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ROUTING AND RECORD SHEET

SUBJECT: (Optional)

FROM:
Assistant General Counsel

EXTENSION

NO.

DATE
1 August 1984

TO: (Officer designation, room number, and building)

DATE

OFFICER'S INITIALS

COMMENTS (Number each comment to show from whom to whom. Draw a line across column after each comment.)

RECEIVED FORWARDED

1.
C/LEG/OLL
7B24 Hqs

25X1

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25X1

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Done
8/10/84
(S. 2130 + H.R. 5922)

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1 August 1984

MEMORANDUM FOR: Chief, Legislation Division, OLL

FROM:
Assistant General Counsel

SUBJECT: Pending Legislation Concerning Hiring of
Former Government Procurement Officials

1. According to the July 23, 1984 edition of Aviation Week and Space Technology, there is a new bill before Congress, which is generally described as follows:

A bill before Congress takes a new approach to discourage government contractors from hiring former government procurement officials. The measure would require disclosure by contractors of all former government employees they had hired in the previous five years. Those disclosure reports would be reviewed by the Office of Government Ethics for possible violations of conflict of interest laws. The bill also contains a provision banning former government employees from going to work for contractors they had dealt with officially for at least five years after leaving the government. The bill was introduced in the Senate by Sen. David Pryor (D.-Ark.) and in the House by Rep. Barbara Boxer (D.-Calif.).

2. Could you please provide us with a copy.

*Done 8/10/84
(S. 2830 / H.R. 5922)*

Ph... ZEMENT

OLL 84-2673
23 July 1984

MEMORANDUM FOR: Chief, Procurement Management Staff
Office of Logistics

Chief, Logistics and Procurement Law Division
Office of General Counsel

STAT FROM:
Legislation Division
Office of Legislative Liaison

SUBJECT: Recent Procurement-related Legislation:
S. 2489, S. 2842, and H.R. 5509.

1. Attached for your review and comment are the following recent bills.

S. 2489: amends the Small Business Act to enhance competition in Government procurement. This bill contains parts of S. 1730, which OGC previously reviewed and found to have no impact. Recent committee amendments, however, have substantially enhanced the scope of this bill.

S. 2842: the "Consultant Reform and Disclosure Act of 1984" clarifies the authority for appointment and compensation of experts and consultants and requires the publication of notice of consulting contracts over \$10,000 (§ 202).

H.R. 5509: the "Program Fraud Civil Penalties Act of 1984" would provide civil penalties for false claims and statements made to the United States in connection with contracts.

2. It is unclear whether any of these bills will succeed to enactment, although they could be added as amendments to other active pieces of legislation.

3. Please provide this office with your views on these bills. Our office will monitor and report on these bills as appropriate.

Attachments

STAT cc:

OLL:LEG:ROD:sm (23 July 1984)

Distribution:

Original - Addressee

1 - C/L&PD/OGC

1 - [redacted]

1 - OLL Chrono

1 - LEG Subject (Procurement)

[redacted]

1 - D/OLL

1 - DD/OLL

STAT

25X1

Calendar No. 975

98TH CONGRESS
2D SESSION

S. 2489

To amend the Small Business Act to enhance competition in Government procurement.

IN THE SENATE OF THE UNITED STATES

MARCH 29 (legislative day, MARCH 26), 1984

Mr. WEICKER (for himself, Mr. DIXON, Mr. KASTEN, Mr. RUDMAN, Mr. NICKLES, Mr. SASSER, Mr. NUNN, Mr. DANFORTH, Mr. CHILES, Mr. D'AMATO, Mr. MOYNIHAN, Mr. HATCH, Mr. PRYOR, Mr. ABDNOB, Mr. BAUCUS, Mr. BOREN, Mr. HUDDLESTON, Mr. HECHT, Mr. FORD, Mr. HEFLIN, Mr. LEAHY, Mr. PELL, Mr. SARBANES, Mr. NUNN, Mr. D'AMATO, Mr. BUMPERS, Mr. ZORINSKY, Mr. BOSCHWITZ, Mr. LEVIN, and Mr. MATTINGLY) introduced the following bill; which was read twice and referred to the Committee on Small Business

MAY 11 (legislative day, APRIL 30), 1984

Reported by Mr. WEICKER, with amendments

[Omit the part struck through and insert the part printed in italic]

Ordered referred to the Committee on Armed Services until June 8, 1984

JUNE 8 (legislative day, JUNE 6), 1984

Committee discharged; placed on the calendar

JUNE 11, 1984

Ordered referred to the Committee on Armed Services until the close of business
June 11, 1984

JUNE 11, 1984

Reported by Mr. TOWER, with amendments and an amendment to the title

[Omit the part in bold face brackets and insert the part printed in bold roman]

A BILL

To amend the Small Business Act to enhance competition in Government procurement.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

SHORT TITLE

3
4 SECTION 1. This Act may be cited as the "Small Busi-
5 ness **and Federal Procurement** Competition Enhance-
6 ment Act of 1984".

PURPOSES

7
8 SEC. 2. The purposes of this Act are to—

9 (1) eliminate Federal procurement procedures and
10 practices which ~~discourage or prevent participation by~~
11 ~~new competitors for Government contracts, especially~~
12 ~~small business concerns~~ [;] *inhibit* [maximum] *free*
13 *and open competition for Government contracts, espe-*
14 *cially by small business competitors;*

15 (2) use Federal contracting opportunities as a
16 means to expand our Nation's industrial base [, and
17 thereby enable it to respond more quickly] **in order**
18 **to ensure adequate responsive capability of**
19 **the economy** to the increased demands of the
20 defense and civilian agencies in times of national
21 emergency;

1 (3) reduce the number of noncompetitive **govern-**
2 **ment** contract awards; and

3 (4) foster *opportunities* for increased small busi-
4 ness and small disadvantaged business participation in
5 the *competitive* Federal procurement process.

6 **PLANNING FOR FUTURE COMPETITION**

7 **SEC. 3.** Section 15 of the Small Business Act is amend-
8 ed by adding at the end thereof the following:

9 “(m) (1) To encourage the competitive acquisition of
10 ~~requirements to supplies and services to support and~~ maintain
11 a major system during its service life, the head of the Federal
12 agency with responsibility for that system shall ensure that—

13 “**[(1)] (A)** the following are accorded weight as
14 evaluation considerations in any competitive solicitation
15 for the award of any development contract for a major
16 system, to the maximum extent practicable considering
17 the purposes for which the system is being procured:
18 *in any competitive solicitation for the award of any de-*
19 *velopment contract for a major system, the following*
20 **[are accorded substantial weight]** shall be includ-
21 ed as evaluation factors, giving due consideration to
22 the purposes for which the system is being procured
23 and the technology to achieve the system’s required ca-
24 pabilities:

25 “**[(A) Proposals]** (i) **proposals** to incor-
26 porate in the design of the major ~~system~~ system,

1 components which are currently available within
2 the supply system of the Federal agency responsi-
3 ble for the major system, available elsewhere in
4 the national supply system, or commercially avail-
5 able from more than one source; and

6 “**[(B) Proposals]** (ii) **proposals** to incor-
7 porate in the design of the major ~~system~~ *system,*
8 ~~components whose associated technical data will~~
9 ~~permit the agency to competitively acquire com-~~
10 ~~ponents that are likely to be required in substan-~~
11 ~~tial quantities during the system's service life and~~
12 ~~will permit future competitive acquisitions by the~~
13 ~~Government; and~~

14 “**[(2)] (B)** ~~the following are accorded substan-~~
15 ~~tial weight as evaluation considerations in any competi-~~
16 ~~tive solicitation for the award of any production con-~~
17 ~~tract for such major system: in any competitive solici-~~
18 ~~tation for the award of any production contract for a~~
19 ~~major system, the following [are accorded substantial~~
20 ~~weight]~~ **shall be included** *as evaluation factors:*

21 “**[(A) Proposals]** (i) **proposals** to identify
22 components in the system that are likely to be re-
23 quired in substantial quantities during the sys-
24 tem's service life and ~~which provide for a prede-~~
25 ~~termination as to whether the technical data asso-~~

1 eiated with for such components will be restricted
2 for further use; permit future competitive acquisi-
3 tions by the Government; and

4 “**[(B)]** (ii) Separately priced options for
5 the purchase or licensing of such restricted techni-
6 cal data by the Federal agency so as to permit
7 the competitive acquisition of requirements for
8 such components; and **[Proposals]** proposals
9 to identify technical data for sale or license to the
10 Federal Government which the offeror, at its dis-
11 cretion, will identify and separately price so as to
12 permit the Government to competitively acquire
13 future requirements for such components **[:]**;
14 and

15 “(C) Proposals to expand the participation of
16 small and small disadvantaged business concerns
17 in meeting the requirements of the prime contrac-
18 tor.

19 The foregoing evaluation considerations also shall be consid-
20 ered as negotiation objectives in making a noncompetitive
21 award of a development contract or a production contract for
22 a major system. The application of any of the requirements
23 specified in paragraph (2) (A) or (B) of this subsection may be
24 waived if the contracting officer determines in writing that
25 such requirement would not be applicable to the production

1 contract or otherwise would not be in the best interests of the
2 Government in attaining the purposes for which the system is
3 being procured, stating the reasons therefor. Such determina-
4 tion shall be made a part of the contract file.”.

5 *[Provided, That the provisions of this paragraph (2)*
6 *may be waived if the contracting officer determines in*
7 *writing that such provisions would not be applicable to*
8 *such production contract, giving due consideration to*
9 *the stability of the system's design, or otherwise would*
10 *not be in the best interests of the Government in at-*
11 *taining the purposes for which the system is being pro-*
12 *cured, stating the reasons therefor, and including such*
13 *determination and finding as part of the contract file;*
14 *and]*

15 *“[(3)] (C) the evaluation factors specified in*
16 *paragraphs (1) and (2) of this subsection shall be con-*
17 *sidered as negotiation objectives when an agency is*
18 *making a noncompetitive award of a development con-*
19 *tract or a production contract for a major system. [”.]*

20 **“(2) The provisions of paragraph (1)(B) may**
21 **be waived if the contracting officer determines in**
22 **writing that such provisions would not be applica-**
23 **ble to such production contract, giving due consid-**
24 **eration to the stability of the system's design, or**
25 **otherwise would not be in the best interests of the**

1 **Government in attaining the purposes for which**
 2 **the system is being procured, states the reasons**
 3 **therefor, and includes such determination and**
 4 **finding as part of the contract file.**

5 ENCOURAGING NEW COMPETITORS TO BROADEN THE
 6 INDUSTRIAL BASE

7 SEC. 4. (a) Section 15 of the Small Business Act is
 8 amended by adding at the end thereof the following new
 9 paragraph:

10 “(n)(1) Before **[a Federal agency may establish]** es-
 11 **tablishing** any prequalification requirement *applicable to*
 12 *an offeror or its product which would be considered as an*
 13 *element of responsiveness to a solicitation*, the Federal
 14 agency shall—

15 “(A) prepare a written justification stating the
 16 ~~reasons for the restriction and why free and open com-~~
 17 ~~petition is not feasible~~; *necessity for establishing the*
 18 *prequalification requirement and the reasons why free*
 19 *and open competition is not feasible*;

20 “(B) specify in writing and make available upon
 21 request all standards which a prospective contractor, or
 22 its product, must ~~meet~~ *satisfy* in order to become
 23 qualified, such standards being limited to those least
 24 restrictive to ~~attain the objective stated as the justifica-~~
 25 ~~tion for the restriction~~; *meet the purposes necessitating*
 26 *the establishment of the prequalification requirement*;

1 “(C) specify an estimate of the costs of
2 testing and evaluation likely to be incurred
3 by a prospective contractor for that contrac-
4 tor to become qualified;

5 “[(C)] (D) provide a prompt opportunity for
6 ensure that (i) a prospective contractor is provided,
7 upon request, a prompt opportunity to demonstrate its
8 ability to meet the standards specified for qualification,
9 utilizing qualified personnel and facilities of the agency
10 or another agency obtained through interagency agree-
11 ment, or the services of a private contractor other
12 methods approved by the agency [: Provided, That],
13 and (ii) any testing and evaluation services provided
14 by a private contractor should, whenever possible,
15 under contract to the agency should be provided by a
16 contractor other than a contractor who could reason-
17 ably who will not be expected to benefit from an ab-
18 sence of additional qualified sources and such contrac-
19 tor who shall be required to adhere to any restrictions
20 restriction on technical data asserted by the prospec-
21 tive contractor seeking qualification; and

22 “[(D)] (E) inform the prospective contractor
23 promptly ensure that a prospective contractor seeking
24 qualification is promptly informed as to whether quali-
25 fication has been attained, or in the event qualification

1 has not been attained, information sufficient to specifi-
2 cally inform the prospective contractor why qualifica-
3 tion was not attained.

4 “(2) Before a Federal agency may enforce any existing
5 prequalification requirement **[on]** with respect to an of-
6 feror or its product, the Federal agency shall, ~~upon request,~~
7 comply with the requirements of paragraph (1) of this subsec-
8 tion. A Federal agency need not delay a procurement action
9 in order to provide a prospective contractor with an opportu-
10 nity to demonstrate its ability to meet the standards specified
11 for qualification.

12 “(3) In the event that the number of ~~currently~~ qualified
13 sources or qualified products available to actively compete for
14 anticipated future requirements is fewer than **[five]** two
15 **actual manufacturers or the products of two**
16 **actual manufacturers, respectively,** the Federal
17 agency shall—

18 “(A) periodically publish notice in the Commerce
19 Business Daily soliciting additional sources or products
20 to seek qualification; and

21 “(B) ~~waive or otherwise~~ bear the cost of conduct-
22 ing the specified testing and evaluation, but excluding
23 the costs associated with producing the item or estab-
24 lishing the production, quality control, or other system
25 to be tested and evaluated, *only* for a small business

1 concern or a product manufactured by a small business
2 concern, ~~ultimately determined to be qualified~~ which
3 has met the standards specified for qualification, and
4 which could reasonably be expected to compete, **except**
5 **that the Federal agency shall bear such costs**
6 **only if it determines that such additional**
7 **qualified sources or products are likely to**
8 **result in cost savings from increased competi-**
9 **tion for future requirements sufficient to am-**
10 **ortize the costs incurred by the Federal**
11 **agency.**

12 The Federal agency may ~~request a certification from~~ require
13 a prospective contractor ~~seeking the waiver or reimbursement~~
14 ~~of requesting testing and evaluation costs to certify~~ as to its
15 status as a small business concern, and, in good faith, rely
16 thereon. [Nothing herein shall prohibit a Federal agency
17 from funding, either before or after testing, some or all of the
18 costs incurred by a small business concern in producing the
19 product to be tested. The Federal agency may fund some or
20 all of the cost of production and qualification for additional
21 small business sources or the products manufactured by such
22 sources beyond the five if the Federal agency determines that
23 such additional qualified sources or products will expand the
24 industrial mobilization base or is likely to result in cost sav-
25 ings from increased competition for future requirements suffi-

1 cient to amortize the costs incurred by the Federal agency.”
2 agency.]

3 “(4) Within [five] seven years after the establish-
4 ment of any prequalification requirement pursuant to para-
5 graph (1), or within [five] seven years following an agen-
6 cy’s enforcement of any existing prequalification requirement
7 pursuant to paragraph (2), any such prequalification re-
8 quirement shall be [automatically terminated unless the
9 Federal agency complies] examined and revalidated in
10 accordance with the requirements of paragraph (1) of this
11 subsection (n).

12 “(5) [Whenever] Except in an emergency,
13 whenever a Federal agency determines not to enforce an
14 existing prequalification requirement for a solicitation, the
15 agency may not enforce any such prequalification require-
16 ment unless the agency complies with the requirements of
17 paragraph (1) of this subsection (n).”

18 **REPORTING REQUIREMENT**

19 **SEC. 5.** Not later than July 1, 1985, a report
20 prepared under the direction of the Office of Fed-
21 eral Procurement Policy shall be submitted to the
22 Congress on the desirability and feasibility of re-
23 quiring the prime contractor for a major system to
24 establish and maintain procedures to qualify com-
25 peting sources for those components of the major

1 system likely to be needed in substantial quanti-
2 ties during the system's service life.

3 **ENHANCED PROCUREMENT NOTICES**

4 ~~(b)(1)~~ *Sec. [5.]* 6. (a) Section 8(e) of the Small Busi-
5 ness Act is amended—

6 (A) (1) by inserting before the semicolon at the
7 end of subparagraph (3)(A) a comma and “and in-
8 cludes, as appropriate, agency nomenclature, National
9 Stock Number or other part number, ~~and system appli-~~
10 ~~cation~~, all amplified by a brief description relating to
11 the item's form, fit or function, physical dimensions,
12 predominant material of manufacture, or similar infor-
13 mation to assist a prospective contractor to make an
14 informed business judgment as to whether a solicitation
15 should be requested”;

16 (B) (2) by redesignating subparagraphs (B) and
17 (C) of paragraph (3) as subparagraphs (C) and (E),
18 respectively;

19 (C) (3) by inserting after subparagraph (A) of
20 paragraph (3) a new subparagraph (B) as follows:

21 “(B) a procurement history and forecast of re-
22 quirements, to the extent available, including—

23 “(i) date of last award and price thereof,
24 number of units and unit price, time for perform-

1 ance, and whether the last contract was awarded
2 competitively;

3 “(ii) aggregate dollar value and number of
4 units procured during the last two fiscal years;
5 and

6 “(iii) number of additional requirements (ex-
7 pressed in the same unit term as the procurement
8 history) estimated for procurement during the re-
9 mainder of the current fiscal year and each of the
10 two succeeding fiscal years;”;

11 ~~(D)~~ (4) by inserting after subparagraph (C) of
12 paragraph (3), as redesignated, a new subparagraph
13 (D) as follows:

14 “(D) notations as to whether—

15 “(i) ~~the solicitation will reference technical~~
16 ~~data which a prospective contractor will be re-~~
17 ~~quired to obtain from other governmental sources~~
18 ~~prior to submitting an offer; and the technical data~~
19 ~~required to respond to a solicitation will not be~~
20 ~~furnished as part of such solicitation, and identi-~~
21 ~~fying the governmental source, if any, from which~~
22 ~~the technical data may be obtained; and~~

23 “(ii) ~~a prospective~~ an offeror or its product
24 must be prequalified in order to have its offer con-
25 sidered for ~~award~~ award, and ~~identify~~ identifying

1 the office from which the standards specified for
2 prequalification may be obtained;” **[and]**

3 **[~~(E)~~ (5) by redesignating paragraph (6) as para-**
4 **graph (7) and inserting a new paragraph (6) as**
5 **follows:]**

6 **(5) by inserting in paragraph (4), after**
7 **“provisions of this paragraph were complied**
8 **with,” the following: “or unless the procure-**
9 **ment is under the foreign military sales pro-**
10 **gram and a foreign government has request-**
11 **ed a sole source,”;**

12 **(6) by redesignating paragraph (6) as**
13 **paragraph (7) and inserting a new paragraph**
14 **(6) as follows:**

15 **“(6) In order to further carry out the requirements of**
16 **this subsection and section 223(a) of the Act of October 24,**
17 **1978 (Public Law 95-507, 15 U.S.C. 637b), each Federal**
18 **agency shall—**

19 **“(A) publicly post in either full text or abstract**
20 **format **[.]** at the contracting office, any solicita-**
21 **tion or otherwise readily make available a compilation,**
22 **of information relating to **[.]** procurement actions in**
23 **excess of \$2,500 which would have been synopsisized**
24 **in the Commerce Business Daily if ~~it~~ such procurement**

1 *actions* had equaled or exceeded the applicable dollar
2 threshold for ~~such publication~~ *publication*; and

3 “(B) ~~reasonably~~ make available to any small busi-
4 ness concern, or to the authorized representative of
5 such concern, the complete solicitation package for any
6 ~~solicitation posted in abstract format on-going procure-~~
7 *ment action announced pursuant to this paragraph* and
8 permit the copying thereof: *Provided, That a* ~~A~~ Feder-
9 al agency may require the payment of a fee, not ex-
10 ceeding the actual cost of duplication.” **[.]**; and

11 **(7) by inserting at the end of paragraph**
12 **(7) (as redesignated by clause (6)) the follow-**
13 **ing new clause:**

14 “(C) the term ‘procuring activity’
15 means that organizational element of a
16 Federal department actually responsible
17 for the issuance of solicitations, the eval-
18 uation of offers, and the award of con-
19 tracts.”.

20 ~~(2)~~ *(b)* Section 8(d)(1) of the Small Business Act is
21 amended by adding at the end thereof the following new sen-
22 tence: “It is further the policy of the United States that small
23 business concerns, and small business concerns owned and
24 controlled by socially and economically disadvantaged indi-
25 viduals, shall have the maximum practicable opportunity to

1 participate in the performance of contracts and subcontracts
 2 for appropriate portions of subsystems, assemblies, compo-
 3 nents, and related services for major systems.”.

4 ~~(3)~~ (c) Section 8(d)(3)(A) of the Small Business Act is
 5 amended by adding at the end thereof the following new sen-
 6 tence: “It is further the policy of the United States that small
 7 business concerns, and small business concerns owned and
 8 controlled by socially and economically disadvantaged indi-
 9 viduals, shall have the maximum practicable opportunity to
 10 participate in the performance of contracts and subcontracts
 11 for appropriate portions of subsystems, assemblies, compo-
 12 nents, and related services for major systems.”.

13 TECHNICAL DATA MANAGEMENT TO FOSTER FUTURE
 14 COMPETITION

15 SEC. ~~5.~~ **[6.]**7. (a) Section 15 of the Small Business
 16 Act is *further* amended by adding at the end thereof the fol-
 17 lowing—*following*:

18 **“(o)(1)(A) An offeror submitting a proposal**
 19 **for a contract shall furnish information in the**
 20 **proposal identifying—**

21 **“(i) with respect to all items that will be**
 22 **delivered to the United States under the con-**
 23 **tract (other than items to which clause (ii)**
 24 **applies), those items for which technical data**
 25 **will not be provided to the United States; and**

1 “(ii) with respect to technical data that
2 will be delivered to the United States under
3 the contract, any of such technical data that
4 will not be provided with restrictions on the
5 Government’s right to use such data for gov-
6 ernmental purposes.

7 “(B) With respect to items that will be deliv-
8 ered to the United States under a contract de-
9 scribed in subparagraph (A) with respect to which
10 it would be impracticable to ascertain, at the time
11 the contract is entered into, the technical data re-
12 lating to such items that will not be provided to
13 the United States with unlimited rights, the con-
14 tract shall require that the contractor shall pro-
15 vide identifying information similar to that re-
16 quired to be furnished under subparagraph (A) at
17 the time to be specified in the contract.

18 “(C) The head of a Federal agency shall
19 ensure that the information furnished under sub-
20 paragraph (A) is considered in selecting the con-
21 tractor for the contract.

22 “[o] (2) To foster competition for the acquisition of
23 ~~requirements~~ *supplies and services* to maintain a major
24 system during its service life, the head of the Federal agency
25 with responsibility for the system shall ~~insure~~ *ensure* that the

1 initial and all subsequent production contracts *for a major*
2 *system, developed under Government contract*, contain appro-
3 priate provisions related to technical data, including—

4 “**[(1)] (A)** specifying the technical data ~~deliver-~~
5 ~~able to be delivered~~ under the contract, *if any, includ-*
6 *ing and a delivery schedule schedules therefor*, there-
7 for; ~~including options for deferred delivery or multiple~~
8 ~~deliveries~~;

9 “**[(2)] (B)** establishing criteria for determining
10 the acceptability of technical data to be delivered under
11 the contract;

12 “**[(3)] (C)** establishing separate payment lines
13 ~~relating to the delivery of technical data under the con-~~
14 ~~tract for the technical data to be delivered under the~~
15 *contract, if any*, and authorizing the withholding of
16 payments for failure to make timely deliveries of ac-
17 ceptable data;

18 “**[(4)] (D)** ~~specifying~~ *defining* **[,]** the respec-
19 tive rights of the Government and a contractor or sub-
20 contractor regarding *any* technical data to be ~~submit-~~
21 ~~ted delivered~~ under the contract, including therein a
22 definition of the **[phrase] term** ‘developed at private
23 expense’;

24 “**[(5)] (E)** **to the maximum practicable**
25 **extent**, identifying, in advance of *its* delivery, techni-

1 cal data which is to be delivered with restrictions on
2 the Government's ~~rights in such data~~ *right to use such*
3 *data for governmental purposes, except that data*
4 **not so identified may be identified and**
5 **marked with restrictions on the Govern-**
6 **ment's right to use such data if by a time**
7 **specified by regulation the contractor re-**
8 **quests to so limit the Government's right to**
9 **the data, demonstrates the validity of such**
10 **limitations, demonstrates that the failure to**
11 **identify the data in advance of delivery was**
12 **inadvertent, and relieves the Government of**
13 **any liability with respect to the use of such**
14 **technical data prior to the assertion of a re-**
15 **striction;**

16 " **[(6)] (F)** requiring the contractor ~~to prepare~~
17 ~~or cause to be prepared in advance of delivery, and~~
18 ~~retain, a justification for any restriction to be asserted~~
19 ~~by the contractor or any subcontractor limiting the~~
20 ~~Government's rights in such data; and each subcon-~~
21 ~~tractor to be prepared to furnish, within 60 days after~~
22 **a written request directed to the party assert-**
23 **ing a restriction, a written justification for any re-**
24 **striction to be asserted limiting the Government's right**
25 **to use such data for governmental purposes, for as long**

1 *as such restriction is asserted by the contractor or sub-*
2 *contractor;*

3 ~~“(7) authorizing the Government to disclose limit-~~
4 ~~ed rights data to a contractor retained by the Govern-~~
5 ~~ment solely for the purpose of reviewing the justifica-~~
6 ~~tion for the limitation placed on the data, and requiring~~
7 ~~such contractor to strictly adhere to any restrictions~~
8 ~~placed on the data;~~

9 ~~“(8) specifying liquidated damages to be paid to~~
10 ~~the Government by the contractor or by a subcontractor~~
11 ~~in the event that the Government's challenge to a~~
12 ~~limitation on the Government's rights in technical data~~
13 ~~asserted by the contractor or a subcontractor is sus-~~
14 ~~tained;~~

15 ~~“(9) [(7)] (G) prohibiting a contractor from re-~~
16 ~~quiring a subcontractor or the Government to pay a~~
17 ~~fee, royalty, or other charge for the subcontractor's use~~
18 ~~of any technical data, except that protected by patent,~~
19 ~~in the performance of a contract to furnish a compo-~~
20 ~~nent or other requirement directly to the Government,~~
21 ~~except that data protected by patent, licensing agree-~~
22 ~~ment or any preexisting agreement involving a subcon-~~
23 ~~tractor's performance under a [commerical] com-~~
24 ~~mercial contract, if the same technical data was fur-~~
25 ~~nished or otherwise made available by the contractor~~

1 to the subcontractor for the performance of a contract
2 between them furnishing that component;

3 ~~“(10)~~ **[(8)] (H)** prohibiting the contractor from
4 limiting, either directly or indirectly, the Government’s
5 right to purchase directly from a subcontractor a sub-
6 contractor from selling to the Government any compo-
7 nent ~~or other requirement~~ which the subcontractor had
8 previously furnished to the contractor without restric-
9 tion; restriction, except that the contractor may restrict
10 a subcontractor from providing to the Government any
11 component restricted by a preexisting agreement involv-
12 ing the subcontractor’s performance for the contractor
13 under its commercial contracts;

14 ~~“(11)~~ **[(9)] (I)** ascertaining and documenting
15 the identity of the manufacturer of a component by re-
16 quiring the contractor, and each subcontractor at every
17 tier, to annotate engineering drawings with such infor-
18 mation; and through the annotation of engineering
19 drawings, the maintenance of lists, or otherwise **[.]**;

20 **“(J) requiring the contractor to revise**
21 **any technical data delivered pursuant to the**
22 **contract to reflect engineering design**
23 **changes and to deliver such revised technical**
24 **data to an agency within a specified time;**

1 “(K) requiring the contractor to certify
2 at the time the technical data is made avail-
3 able or delivered, that the technical data is
4 complete, accurate, and adequate for the pur-
5 pose for which the technical data is procured;

6 “(L) requiring the contractor to promptly
7 correct any technical data found to be incom-
8 plete, inadequate, or deficient or to promptly
9 furnish complete, accurate, and adequate
10 technical data to the agency; and

11 “(M) authorizing the head of the agency
12 to withhold progress payments under a con-
13 tract during any period that the contractor
14 does not meet the requirements of the con-
15 tract pertaining to the delivery of technical
16 data.

17 ~~“(12) requiring the contractor, and each subcon-~~
18 ~~tractor at every tier, to maintain a listing of the sub-~~
19 ~~contractors and suppliers from whom it has purchased,~~
20 ~~or solicited to purchase, components included in the~~
21 ~~major system and granting to the Government the~~
22 ~~right to obtain a copy thereof.~~

23 The application of any of the provisions specified in this sub-
24 section may be waived. *The provisions specified in this sub-*
25 *section shall be [included] implemented in the single*

1 *system of Government-wide procurement regulations, [as*
2 *defined in section 403 of title 41, United States Code,]*
3 **section 4(4) of the Office of Federal Procurement**
4 **Policy Act (41 U.S.C. 403(4)) and may be waived in**
5 *accordance with such procurement regulations if the contract-*
6 *ing officer determines in writing that any such provision*
7 **[would]** *should not be applicable to the production con-*
8 *tract, or otherwise would not be in the best interests of the*
9 *Government in attaining the purposes for which the system is*
10 *being procured, stating the reasons therefor. Such determina-*
11 *tion shall be made part of the contract file. [".]*

12 **“(3) Nothing in this subsection or subsection**
13 **(m) of this section prohibits an agency from in-**
14 **cluding—**

15 **“(A) in any competitive solicitation for**
16 **the award of a contract, or**

17 **“(B) as a negotiation objective when the**
18 **agency is making a noncompetitive award,**
19 **a provision specifying in the contract the date**
20 **after which the United States shall have the right**
21 **to use or have used for any governmental purpose**
22 **all technical data required to be delivered to the**
23 **United States under contract.”.**

24 **(b)(1) Within one year after the date of enactment of**
25 **[the Small Business Competition Enhancement Act of**

1 1984] **this Act**, each Federal agency shall develop a plan
2 for the management of technical data received under con-
3 tracts for the development, production, modification, or main-
4 tenance of major systems within its jurisdiction. ~~Among other~~
5 ~~matters~~, *At a minimum*, the management plan shall address
6 *procedures for—*

7 (A) *inventory of existing data;*

8 (B) (A) ~~procedures for inventorying~~, indexing,
9 storing, and updating items of technical data ~~entered~~
10 into ~~the a~~ system;

11 (C) (B) ~~techniques for~~ verifying contractor-im-
12 posed limitations on the Government's rights to make
13 future use of the data in competitive acquisitions; and

14 (D) (C) ~~procedures to assure~~ *assuring* that agency
15 procurement officials and ~~qualified~~ prospective contrac-
16 tors will have timely access to complete and current
17 technical data for the competitive acquisition of ~~re-~~
18 ~~quirements~~ *supplies and services* for the maintenance
19 of the system during its service life.

20 (2) Within 5 years after the date of enactment of [the
21 Small Business Competition Enhancement Act of 1984]
22 **this Act**, each Federal agency shall complete implementa-
23 tion of the management plan required by paragraph (1), and
24 include *in the system* the *available* technical data for each
25 currently operational major system within its jurisdiction.

1 (3) Not later than eighteen months after the enactment
 2 of this **[section]** Act, the Comptroller General of the
 3 United States shall transmit to the Congress a report evalu-
 4 ating the plans of selected Federal agencies for the manage-
 5 ment of technical data for major systems within their jurisdic-
 6 tion. The report shall include an evaluation of the plans of
 7 the Department of Defense, the Department of Energy and
 8 the Department of Transportation, and the National Aero-
 9 nautics and Space Administration.

10 VALIDATING PROPRIETARY DATA RESTRICTIONS

11 ~~SEC. 6.~~ **[7.]** 8. Section 15 of the Small Business Act
 12 is amended by adding at the end thereof the following:

13 “(p)(1) ~~In order to competitively procure the maximum~~
 14 ~~number~~ *To encourage the competitive acquisition of compo-*
 15 *nents needed to maintain a major system during its service*
 16 *life, a review of the validity of any restriction on the Govern-*
 17 *ment’s* ~~rights in right to use for governmental purposes~~ *tech-*
 18 *nical data furnished under contract shall be initiated by the*
 19 *contracting officer, if the contracting officer, an agency advo-*
 20 *cate for competition, or [an authorized representative of the*
 21 *Administration]* **the representative of the Adminis-**
 22 **tration assigned to the procurement center** deter-
 23 *mines such a review is* ~~warranted.~~ *warranted and the con-*
 24 *tracting officer determines that compliance with the asserted*
 25 *restriction makes it impracticable to competitively procure the*
 26 *required component.* +”

1 “(2) Upon the ~~request~~ *written demand* of the contracting
2 officer, the contractor *or subcontractor, as appropriate*, shall
3 submit its justification for the asserted restriction on the Gov-
4 ernment’s ~~rights in such data~~, *right to use such data for gov-*
5 *ernmental purposes* certifying to the current validity of the
6 asserted restriction within—

7 “(A) 60 days, if the contract contains a provision
8 that requires ~~the preparation and retention of a con-~~
9 *tractor or subcontractor to be prepared to furnish a*
10 *written justification for any restriction limiting the*
11 *Government’s rights in right to use for governmental*
12 *purposes* technical data to be delivered under the con-
13 tract, or

14 “(B) 180 days, if the contract does not contain
15 such a provision **[: Provided, That]**, **except that** *the*
16 *contracting officer may extend such time limits for a*
17 *reasonable period for good cause shown.*

18 “(3) Upon a failure to submit any justification, ~~as re-~~
19 ~~quired by pursuant to the requirements of~~ paragraph (2) of
20 this subsection, the contracting officer shall, after *giving*
21 *notice to the contractor to the party asserting the re-*
22 **striction**, promptly cancel the restriction on the Govern-
23 ment’s ~~rights in right to use for governmental purposes~~ *tech-*
24 *nical data for which justification had been requested.*

1 “(4) If after review of the justification submitted pursu-
2 ant to paragraph (2) of this subsection, the contracting officer
3 determines that the justification for the ~~restrictions~~ *restriction*
4 on the Government’s ~~rights in~~ *right to use the data for gov-*
5 *ernmental purposes the data* does not adequately support the
6 ~~restrictions~~, **[restriction the]** asserted ~~limitation restric-~~
7 *tion* **[,]** on the technical data, **[and]** the justification there-
8 for shall be promptly subjected to technical review and audit.
9 by ~~qualified personnel of the agency or another Federal~~
10 ~~agency obtained through interagency agreement, or a private~~
11 ~~contractor who is capable of providing an impartial review~~
12 ~~and who shall be required to adhere to any asserted restric-~~
13 ~~tions on technical data.~~

14 “(5) If after reviewing the findings of the technical
15 review and audit, it is determined that the ~~limitation restric-~~
16 *tion on the Government’s rights in the data right to use such*
17 *data for governmental purposes* warrants challenge, the con-
18 tracting officer shall issue a final decision pertaining thereto
19 which shall be subject to the provisions of the Contract Dis-
20 putes Act (41 U.S.C. 601 et seq.).

21 “(6) If the Government’s challenge to the restriction on
22 the Government’s ~~rights in~~ *right to use for governmental pur-*
23 *poses* technical data as certified pursuant to paragraph (2) of
24 this subsection is sustained, upon final disposition—

1 “(A) the restriction on the Government’s ~~rights in~~
2 *right to use that technical data for governmental pur-*
3 *poses shall be cancelled; and*

4 “(B) the contractor or subcontractor, as appropri-
5 *ate, shall be liable to the Government for [—]*

6 ~~“(i) the liquidated damages specified in the~~
7 ~~contract; and~~

8 ~~“(ii) the Government’s cost of technically~~
9 ~~evaluating and auditing the asserted restriction,~~
10 ~~and the fees and other expenses, as defined in~~
11 ~~section 2412 (a) (d)(2)(A) of title 18 28, United~~
12 ~~States Code, incurred by the Government in chal-~~
13 ~~lenging the asserted restriction, if the asserted re-~~
14 ~~striction, as certified, is found not to be substan-~~
15 ~~tially justified, unless special circumstances would~~
16 ~~make such awards unjust.”.~~

17 BREAKOUT PROCUREMENT CENTER REPRESENTATIVES

18 SEC. 7. ~~[8.]~~ 9. Section 15 of the Small Business Act
19 (15 U.S.C. 644) is amended by adding at the end thereof the
20 following:

21 “(q)(1) The Administration shall assign to each major
22 procurement center a breakout procurement center repre-
23 sentative, with such assistance as may be appropriate; ~~who~~
24 ~~shall be an advocate for the competitive procurement of the~~
25 ~~center’s requirements and be responsible for executing the~~
26 ~~functions described under paragraph (2). In carrying out the~~

1 *functions described in paragraph (2), such representative*
2 *shall be an advocate for the breakout of components for com-*
3 *petitive procurement whenever possible while maintaining the*
4 *integrity of the system in which such components are used,*
5 *and be an advocate for the competitive procurement of the*
6 *supplies and services procured by the center. Any breakout*
7 *procurement center ~~representatives~~ representative appointed*
8 *under ~~the authority of the preceding sentence~~ this subsection*
9 *shall be distinct ~~from~~ from, and in addition ~~to~~ to, any other*
10 *procurement center ~~representatives~~ representative who may*
11 *be, from time to time, assigned by the Administration to ~~vari-~~*
12 *ous a procurement ~~centers~~ center for the purpose of advocat-*
13 *ing increased small business participation.*

14 “(2) ~~The~~ *In addition to carrying out the responsibilities*
15 *assigned by the Administrator, a breakout procurement*
16 *center representative is empowered to—*

17 “(A) participate as a regular member of any pro-
18 visioning conference, or similar evaluation session re-
19 lating to maintaining a major system during its service
20 life, during which determinations are made as to
21 whether requirements are to be procured through other
22 than free and open competition;

23 “(B) review, at any time, restrictions on competi-
24 tion previously imposed on requirements through acqui-
25 sition method coding or similar procedures, and to re-

1 quest prompt reevaluation of such limitations on com-
2 petition by agency personnel;

3 “(C) review restrictions on competition arising out
4 of restrictions on the Government’s rights in technical
5 data and, when appropriate, recommend that the con-
6 tracting officer initiate a review of the validity of such
7 an asserted restriction;

8 “(D) obtain from any governmental source techni-
9 cal data suitable for the preparation of a competitive
10 solicitation package for any requirement previously
11 procured noncompetitively due to the nonavailability of
12 unrestricted technical data and make it available for
13 validation by appropriate procurement center person-
14 nel; and obtain from any source, and make available to
15 the appropriate procurement center personnel, unre-
16 stricted technical data necessary for the preparation of
17 a competitive solicitation package for any item of
18 supply or service previously procured noncompetitively
19 due to the unavailability of such unrestricted data; and

20 “(E) have access to the unclassified procurement
21 records and other data of the procurement center so as
22 to facilitate effective discharge of the foregoing func-
23 tions and to permit the preparation of complete and ac-
24 curate reports to the ~~Administration~~ Administration;

1 “(F) receive unsolicited value-engineering propos-
2 als, forwarding them with or without recommendation
3 to procurement center personnel responsible for review-
4 ing such proposals and who shall furnish the breakout
5 procurement center representative with information re-
6 garding any action taken with respect to any such pro-
7 posal; and

8 “(G) review the procurement practices of the
9 center and make recommendations to the Administrator
10 who shall, as appropriate, consult with the responsible
11 agency procurement executive regarding the implemen-
12 tation thereof.

13 “(3)(A) Each Federal agency having one or more major
14 procurement centers shall assign **at least one** technical
15 advisor [s] to each major procurement center to which the
16 Administration has assigned a breakout procurement center
17 representative.

18 “(B) Technical advisors assigned under this paragraph
19 shall be—

20 “(i) full-time employees of such agency;

21 “(ii) colocated with the assigned breakout procure-
22 ment center representative; and

23 “(iii) fully qualified, technically trained, and famil-
24 iar with the supplies and services procured by the
25 major procurement center.

1 **[At least one such technical advisor ~~position~~ assigned to**
2 **each major procurement center shall be ~~classified as~~ requiring**
3 **an accredited engineer.]**

4 “(C) The primary duty of a technical advisor assigned
5 under this paragraph shall be to assist the breakout procure-
6 ment center representative for the center to which such advi-
7 sor is assigned in carrying out his functions.

8 “(4) There are authorized to be appropriated to the Ad-
9 ministration such sums as may be necessary to carry out the
10 provisions of *paragraphs (1) and (2) of this subsection.*”.

11 **PROHIBITION OF LIMITING DIRECT SALES BY**

12 **SUBCONTRACTORS TO THE UNITED STATES**

13 **SEC. 10. Section 15 of the Small Business Act**
14 **(15 U.S.C. 644) is further amended by adding at the**
15 **end thereof the following:**

16 “(r) Each contract for the purchase of sup-
17 plies or services made by a Federal agency shall
18 provide that the contractor will not—

19 “(1) enter into any agreement with a sub-
20 contractor under the contract that has the
21 effect of unreasonably restricting sales by the
22 subcontractor directly to the United States of
23 any item or process (including computer soft-
24 ware) like those made, or services like those
25 furnished, by the subcontractor under the

1 **contract (or any follow-on production con-**
2 **tract); or**

3 **“(2) otherwise act to restrict unreason-**
4 **ably the ability of a subcontractor to make**
5 **sales to the United States described in clause**
6 **(1).”.**

7 *CERTIFICATE OF COMPETENCY*

8 *Sec. [9.] 11. Section 8(b)(7) of the Small Business*
9 *Act is amended by adding at the end thereof the following:*
10 *“Notwithstanding the first sentence of this subsection, the*
11 *Administration may not establish an exemption from referral*
12 *or notification or refuse to accept a referral or notification*
13 *from a Government procurement officer made pursuant to*
14 *subparagraph (A) or (B) of this paragraph, but nothing in*
15 *this paragraph shall require the processing of an application*
16 *for certification if the small business concern to which the*
17 *referral pertains declines to have the application processed. If*
18 *a Government procurement officer proposes to deny a con-*
19 *tractor’s decision to use a small business concern as a sub-*
20 *contractor because of a lack of any element of responsibility*
21 *provided for in subparagraphs (A) or (B) of this paragraph,*
22 *such officer may not preclude the contractor from subcon-*
23 *tracting to such small business concern without referring the*
24 *matter for final disposition to the Administration.”.*

1 **contract (or any follow-on production con-**
2 **tract); or**

3 **“(2) otherwise act to restrict unreason-**
4 **ably the ability of a subcontractor to make**
5 **sales to the United States described in clause**
6 **(1).”.**

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10 *“Notwithstanding the first sentence of this subsection, the*
11 *Administration may not establish an exemption from referral*
12 *or notification or refuse to accept a referral or notification*
13 *from a Government procurement officer made pursuant to*
14 *subparagraph (A) or (B) of this paragraph, but nothing in*
15 *this paragraph shall require the processing of an application*
16 *for certification if the small business concern to which the*
17 *referral pertains declines to have the application processed. If*
18 *a Government procurement officer proposes to deny a con-*
19 *tractor’s decision to use a small business concern as a sub-*
20 *contractor because of a lack of any element of responsibility*
21 *provided for in subparagraphs (A) or (B) of this paragraph,*
22 *such officer may not preclude the contractor from subcon-*
23 *tracting to such small business concern without referring the*
24 *matter for final disposition to the Administration.”.*

1 **[DEFINITIONS] DEFINITIONS**

2 *Sec. [8.] [10.]* 12. Section 3 of the Small Business
3 Act is amended by adding at the end thereof the following:

4 “(j) For the purpose of this Act and section 5 **[6(b)]**
5 **7(b)** of the Small Business **and Federal Procurement**
6 Competition Enhancement Act of 1984, the term—

7 “(1) ‘component’ means any individual part, sub-
8 assembly, assembly, or subsystem integral to a major
9 system, which may be replaced during the service life
10 of the system. The term includes spare part and re-
11 plenishment spare part. The term does not include
12 packaging or labeling associated with shipment or iden-
13 tification of a ‘component’;

14 “(2) ‘major procurement **[’]** center’ means a pro-
15 curement center that awarded contracts for compo-
16 nents other than commercial items totaling at least
17 \$150,000,000 in the preceeding fiscal year;

18 “(3) ‘major system’ means a combination of ele-
19 ments that will function together to produce the capa-
20 bilities required to fulfill a mission need. The elements
21 may include hardware, equipment, software or any
22 combination thereof, but excludes construction or other
23 improvements to real property. A system shall be con-
24 sidered a ‘major system’ if **[**: (a) the Department of
25 Defense is responsible for the system and the total ex-

1 penditures for research, development, test and evalua-
2 tion are estimated to be more than \$75,000,000 (based
3 on fiscal year 1980 constant dollars) or an eventual
4 total expenditure for procurement of more than
5 \$300,000,000 (based on fiscal year 1980 constant dol-
6 lars); or (b) a civilian agency is responsible for the
7 system and **]** (A) total expenditures for the system are
8 estimated to exceed \$750,000 (based on fiscal year
9 1980 constant dollars) or the dollar threshold for a
10 'major system' established by the agency pursuant to
11 Office of Management and Budget (OMB) Circular A-
12 109, entitled 'Major Systems Acquisitions', whichever
13 is greater, or **[(3) any]** (B) the system is designated
14 a 'major system' by the head of the agency responsible
15 for the system;

16 “(4) 'technical data' means recorded information,
17 regardless of form or characteristic, of a scientific or
18 technical nature. It documents research, experimental,
19 developmental or engineering work, or is usable or
20 used to define a design or process or to procure,
21 produce, support, maintain, or operate material. The
22 data may be graphic or pictorial delineations in media
23 such as drawings or photographs; text in specifications
24 or related performance or design-type documents; or
25 computer printouts. Examples of technical data include

1 research and engineering data, engineering drawings
2 and associated lists, specifications, standards, process
3 sheets, manuals, technical reports, catalog item identi-
4 fications and related information. Technical data does
5 not include computer software, financial, administra-
6 tive, cost or pricing, and management data, or other
7 information incidental to contract administration.
8 ~~'Technical data'~~, as herein defined, does not include
9 technical data for commercial products or components
10 thereof developed at private expense." (regardless of
11 form or method of recording) of a scientific or technical
12 nature, including data resulting from work which was
13 specified **and directly funded** as an element of per-
14 formance of a contract from the United States, but
15 does not include—

16 "(i) computer software [**and documenta-**
17 **tion**];

18 "(ii) financial, administrative, cost or pric-
19 ing, management data, or other information inci-
20 dental to contract administration;

21 "(iii) data relating to products, components,
22 or processes developed at private expense; or

23 "(iv) data relating to products, components,
24 or processes developed [**solely**] at private ex-

1 *required to contain the clauses contained in paragraph (3) of*
2 *section 8(d) of the Small Business Act which are awarded on*
3 *or after 180 days following the date of enactment of this Act.*

4 (e) *The amendments made to section 15 of the Small*
5 *Business Act by sections 3 and 6 of this Act shall take effect*
6 *immediately and shall be included in appropriate solicita-*
7 *tions for bids or proposals issued on or after 180 days after*
8 *the effective date of this Act.]*

9 **PROVISIONS APPLICABLE TO THE DEPART-**
10 **MENT OF DEFENSE AND RELATED**
11 **AGENCIES**

12 **SEC. 13. (a)(1) Chapter 137 of title 10, United**
13 **States Code, is amended by adding at the end**
14 **thereof the following new sections:**

15 **“§ 2317. Planning for future competition**

16 **“(a) To encourage the competitive acquisition**
17 **of supplies and services to support and maintain a**
18 **major system during its service life, the head of an**
19 **agency with responsibility for that system shall**
20 **ensure that—**

21 **“(1) in any competitive solicitation for**
22 **the award of any development contract for a**
23 **major system, the following shall be included**
24 **as evaluation factors, giving due consider-**
25 **ation to the purposes for which the system is**

1 **being procured and the technology to achieve**
2 **the system's required capabilities:**

3 **“(A) proposals to incorporate in the**
4 **design of the major system, components**
5 **that are currently available within the**
6 **supply system of the Federal agency re-**
7 **sponsible for the major system, available**
8 **elsewhere in the national supply system,**
9 **or commercially available from more**
10 **than one source; and**

11 **“(B) proposals to incorporate in the**
12 **design of the major system, components**
13 **that are likely to be required in substan-**
14 **tial quantities during the system's service**
15 **life and will permit future competitive**
16 **acquisitions by the Government;**

17 **“(2) in any competitive solicitation for**
18 **the award of any production contract for a**
19 **major system, the following shall be included**
20 **as evaluation factors:**

21 **“(A) proposals to identify compo-**
22 **nents in the system that are likely to be**
23 **required in substantial quantities during**
24 **the system's service life and whether the**
25 **technical data for such components will**

1 **permit future competitive acquisitions by**
2 **the Government; and**

3 **“(B) proposals to identify technical**
4 **data for sale or license to the Federal**
5 **Government which the offeror, at its dis-**
6 **cretion, will identify and separately price**
7 **so as to permit the Government to com-**
8 **petitively acquire future requirements for**
9 **such components; and**

10 **“(3) the evaluation factors specified in**
11 **paragraphs (1) and (2) of this subsection**
12 **shall be considered as negotiation objectives**
13 **when an agency is making a noncompetitive**
14 **award of a development contract or a produc-**
15 **tion contract for a major system.**

16 **“(b) The provisions of paragraph (2) of sub-**
17 **section (a) may be waived in whole or in part if**
18 **the contracting officer determines in writing that**
19 **such provisions should not be applicable to such**
20 **production contract, giving due consideration to**
21 **the stability of the system’s design, or otherwise**
22 **would not be in the best interests of the United**
23 **States in attaining the purposes for which the**
24 **system is being procured, states the reasons there-**

1 **for, and includes such determination and finding**
2 **as part of the contract file.**

3 **“§ 2318. Encouraging new competitors to broaden the industrial base**

4 **“(a) Before establishing any prequalification**
5 **requirement applicable to an offeror or its product**
6 **which would be considered as an element of re-**
7 **sponsiveness to a solicitation, the head of an**
8 **agency shall—**

9 **“(1) prepare a written justification stat-**
10 **ing the necessity for establishing the prequal-**
11 **ification requirement and the reasons why**
12 **free and open competition is not feasible;**

13 **“(2) specify in writing and make avail-**
14 **able upon request all standards which a pro-**
15 **spective contractor, or its product, must satis-**
16 **fy in order to become qualified, such stand-**
17 **ards to be limited to those least restrictive to**
18 **meet the purposes necessitating the establish-**
19 **ment of the prequalification requirement;**

20 **“(3) specify an estimate of the costs of**
21 **testing and evaluation likely to be incurred**
22 **by a prospective contractor for that contrac-**
23 **tor to become qualified;**

24 **“(4) ensure that (A) a prospective con-**
25 **tractor is provided, upon request, a prompt**

1 **opportunity to demonstrate its ability to meet**
2 **the standards specified for qualification, uti-**
3 **lizing qualified personnel and facilities of the**
4 **agency or another agency obtained through**
5 **interagency agreement, or other methods ap-**
6 **proved by the agency, and (B) any testing**
7 **and evaluation services provided under con-**
8 **tract to the agency should be provided by a**
9 **contractor who will not be expected to bene-**
10 **fit from an absence of additional qualified**
11 **sources and who shall be required to adhere**
12 **to any restriction on technical data asserted**
13 **by the prospective contractor seeking qualifi-**
14 **cation; and**

15 **“(5) ensure that a prospective contractor**
16 **seeking qualification is promptly informed as**
17 **to whether qualification has been attained, or**
18 **in the event qualification has not been at-**
19 **tained, is promptly furnished specific infor-**
20 **mation why qualification was not attained.**

21 **“(b) Before the head of an agency may en-**
22 **force any existing prequalification requirement**
23 **with respect to an offeror or its product, the**
24 **agency shall comply with the requirements of sub-**
25 **section (a). The head of an agency need not delay**

1 a procurement action in order to provide a pro-
2 spective contractor with an opportunity to demon-
3 strate its ability to meet the standards specified
4 for qualification.

5 “(c) In the event that the number of qualified
6 sources or qualified products available to actively
7 compete for anticipated future requirements is
8 fewer than two actual manufacturers or the prod-
9 ucts of two actual manufacturers, respectively, the
10 head of an agency shall—

11 “(1) periodically publish notice in the
12 Commerce Business Daily soliciting addition-
13 al sources or products to seek qualification;
14 and

15 “(2) bear the cost of conducting the spec-
16 ified testing and evaluation, but excluding the
17 costs associated with producing the item or
18 establishing the production, quality control,
19 or other system to be tested and evaluated,
20 only for a small business concern or a prod-
21 uct manufactured by a small business con-
22 cern which has met the standards specified
23 for qualification, and which could reasonably
24 be expected to compete, except that the head
25 of an agency shall bear such costs only if it

1 **determines that such additional qualified**
2 **sources or products are likely to result in**
3 **cost savings from increased competition for**
4 **future requirements sufficient to amortize**
5 **the costs incurred by the agency.**

6 **The head of an agency may require a prospective**
7 **contractor requesting testing and evaluation costs**
8 **to certify as to its status as a small business con-**
9 **cern, and, in good faith, rely thereon.**

10 **“(d) Within seven years after the establish-**
11 **ment of any prequalification requirement under**
12 **subsection (a), or within seven years following an**
13 **agency’s enforcement of any existing prequalifica-**
14 **tion requirement pursuant to subsection (b), any**
15 **such prequalification requirement shall be exam-**
16 **ined and revalidated in accordance with the re-**
17 **quirements of subsection (a) of this section.**

18 **“(e) Except in an emergency, whenever the**
19 **head of an agency determines not to enforce an**
20 **existing prequalification requirement for a solici-**
21 **tation, the agency may not enforce any such pre-**
22 **qualification requirement unless the agency com-**
23 **plies with the requirements of subsection (a).**

1 **“§ 2319. Technical data management to foster future competition**

2 **“(a)(1) An offeror submitting a proposal for a**
3 **contract shall furnish information in the proposal**
4 **identifying—**

5 **“(A) with respect to all items that will be**
6 **delivered to the United States under the con-**
7 **tract (other than items to which paragraph**
8 **(2) applies) those items for which technical**
9 **data will not be provided to the United**
10 **States; and**

11 **“(B) with respect to technical data that**
12 **will be delivered to the United States under**
13 **the contract, any of such technical data that**
14 **will be provided with restrictions on the Gov-**
15 **ernment’s right to use such data for govern-**
16 **mental purposes.**

17 **“(2) With respect to items that will be deliv-**
18 **ered to the United States under a contract de-**
19 **scribed in paragraph (1) with respect to which it**
20 **would be impracticable to ascertain, at the time**
21 **the contract is entered into, the technical data re-**
22 **lating to such items that will not be provided to**
23 **the United States with unlimited rights, the con-**
24 **tract shall require that the contractor provide**
25 **identifying information similar to that required to**

1 be furnished under paragraph (1) at a time to be
2 specified in the contract.

3 “(3) The head of an agency shall ensure that
4 the information furnished under paragraph (1) is
5 considered in selecting the contractor for the con-
6 tract.

7 “(b) To foster competition for the acquisition
8 of supplies and services to maintain a major
9 system during its service life, the head of the
10 agency with responsibility for the system shall
11 ensure that the initial and all subsequent produc-
12 tion contracts for a major system, developed
13 under Government contract, contain appropriate
14 provisions related to technical data, including—

15 “(1) specifying the technical data to be
16 delivered under the contract, if any, includ-
17 ing delivery schedules therefor;

18 “(2) establishing criteria for determining
19 the acceptability of technical data to be deliv-
20 ered under the contract;

21 “(3) establishing separate payment lines
22 for the technical data to be delivered under
23 the contract, if any, and authorizing the with-
24 holding of payments for failure to make
25 timely deliveries of acceptable data;

1 **“(4) defining the respective rights of the**
2 **Government and a contractor or subcontract-**
3 **tor regarding any technical data to be deliv-**
4 **ered under the contract, including therein a**
5 **definition of the term ‘developed at private**
6 **expense’;**

7 **“(5) to the maximum practicable extent,**
8 **identifying, in advance of its delivery, techni-**
9 **cal data which is to be delivered with restric-**
10 **tions on the Government’s right to use such**
11 **data for governmental purposes;**

12 **“(6) requiring the contractor and each**
13 **subcontractor to be prepared to furnish,**
14 **within 60 days after a written request direct-**
15 **ed to the party asserting a restriction, a writ-**
16 **ten justification for any restriction to be as-**
17 **serted limiting the Government’s right to use**
18 **such data for governmental purposes, for as**
19 **long as such restriction is asserted by the**
20 **contractor or subcontractor;**

21 **“(7) prohibiting a contractor from requir-**
22 **ing a subcontractor or the Government to**
23 **pay a fee, royalty, or other charge for the**
24 **subcontractor’s use of any technical data in**
25 **the performance of a contract to furnish a**

1 component directly to the Government,
2 except that data protected by patent, licens-
3 ing agreement or any preexisting agreement
4 involving a subcontractor's performance
5 under a commercial contract, if the same
6 data was made available by the contractor to
7 the subcontractor furnishing that component;

8 “(8) prohibiting the contractor from lim-
9 iting, either directly or indirectly, a subcon-
10 tractor from selling to the Government any
11 component which the subcontractor had pre-
12 viously furnished to the contractor without
13 restriction, except that the contractor may re-
14 strict a subcontractor from providing to the
15 Government any component restricted by a
16 preexisting agreement involving the subcon-
17 tractor's performance for the contractor
18 under its commercial contracts;

19 “(9) ascertaining and documenting the
20 identity of the manufacturer of a component
21 through the annotation of engineering draw-
22 ings, the maintenance of lists, or otherwise;

23 “(10) requiring the contractor to revise
24 any technical data delivered pursuant to the
25 contract to reflect engineering design

1 **changes and to deliver such revised technical**
2 **data to an agency within a specified time;**

3 “(11) requiring the contractor to certify,
4 **at the time the technical data is made avail-**
5 **able or delivered, that the technical data is**
6 **complete, accurate, and adequate for the pur-**
7 **pose for which the technical data is procured;**

8 “(12) requiring the contractor to prompt-
9 **ly correct any technical data found to be in-**
10 **complete, inadequate, or deficient to or**
11 **promptly furnish complete, accurate, and**
12 **adequate technical data to the agency; and**

13 “(13) authorizing the head of the agency
14 **to withhold progress payments under a con-**
15 **tract during any period that the contractor**
16 **does not meet the requirements of the con-**
17 **tract pertaining to the delivery of technical**
18 **data.**

19 **The provisions specified in this subsection may be**
20 **waived in accordance with the single system of**
21 **Government-wide procurement regulations de-**
22 **finied in section 4(4) of the Office of Federal Pro-**
23 **curement Policy Act (41 U.S.C. 403(4)) if the con-**
24 **tracting officer determines in writing that any**
25 **such provision should not be applicable to the pro-**

1 **duction contract, or otherwise would not be in the**
2 **best interests of the Government in attaining the**
3 **purposes for which the system is being procured,**
4 **stating the reasons therefor. Such determination**
5 **shall be made part of the contract file.**

6 **“(c) Nothing in this section or section 2317 of**
7 **this title prohibits an agency from including—**

8 **“(1) in any competitive solicitation for**
9 **the award of a contract, or**

10 **“(2) as a negotiation objective when the**
11 **agency is making a noncompetitive award,**
12 **a provision specifying in the contract the date**
13 **after which the United States shall have the right**
14 **to use or have used for any governmental purpose**
15 **all technical data required to be delivered to the**
16 **United States under contract.**

17 **“§ 2320. Validating proprietary data restrictions**

18 **“(a) To encourage the competitive acquisition**
19 **of components needed to maintain a major system**
20 **during its service life, a review of the validity of**
21 **any restriction on the Government’s right to use**
22 **for governmental purposes technical data fur-**
23 **nished under contract shall be initiated by the**
24 **contracting officer, if the contracting officer, an**
25 **agency advocate for competition, or the represent-**

1 **ative of the Small Business Administration as-**
2 **signed to the procurement center determines such**
3 **a review is warranted and the contracting officer**
4 **determines that compliance with the asserted re-**
5 **striction makes it impracticable to competitively**
6 **procure the required component.**

7 **“(b) Upon the written demand of the contract-**
8 **ing officer, the contractor or subcontractor, as ap-**
9 **propriate, shall submit its justification for the as-**
10 **serted restriction on the Government’s right to use**
11 **such data for governmental purposes certifying to**
12 **the current validity of the asserted restriction**
13 **within—**

14 **“(1) 60 days, if the contract contains a**
15 **provision that requires a contractor or sub-**
16 **contractor to be prepared to furnish a written**
17 **justification for any restriction limiting the**
18 **Government’s right to use for governmental**
19 **purposes technical data to be delivered under**
20 **the contract, or**

21 **“(2) 180 days, if the contract does not**
22 **contain such a provision, except that the con-**
23 **tracting officer may extend such time limits**
24 **for a reasonable period for good cause**
25 **shown.**

1 **“(c) Upon a failure to submit any justification**
2 **pursuant to the requirements of subsection (b),**
3 **the contracting officer shall, after giving notice to**
4 **the party asserting the restriction, promptly**
5 **cancel the restriction on the Government’s right to**
6 **use for governmental purposes technical data for**
7 **which justification had been requested.**

8 **“(d) If after review of the justification submit-**
9 **ted pursuant to subsection (b), the contracting of-**
10 **ficer determines that the justification for the re-**
11 **striction on the Government’s right to use the data**
12 **for governmental purposes does not adequately**
13 **support the asserted restriction on the technical**
14 **data, the justification therefor shall be promptly**
15 **subjected to technical review and audit.**

16 **“(e) If after reviewing the findings of the tech-**
17 **nical review and audit, it is determined that the**
18 **restriction on the Government’s right to use such**
19 **data for governmental purposes warrants chal-**
20 **lenge, the contracting officer shall issue a final de-**
21 **cision pertaining thereto which shall be subject to**
22 **the provisions of the Contract Disputes Act (41**
23 **U.S.C. 601 et seq.).**

24 **“(f) If the Government’s challenge to the re-**
25 **striction on the Government’s right to use for gov-**

1 **ernmental purposes technical data as certified**
2 **pursuant to subsection (b) is sustained, upon final**
3 **disposition—**

4 **“(1) the restriction on the Government’s**
5 **right to use that technical data for govern-**
6 **mental purposes shall be cancelled; and**

7 **“(2) the contractor or subcontractor, as**
8 **appropriate, shall be liable to the Govern-**
9 **ment for the Government’s cost of technically**
10 **evaluating and auditing the asserted restric-**
11 **tion, and the fees and other expenses, as de-**
12 **finied in section 2412(d)(2)(A) of title 28,**
13 **United States Code, incurred by the Govern-**
14 **ment in challenging the asserted restriction,**
15 **if the asserted restriction, as certified, is**
16 **found not to be substantially justified, unless**
17 **special circumstances would make such**
18 **awards unjust.”.**

19 **(2) The analysis of such chapter is amended**
20 **by adding at the end thereof the following new**
21 **items:**

“2317. Planning for future competition.

“2318. Encouraging new competitors to broaden the industrial base.

“2319. Technical data management to foster future competition.

“2320. Validating proprietary data restrictions.”.

1 **(b) Section 2302 of title 10, United States**
2 **Code, is amended by adding at the end thereof the**
3 **following:**

4 **“(4) ‘Component’ means any individual**
5 **part, subassembly, assembly, or subsystem in-**
6 **tegral to a major system, which may be re-**
7 **placed during the service life of the system.**
8 **The term includes spare part and replenish-**
9 **ment spare part. The term does not include**
10 **packaging or labeling associated with ship-**
11 **ment or identification of a ‘component’.**

12 **“(5) ‘Major procurement center’ means a**
13 **procurement center that awarded contracts**
14 **for components other than commercial items**
15 **totaling at least \$150,000,000 in the preced-**
16 **ing fiscal year.**

17 **“(6) ‘Major system’ means a combination**
18 **of elements that will function together to**
19 **produce the capabilities required to fulfill a**
20 **mission need. The elements may include**
21 **hardware, equipment, software or any com-**
22 **bination thereof, but excludes construction or**
23 **other improvements to real property. A**
24 **system shall be considered a major system if**
25 **(A) the Department of Defense is responsible**

1 for the system and the total expenditures for
2 research, development, test and evaluation
3 for the system are estimated to be more than
4 \$75,000,000 (based on fiscal year 1980 con-
5 stant dollars) or the eventual total expendi-
6 ture for procurement of more than
7 \$300,000,000 (based on fiscal year 1980 con-
8 stant dollars); or (B) a civilian agency is re-
9 sponsible for the system and total expendi-
10 tures for the system are estimated to exceed
11 \$750,000 (based on fiscal year 1980 constant
12 dollars) or the dollar threshold for a 'major
13 system' established by the agency pursuant to
14 Office of Management and Budget (OMB)
15 Circular A-109, entitled 'Major Systems Ac-
16 quisitions', whichever is greater, or (C) the
17 system is designated a 'major system' by the
18 head of the agency responsible for the
19 system.

20 "(7) 'Technical data' means recorded in-
21 formation (regardless of form or method of
22 recording) of a scientific or technical nature,
23 including data resulting from work which
24 was specified and directly funded as an ele-

1 **ment of performance of a contract from the**
2 **United States, but does not include—**

3 **“(A) computer software;**

4 **“(B) financial, administrative, cost or**
5 **pricing, management data, or other infor-**
6 **mation incidental to contract adminis-**
7 **tration;**

8 **“(C) data relating to products, com-**
9 **ponents, or processes developed at pri-**
10 **ivate expense; or**

11 **“(D) data relating to products, com-**
12 **ponents, or processes developed at pri-**
13 **ivate expense and offered for sale to the**
14 **general public.”.**

15 **(c)(1) Within one year after the date of enact-**
16 **ment of this Act, the head of each agency shall de-**
17 **velop a plan for the management of technical data**
18 **received under contracts for the development, pro-**
19 **duction, modification, or maintenance of major**
20 **systems within its jurisdiction. At a minimum, the**
21 **management plan shall address procedures for—**

22 **(A) inventorying, indexing, storing, and**
23 **updating items of technical data into a**
24 **system;**

1 **(B) verifying contractor-imposed limita-**
2 **tions on the Government's rights to make**
3 **future use of the data in competitive acquisi-**
4 **tions; and**

5 **(C) assuring that agency procurement of-**
6 **ficials and prospective contractors will have**
7 **timely access to complete and current techni-**
8 **cal data for the competitive acquisition of**
9 **supplies and services for the maintenance of**
10 **the system during its service life.**

11 **(2) Within 5 years after the date of enactment**
12 **of this Act, the head of each agency shall complete**
13 **implementation of the management plan required**
14 **by paragraph (1), and include in the system the**
15 **available technical data for each currently oper-**
16 **ational major system within the jurisdiction of the**
17 **head of such agency.**

18 **(3) Not later than eighteen months after the**
19 **date of enactment of this section, the Comptroller**
20 **General of the United States shall transmit to the**
21 **Congress a report evaluating the plans of selected**
22 **agencies for the management of technical data for**
23 **major systems within the jurisdiction of such**
24 **agencies. The report shall include an evaluation of**
25 **the plans.**

1 **(4) As used in this subsection, the term**
2 **“agency” means an agency which is subject to**
3 **chapter 137 of title 10, United States Code.**

4 **(c)(1) Chapter 141 of title 10, United States**
5 **Code, is amended by adding at the end thereof the**
6 **following new section:**

7 **“§ 2402. Prohibition of contractors limiting subcontractor sales di-**
8 **rectly to the United States**

9 **“Each contract for the purchase of supplies or**
10 **services made by the Department of Defense shall**
11 **provide that the contractor will not—**

12 **“(1) enter into any agreement with a sub-**
13 **contractor under the contract that has the**
14 **effect of unreasonably restricting sales by the**
15 **subcontractor directly to the United States of**
16 **any item or process (including computer soft-**
17 **ware) like those made, or services like those**
18 **furnished, by the subcontractor under the**
19 **contract (or any follow-on production con-**
20 **tract); or**

21 **“(2) otherwise act to restrict unreason-**
22 **ably the ability of a subcontractor to make**
23 **sales to the United States described in clause**
24 **(1).”.**

1 **(3) The amendments made by sections 5, 9,**
2 **and 11 shall take effect on the date of enactment**
3 **of this Act.**

Amend the title so as to read "A bill to amend the Small Business Act and title 10, United States Code, to enhance competition in Government procurement."

98TH CONGRESS
2D SESSION

S. 2842

To amend section 3109 of title 5, United States Code, to clarify the authority for appointment and compensation of experts and consultants, to provide statutory guidelines concerning the award of contracts for the procurement of consulting services, management and professional services, and special studies and analyses, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JUNE 29 (legislative day, JUNE 25), 1984

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

A BILL

To amend section 3109 of title 5, United States Code, to clarify the authority for appointment and compensation of experts and consultants, to provide statutory guidelines concerning the award of contracts for the procurement of consulting services, management and professional services, and special studies and analyses, 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 this Act may be cited as the "Consultant Reform and
- 4 Disclosure Act of 1984".

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STATEMENT OF FINDINGS

SEC. 2. The Congress finds and declares that—

(1) Federal procurement officials have not consistently complied with the laws relating to procurement activities and regulations and management guidelines in awarding contracts for the procurement of consulting services, management and professional services, and special studies and analyses;

(2) procurement practices, insofar as they relate to the procurement of consulting services, management and professional services, and special studies and analyses, do not presently provide for (A) full and open competition, (B) the prevention of duplication or overlap among contracts, (C) adequate consideration of conflicts of interest, or (D) the public disclosure of the use and role of contractors who provide such services, studies, and analyses;

(3) information regarding the Federal Government's use of consulting services, management and professional services, and special studies and analyses is not maintained in a manner that results in the availability of helpful or meaningful information to the Congress, the executive branch, or the public;

(4) the competitive pressures of the free marketplace increase the likelihood that consulting services,

1 management and professional services, and special
2 studies and analyses will be provided at competitive
3 prices;

4 (5) full and open competition in the Federal pro-
5 curement process supports the basis of the free enter-
6 prise system while guaranteeing maximum return on
7 Federal procurement expenditures;

8 (6) the costs of performing governmental functions
9 are borne by the taxpayer regardless of whether the
10 functions are performed in the private or public sector;

11 (7) the integrity of the governmental process, es-
12 pecially when consulting services, management and
13 professional services, and special studies and analyses
14 are used in the performance of governmental functions,
15 requires full public disclosure of the use and role of
16 contractors who perform such functions; and

17 (8) legislation and oversight is necessary to
18 achieve the consistent policies and practices needed in
19 Federal procurement of consulting services, manage-
20 ment and professional services, and special studies and
21 analyses.

22 STATEMENT OF POLICY

23 SEC. 3. It is the policy of the United States that—

24 (1) governmental policymaking and decisionmak-
25 ing functions should be performed by accountable Fed-
26 eral officials;

1 (2) the procurement of consulting services, man-
2 agement and professional services, and special studies
3 and analyses by contract should be in compliance with
4 applicable laws and regulations; and

5 (3) governmental functions should be accomplished
6 through the most economical means available while
7 recognizing the inherently governmental nature of cer-
8 tain activities.

9 **TITLE I—APPOINTMENTS**

10 **REVISION OF SECTION 3109 OF TITLE 5**

11 **SEC. 101.** (a) Section 3109 of title 5, United States
12 Code, is amended to read as follows:

13 **“§ 3109. Employment of individual experts and consult-**
14 **ants**

15 “(a) For the purposes of this section—

16 “(1) ‘agency’ has the same meaning as in section
17 552(e) of this title;

18 “(2) ‘appointed consultant’ means an individual—

19 “(A) who has a high degree of knowledge,
20 skill, or experience in a particular field; and

21 “(B) whose primary function is to serve an
22 agency in an advisory capacity in that field,
23 rather than to perform or supervise an operating
24 function of the agency; and

25 “(3) ‘appointed expert’ means an individual—

1 “(A) who has excellent qualifications and a
2 high degree of attainment in a professional, scien-
3 tific, technical, or other field;

4 “(B) who, because of such qualifications and
5 attainment, is usually regarded as an authority or
6 as a practitioner of unusual competence and skill
7 by other individuals who work in that field; and

8 “(C) whose primary function is to perform or
9 supervise an operating function of an agency
10 rather than to provide advisory services.

11 “(b) When authorized by an appropriation Act or other
12 statute, the head of an agency may appoint and fix the pay of
13 appointed experts and consultants for temporary (not in
14 excess of one year) or intermittent services, without regard
15 to—

16 “(1) the provisions of this title governing appoint-
17 ment in the competitive service; and

18 “(2) chapter 51 and subchapter III of chapter 53
19 of this title (relating to position classification and pay
20 rates),

21 except that the rate of pay for any individual so appointed
22 may not exceed the rate of basic pay payable for GS-18
23 unless otherwise specifically authorized by statute.

24 “(c) Positions in the Senior Executive Service may not
25 be filled under the authority of subsection (b) of this section.

1 “(d) The Office of Personnel Management shall pre-
2 scribe regulations governing the employment of appointed ex-
3 perts and consultants and the reporting requirements of this
4 section, and may take such action as it considers appropriate
5 to assure compliance with those regulations, including audit
6 of individual cases, and, if necessary, suspension of the au-
7 thority to appoint experts and consultants. Agencies shall
8 comply with the requirements of the Office, including taking
9 any corrective action the Office may direct.

10 “(e) Each agency shall report to the Office of Personnel
11 Management on a periodic basis with respect to—

12 “(1) the number of days each appointed expert or
13 appointed consultant employed by the agency during
14 the period was so employed, and

15 “(2) the total amount paid by the agency to each
16 appointed expert and appointed consultant for such
17 work during the period.

18 “(f) The head of any agency with statutory authority to
19 appoint experts and consultants without regard to the provi-
20 sions of this section shall, to the extent practicable and in
21 keeping with the provisions of such authority, appoint such
22 experts and consultants in a manner consistent with the pro-
23 visions of this section.

24 “(g) The head of each agency shall establish procedures
25 for the review and approval of—

1 “(1) any determination relating to the need for the
2 services of an appointed expert or appointed consultant
3 under this section; and

4 “(2) the appointment of each appointed expert or
5 appointed consultant.”.

6 (b) The table of sections at the beginning of chapter 31
7 of title 5, United States Code, is amended by striking out the
8 item relating to section 3109 and inserting in lieu thereof the
9 following new item:

 “3109. Employment of individual experts and consultants.”.

10

EFFECTIVE DATE

11 SEC. 102. The amendments made by this title shall take
12 effect one hundred and eighty days after the date of enact-
13 ment of this Act.

14

TITLE II—CONTRACTS

15

DEFINITIONS

16 SEC. 201. For purposes of this title:

17 (1) The term “agency” has the same meaning as in sec-
18 tion 552(e) of title 5, United States Code.

19 (2) The term “contract” means (A) any agreement, in-
20 cluding any amendment to or modification of an agreement,
21 between the Government and a contractor for the procure-
22 ment of goods and services, or (B) any letter authorizing a
23 contractor to provide goods or services to the United States
24 prior to a specification of the compensation for the provision
25 of such goods or services.

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

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

10 (A) to such agency, or

11 (B) on behalf of such agency to any other agency
12 of the Government,

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

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

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

21 (A) management data collection services;

22 (B) policy review and development services;

23 (C) program evaluation services;

24 (D) program management support services;

25 (E) program review and development services;

1 (F) systems engineering services; and

2 (G) other management and professional services of
3 a similar nature which are not related to any specific
4 program.

5 (7) The term "special study or analysis"—

6 (A) means any nonrecurring examination of a sub-
7 ject which—

8 (i) is undertaken to provide greater under-
9 standing of relevant issues and alternatives re-
10 garding organizations, policies, procedures, sys-
11 tems, programs, and resources; and

12 (ii) leads to conclusions or recommendations
13 with respect to planning, programing, budgeting,
14 decisionmaking, or policy development; and (B)
15 includes—

16 (i) any study initiated by or for the program
17 management office;

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

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

5 (iv) any similar special study or analysis.

6 PUBLICATION OF NOTICE OF CONTRACTS

7 SEC. 202. (a) Notwithstanding any other provision of
8 law, as soon as an agency completes preparation of a pro-
9 curement request for consulting services, management and
10 professional services, or a special study or analysis which the
11 agency estimates will result in the award of a contract the
12 cost of which exceeds \$10,000, the agency shall transmit to
13 the Secretary of Commerce a written notice describing such
14 contract. The Secretary of Commerce shall publish each
15 notice received pursuant to this subsection in the publication
16 "Commerce Business Daily" published by the Department of
17 Commerce. An agency is not required by the first sentence of
18 this subsection to transmit to the Secretary of Commerce a
19 notice with respect to any contract—

20 (1) for which a national security classification has
21 been lawfully made relative to the contract or the
22 terms therein; or

23 (2) which is awarded due to such an unusual and
24 compelling emergency that the Government would be
25 seriously injured if award of such contract were de-

1 laid for the purpose of publishing such notice prior to
2 award.

3 (b) Whenever an agency modifies a contract for consult-
4 ing services, management and professional services, or a spe-
5 cial study or analysis, and in the modification of such contract
6 increases the cost of the contract award by at least \$25,000,
7 the agency shall transmit to the Inspector General of such
8 agency or comparable official, or in the case of an agency
9 which does not have an Inspector General or comparable of-
10 ficial, the head of the agency or his designee, a written notice
11 describing—

- 12 (1) the original contract;
- 13 (2) the modification being made; and
- 14 (3) the justification for the modification.

15 DISCLOSURE OF INFORMATION CONCERNING THE USE OF
16 CONTRACTORS

17 SEC. 203. Each report prepared by a contractor pursu-
18 ant to a contract for consulting services, management and
19 professional services, or a special study or analysis, and each
20 report prepared by an agency which is substantially derived
21 from or includes substantial portions of any such report, shall
22 include a statement disclosing—

- 23 (1) the name and business address of the contrac-
24 tor who prepared or contributed to the report;
- 25 (2) the total cost of the contract;

1 (3) whether the contract was awarded using com-
2 petitive or noncompetitive procedures;

3 (4) the name of the office which or employee who
4 authorized the award of the contract;

5 (5) in any case in which a contractor uses a sub-
6 contractor to prepare any portion of a report for an
7 agency, the name and business address of the subcon-
8 tractor and the amount paid to the subcontractor for
9 the work;

10 (6) the names of all employees of the contractor,
11 and any subcontractor, who substantially contributed to
12 the report; and

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

17 CONTRACT EVALUATION

18 SEC. 204. (a) Within one hundred and twenty days after
19 the date of completion of the performance required by any
20 contract for consulting services, management and profession-
21 al services, or a special study or analysis, the total cost of
22 which exceeds \$50,000, the agency shall prepare a written
23 evaluation of the contract performance. The evaluation shall
24 include a summary of the performance of the contractor
25 under the contract, including—

1 (1) the performance of the contractor, based on
2 the terms and specifications included in the contract;
3 and

4 (2) any deviation by the contractor from the provi-
5 sions of the contract originally awarded with respect to
6 cost and time for completion of the contract and a
7 statement of the reasons for any such deviation.

8 (b) The agency shall include the evaluation required by
9 subsection (a) in the records maintained by the agency re-
10 garding the contract and shall maintain a copy of the evalua-
11 tion in a central location within the agency.

12 (c) A written copy of any evaluation made under this
13 section shall be transmitted to the contractor concerned to-
14 gether with a notice stating that the contractor may, within
15 ten days after the date on which the contractor receives such
16 copy, transmit comments to the agency concerning such eval-
17 uation. Any such comments shall be included in the evalua-
18 tion as a supplement.

19 ORGANIZATIONAL CONFLICT OF INTEREST

20 SEC. 205. (a) For purposes of this section—

21 (1) the term “designated agency” means the De-
22 partment of Energy, the Department of Transporta-
23 tion, or the Environmental Protection Agency;

24 (2) the term “organizational conflict of interest”
25 means any relationship or situation in which an offeror
26 for a contract for consulting services, management and

1 professional services, or a special study or analysis or a
2 contractor under such contract has past, present, or
3 anticipated interests which either directly, or indirectly
4 through a client relationship, relate to work to be per-
5 formed under such contract and which—

6 (A) may diminish the capacity of the offeror
7 or contractor to furnish impartial, technically
8 sound, and objective assistance, advice or services
9 under such contract; or

10 (B) may result in an unfair competitive ad-
11 vantage to the offeror or contractor;

12 except that, such term does not include the normal
13 flow of benefits from the performance of the contract;
14 and

15 (3) the terms “offeror” and “contractor” in-
16 clude—

17 (A) a chief executive or director of the of-
18 feror or contractor, to the extent that such execu-
19 tive or director will or does become substantially
20 involved in the performance of a contract for con-
21 sulting services, management and professional
22 services, or a special study or analysis entered
23 into with a designated agency; and

24 (B) a consultant or subcontractor proposed to
25 be used by the offeror or contractor in the per-

1 formance of such contract in any case in which
2 such consultant or subcontractor may be perform-
3 ing services similar to the services performed by
4 the offeror or contractor.

5 (b)(1) Whenever an offeror submits to a designated
6 agency a bid or proposal for a contract for consulting serv-
7 ices, management and professional services, or a special
8 study or analysis, the offeror shall include with such bid or
9 proposal—

10 (A) a statement which discloses all relevant facts
11 relating to each existing or potential organizational
12 conflict of interest with respect to the contract; or

13 (B) a statement certifying, to the best knowledge
14 and belief of such offeror, that there is no existing or
15 potential organizational conflict of interest with respect
16 to the contract.

17 (2) Any consultant or subcontractor which any such of-
18 feror proposes to use in the performance of a contract de-
19 scribed in paragraph (1) shall also submit to the designated
20 agency receiving the bid or proposal a statement including
21 the information required by paragraph (1).

22 (3) In any case in which a contract described in para-
23 graph (1) has been entered into by a designated agency and a
24 modification of the contract becomes necessary, the contrac-
25 tor and any consultant or subcontractor used by the offeror in

1 the performance of the contract shall submit to such
2 agency—

3 (A) a statement with respect to such modification
4 which includes the information required by paragraph
5 (1) to be submitted with respect to a contract; or

6 (B) a revision of any statement submitted under
7 paragraph (1) which relates to any existing or potential
8 organizational conflict of interest concerning such
9 modification.

10 (4) Each contractor, consultant, and subcontractor
11 which has submitted a statement to a designated agency
12 under this subsection shall submit to the same agency, on a
13 timely basis, such revisions of such statement as may be nec-
14 essary to reflect clearly and accurately any changes in cir-
15 cumstances relating to an existing or potential organizational
16 conflict of interest arising after such statement was made or
17 last revised.

18 (c) The head of each designated agency shall establish
19 or designate an office to administer the provisions of this sec-
20 tion with respect to contracts of the agency and bids and
21 proposals submitted for such contracts. The head of each
22 such office shall evaluate each statement received pursuant
23 to subsection (b) to determine whether an organizational con-
24 flict of interest or the appearance of such a conflict exists
25 with respect to the contract for which the statement is sub-

1 mitted. In making such evaluation, the head of such office
2 shall—

3 (1) consider whether—

4 (A) the offeror, contractor, consultant, or
5 subcontractor has conflicting roles or interests
6 which might bias the judgment of the offeror, con-
7 tractor, consultant, or subcontractor concerning
8 the work to be performed pursuant to the con-
9 tract; or

10 (B) the offeror or contractor will have an
11 unfair competitive advantage in the performance
12 of the contract; and

13 (2) specifically consider any proposed terms of the
14 contract which require the offeror or the contractor to
15 furnish advice, evaluation, or other services which will
16 have a direct effect on future decisions of the agency
17 relating to contracts, procurement, research and devel-
18 opment programs, production, or regulatory activities.

19 (d) Whenever the head of an office established or desig-
20 nated under subsection (c) determines that an organizational
21 conflict of interest or that the appearance of such a conflict
22 exists with respect to a contract for consulting services, man-
23 agement and professional services, or a special study or anal-
24 ysis, or a proposal for such a contract, he shall transmit a
25 notice of his determination to the offeror or contractor in-

1 volved. Within ten days after the date on which the offeror or
2 contractor receives such notice, the offeror or contractor may
3 transmit written comments to the head of the office concern-
4 ing the determination or may transmit such comments to the
5 head of the agency with a request that the head of the agency
6 review such determination. Within thirty days after the date
7 on which the head of the agency receives any such request,
8 the head of the agency shall review the determination of the
9 head of the office and shall issue a written decision. In re-
10 viewing such determination, the head of the agency may re-
11 quest the offeror or contractor to furnish additional informa-
12 tion concerning the issues involved. The head of the agency
13 shall transmit a copy of his decision under this subsection to
14 the offeror or contractor and the head of the office.

15 (e) If, prior to the award of a contract for consulting
16 services, management or professional services, or a special
17 study or analysis, the head of the office established or desig-
18 nated by the head of a designated agency under subsection (c)
19 determines that an organizational conflict of interest or the
20 appearance of such a conflict exists in the case of any offeror
21 for, or of any consultant or subcontractor proposed to be used
22 by an offeror in the performance of, such contract and such
23 determination is not reversed by the head of the designated
24 agency—

1 (1) such agency shall disqualify such offeror from
2 eligibility for award of the contract or, in the case of
3 an organizational conflict of interest or the appearance
4 of such a conflict involving a consultant or subcontractor
5 proposed to be used by the offeror in the perform-
6 ance of the contract, shall prohibit the offeror from
7 using the services of such consultant or subcontractor;

8 (2) such agency shall include in the contract
9 awarded to the offeror such conditions as such agency
10 determines would avoid an organizational conflict of in-
11 terest or the appearance of such a conflict involving
12 such offeror or such consultant or subcontractor; or

13 (3) if such agency determines that—

14 (A) the facts and circumstances surrounding
15 the contract necessitate immediate action; and

16 (B) such agency is unable to obtain the serv-
17 ices to be performed pursuant to the contract from
18 any other person other than the offeror, consult-
19 ant, or subcontractor involved in the organization-
20 al conflict of interest or the appearance of such a
21 conflict,

22 such agency may award the contract to the offeror if
23 such agency includes in the records maintained by such
24 agency on the contract, makes available to the public,
25 and transmits to each committee of the Senate and the

1 House of Representatives having legislative jurisdiction
2 over the agency, a complete statement of the relevant
3 facts disclosed by the offeror, consultant, or subcon-
4 tractor pursuant to subsection (b), or otherwise known
5 or made available to the agency.

6 (f)(1) If, after a designated agency has entered into a
7 contract for consulting services, management and profession-
8 al services, or a special study or analysis, the head of an
9 office established or designated in the agency under subsec-
10 tion (c) determines that an organizational conflict of interest
11 or the appearance of such a conflict exists with respect to the
12 contract, and such determination is not reversed by the head
13 of the agency, the agency shall—

14 (A) terminate the contract; or

15 (B) in any case in which termination is not in the
16 best interest of the Government, modify the contract to
17 the extent necessary to prevent or mitigate to the
18 greatest extent possible the conflict or the appearance
19 of the conflict and include in the records maintained by
20 the agency on the contract, make available to the
21 public, and transmit to each committee of the Senate
22 and the House of Representatives having legislative ju-
23 risdiction over the agency, a complete statement of the
24 relevant facts determined to exist regarding the offeror,
25 consultant, or subcontractor.

1 (2)(A) Except as provided in the second sentence of this
2 subparagraph, a contractor who has entered into a contract
3 with a designated agency for consulting services, manage-
4 ment and professional services, or a special study or analysis,
5 or a consultant or a subcontractor to any such contractor,
6 shall have no claim against the United States for damages as
7 a result of an action of such agency under paragraph (1)
8 (other than a claim specified pursuant to a clause in the con-
9 tract authorizing termination for the convenience of the Gov-
10 ernment). Except as provided in subparagraph (B), such con-
11 tractor, consultant, or subcontractor may have a claim
12 against the United States for compensation for work per-
13 formed prior to such agency action.

14 (B) A contractor who has enter into a contract with a
15 designated agency for consulting services, management and
16 professional services, or a special study or analysis, or a con-
17 sultant or a subcontractor to any such contractor shall have
18 no claim for compensation for work performed prior to an
19 action of such agency under paragraph (1) if it is determined
20 that such contractor's, consultant's, or subcontractor's failure
21 to disclose completely the relevant facts under subsection (b)
22 precluded a determination of the existence of an organiza-
23 tional conflict of interest or the appearance of such a conflict
24 involving such contractor, consultant, or subcontractor prior
25 to the award of the contract.

1 (i)(1) This section shall not only apply to contracts for
2 consulting services, management and professional services, or
3 any special study or analysis entered into, or bids or propos-
4 als for such contracts submitted, on or after the date three
5 years after the effective date of this title.

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

15 **BUDGET IDENTIFICATION AND JUSTIFICATION**

16 **SEC. 206. (a)** The head of each agency shall include
17 with the request for regular appropriations for each fiscal
18 year submitted to the President pursuant to section 1108 of
19 title 31, United States Code, an itemized statement of the
20 amounts requested by the agency for procurement in such
21 fiscal year. The statement shall identify such amounts ac-
22 cording to the same subfunctional categories to be used by
23 the President in the submission of the Budget for such fiscal
24 year pursuant to section 1105 (a) of such title and, within
25 each such category, shall identify such amounts according to
26 classifications for (1) procurement of consulting services,

1 management and professional services, and special studies
2 and analyses, and (2) all other procurement activities.

3 (b) The Budget transmitted by the President to the Con-
4 gress for each fiscal year under section 1105(a) of title 31,
5 United States Code, shall set forth separately, within each
6 subfunctional category used in such Budget, requests for new
7 budget authority for, and estimates of outlays by, each
8 agency for (1) procurement of consulting services, manage-
9 ment and professional services, and special studies and analy-
10 sis, and (2) all other procurement activities.

11 (c)(1) By April 1 of the fiscal year preceding the fiscal
12 year for which the Budget is submitted pursuant to section
13 1105(a) of title 31, United State Code, the head of each
14 agency shall prepare and transmit to the Committees on Ap-
15 propriations of the Senate and the House of Representatives
16 an analysis of each request for new budget authority and of
17 the estimates of outlays included in such Budget for such
18 agency pursuant to subsection (b) of this section and a state-
19 ment justifying the need for each such request and estimate.

20 (2) Within sixty days after the date on which the Presi-
21 dent transmits to the Congress a revision of any request or
22 estimate included in the Budget for any fiscal year pursuant
23 to subsection (b), the head of the agency affected by such
24 revision shall prepare and transmit to the Congress a modifi-

1 cation of the analysis and statement required by paragraph
2 (1) which reflects the revision made by the President.

3 **FEDERAL PROCUREMENT DATA SYSTEM**

4 **SEC. 207. (a) The Administrator for Federal Procure-**
5 **ment Policy shall establish a data system for the collection**
6 **and dissemination of information regarding all contracts en-**
7 **tered into by each agency. The system shall classify each**
8 **contract or contract modification in an amount exceeding**
9 **\$10,000 as either a contract for professional type services or**
10 **a contract for commercial and industrial type activities, and**
11 **shall include for each such contract or contract modifica-**
12 **tion—**

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

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

16 (3) the name of the contracting office of the agency
17 which awarded the contract;

18 (4) the name of the contractor;

19 (5) whether the contractor is a small business or a
20 minority business;

21 (6) the date on which the contract award or the
22 modification was made;

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

25 (8) a brief description of the work to be performed
26 under the contract;

1 (9) the total amount payable by the Government
2 under the contract;

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

4 (11) whether the contract was awarded through
5 competitive or noncompetitive procedures;

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

8 (13) if applicable, the authority used to negotiate
9 the contract under the second sentence of section
10 2304(a) of title 10, United States Code, or section
11 302(c) of the Federal Property and Administrative
12 Services Act of 1949.

13 (b)(1) Consistent with otherwise applicable law, the Ad-
14 ministrator for Federal Procurement Policy shall make infor-
15 mation in the data system established under subsection (a)
16 available, on request, to the Congress, the various agencies,
17 and the public.

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

22 (c) Each agency shall provide such information to the
23 Administrator for Federal Procurement Policy as may be
24 necessary to assure that the data concerning the agency con-
25 tained in the data system established under subsection (a) and

1 in the reports transmitted under subsection (b)(2) is current,
2 accurate, and complete.

3 PUBLIC AVAILABILITY

4 SEC. 208. (a)(1) Each agency shall compile and make
5 available to the public a list of all contracts entered into by
6 the agency during the twelve-month period immediately pre-
7 ceding the month during which the list is prepared and a
8 separate list of all contracts entered into by the agency for
9 which performance has not been completed on the date on
10 which such list is prepared. The lists shall be updated on a
11 quarterly basis and shall include, for each such contract—

12 (A) the contract identification number assigned by
13 the agency;

14 (B) the contractor's name;

15 (C) the date of award and the estimated comple-
16 tion date;

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

19 (E) a brief description of the work to be per-
20 formed.

21 (2) Each agency shall prepare and maintain a written
22 statement justifying the need for each contract for consulting
23 services, management and professional services, or a special
24 study or analysis which is entered into by the agency. The
25 statement shall include the name of the Government officer
26 or employee who authorized the award of the contract and

1 the Government officer or employee who is responsible for
2 the administration of the contract.

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

8 (b)(1) Except in the case of a contract the disclosure of
9 which or of any information included therein is prohibited by
10 law, and except in the case of a contract the terms of which
11 are lawfully classified for reasons of national security—

12 (A) all contracts shall be considered public infor-
13 mation and shall be available to the public upon re-
14 quest; and

15 (B) in the case of a contract for consulting serv-
16 ices, management and professional services, or a spe-
17 cial study or analysis the following information shall be
18 available to the public:

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

21 (ii) in the case of a contract awarded on a
22 sole source basis, the justification for awarding
23 such contract on such basis.

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

1

EXEMPTIONS

2 **SEC. 209.** Notwithstanding any other provision of this
3 title, contracts for consulting services, management and pro-
4 fessional services, and special studies or analyses, and any
5 data, reports, or other material pertaining thereto, which—

6 (1) relate to sensitive foreign intelligence or for-
7 eign counterintelligence activities;

8 (2) relate to sensitive law enforcement investiga-
9 tions; or

10 (3) are classified under the national security clas-
11 sification system,

12 are exempt from the provisions of this title.

13 **EFFECT ON OTHER LAW**

14 **SEC. 210.** The provisions of this title shall supersede
15 any statute enacted before the date of enactment of this Act
16 to the extent such statute is inconsistent with the provisions
17 of this title.

18 **EFFECTIVE DATE**

19 **SEC. 211.** The provisions of this title shall take effect
20 one hundred and eighty days after the date of enactment of
21 this Act.

○

98TH CONGRESS
2D SESSION

H. R. 5509

To amend title 5, United States Code, to provide civil penalties for false claims and statements made to the United States, to certain recipients of property, services, or money from the United States, or to parties to contracts with the United States, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

APRIL 25, 1984

Mr. HERTEL of Michigan introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend title 5, United States Code, to provide civil penalties for false claims and statements made to the United States, to certain recipients of property, services, or money from the United States, or to parties to contracts with the United States, 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 this Act may be cited as the "Program Fraud Civil
4 Penalties Act of 1984".

5 SEC. 2. (a)(1) The Congress finds that—

6 (A) fraud in Government programs is a serious
7 and growing problem;

1 (B) present civil and criminal remedies for pro-
2 gram fraud are not sufficiently responsive to this prob-
3 lem;

4 (C) fraud in Government programs results in the
5 loss of millions of dollars annually; and

6 (D) fraud in Government programs undermines
7 the integrity of these programs by allowing ineligible
8 persons to participate and receive Federal funds to
9 which they are not entitled.

10 (2) The Congress further finds that it is desirable to
11 create an expeditious and inexpensive administrative proce-
12 dure which Federal agencies may use to impose an adminis-
13 trative penalty for false, fictitious, or fraudulent claims and
14 statements.

15 (b) The purposes of this Act are—

16 (1) to allow Federal agencies which are the vic-
17 tims of false, fictitious, and fraudulent claims and state-
18 ments to have an administrative remedy penalizing
19 persons who submit such claims and statements;

20 (2) to provide an administrative penalty procedure
21 which is comparable with administrative penalty proce-
22 dures with respect to Government contracts, personnel
23 disciplinary proceedings, and Government grants; and

24 (3) to provide reasonable due process protections
25 to all persons who are subject to the adjudication of

1 administrative penalties for false, fictitious, or fraudu-
2 lent claims or statements.

3 SEC. 3. (a) Title 5 of the United States Code is amended
4 by inserting after chapter 7 the following new chapter:

5 **“CHAPTER 8—ADMINISTRATIVE PENALTIES AND**
6 **ASSESSMENTS FOR FALSE CLAIMS AND STATE-**
7 **MENTS**

“Sec.

“801. Definitions.

“802. False claims and statements; liability.

“803. Hearing and determination by authority head; subpoena authority.

“804. Judicial review.

“805. Collection of civil penalties and assessments.

“806. Limitations.

“807. Right to setoff.

“808. Regulations.

“809. Reports.

8 **“§ 801. Definitions**

9 **“(a) As used in this chapter—**

10 **“(1) ‘authority’ means any establishment as de-**
11 **defined in section 11(2) of the Inspector General Act of**
12 **1978 (92 Stat. 1109), any executive department, any**
13 **military department, and the United States Postal**
14 **Service;**

15 **“(2) ‘authority head’ means—**

16 **“(A) the head of an authority, or**

17 **“(B) an official or employee of the authority**
18 **designated, in regulations promulgated by the**
19 **head of the authority, to make findings and deter-**

1 minations under this chapter on behalf of the head
2 of the authority;

3 “(3) ‘claim’ means any request or demand, wheth-
4 er under a contract or otherwise—

5 “(A) to an authority for property, services,
6 or money (including money representing grants,
7 loans, insurance, or benefits); or

8 “(B) to a recipient of property, services, or
9 money from an authority or to a party to a con-
10 tract with an authority—

11 “(i) for property or services if the
12 United States provided such property or
13 services or any portion of the funds for the
14 purchase of such property or services or will
15 reimburse such recipient or party for the pur-
16 chase of such property or services; or

17 “(ii) for the payment of money (includ-
18 ing money representing grants, loans, insur-
19 ance, or benefits) if the United States provid-
20 ed any portion of the money requested or de-
21 manded or will reimburse such recipient for
22 any portion of the money paid on such re-
23 quest or demand;

24 “(4) ‘statement’ means any written representation
25 or certification—

1 “(A) with respect to a claim; or
2 “(B) with respect to—
3 “(i) a contract with, or a bid or proposal
4 for a contract with,
5 “(ii) a grant, loan, or benefit from,
6 “(iii) an application for insurance from,
7 or
8 “(iv) an application for employment
9 with,
10 an authority, or any State, political subdivision of
11 a State, or other party acting on behalf of, or
12 based upon the credit or guarantee of, an
13 authority;
14 “(5) ‘person’ means any individual, partnership,
15 corporation, association, or private organization;
16 “(6) ‘investigating official’ means—
17 “(A) the Inspector General in an authority
18 which is authorized an Inspector General by the
19 Inspector General Act of 1978 (92 Stat. 1101) or
20 any other Federal law; or
21 “(B) in the case of an authority which is not
22 authorized an Inspector General by the Inspector
23 General Act of 1978 (91 Stat. 1101) or any other
24 Federal law, any official or employee of the au-
25 thority when designated by the head of the au-

1 thority to conduct investigations under the provi-
2 sions of section 803(a)(1) of this title; and

3 “(7) ‘reviewing official’ means any official or em-
4 ployee of an authority—

5 “(A) whose rate of basic pay is equal to or
6 greater than the minimum rate of basic pay for
7 grade GS-18 under section 5332 of this title; and

8 “(B) who is designated by the head of the
9 authority to make the determination provided in
10 section 803(a)(2) of this title.

11 “(b) For the purposes of subsection (a)(3) of this
12 section—

13 “(1) each voucher, invoice, claim form, or other
14 individual request or demand for property, services, or
15 money constitutes a separate claim whether submitted
16 separately or together with other claims;

17 “(2) each request or demand for property, serv-
18 ices, or money constitutes a claim regardless of wheth-
19 er such property, services, or money is actually deliv-
20 ered or paid; and

21 “(3) a claim shall be considered made to an au-
22 thority, recipient, or party when such claim is made to
23 an agent, fiscal intermediary, or other entity, including
24 any State or political subdivision thereof, acting for or
25 on behalf of such authority, recipient, or party.

1 “(c) For the purposes of subsection (a)(4) of this sec-
2 tion—

3 “(1) each written representation or certification
4 constitutes a separate statement whether submitted
5 separately or together with other statements; and

6 “(2) a statement shall be considered made to an
7 authority although such statement is actually made to
8 an agent, fiscal intermediary, or other entity, including
9 any State or political subdivision thereof, acting for or
10 on behalf of such authority.

11 **“§ 802. False claims and statements; liability**

12 “(a) For purposes of this chapter—

13 “(1) a claim is false when the claim—

14 “(A) includes or is supported by any false,
15 fictitious, fraudulent, or intentionally misleading
16 statement, document, record, or accounting or
17 bookkeeping entry;

18 “(B) is for payment for the provision of prop-
19 erty or services which the claimant has not pro-
20 vided, or has not provided in accordance with the
21 terms of the contract on which such claim is
22 based, or has provided in violation of any applica-
23 ble Federal or State statute or regulation; or

24 “(C) is for the payment of an amount in
25 excess of the amount which is properly due; and

1 “(2) a statement is false when a material fact—

2 “(A) is asserted in such statement and is
3 false, fictitious, fraudulent, or intentionally mis-
4 leading; or

5 “(B) is omitted from such statement and—

6 “(i) as a result of the omission, such
7 statement is substantially false, fictitious, or
8 fraudulent or, in the case of an intentional
9 omission, is intentionally misleading; or

10 “(ii) the person making such statement
11 has a duty to include such material fact in
12 the statement.

13 “(b) Any person who, on or after the effective date of
14 the Program Fraud Civil Penalties Act of 1983, knowingly
15 makes, presents, or submits, or knowingly causes to be made,
16 presented, or submitted, a false claim or statement, is liable
17 to the United States for—

18 “(1) a civil penalty of not more than \$10,000 for
19 each false claim or statement; and

20 “(2) an assessment of not more than double—

21 “(A) the full amount of money paid to and
22 the full value of property or services delivered to
23 a person as a result of the false claim or state-
24 ment of such person; or