FEDERAL GRANT AND COOPERATIVE AGREEMENT ACT OF 1976

HEARING

BEFORE A

SUBCOMMITTEE OF THE COMMITTEE ON GOVERNMENT OPERATIONS HOUSE OF REPRESENTATIVES

NINETY-FOURTH CONGRESS

SECOND SESSION

ON

H.R. 15499

TO DISTINGUISH FEDERAL GRANT AND COOPERATIVE AGREEMENT RELATIONSHIPS FROM FEDERAL PROCUREMENT RELATIONSHIPS, AND FOR OTHER PURPOSES

SEPTEMBER 13, 1976

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FEDERAL GRANT AND COOPERATIVE AGREEMENT ACT OF 1976

MONDAY, SEPTEMBER 13, 1976

HOUSE OF REPRESENTATIVES,
LEGISLATION AND NATIONAL SECURITY SUBCOMMITTEE
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, D.C.

The subcommittee met, pursuant to notice, at 11:05 a.m., in room 2154, Rayburn House Office Building, Hon. Jack Brooks (chairman of the subcommittee) presiding.

Present: Representatives Jack Brooks, John E. Moss, Benjamin S. Rosenthal, William S. Moorhead, Frank Horton, John N. Erlenborn, and Joel Pritchard.

Also present: Elmer W. Henderson, staff director; William M. Jones, general counsel; James L. McInerney and Richard L. Thompson, minority professional staff, Committee on Government Operations.

OPENING STATEMENT OF CHAIRMAN BROOKS

Mr. BROOKS. The subcommittee will come to order.

The hearing by the Subcommittee on Legislation and National Security has been called to consider H.R. 15499, a bill introduced by our colleague, Congressman Horton, and myself to distinguish Federal grant and cooperative agreement relationships from Federal procurement relationships. An identical bill, S. 1437, was passed by the Senate unanimously and is pending before the committee.

[The bill, H.R. 15499, follows:]

94TH CONGRESS
2D SESSION

H. R. 15499

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 9, 1976

Mr. BROOKS (for himself and Mr. HORTON) introduced the following bill; which was referred to the Committee on Government Operations

A BILL

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

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

FINDINGS AND PURPOSE

SEC. 2. (a) The Congress finds that—

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

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

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

(b) The purposes of this Act are—

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

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

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

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

DEFINITIONS

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

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

(2) "local government" means any unit of government within a State, a county, municipality, city, town, township, local public authority, special district, intrastate district, council of governments, sponsor group

representative organization, other interstate government entity, or any other instrumentality of a local government;

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

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

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

USE OF CONTRACTS

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

(1) whenever the principal purpose of the instru-

ment is the acquisition, by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government; or

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

USE OF GRANT AGREEMENTS

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

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

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

USE OF COOPERATIVE AGREEMENTS

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

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

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

AUTHORIZATIONS

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

(b) The authority to enter into grant or cooperative agreements shall include the discretionary authority, when it

is deemed by the head of an executive agency to be in furtherance of the objectives of such agency, to vest in State or local governments or other recipients, without further obligation to the Federal Government or on such other terms and conditions as deemed appropriate, title to equipment or other tangible personal property purchased with such grant or cooperative agreement funds.

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

STUDY OF FEDERAL ASSISTANCE PROGRAMS

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

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

of this Act, as may be deemed appropriate on the basis of the findings of the study.

REPEALS AND SAVINGS PROVISIONS

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

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

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

(d) The Director of the Office of Management and Budget may except individual transactions or programs of

any executive agency from the application of the provisions of this Act. This authority shall expire one hundred and eighty days after receipt by the Congress of the study provided for in section 8 of this Act.

Mr. BROOKS. H.R. 15499 will carry out two recommendations of the Commission on Government Procurement. That Commission was created by legislation reported from this committee and issued its report in 1973. Congressman Horton was an active member of that Commission as was Senator Chiles, the author of the companion Senate bill, and Comptroller General Staats.

The first recommendation was to enact legislation to distinguish assistance relationships as a class from procurement relationships by restricting the term "contract" to procurement relationships, and the terms "grant," "grant-in-aid," and "cooperative agreement" to assistance relationships, and also to authorize the general use of instruments reflecting the foregoing types of relationships.

The second recommendation was to urge the Office of Federal Procurement Policy to undertake or sponsor a study of the feasibility of developing a system of guidance for Federal assistance programs.

The bill before you seeks to clarify the distinctions between, number one, grant-type assistance, and, number two, procurement; and to distinguish between the classes of grant-type assistance by requiring each executive agency to use a contract, a grant, or a cooperative agreement which would reflect more precisely the relationship between the Federal Government and the recipient.

The bill authorizes executive agencies to enter into contracts, grants, or cooperative agreements and to use the instruments required. The bill further directs the Office of Management and Budget to undertake a study to develop a better understanding of alternative means of implementing Federal assistance programs and determining the feasibility of developing a comprehensive system of guidance for such programs.

This bill is basically technical, but its results should be extremely beneficial in properly and clearly determining the relationships between the Federal donor and the recipient and make for a general improvement in such relationships.

Our first witness this morning will be the Honorable Lawton Chiles; but first we have a statement by one of the authors of this legislation, a leader in this field, Congressman Horton.

Mr. HORTON. Thank you, Mr. Chairman. I want to welcome Senator Chiles before our subcommittee.

He was a very active member of the Procurement Commission, on which I also served. He has, probably more than anyone in the last few years since the Commission completed its work, been active in trying to carry out the recommendations of the Procurement Commission.

I want to take this opportunity to laud him and express appreciation for his leadership in the Senate and in trying to get through some of these very important pieces of legislation to carry out the recommendations of the Procurement Commission. I think they are very important recommendations.

The importance of this legislation is underscored by the fact that one-third of the Federal budget is spent through outlays on either procurement contracts, some $70 billion, or grants, some $65 billion.

This legislation would implement two key recommendations made by the Commission on Government Procurement resulting from our 2½-year study.

First: It provides uniform guidelines to distinguish and control the use of grants, procurement contracts, and cooperative agreements by Federal agencies based on the fundamental purpose of the transaction and what kind of relationship is expected between the Government and a recipient.

Second: It mandates a study which should lead to the development of a comprehensive system of guidance for Federal assistance programs.

I might add that the Paperwork Commission, of which I am a member and which I chair, and which is patterned after the Procurement Commission, has recently endorsed this legislation and supports the clarification of Federal recipient relationships through a standardization of legal instruments as one way of changing the causes of the redtape-paperwork problem.

The approach adopted in this legislation would clarify Federal relationships through the standardization of legal instruments rather than through organizational administrative coordination and fiscal relationships.

In addition, there is increasing evidence that a primary cause of excessive redtape and paperwork problems is the growth of large numbers of uncoordinated Federal assistance programs. This legislation would help to structure and organize management in Federal assistance programs, thereby improving management techniques so that paperwork can be reduced.

Mr. Brooks. Thank you very much.

I would say that our first witness this morning is the Honorable Lawton Chiles, a Senator from Florida, author of the bill. He steered it through the U.S. Senate.

He was born in Florida. He has a Bachelor of Science and a law degree from the University of Florida. He was an artillery officer in the U.S. Army during the Korean Conflict. He later served in both the Florida House of Representatives and the Florida Senate.

He has received a number of honors, the best of which was getting married and having four children. He was appointed a member of the Commission on Government Procurement. He is a dedicated father and an outstanding Senator. He was elected in 1970. He is running for reelection, we trust successfully.

Senator, we are delighted and honored to have you here. We welcome you to the Government Operations Committee.

STATEMENT OF HON. LAWTON CHILES, A SENATOR IN CONGRESS FROM THE STATE OF FLORIDA

Mr. CHILES. Thank you, Mr. Chairman, for your kind remarks. I also appreciate the remarks of Mr. Horton, who I did have the pleasure of serving with on the Procurement Commission.

Thank you also for providing me the opportunity to appear before this committee to testify in support of the Federal Grant and Cooperative Agreement Act during this late hour of the 94th Congress.

I am very delighted to have you, Mr. Chairman, as a cosponsor of the House bill along with Mr. Horton. If I get you both supporting this bill, it is going to have a tremendous amount of thrust behind it. Mr. Chairman, I would rather have Mr. Horton for me than against me anytime.

Mr. HORTON. I must interrupt to compliment you on your leadership of the sunshine bill. I understand the President is to sign the bill today at noon. I hope to see you down there.

Mr. CHILES. Yes, I do hope to see you down there.

The chairman's and this committee's reputation for contributions to better, more effective, and more efficient operations of Government are well known. In a time when so many of our citizens are concerned with the growth of Government control over our lives and the ineptitude and unresponsiveness of bureaucracy, the kind of tough, nuts-and-bolts work this committee must often perform to restore integrity and efficiency to the operations of Government deserves praise.

Let me speak to what the bill does. The Federal Grant and Cooperative Agreement Act would implement two key recommendations made by the Commission on Government Procurement that resulted from its 2½-year study.

The bill represents an initial step to eliminate ineffectiveness and waste resulting from confusion over the definition and understanding of legal instruments used to carry out transactions and reflect basic relationships between the Federal Government and recipients of contract and grant awards.

While approximately one-third of the Federal budget is allocated through outlays in procurement contracts—some $70 billion—and grants, which are $60 billion plus, no uniform statutory guideline exists to express the sense of Congress on when executive agencies should use grants rather than contracts.

The requirements contained in the bill are intended to prevent certain abuses—such as using grants to avoid the requirements of the procurement system—clarify some of the confusions, and reorder inconsistent practices that have resulted from the lack of central guidance.

The bill would do two things. First, sections 4, 5, and 6 provide uniform guidelines to distinguish and control the use of grants, procurement contracts, and cooperative agreements based on the fundamental purpose of the transaction and what kind of relationship is expected between the Government and a recipient.

The discipline the bill requires of the agencies should, No. 1, prevent the use of grants to bypass competitive and other requirements of the procurement system, and, No. 2, constrain the discretionary actions

of agencies and the redtape found in grant programs. It will be harder for agencies to bypass congressional intent in the arrangements they make with recipients.

Second, section 8 mandates a study that should lead to the development of a comprehensive system of guidance for Federal assistance programs. A well-conceived system would prevent uncoordinated and fragmented rules, regulations, and administrative requirements by Federal agencies.

In short, the bill requires a clear separation between Federal procurement and Federal assistance spending practices and initiates a beginning step in bringing some order and understanding to Federal assistance programs. The study provision recognizes that a comprehensive effort is needed to put all the pieces together into a big picture.

One other point about the bill's effect should be made. Section 7(b) authorizes the discretionary vesting of title in equipment or tangible property purchased with grant or cooperative agreement funds. Section 7(c) authorizes the discretionary vesting of title under contracts for the conduct of research at nonprofit research organizations and institutions of higher education.

Both these provisions evolved from the fact that the bill repeals Public Law 85–934, the Grants Act of 1958. The intent was to replace the authority to vest title in research projects provided in that bill.

Section 7(c) does nothing to change present law. In section 7(b), the discretionary authority to vest title was extended to uniformly cover all assistance programs, not just research programs. Presently, this question is treated separately by each of the hundreds of statutes which authorize individual programs. Some provide this authority; others do not.

The rationale behind this governmentwide uniform authorization was as follows:

The 1958 Grants Act had provided the authority because the Federal Government could often save money if it did not have to retain title and provide the administrative support systems to manage equipment bought with research funds.

By providing this authority on a uniform basis, the executive branch could provide governmentwide guidelines and more effectively manage the use of this discretionary authority. There would be an opportunity for more Federal savings and a governmentwide set of principles would enable the Congress to exercise better oversight of the use of this authority.

Mr. Chairman the need for this legislation is substantial. Federal grants to State and local governments alone have grown from $6.8 billion in 1960 to over $60 billion this fiscal year. Add grants to other institutions such as universities and individuals and the growth is even more apparent. The number of programs has also grown to where we now have approximately 1,000.

With increased spending and number of programs comes increased bureaucracy. It is the piecemeal, never-ending, incremental growth of bureaucratic actions that produces regulations, promotes redtape and overwhelms our citizens. Some of it is necessary for accountability purposes. But the irrationality of it all is unreasonable.

Organizing principles have to be introduced to the maze of agencies and programs we call our Federal bureaucracy. The Commission on

Government Procurement recommendations that are incorporated in this legislation are a necessary initial step to force some government-wide consistency and management discipline.

Some of the specific abuses that this bill would prevent are as follows:

Some agencies admit that they use grants instead of procurement contracts to avoid certain requirements such as advance payment justifications. Some program officials who have responsibility for negotiating and administering grants, but not contracts, tend to shift to contracts when they are busy in order to place the workload elsewhere.

Some agencies use more grants in June to obligate funds before the end of the fiscal year because grants are quicker to process than contracts. Figures show that in one fiscal year, the Department of Health, Education, and Welfare issued about three grants for each contract over the course of the fiscal year. But in June that ratio jumped to 7 to 1 while total outlays in grants and contracts exploded 800 percent—from an average of $300 million per month to over $2.4 billion in June. With the lack of congressional guidance and under circumstances such as these, the potential for the misuse of grants is enhanced.

HEW has acknowledged that many agencies use grants to obtain goods and services in direct support of agency operations. Specifically, grants instead of procurement contracts are being used to obtain consulting studies, technical assistance, collect data, perform surveys, studies, and training programs for agencies. These should be competed.

On the other side of the coin, we have found instances where procurement contracts are being used simply to avoid cost-sharing requirements of grants. Failure to distinguish between procurement and assistance relationships has also led to the adding of unnecessary redtape to grants. The Department of Labor, for example, has stopped managing some of its manpower programs to State and local governments as procurement contracts and now manages them as grants.

This bill should discipline Federal agencies to consciously decide what the principal purpose of a transaction will be and what requirements are or are not needed. In the absence of congressional guidance, agencies today are able to employ practices which give them administrative discretion not intended by Congress.

Let me make a few comments on the legislative history to this bill.

The Senate passed a similar bill in the 93d Congress unanimously. Due to the late hour the bill arrived in the House and the administration's position that more study was needed, the bill was not acted upon.

I reintroduced the bill in the 94th Congress. When Jim Lynn came before the Senate for his confirmation to the Director of the Office of Management and Budget, I asked him to give the bill a fresh look. My feeling was similar to that of Mr. Staats, the Comptroller General, when he expressed to this committee in his earlier testimony on this bill that the executive agencies would always resist change in this direction. They prefer the discretion they now have in the absence of congressional guidance.

At the time of my request to Mr. Lynn, the Procurement Commission had already spent 2½ years of study in developing the recommendations. Two interagency studies had endorsed the recommendations.

The General Accounting Office had strongly supported the bill. State government, private sector, and university witnesses had endorsed the bill. My committee had already worked with the administration to improve the bill, and the Senate had already passed the bill unanimously.

In May of 1975, the Director wrote me, in a letter I put in the Congressional Record, that he had reviewed the situation and had reached the conclusion that "OMB will not oppose similar legislation." He wrote that he had some remaining reservations and that an interagency study would be started to analyze and build upon the bill's criteria.

In June, a month later, a formal executive branch position of acceptance of the two incorporated Commission recommendations was published.

I thought progress was finally being made and in March and April we held hearings to update the record. The Governor's Conference, the National Association of Counties, and the American Bar Association came and endorsed the bill. Later, a consortium of 19 voluntary human service organizations, including such groups as the Red Cross, United Way, and the Urban League and the Federal Paperwork Commission endorsed the bill.

Mr. Lynn, however, came before the committee and changed his mind. He felt legislation was not desirable and preferred to meet the objectives of the bill through administrative steps.

I wrote the Director in June that I planned to move the legislation in committee and asked for any recommended changes. He wrote back, maintained his position that legislation was not necessary, and commented that a draft OMB circular would be circulated among the agencies in the following month and issued later this year. He further suggested that we wait yet another year and see what happens with the circular.

Mr. Chairman, I have had some recent experience with OMB circulars and the management side of OMB. The circulars can be important executive branch management tools, but they are not worth much if they are not taken seriously and steps are not taken to insure compliance.

The Governor's Conference folks and local county and city officials have mentioned to me their concern that when issues of intergovernmental management and leadership are raised, the "M" in this administration's OMB has been dropped, despite all the talk about cutting redtape and managing our Federal bureaucracy.

It comes as no surprise to me that I have heard nothing about any progress on the circular promised by the Director. I have learned that unless you look over their shoulder, very little in the management area, which is apart from budget functions, ever gets done. In this regard, what success we have had with the OMB situated Office of Federal Procurement Policy is due to the statutory mandate we, in the Congress, gave the administrator and the oversight we put that office through.

I should add that the committee did give the administration's reservations serious consideration and fully discussed them in the committee report accompanying the bill which again was passed unanimously by the Senate.

Briefly, they were as follows:

First: The bill might impair program flexibility and would add to the executive branch workload.

We asked for specific examples of where the bill might impose operational hardships. None of the examples provided were considered a problem.

As for the added workload, executive agencies are already making decisions on the choice of legal instruments. The problem is that each agency goes its own way. This bill merely establishes governmentwide standards. It is worth noting that the Paperwork Commission, of which Mr. Lynn is a member, endorsed the concepts within the bill as a means to reduce, not add to, the paperwork burden.

Second: The executive branch also argued that some transactions presently called cooperative agreements might not fit the criteria of the bill.

Again, we asked for the examples, looked at them, and determined that they did fit the criteria of the bill.

Third: The executive branch argued that there are instances in research programs where it is difficult to distinguish between procurement and assistance relationships.

The bill merely requires that agencies make a public statement about the principal purpose of the transaction. This is a broad, flexible requirement, not a narrow one. Agencies which have expressed this concern in the past presently use the Grants Act of 1958 to support basic research. We determined that use of that act could be classified as reflecting assistance relationships under the criteria of this bill. If it is not assistance, then the procurement system and its requirements for competition should be used.

Fourth: Mr. Lynn finally argued that legislation is not needed and is not important.

With all the work that has now been done, the Procurement Commission's study, the various interagency studies, the work of the General Accounting Office, the 8 days of hearings and committee work stretched out over two Congresses, the support and endorsement of nearly everybody but the executive branch, this argument just does not make sense. While the bill represents merely a first step, it is an important one of the Commission on Government Procurement's recommendations, this one, unlike many of the 147 others, was slated for statutory enactment.

In conclusion, Mr. Chairman, it has been 3½ years since the Procurement Commission issued its report. There has been no progress within the executive branch to actually implement the recommendations incorporated in this bill. The problems this bill addresses are growing, not diminishing. I think the Congress has been patient enough. It is time to take this step.

Mr. BROOKS. I want to thank you for a very splendid statement. I want to ask you a couple of questions, Senator, while you are here.

Is there anything you would like to say about the need for this legislation that you have not already covered in your statement?

Mr. CHILES. We are talking about one-third of the Federal budget which has no systems of controls. This bill is a first, but very necessary step.

Mr. BROOKS. Why is the administration a little bit cool toward this legislation?

Mr. CHILES. I guess there are two reasons.

One: I think, Mr. Chairman, is that they always would rather fix it administratively. That is the answer that we keep getting. I think we have almost gotten that answer on every one of the procurement recommendations that we first tried to push. They say that it's good, they are for it, they can do it. They want to handle it administratively. But we never seem to see it getting done.

Mr. BROOKS. They do not object to the objective.

Mr. CHILES. No, they certainly do not.

The other hesitancy is that they still want the discretion. Some of the agencies themselves would much rather be able to deal flexibly with these things so that they can, at the end of the year, put grant money out a lot faster than they can contract money out.

When they want to get rid of their money, they would like to have the flexibility of being able to shell it out in the way of grants. They also can have more direction of who this money is going to go to. If it is going to be a contract, there has got to be a little more competitive situation as opposed to a grant, where you can streamline who you are going to give it to. So I think that flexibility is something they would like.

Mr. BROOKS. Maybe we should pass this bill quick while there is some indecision there; we might get this guideline set up.

Mr. CHILES. I think that certainly cuts both ways, Mr. Chairman; to anybody that happens to be in power, it would be better if you had some uniform basis of doing it.

Mr. BROOKS. Are there any special problems that the use of these three clearly defined categories may present to Federal agencies or recipients?

Mr. CHILES. I cannot find any problem with the agencies. I think they will have to do a better job at answering the tough question of what kind of relationship they expect that they are entering into. I think they ought to have to make that decision on the front end rather than put the money out first and then determine.

The administration kept trying to find particular grants that they said would not fit into the categories. They kept saying that they think this will give us a problem. We kept asking where? Everyone that they came up with, it fit very precisely into one of the categories or the other, either as a contract or as a grant.

For the recipients, I think most of them definitely would be helped. They sort of get a truth-in-labeling law. Also, they know what they are getting into. They know whether they are getting this money primarily for their benefit or whether they are supposed to be furnishing something back to the Federal Government.

I am sure that State and local governments will be helped as far as paperwork goes. They very much like it. Some of the nonprofits would like it a little bit better, maybe, if they have a particular streamlined relationship with some agency. There would be a flexibility here that they could go grant or contract.

Other than that—and I do not see a valid reason for that—I do not think there should be any problems.

Mr. BROOKS. Senator, in section 7(b) of the bill, you include the discretionary authority to vest title in personal property acquired

with grant funds in the grantee. It would vest in State or local governments or other recipients without further obligation to the Federal Government, title to equipment or other tangible personal property.

I know we had discussed this. I had some problem about it. As I understand it you would not object to an amendment that would strike——

Mr. CHILES. Sir, we made it just a little bit broader than the present act. We had to have some language in that. Right now, as I recall, they have the discretionary authority with your universities for basic and applied research to vest this title in them if they want to. If they are giving a centrifuge or something like that and they think it would be problematic to take it back at the end, the agency now has that authority.

We broadened that out a little bit more to give the agency the discretionary authority. If the chairman in his wisdom thinks that is too broad, we would have no objection.

Mr. BROOKS. We keep the basic authority on page 7 on line 18 where the authority is to make contract. That is retained.

Mr. CHILES. That would trace the existing law.

Mr. BROOKS. I wanted to let you know that I had some second thoughts about that. We have been over it with your staff. I do not think they object too badly.

The language would just strike that language from page 7 and leave the next paragraph in section 7.

Mr. CHILES. Yes, sir.

Mr. BROOKS. I have no further comments.

Mr. Horton?

Mr. HORTON. Thank you, Mr. Chairman.

I want to underscore what Senator Chiles said with regard to the administration's opposition to some of the recommendations of the Procurement Commission.

For example, they were not in favor of us statutorily setting up the Office of Federal Procurement Policy. But ultimately they did come along with us. In a way, they have been brought into this kind of kicking and screaming.

But they do in essence support the concept of the recommendations of the Commission and the concept in this legislation. For some reason or other, they are reluctant to have it done statutorily.

I really think it is better that the Office of Federal Procurement Policy was established as we did establish it, rather than have it done administratively. I just do not think it would have worked as well.

Mr. CHILES. I think it has some teeth because of the way we set it up. I think now the people in OMB as well as the President agree with that.

Mr. HORTON. I think that is true. That is the point I was going to make. Now that the Office of Federal Procurement Policy has been established, I think that OMB and the administration feel that it is a very important office. They feel that it is an excellent office and that it is doing a good job.

I think that will be the same situation with regard to this legislation.

Would you comment on the importance of this legislation and the thoughts of the Procurement Commission with regard to this legislation? The Procurement Commission as I recall felt that this was a

very important recommendation. It is very important to the overall procurement policy that this type of legislation be adopted.

Mr. CHILES. Yes, sir, because it is such a growing field. There are over a thousand programs now. It has gone from $6.8 billion to over $100 billion going to State and local governments.

By virtue of the way the money is going, there has to be some kind of formal control on it as to when you are going to use a grant and when you use a contracts.

There are basic differences, as we know. We need a start. This legislation is a start. That is why it requires additional study.

If you are going to give out some money, and the primary purpose for putting that money out is to help the recipient, then you use a grant. On the other hand, if you are seeking something back for the Federal Government, that you expect the Federal Government to have some proprietary interest in, then you should use a contract. That is the way to protect the Federal Government's interest. It is the way, again, to handle this.

In setting up a procedure this way, where the Government is going to get something back, in most instances we want to see some sort of competition for what the Government is going to get back. The way to do that is by use of the contract and the instruments that go with that.

On the other hand, if it's primarily for the benefit of the recipient, then we will allow the procedure of the grant.

This, I think, was the Commission's feeling. It is part of the whole process of procurement and a very important part. Many times, people just look at what the Government buys by virtue of just the hardware that they buy. But now we are seeing that this item is getting as big, in a monetary sense, as the purchases that we are making in weapons systems and hardware. There has to be some kind of way of controlling that.

Mr. HORTON. I appreciate your statement. I think you have pretty well covered it in your statement to the committee.

Again, I want to express appreciation to you for your leadership in trying to carry out the recommendations of the Procurement Commission. This legislation is the result of one of the important recommendations of the Commission.

We did make recommendations for administrative changes and also for legislative changes.

Mr. CHILES. Yes, sir.

Mr. HORTON. The Commission recommended this by way of legislative change rather than administrative change. That is another supportive point, I think, in trying to do it legislatively.

Mr. CHILES. One of those reasons was, if we do it with a legislative change, then it really sort of puts a flag on it for the Congress; and we are going to oversight it more carefully.

Mr. HORTON. Thank you.

Mr. BROOKS. Thank you very much.

Mr. Rosenthal?

Mr. ROSENTHAL. I have no question, Mr. Chairman, although I do want to commend Senator Chiles for a very original and creative, thoughtful presentation. I thoroughly agree that it is a very useful piece of legislation. I am pleased to have the opportunity to support it.

Mr. CHILES. Thank you very much, sir.

Mr. BROOKS. Mr. Erlenborn?

Mr. ERLENBORN. Thank you, Mr. Chairman.

Thank you, Senator. We are pleased to have you here this morning. I want to thank you for your presentation.

I have one or two short questions.

I notice that the act which is now in effect, called the Grants Act, will be repealed by this legislation.

I am not familiar with that act. Could you tell me, is it long, complicated, involved, establishing relationships between the Federal Government and grant recipients?

Are we just simplifying or are we basically changing that legislation?

Mr. CHILES. I think what we are doing is making it uniform. That Grants Act authorized the use of grants for applied and basic research. In any part that we are repealing with that act, we are picking up in this. So I do not think we are leaving a hiatus by doing that.

I think we are making a more uniform process here than the original Grants Act. We are now dealing with contracts, and we are dealing with more than the basic and applied research.

Mr. ERLENBORN. Would the passage of this legislation, in your opinion, cause a change in the relationship between the Federal Government and current grant recipients that some of them might be performing under contracts rather than grants? In other words, would we continue the same relationship, or would this cause a change?

Mr. CHILES. There could be a change in the relationship between some of the parties in that some of the work that is now being done under grants definitely should be done under contracts.

It is interesting because, if you look back in the history of this, you will find sometimes the same recipient getting a contract, then getting a grant, then getting a contract for basically the same thing that he is doing. It depends sometimes on what time of year he gets them. If it is getting close to the end of the year, everything starts coming out in grants.

In other instances you will find one recipient getting a contract for something and someone else getting a grant for exactly the same thing.

There could be a change. A person who has been getting it by grants may now have a contract instrument.

Just because it is a contract does not mean that there are reams of additional paperwork. There are all sorts of short forms on the contract.

Basically what we are saying is this. How can you start off with a simple first step?

If you will just talk to your State and local government people, they will tell you they tear their hair out at the paperwork and everything they have to go into.

So the whole thing is much more than what we are dealing with in this bill. But we are trying to take that first step of saying that if it is going to be primarily for the benefit of the recipient, then use a grant. If it is primarily for the benefit of the Federal Government, then use a contract.

Mr. ERLENBORN. Have you studied the question of how much we would be extending, if at all, the application of the Walsh-Healey Act or the Service Contracts Act as a result of changing from grants to contracts?

Mr. CHILES. No, sir. I cannot say that we have.

Mr. ERLENBORN. Would you know what implication there might be for the proposed extension of the Service Contracts Act to white-collar workers rather than just blue collar workers? A bill to that purpose is now being acted upon in the House.

Mr. CHILES. No, sir, I do not. Under this, I do not know that we will get into that problem.

There is a contract and there is a grant, but it is a little different, I think, from a bid situation.

Mr. ERLENBORN. It is something the committee might want to look into because the application of Walsh-Healey and the Service Contracts Act might be extended considerably if we change any large number of grant forms to contract forms as a result of the passage of this.

Thank you very much.

Mr. BROOKS. Mr. Pritchard?

Mr. PRITCHARD. I have no questions, Mr. Chairman. It is nice to see the Senator here.

Mr. CHILES. Thank you, sir.

Mr. BROOKS. Senator, I want to thank you very much for the fine presentation. I appreciate your being here today.

Mr. CHILES. Thank you, sir.

Mr. BROOKS. The next witness is Mr. Ahart of the U.S. General Accounting Office.

He is not only a certified public accountant, he is an attorney. He joined the GAO in 1957. He is Director of the Human Resources Division of GAO since 1972.

Mr. Ahart, we are delighted to have you here.

Without objection, your prepared statement including the attachment will be inserted in the record.

STATEMENT OF GREGORY J. AHART, DIRECTOR, HUMAN RESOURCES DIVISION, U.S. GENERAL ACCOUNTING OFFICE

Mr. AHART. Thank you, Mr. Chairman. I am pleased to be here this morning to present the views of the General Accounting Office on this legislation.

We testified on a similar bill in the Senate in July 1974 and before this committee in November 1974. We supported this legislation on those two occasions. We support it now, basically for the reasons which were offered by the Procurement Commission in support of those recommendations.

We believe that enactment of the bill in its present form would be a significant step forward and that the study called for in section 8, which would address matters set forth in the relevant part of the Commission's report, should set the basis for further significant progress.

That is very briefly our position, Mr. Chairman. I would be happy to respond to any questions you or other members of the subcommittee may have.

Mr. BROOKS. Thank you very much for a good statement.

Has GAO's own experience in auditing Federal assistance and grant programs supported the need for these categories?

Mr. AHART. Yes, Mr. Chairman. We have seen confusion between the grant and contract categories. We feel that this would define the relationships, call for the proper instrument to be used, and the proper rules and procedure for the awards.

Mr. BROOKS. Thank you.

Mr. Rosenthal?

Mr. ROSENTHAL. No questions, Mr. Chairman.

Mr. BROOKS. Mr. Horton?

Mr. HORTON. Mr. Chairman, I just wondered if Mr. Ahart could indicate to us any estimate of potential savings that might result from this legislation.

Mr. AHART. We do not have an estimate, Mr. Horton. I think when we talk about savings, there is some room for opportunity for savings here, if you go the competitive route on contracts as opposed to grants in certain situations. I do not know what that would be.

I think also if you use the proper procedures in awarding contracts and go through a competitive process and have technical as well as price competition, you might well see an improved product for the Government.

Mr. HORTON. I do not want to speak for the Comptroller General, but perhaps you can. He was a member of the Procurement Commission and personally very much interested in this matter.

Can you make any comment with regard to his personal interest in this particular legislation?

Mr. AHART. Yes, I certainly can, Mr. Horton. But for the fact that he is out of town, he would be here today I am sure and speak for himself.

He is strongly supportive of this legislation. He draws his support for it both from his experience as Comptroller General and his past experience as the Deputy Director of the former Bureau of the Budget, where he saw these same kinds of problems operate in the executive branch.

Mr. HORTON. Thank you very much.

Mr. BROOKS. Mr. Erlenborn?

Mr. ERLENBORN. Mr. Ahart, you heard the question I asked of Senator Chiles about the extension of the application of Walsh-Healey and the Service Contract Act.

Have you examined this at GAO and would you be able to respond?

Mr. AHART. No, we have not examined it, Mr. Erlenborn. I did give some thought to it after you posed the question to the senator.

On the basis of my knowledge of those acts, I would not see that there would be any very large change. To the extent that there is change, it would seem to me that by using contracts where that is appropriate and bringing those acts to bear where the rules call for it would be nothing more than bringing the will of the Congress in the enactment of the Service Contract Act and the Walsh-Healey Act to bear in those situations where you have a contract and should have a contract relationship.

Personally, on the basis of short thought, I would not be very concerned about it.

Mr. ERLENBORN. I do not know how it is going to be resolved, but I think you are aware that the Service Contract Act coverage is now in question as a result of a court decision that said that it was intended to and does apply only to blue collar workers. There has been a broader application in the past by the Department of Labor. There are now legislative attempts to expand clearly in the language of the legislation its application to white collar workers.

We get into this area of research. If more research is carried on by way of contract than grant as a result of the passage of this act, might not the combination of these circumstances that I have outlined mean there would be a good deal of effort spent by the Labor Department in determining area wages and so forth, and possible interference in the research laboratory with the wage levels of research assistants and others that would be clearly white collar rather than blue collar workers?

Mr. AHART. As I say, we have not studied the matter specifically, particularly not in the light of the legislative changes now being proposed.

If the subcommittee would wish, we would be glad to look into it to some degree and come back to the subcommittee with a statement.

Mr. ERLENBORN. I personally would appreciate it if you could do that. I do not know if we intend to move this legislation out of subcommittee today; very likely, we will. But before the matter is before the full committee, I would like to have some estimate of the impact of this act on those two existing acts.

Mr. BROOKS. That would be helpful for the full committee.

[The information follows:]

During our testimony on September 13, 1976, regarding H.R. 15499, the bill to distinguish Federal grant and cooperative agreement relationships from Federal procurement relationships, we were asked to comment on the bill's potential effect on the coverage of the Service Contract Act, 41 U.S.C. 351 et seq. ("SCA"). The SCA prescribes minimum wage and working conditions for service employees used to perform any Government contract in excess of $2,500, the principal purpose of which is to furnish services.

The Commission on Government Procurement, whose recommendations are reflected in H.R. 15499, found a great deal of confusion and a lack of centralized guidance in distinguishing between grant type assistance relationships, where the Federal Government is principally interested in fostering local programs, and procurement, where the Government is purchasing goods and services for its own use. Thus the Commission found that grants and contracts were often used interchangeably by Federal agencies for similar purposes, the decision on which to use being based on such considerations as the statutory authority of the agency, the agency's workload, and the time of year.

The SCA, as noted, applies only to Government contracts. Thus service employees under grant arrangements are denied such protection as may be available under the SCA.

It would appear from the Procurement Commission's findings that in the past many agencies have used grants where procurement of services for a Government purpose is the end result. This would have resulted in employees losing benefits they might have obtained if the arrangement had been designated a contract, and in effect frustrating the intent of the SCA.

Under the above conditions, it is possible that H.R. 15499, if passed, would increase the coverage of the SCA, since it would theoretically result in greater use of contracts where grants are now the preferred devices.

On the other hand, some agencies may resort to grants where they now use contracts, since section 7 of the bill provides authority for all agencies to use grants, cooperative agreements and contracts wherever appropriate under the standards set out in sections 4, 5 and 6.

Where agencies have been using contracts for purposes more suited to grants or cooperative agreements, a shift to the latter devices pursuant to the restructuring proposed in H.R. 15499 would result in a shrinkage of SCA coverage.

In any event, to the extent that the bill forces agencies to use contracts in situations where that instrument is appropriate, and vice versa, the effect will be merely to bring into play those mechanisms and protections that the Congress has determined should be applicable to the type of instrument involved, including those called for by the SCA. Thus the protections afforded will flow from the nature of the Federal/non-Federal relationship, as they should, rather than be dependent upon the administering agency's discretionary choice of instruments.

It may be that the reshuffling of legal arrangements pursuant to H.R. 15499 would result in an equal number of grants becoming contracts or vice versa. This would mean no net increase or decrease in the number of employees covered by the SCA.

Ultimately, the purpose of H.R. 15499 is to reduce the confusion in Federal procurement—assistance relationships. This might have an incidental effect on the number of persons covered by the SCA, but it is difficult now to assess the magnitude of that effect.

We were also asked how the proposed amendments clarifying the applicability of the SCA to white collar workers (such as H.R. 13661, H.R. 14987 and S. 3736) would impact on researchers and research assistants under grants and contracts covered by H.R. 15499.

To the extent that the SCA amendments would bring researchers and research assistants under the coverage of the Act, they would be affected in the same way as other service employees by any reorienting of legal arrangements, resulting from the passage of H.R. 15499. That is, since the bill tells agencies when to use grants and contracts, and the SCA covers only the latter, the bill could affect SCA coverage of certain employees. However, the SCA amendments deal with the type of employee, rather than the type of arrangement, covered by that Act. Thus, once again, any interrelationship between H.R. 15499 and the SCA amendments would be coincidental.

Similar concern was expressed concerning the application of the Walsh-Healey Act (41 U.S.C. 35–45). Although, as in the case of the SCA, there might be some coincidental effect, since this act applies to supply contracts, which for the most part have presumably been considered procurement transactions in the past, this effect, if any, should be minimal.

Mr. BROOKS. Mr. Prichard?

Mr. PRITCHARD. No questions.

Mr. BROOKS. I want to thank you very much, Mr. Ahart. We appreciate your statement, your comments, and your cooperation.

Without objection, I will accept for the record a statement from Paul H. O'Neill, Deputy Director of the Office of Management and Budget. It has an attachment which is a statement of James T. Lynn, Director, Office of Management and Budget.

[The material follows:]

PREPARED STATEMENT OF PAUL H. O'NEILL, DEPUTY DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET

H.R. 15499 A BILL TO DISTINGUISH FEDERAL GRANT AND COOPERATIVE AGREEMENT RELATIONSHIPS FROM FEDERAL PROCUREMENT RELATIONSHIPS AND FOR OTHER PURPOSES

We appreciate this opportunity to present the views of the Office of Management and Budget on H.R. 15499. Since Mr. Lynn testified on a similar bill on April 5, 1976, before the Senate Subcommittee on Federal Spending Practices, Efficiency, and Open Government (copy of his statement attached), this statement is limited to some basic points which we think the Congress should address carefully in considering the merits of H.R. 15499.

First, the overall objectives of H.R. 15499 are laudable and have never been a matter of dispute. Everyone who has testified to date has expressed support for the idea of developing clearer distinctions between procurement and assistance type relationships, providing recipients of Federal assistance with a better understanding of the nature and degree of Federal involvement in the administration

of federally supported programs, and the need for continuing to develop a more comprehensive system of guidance governing Federal assistance programs. From a broad, conceptual perspective, it is not surprising that most witnesses, including OMB, would endorse such goals.

At the same time, according to the bill, OMB would be responsible for developing specific guidelines to carry out the various provisions of the bill. Based on our analysis, we have found a substantial gap between the existence of a broad consensus on the need to better distinguish between and among procurement and assistance type relationships (as originally proposed by the Commission on Government Procurement) and our collective ability to date to develop the type of definitions and requirements to carry out these objectives. The universe of Federal assistance programs and activities is extremely broad and complex and does not lend itself to being characterized under two or three basic definitions. That is not to say we shouldn't proceed with the effort to bring about a clearer understanding of these various types of relationships, but it does suggest a good deal of caution before enacting legally binding requirements in this area. This was the basis for Mr. Lynn's earlier comments regarding the wisdom of implementing selected features of the bill administratively, gaining more practical experiences with potential problem areas, and assessing the need for legislation based on that experience. I should also point out that we are proceeding with that approach and have been working on a draft OMB circular to provide guidance to the departments and agencies. The draft is being reviewed now at the staff level within OMB and selected agencies, and should be ready for agency review by the end of this month. We will certainly work with both the House and Senate Committees to provide you and your staffs with a full opportunity to comment on the circular at whatever point you deem appropriate.

We recognize that there has been considerable testimony in favor of proceeding with the bill as written, including supportive statements from the Comptroller General and others who pointed out the advantages of statutory guidance as a means of gaining the attention of the executive branch and assuring systematic compliance. Neither the Director nor I would argue with that line of reasoning. However, we have pointed out very specific, concrete problems affecting our ability to implement the bill as written. For example:

Distinction between procurement and assistance relationships

Section 4(1) of the bill states that a procurement contract be used whenever the principal purpose of the instrument is the acquisition by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government.

However, there are instances in research programs where the Federal agency expects the other party to perform some fairly specific task which will benefit the agency, but the two parties are jointly defining the task as work progresses and a substantial degree of flexibility to modify the agreement is needed.

I think what we want here is flexibility to do what makes sense—not to force all transactions into neat, preconceived molds which contribute nothing to improving program administration. I also think that was the clear intent of Congress in passing the Grants Act (P.L. 85–934) which provides just such flexibility for research programs. Accordingly, we believe that the Grants Act should be retained, but H.R. 15499 would repeal it one year after enactment.

Use of cooperative agreements

Section 6 of the bill states that Cooperative Agreements are required for assistance programs when substantial Federal involvement is anticipated.

Cooperative Agreements are most frequently used now when a Federal agency and a non-Federal organization entered into a relationship in which there is substantial direct benefit to both. Both parties normally participate, work, or support each other in fulfilling each other's operating mission and share in the work results. A good example is providing firefighting services in Federal and State forest preserves. There could be elements of both procurement and assistance, but the transaction does not neatly fit either category exclusively. Therefore, we continue to feel that such agreements should be considered as a major category of relationships.

Study of Federal assistance programs

Section 8 of the bill requires OMB to perform 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 within two years after the enactment of the Act.

In the Director's testimony before the Senate in April, he pointed out that the requirements of Section 8 are really continuing responsibilities of the Office of Management and Budget rather than a one-time effort as the bill implies. We also have some reservations about the effect of this bill in reordering the priorities within OMB and the agencies with respect to a number of other management reform initiatives which the President has recently called for. As you know, we are pressing hard for substantial improvements in the number and quality of program evaluations, reduction of non-essential paperwork and reporting requirements, and more effective use of manpower resources.

I might also mention that considerable work is going on within OMB on various aspects of policy guidance governing assistance programs. Within the last few months, we issued Circular A–110 providing uniform administrative requirements for hospitals, universities, and private non-profit grantees, and Circular A–111 promulgating procedures to implement the Joint Funding Simplification Act. Other current initiatives include:

The development of standard cost principles for nonprofit organizations receiving Federal assistance.

Revision of the cost principles applicable to colleges and universities, to better define those costs that Federal programs should share, and to standardize and streamline the documentation of claims.

Continuing work on a study of advance appropriations, and how they might affect various programs including procurement and assistance programs.

Development of more comprehensive policies governing procurement under assistance type awards.

Efforts to reduce Federal reporting and paperwork burdens.

Relationships under assistance programs

Sections 5 and 6 of the bill would classify all assistance transactions into two categories—those in which no substantial involvement is anticipated (Grants) and those in which substantial involvement is anticipated (Cooperative Agreements). These classifications were studied by an interagency review team last year.

The team reviewed Federal involvement in some 50 programs and discussed the working relationships involved with Federal agency officials and recipient representatives. The team recommended that in addition to the procurement relationship, there should be three types of assistance relationships: those involving Federal direction and close monitoring; those for which Federal technical assistance (but not direction) is made available when needed or requested; and those with little or no Federal involvement. Although the majority of the team endorsed this approach, there were still divergent views among the study team members and subsequently among the agencies on both the appropriate number of categories of assistance relationships and the characteristics of each category. Questions have also been raised on how we would treat General Revenue Sharing, for example, and whether it should be classified as a grant program as the bill would require. I think these problems are indicative of the complexities I referred to earlier and gives us further doubts as to the wisdom of attempting to legislatively define assistance categories.

In closing, I would like to repeat my earlier statement that we are not opposing the broad objectives of the bill. At the same time, we are saying that legislation in this area may not be desirable in light of the complexities involved and the need to retain flexibility in the administration of Federal programs. We are preparing to promulgate draft administrative guidelines shortly to better distinguish between and among procurement and assistance type transactions and urge that the Congress evaluate the effectiveness of that approach before enacting a bill which we know will cause some unnecessary confusion and be difficult to implement. I should also point out that S. 3359 (Commission on Federal Aid Reform) also contains provisions calling for a comprehensive study of Federal assistance programs which would duplicate the requirements of Section 8 of this bill.

Thank you again for the opportunity to present our views on this legislation.

PREPARED STATEMENT OF JAMES T. LYNN, DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET

S. 1437 A BILL TO DISTINGUISH FEDERAL GRANT AND COOPERATIVE AGREEMENT RELATIONSHIPS FROM FEDERAL PROCUREMENT RELATIONSHIPS AND FOR OTHER PURPOSES

Mr. Chairman and Members of the Committee: I am pleased to have the opportunity to present to you my views on S. 1437.

As you know, the work of the Commission on Government Procurement resulted in the introduction of S. 1437 and its predecessor bills. When the original bill was introduced in the Senate, OMB and GSA expressed some reservations about certain provisions. Some of these problems were resolved in the final bill passed by the Senate in the last Congress.

Other problems remained. During the June 1974 Senate Hearings before the Ad Hoc Committee on Federal Procurement and the Subcommittee on Intergovernmental Relations, the statements by the executive branch witnesses generally had a basic theme:

The definitions of "Contract," "Grant," and "Cooperative Agreement" in the bill were too general or too broad and may not be conducive to achieving the intent of the bill.

Therefore, a detailed study of the proposed definitions should precede the passage of legislation.

The Office of Management and Budget and the General Services Administration essentially concurred with that position and agreed to complete such a study by December 31, 1975.

The Study was to consider the following:

A clearer definition of the term "substantial involvement" by a Federal agency with respect to State or Local Governments or other recipients during the performance of a federally financed activity.

More specific criteria to distinguish "Contract" from other agreements when the objectives of the relationship tend to provide property or service for the direct benefit or use of the Federal Government, but at the same time enhance and support the recipient's organization and activities.

An interagency study group co-Chaired by OMB and GSA was established in July 1975 to perform the study. The study group completed its work and submitted its report to OMB on December 19, 1975. It is my understanding that the study group has kept your staff members informed on its progress, and a copy of the report was furnished to them.

Since then we have asked the Federal agencies, Public Interest Groups, and other interested associations and individuals to review the study team report. The comments we have received and our own analysis of the report confirm general support for the objectives of the bill. However, such comments and analysis also lead us to question seriously whether at this point legislation is necessary or desirable. I realize, with the benefit of at least some years in government, that a legislative directive imposes the highest kind of priority to get a job done. But given the immense variety of programs on the Federal books, I have substantial fears that no matter how careful the drafting, an omnibus bill to force thousands of transactions into one of three definitions will only result, in many cases, in destroying or impairing needed programmatic flexibility. It will also divert too many work hours into efforts to fit, some way or another, particular programs into the legislated definitions that appear most desirable.

I sincerely believe that the preferable alternative route would be for the executive branch, pursuant to a schedule and work plan agreeable to this Committee and its counterpart in the House, to proceed administratively under OMB supervision to carry out as fully as possible the objectives addressed S. 1437. If the experience from this kind of an effort over a period of time demonstrated that legislation is required, that experience would also provide a far better foundation for formulating legislation than we have now.

Here are some of the problems we have identified that would argue against legislation at this time and for at least trying administrative solutions.

Relationships under assistance programs

Sections 5 and 6 of the Bill classify assistance into two categories—those in which no substantial involvement is anticipated (Grant) and those in which substantial involvement is anticipated (Cooperative Agreements).

Based on the review of Federal involvement in some 50 Federal programs and the discussion with Federal agency officials and recipient representatives, a majority of the study group recommended that in addition to the procurement relationship, there be three assistance relationships: those involving Federal direction and close monitoring; those for which Federal technical assistance (but not direction) is made available when needed or requested; and those with little or no Federal involvement, respectively. Although the majority of the team endorsed this approach, there were divergent views among the study team members on both the appropriate number of categories of assistance relationships and the characteristics of each category.

Although there is room for more standardization, there are justifications for some diversity in how Federal agencies direct, control, and monitor recipient operations and activities. In view of the extremely complex and changing nature of Federal assistance programs, we strongly urge that the Congress not legislate definitions for categories of assistance relationships but leave the number and nature of such classifications of Federal assistance transactions to the executive branch to determine and implement.

We would issue instructions to distinguish procurement from assistance as clearly as possible and to initiate classification of assistance programs by using the framework developed by the study group for requiring Federal agencies to identify Federal involvement at the activity and subactivity levels program by program. Through this process, clearer patterns of assistance relationships should emerge and recipients will have a clear understanding of intended Federal involvement in advance.

Under this approach, subsequent modifications and refinements could be introduced when further operating experience and evaluation suggest that they are needed.

Use of cooperative agreements

Section 6 of the bill provides that cooperative agreements will be used for assistance programs when substantial Federal involvement is anticipated. Therefore, the bill treats Cooperative Agreement as one of the two major categories of assistance relationships.

Cooperative agreements, as used now in actual practice, do not all fit the proposed definition in the bill. Frequently, Cooperative Agreement relationships now occur when a Federal agency and a non-Federal organization enter into a relationship in which there is substantial benefit, or at least the prospect of substantial benefit, to both. Both parties normally participate, work, or support each other in fulfilling each other's operating mission and share in the work results. There could be elements of both procurement and assistance, but the transaction does not neatly fit either category exclusively. Therefore, a majority of the study team recommended that a separate category of transactions should be recognized in the bill as Cooperative Agreements.

The Departments of Agriculture and Interior are the predominant participants in this type of relationship. Other Federal agencies also enter into these relationships, but much less frequently. A specific example of the so-called partnership or Cooperative Agreement relationship would be the Forest Service's Fire Control Agreements with State Forest Service managers. These standard-form agreements call for sharing responsibility for detection and suppression of forest fires on Federal, State, or adjacent private lands. The agreements provide for reimbursement of either parties' expenses by the other.

Thus it should be recognized that a separate category of transactions exist which are neither procurement nor assistance relationships in the usual sense. It should be made clear that part of our job in the Executive Branch is to work out guidelines for these categories of transactions.

Distinction between procurement and assistance relationships

Section 4(1) of the Bill prescribes that a procurement contract be used whenever the principal purpose of the instrument is the acquisition by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government.

However, this criterion is difficult to apply to some programs. For example, there are instances in research programs where the Federal agency expects the other party to perform some fairly specific task which will benefit the agency, but the two parties are jointly defining the task as work progresses and a substantial degree of flexibility to modify the agreement is needed. It is in this area where some agencies are using contracts and others are using grants. These agencies in many cases decide to use contracts or grants on the basis of such other factors as mandatory cost sharing requirements for grants, complexity of the selection process used for contracts, extensive and time-consuming procurement procedures, and the type of recipient involved. Depending on the decision to use contracts or grants, the ability to compete for research awards may be hindered either for nonprofit organizations or profit-making organizations.

I think what we all want here is flexibility to do what makes sense—not to artificially force a procedure that in some cases hurts rather than helps produce fair, equitable and efficient procedures. Therefore, we will undertake a project to

determine the feasibility of establishing requirements and procedures for research programs that are as uniform as practicable including a process for selecting awardees and the use of standard clauses and conditions for research awards.

Study of Federal assistance programs

Section 8 of the bill requires OMB to perform 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 within two years after the enactment of the Act.

The development of a comprehensive system of guidance cannot be a one-shot effort. Such development efforts will require frequent modification and experimentation. Any initial system will be only a beginning. Therefore, we recommend that instead of a requirement for a two year study, OMB should carry out this responsibility on a continuing basis and make periodic reports to the Congress on progress and accomplishments, as appropriate. Again, we would be pleased to work with you on a mutually acceptable timetable.

The development of Federal Management Circular 74–7 (A–102) which covers standard application forms and administrative requirements for Federal assistance programs is ample evidence that a comprehensive system of guidance is feasible. We recognize that there is a need for more central guidelines concerning pre-award phases of Federal assistance including the award selection process and advertising/announcing procedures. Also, there is a need to study the advantages and disadvantages of the wide array of present legislative requirements and to further analyze administratively established program requirements for the purpose of developing greater uniformity among assistance programs.

In summary, we endorse the basic objectives of the bill but we do not agree that legislation is necessary to fulfill these objectives. We are dealing with a very complex area as the problems discussed above indicate. I can frankly say I did not fully recognize the complexity of the many issues involved until I reviewed the study team's report and agency reactions thereto. I think the objective can better be achieved administratively and will endeavor to do so in full cooperation with your staff.

If however, at the completion of these hearings, your Committee still feels strongly that legislation is required, we would appreciate the opportunity to discuss these and other problems with your Committee staff in the effort to arrive at legislative language that will reduce such problems to the extent feasible.

I wish to thank the Committee for the opportunity to comment on this bill and would be happy to answer any questions the members may have.

Mr. BROOKS. Mr. Rosenthal?

Mr. ROSENTHAL. Mr. Chairman, I have an amendment, the purpose of which is to delete a paragraph that would authorize the head of an agency to vest title to all personal property purchased with grant funds in the grantee. It is my understanding that it is not the purpose of the Senate proponents of this legislation to expand that authority beyond the present situation. It is my purpose and that of the Senate sponsors to retain the present status of vesting of title in grant property. This would be done by the amendment I have offered without risking an unintentional expansion of such authority.

The amendment is as follows:

Delete the language beginning on page 6, line 24, through page 7, line 7.

On page 7, line 8, delete "(c)" and insert in lieu thereof "(b)" and add after the word "contracts" the following: ", grants, and cooperative agreements".

On line 18, delete the word "contract".

Mr. BROOKS. Mr. Horton?

Mr. HORTON. Mr. Chairman, I have no objection to the amendment. I think it is a good amendment. We ought to adopt it.

Mr. BROOKS. Mr. Erlenborn?

Mr. ERLENBORN. Mr. Chairman, I have a question for the author of the amendment.

Are there any provisions in the so-called Grants Act relative to disposition of the title of this property?

I am not familiar with the Grants Act, but the current law that is existing under the Grants Act would be repealed.

Mr. ROSENTHAL. It is my understanding there are no such provisions.

Mr. ERLENBORN. Thank you.

Mr. ROSENTHAL. Mr. Chairman, if there is no further discussion, I move the adoption of the amendment.

Mr. BROOKS. Is there objection?

The Chair hears none. The amendment is agreed to.

I would say the hearings are concluded. We have heard from Senator Chiles, the GAO, the statement from OMB; the comments of OMB are not sufficient to hold up passage of the legislation. I urge the committee to—Mr. Rosenthal?

Mr. ROSENTHAL. Mr. Chairman, I move that the bill as amended be reported to the full committee with the recommendation that it be reported to the House for passage.

Mr. BROOKS. As many as are in favor of the motion, vote aye.

[Chorus of ayes.]

Mr. BROOKS. Opposed, vote no.

The ayes have it.

I would note that a quorum is present.

I want to thank the gentleman. The subcommittee is adjourned.

[Mr. Ahart's prepared statement follows:]

PREPARED STATEMENT OF GREGORY J. AHART, DIRECTOR, HUMAN RESOURCES DIVISION, U.S. GENERAL ACCOUNTING OFFICE

Mr. Chairman and Members of the Subcommittee, I am pleased to present our views on H.R. 15499, which is identical to S. 1437 as passed by the Senate on August 31, 1976.

The purposes of the bill are:

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

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

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

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

Enactment of the bill would have the effect of adopting the substance of two recommendations (F–1 and F–2) of the Commission on Government Procurement. As you know, the Comptroller General was a statutory member of the Commission and supported each of the two recommendations. I have attached to my statement a brief description of the Commission's rationale in support of the two recommendations and of their relationship to each other in the context of this bill.

On July 10, 1974, we testified before the Ad Hoc Subcommittee on Federal Procurement and the Subcommittee on Intergovernmental Relations, Senate Committee on Government Operations, regarding the then proposed similar bill S. 3514. On November 25, 1974, we also testified before the House Subcommittee on Legislation and Military Operations, regarding S. 3514 as it passed the Senate on October 9, 1974. We supported on these two occasions, and support now, the adoption of both Commission recommendations, as provided for in H.R. 15499 and for the same basic reasons offered by the Commission.

We believe enactment of H.R. 15499 would be a significant step forward and that the study called for by section 8, addressing the matters set forth in the relevant part of the Commission's report, should set the basis for further significant progress.

We will be happy to answer any questions you may have.

In connection with recommendation F–1, the Commission found that there is a fundamental conceptual difference between grant-type relationships and contracts, i.e., grant-type relationships are customarily used where Federal assistance of activities having a beneficial effect on public policy is desired while contracts are customarily used for the procurement of goods and services required for the conduct of the Government's business. Despite this fundamental difference, the Commission found confusion among Government agencies and in the non-Federal sector as to when contracts as opposed to grant-type agreements should be used and vice-versa. The Commission also found that in many instances, Government agencies have been forced to use contracts in situations where a grant-type agreement would be more appropriate because they lack necessary statutory authority for the use of grant-type agreements. Finally, the Commission drew a distinction between grant-type activities wherein little Government involvement is required during performance and those which require substantial Federal involvement during performance, recommending that the latter activities be classified as "cooperative agreements" and that instruments creating such agreements detail the nature and extent of Federal involvement contemplated.

In connection with recommendation F–2, the Commission pointed out that much of the attention devoted to the hundreds of assistance programs is concentrated on achieving individual program objectives. It said much less effort has been devoted to generalizing from the methods used in assistance programs. The Commission said that if assistance methods can be standardized and catalogued, it should be possible to take a long step in the direction of consistency and simplicity, and at the same time enhance program effectiveness by establishing a system of guidance for generic aspects of the management of assistance programs.

The Commission said that the system that needs to be developed should cover all types of assistance relationships. It said the need is to: (1) identify the assistance universe comprehensively; (2) examine existing techniques and related considerations; (3) generalize to the extent possible from such data; and (4) explore the possibilities of developing new techniques. Further, it said an analysis and evaluation of assistance techniques should consider, in addition to the usual grant-type transactions, loans, direct payments, and all forms of non-financial assistance. The Commission said the study also should consider subsidies which usually are not regarded as "assistance" and that it also may be desirable to consider the applicability of assistance techniques to "revenue sharing." The Commission said systematic review of all forms of Federal assistance and their operational methods and techniques could assist in decisions on how new forms of assistance should be structured to achieve desired ends.

The Commission recognized in its report that other studies had been attempted but that more was needed.

Although there is some relationship between the two recommendations of the Commission, the basic issues involved are quite separable. Recommendation F–1, dealt with in sections 3 through 7 of the bill, was designed to clearly distinguish between Federal procurement and Federal assistance and to require the use of legal instruments which are consistent with the different Federal/non-Federal relationships involved. Recommendation F–2, dealt with in section 8 of the bill, was designed to gain a better understanding of the alternative means of implementing Federal assistance programs and to assess the feasibility of developing a comprehensive system of guidance to govern the administration of such programs.

[Whereupon, at 11:55 a.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

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