**The original documents are located in Box 70, folder "10/23/76 S1437 Federal Grant and Cooperative Agreement Act of 1976 (vetoed) (1)" of the White House Records Office: Legislation Case Files at the Gerald R. Ford Presidential Library**

Pocket Vetoed
Aff. midnight 10/23/76
Memo of Disapproval issued 10/22/76

disapproved 10/22/76

THE WHITE HOUSE

WASHINGTON

October 20, 1976

ACTION
Last Day: October 23

MEMORANDUM FOR: THE PRESIDENT

FROM: JIM CANNON

SUBJECT: Enrolled Bill S. 1437 - Federal Grant and Cooperative Agreement Act of 1976

Posted 10/22/76

This is to present for your action S. 1437, a bill which would provide standards pertaining to the legal arrangements through which the Federal government acquires property and services and furnishes assistance to State and local governments and other recipients. The bill was sponsored by Senator Chiles (D) Florida and 12 others.

BACKGROUND

S. 1437 would establish three categories of legal agreements which the Federal government would be required to use in transactions with outside entities:

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

(2) Grant agreements, to be used when the agreement reflects a relationship with a principal public purpose and when no substantial involvement is anticipated between the Federal agency and the recipient.

(3) Cooperative agreements, to be used whenever there will be substantial involvement between the Federal agency and the recipient.

S. 1437 also requires the Office of Management and Budget to undertake a study of (a) alternative means of implementing Federal assistance programs and (b) the

feasibility of developing a comprehensive system of guidance for Federal assistance programs.

S. 1437 passed the House and Senate by voice vote.

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

ARGUMENTS FOR APPROVAL

1. The bill has the worthwhile objective of standardizing Federal contract and grant terminology in order to clarify the nature of the relationship between the Federal government and its contractors.

2. S. 1437 is a much needed initial effort to provide clarity in this complex area.

AGRUMENTS FOR DISAPPROVAL

1. The definitions and criteria provided in the bill to distinguish among categories of agreements are vague, inconsistent and inadequate.

2. This bill, which attempts to force thousands of transactions into one of three categories, may impair the flexibility necessary to administer Federal agreements.

3. The complete study of Federal assistance administrative processes should be completed before categories of assistance relationships are fixed.

4. Because of the extremely complex and changing nature of these programs, the criteria for categories of relationships should be left to actions of the Executive Branch which are more quickly adaptable to change than a Federal statute.

5. OMB has already completed a study in this area which has been reviewed by other Federal agencies and public interest groups. OMB has developed guidelines; has issued circulars implementing these guidelines; and is continuing its efforts in this area.

AGENCY RECOMMENDATIONS

Of the agencies contacted for recommendations by OMB, the Department of the Treasury, HEW and Agriculture recommend disapproval.

OMB recommends disapproval of the enrolled bill.

STAFF RECOMMENDATIONS

| | |
|---|---|
| Max Friedersdorf | "Recommend disapproval. Sen. Weicker has contacted White House with request President sign bill." |
| Counsel's Office (Kilberg) | "defer to OMB" |
| Steve McConahey | "S. 1437 is strongly supported by those advocating reform in the intergovernmental system, particularly the National Governors' Conference and the National Association of Counties. These groups believe that a strong Federal directive is needed in our 'non-system' of intergovernmental relations." |

RECOMMENDATION

I recommend disapproval of S. 1437. Although the legislation has a laudable objective, the bill would not fulfill this objective. Rather, because of the inflexibility and vagueness in its definitions, the bill would increase the confusion surrounding Federal assistance agreements. This objective of clarifying Federal assistance agreements can be best done within the Executive Branch.

DECISION

Sign S. 1437 at Tab B.

Veto S. 1437 and sign Memorandum of Disapproval at Tab C which has been cleared by Doug Smith.

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

OCT 18 1976

MEMORANDUM FOR THE PRESIDENT

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

Last Day for Action

October 23, 1976 - Saturday

Purpose

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

Agency Recommendations

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

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

Discussion

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

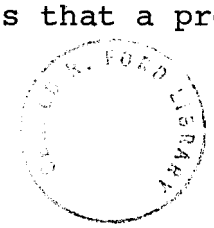
In commenting on the need for legislation to implement the Commission's recommendations, the Senate Government Operations Committee stated that Federal grant making outlays were increasing rapidly, that there were no uniform statutory guidelines to express the sense of Congress as to when grants should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

The bill passed the House and Senate by voice vote.

Summary of S. 1437

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

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



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

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

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

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

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

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

Other provisions. The bill would also:

-- repeal, one year after the date of enactment, the Grants Act of 1958;

-- provide that its provisions would not render void or voidable any contracts, grants, or cooperative arrangements existing or entered into up to one year after the date of enactment;

-- provide that a single relationship (i.e., grant, contract or cooperative agreement) between the Federal Government or a recipient would not be required in a jointly funded project if different relationships would be appropriate for different components of the project; and

-- authorize the Director of OMB to except individual transactions or programs from the application of the provisions of the bill for a period ending 180 days after Congress receives the OMB study described above (a point in time that could be 2 1/2 years from the date of enactment).

Agency Views

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

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

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

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

-- The criteria provided in the bill to determine whether or not a contract, grant or cooperative agreement is to be used are inadequate. For example, HEW states that the basic criterion by which to distinguish between procurement agreements and assistance relationships (i.e., whether the object of the instrument is a matter of direct benefit or use to the Federal Government) is insufficient; "the distinction to be derived between cooperative agreements and ordinary grants (i.e., substantial involvement) is also of questionable utility."

-- Establishing statutory criteria to govern the selection of the form of Federal assistance would impair the flexibility necessary in administering Federal research programs. In this regard, DOD states: "There are problems of definition which we feel will not allow us to continue the use of grants with universities for research of benefit to the Department of Defense... There are currently about 950 Department of Defense active grants with 150 institutions for a value of 950 million dollars. Changing a program of this magnitude to a contract operation would require a significant increase in administrative workload and a corresponding decrease in the manpower available for technical effort."

-- Statutorily mandating major changes in the Federal assistance administrative processes should be preceded, not succeeded, by a complete study of these processes. (USDA)

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

Recommendation

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

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

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

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

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

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

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

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

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

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

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

Paul H. O'Neill
Acting Director

Enclosures

# United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

OCT 8 - 1976

Dear Mr. Lynn:

This responds to your request for the views of this Department on the enrolled bill S. 1437, "To distinguish Federal grant and cooperative agreement relationships from Federal procurement relationships, and for other purposes."

We recommend that the bill be approved by the President.

S. 1437, cited as the "Federal Grant and Cooperative Agreement Act of 1976", is an attempt to eliminate ineffectiveness and waste resulting from confusion over the definition and understanding of legal instruments used to carry out transactions and reflect basic relationships between the Federal Government and non-Federal entities.

The bill authorizes executive agencies to enter into contracts, grant agreements, or cooperative agreements. It gives uniform discretionary authority to vest title to equipment or other tangible personal property when purchased by recipients with grant or cooperative agreement funds. It provides authority to make contracts for the conduct of basic or applied scientific research at nonprofit institutions of higher education. The bill also authorizes a two-year study to examine alternative means of implementing Federal assistance programs and to determine the feasibility of developing a comprehensive system of guidance for such programs.

Sincerely yours,

Acting Secretary of the Interior

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

UNITED STATES
ENERGY RESEARCH AND DEVELOPMENT ADMINISTRATION
WASHINGTON, D.C. 20545

OCT 8 1976

Mr. James M. Frey
Assistant Director for
Legislative Reference
Office of Management and Budget

Dear Mr. Frey:

The Energy Research and Development Administration (ERDA) is pleased to respond to your invitation to comment on the Enrolled Bill, S. 1437. This measure is cited as the "Federal Grant and Cooperative Agreement Act of 1976."

The purpose of this Act is to achieve uniformity among the agencies of the Federal Government in the use of grants, cooperative agreements, and contracts. This is indeed a laudable goal and one which this agency endorses. However, in reviewing the Act we note that some broadening of Section 7 might be in order in the future so that it would extend more generally to property and equipment purchased with Federal funds. We have also noted in our comments to the Congress that some refinement of the definitions of grant, contract and agreements for cooperation might be indicated.

On balance, ERDA feels that S. 1437 is a much needed and desirable initial effort to provide clarity in this complex area. We therefore recommend that the President sign into law the Enrolled Bill, S. 1437.

Sincerely,

for
Robert C. Seamans, Jr.
Administrator

National Aeronautics and
Space Administration

Washington, D.C.
20546

Office of the Administrator

OCT 8 1976

Director
Office of Management and Budget
Executive Office of the President
Washington, DC 20503

Attention: Assistant Director
for Legislative Reference

Subject: Enrolled Enactment Report on S. 1437, 94th Congress

This is an Enrolled Enactment report on S. 1437, "To distinguish Federal grant and cooperative agreement relationships from Federal procurement relationships, and for other purposes." It is submitted pursuant to Mr. James M. Frey's memorandum of October 6, 1976.

The Bill would place funding actions generally into two categories: (1) procurement relationships which are formalized by contracts and (2) assistance relationships which are formalized by grants or cooperative agreements. It would also repeal the Grants Act (72 Stat. 1793; 42 U.S.C. 1891 and 1892) and would direct the Office of Management and Budget to study Federal assistance programs with a view toward developing a comprehensive system of guidance.

NASA currently utilizes grants to obtain research from educational institutions where a less complex instrument than a contract is desirable. While this Bill was pending, NASA took the position that repeal of the Grants Act would impose an administrative burden on NASA and the universities with whom we deal and would afford us less flexibility in entering into grants for basic research with such institutions. While we still believe this to be true, the effects would not be so serious, from NASA's limited viewpoint, as to warrant our recommending disapproval of the Bill by the President. It is noted that NASA's authority in section 203(c)(5) of the National Aeronautics and Space Act of 1958, as amended, 42 U.S.C. 2473(c)(5), "to enter into and perform such contracts, leases, cooperative agreements, or other transactions as may be necessary in the conduct of its work and on such terms as it may deem appropriate ..." would not be repealed by the Bill.

In view of the foregoing, the National Aeronautics and Space Administration would not object to approval of the Enrolled Bill S. 1437.

James C. Fletcher
Administrator

THE SECRETARY OF TRANSPORTATION

WASHINGTON, D.C. 20590

OCT 8 1976

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

Dear Mr. Lynn:

You have asked for our views on S. 1437, an enrolled bill,

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

The bill would:

1. Require each executive agency, when entering a relationship with a State or local government or other recipient, to use a procurement contract as the legal instrument when the principal purpose of the relationship is to acquire property or services for the direct benefit or use of the Federal Governemnt.

2. Require each executive agency, when entering a relationship with a State or local government or other recipient, to use a grant agreement as the legal instrument when the purpose of the relationship is to transfer money, property, services or anything of value in order to accomplish a public purpose rather than acquiring property or services for the direct benefit or use of the Federal Government, and where there is no substantial involvement between the executive agency and the recipient.

3. Require each executive agency, where a grant agreement would otherwise be required, to use a cooperative agreement as the legal instrument when there will be substantial involvement between the executive agency and the recipient during the performance of the contemplated activity.

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

The bill contains the following provisions which are inconsistent or impractical:

1. Section 2(b)(1) states that the purpose of the bill is "to characterize the relationships between the Federal Government and contractors, State and local governments and other recipients..." By setting contractors apart from other recipients this language appears to establish a category of recipient entitled "contractors." Since state and local governments and other recipients, such as educational institutions, are eligible to receive contracts it would be incorrect to establish a separate category of recipient designated as "contractors." As written, this section could be interpreted to mean that state and local governments and other recipients can only enter into a relationship with the Federal Government which is established by an instrument other than a contract.

2. Section 2(b)(2) states that the government-wide criteria for selection of appropriate legal instruments are to achieve uniformity in the use by the executive agencies of such instruments. This implies that the criteria will result in total uniformity. This level of standardization is not practical and would not in all instances promote the efficient operation of government programs.

3. Section 2(b)(3) states that the purpose of the Act is to, "promote increased discipline in the selection and use of types of contract, grant agreement and cooperative agreements..." The reference to type of instrument is incorrect because the bill does not contain instructions on this subject, e.g., there are various types of contracts, including cost reimbursable and fixed price. The bill includes no directions regarding when it is appropriate to select one type over another.

4. Section 2(b)(3) establishes a requirement to maximize competition in the award of contracts. It is a well established requirement in Federal contracts to promote full, free and open competition. To reiterate this requirement in the proposed legislation serves little purpose and implies that it is a new, rather than a long-standing requirement.

5. Section 4(2) authorizes an executive agency to use a procurement contract whenever it determines one is appropriate. Sections 5 and 6 require that executive agencies "shall use" a grant or cooperative agreement in certain circumstances. Section 4(2) conflicts with Sections 5 and 6. The use of the words "shall use" effectively negates the option provided to executive agencies under Section 4(2).

6. Section 9(c) states that the Act does not require a single relationship between the Federal Government and the recipients in jointly funded projects. This would permit the award of grants, cooperative agreements and contracts to be combined under one project. The primary purpose of this proposed legislation is to eliminate confusion by clearly distinguishing the different relationships and identifying the substantive nature of each. We believe that combining the two relationships is contradictory to the bill's purpose and, on the basis of our experience, this dual relationship cannot exist in a single project. The Commission on Government Procurement characterized the procurement relationship as one involving "a basic arms length buyer-seller relationship" and the assistance relationship as that "of a patron or partner." We do not believe that the Federal Government and recipients can assume both roles in a single project. The likelihood of this occurring is further diminished by the fact that the basis for several agencies agreeing to participate in a joint funding project is that all support a common purpose.

> We do not believe a common purpose can be served where the recipient is simultaneously selling items to the Federal Government and receiving assistance to meet its objectives. In addition to the dual relationship problem, it would also be impractical to reconcile the differences between the regulations governing contracts and those governing grants in such areas as advance payments, property ownership, competition, remedies and third-party contracting.

The Department believes that certain provisions of the bill are inconsistent and impractical. However, the bill has only a small impact on this Department because the enabling legislation for our assistance programs is generally very precise as to which instrument is required, and because our activities in the area where the inconsistent use of legal instruments most frequently occurs, i.e., basic research, almost always call for using procurement contracts.

While our problems with the bill are minimal, there are several executive agencies that may have serious problems with its provisions. These agencies have extensive basic research programs under which there is a mutual sharing of the benefits between the agencies and the recipients. Under such programs, it is often difficult to decide whether the principal purpose of the relationship is to enrich the executive agency or the recipient performing the services. Certainly the views of these agencies should weigh heavily in deciding whether to sign the bill.

Therefore, we defer our recommendation on the bill to those submitted by agencies that will be seriously affected by its provisions.

Sincerely,

William T. Coleman, Jr.

Enclosure

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

OCT 12 1976

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: S. 1437, 94th Congress
Enrolled Enactment

This is in response to your request for our views on the enrolled enactment of S. 1437.

The bill would establish guidelines for executive agencies as to the circumstances in which they should use procurement type or grant instruments. It authorizes agencies to use the described types of instruments in the appropriate circumstances "notwithstanding any other provision of law". It also directs the OMB, in cooperation with the executive agencies, to study the feasibility of a comprehensive system of guidance for Federal assistance programs and to report the results of that study to the Senate and House Committees on Government Operations.

This Department has no objection to approval of S. 1437 by the President.

Sincerely,

Douglas M. Baker

for Robert R. Elliott

UNITED STATES OF AMERICA
GENERAL SERVICES ADMINISTRATION
WASHINGTON, DC 20405

October 12, 1976

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

Dear Mr. Lynn:

By letter of October 6, 1976, you requested the views of the General Services Administration (GSA) on enrolled bill S. 1437, "To distinguish Federal grant and cooperative agreement relationships from Federal procurement relationships, and for other purposes."

GSA has completed its review of this bill and offers no objection to presidential approval.

Sincerely,

Jack Eckerd

JACK ECKERD
Administrator

ADVISORY
COMMISSION ON INTERGOVERNMENTAL RELATIONS
WASHINGTON, D.C. 20575

October 12, 1976

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

Dear Mr. Frey:

This is in response to your request for the views and recommendations of the Commission on enrolled bill S. 1437, the proposed "Federal Grant and Cooperative Agreement Act of 1976." The Commission has not considered this bill. However, the thrust of Commission recommendations on Federal grant policies over the years is in agreement with the bill's general objective of bringing greater clarity to procurement and assistance relationships between the Federal government and State and local governments. Most recently, for example, in its current study, The Intergovernmental Grant System: An Assessment and Proposed Policies, the Commission stated its belief "that efforts must be continued to improve grant administration through such means as management circulars, measures to improve intergovernmental information and consultation, as well as procedures for strengthening state and local coordination and discretion."

Commission staff has examined the enrolled bill and is aware of OMB's concern that sections 4, 5, and 6 setting forth criteria for use of contracts, grants, and cooperative agreements might prove unworkable. In staff's judgment, the provision of section 8(3) for OMB to recommend statutory changes in sections 3 through 7 based on its study, and the authority for the Director of OMB to grant interim exceptions to the application of the provisions of the act should provide flexibility to enable the Administration to make the act work without undue hardship on any agencies or programs.

Thank you for the opportunity to review and comment on the enrolled bill.

Sincerely,

David B. Walker

David B. Walker
Assistant Director

NATIONAL SCIENCE FOUNDATION
WASHINGTON, D.C. 20550

OFFICE OF THE
DIRECTOR

October 12, 1976

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 communication of October 6, 1976, requesting the comments of the National Science Foundation on Enrolled Bill S. 1437, the "Federal Grant and Cooperative Agreement Act of 1976."

As indicated in our earlier reports on this bill, the Foundation believes that this bill may cause some problems and confusion because of the vagueness of the concept of "substantial involvement." Further, we are uncertain about the applicability of the distinctions contemplated by the bill to a research-supporting agency such as NSF as opposed to agencies involved in more traditional grant-in-aid or assistance programs. Nevertheless, we believe that we can function under the bill if it is administered in a reasonable manner.

In line with the above expression of doubts, we hope that if the bill is approved agencies will be permitted to implement its provisions in terms of their own programs and needs pending completion of the study required by Section 8 of the bill. In this connection, we may wish to request an exemption as authorized by Section 9 (d) of the bill. Assuming this is possible, we believe we could operate satisfactorily. We are hopeful that the study will lead to clarification of some of the ambiguities noted above.

Sincerely yours,

R.C. Atkinson

Richard C. Atkinson
Acting Director

DEPARTMENT OF AGRICULTURE
OFFICE OF THE SECRETARY
WASHINGTON, D. C. 20250

October 12, 1976

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

Dear Mr. Lynn:

In reply to the request of your office, the following report is submitted on the enrolled enactment S. 1437, an Act "To distinguish Federal grant and cooperative agreement relationships from procurement relationships, and for other purposes."

This Department recommends that the President disapprove the bill.

The bill establishes criteria for the selection of appropriate legal instruments (contracts, grants or cooperative agreements) by Federal agencies in the conduct of Government business. It also requires a study of the feasibility of developing a comprehensive system of guidance for carrying out Federal Assistance programs.

We do not disagree with the basic objectives of the bill. However, the reservations expressed in your statement at the Senate Committee hearings on the bill as summarized in the Committee report and stated below, accurately reflect the Department's continuing position that:

> "No matter how careful the drafting, an omnibus bill to force thousands of transactions into one of three categories may impair needed programmatic flexibility and will divert too many work hours into fitting programs into legislative definitions.
>
> In view of the extremely complex and changing nature of Federal assistance programs, categories of assistance relationships should be left to the executive branch to determine and implement.
>
> Cooperative agreements, as used now in actual practice, do not all fit the proposed definitions of the bill.

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

Also, our continuing position is that any study of the Federal assistance administrative processes as contemplated in Section 8 of this bill or in S. 3359 (Commission on Federal Aid Reform) as introduced in this last session of Congress should precede any legislatively mandated changes to these processes.

As we do not know at this time how this bill would be implemented, we are unable to estimate the cost of implementation to this Department.

Sincerely,

John A. Knebel
Acting Secretary

To the Senate:

I return herewith, without my approval, S. 1437, "An Act to distinguish Federal grant and cooperative agreement relationships from Federal procurement relationships, and for other purposes."

This bill establishes Government-wide criteria for the selection of appropriate legal instruments (contracts, grants and cooperative agreements) to achieve uniformity in the use by executive agencies of such instruments, a clear definition of the relationships they reflect, and better understanding of the responsibilities of the parties. The bill would also require a study of the relationship between the Federal Government and grantees and other recipients in Federal assistance programs and the feasibility of developing a comprehensive system of guidance for the use of grants and cooperative agreements and other forms of Federal assistance in carrying out such programs.

While the basic objectives of the bill are in accord with my views to eliminate Federal red tape on recipients of Federal programs, I am not convinced that this legislation will do that. On the contrary, it is likely to further confuse Federal contract, grant and agreement administrative processes by forcing thousands of Federal transactions into one of three categories eliminating needed programmatic flexibility, by wasting many Federal work hours fitting programs into legislative definitions and by forcing recipients of established programs to conform to constantly changing Federal administrative regulations and procedures. Further, cooperative agreements, as now used, do not all fit the definitions in the bill. There are also situations in research programs where it may be extremely difficult to distinguish between procurement and assistance.

Finally, if the study provisions in Section 8 of this legislation or a study as proposed by the American Bar Association and as contemplated in S. 3359 (Commission on Federal Aid Reform) introduced during this last session of Congress, are valid, it is my position that such studies should precede any legislatively mandated changes in Federal contract, grant or agreement administrative management processes.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

OCT 12 1976

The 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 a report on S. 1437, an enrolled bill "To distinguish Federal grant and cooperative agreement relationships from Federal procurement relationships, and for other purposes".

While we concur with the basic purpose of the enrolled bill--to provide standards and uniform procedures applicable to the legal instruments through which the Federal Government acquires property and services and furnishes assistance to State and local governments and other recipients--we believe the enrolled bill may create more problems than it resolves because it fails to draw clear distinctions as to the appropriate criteria for use of these instruments. We therefore recommend that the bill not be approved.

The bill would establish three categories of legal instruments which Federal agencies would be required to use for certain arrangements with outside entities:

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

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

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

Each Federal agency would be authorized and directed to enter into and use types of contracts, grant agreements, or cooperative agreements in appropriate situations as required by the enrolled bill.

The bill would also require the Office of Management and Budget to undertake a study of alternative means of implementing Federal assistance programs.

We question whether the definitions and criteria for use of each instrument, as established by the enrolled bill to characterize the various types of arrangements entered into by a Federal agency, are sufficiently explicit to allow us logically to select a proper instrument without creating additional confusion. */ For example, we enter into a number of technical assistance contracts, through which we procure the services of an outside entity (e.g. a university) to provide technical assistance to a third party (e.g. a community organization). Under the enrolled bill, this would not be a procurement contract because the primary purpose is not to acquire property or services for the direct benefit of the Federal Government.

*/ We also note that the division that is drawn between procurement contracts and grant agreements is not necessarily logical. While section 4 of the bill, relating to procurement contracts, speaks in terms of the "purpose of the instrument", section 5 relating to grant agreements, speaks in terms of the "purpose of the relationship".

Nor would it be a grant or cooperative agreement under the terms of the enrolled bill because the principal purpose is not to transfer property or money to a recipient. Applied social research is another example of an activity that would not be covered by the criteria established by the bill.

The distinction that the enrolled bill would seem to draw between procurement agreements and assistance arrangements would be whether the object of the instrument is a matter that is of direct benefit or use to the Federal Government. This criterion is not sufficiently definite to provide a useful basis for making a distinction with regard to many arrangements entered into by this Department.

The distinction that the enrolled bill attempts to draw between cooperative agreements and ordinary grants is also of questionable utility. In fact, the establishment of these two types of arrangements would create a further difficulty, since no means is provided for distinguishing between the two except the subjective criterion of whether there will be substantial involvement between the Federal agency and the recipient. Furthermore, where such continuing interaction is anticipated, it may well be more appropriate and advantageous to the agency to proceed through the procurement route rather than utilizing the somewhat more indefinite requirements that might apply to cooperative agreements.

The indefiniteness of the distinctions attempted by the enrolled bill could also have a serious result beyond the difficulties noted above. Section 9(b) states that the Act shall not be construed to render void or voidable any existing contract, grant, or cooperative agreement, or any such contract, grant or agreement entered into up to one year after the date of enactment of the Act. This provision appears to imply that, when the Act has been in effect for one year, any contract, grant, or cooperative agreement thereafter entered into may be void or voidable upon a determination that the choice of the instrument used, as between those three, was not the right one.

There is another problem of significance that we see in this bill. Although its provisions are directed generally to distinguishing between "procurement" type arrangements and those that are more in the nature of "assistance", "procurement" is nowhere defined. Although the bill would require that the legal relationship be denominated "procurement" if the purpose of the arrangement was as described in section 4, there is no suggestion what this may imply in the real world of government administration. If it is intended that the government procurement regulations shall govern the selection of the contractor for such "procurements" the bill should say so. If it does not mean this, it is impossible to divine the practical significance of the classification.

We also question whether the procedures which are mandated under the enrolled bill are necessary to accomplish the bill's objectives. The Office of Management and Budget has already gone some distance in attempting to accomplish those objectives through the issuance of circulars such as A-102 and A-110. Indeed, it would seem more appropriate for implementation of the criteria that are established by this bill to await completion of the study of Federal assistance programs that would be required under section 8 of the enrolled bill.

In conclusion, we do not believe that the enrolled bill will be useful in our attempts to standardize agency practices with regard to the use of grants and contracts. In fact, it may raise unnecessary questions as to the legal sufficiency of instruments used by Federal agencies to carry out routine functions. Moreover, it may interfere with and delay efforts to develop rational and standardized grant and procurement procedures that are already under way within this agency and the Federal Government as a whole. We therefore recommend that the enrolled bill not be approved.

Sincerely,

Marjorie Lynch

Under Secretary

DEPARTMENT OF THE AIR FORCE
WASHINGTON, D.C. 20330

OFFICE OF THE SECRETARY

13 OCT 1976

Dear Mr. Director:

Reference is made to your request to the Secretary of Defense for the views of the Department of Defense with respect to S. 1437, 94th Congress, an enrolled bill "to distinguish Federal grant and cooperative agreement relationships from Federal procurement relationships, and for other purposes." The Secretary of Defense has delegated to the Department of the Air Force the responsibility for expressing the views of the Department of Defense.

The purpose of this bill is to characterize the relationships between the Federal government and contractors, state and local governments, and other recipients; to establish Government-wide criteria for the selection of appropriate legal instruments to achieve uniformity in their use; to promote increased discipline in the selection and use of types of instruments and to encourage competition; and to require a study of the relationships between the Federal Government and grantees and other recipients and the feasibility of developing a comprehensive system of guidance for the use of grants and cooperative agreements and other forms of Federal assistance.

The Department of Defense supports the general purpose of the bill defining procurement and assistance, however there are problems of definition which we feel will not allow us to continue the use of grants with universities for research of benefit to the Department of Defense. Mission oriented basic research using grants as simple, effective and economical instruments was provided through PL 85-934. While the reason for mission oriented research has not changed, S. 1437 will repeal PL 85-934 leaving no way for the Department of Defense to use grants.

There are currently about 950 Department of Defense active grants with 150 institutions for a value of 950 million dollars. Changing a program of this magnitude to a contract operation would require a significant increase in administrative workload and a corresponding decrease in the manpower available for technical effort.

For the reasons stated above, the Department of the Air Force, on behalf of the Department of Defense, is still opposed to the Act in its present form. We defer to your judgement regarding possible veto action by the President.

This report has been coordinated within the Department of Defense in accordance with procedures prescribed by the Secretary of Defense.

Sincerely,

John Martin

JOHN J. MARTIN
Assistant Secretary
Research & Development

Honorable James T. Lynn
Director, Office of Management
and Budget

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OCT 15 1976

OFFICE OF THE
ADMINISTRATOR

Dear Mr. Lynn:

This letter is in response to your request of October 6, 1976, for the views of the Environmental Protection Agency on the enrolled bill, S. 1437, to be cited as the "Federal Grant and Cooperative Agreement Act of 1976."

The basic objective of this bill is to standardize Federal contract and grant terminology in order to clarify the nature of the relationship between the Federal government and its contractors, including State and local governments. The bill requires that executive agencies use the term "procurement contract" where the principal purpose of an instrument is the acquisition of property or services for the direct benefit or use of the Federal government. The term "grant agreement" is required to be used where the purpose of an instrument is the transfer of funds to a recipient in order to accomplish a public purpose authorized by Federal statute and no substantial involvement is anticipated between the executive agency and the recipient during performance of the contemplated activity. In the event that substantial involvement between an agency and the recipient is expected, the legal instrument would be defined as a "cooperative agreement." The bill also directs the Office of Management and Budget to study and report to the Committee on Government Operations of the Senate and the House of Representatives on alternative means of implementing Federal assistance programs and the feasibility of developing a comprehensive system of guidance for such programs.

The Environmental Protection Agency does not object to the signing of this bill, but we do see potential problems associated with its prospective application.

On the surface, the bill would appear to have a negligible effect on EPA grants in the short run since each executive agency is permitted to examine current assistance authorities and select the label determined to be applicable to the nature of the contractual relationship. The implementation of the bill, however, would involve a great deal of bureaucratic red tape. First, we expect some problems in identifying the category for each of the agencies' grants, publishing a proposed determination in the Federal Register, and taking comments on each of our numerous grant programs. Second, we anticipate considerable pressure from recipient States and contractors to use the "grant agreement" as opposed to the "cooperative agreement" category with the goal of eliminating the Federal supervisory role.

Although the intent of the legislation, the standardization of Federal contract terminology, is a laudable goal, we believe that the Congress could in the future use the terms established in this bill as a means of eliminating executive agency involvement, in the nature of guidance and supervision over the manner in which grant recipients implement EPA programs thereby altering the intent of previously enacted environmental legislation. For example, under the authority of the Federal Water Pollution Control Act (FWPCA), EPA currently exercises a substantial degree of involvement after the award of a construction grant for municipal sewage treatment facilities. Our supervision is necessary to insure that the intent of Congress as expressed in the FWPCA and other Federal statutes is carried out. Congress could, however, through an amendment to the Agency's authorities or authorizations limit EPA's role without focusing on the substantive impact of such a change by simply directing that the Agency's grants be in the nature of a "grant agreement" as defined in S. 1437. This would have the effect of eliminating EPA's supervisory role in the post grant period.

We, therefore, believe that S. 1437 may create unnecessary bureaucratic requirements and represents a possible step toward removing executive branch discretion in the administration of grant assistance programs.

Sincerely yours,

Russell E. Train
Administrator

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

U. S. DEPARTMENT OF LABOR

OFFICE OF THE SECRETARY

WASHINGTON

OCT 15 1976

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 our comments on an enrolled enactment, S. 1437, the "Federal Grant and Cooperative Agreement Act of 1976."

This measure is an outgrowth of the work of the Commission on Government Procurement, which reported several years ago that there was a need to clarify the various instruments used by Federal agencies in distributing money. As you pointed out in your testimony before the Subcommittee on Federal Spending Practices, Efficiency and Open Government, Senate Committee on Government Operations, in April of this year, there is no disagreement with the finding of the Commission on Government Procurement in this regard. You further noted, however, that accomplishing reform could best be done by administrative rather than legislative action, and that in any event, S. 1437 had some deficiencies which would need correction should the Congress proceed with legislation.

In its present form, S. 1437 would specify those situations in which "procurement contracts," "grant agreements," or "cooperative agreements" would be the instrument used to distribute Federal funds. The first category would be used where the funds were used for the attainment of something of direct benefit to the Federal government - i.e. for procurement. The latter two categories would be where funds are used for assistance, with cooperative agreements including substantial participation by the Federal government in the performance of the activity. The measure also provides for a two year study by OMB of Federal assistance programs, including agency experience under this measure, so as to provide the basis for further definition in this area if necessary.

We are not without concern as to the implementation of S. 1437 in this Department, for many of the same reasons described both in your testimony of last April and in the report of a special interagency study team which studied this measure. Nevertheless, given the present posture of the legislation as an enrolled enactment, after many years of study and discussion throughout the executive and legislative branches, we do not believe it appropriate to recommend a veto of this initial attempt to reform the Federal procurement and grant system. Provision is made for agency programs to be exempted by OMB from the requirements of S. 1437, and agency flexibility is contained in the enrolled enactment and its legislative history. We believe that these provisions would enable us to operate under the new requirements.

Therefore we would have no objection to Presidential signature of this measure, but would, as a result of your expertise in this area, defer to a veto recommendation if that is your judgment.

Sincerely,

W. J. Usery, Jr.

Secretary of Labor

ASSISTANT ATTORNEY GENERAL
LEGISLATIVE AFFAIRS

# Department of Justice
Washington, D.C. 20530

October 18, 1976

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 of the enrolled bill S. 1437, the "Federal Grant and Cooperative Agreement Act of 1976."

The bill distinguishes between grants and contracts and provides guidelines to Federal agencies on which form to use for certain results. Also established would be a new form entitled a "cooperative agreement". While the Department of Justice supports the basic objectives of the legislation, particularly provisions which deal with vesting of property, there are strong reservations regarding creation of the hybrid concept of a cooperative agreement.

The Department of Justice defers to the Office of Management and Budget as to whether this bill should receive Executive approval.

Sincerely,

Michael M. Uhlmann

Michael M. Uhlmann
Assistant Attorney General

THE GENERAL COUNSEL OF THE TREASURY
WASHINGTON, D.C. 20220

OCT 21 1976

Director, Office of Management and Budget
Executive Office of the President
Washington, D. C. 20503

Attention: Assistant Director for Legislative Reference

Sir:

This report responds to your request for the views of this Department on the enrolled enactment of S. 1437, "To distinguish Federal grant and cooperative agreement relationships from Federal procurement relationships, and for other purposes."

The intention of the enrolled bill is to categorize all relationships between the Federal Government and recipients in the acquisition of property and services and in the furnishing of assistance by the Federal Government as either "contracts", "grants", or "cooperative agreements". General revenue sharing is an entitlement not a grant and payments to State and local governments under title II of the Public Works Employment Act of 1976 are not considered to be grants. However, section 5 of S. 1437 which describes relationships in which a grant agreement is to be used, read in conjunction with the definition of "grant or cooperative agreement" in section 3(5), does not appear to exclude these programs that are administered by the Treasury Department.

Failure to except these programs from being termed "grants" for the purposes of S. 1437 could lead to questions being raised if they are not also subject to other provisions of law that are applied to Federal grant programs but which have not been applied to general revenue sharing.

To forestall any confusion that the enrolled enactment could raise concerning these Treasury programs, the Department would prefer it if the measure did not become law. Thus, we would support a recommendation that the enrolled enactment not be approved by the President.

Should the enrolled enactment be approved, it may be necessary for the Treasury to apply for the temporary exception under section 9(d).

Sincerely yours,

General Counsel

Richard R. Albrecht

GENERAL COUNSEL OF THE
UNITED STATES DEPARTMENT OF COMMERCE
Washington, D.C. 20230

OCT 19 1976

Honorable James T. Lynn
Director, Office of Management
and Budget
Washington, D. C. 20530

Attention: Assistant Director for Legislative Reference

Dear Mr. Lynn:

This is in reply to your request for the views of this Department regarding S. 1437, an enrolled enactment

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

cited as the "Federal Grant and Cooperative Agreement Act of 1976."

The purpose of the enrolled enactment is to clarify the distinctions between contracts, grants, and cooperative agreements. Toward this end, the bill provides criteria for the use of each of those respective types of agreements.

The Senate Report on S. 1437 states that the bill would provide that notwithstanding any other provision of law, an executive agency authorized by law to enter into any one of the three types of agreements may enter into all three. In our view, the language of the bill itself is less clear. Since the enrolled bill repeals 42 USC 1891, which authorizes agencies, including the Department of Commerce, to enter into grant relationships for scientific research where they have only substantive authority to contract for such, it is important to the Department of Commerce that the Committee Report interpretation be sustained.

While the enrolled bill could change the form in which several of the agencies in the Department of Commerce enter into business relationships, we do not anticipate that it will substantially affect the manner in which they do business or their ability to carry out their responsibilities.

We would hope that if the Office of Management and Budget undertakes the comprehensive study which will be required by the enrolled bill, we will have an opportunity to participate in the development of guidelines for the use of the various types of agreements.

The Department of Commerce has no objection to the President's approval of S. 1437.

Enactment of the enrolled bill would involve no expenditure of funds by this Department.

Sincerely,

General Counsel