GAO

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General Accounting Office
Washington, D.C. 20548

Office of the General Counsel

B-259499

August 22, 1995

Mr. Jeffrey H. Smith
General Counsel
Central Intelligence Agency

Dear Mr. Smith:

By letter dated November 4, 1994, David Pearline of your staff asked whether the Central Intelligence Agency (CIA) may provide services to another agency through CIA personal services contractors where the ordering agency does not have the authority to contract for personal services. For the reasons and in the circumstances discussed below and in the enclosed analysis, the CIA may use its personal services contractors to provide ordered services consistent with the Economy Act, 31 U.S.C. §§ 1535, 1536.

We understand that pursuant to the Economy Act, other agencies of the Intelligence Community request services from the CIA that the CIA's personal services contractors can best provide. In some instances, the services mutually benefit the CIA and the ordering agency. The CIA may or may not have acquired the personal services contractors in compliance with procurement statutes applicable to ordering agencies. In some cases, those which give rise to the question here, the ordering agency lacks the authority to engage personal services contractors.

In the interest of national security, your agency has not provided us with the specific details of any request for interagency services that may involve the use of CIA personal services contractors. However, for purposes of the request, we were informally advised that this issue presents itself in essentially four situations. In the first situation, the ordering agency seeks services that the CIA will perform in-house using its employees, including those it has employed under contracts for personal services. The second situation is the same as the first, except that the CIA personal services contractors will perform some of the requested work on the premises of the ordering agency (e.g., gathering information only available at the ordering agency), but will remain under the direct supervision and control of the CIA. The third situation is similar to the second, except that the CIA personal services

contractor is under the direct supervision and control of the ordering agency. The fourth situation is similar to the third, except that the CIA engages the personal services contractor subsequent, and solely in response, to the ordering agency's needs.

The first two situations described above would not contravene the prohibitions of the Economy Act even where the ordering agency is not authorized to engage personal services contractors. In these two situations, the services would be rendered by CIA employees whose employer-employee relationship to the CIA remains unchanged. This is true regardless of whether all or part of the services are rendered by such contractors. The CIA personnel would be acting similar to independent contractors as opposed to employees vis-a-vis the ordering agency and thus any limitation on, or absence of authority in, the ordering agency would not be circumvented in this regard. Further, any doubt as to the CIA's authority in the first two situations is removed by virtue of the Federal Acquisition Streamlining Act amendments when (1) the CIA has entered into the contract in question prior to the order being placed, or (2) the CIA enters into the personal services contract subsequent to the order and a senior procurement official of the ordering agency approves the procurement that otherwise would not satisfy the procurement requirements applicable to the ordering agency.

The third and fourth situations would contravene the prohibitions of the Economy Act where the ordering agency is not authorized to engage personal services contractors. In these two situations, the services would be rendered by personal services contractors in circumstances tantamount to an employer-employee relationship with the ordering agency. This is precisely what the ordering agency would not be authorized to do. The Economy Act does not permit the ordering agency to do indirectly what it may not do directly in its own right.

Enclosed is a detailed analysis of the issues raised by your question. We trust you will find it useful. Should you have any further questions with respect to these issues, please contact Gary L. Kepplinger, Associate General Counsel, or Richard Cambosos, Senior Attorney at (202) 512-5644.

Sincerely yours,

Robert P. Murphy
General Counsel

Enclosure

ENCLOSURE

CIA's Authority Under The Economy
Act To Use Personal Service Contractors
To Provide Services To Another Agency

Background

By letter dated November 4, 1994, David Pearline, Office of General Counsel (OGC), Central Intelligence Agency (CIA), asked whether the CIA may provide services to another agency through its personal services contractors where the ordering agency lacks the authority to contract for personal services. The OGC, CIA, advises that other agencies of the Intelligence Community will request services pursuant to the Economy Act, 31 U.S.C. § 1535, that CIA believes can best be provided by its personal services contractors. In some instances, the services will mutually benefit the CIA and the ordering agency. The CIA advises that it may or may not have acquired the personal service contractors consistent with the requirements of procurement statutes applicable to the ordering agencies. Also, in some cases, the ordering agency may lack authority to engage personal services contractors in its own right.

In the interest of national security, the CIA has not provided the specific details of any request involving the provision of interagency services by CIA personal services contractors. For purposes of its request, CIA advises that its question presents itself in essentially four situations. In the first situation, the ordering agency seeks services that the CIA will perform in-house using its employees, including those it has employed under contracts for personal services. The second situation is the same as the first, except that the CIA personal services contractors will perform some of the requested work on the premises of the ordering agency (e.g., gathering information only available at the ordering agency), but will remain under the direct supervision and control of the CIA. The third situation is similar to the second, except that the CIA personal services contractor is under the direct supervision and control of the ordering agency. The fourth situation is similar to the third, except that the CIA engages the personal services contractor subsequent, and solely in response, to the ordering agency's needs.

Personal Service Contracts

Unless otherwise authorized by law, personal services may not be obtained on a contractual basis but must be performed by government employees. U.S. Advisory Commission on Public Disclosure, 61 Comp. Gen. 69, 72 (1981) and decisions cited therein. This of course is not to say that the government may not contract for services. The critical factor in such contracts is that the relationship between the government and the service contractor (and/or its personnel) is not that of employer and employee. Office

of Revenue Sharing--Contracts for Personal Services, 66 Comp. Gen. 420 (1987); 51 Comp. Gen. 561 (1972). In other words, so long as an agency acquires services from an independent contractor, no issue arises whether such services were or should have been obtained in accordance with federal personnel laws.[1]

Typically, the linchpin to any analysis whether an employer-employee relationship exists is supervision.[2] The essence of "supervision" as a criterion is whether federal officials, on a close and continuous basis, not only control what the contractor and its employees do, but how, when, and where they do it, to such an extent that the independence of the contractor's performance, essential when the government contracts for services, is lost. 53 Comp. Gen. 542 (1974). Where an agency needs to exercise detailed supervision, the agency should obtain the needed services through federal employees or through personal services contractors where so authorized. As noted earlier, Congress may in appropriations act or other provisions of law authorize agencies to acquire "personal services" by contract.[3]

Finally, one other issue affects whether an agency may engage a contractor to furnish services. It is by now axiomatic that the government may not use service contractors to

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[1]Services routinely acquired pursuant to the procurement laws and regulations will necessarily be "nonpersonal services." See Federal Acquisition Regulation §§ 37.101 and 102(d). If such services are "personal," then the relationship that exists between the government and the "contractor" is governed not by the procurement laws and regulations, but the employment and compensation laws. 66 Comp. Gen. 420 (1987); 51 Comp. Gen. 561 (1972).

[2]Section 2105 of title 5, United States Code, defines "employee" as an officer or an individual (1) appointed in the civil service by designated officials, (2) engaged in the performance of a federal function under authority of law or an executive act, and (3) subject to the supervision of a federal official while in the performance of his or her duties.

[3]For example, Congress will often authorize agencies to contract for the temporary or intermittent services of experts or consultants without regard to certain civil service and contracting requirements. See 5 U.S.C. § 3109 (Supp. IV 1993). Where so authorized, the agencies may not pay for services provided in excess of the highest rate authorized by 5 U.S.C. § 5332. The limitation on compensation imposed by section 3109 does not apply to a contract for expert and consulting services entered into on a truly independent contract basis. 26 Comp. Gen. 188 (1946). However, if the relationship created under the contract is that of employer-employee (i.e., personal services) the limitation applies. 26 Comp. Gen. 188 (1946); 26 Comp. Gen. 442 (1946); and 42 Comp. Gen. 395 (1963).

discharge inherently governmental functions. See Office of Federal Procurement Policy, Policy Letter 92-1, September 30, 1992, 57 Fed. Reg. 45096. (OFPP issued a proposed rule on June 8, 1994, to amend the FAR to implement the policy guidance. See 59 Fed. Reg. 29696 (1994).) Thus, before contracting for services, an agency should determine whether the service involves an inherently governmental function requiring performance by a government officer or employee. Next, if the agency proposes to contract for personal services, the agency must determine whether it has authority to do so.

The Central Intelligence Agency Act of 1949

The Central Intelligence Agency Act of 1949, 50 U.S.C. § 403a et seq. (1988) (CIAA), confers broad authority on the CIA to undertake activities without regard to constraints usually applicable to executive agencies. Section 8(a) of the CIAA, as amended, 50 U.S.C. § 403j(a) (1988), authorizes the CIA to expend funds appropriated or otherwise made available to it for purposes necessary to carry out its functions, including personal services, notwithstanding any other provision of law. Section 8(b) of the CIAA, 50 U.S.C. § 403j(b), provides that sums made available to the CIA may be expended without regard to the provisions of law and regulations relating to the expenditure of government funds. The CIA relies on section 8 of the CIAA to employ persons, including obtaining personal services either by appointment or by contract.[4]

There are other provisions of the CIAA that, in certain circumstances, authorize the CIA to contract for personal services using funds transferred to CIA from another agency.[5]

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[4]Section 3 of the CIAA, as amended, 50 U.S.C. § 403c(a) (1988), provides that in the performance of its functions, the CIA is authorized to exercise the procurement authorities in 10 U.S.C. §§ 2304(a)(1)-(6), (10), (12), (15), (17), 2305(a)-(c), 2306, 2307, 2308, 2309, 2312, and 2313.

[5]Section 5 of the CIAA, as amended, 50 U.S.C. § 403f(a) (Supp. V 1993), authorizes executive agencies, departments, or establishments when approved by OMB to transfer funds to the CIA to carry out functions conferred by section 103(d)(2)-(4) of the National Security Act of 1947, as amended, 50 U.S.C. § 403-3(d)(2)-(4) (Supp. V 1993) (NSA). Section 103(d)(2)-(4) of the NSA authorizes the Director of the CIA to provide overall direction for the collection of national intelligence, to correlate and evaluate intelligence, and to perform additional services that are of common concern to the Intelligence Community that the Director determines can be more efficiently accomplished centrally. Section 5 of the CIAA further provides that funds transferred to the CIA may be expended for the purpose and under authority of the CIAA without regard to limitation on appropriations from which transferred.

(continued...)

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However, in situations where the CIA is unable to avail itself of such authority, and no other authority is applicable, the Economy Act provides the authority to perform work or services for other government agencies. For purposes of this request, our analysis will focus primarily on the Economy Act.

The Economy Act

As initially enacted, the Economy Act of 1932 authorized any executive department or independent establishment of the government, or organizational units thereof, to place orders with one another "for materials, supplies, equipment, work or services, of any kind that such requisitioned federal agency may be in a position to supply or equipped to render . . . ." Act of June 30, 1932, ch. 314, § 601, 47 Stat. 417 (31 U.S.C. § 686(a) (1934)). The purpose of this provision was explained in H.R. Rep. No. 1126, 72d Cong., 1st Sess. 15 as follows:

> "The purpose of this title is to permit the utilization of the materials, supplies, facilities, and personnel belonging to one department by another department or independent establishment which is not equipped to furnish the materials, work, or services for itself, and to provide a uniform procedure so far as practical for all departments."

The act did not expressly refer to situations where the performing agency was to provide the requested material or service through a contract (or supplemental agreement with an existing contractor) entered into for such purpose. When asked whether the 1932 act authorized such a transaction we held that:

> "Section 601 of the Economy Act of June 30, 1932 . . . does not authorize the transfer of funds from one federal agency to another for the purpose of having the second agency procure the performance of work for the first

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[5](...continued)

Finally, § 1.5(c) Executive Order No. 12333, 46 Fed. Reg. 59941, December 4, 1981, 50 U.S.C. § 401 note (1988), authorizes the Director of the CIA to promote the development and maintenance of services of common concern by designated intelligence organizations on behalf of the Intelligence Community. In addition, section 1.8(f) of Executive Order No. 12333 authorizes the CIA to conduct services of common concern for the Intelligence Community as directed by the National Security Council. The Intelligence Community includes the CIA, National Security Agency, Defense Intelligence Agency, and certain offices within the Departments of Defense and State. Executive Order No. 12333, § 3.4(f).

> agency by outside contracts, the authority being limited to orders that the requisitioned agency may be in a position to supply or equipped to render." 19 Comp. Gen. 544, 547 (1939).

Subsequently, Congress amended the Economy Act to allow agencies which had been requested to furnish supplies or to perform work for one of five specifically named agencies (the Departments of the War, Navy, and Treasury and the Maritime Commission and the Civil Aeronautics Administration, which in 1942 were the primary military and civilian procuring agencies) to do so by entering into a contract with a private contractor. Act of July 20, 1942, ch. 507, 56 Stat. 661 (31 U.S.C. § 686(a) (1946)). The House and Senate reports accompanying the 1942 amendment acknowledged the Comptroller General's interpretation of the Economy Act in 19 Comp. Gen. 544 (1939), but pointed out that there were numerous situations where the amendment would be advantageous:

> "(1) Where one department has a contractor working at a particular location and another of the enumerated departments considers it advantageous to have the same contractor perform work at the same place.
>
> "(2) Where two of the enumerated departments contemplate work of the same or similar nature at a particular location each having available funds therefor, and it being desirable to have the work performed under a single contract.
>
> "(3) Where one department is peculiarly qualified by experience and organization or special knowledge to perform work desired by one of the enumerated departments." H.R. Rep. No. 2267, 77th Cong., 2d Sess. 2 (1942). See also, S. Rep. No. 840, 77th Cong., 1st Sess. 2 (1941).

Congress also has authorized agencies to jointly cooperate to carry out specific programs or activities that were of benefit to each agency.[6] In light of such statutory authority, the Comptroller General was asked whether the Economy Act barred an agency from entering into jointly funded contracts to carry out authorized mutually beneficial projects when the other agencies contributing to funding the contract were not agencies authorized to have orders filled by contract by the 1942 amendments to the Economy Act. We held that the Economy Act did not bar such interagency joint funding of contracts entered into to carry out mutually beneficial projects that were otherwise authorized by law. 52 Comp. Gen. 128 (1972).

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[6]The CIA possesses authority independent of the Economy Act to undertake jointly funded projects, e.g., section 103(d)(2)-(4) of the NSA of 1947 and section 1.5(c), 1.8(f) of Executive Order No. 12333. See footnote 5 above.

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In 1982, Congress codified title 31, United States Code, assigning the Economy Act of 1932, as amended, to 31 U.S.C. §§ 1535, 1536. Pub. L. No. 97-258, § 1, 96 Stat. 877 (1982). At the same time Congress was considering the codification of title 31, Congress was amending the Economy Act to permit the performing agency in an Economy Act transaction to contract out for ordered goods and services. Pub. L. No. 97-332, 96 Stat. 1622 (1982).[7] As amended, 31 U.S.C. § 1535 (1988) now provides that:

> "(a) The head of an agency or major organizational unit within an agency may place an order with a major organizational unit within the same agency or another agency for goods or services if–
>
> "(1) amounts are available;
>
> "(2) the head of the ordering agency or unit decides the order is in the best interest of the United States Government;
>
> "(3) the agency or unit to fill the order is able to provide or get by contract the ordered goods or services; and
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> "(4) the head of the agency decides ordered goods or services cannot be provided by contract as conveniently or cheaply by a commercial enterprise.
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> * * * * *
>
> "(c) A condition or limitation applicable to amounts for procurement of an agency or unit placing an order or making a contract under this section applies to the placing of the order or the making of the contract."

The language in subsections (a)(3), (a) (4), and (c) reflect the 1982 amendment to the Economy Act.

The House report accompanying the 1982 amendment explains the amendment to subsection (a)(3):

> "This provision has the effect of allowing a requisitioned agency to contract out for goods and services ordered by any other agency in the federal government. It is important to note that the requisitioned agency by virtue of its operating authority, be already able–in a position or equipped–to

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[7]Subsequently, the 1982 amendments were codified by Pub. L. No. 98-215, § 1(2), 98 Stat. 3 (1984).

> supply such goods or services, whether through its own resources or by contract with outside parties." H.R. Rep. No. 97-456, 97th Cong., 2d Sess. 4 (1982).

The report further states with regard to the amendment to subsection (a)(4) wherein Congress substituted "contract" for "competitive bids" that:

> "The effect of this provision is to allow the requisitioned agency to use any method of procurement which is allowed by other laws governing government procurement. Since the drafting of the competitive bid language, a separate body of law governing contracting out by government agencies has developed. Implementing procurement regulations require that agencies obtain materials and services by competitive sealed bids whenever possible. When not possible, the regulations permit negotiation, again requiring competition whenever possible. Written justification and approval are required for any non-competitive procurement. These alternatives should be available when one agency is requisitioned by another, and the continued specifying of only one method of contracting could, in some cases, impede or prevent the carrying out of the requisition." H.R. Rep. No. 97-456 at 5.

Finally, with regard to the addition of subsection (c), the report states:

> "This provision precludes any interagency activity which could result in the circumvention of conditions and limitations applicable to either the ordering or the requisitioned agency on the use of government funds which are otherwise available for the procurement of goods or services." H.R. Rep. No. 97-456, at 5-6 (1982).

The purpose of the 1982 amendment to subsection (a)(3) was to extend to all requisitioning agencies the authority to have goods or services provided by the performing agency through contracts entered into with commercial enterprises. (Thus extending the authority that had been conferred on only five agencies under the 1942 amendment.) These provisions are concerned with prospective contracting by the performing agency on behalf of the ordering agency, and not with providing goods or services that the performing agency has already obtained or has contracted to obtain at the time of the order.

Congress intended subsections (a)(4) and (c) to address two distinct concerns. At a minimum Congress intended the amendment to subsection (a)(4) to authorize the performing agency to procure goods or service using the procurement authority otherwise

applicable to the performing agency. This seems logical since this would be the procedure the performing agency would be expected to be familiar with since that is the method the agency is otherwise required by law to comply with. Thus the fact that the performing agency is governed by a set of procurement statutes different from the ordering agency is not a bar to an Economy Act order.

On the other hand, and consistent with the purpose of subsection (a)(4), the amendment to subsection (c) seems intended to ensure that the ordering agency does not obtain goods or services either in excess of appropriation limits on the amounts available for such purpose or which it is otherwise not authorized to procure. Congress clearly did not want an ordering agency that is not authorized to procure, for example, motor vehicles, aircraft, or computers, to obtain such items by transfer from another agency pursuant to an Economy Act transaction. Thus subsection (a)(4) confers authority regarding the means of procurement of otherwise authorized items, while subsection (c) prevents the ordering agency from accomplishing, under the guise of an Economy Act transaction, purposes outside the scope of its authority.

While the ordering agency may not obtain goods or services under the Economy Act that it is not otherwise authorized to obtain, this does not preclude the performing agency from using goods and services that it is authorized to obtain when performing an interagency order as long as any legal restrictions on the ordering agency are not circumvented. For example, an ordering agency lacking the authority to procure computers, aircraft, or automobiles is not precluded from obtaining services from another agency involving the use of such items, provided the services rendered are necessary to fulfill an authorized purpose of the requesting agency's appropriation and do not involve the transfer of the property involved. In such circumstances, the use of the items by the performing agency is a means to an otherwise authorized end, and not an end in itself.

To complete our survey of the evolution of the Economy Act, we need to discuss two other legislative developments. First, in 1984, Congress enacted the Competition in Contracting Act, Pub. L. No. 98-369, 98 Stat. 1174 (1984) (CICA). Insofar as relevant here, CICA added a similar provision to the procurement laws applicable to executive agencies subject to the Federal Property and Administrative Services Act of 1949 (FPASA), 41 U.S.C. § 253, and to the Departments of Defense, Army, Navy, Air Force, Transportation and the National Aeronautics and Space Administration, 10 U.S.C. ch. 137. Both provisions provide that in no case may a covered department or agency procure property or services from another agency unless such other agency complies fully with the requirements of chapter 137 of title 10, United States Code, or title III of FPASA in its procurement of such property or services. 41 U.S.C. § 253(f)(5)(B) and 10 U.S.C. § 2304(f)(5)(B).

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Congress explicitly made the above restriction "in addition to, and not in lieu of, any other restriction provided by law." Id.

Second, Congress in section 1074 of the Federal Acquisition Streamlining Act of 1994 (FASA), Pub. L. No. 103-355, 108 Stat. 3243, 3271 (1994), directed that the FAR be revised to cover agency exercise of authority under the Economy Act to purchase goods or services under contracts entered into or administered by other agencies. Section 1074(b) prescribed that the regulations shall

> "(1) require that each purchase described in subsection (a) be approved in advance by a contracting officer of the ordering agency with authority to contract for the goods or services to be purchased or by another official in a position specifically designated by regulation to approve such purchase;
>
> "(2) provide that such a purchase of goods or services may be made only if–
>
> "(A) the purchase is appropriately made under a contract that the agency filling the purchase order entered into, before the purchase order, in order to meet the requirements of such agency for the same or similar goods or services;
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> "(B) the agency filling the purchase order is better qualified to enter into or administer the contract for such goods or services by reason of capabilities or expertise that is not available within the ordering agency; or
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> "(C) the agency or unit filling the order is specifically authorized by law or regulations to purchase such goods or services on behalf of other agencies;
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> "(3) prohibit any such purchase under a contract or other agreement entered into or administered by an agency not covered by chapter 137 of title 10, United States Code, or title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251 et seq.) and not covered by the Federal Acquisition Regulation unless the purchase is approved in advance by the senior procurement official responsible for purchasing by the ordering agency; and
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> "(4) prohibit any payment to the agency filling a purchase order of any fee that exceeds the actual cost or, if the actual cost is not known, the estimated cost of entering into and administering the contract or other agreement under which the order is filled."

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Congress imposed a similar requirement on the Secretary of Defense with regard to Economy Act transactions involving the Department of Defense in section 844 of the National Defense Authorization Act of 1994 (NDAA), Pub L. No. 103-160, 107 Stat. 1720 (1993) (31 U.S.C. § 1535 note). A review of the legislative history of the NDAA provision, which was added by a Senate floor amendment to the bill, indicates that the provision was intended to prevent contract off-loading by Department of Defense under the Economy Act except in specific circumstances. Senator Levin, one of the sponsors of the amendment, stated that:

> "Under our amendment, DOD would be permitted to off-load contracts to other agencies only in specific circumstances–described . . . at our hearings–where such off-loads are appropriate. These circumstances are where: (1) the other agency is purchasing similar goods or services for itself, and it makes sense to consolidate the purchases; (2) the other agency has unique capabilities or expertise, not otherwise available to the ordering agency or unit; or (3) the other agency is specifically authorized to make purchases on behalf of other agencies. The amendment would authorize off-loads in additional circumstances, in the event of the issuance of an Executive Order or a revision of the Federal Acquisition Regulation setting forth specific additional circumstances in which such purchases are appropriate." 139 Cong. Rec. S11291-S11292 (daily ed. Sept. 9, 1993)

Discussion

The issue presented is whether the CIA may provide services to another agency using CIA personal services contractors where the ordering agency lacks authority to contract for personal services in its own right. In the first of the four situations presented, the ordering agency seeks service that the CIA will perform in-house using its employees and its personal service contractors. In some instances the services will mutually benefit the CIA and the ordering agency. Similarly, in the second situation, the CIA will provide services in-house but CIA employees or personal service contractors will perform some work (for example, gathering information available only at the ordering agency) on the premises of the ordering agency. In the second as in the first situation, the CIA employees and personal services contractors remain under the direct supervision and control of the CIA.

In our opinion, the first two situations do not contravene the Economy Act. As our earlier discussion of the Economy Act indicates, from the outset, the Economy Act assumed that one agency would use its own employees to provide ordered goods and services to another agency. (Congress expanded the Economy Act to permit agencies to use private contractors to satisfy Economy Act requests for goods and services in

response to decisions of this Office limiting execution of agency orders for goods and services to the employees of the performing agency.) Although a CIA personal service contractor is a "contractor," the relationship between CIA and such contractor shares the hallmark trait of the typical employer-employee relationship, namely, close supervision and control, and in this sense a personal services contractor is also an "employee." Thus, in the first two situations, the CIA provides the requested goods or services through personnel whose basic employer-employee relationship to the CIA remains unchanged. The fact that some work is performed at the ordering agency's location does not alter our view so long as the CIA does not relinquish supervision and control of its employees/contractors.

The legal relationship established by agreements between an agency requesting goods and services under the Economy Act and the providing agency, while not technically one of contract (since the government cannot contract with itself), is certainly analogous to the relationship established by contract. Extending this analogy one step further, in the typical Economy Act transaction, the performing agency operates essentially as an independent contractor to the requesting agency. In this sense, the relationship between the requesting agency and the performing agency (and its employees/contractors) cannot fairly be characterized as one for personal services. Thus, the CIA personnel act in effect as independent contractors as opposed to employees vis-a-vis the ordering agency. Accordingly, viewed from this perspective, we see no circumvention of a limitation on the ordering agency with respect to the hire of personal service contractors when the CIA uses personal service contractors to perform requested work.

Further, the FASA amendments resolve any doubts. As noted earlier, FASA directs the promulgation of regulations amending the FAR to govern an ordering agency's ability to take advantage of a performing agency's contractor for goods or services. The regulations shall provide that an ordering agency may only purchase goods or services pursuant to a contract that the performing agency awarded prior to the ordering agency's request and to meet the needs of the performing agency for the same or similar goods or services. FASA, Pub. L. No. 103-355, § 1074(b)(2)(A), 108 Stat. 3271 (1994). In situation one and two, the CIA entered into the personal service contracts prior to the requesting agency's order. This would hold true even if the CIA enters into the personal service contract subsequent to the order so long as a senior procurement official of the ordering agency approves procurement. FASA, Pub. L. No. 103-355, § 1074(b)(3), 108 Stat. 3271 (1994).

In our opinion, the arrangements in the third and fourth situations presented, under which the CIA personal services contractor is under the direct supervision and control of the ordering agency, are not authorized under the Economy Act. The service contractors would be rendering services in circumstances tantamount to an employer-employee relationship. This is precisely what the ordering agency lacks the authority to do. As

discussed above, 31 U.S.C. § 1535 and other provisions of law preclude an agency from avoiding a limitation on its contracting authority by obtaining goods or services through an Economy Act transaction with an agency whose own contracting authority is not so limited.

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DIGEST

1. The Central Intelligence Agency may enter into an Economy Act agreement (31 U.S.C. §§ 1535, 1536) to perform services for another agency using CIA employees, including those engaged under personal services contract, even though the ordering agency is not authorized to contract for personal services in the following situations: (1) when the CIA performs the work in-house or (2) when CIA employees will perform some of the requested work while on the premises of the ordering agency, but still under the direct supervision and control of the CIA. Such agreement would not contravene the requirements of 31 U.S.C. § 1535(c).

2. The Central Intelligence Agency may not enter into an Economy Act agreement (31 U.S.C. §§ 1535, 1536) to perform services for another agency using CIA employees engaged under personal services contracts, when the ordering agency is not authorized to contract for personal services in the following situations: (1) when the CIA personnel will be under the direct supervision and control of the ordering agency, in a manner that is tantamount to an employer-employee relationship between the CIA contractor personnel and the ordering agency or (2) when the CIA engages the personal services under a contract entered into subsequent to the order solely for the purpose of meeting the ordering agency's needs. Such an agreement would contravene the requirements of 31 U.S.C. § 1535(c).

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1. MISCELLANEOUS TOPICS
Federal Administrative/Legislative Matters
Interagency agreements

2. PROCUREMENT
Special Procurement Methods/Categories
Service contracts
Personal services
Criteria