

OLL 84-2792  
6 August 1984

MEMORANDUM TO: C/PMS/OL  
C/L&PLD/OGC

STAT FROM: [redacted]  
Legislation Division  
Office of Legislative Liaison

SUBJECT: S.2841 Consulting Contract Guidelines

Attached for your review and comment is S.2841, a bill to provide statutory guidelines concerning the award of certain consulting contracts. Although I don't anticipate action on this bill during this Congress, I would appreciate your views on this bill, especially the formulation of the national security exception in Section 2 and the OFPP records system in Section 7.

STAT [redacted]

STAT cc: [redacted]

Attachment

Distribution:

- Original - Addressee
- 1 - C/L&PLD/OGC
- 1 - [redacted]
- 1 - D/OLL
- 1 - DD/OLL
- 1 - OLL Chrono
- 1 - LEG Subject (Procurement)
- 1 - [redacted]

OLL:LEG [redacted] (6 August 1984)

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98TH CONGRESS  
2D SESSION

# S. 2841

To provide statutory guidelines concerning the award of certain contracts, and for other purposes.

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## IN THE SENATE OF THE UNITED STATES

JUNE 29 (legislative day, JUNE 25), 1984

Mr. PRYOR (for himself and Mr. BUMPERS) introduced the following bill; which was read twice and referred to the Committee on Governmental Affairs

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## A BILL

To provide statutory guidelines concerning the award of certain contracts, and for other purposes.

- 1       *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*  
3 That for purposes of this Act:  
4       (1) The term "agency" has the same meaning as in sec-  
5 tion 552(e) of title 5, United States Code.  
6       (2) The term "contract" means (A) any agreement, in-  
7 cluding any amendment to or modification of an agreement,  
8 between the Government and a contractor for the procure-  
9 ment of goods and services, or (B) any letter authorizing a  
10 contractor to provide goods or services to the United States

1 prior to a specification of the compensation for the provision  
2 of such goods or services.

3 (3) The term "contractor" means any person, firm, un-  
4 incorporated association, joint venture, partnership, corpora-  
5 tion or affiliates thereof, including consultants and organiza-  
6 tions thereof, which is a party to a contract with the Govern-  
7 ment.

8 (4) The term "report" means a written study, plan,  
9 evaluation, analysis, manual, or similar document, in draft or  
10 final form, which is prepared by a contractor pursuant to a  
11 contract with an agency and which is submitted—

12 (A) to such agency, or

13 (B) on behalf of such agency to any other agency  
14 of the Government.

15 but does not mean a billing document, invoice, or other rou-  
16 tine business transmittal made with respect to the contract.

17 (5) The term "consulting services" means advisory serv-  
18 ices with respect to agency administration and management  
19 or agency program management.

20 (6) The term "management and professional services"  
21 means professional services related to management and con-  
22 trol of programs, including—

23 (A) management data collection services;

24 (B) policy review and development services;

25 (C) program evaluation services;

1 (D) program management support services;  
2 (E) program review and development services;  
3 (F) systems engineering services; and  
4 (G) other management and professional services of  
5 a similar nature which are not related to any specific  
6 program.

7 (7) The term "special study or analysis" means any  
8 nonrecurring examination of a subject which—

9 (A) is undertaken to provide greater understand-  
10 ing of relevant issues and alternatives regarding orga-  
11 nizations, policies, procedures, systems, programs, and  
12 resources; and

13 (B) leads to conclusions or recommendations with  
14 respect to planning, programing, budgeting, decision-  
15 making, or policy development.

16 Such term includes—

17 (i) any study initiated by or for the program man-  
18 agement office;

19 (ii) a cost benefit analysis, a data analysis (other  
20 than a scientific analysis), an economic study or analy-  
21 sis, an environmental assessment or impact study, a  
22 feasibility study which does not relate to construction,  
23 a legal or litigation study, a legislative study, a regula-  
24 tory study, or a socioeconomic study;

1 (iii) a geological study, a natural resources study,  
2 a scientific data study, a soil study, a water quality  
3 study, a wildlife study, or a general health study; or

4 (iv) any similar special study or analysis.

5 SEC. 2. (a) Notwithstanding any other provision of law,  
6 as soon as an agency completes preparation of a procurement  
7 request for consulting services, management and professional  
8 services, or a special study or analysis which the agency esti-  
9 mates will result in the award of a contract in excess of  
10 \$10,000, the agency shall transmit to the Secretary of Com-  
11 merce a written notice describing such contract. The Secre-  
12 tary of Commerce shall publish each notice received pursuant  
13 to this subsection in the publication "Commerce Business  
14 Daily" published by the Department of Commerce. An  
15 agency is not required to transmit to the Secretary of Com-  
16 merce a notice with respect to any contract—

17 (1) for which a national security classification has  
18 been lawfully made relative to the contract or the  
19 terms therein; or

20 (2) which is awarded due to such an unusual and  
21 compelling emergency that the Government would be  
22 seriously injured if prior notice of the contract were re-  
23 quired to be published.

24 (b) Whenever an agency modifies a contract for consult-  
25 ing services, management and professional services, or a spe-

1 cial study or analysis, and in the modification of such contract  
2 increases the amount of the contract award by at least  
3 \$25,000, the agency shall transmit to the Inspector General  
4 of such agency or comparable official, or in the case of an  
5 agency which does not have an Inspector General or compa-  
6 rable official, the head of the agency or his designee, a writ-  
7 ten notice describing—

- 8 (1) the original contract;
- 9 (2) the modification being made; and
- 10 (3) the justification for the modification.

11 SEC. 3. Each report prepared by a contractor pursuant  
12 to a contract for consulting services, management and profes-  
13 sional services, or a special study or analysis, and each report  
14 prepared by an agency which is substantially derived from or  
15 includes substantial portions of any such report, shall include  
16 a statement disclosing—

- 17 (1) the name and business address of the contrac-  
18 tor who prepared or contributed to the report;
- 19 (2) the total amount of the contract;
- 20 (3) whether the contract was awarded through  
21 competitive or noncompetitive procedures;
- 22 (4) the name of the office which or employee who  
23 authorized the award of the contract;
- 24 (5) in any case in which a contractor uses a sub-  
25 contractor to prepare any portion of a report for an

1 agency, the name and business address of the subcon-  
2 tractor and the amount paid to the subcontractor for  
3 the work;

4 (6) the names of all employees of the contractor,  
5 and any subcontractor, who substantially contributed to  
6 the report; and

7 (7) in any case in which an organizational conflict  
8 of interest has been determined under section 205 to  
9 exist with respect to the contract, the facts and cir-  
10 cumstances of the conflict of interest.

11 SEC. 4. (a) Within one hundred and twenty days after  
12 the completion of any contract for consulting services, man-  
13 agement and professional services, or a special study or anal-  
14 ysis, the total amount of which is in excess of \$50,000, the  
15 agency shall prepare a written evaluation of the contract per-  
16 formance. The evaluation shall include a summary of the per-  
17 formance of the contractor under the contract, including—

18 (1) the performance of the contractor, based upon  
19 the terms and specifications included in the contract;  
20 and

21 (2) any deviation by the contractor from the provi-  
22 sions of the contract originally awarded with respect to  
23 cost and time for completion of the contract and a  
24 statement of the reasons for any such deviation.

1       (b) The agency shall include the evaluation required by  
2 subsection (a) in the records maintained by the agency re-  
3 garding the contract and shall maintain a copy of the evalua-  
4 tion in a central location within the agency.

5       (c) A written copy of any evaluation made under this  
6 section shall be transmitted to the contractor concerned to-  
7 gether with a notice stating that the contractor may, within  
8 ten days after receipt of such copy, transmit comments to the  
9 agency concerning such evaluation. Any such comments shall  
10 be included in the evaluation as a supplement.

11       SEC. 5. (a) Beginning on the effective date of this Act  
12 and ending three years after such date, this section applies to  
13 the award of contacts by the Department of Energy, the De-  
14 partment of Transportation, and the Environmental Protec-  
15 tion Agency.

16       (b) For purposes of this section:

17       (1) The term "organizational conflict of interest" means  
18 any relationship or situation in which an offeror or contractor  
19 has past, present, or anticipated interests that either directly,  
20 or indirectly through a client relationship, relate to work to  
21 be performed under a contract for consulting services, man-  
22 agement and professional services, or a special study or anal-  
23 ysis, and which—



1 (A) may diminish the capacity of the offeror or  
2 contractor to give impartial, technically sound, and ob-  
3 jective assistance and advice; or

4 (B) may result in an unfair competitive advantage  
5 to the offeror or contractor;

6 but such term does not include the normal flow of benefits  
7 from the performance of the contract.

8 (2) The terms "offeror" and "contractor" include—

9 (A) a chief executive or director of the offeror or  
10 contractor, to the extent that such executive or direc-  
11 tor will or does become substantially involved in the  
12 performance of a contract entered into with an agency;  
13 and

14 (B) a consultant or subcontractor proposed to be  
15 used by the offeror or contractor in the performance of  
16 a contract entered into with an agency in any case in  
17 which such consultant or subcontractor may be per-  
18 forming services similar to the services provided by the  
19 offeror or contractor.

20 (c)(1) Whenever an offeror submits to any agency a pro-  
21 posal for a contract for consulting services, management and  
22 professional services, or a special study or analysis, the of-  
23 feror shall include with such proposal—

1 (A) a statement which discloses all relevant facts  
2 relating to an existing or potential organizational con-  
3 flict of interest concerning the contract; or

4 (B) a statement certifying, to the best knowledge  
5 and belief of such offeror, that no relevant facts exist  
6 relating to such an existing or potential organizational  
7 conflict of interest.

8 (2) Any consultant or subcontractor which any such of-  
9 feror proposes to use in the performance of a contract de-  
10 scribed in paragraph (1) shall also submit a statement con-  
11 taining the information required by paragraph (1) to the  
12 agency receiving the proposal.

13 (3) In any case in which a contract described in para-  
14 graph (1) has been entered into by an agency and a modifica-  
15 tion of the contract becomes necessary, the contractor and  
16 any consultant or subcontractor used by the offeror in the  
17 performance of the contract shall submit to the agency—

18 (A) the same type of statement with respect to  
19 such modification as required by paragraph (1) with re-  
20 spect to a contract; or

21 (B) a revision of any statement submitted under  
22 paragraph (1) which relates to any potential organiza-  
23 tional conflict of interest concerning such modification.

24 (4) Each contractor, consultant, and subcontractor  
25 which has submitted a statement under this subsection shall

1 submit, on a timely basis, revisions of such statement as may  
2 be necessary to clearly and accurately reflect any changes in  
3 circumstances relating to an existing or potential organiza-  
4 tional conflict of interest arising after the statement was  
5 made or last revised.

6 (d) The head of each agency to which this section ap-  
7 plies shall establish or designate an office to administer the  
8 provisions of this section with respect to contract proposals  
9 and contracts of the agency. The head of each such office  
10 shall evaluate each statement received pursuant to subsection  
11 (c) to determine whether an organizational conflict of interest  
12 or the appearance of such a conflict exists with respect to the  
13 contract for which the statement is submitted. In making  
14 such evaluation, the head of such office shall—

15 (1) consider whether—

16 (A) the offeror, contractor, consultant, or  
17 subcontractor has conflicting roles or interests  
18 which might bias the judgment of the offeror, con-  
19 tractor, consultant, or subcontractor concerning  
20 the work to be performed pursuant to the con-  
21 tract; or

22 (B) the offeror or contractor will have an  
23 unfair advantage in the performance of the con-  
24 tract; and

1           (2) pay particular attention to proposed contrac-  
2           tual requirements which call for the provision of  
3           advice, evaluation, or other actions which will have a  
4           direct effect on future decisions of the agency relating  
5           to contracts, procurement, research and development  
6           programs, production, or regulatory activities.

7           (e) Whenever the head of an office established or desig-  
8           nated under subsection (d) determines that an organizational  
9           conflict of interest or that the appearance of such a conflict  
10          exists with respect to a contract for consulting services, man-  
11          agement and professional services, or a special study or anal-  
12          ysis, or a proposal for such a contract, he shall transmit a  
13          notice of his determination to the offeror or contractor in-  
14          volved. Within 10 days after the receipt of such notice, the  
15          offeror or contractor may transmit written comments to the  
16          head of the office concerning the determination or may trans-  
17          mit such comments to the head of the agency with a request  
18          that the head of the agency review such determination.  
19          Within thirty days after receiving such a request, the head of  
20          the agency shall review the determination of the head of the  
21          office and shall issue a written decision. In conducting such  
22          review, the head of the agency may request the offeror or  
23          contractor to provide additional information concerning the  
24          issues involved. The head of the agency shall transmit a copy

1 of his decision under this subsection to the offeror or contrac-  
2 tor and the head of the office.

3 (f) If, prior to the award of a contract for consulting  
4 services, management or professional services, or a special  
5 study or analysis, the head of the office determines that an  
6 organizational conflict of interest or the appearance of such a  
7 conflict exists with respect to the contract, and such determi-  
8 nation is not reversed by the head of the agency—

9 (1) the agency shall disqualify the offeror from eli-  
10 gibility for award of the contract or, in the case of an  
11 organizational conflict of interest or the appearance of  
12 such a conflict involving a consultant or subcontractor  
13 proposed to be used by the offeror in the performance  
14 of the contract, shall prohibit the offeror from using the  
15 services of such consultant or subcontractor;

16 (2) the agency shall include in the contract  
17 awarded to the offeror such conditions as the agency  
18 determines would avoid an organizational conflict of in-  
19 terest or the appearance of such a conflict involving  
20 such offeror or any consultant or subcontractor; or

21 (3) in any case in which the agency determines  
22 that—

23 (A) the facts and circumstances surrounding  
24 the contract necessitate immediate action; and

1           (B) the agency is unable to obtain the serv-  
2           ices to be performed pursuant to the contract from  
3           any other person other than the offeror, consult-  
4           ant, or subcontractor involved in the organiza-  
5           tional conflict of interest or the appearance of  
6           such a conflict,

7           the agency may award the contract to the offeror if the  
8           agency includes in the records maintained by the  
9           agency on the contract, makes available to the public,  
10          and transmits to each committee of the Senate and the  
11          House of Representatives having legislative jurisdiction  
12          over the agency, a complete statement of the relevant  
13          facts disclosed by the offeror, consultant, or subcon-  
14          tractor pursuant to subsection (c), or otherwise known  
15          or made available to the agency.

16          (g)(1) If, after the agency has entered into a contract for  
17          consulting services, management and professional services, or  
18          a special study or analysis, the head of an office established  
19          or designated in the agency under subsection (d) determines  
20          that an organizational conflict of interest or the appearance  
21          of such a conflict exists with respect to the contract, and such  
22          determination is not reversed by the head of the agency, the  
23          agency shall—

24                 (A) terminate the contract; or

1 (B) in any case in which termination is not in the  
2 best interest of the Government, modify the contract to  
3 the extent necessary to prevent or mitigate to the  
4 greatest extent possible the conflict or the appearance  
5 of the conflict and include in the records maintained by  
6 the agency on the contract, make available to the  
7 public, and transmit to each committee of the Senate  
8 and the House of Representatives having legislative ju-  
9 risdiction over the agency, a complete statement of the  
10 relevant facts determined to exist regarding the offeror,  
11 consultant, or subcontractor.

12 (2)(A) Except as provided in subparagraph (B), a con-  
13 tractor who has entered into a contract with an agency for  
14 consulting services, management and professional services, or  
15 a special study or analysis, or a consultant or a subcontractor  
16 to any such contractor shall have no claim against the United  
17 States for damages as a result of an action of an agency  
18 under paragraph (1) (other than a claim specified pursuant to  
19 a convenience clause in the contract), but such a contractor,  
20 consultant, or subcontractor may have a claim against the  
21 United States for compensation for work performed prior to  
22 such agency action.

23 (B) A contractor who has entered into a contract with  
24 an agency for consulting services, management and profes-  
25 sional services, or a special study or analysis, or a consultant

1 or a subcontractor to any such contractor shall have no claim  
2 for compensation for work performed prior to an agency  
3 action under paragraph (1) if it is determined that such con-  
4 tractor's, consultant's, or subcontractor's failure to com-  
5 pletely disclose the relevant facts under subsection (b) pre-  
6 cluded a determination of the existence of an organizational  
7 conflict of interest or the appearance of such a conflict involv-  
8 ing such contractor, consultant, or subcontractor prior to the  
9 award of the contract.

10 (h) Two years after the effective date of this Act, the  
11 Comptroller General of the United States, in conjunction  
12 with the Director of the Office of Management and Budget,  
13 shall commence an evaluation of the operations of the provi-  
14 sions of this section, and, within nine months after the com-  
15 mencement of such evaluation, shall prepare and transmit a  
16 report to the Congress concerning the result of such evalua-  
17 tion, including recommendations for the continuation, modifi-  
18 cation, or termination of such provisions.

19 SEC. 6. (a) The head of each agency shall include with  
20 the request for regular appropriations for each fiscal year  
21 submitted to the Director of the Office of Management and  
22 Budget pursuant to section 215 of the Budget and Account-  
23 ing Act, 1921 (31 U.S.C. 23), an itemized statement of the  
24 amounts requested by the agency for procurement in such  
25 fiscal year. The statement shall identify such amounts ac-



1 cording to the same subfunctional categories to be used by  
2 the President in the submission of the Budget for such fiscal  
3 year pursuant to section 201(a) of such Act (31 U.S.C. 11),  
4 and, within each such category, shall identify such amounts  
5 according to classifications for (1) procurement of consulting  
6 services, management and professional services, and special  
7 studies and analyses, and (2) all other procurement activities.

8 (b) The Budget transmitted by the President to the Con-  
9 gress for each fiscal year under section 201(a) of the Budget  
10 and Accounting Act, 1921 (31 U.S.C. 11) shall set forth sep-  
11 arately, within each subfunctional category used in such  
12 Budget, requests for new budget authority for, and estimates  
13 of outlays by, each agency for (1) procurement of consulting  
14 services, management and professional services, and special  
15 studies and analyses, and (2) all other procurement activities.

16 (c)(1) By April 1 of the fiscal year preceding the fiscal  
17 year for which the Budget is submitted pursuant to section  
18 201(a) of the Budget and Accounting Act, 1921, the head of  
19 each agency shall prepare and transmit to the Committees on  
20 Appropriations of the Senate and the House of Representa-  
21 tives an analysis of each request for new budget authority  
22 and of the estimates of outlays included in such Budget for  
23 such agency pursuant to subsection (b) of this section and a  
24 statement justifying the need for each such request and  
25 estimate.

1           (2) Within sixty days after the President transmits to  
2 the Congress a revision of any request or estimate included in  
3 the Budget for any fiscal year pursuant to subsection (b), the  
4 head of the agency affected by such revision shall prepare  
5 and transmit to the Congress a modification of the analysis  
6 and statement required by paragraph (1) which reflects the  
7 revision made by the President.

8           SEC. 7. (a) The Administrator for Federal Procurement  
9 Policy shall establish a data system for the collection and  
10 dissemination of information regarding all contracts entered  
11 into by each agency. The system shall classify every contract  
12 or contract modification for an amount in excess of \$10,000  
13 as either for professional type services or for commercial and  
14 industrial type activities, and shall include for each such con-  
15 tract or contract modification—

16                   (1) the name of the agency awarding the contract;

17                   (2) an identification number or other designation  
18 for the contract or modification, as the case may be;

19                   (3) the name of the contracting office of the  
20 agency which awarded the contract;

21                   (4) the name of the contractor;

22                   (5) whether the contractor is a small business or a  
23 minority business;

24                   (6) the date on which the contract award or the  
25 modification was made;

1           (7) the city, county, State, or country in which  
2 the work under the contract will be performed;

3           (8) a brief description of the work to be performed  
4 under the contract;

5           (9) the total dollars payable by the Government  
6 under the contract;

7           (10) the estimated completion date of the contract;

8           (11) whether the contract was awarded through  
9 competitive or noncompetitive procedures;

10          (12) the type of contract, such as a cost reim-  
11 bursement contract or fixed price contract; and

12          (13) if applicable, the negotiation authority used  
13 to award the contract under the provisions of section  
14 2304(a) of title 10, United States Code, or section  
15 302(c) of the Federal Property and Administrative  
16 Services Act of 1949.

17          (b)(1) Consistent with otherwise applicable law, the Ad-  
18 ministrator for Federal Procurement Policy shall make infor-  
19 mation within the system available, on request, to the Con-  
20 gress, the various agencies, and the public.

21          (2) The Administrator for Federal Procurement Policy  
22 shall prepare and transmit to the Congress quarterly and  
23 annual reports regarding the information maintained on each  
24 agency within the system.

1 (c) Each agency shall provide such information to the  
2 Administrator for Federal Procurement Policy as may be  
3 necessary to assure that the data concerning the agency in  
4 the system and in the reports under subsection (b)(2) is cur-  
5 rent, accurate, and complete.

6 SEC. 8. (a)(1) Each agency shall compile and make  
7 available to the public a list of all contracts entered into by  
8 the agency during the twelve-month period immediately pre-  
9 ceding the month in which the list is prepared and a separate  
10 list of all contracts entered into by the agency for which per-  
11 formance has not been completed at the time of the prepara-  
12 tion of such list. The lists shall be updated on a quarterly  
13 basis and shall include, for each such contract—

14 (A) the contract identification number assigned by  
15 the agency;

16 (B) the contractor's name;

17 (C) the date of award and the estimated comple-  
18 tion date;

19 (D) the original and current amounts to be paid  
20 by the agency under the contract; and

21 (E) a brief description of the work to be per-  
22 formed.

23 (2) Every agency shall prepare and maintain a written  
24 statement justifying the need for each contract for consulting  
25 services, management and professional services, or a special

1 study or analysis which is entered into by the agency. The  
2 statement shall include the name of the Government employ-  
3 ee who authorized the award of the contract and the Govern-  
4 ment employee who is responsible for the administration of  
5 the contract.

6 (3) Each agency shall permit the public to inspect and  
7 make copies of the list prepared under paragraph (1) and the  
8 statements prepared under paragraph (2). The agency may  
9 make a reasonable charge for the costs of making such  
10 copies.

11 (b)(1) Except in any case in which the disclosure of a  
12 contract or any information therein is prohibited by law, and  
13 except in any case in which, for national security reasons, the  
14 terms of a contract are lawfully determined to be of a classi-  
15 fied nature—

16 (A) all contracts shall be considered public infor-  
17 mation and shall be available to the public upon re-  
18 quest; and

19 (B) the following information shall be available to  
20 the public for every contract for consulting services,  
21 management and professional services, or a special  
22 study or analysis:

23 (i) the name and qualifications of any person-  
24 nel designated in the contract; and

1                   (ii) the sole source justification if such con-  
2                   tract was awarded on a sole source basis.

3           (2) Paragraph (1) does not require an agency to make  
4 technical proposals available to the public.

5           SEC. 9. Notwithstanding any other provision of this Act,  
6 contracts for consulting services, management and profes-  
7 sional services, and special studies or analyses, and any data,  
8 reports, or other material pertaining thereto, which relate to  
9 sensitive foreign intelligence or foreign counterintelligence  
10 activities, which relate to sensitive law enforcement investi-  
11 gations, or which are classified under the national security  
12 classification system are exempt from the provisions of this  
13 Act.

14           SEC. 10. Subsection (b) of section 202 of the Federal  
15 Power Act (16 U.S.C. 824a(b)) is amended by adding at the  
16 end thereof the following: "Nothing in this subsection or any  
17 other provision of this Act shall be construed as authorizing  
18 the Commission on or after January 1, 1984, to order a  
19 public utility to purchase the output or pay, or any way com-  
20 pensate, for any generating facility, or any portion thereof,  
21 the title to which is held by any other entity, except as pro-  
22 vided by section 210 of the Public Utility Regulatory Policies  
23 Act of 1978 (16 U.S.C. 824a-3).

24           SEC. 11. The provisions of this Act shall supersede any  
25 statute enacted before the date of enactment of this Act to

22

- 1 the extent such statute is inconsistent with the provisions of
- 2 this Act.

○