proceeded directly to markup the legislation on May 12th. The full Government Operations Committee considered and accepted the subcommittee's recommendation to favorably report S. 1259 on June 18th, pending notification by the General Accounting Office of a cost study of the bill. (See Appendix A.)

Several measures were introduced in the House of Representatives that incorporated both modification and termination provisions. The House Small Business Committee considered these bills and reported a clean measure, H.R. 5541, that passed the House on April 22, 1975.

The Senate bill does *not* offer or attempt to remedy a contractor's past losses. It merely prevents a contractor from incurring additional losses which may result in the demise of a valuable supplier.

In addition, this amendment would require the contractor to supply evidence that his predicament was not the result of negligence or a

deliberate underbidding. This supporting documentation would assure the uniformity of this statute's application and ultimately its equity.

Finally, the bill contains strict time limitations. The termination authority would only cover contracts entered into during the period influenced by price controls (August 15, 1971 through April 30, 1974). Moreover, contractors would be held to a specific period in which to apply for and receive relief under this bill: the authority to terminate contracts is to expire December 31, 1975.

The intent of the time limitations is to permit contractors a reasonable opportunity to obtain relief from contracts priced under abnormal circumstances but not to perpetuate allowances for economic abnormalities that could undermine the whole business of Federal contracting if continued or used as a precedent.

In this regard, the committee's legislative intent should not be mistaken. This bill is unique and serves to resolve only a unique set of circumstances created after lifting price controls. This bill does not create a precedent for relief in any but the special conditions described herein, nor is there any intention to repeat legislation of this nature for any other situations.

It is expected that the criteria used by executive agencies in exercising the authority granted would concentrate first and foremost on the ability of a small business concern to remain a viable functioning economic unit if forced to complete contract obligations. Mere loss of profits or loss incurred on a particular contract are not, by themselves, sufficient grounds for termination but should be assessed in the context of the small business concern's ability to recover from such losses. The committee believes the documentation required to support each case will be sufficient for the agencies to make such a determination on a fair and equitable basis.

IV. SECTION-BY-SECTION ANALYSIS

Section 1 states the short title—"Small Business Emergency Relief Act."

POLICY

Section 2 is a declaration of the policy of Congress to provide relief to small business concerns which have fixed price government contracts where such concerns have encountered financial difficulties as a result of the energy crisis or the unanticipated inflationary spiral. This congressional concern does *not* envision granting relief to contractors suffering a reduction in profits on government business. Rather, its intended application would be to those small businesses whose very existence has been placed in jeopardy as a result of the problems brought about by their fixed-price government contract commitments.

DEFINITIONS

Section 3(1). The definition "*executive agency*" serves to delineate the agencies empowered to exercise the authority granted by this bill. These include the executive departments, military departments, independent establishments, and wholly owned government corporations.

Section 3(2). The definition of "*small business concern*" is intended to limit the eligibility under this bill to those concerns meeting the definition provided in the Small Business Act.

AUTHORITY

Section 4(a) grants the head of any executive agency the latitude to terminate for the convenience of the government any fixed-price contract between that agency and a small business concern upon the agency's finding that the unanticipated cost increase was directly related to the contract and that the cost increases were a market phenomenon and not a result of negligence, deliberate underbidding, or other management factors peculiar to the small business concern in question.

This section grants the agency the authority heretofore unavailable to terminate a contract for reasons other than a change in requirements and, therefore, the ability to immediately reprocur like items upon completion of a termination action. However, the exercise of this authority is discretionary and, at best, applicable only to those situations where it is apparent that a small business government supplier will be in jeopardy of losing his business if the agency does not release him from his obligations to perform.

The agency is not required to initiate or be alert to the need for such an action to terminate. Rather, it is the contractor who must submit an application for this relief.

It is expected that in implementing the authority granted by this legislation, agencies will follow established regulatory procedures for termination for convenience.

Section 4(b) requires that this application be accompanied by detailed documentation supporting the small business concern's eligibility under the intent of the bill. It is this documentation that will permit the agency to ensure a uniform and equitable application of the provisions of the bill. This list of documentation is as follows:

Section 4(b)(1) provides a basic accounting of just what is involved in the contract. It provides insight into contract duration and materials involved and therefore would also provide insight as to eligibility.

Section 4(b)(2) brings the accounting up to date and sets out the remaining obligations and a forecast as to completion possibilities.

Section 4(b)(3) expresses, in the contractor's opinion, the various factors which have caused the loss under the contract.

Section 4(b)(4) gives the contractor the opportunity to state his case as to what will happen if his request is denied. When properly prepared, this becomes useful to the agency head in determining a company's ability to remain viable.

Section 4(b)(5) provides an up to date financial accounting concerning the contract.

Section 4(b)(6) through (11) is intended to demonstrate the financial "health" of the small business concern. Starting with the baseline established in the original breakdown, it provides financial adjustments information to reflect stages of completion and estimates to complete, as well as adjustments for claims or

contract changes. In addition, it will portray the total profit and loss picture of the company both from government contracts and all other sources. This last point is significant in view of the intent to limit relief to those small business concerns on the verge of being driven to close their doors.

Section 4(b)(12) requires the submission of balance sheets and income statements from the year preceding the "loss" contracts up to the present time. This information will contribute to the agencies ability to determine the cause or causes for the current financial situation of the company. The balance sheets and income statements should be both consolidated, and by affiliates, and should show all transactions between the contractor and his affiliates, stockholders, and partners, including loans to the contractor guaranteed by any stockholder or partner.

Section 4(b)(13) requires the listing of all salaries, bonuses, and other forms of compensation of the principal officers or partners. Information of this nature, as well as payments to stockholders, further contributes to determining a trend as to the financial "health" of the company.

DELEGATION

Section 5 authorizes the head of each executive agency to delegate the authority conferred by this bill to the appropriate level that will permit expectations processing of applications as well as ensure uniformity in its application. It is assumed that this could best be achieved at the level of the Director of Contracts within the agency.

LIMITATIONS

Section 6(a) limits the applicability of this bill to contracts, still in effect, which were written during the period from August 15, 1971, through April 30, 1974.

Section 6(b) limits the time a contractor may have to file an application for relief. In any event, the government's authority under this bill would expire on December 31, 1975.

V. ESTIMATED COST OF LEGISLATION

In accordance with section 252(a) of the Legislative Reorganization Act of 1946, as amended, the committee estimates that there will be no direct expenditure of additional Federal funds required by enactment of S. 1259.

There will be some additional workload placed on agency procurement activities in order to process submissions for relief under the bill and, where termination is found appropriate, to process contract close-outs. Due to the time limits placed on eligible contracts, however, it is expected that this incremental indirect cost can be borne within existing funds for agency procurement activities.

VI. CHANGES IN EXISTING LAW

In accordance with subsection (4) of rule XXIX of the Standing Rules of the Senate, the committee reports that there are no changes in existing law required by the bill, as amended.

APPENDIX A

COMMITTEE ON GOVERNMENT OPERATIONS,
SUBCOMMITTEE ON FEDERAL SPENDING PRACTICES,
EFFICIENCY, AND OPEN GOVERNMENT,
Washington, D.C. July 1, 1975.

HON. ELMER B. STAATS,
*Comptroller General, General Accounting Office,
Washington, D.C.*

DEAR MR. STAATS: During consideration by the Senate Government Operations Committee of S. 1259, the Small Business Emergency Relief Act, questions were raised relative to the cost of the program provided in the bill.

Would you please furnish the Committee with your estimates of the cost covered by this proposed legislation at your earliest convenience.

With kindest regards,
Sincerely,

LAWTON CHILES, *Chairman.*

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, D.C., July 29, 1975.

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

DEAR MR. CHAIRMAN: This is in response to your request for estimates of the cost of the program provided in the bill S. 1259, the "Small Business Emergency Relief Act." The bill, if enacted, would provide relief to small business concerns which have fixed-price Government contracts in cases where such concerns encounter significant and unavoidable difficulties during performance because of the energy crisis or rapid and unexpected escalations of contract costs.

Because of the many variable or unknown factors that are present, including the number of contractors who may request that their contracts be terminated and the unanticipated inflationary costs that may be incurred, we cannot estimate what program costs may be.

Your office also requested that we assess whether the legislation would limit relief to recovery of costs incurred and exclude any provision for contractor profit.

S. 1259 would provide for termination for the convenience of the Government. S. 3619, introduced in the last Congress, used the same language. The legislative history of the earlier bill clearly indicates that the termination was intended to be at no cost to the Government. We assume that the language in the current bill relating to termination is intended in the same sense.

In a letter dated June 3, 1975, to the Chairman of the Senate Committee on Government Operations we commented on the bill and made

recommendations for several changes. We recommended, for example, that provision be made for the alternative to modify rather than terminate contracts so that the Government could obtain needed supplies and services. We also made recommendations for changes that would limit any contract price adjustments to costs that exceed contract prices.

We trust that the above satisfies the purpose of your inquiry.

Sincerely yours,

R. F. KELLER,
Deputy Comptroller General of the United States.

APPENDIX B

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, D.C., June 3, 1975.

HON. ABRAHAM RIBICOFF,
Chairman, Committee on Government Operations,
U.S. Senate.

DEAR MR. CHAIRMAN: By letter of April 2, 1975, you requested our views regarding S. 1259, 94th Congress 1st Session which, if enacted, would be cited as the "Small Business Emergency Relief Act."

This bill would allow Federal Government agencies, at the request of small business contractors, to terminate certain fixed-price contracts entered into during the period from August 15, 1971 through April 30, 1974, until the authority terminates on December 31, 1975. Section 4 (a) of this bill provides that the termination authority may be exercised upon a finding that (1) during the performance of the contract, the concern has experienced or is experiencing significant unanticipated cost increases directly affecting the cost of contract compliance; and (2) the conditions which have caused or are causing such cost increases were, or are being, experienced generally by other small business concerns in the market at the same time and are not caused by negligence, underbidding, or other special management factors peculiar to that small business concern.

Recognizing the urgent need to provide relief for small business contractors having fixed-price contracts with the Federal Government, we generally favor the enactment of this bill. Contract termination would provide a form of relief to a small business contractor unable to economically perform an existing fixed-price contract because of inflation, thus avoiding the harsh consequences of a termination for default. We also believe that the purpose intended to be served by this bill could be better achieved by adding a provision authorizing modification of existing small business contracts entered into during the period covered by the bill. Modification authority would allow the Government to satisfy its procurement needs and, at the same time, provide relief to the small business contractor. Therefore, your committee may wish to consider providing in a single bill modification authority together with termination authority. We believe that the combined remedies would provide the degree of flexibility needed to cope with the emergency situation.

In this connection we recommend that Section 4(a) be amended to include the following language immediately preceding the word "any" on page 2, line 18: "or make appropriate modification in the terms of". It is further recommended that a new subsection (b) be inserted to include the following language: "Any contract price adjustment under subsection (a) shall be authorized only to the extent that contract costs exceed the contract price." The language in the existing subsection (b) should be retained as subsection (c). Furthermore, we suggest the inclusion of a provision which would authorize the contracting

agency and this Office access to all of the records of the contractor relating to the contract being modified so that the Government may have the opportunity to assure itself that the modification it negotiates is equitable and reasonable. In this connection, we recommend a new subsection (d) to include the following language:

"(d) The agency head and the Comptroller General of the United States, or any of their duly authorized representatives shall, until the expiration of three years after final payment of any contract modified under subsection (a), have access for the purpose of audit and examination to any books, documents, papers, and records of such receipts which in the opinion of the agency head or the Comptroller General may be related or pertinent to any such contract modification."

In addition we believe that Section 4(a)(1) should be amended to include the following language after the word "compliance": so that the cost of performance exceeds, or will exceed, the contract price". Consistent with the purpose of the legislation we believe that the termination authority should not be exercised unless it is clear that the contract cannot be economically performed because of inflationary conditions.

Notwithstanding the use in Section 4(a) of the term "termination for the convenience of the Government," the termination contemplated by this bill appears essentially to be in the nature of a no cost settlement initiated at the contractor's request, for its convenience and in its best interests. On the other hand, a termination which is in fact for the Government's convenience will result in a settlement to compensate the contractor fairly for the work done and the preparations made for the terminated portions of the contract, including an allowance for profit thereon which is reasonable under the circumstances. Since the matter of the contractor's entitlement to termination costs is not covered under the bill, we recommend inclusion of a provision to spell out whether or not entitlement to costs in the event of termination is intended. In any event, we recommend that Section 4(a) be further amended to delete the term "for the convenience of the Government" which appears after the word "terminate".

We further suggest that the termination and modification authority be expressly made discretionary by inserting after the word "may" in Section 4(a) a comma and the following language: "in his or her discretion".

Finally, a technical change should be made. We suggest that the reference to "Section 3(a)" on page 5, line 25 be changed to "Section 4(a)".

We think the above satisfies the purpose of your inquiry and we appreciate the opportunity to comment on this matter.

Sincerely yours,

R. F. KELLER,
Deputy Comptroller General of the United States.

OFFICE OF MANAGEMENT AND BUDGET,
Washington, D.C., June 19, 1975.

HON. ABRAHAM A. RIBICOFF,
*Chairman, Committee on Government Operations, U.S. Senate,
Dirksen Senate Office Building, Washington, D.C.*

DEAR MR. CHAIRMAN: It is my understanding that the Senate is considering two similar bills that would provide emergency relief to

small business firms. Such relief would be granted if small business firms holding fixed price type contracts experienced difficulties caused by the energy crisis or unexpected cost increases resulting from inflation. The two bills are H.R. 5541, which passed the House of Representatives on April 22, 1975, and S. 1259, which is an update of a bill (S. 3619) passed by the Senate last year.

The Administration has opposed this type of legislation for several reasons. First, Government agencies have already taken steps to ease the burden of cost increases due to inflation and material shortages through flexible contractual provisions such as price adjustment clauses and short-term contracts. Second, while contractors were most affected by energy and inflation problems in late 1973 and early 1974, they can now more accurately predict difficulties related to cost increases. Third, most contracts held by small business firms during the 1971-1974 period covered by the legislation have been completed at this time. Finally, there is no way to be certain of the ultimate cost to the taxpayer resulting from this legislation.

The Office of Management and Budget prefers S. 1259 to H.R. 5541. Specifically, the House bill would authorize Government agencies not only to terminate contracts for the convenience of the Government but also to make modifications in the contract if it can be shown that the firm experienced "significant unanticipated cost increases" which were experienced by other small businesses at the same time. The Senate version, on the other hand, would only permit termination of a contract for the convenience of the Government. The termination provision could be administered by the executive agencies with much more ease and equity than the provisions of the House bill. We believe the House version would result in strong pressure on Government contracting personnel to modify large numbers of contracts, thus providing a potential for price increases in many goods and services. This type of contract modification goes beyond the need for limited relief to meet emergency circumstances and not only tends to destroy the integrity of fixed-price contracting but also is inflationary in nature.

Sincerely,

JAMES M. FREY,
Assistant Director for Legislative Reference.

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE,
Washington, D.C., August 15, 1975.

HON. ABRAHAM RIBICOFF,
Chairman, Committee on Government Operations, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your letter dated 27 May 1975 requesting a Department of Defense report on S. 1259 entitled an act "To provide for emergency relief for small business concerns in connection with fixed-price contracts."

S. 1259 would state it is the policy of Congress to provide relief to small business concerns which have fixed price Government contracts. This relief would be provided in cases where such concerns encounter significant and unavoidable difficulties during contract performance because of the energy crisis or rapid and unexpected escalations of contract costs. Under the bill, upon application by a small business

concern, the head of the procuring agency would be authorized to terminate for the convenience of the Government any fixed price contract between the agency and the small business concern upon a showing that—

(1) during the performance of the contract, the concern has experienced or is experiencing significant unanticipated cost increases directly affecting the cost of contract compliance; and

(2) the conditions which have caused or are causing such cost increases were, or are being, experienced generally by other small business concerns in the market at the same time and are not caused by negligence, underbidding, or other special management factors peculiar to that small business concern.

Termination of a loss contract for convenience under current procurement regulations involves paying the contractor for all costs of performance incurred up to the date of termination, adjusted to reflect a proportionate share of the loss as applied to the work performed.

The bill sets forth various documentation to be submitted by the applicant and provides that the head of the agency may delegate to appropriate levels. Finally, it provides that its provisions shall expire on December 31, 1975 and shall apply only to contracts entered into during the period from August 15, 1971 through April 30, 1974.

The Department of Defense is aware of the plight of contractors who have encountered significant price increases, material shortages, late deliveries from suppliers and other problems arising from the energy shortage and inflation. The Department is particularly aware of the impact these factors have had on some small business concerns. However, while there are some hardship cases, we have no evidence that these are sufficient to warrant special legislation. Also, as the bill itself recognizes, the problem is not a continuing one. It is, we believe, confined primarily to competitive contracts awarded prior to mid-1974 and requiring deliveries after the first quarter of calendar year 1974. The current marketplace conditions are being adequately considered in the pricing of new contracts, because both buyers and sellers are attuned to the potential problems. Furthermore, not all cases in which firms have experienced difficulty can be traced directly to shortages or inflation. Legislation authorizing relief even for those cases which could be traced to shortages or inflation would set a dangerous precedent for similar actions in the future merely because of variations in the open marketplace. Of even greater concern is the fact that such legislation tends to destroy the very fiber of competitive procurement. For these and other reasons, detailed below, we are opposed to the enactment of S. 1259.

We foresee a number of very serious substantive and administrative problems in the proposal to authorize the convenience termination of individual contracts:

a. The criteria for meriting consideration for relief are vague and would not necessarily provide relief to those who need it or deserve it the most. What are "significant unanticipated cost increases"? Against what standard is this to be measured? Many firms may have encountered difficulties, but do not meet the criteria for relief, or they have taken other measures to mitigate those difficulties.

b. The language of Section 4(a) would seem to authorize relief even though the cost increases might do nothing more than decrease a

firm's profits. Diminution of profit should not be considered a basis for termination for convenience.

c. Although small business firms undoubtedly are impacted more seriously by inflation and the energy shortage than are large business firms, they are not the only ones who are encountering difficulties. Inflation may strike just as heavily, or even more so, on a firm which barely exceeds the small business size standards for a given commodity. Such a firm would not qualify for relief under this bill.

d. Determination of eligibility for relief on a contract-by-contract basis would impose a tremendous administrative burden on Department of Defense, and could delay relief to many firms to the extent that they could not survive the delay. This would be further complicated by the fact that most firms which do business with the Government have more than one contract, and many have numerous contracts with several different agencies. Thus, the filing and coordination of several individual requests for termination would be necessary. Even if a firm which held several contracts only requested termination of one of them, in order to insure that relief was in fact warranted it would be necessary to review the status of all the firm's other contracts. Otherwise, this bill could become the vehicle for getting rid of a losing contract while keeping the profitable ones.

e. The potential cost of S. 1259 could be significant. We can be quite certain that the passage of this legislation could elicit a flood of requests, many without merit. The administrative cost alone of processing such claims and determining which have merit would be an onerous burden and extremely costly to the taxpayer. It is difficult to estimate the total cost. While S. 1259 itself would not appear to result in the outlay of money directly to contractors seeking relief, it would eventually result in higher outlays by the Department of Defense to reprocur the items covered by the termination contracts. It would seem reasonable to expect that the vast majority of small business firms have experienced some increases in their costs, some diminution of profit or varying degrees of losses. How many of these firms would merit relief under the terms of S. 1259 is highly conjectural at best. Department of Defense awards to small business firms exceeded \$6 billion in FY 1973. With over six million procurement awards to small business potentially involved, processing such claims and determining which were meritorious would be an administrative burden.

f. There is no provision for finality of decisions made by the head of an agency. If he denied a contractor's request for termination, would this decision be subject to appeal? And would the contractor be required to continue performance pending outcome of his appeal?

g. One of the more difficult aspects of processing any such requests for relief would be determining the question of fairness to other bidders under that same procurement. Under our competitive bidding process, and most of these awards were made as the result of competition, we rely on the forces of the marketplace to establish a fair and reasonable price. Award is generally made to the low responsible bidder. To now relieve the contractor of his obligation to perform, simply because he has lost or is losing money, may be unfair to the other bidders who might have been able to perform the contract without such relief.

h. Legislation such as this could have an adverse impact on an already inflationary economy. While it does not necessarily authorize payment of additional money to a contractor, it nevertheless relieves him of an obligation, and the Department of Defense will eventually incur additional costs in the award of a new contract. There is no incentive to do business by the rules of the marketplace if there is a handy procedure available whenever a firm gets into financial difficulty. There is no incentive to economize on those contracts already awarded and being performed if the contractor can in effect walk away from his obligations as soon as it is no longer profitable to continue.

i. There is also the question of subcontractors who would contend they have not received equal treatment. We estimate there are many more subcontractors than prime contractors that are small business firms.

The Department of Defense is concerned with the plight of small business and the maintenance of our small business program, which now equates to about 20% of Defense procurement expenditures. We do not want to lose our reliable and long-proven small business suppliers, but we do feel that emergency relief of this broad scale should not be handled on a contract-by-contract basis in the procurement arena.

The Department of Defense has authority now under P.L. 85-804 to amend contracts without consideration in limited cases where the continued performance of a contractor is considered essential to the national defense. However, only a few contractors who are currently experiencing difficulties will be able to meet all of the criteria necessary to support a finding of essentially, since in most cases there are other competing firms willing and able to bid on contracts for Department of Defense's needs. Department of Defense has taken and is taking other steps to ease the problems which inflation and material shortages have on contractors—measures such as using shorter term contracts, curbing the use of options, and more frequent use of Economic Adjustment clauses. The Assistant Secretary of Defense (Installations and Logistics) issued a memorandum of June 12, 1974 to the Military Departments and Defense Agencies alerting them to the problems and the various techniques to be employed during this period of price instability. A similar memorandum was issued on November 27, 1974 relating to consideration of these problems in consenting to major defense system subcontracts. We recognize that none of these measures will fully satisfy the needs of those firms which have already experienced cost increases. However, these actions should prevent a recurrence of the problem, or at least the impact of price instability, in future contracts.

Of the 9.2 million procurement transactions under \$10,000 made last year in the Department of Defense, it is our estimate that the overwhelming majority of these awards had delivery cycles of less than six months. Of those awards of less than \$2,500, the vast proportion had delivery schedules of 30 days or less. Thus, in either case, both the buyer and seller were fully conversant with the inflationary pressures of the market and, we think, able to respond satisfactorily to them in pricing their products.

It is further our observation that the sudden increase in the rate of inflation which took place from late 1973 until late 1974 is not cur-

rently present. Hence, we see a very limited opportunity for relief as envisioned by the proposed legislation. On the other hand, we foresee the possibility that there would be a large number of claims for such relief.

The magnitude of the administrative task to sort from amongst a large body of claimants those relative few whose position would merit consideration, would make this a very costly program to administer.

The Department of Defense believes that enactment of S. 1259 is undesirable and unnecessary. However, this legislation is preferable to H.R. 5541 which extends even further relief to contractors.

S. 1259 is identical in most respects with H.R. 5541 passed by the House on April 22, 1975. It is our understanding that H.R. 5541 has been referred to your Committee. There are two primary differences between these bills:

H.R. 5541 includes the words "or make appropriate modification in the terms of" after the "Government" in line 3 of Section 4(a). H.R. 5541 provides that the authority contained in Section 4(a) of the bill would apply only to contracts entered into during the period from August 15, 1971, through October 31, 1975, while S. 1259 provides that the above period would end on April 30, 1975. Also, H.R. 5541 states that the authority conferred by Section 4(a) of the Act shall terminate December 31, 1976, while the authority in S. 1259 would terminate December 31, 1975.

With regard to the inclusion of the additional words in Section 4(a) as provided by H.R. 5541, this office has no information or knowledge as to what kinds of modification were contemplated. It is, therefore, conceivable that such modifications could involve payment of additional monies to contractors, reduction of performance or quality assurance requirements, relief from delivery schedules, or any combinations of these. The substantive and administrative problems expressed above in subparagraphs (a) through (i) that we foresee with regard to convenience terminations authorized under S. 1259 will be even more complicated if applied to the additional authority to make "appropriate modifications" under H.R. 5541.

While the primary thrust of S. 1259 is to relieve the contractor of his obligations under the contract, the additional language in H.R. 5541 would appear to require the payment of substantial additional costs. In addition, such costs would seem to be payable even though the cost increases might do nothing more than decrease a firm's profits. Diminution of profit should not be considered as a basis for price adjustment. The possibility of such payments substantially increases the magnitude of any administrative task in processing contractor's claims, and in assuring through audit, hearings, and other analysis, that funds expended for such claims can be properly and completely justified.

With regard to extending the applicability of the authority to contracts entered into through October 31, 1974, instead of April 30, 1974, we are convinced that the problem is primarily confined to contracts awarded prior to mid FY 1974 and requiring deliveries after the first quarter of calendar year 1974. We are of the view that marketplace conditions are adequately reflected on contracts entered into since that time, and therefore, we are opposed to extending the authority to

contracts entered into during the period between April 30, 1974 and October 31, 1974.

For these reasons set forth above regarding S. 1259 and for these additional reasons, the Department of Defense opposes enactment of H.R. 5541.

The Office of Management and Budget advises that from the standpoint of the Administration's program, there is no objection to the presentation of this report for the consideration of the Committee.

Sincerely,

L. NIEDERLEHNER,
Acting General Counsel.

APPENDIX C

U.S. SENATE,
SELECT COMMITTEE ON SMALL BUSINESS,
Washington, D.C., March 12, 1975.

HON. LAWTON CHILES,
U.S. Senate,
Washington, D.C.

DEAR LAWTON: In the next few days, I plan to introduce the, "Small Business Emergency Relief Act," which would provide that a government agency could terminate, for the convenience of the government, a small business fixed price contract upon a showing by the small business contractor that he is experiencing significant unanticipated cost increases in the performance of his contract.

The Senate Small Business Subcommittee on Government Procurement, of which I am Chairman, held a hearing last year looking into this and other problems of small business contractors. During the hearing and subsequent to it, the Subcommittee learned that increasing numbers of small business firms performing fixed price contracts with the Federal Government are experiencing great difficulty in performing their contracts due to the energy crisis and the rapid rate of inflation. Many of these contractors who obtained their contracts by competitive bidding have found inflation has driven up the price of materials during the contract period to the point where they are being dragged to the brink of bankruptcy in performance of the contract.

The bill which I propose to introduce would not authorize a modification of the contract to provide additional money to the contractor, but it would authorize the government to terminate, for the convenience of the government, a small business fixed price contract where the contractor could show that he is suffering a serious financial loss.

The language of the proposed legislation is the same as S. 3619, reported unanimously by the Government Operations Committee and passed unanimously by the Senate on October 9, 1974.

I solicit your cosponsorship of this bill. If you wish to cosponsor, or if you have any questions about the bill, please have your staff contact Jim Medill, 4-8482.

With best regards,
Sincerely,

WILLIAM D. HATHAWAY,
U.S. Senator.

(17)

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SMALL BUSINESS EMERGENCY RELIEF ACT

APRIL 18, 1975.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. EVINS of Tennessee, from the Committee on Small Business, submitted the following

REPORT

[To accompany H.R. 5541]

The Committee on Small Business, to whom was referred the bill (H.R. 5541) to provide for emergency relief for small business concerns in connection with fixed-price Government contracts, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

INTRODUCTION AND BACKGROUND OF BILL

The bill, H.R. 5541, is a product of congressional concern with the economy and particularly with the effect of the tremendous increases in the cost of goods, materials, and labor to small business contractors who entered fixed-price contracts with the Federal Government during the period of August 15, 1971, through October 31, 1974. The small business sector was experiencing significant unanticipated cost increases directly affecting the cost of performing under the contract, and was also being affected by shortages of energy, petroleum products, or products or components manufactured or derived therefrom or impacted thereby. These factors resulted in the small business contractor being unable to perform under the contract in a timely manner which caused him to default.

The result to the small businessman is oftentimes financial ruin. From the standpoint of the Government's interest, enforcement of the contract and the lack of ability to modify its terms may force the concern to go bankrupt and frequently hinders or even prevents the Government from obtaining the product for which it contracted. Thus it may also be in the interest of the Government to adjust the terms of the contract since granting the Government the authority to make such price adjustments, where justified, will permit the contracting agency to obtain the needed materials and services in a timely fashion.

Under existing law a contracting agency of the Federal Government is not authorized to assist the small businessman who may be bankrupted by enforcement of the contract, except in a very few limited situations under Public Law 85-804, which authorizes the agency to amend contracts without consideration in limited cases where the continued performance of a contractor is considered essential to the national defense. However, only a few contractors experiencing such difficulties are able to meet all of the criteria necessary to support a finding of essentiality since in most cases there are other competing firms willing and able to bid on contracts for the agency's needs.

Hearings on emergency relief legislation (H.R. 2879, 3207, 3886 and 4544) were held by the Subcommittee on SBA and SBIC Legislation on March 21, 1975. The subcommittee held markup sessions on H.R. 3207, the "Small Business Emergency Relief Act" on March 25, 1975. The subcommittee made numerous changes in H.R. 3207 and reported out a clean bill, H.R. 5541, which the full committee ordered reported on April 10, 1975.

NEED FOR THE LEGISLATION

Based upon the committee's studies, investigations, and hearings the committee finds that there are many small business concerns currently encountering serious problems and facing the possibility of financial ruin in attempting to perform fixed-price Government contracts under prevailing conditions of price escalations and energy impacted material shortages.

The fixed-price contracts were awarded by the Government agencies during a period when the successful small business bidders submitted their bids based upon prices then under some phase of price controls established by the Government. Price escalation clauses were not included in most of these contracts. Default clauses in the contracts did not take into consideration delays in scheduled deliveries beyond the contractor's control due to energy or petroleum shortages.

Subsequent to the granting of such awards, the Government lifted its price controls. This resulted in substantial increases in labor and material costs while the fixed-price commitments of the small business concerns to the Government remained intact. In addition, unanticipated oil embargos led to severe material shortages and substantially higher prices for any such materials which became available.

The small business contractor under these circumstances is in a dilemma. He is left without any alternative relief. In most instances he faces financial hardships or bankruptcy if he tries to live up to the terms of the contract, and he meets the same fate if he should default on the contract.

Under existing law, Public Law 85-804, extraordinary relief from such hardship is available for the fixed-price Government contractor only if the Government agency determines that he is essential to the national defense. In practice, however, the application of Public Law 85-804 is rare. The essentiality requirement eliminates most of the small business contractors caught in the price squeeze and material shortage situation. Public Law 85-804 does not provide an adequate remedy to the problem. More than this is needed in order to provide relief to the average small business contractor.

In some cases, the Government agencies have adopted administrative steps designed to mitigate the detrimental impact of unanticipated price escalation on the small contractor, such as not exercising the Government's option for renewal or for additional requirements at the price fixed in the original contract. Such administrative action is not applied uniformly and is not Governmentwide. Furthermore, the questionable legality of such mitigating actions inhibits their use.

The procuring agencies generally recognize the no-fault predicament of their small business suppliers who are caught in the price squeeze and material shortage situation. However, they are without authority under existing law to provide any relief. To the contrary, they find themselves constrained under present law to default the contractor, buy against the contract at higher costs, and institute proceedings to attempt to recover the excess cost and damage from their small business suppliers. This is done even though the small business concerns have been historically good, dependable suppliers to the Government. This occurs even though such actions ultimately reduce the Government agencies' sources of supply and decrease competition for their requirements, thereby increasing future costs for such items to the Government. This is contrary to our National policy and the best interests of the small business Government contractors, the Government agencies, and the taxpayer.

Legislation is needed to enable the Government agencies to grant relief at their discretion to eligible small business fixed-price contractors.

The committee finds that in many instances small business contractors are encountering difficulty in meeting delivery schedules under the contract due to unavailability and shortages of energy or petroleum products even at escalated prices.

Under default clauses contained in fixed-price contracts, the Federal agency is required to terminate the contract in the event of a default in deliveries by the small business contractor even though he is encountering difficulty in obtaining energy and petroleum related materials or may even be unable to obtain such needed materials. This problem is a serious one and is being experienced by many small business contractors.

Upon termination for default, the small business contractor finds himself liable to the Government for increased costs and for damages arising out of his failure to deliver on time.

Legislation is needed in such instances to give the Federal agencies the authority, where justified, to terminate the contract for the convenience of the Government at no cost to the contractor and to enable the Federal agency in its discretion, to consider such delays or defaults in performance as excusable in appropriate cases.

In addition, legislation is needed in order to give the procuring Government agencies the authority to modify the terms of the fixed-price contract whenever it appears that it would be more economical, efficient and effective for the Government to change the terms of an existing fixed-price contract as to price or delivery rather than undergo costly delays and expense in reprocurring the item. Such remedial action cannot be taken under existing law even though the modification would be in the best interests of the Government.

WHAT THE BILL WOULD DO

H.R. 5541 would provide limited relief to small businessmen who enter fixed-price contracts with an agency of the Federal Government if during the performance of the contract they experienced or are experiencing significant unanticipated cost increases directly affecting the cost of contract compliance, provided the conditions which have caused or are causing such cost increases were or are being experienced generally by other small business concerns in the market at the same time and are not being caused by negligence, underbidding, or other special management factors peculiar to the small business concern. The bill would not require that the executive agency provide any relief but would merely authorize the head of the agency to either terminate the contract for the convenience of the Government without cost to the contractor or to modify the terms of a fixed-price contract, i.e., to grant a price increase, which was entered during the period from August 15, 1971 through October 31, 1974. In order to obtain relief, the contractor must make a request for relief and document the request with data and information on his costs, profits, and losses as specified in the bill. The authority of the contracting agency to grant such relief would terminate on December 31, 1976.

This bill would also provide that any delay by a small business concern in the performance of a fixed-price Government contract which is a result of a shortage of energy, petroleum products, or products or components manufactured or derived therefrom or impacted thereby, may be deemed to be an excusable delay under the terms of any default clause in the contract. Similarly, these provisions of this bill are not mandatory but merely authorize the contracting agency to excuse a delay in the performance of the contract.

CONCLUSION

In conclusion, H.R. 5541 presents a viable method of dealing with the problem of small business contractors who entered fixed-price contracts with the Federal Government during a period of severe inflation. The committee notes that contracts between businesses in the private sector of the economy may be and often are modified in order to take into account the substantial increases in the cost of goods, materials, and labor needed by the contractor to perform under the contract and it believes that similar discretionary authority should be granted where justified in situations where the Federal Government is doing the contracting. Not only will this be beneficial to the small business, but it is in the Government's best interests as in many situations the contractor may be unable to perform at the price specified in the contract. Thus the lack of authority for the agency to grant price increases, where justified, may not only cause the demise of the small business, but it may also hinder the Government by causing a delay and procurement costs in the agency's obtaining vitally needed goods and materials.

The committee believes that such relief is especially appropriate since many of these price increases may be attributable to the action of the Federal Government in modifying and eliminating price controls.

According to information received by the committee the price of these goods, materials, and labor appears to have stabilized now and it is not believed that any concerns which contracted after the beginning of the stabilization period, November 1, 1974, should be entitled to any such emergency relief since they are now in a better position to estimate their cost of materials and labor needed to perform their contracts. The committee also has been informed that the Federal Government is now using price adjustment clauses in Government contracts where appropriate. The committee believes that this legislation represents reasonable and adequate means of resolving this problem.

MATTERS REQUIRED TO BE DISCUSSED UNDER HOUSE RULES

In compliance with clause 2(1)(2) of Rule XI of the House of Representatives the following statement is made relative to the record vote on the motion to report H.R. 5541:

A majority of the committee was actually present and the motion was approved by voice vote with no roll call vote being requested.

In compliance with clause 2(1)(3) of Rule XI of the Rules of the House of Representatives the following statements are made:

With regard to subdivision (A), relating to oversight findings, the committee finds, in keeping with clause 2(b)(1) of Rule X, that this legislation is in full compliance with the provision of this Rule of the House, which states:

"In addition, each such committee shall review and study any conditions or circumstances which may indicate the necessity or desirability of enacting new or additional legislation within the jurisdiction of that committee. * * *"

The objectives of this legislation are to provide limited financial relief for small business contractors caught in a price squeeze under fixed-price contracts with the Federal Government and to assist the Federal Government in obtaining a continued, assured supply of goods and services from reliable small business contractors at a minimal price.

With regard to subdivision (B), relating to the statement required by section 308(a) of the Congressional Budget Act of 1974, the following statement is made relative to the legislation:

The measure does not provide new budget authority or new or increased tax expenditures.

With regard to subdivisions (C) and (D), the committee advises that no estimate or comparison has been prepared by the Director of the Congressional Budget Office relative to any of the provisions of H.R. 5541 nor have any oversight findings or recommendations been made by the Committee on Government Operations with respect to the subject matter contained in H.R. 5541.

In compliance with clause 2(1)(4) the committee believes that the provisions of this legislation in and of themselves will have little, if any, inflationary impact on prices and costs in the operation of the National economy.

The committee estimates that there will be no substantial direct expenditure of additional Federal funds required by enactment of H.R. 5541. Although additional payments may be made to some contractors in certain situations, such payments may be fully or partially

offset by a savings of additional costs which the Government might incur if the goods and services had to be reprocurd at higher prices upon the contractor's default.

There will be some additional workload placed on agency procurement activities in order to process submissions for relief under the bill and, where modification or termination is found appropriate, to process the request for relief. Due to the time limits placed on eligible contracts, however, it is expected that this incremental cost can be borne within existing funds for agency procurement activities.

In your committee's opinion, the above statements fully comply with the Rules of the House of Representatives.

SECTION-BY-SECTION SUMMARY OF THE BILL

SECTION 1. Short title.

This section of the bill provides that upon enactment it may be cited as the "Small Business Emergency Relief Act".

SEC. 2. Statement of Congressional policy.

This section sets forth that it is the policy of Congress to provide relief to small business concerns which have fixed-price Government contracts in cases where such concerns encounter significant and unavoidable difficulties during performance because of the energy crisis or rapid and unexpected escalations of contract costs.

SEC. 3. Definitions.

Subsection (1) defines the term "executive agency" as an executive department (Departments of State; Treasury; Defense; Justice; Interior; Agriculture; Commerce; Labor; Health, Education and Welfare; Housing and Urban Development and Transportation); a military department (Departments of the Army, Navy and Air Force), and independent establishment (an establishment in the executive branch, other than the U.S. Postal Service or the Postal Rate Commission, which is not an executive department, military department, Government corporation, or part thereof, or part of an independent establishment), and a wholly owned Government corporation.

Subsection (2) defines the term "small business concern" as one which is independently owned and operated and which is not dominant in its field of operation and which is so defined by the Administrator of the Small Business Administration who shall make a detailed definition, using among the criteria, the number of employees and dollar volume of business.

SEC. 4. Authority to grant relief.

Subsection (a) of this section authorizes the head of an executive agency, upon the application of a small business concern, to terminate for the convenience of the Government, without cost to the small business contractor, or to make appropriate modification in the terms of any fixed-price contract between that agency and such small business upon a finding that (1) during the performance of the contract, the concern has experienced or is experiencing significant unanticipated cost increases directly affecting the cost of contract compliance, and (2) that the conditions which have caused or are causing such cost increase were, or are being, experienced generally by other small busi-

ness concerns in the market at the same time and are not caused by negligence, underbidding, or other special management factors peculiar to that small business concern.

Subsection (c) of this section requires a small business concern requesting such relief to support the request with the following documentation and certification:

- (1) A brief description of the contract;
- (2) A history of performance under the contract, and the contractor's expectations regarding completion thereof;
- (3) A statement of the factors which have caused the loss;
- (4) A statement as to the anticipated course of events if the request is denied;
- (5) A statement showing an accounting of payments received and to be received and information as to obligations of the Government yet to be performed under the contract;
- (6) A statement and evidence of the contractor's original breakdown of estimated costs;
- (7) A statement and evidence of the contractor's present estimate of total costs under the contract if enabled to complete;
- (8) A statement and evidence of the contractor's estimate of the final price of the contract;
- (9) A statement of any additional claims known or contemplated by the contractor against the Government involving the contract in question;
- (10) An estimate of the contractor's total profit or loss under the contract if required to complete at the original contract price;
- (11) An estimate of the contractor's total profits from all sources during the period from the date of the first contract involved to the latest estimated date of completion of any other contracts involved;
- (12) The contractor's certified balance sheets together with income statements; and
- (13) A list of compensation provided the principal officers or partners and of all dividends or other payments to stock holders in any form since the date of the first contract involved.

Subsection (b) of this section provides that if a small business concern in the performance of a fixed-price Government contract experiences or has experienced shortages of energy, petroleum products, or products or components manufactured or derived therefrom or impacted thereby, and if such shortages result in delay in the performance of a contract, the delay may be deemed to be an excusable delay under the terms of any default clause in the contract.

SEC. 5. Delegation.

This section provides that to the extent practicable the head of each executive agency shall delegate the authority conferred by this Act in order to permit the expeditious processing of applications for relief and to insure uniformity of the Act's application.

SEC. 6. Limitations.

Subsection (a) of this section provides that the authority of an executive agency to either terminate the contract for the convenience of the Government or to make appropriate modification in its terms shall apply only to contracts entered into during the period from August 15, 1971, through October 31, 1974.

Ninety-fourth Congress of the United States of America

AT THE FIRST SESSION

*Begun and held at the City of Washington on Tuesday, the fourteenth day of January,
one thousand nine hundred and seventy-five*

An Act

To provide for emergency relief for small business concerns in connection with fixed-price Government contracts.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "Small Business Emergency Relief Act".

POLICY

SEC. 2. It is the policy of Congress to provide relief to small business concerns which have fixed-price Government contracts in cases where such concerns have suffered or can be expected to suffer serious financial loss because of significant and unavoidable difficulties during performance because of the energy crisis or rapid and unexpected escalations of contract costs.

DEFINITIONS

SEC. 3. As used in this Act—

(1) the term "executive agency" means an executive department, a military department, and an independent establishment within the meaning of sections 101, 102, and 104(1) respectively, of title 5, United States Code, and also a wholly owned Government corporation within the meaning of section 101 of the Government Corporation Control Act; and

(2) the term "small business concern" means any concern which falls under the size limitations of the "Small Business Administrator's Definitions of Small Business for Government Procurement."

AUTHORITY

SEC. 4. (a) Pursuant to an application by a small business concern, the head of any executive agency may terminate for the convenience of the Government any fixed-price contract between that agency and such small business concern, upon a finding that—

(1) during the performance of the contract, the concern has suffered or can be expected to suffer serious financial loss due to significant unanticipated cost increases directly affecting the cost of contract compliance; and

(2) the conditions which have caused or are causing such cost increases were, or are being, experienced generally by other small business concerns in the market at the same time and are not caused by negligence, underbidding, or other special management factors peculiar to that small business concern.

(b) Upon application under subsection (a) by a small business concern to terminate a fixed-price contract between an executive agency and such small business concern, the head of the executive agency may modify the terms of the contract in lieu of termination for the convenience of the Government only if he finds after review of the application that—

(1) (a) the agency would reprocure the supplies or services in the event that the contract was terminated for the convenience of the Government; and

(b) the cost of terminating the contract for the convenience of the Government plus the cost of reprocurement would exceed the amount of the contract as modified; and

(2) Any such modification shall be made in compliance with cost comparison and compensation guidelines to be issued by the Administrator of the Office of Federal Procurement Policy. Such cost comparison and compensation guidelines shall be promulgated by the Administrator not later than 10 days after enactment of this Act.

(c) If a small business concern in performance of a fixed-price Government contract experiences or has experienced shortages of energy, petroleum products, or products or components manufactured or derived therefrom or impacted thereby, and such shortages result in a delay in the performance of a contract, the head of the agency, or his designee, shall provide by modification to the contract for an appropriate extension of the contract delivery date or period of performance.

(d) A small business concern requesting relief under subsection (a) shall support that request with the following documentation and certification:

(1) a brief description of the contract, indicating the date of execution and of any amendment thereto, the items being procured, the price and delivery schedule, and any revision thereof, and any other special contractual provision as may be relevant to the request;

(2) a history of performance indicating when work under the contract or commitment was begun, the progress made as of the date of the application, an exact statement of the contractor's remaining obligations, and the contractor's expectations regarding completion thereof;

(3) a statement of the factors which have caused the loss under the contract;

(4) a statement as to the course of events anticipated if the request is denied;

(5) a statement of payments received, payments due and payments yet to be received or to become due, including advance and progress payments, and amounts withheld by the Government, and information as to other obligations of the Government, if any, which are yet to be performed under the contract;

(6) a statement and evidence of the contractor's original breakdown of estimated costs, including contingency allowances and profit;

(7) a statement and evidence of the contractor's present estimate of total costs under the contract if enabled to complete, broken down between costs accrued to date of request, and runout costs, and as between costs for which the contractor has made payment and those for which he is indebted at the time of the request;

(8) a statement and evidence of the contractor's estimate of the final price of the contract, giving effect to all escalation, changes, extras, and other comparable factors known or contemplated by the contractor;

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(9) a statement of any claims known or contemplated by the contractor against the Government involving the contract in question, other than those referred to under (8) above;

(10) an estimate of the contractor's total profit or loss under the contract if required to complete at the original contract price;

(11) an estimate of the total profits from other Government business, and all other sources, during the period from the date of the first contract involved to the latest estimated date of completion of any other contracts involved;

(12) balance sheets, certified by a certified public accountant, as of the end of the contractor's fiscal year first preceding the date of the first contract, as of the end of each subsequent fiscal year, and as of the date of the request together with income statements for annual periods subsequent to the date of the first balance sheet; and

(13) a list of all salaries, bonuses, and all other forms of compensation of the principal officers or partners and of all dividends and other withdrawals, and all payments to stockholders in any form since the date of the first contract involved.

DELEGATION

SEC. 5. The head of each executive agency shall delegate authority conferred by this Act, to the extent practicable, to an appropriate level that will permit the expeditious processing of applications under this Act and to insure the uniformity of its application.

LIMITATIONS

SEC. 6. (a) The authority prescribed in section 4(a) shall apply only to contracts which have not been completely performed or otherwise terminated and which were entered into during the period from August 15, 1971, through October 31, 1974.

(b) The authority conferred by section 4(a) of this Act shall terminate September 30, 1976.

Speaker of the House of Representatives.

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

December 19, 1975

Dear Mr. Director:

The following bills were received at the White House on December 19th:

✓ H.R. 3474 ✓	✓ H.R. 8631 ✓
✓ H.R. 4073 ✓	✓ H.R. 10555 ✓
✓ H.R. 5541 ✓	✓ H.R. 10792 ✓
✓ H.R. 6461 ✓	✓ H.R. 11016 ✓
✓ H.R. 7862 ✓	✓ H.R. 11172 ✓

Please let the President have reports and recommendations as to the approval of these bills as soon as possible.

Sincerely,

Robert D. Linder
Chief Executive Clerk

The Honorable James T. Lynn
Director
Office of Management and Budget
Washington, D. C.

