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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-125087

February 28, 1979

The Honorable Ernest F. Hollings
Chairman, Subcommittee on State, Justice,
Commerce and The Judiciary
Committee on Appropriations
United States Senate

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SEN 00315

Dear Mr. Chairman:

This is in response to your request for an opinion on the legality of a proposed contract between the Department of State (Department) and the American Institute in Taiwan (Institute), absent the enactment of legislation now under consideration. DZG 01007

On December 15, 1978, in a joint communique by the Governments of the United States and the People's Republic of China (PRC), the United States announced that commencing January 1, 1979, the United States would recognize the Government of the PRC as the sole legal Government of China, and would terminate diplomatic relations with the Republic of China. The President has declared that in the future, "the American people will maintain commercial, cultural and other relations with the people of Taiwan without official government representation and without diplomatic relations," using where appropriate "an unofficial instrumentality in corporate form." Presidential Memorandum of December 30, 1978, 44 Fed. Reg. 1075, January 4, 1979 (President's Memorandum).

This declaration embodies the President's belief that it is in the national interest to maintain these unofficial relations with the people in Taiwan, H. Doc. 96-45, 96th Cong., 1st Sess. 1, and his recognition that this unique situation necessitates an unusual means of implementation. To that end, the Institute has been incorporated with the specific intent of performing functions in Taiwan, on behalf of the American people, that were formerly performed by the United States Government. The contract at issue is the means selected by the Department for implementing this aspect of the President's foreign policy.

The purpose of the contract, as set forth in Article I thereof, is to

"[c]arry out, on an unofficial basis, programs, transactions, and other relations with or relating to the people on Taiwan, and perform and enforce existing international and other agreements and arrangements

*Letter
attached*

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between the Government or any department or agency thereof and the people on Taiwan, in accordance with the President's Memorandum of December 30, 1978, to Heads of Departments and Agencies, entitled 'Relations With The People on Taiwan' (44 Fed. Reg. 1075); and

"[o]therwise represent the United States and the American people, and carry out functions on their behalf, as directed by the Contracting Officer or the Contracting Officer's Representative, with respect to the people on Taiwan."

The Department has proposed financing this contract commencing March 1, 1979, through the reprogramming of funds appropriated to the Department for Administration of Foreign Affairs, Salaries and Expenses, and Representation Allowances, in the Department of State Appropriation Act, 1979, Title I of Pub. L. No. 95-434, 92 Stat. 1021, October 10, 1978, designated by the Department for expenditures of the former United States Embassy in Taipei.

The functions of the Secretary of State in conducting foreign affairs are set forth in 22 U.S.C. § 2686:

"The Secretary of State shall perform such duties as shall from time to time be enjoined on or entrusted to him by the President relative to correspondences, commissions, or instructions to or with public ministers or consuls from the United States, or to negotiations with public ministers from foreign states or princes, or to memorials or other applications from foreign public ministers or other foreigners, or to such other matters respecting foreign affairs as the President of the United States shall assign to the department, and he shall conduct the business of the department in such manner as the President shall direct. R.S. § 202."

Pub. L. No. 95-434, supra, the Department's Fiscal Year 1979 appropriation for Foreign Service Salaries and Expenses provides in pertinent part:

"For necessary expenses of the Department of State and the Foreign Service, not otherwise provided for, including allowances as authorized by 5 U.S.C. § 5921-5925 * * *"

There is no restriction on the use of these funds for contracting out the Department's foreign affairs functions, if otherwise proper. While normally the personal services to the people of Taiwan and to Americans

living in. Visiting Taiwan would be expected to be performed "in-house" by Department personnel, there are compelling reasons to contract outside for their performance in this situation.

Therefore, given the unusual, even unprecedented, circumstances that led to the termination of diplomatic relations with Taiwan, the resulting inability to continue official relations, and the strong policy reasons for maintaining unofficial ties with the people of Taiwan, we do not object to the decision to utilize a private contractor as the vehicle for implementing this unofficial relationship. We do, however, have some serious problems with particular provisions of the proposed contract, and therefore with the use of Department S & E funds to finance the contract.

We have examined the transcript of the testimony of Department officials before the House Subcommittee on State, Justice, Commerce and the Judiciary on February 8, 1979, and copies of the proposed contract, a bill now under consideration (H. R. 1614), and the Articles of Incorporation of the Institute. Nowhere in the proposed contract (or in the other documents) is there a detailed statement of the duties and functions of the Institute, or of the methods it will use in carrying them out. Rather, Article II of the contract states only that "the COR [Contracting Officer's Representative] is authorized to provide guidance and direction to the Institute to implement the general scope of the work within the terms of the contract."

In view of your need for an expedited reply, we requested the Department to provide us in an informal manner with information about the contemplated functions of the Institute.

We have been advised informally that the activities of the Institute will involve only non-discretionary functions necessary for the maintenance of cultural, commercial and other relations with the people of Taiwan, as directed in the President's Memorandum, *supra*. For example, as we understand it, the Institute will transmit applications for visas or passports to the United States Consular Office in Hong Kong, and upon notification of official approval, will provide the applicant with documentation which can be exchanged for the visa or passport at a United States Embassy or Consular Office or at a port of entry. Applications for export licenses will be treated similarly, with the relevant Government agency performing necessary official functions and prescribing the documentation it will recognize upon approved issuance by the Institute.

The Institute directly will provide businessmen and tourists with requested information, assist visitors to Taiwan, and will perform

services for individuals and Government agencies such as locating a local resident and obtaining his signature on a document. Private companies will not be required to transact business through the Institute, and the Institute will not interfere with existing transactions between Government agencies and private entities in Taiwan.

According to the Department's informal advice, services performed for the Department and other agencies will be done at the direction of authorized agency officials, and through the Taiwanese counterpart institute rather than through governmental contacts which are no longer practicable. Thus, for example, arrangements can be made by the Institute to facilitate cultural and educational exchanges of groups of students or performing artists, when the exchange has been authorized by the appropriate agency. Local conditions can be reported upon and analyzed, in compliance with grant and contract terms and conditions, and can be monitored and reported, if requested by an agency.

It is axiomatic that functions which the Department itself has no authority to perform cannot be carried out on its behalf by a contractor. The purely ministerial functions described above, such as providing information to businesses and individuals, and assisting individuals to apply for visas or passports, are not troublesome to us. However, the language of the contract is broad and non-specific. If at any time services are directed to be performed by the contracting officer or his representative which amount to financial or technical assistance to the people of Taiwan, there could be a violation of the specific terms of section 620(t) of the Foreign Assistance Act of 1961, 22 U.S.C. § 2370(t). Subsection (t) states as follows:

"(t) No assistance shall be furnished under this chapter or any other Act, and no sales shall be made under the Agricultural Trade Development and Assistance Act of 1954, in or to any country which has severed or hereafter severs diplomatic relations with the United States or with which the United States has severed or hereafter severs diplomatic relations, unless (1) diplomatic relations have been resumed with such country and (2) agreements for the furnishing of such assistance or the making of such sales, as the case may be, have been negotiated and entered into after the resumption of diplomatic relations with such country."

An analysis of the Foreign Assistance Act reveals that the assistance referred to in section 620(t) consists primarily of financial and technical aid designed to further economic and social development in friendly countries, made available through grants, loans and other means.

As a result of the termination of diplomatic relations with the Taiwan Government, under the terms of section 620(t) it appears that no such assistance can be provided by the Department to the people of Taiwan, whether directly or through a contractor, absent specific authorizing legislation. Section 620 does not appear to prohibit the provision of informational and procedural assistance to individuals and private organizations, which the Department advises us will be the function of the Institute.

The contract also requires the Institute to "perform and enforce" existing treaties and other agreements or arrangements between the Government of the United States and "the people on Taiwan", in accordance with the President's Memorandum of December 30, 1978, supra. That memorandum does not shed any further light on which treaties or agreements are covered and how these performance and enforcement functions are to be carried out. Our concern is that functions which by their nature must be carried out by a governmental entity can not be performed by a contractor. For example, there is the Mutual Defense Treaty of 1974, 6 U.S.T. 433, 1954 T.I.A.S. 3178, which was entered into between the United States and Taiwan Governments. An official one-year notice of termination of this treaty was given to the Government of Taiwan, effective January 1, 1979, but the legality of the termination is currently in litigation and is the subject of considerable controversy. In any case, we do not believe there is any authority to delegate to a private entity the power to carry out United States obligations under this treaty for whatever period it remains in force.

There are 58 executive agreements in force between the United States and Taiwan Governments, which the President has directed are to remain in force (President's Memorandum, supra.) From a selective examination of these agreements, it appears that in most instances the Institute could provide the kind of non-technical and non-financial assistance required.

For example, paperwork can be prepared by the Institute at the direction of concerned agencies, to facilitate the exchange of cultural groups, as required by 1964 T.I.A.S. 5572. Institute employees can observe and report on the flow of narcotic drugs in and out of Taiwan (6 Bevans 797 (1947)), although they could not take any action in the name of the United States to deal with drug offenders. On the other hand, there is no present authority for the Government to transfer surplus military vessels to the Institute, which would then make long term loans of the vessels to its Taiwanese counterpart upon terms provided by the originating agency, as required by 1959 T.I.A.S. 4180, and 1951 T.I.A.S. 2293 as amended.

Moreover, the two Governments are signatories to many multilateral treaties dealing with matters ranging from the settlement of investment disputes, 1966 T.I.A.S. 6090, to air piracy, 1969 T.I.A.S. 6768. The Institute would not be able to enforce or sanction compliance with multilateral treaties since this involves official Government actions, although it could observe and report possible violations to the Department.

Prior to our informal discussions with the Department, we had some serious reservations about the legality of some of the contract provisions relating to employee compensation and benefits, set forth in Attachment A to the contract. (During these discussions, we were informed that the proposed contract was still in draft form, and has been amended by the Department. We note that we have not seen the amendments incorporated by the Department during the past week or so.) We indicated that we were aware of no legal authority, absent legislation, for the transfer to the Institute of employees' annual, sick, and home leave balances held with the Government, as set forth in paragraph 8. As a result of this discussion, the Department official agreed to amend the next to the last sentence in paragraph 8 to state: "The Institute shall give credit for annual, sick and home leave balances held with the U.S. Government," thereby eliminating this reservation. We recommend a similar amendment in paragraph 12 of Attachment A.

We also informed the Department that we were aware of no existing legal mechanism whereby "the Institute will make employee deductions and will make current payments of such employee deductions and employer contributions to U.S. retirement and insurance programs as required to maintain coverage of its employees under such programs", as set forth in paragraph 14. We were informed that until legislation is enacted, or for a maximum of 6 months, all United States citizen employees of the Institute will be Department employees on leave without pay (LWOP) status. Their salaries will be paid by the Institute pursuant to the provisions of Attachment A.

Such employees retain their Government health and life insurance coverage for 12 months without cost, 5 C.F.R. §§ 890.303(e), 870.50(c), and the Institute should make deductions or contributions on behalf of these employees. Similarly, up to 6 months' credit for service while on LWOP will be counted toward retirement for these employees, but no contributions may be made, and any income earned by these employees will not be considered in calculating individual annuities.

If there is no legislation enacted before these free coverages lapse, there will be no legal means available thereafter for providing the Institute's employees with these benefits, unless subsequent legislation

contains specific provisions for retroactivity. We were advised by the Department that paragraph 14 is not intended or considered to be applicable to employees on LWOP status, and without appropriate legislation will not be implemented with respect to former Government employees who may subsequently be employed by the Institute.

In conclusion, we believe that in view of the unique circumstances created by our recognition of the People's Republic of China and termination of diplomatic relations with Taiwan, it would be legally supportable for the Department to carry out the President's foreign policy by entering into a contract to maintain informal relations with the people of Taiwan. However, our information about the scope of the activities and services described only in general terms in the proposed contract is too limited to give it an unequivocal endorsement. As noted, some activities and services may quite properly be contracted for and others might be impermissible either because they constitute the kind of assistance prohibited by section 620(t) of the Foreign Assistance Act or because they involve the performance of the kind of duty which can only be carried out by a Government official. We suggest that in the absence of authorizing legislation, the Committee withhold approval of the reprogramming request until it has received a more specific description of the functions of the Institute so that it can determine whether the Institute will be expected to perform unauthorized duties in the light of the considerations we have set forth.

Sincerely yours,

(SIGNED) ELMER D. STAATS

Comptroller General
of the United States

DIGEST

1. Department of State Appropriation Act, 1979, Title I of Pub. L. No. 95-434, 92 Stat. 1021, October 10, 1978, contains no restriction on use of Salaries and Expenses funds for contracting out Department foreign affairs functions, if otherwise proper. While normally personal services to people of Taiwan would be expected to be performed "in-house" by Department personnel, there are compelling reasons to contract outside for their performance in this situation.
2. It is axiomatic that functions which Department of State itself has no authority to perform cannot be carried out on its behalf by a contractor.
3. Services and activities of Department of State which involve the performance of kind of duty which can only be carried out by a Government official, cannot be performed for the Department by a contractor.
4. As a result of termination of diplomatic relations with Taiwan Government, under terms of section 620(t) of Foreign Assistance Act of 1961, 22 U.S.C. § 2370(t), it appears that no financial or technical assistance can be provided by Department of State to people of Taiwan, whether directly or through a contractor, absent specific authorizing legislation.