



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

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The Honorable Jack Brooks, Chairman
Committee on Government Operations
House of Representatives

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Dear Mr. Chairman:

This is in response to your further inquiries concerning inter- or intra-agency orders under section 601 of the Economy Act of 1932, as amended, 31 U.S.C. § 686. You indicate that there are instances where an order or requisition by an agency (other than one authorized to have its order filled by another agency through contracts with an outside party) could be executed by the performing agency in part by using its own expertise and in part by using work, services, equipment, supplies or materials (work) obtained by contract. You also indicate that, in these cases, the entire requisition would be prevented by interpreting section 601 as not authorizing the use of contracts for partial fulfillment of the order even though the performing agency would itself perform some of the order. Thus you ask:

- "1. Whether this aspect would be a sound basis for modifying section 601 to enable other agencies than those named in the first provided clause to have their requisitions under section 601 partially effectuated through use of contracts.
- "2. What standards are used to determine when a purchase of materials, supplies, equipment or services for use in such a project would be deemed an illegal contract instead of a replacement or substitution for materials, supplies, equipment or services otherwise available to the agency."

It is our opinion that 31 U.S.C. § 686 authorizes agencies to perform work or service for other agencies even though they must procure additional supplies, materials or equipment or temporarily hire additional employees. However, partial fulfillment of inter-agency orders by contracts for work or service with outside parties is not authorized by 31 U.S.C. § 686. Thus an amendment of 31 U.S.C. § 686 is necessary.

As we indicated in our previous letter there is no authority to fill an entire order through contract where the requesting agency is not one of the agencies named in the first proviso of 31 U.S.C. 686(a), 19 Comp. Gen. 544 (1939); 20 id. 264 (1940), since, 31 U.S.C. § 686(a)

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requires the performing agency to be in a position to supply or equipped to render the requisitioned service. However, we have never specifically addressed the question of whether an agency which performs some of the work itself, could have the remainder of the work performed by contract. Furthermore, our decisions do not discuss the effect of 31 U.S.C. § 686(b) on the limitation set forth in 31 U.S.C. § 686(a).

31 U.S.C. § 686(b) provides:

"Amounts paid as provided in subsection (a) of this section shall be credited, (1) in the case of advance payments, to special working funds * * *. The Secretary of the Treasury shall establish such special working funds as may be necessary to carry out the provisions of this subsection. Such amounts paid shall be available for expenditure in furnishing the materials, supplies, or equipment, or in performing the work or services, or for the objects specified in such appropriations or funds. Where materials, supplies, or equipment are furnished from stocks on hand, the amounts received in payment therefor shall be credited to appropriations or funds, as may be authorized by other law, or, if not so authorized, so as to be available to replace the materials, supplies, or equipment.* * *" Emphasis added.

We pointed out in Washington National Airport; Federal Aviation Administration; intra-agency reimbursements under 31 U.S.C. § 686, (57 Comp. Gen. 674 (1978)), section 601 of the Economy Act of 1932 had as its beginnings in H.R. 10199, 71st Congress, introduced on February 22, 1930, for the purpose of authorizing inter-agency procurement of work, materials, or equipment with reimbursement to be based upon actual cost, which provided:

"* * * any executive department or independent establishment of the Government may place orders with any other department or establishment for the procurement of work, materials, and/or services of any kind, for which funds are available.* * *"

During hearings on H.R. 10199, before the Committee on Expenditures in the Executive Departments, Representative French, sponsor of the bill, testified about the purpose of the legislation:

"There is no general authority for one department or establishment to order work, materials or services from another although a number of departments and establishments have authority to perform certain specific classes of work for other establishments * * *.

* * * * *

"This bill is intended to provide the specific legislative authority stated by the Comptroller General to be necessary by authorizing the performance of work or services or furnishing of materials by one department or establishment to another without any limitation as to existing facilities or personnel. On a job of any size for another department or establishment it might frequently be necessary to take on additional personnel in order to utilize existing facilities and complete the job within the time required or to retain the services of employees who would otherwise be discharged."

The language originally proposed in H.R. 10199 left no doubt that agencies were authorized to employ additional personnel or to increase their facilities to perform work for requisitioning agencies.

However, strong criticism of this provision was made by some Government officials, including the Comptroller General, who felt it to be overly broad and in excess of that which was necessary in order to achieve the specified purposes. For example, in his report on H.R. 10199, dated April 25, 1930, to the Chairman of the House Committee on Expenditures in the Executive Departments, the Comptroller General said, concerning the provision of the bill quoted above:

"Under this provision, if it should become law, there could be no check as to activities of the performing agency and the provision would permit the transfer of assignments pertaining to one agency for performance by another not necessarily equipped with adequate facilities or personnel or charged with such duties, the only requirement of the law as drafted being that the funds ultimately to be charged be available therefor* * *.

* * * * *

"* * * It may be that a given governmental agency is not given by the Congress sufficient funds as estimated by the administrative officer to operate,

perhaps because it is the intent of the Congress to curtail or limit the operations or activities of such agency, in which event the curtailment or limitation intended by the Congress could be easily frustrated by a transfer of assignments and funds to that agency under the proposed law.

"In the annual appropriation acts for the Bureau of Standards, the Bureau of Mines, the Geological Survey, and other agencies, there are provisions of law authorizing the transfer of funds for scientific and technical investigations, etc., but said provisions contain clauses to the effect that the transfer of funds is to be made only when the work contemplated is within the scope of the functions of the agency and the agency is unable to perform the same within the limits of its appropriations. The need for these limitations lies apparently in the fact that these agencies of the Government, being fundamentally branches of one whole system, the appropriations of one agency should not be increased at the expense of those of another agency when the work entails no additional expense in the procurement of work, supplies, or services for the other branch of the Government. On the other hand, where additional expenses are involved, there is, as a rule, always the question to be considered whether the activities of one agency should be increased and supported at the expense of the appropriations of another agency unless it is clearly the intent of the Congress that such should be the case. * * * In any event it would appear that the provision of the bill above quoted should be modified so as to authorize transfer of funds from one agency to another only where the procuring or performing agency is by reason of the needs of its own authorized activities equipped with the personnel and other facilities necessary for the procurement or performance for the other agency." Hearings on H.R. 10100, supra., 42-43. See also comments of Representative Shaefer, p. 6; and Representative Colton, p. 19; and statement of Mr. Reed, pp. 20-29.

As a result of his concern, the Comptroller General proposed an alternative draft to limit this otherwise broad authority:

"* * * any executive department or independent establishment of the Government having funds available for the purpose may place orders with any other department or establishment for the procurement of work, materials, and/or services of the class which the regular duties of the procuring or performing department or establishment require it to be equipped to procure or perform * * *." Hearings on H.R. 10199, supra, 42-43.

The final reported version of the bill contained the language now found in section 601(a) of the Act (except for the first proviso which was added later) and a new subsection (b) which provided that—

"Amounts paid as provided in subsection (a) * * * shall be available for expenditure in furnishing the materials, supplies, or equipment, or in performing the work or services (including the procurement of additional equipment or the compensation of regular or additional employees, necessary for such purposes), or for the objects specified in such appropriations or funds. Where materials, supplies, or equipment are furnished from stocks on hand, the amount received in payment therefor shall be credited to appropriations or funds, as may be authorized by other law, or, if not so authorized, so as to be available to replace the materials, supplies, or equipment, except that where the head of any such department, establishment, bureau, or office determines that such replacement is not necessary the amounts paid shall be covered into the Treasury as miscellaneous receipts." Emphasis supplied. H.R. Rep. No. 2201, 71st Cong., Sess., p. 1 (1931).

When the bill was finally enacted, the parenthetical expression had been omitted from the language of subsection (b) without explanation.

Thus there was concern expressed during the evolution of section 601 of the Economy Act that, as initially proposed, the bill would have permitted a performing agency to construct new facilities and to undertake new activities not normally within the scope of an agency's activities. This could have provided a means for agencies to circumvent congressional oversight and control of their activities. However, throughout the evolution of the bill up until the final version was passed, it was also clear that it was intended to authorize the procurement of additional equipment, supplies, materials and services by a performing agency so long as the work was within the scope of the activities normally performed by the agency and adequate facilities already existed to perform the work.

Therefore, in our opinion, an agency may accept an order under the Economy Act for work or service which is within the scope of activities normally performed by the agency and for which it possesses adequate facilities to perform the work or service, even though the performing agency may find it necessary to procure additional supplies, materials or equipment. Support for our opinion can be found in the final sentence of subsection (b) in the Committee-reported version of the bill, quoted supra, which was not changed when the parenthetical clause was omitted from the subsection. Beginning that sentence with "Where" indicated that there would exist situations where equipment, supplies or materials would not be furnished from stocks on hand but would be purchased to perform the work.

It is also our opinion that the omission of the parenthetical clause in subsection (b) should not be viewed as a blanket denial of authority to employ additional personnel when executing Economy Act orders. We note that compensation of additional personnel was mentioned in the parenthetical clause as one of the items of work or service for which the performing agency could make payments. While it can be argued that the unexplained omission of the clause was intended to limit the kinds of items for which these payments could be made, it can also be argued that the omission was intended to remove an example which might serve as a limitation on items of expenditure. In the absence of a clear expression of legislative intent on this matter, we will adopt the interpretation that best serves the purpose of the legislation in question, that is, to effect economy in the Government. 58 Comp. Gen. 674, 681 (1978). Therefore, since permitting agencies to add additional temporary personnel in order to perform work for which it already possesses facilities and expertise serves to effect economy in the Government, we hold that it is authorized under the Economy Act.

However, the legislative history is silent on the question of whether a performing agency could execute an order by contracting to have a portion of the work or service completely performed by outside parties, using their own equipment and personnel. Furthermore, our decisions interpreting the Economy Act's requirement that the performing agency be in a position to supply or equipped to render the requisitioned work only addressed situations where the entire performance was being contracted out. However, the same rationale used to preclude contracting out total performance would also preclude contracting out partial performance since the performing agency would not be in a position to supply or equipped to render the requested services

and cannot place itself in a position to do so by increasing its staff or securing additional equipment or supplies. The addition in 1942 of the first proviso authorizing certain agencies to have their orders executed (presumably in whole or in part) by contract did not remove this prohibition for other agencies.

Of course, to the extent it is possible to sever the work required to be performed by outside contractors from the work to be performed by another agency, an Economy Act order could be placed for that portion of the work to be performed by the agency. The requisitioning agency could then contract directly to have the remaining work performed by an outside party. However, should this not be feasible, then the performing agency could not accept an order which it needs to execute in part by use of outside contractors. You suggest that this might prevent execution of an entire requisition and ask whether there would be a sound basis for modifying section 601 to prevent this result. In our opinion, a legislative amendment would be desirable to authorize all agencies to have their orders executed in part by outside contractors where the service is otherwise substantially performed by another agency.

Sincerely yours,

Signed Elmer B. Staats

Comptroller General
of the United States