

29 March 1984

STAT MEMORANDUM FOR:   
 Legislation Liaison Officer  
 Intelligence Community Staff

STAT FROM:   
 Assistant General Counsel

SUBJECT: Proposed Legislation to Amend the Small  
 Business Act (H.R. 2133)

STAT This is in response to your request for our views on whether H.R. 2133 could have an impact on the Intelligence Community if enacted. I have had discussions with  an attorney in our office who works on contract and procurement matters, and attorneys from NSA, DIA and Defense. The consensus of legal opinion appears to be that there is a potential adverse impact from this bill. While the specific degree of the impact may vary among Intelligence Community components depending upon their individual statutory authorities, all agree that there would be problems in implementing the bill within the Intelligence Community as contemplated by the drafters. You should be aware, however, that CIA strongly believes that its legal authorities are sufficient to exempt its activities from the effects of this bill.

I understand you have been asked to respond to Alan C. Chase, who is a staffer for the House Armed Services Committee, and I have attached for your review and consideration comments you may wish to raise with Mr. Chase regarding the potential impact of the bill. However, I would like to caution you that my coordination has been informal, and each interested agency should be given a chance to weigh in formally before presenting these views to Congress as their official positions. In this way any attempt to remedy the problems we have raised can be given careful review to ensure the protection of Community equities. Please do not hesitate to call me if you have any questions or comments.

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STAT cc:  LD/OLL

## INFORMAL COMMENTS ON H.R. 2133

As proposed H.R. 2133 would impose requirements on intelligence agencies that would be detrimental to the security of Intelligence Community contracting and procurement activities and that could not be implemented satisfactorily within the Intelligence Community. The bill's approach and its stringent administrative requirements are simply incompatible with the structure of Intelligence Community contracting and procurement activities.

Contracting and procurement activities by Intelligence Community components are significantly different from those of other government agencies. As a rule Intelligence Community contracting and procurement activities are highly sensitive, not only for the goods and services they procure but because the indication of the items procured often may convey the size and scope of the United States intelligence effort. Accordingly, security related requirements on Intelligence Community contracts are stringent. Such contracts are most often not the product of any public solicitation, as the classified nature of many Intelligence Community contracting activities prevents utilization of the normal means of notifying small businesses of potential contracting opportunities and precludes compliance with reporting requirements which are integral components of the procedures under the Small Business Act. In addition, there are considerable administrative and managerial problems associated with implementation of its provisions within components of the Intelligence Community. Full compliance by members of the Intelligence Community would require the establishment of additional layers of bureaucracy in order to implement H.R. 2133 procedures and would be detrimental to the goals of the small business community.

It should be noted that the components of the Intelligence Community do not disagree with the philosophy of the Small Business Act. Quite the contrary, there are numerous contracts and subcontracts to small businesses involved in the entire range of the Intelligence Community contracting and procurement activities. In fact, small businesses in many areas play a dominant role in providing goods and services to Intelligence Community components. However, the impact of this bill would be to remove from Intelligence Community components the flexibility that is needed to obtain goods and services from small businesses when appropriate to the Intelligence Community's mission, and that is necessary for the acquisition of the best support consistent with demands of the proposed acquisition.

A number of sections of H.R. 2133 either increase the monetary threshold for Small Business Act qualification, establish definitive guidance regarding qualified bidding lists, or relate to the establishment of small business goals and plans by executive agencies. While those provisions obviously have an impact on

implementation of small business program activities government-wide, they do not have serious consequences to Intelligence Community contracting. The provisions that raise significant concerns for the Community address:

- (1) The creation of an apparent mandatory set-aside for small business concerns as it relates to contracting out A-76. (Section 4 (b), page 5, line 12).
- (2) Creation of a mandatory set-aside for procurement contracts valued at \$25,000 or less (section 4(e), page 10, line 14).
- (3) Creation of a presumption for small business concerns contracting between \$25,000 but less than \$2,000,001 where waiver may be granted only by head of the buying activity (Section 4 (e) page 10, line 19).
- (4) Additional competition requirements for the purchase of spare parts beyond those currently required in existing regulations. (Section 4 (b) page 4, line 14)

All of the above listed provisions reduce the flexibility of Intelligence Community component contracting officers to respond quickly to Intelligence Community requirements by imposing additional bureaucratic steps and procedures without any measurable increase in government efficiency or enhanced small business contracting opportunities.

Component members of the Intelligence Community face a peculiar problem in the A-76 contracting-out arena. Such contracts usually carry with them security requirements and restrictions on contractor employees that may not necessarily exist within other government components. These restrictions quite often require extensive interview of large numbers of candidates in order for a contractor to provide employees acceptable from a security standpoint. Small businesses by definition generally include a smaller number of candidates and, therefore, may be less likely to be able to perform or to comply with contract provisions. Budget Circular A-76 recognizes these problems faced by intelligence agencies, but it does neither the United States Government nor the small business any service if a contract has to be terminated because the contractor is unable to provide necessary cleared personnel to satisfy a contract as contemplated under the requirements of H.R. 2133.

Concerns with H.R. 2133 are similar to those which were expressed with respect to H.R. 4326 in 1982. Congressional appreciation for the problems that the bill posed for the Intelligence

Community subsequently resulted in the language contained at 15 U.S.C. 638 (e)(2), which exempts the Intelligence Community from requirements relating to small business set-asides for research and development. While present concerns do not focus on the specific area of research and development, they still consider sensitive aspects of Intelligence Community procurement activities and the House Report accompanying that earlier amendment is equally relevant in considering H.R. 2133 and the impact of the Small Business Act generally on intelligence activities.