

Honorable Gaylord Nelson
Chairman
Select Committee on Small Business
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

I am writing on behalf of the National Small Business Association. As I am sure you are aware the small business community, in particular those portions of it involved in high technology enterprises, are concerned with the topic of Government patent policy which your Committee is currently reviewing. Initially your hearings featured persons favoring a title-in-the-Government approach to patent policy, and more recently you have focused on Government Patent policy as it applies to universities.

Since we have still received no indication from your staff that you plan to solicit the testimony of small business, we wish to insert our views in the record. We hope, of course, if you should decide to continue with these hearings that you also arrange for fuller participation of small business organizations.

I think it would greatly help to clarify the position of the National Small Business Association if it were first made clear that we are particularly concerned that debate over Government patent policy has tended to focus on the rights in inventions made by large Government contractors. The advocates of Government ownership of contractor inventions, especially, seem to ignore the different consequences and impact this may have on small businesses as opposed to large companies.

We believe this failure to differentiate has resulted in both legislative and administrative policies that have proven detrimental to the

interests of small business firms and, we think, ultimately to the American public.

I would hasten to add, however, that it is not our position that the Government should necessarily take title to inventions made by large contractors. There are, of course, many factors that must be weighted in arriving at the proper policy to apply to large contractors, and we would leave to representatives of the larger firms the task of demonstrating the efficacy of the policies that they would favor. We wish to make it clear, however, that the small business community does not consider that the leaving of title to inventions in large contractors is detrimental to its interests. For example, we cannot agree at all with Admiral Rickover's statement on p. 16 of his statement of December 19, 1977, to your Committee that "Small business, for its own advantage, should be against a giveaway patent policy."

The fact of the matter is that most high technology small business firms can only expect to compete and grow by developing their own unique strengths and ideas. Thus, normally inventions made by large firms in the same field are really not useful to small business concerns. On the other hand, the Government's taking title to an invention made by a small business contractor may be the equivalent of the taking of a major potential asset of that company. The exclusivity afforded by a patent is often a critical factor in attracting venture capital and otherwise impacting a decision by a small firm to attempt to develop and market an invention. Without patent rights many small firms would find it unattractive to develop new products that larger competitors could then copy and undersell because of their superior financial, marketing, distribution and other resources.

Thus as often as not when the Government takes title to a small business contractor's invention it is not fostering competition but hindering it. It is, in effect, making it possible for only a large firm to develop the idea, since such firms, if they need patent rights at all to protect their position, need them only with respect to other large competitors.

Moreover, Admiral Rickover's rather presumptuous assumptions of what is best for small business also ignore the fact that the type of policy he favors also puts small firms at a disadvantage in competing with larger firms for Government contracts and subcontracts.

The current policies of almost all Government agencies, whether derived from statutes such as that governing the Department of Energy or whether based on the Presidential Statement of Government Patent Policy, usually result in the assumption that a profit-making firm must accept either a title-in-the-Government or deferred determination type clause, their being little practical difference between the two. The major exception is the Department of Defense; but even with DOD, because of the wording of section 1(b) of the President's Statement, smaller firms may not automatically be entitled to a "Retention in the Contractor" patent clause as are most large firms.

These policies often place a high-technology, small business firm in the position of accepting Government contracts or subcontracts at the cost of jeopardizing its future non-Government market position. While the same might be said of larger firms, it must be recalled that for them patents do not usually play as important a role in the maintenance or expansion of markets. Moreover, larger firms may be in a much better

financial position to resist Government demands and to negotiate more equitable patent provisions. And they will normally have more resources to allocate to contract negotiations or after-the-fact waiver petitions. Furthermore, larger companies often segregate Government and non-Government work in separate divisions which allows them to guard their commercial lines against being jeopardized by Government claims under R&D contracts and subcontracts.

The taking of inventions from small Government contractors not only hurts those firms, but the overall economy as well. Several studies have documented the importance of a healthy small business enterprise to economic growth and job expansion.

A 1967 Department of Commerce study ^{1/} and a more recent update of that study by John Flender and Richard Morse of the MIT Development Foundation, Inc. ^{2/} lend strong support to the proposition that sales growth and job creation occurs more rapidly in innovative companies than in mature (dominant) companies. And even more significant for purposes of this discussion is the fact that job expansion at young (i.e. small) high technology companies was even more spectacular. ^{3/} These findings indicate that a patent policy that would deemphasize the needs of smaller firms and emphasize concerns with larger firms could have a negative impact on job expansion.

1/ Technological Innovation: Its Environment and Management, U. S. Panel on Invention and Innovation. (Washington, D.C., GPO, 1967).

2/ John O. Flender and Richard S. Morse, The Role of New Technical Enterprises in the U.S. Economy, M.I.T. Development Foundation.

3/ The authors found that during the 5 year period of 1969-74 "six mature companies with combined sales of \$36 billion in 1974 experienced a net gain of only 25,000 jobs, whereas the five young, high technology companies with combined sales of only \$857 million had a net increase in employment of 35,000 jobs.

Thus we believe that current Government patent policies act as a deterrent to small business participation in Government contracting programs, and tend to discourage the utilization of private developments of inventions by those small business firms who nonetheless decide to contract or subcontract with the Government. Policies advocated by Admiral Rickover or Justice Department representatives will only serve to aggravate an already unattractive situation.

Thus we hope that interested persons and organizations from the small business community will be given the opportunity, if you continue with these hearings, to voice their concerns with the present situation.

We also wish to express our support for the Institutional Patent Agreement approach to Government patent policy as set forth in a recent amendment to the Federal Procurement Regulations. While, of course, this policy does not directly affect small business firms, since it applies only to nonprofit organizations, we consider this a viable approach. We think it is especially worthwhile in that it indicates that some Government policy makers are able to make distinctions between classes of Government contractors. In line with our previous remarks, we believe something similar is needed with respect to small business contractors.

We also believe that leaving title in nonprofit organizations will stimulate cooperation between the university and commercial sectors.

3/ The potential harm that could accrue from discounting the need to be concerned with inventions from nondominant firms is further emphasized by a study done by Gelman Research Associates. An international panel of experts selected the 500 major innovations that were introduced into the market during 1953-73 in the U.S., Japan, W. Ger., France, or Canada. Of the 319 innovations produced by U.S. industries, 24% were produced by companies with less than 100 employees. Another 24% were introduced by companies with 100 to 999 employees.

It is our belief that small business firms in high technology areas are especially likely to benefit from such cooperation, including the licensing of university generated inventions. It seems likely to us that if those same inventions were transferred to the Government that the opportunity for small companies to develop and market them would be greatly reduced. Current Government licensing policies strongly favor nonexclusive licenses, thereby tending to favor large, dominant firms over their smaller competitors.

We respectfully request that this letter be entered into the record of the Subcommittee's hearings.

Sincerely yours,

cc: All Members Senate Select Committee
on Small Business
All Members House Committee on Small Business

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