Belkin

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

20003

FILE: B-202159 **DATE:** November 6, 1981

MATTER OF: United States Advisory Commission on Public Diplomacy

DIGEST: 1. Contract entered into by the U.S. Advisory Commission on Public Diplomacy with private law firm for legal services concerning authority of the Advisory Commission and extent of its independence does not constitute illegal personal services contract, since law firm was hired on an independent contract basis requiring no more than minimal supervision and not on employer-employee basis. Furthermore, type of legal services required, involving legal analysis of authority and independence of Advisory Commission, was not related to litigation within jurisdiction of Department of Justice. Also, Advisory Commission's need for second legal opinion, unencumbered by conflict of interest, was not unreasonable under circumstances.

2. Although advisory committees ordinarily must obtain needed services from parent agency, authority granted the U.S. Advisory Commission on Public Diplomacy in 22 U.S.C. § 1469(b) to procure services to the same extent as authorized by 5 U.S.C. § 3109 is sufficiently broad to allow Advisory Commission to enter into contract with private law firm on independent contractor consultant basis.

3. Since contract U.S. Advisory Commission on Public Diplomacy entered into with private law firm was on independent contractor basis, statutory limitation in 22 U.S.C. § 1469, which only applies when services are procured from individuals as employees, was not applicable and did not limit amount of compensation that could be paid to law firm.

4. When agency contracts under authority of 5 U.S.C. § 3109 with consultant on independent contractor basis, it is still required to follow formal contracting procedures and otherwise comply with the applicable statutory and regulatory provisions governing Federal procurements and the recording of obligations. Although the U.S. Advisory Commission on Public Diplomacy did not follow proper procedures in this respect in contract it entered into with private law firm we

019475 116848

do not object to payment of contract claim in this case because the Advisory Commission has authority to contract and because the law firm satisfactorily performed its obligations under the contract. Also, the parent agency - the International Communication Agency - has indicated its willingness to pay the claim.

This decision is in response to a request from Certifying Officer James Q. Kohler, Jr., Chief, Financial Operations Division of the International Communication Agency (ICA), for a legal opinion as to the authority of the ICA to pay a claim presented to it by the United States Advisory Commission on Public Diplomacy (Advisory Commission). The claim, totaling $2850.00, represents legal fees charged by the private law firm of Glassie, Pewett, Beebe and Shanks (law firm) for legal services rendered to the Advisory Commission. For the reasons set forth below, it is our view that the ICA is authorized to pay the full amount of the claim in question.

On July 30, 1980, ICA's Contract and Procurement Division received from the Advisory Commission, a "Request for Supplies/Services" standardized form, dated July 11, 1980, requesting ICA to pay the attached invoice from the law firm in the amount of $2850.00, covering legal services that the law firm had already provided to the Advisory Commission. The request form justified the Advisory Commission's need for the legal services in question as follows:

> "To provide expert advice on certain matters of concern to the Advisory Commission. The Chairman of the Commission determined this was a necessary expenditure for the new Commission."

The attached invoice from the law firm further explained the bill as representing the firm's charges for professional services rendered:

> "From January 18, 1980, to date [March 27, 1980] in connection with research and consultations on the statutes and legislative history relative to the mission, status and authority of the Commission."

Subsequently, ICA requested and received an itemized bill, which stated that a total of 33.25 hours of legal work was performed by the law firm for the Advisory Commission. In his letter to us, the Certifying Officer stated that the itemized bill "revealed that legal advice was received by the Commission on substantially the same matters which were the subject of review and advice by the Agency's [ICA] Office of the General Counsel and by OPM [Office of Personnel Management]." Until ICA received the request form, its officers were unaware that

the Advisory Commission had been seeking or had obtained any legal advice from this or any other law firm. In requesting a legal opinion from our Office as to the propriety of paying this claim, the Certifying Officer states his view that the Advisory Commission had no authority to enter into this contract. Nevertheless, he requests our concurrence in his recommendation that the claim be paid on the basis of "quantum meruit."

In order to determine whether the ICA is authorized, or obligated, to pay any or all of the claim in question, we must resolve two separate although related questions. The initial question is whether the Advisory Commission has authority to procure the services of a private law firm by contract for the purpose and at the rate of compensation involved here. Assuming that question is answered affirmatively, the second question is whether the informal contracting procedures followed by the Advisory Commission were so improper as to nullify what would otherwise be a binding contractual obligation. In order to answer the initial question, we must first examine the historical background and evolution of the Advisory Commission.

The United States Advisory Commission on International Communication, Cultural and Educational Affairs (ICCEA Advisory Commission), the predecessor of the current Advisory Commission, was created on April 1, 1978, under section 8 of Reorganization Plan No. 2 of 1977. 42 Fed. Reg. 62461, 91 Stat. 1636. All of the functions that had previously vested in the United States Advisory Commission on Information and the United States Advisory Commission on International Educational and Cultural Affairs, both of which were abolished by section 9 of Reorganization Plan No. 2 of 1977, were consolidated and vested in the then newly created ICCEA Advisory Commission. The primary responsibility of the reconstituted Advisory Commission was stated in section 8(b) of Reorganization Plan No. 2 of 1977 as follows:

> "The Commission shall formulate and recommend to the Director [of ICA], the Secretary of State, and the President policies and programs to carry out the functions vested in the Director or the Agency, [ICA], and shall appraise the effectiveness of policies and programs of the Agency. * * *"

Notwithstanding the functional independence with respect to policy and program matters that is inherent in being granted such authority, as an advisory committee, the ICCEA Advisory Commission was completely dependent on ICA for administrative and budgetary support. Cf. B-143181, October 9, 1975 and B-179188, April 15, 1975. In this

connection, section 12(b) of the Federal Advisory Committee Act, 5 U.S.C. App. I § 12(b), authorizes agencies to provide support to their advisory committees as follows:

> "Each agency shall be responsible for providing support services for each advisory committee established by or reporting to it unless the establishing authority provides otherwise. * * *"

Also, under 22 U.S.C. § 1467(h), ICA is specifically authorized "to provide the necessary secretarial and clerical assistance" for its advisory commission.

The legal status of the ICEEA Advisory Commission was modified again, effective October 1, 1979, pursuant to section 203(f) of the Department of State Authorization Act, Fiscal Years 1980 and 1981, Pub. L. No. 96-60, 22 U.S.C. § 1469 (Supp. III, 1979). The primary mission of the Advisory Commission, as set forth in Reorganization Plan No. 2 of 1977, was left unaltered. However, Pub. L. No. 96-60 changed the name of the Advisory Commission to what it is today--the United States Advisory Commission on Public Diplomacy--and granted the renamed Advisory Commission the following new authority:

* * * * *

> "(b) The Commission shall have a Staff Director who shall be appointed by the Chairman of the Commission. Subject to such rules and regulations as may be adopted by the Commission, the Chairman of the Commission may--
>
> > "(1) appoint such additional personnel for the staff of the Commission as the Chairman deems necessary; and
> >
> > "(2) procure temporary and intermittent services to the same extent as is authorized by section 3109(b) of Title 5, but at rates for individuals not to exceed the daily equivalent of the annual rate of basic pay payable for grade GS-18 of the General Schedule under section 5332 of Title 5, United States Code."

According to the Certifying Officer, the ICA argues that, even with the new authority provided the Advisory Commission in Pub. L. No. 96-60, the Advisory Commission was not authorized to contract with the law firm for the purposes and at the rate of compensation involved. For the reasons discussed below, we disagree.

First, ICA maintains that as a general matter no Governmental entity can procure by contract the type of legal services involved here from a private source since Government functions must be performed by Government employees. The general rule, established by decisions of our Office and the former Civil Service Commission, is that "personal services may not be obtained on a contractual basis and must be performed by personnel employed in accordance with the civil service and classification laws." B-190188.2, January 24, 1978. However, an exception to the general rule, allowing services normally performed by Governmental personnel to be performed under a proper contract with a private contractor, has been commonly recognized "if that method of procurement is found to be more feasible, more economical, or necessary to the accomplishment of the agency's task." 51 Comp. Gen. 561, 562 (1972). Also see B-193035, April 12, 1979; 45 Comp. Gen. 650 (1966); 43 Comp. Gen. 390 (1963), and numerous other cases cited in those decisions. In this connection, a "proper contract" for services is one in which the relationship between the Government and the contracting personnel is not that of employer and employee. B-193035, supra; B-190118.2, supra; 51 Comp. Gen. 561, supra, and other cases cited therein.

In other words, if the Advisory Commission has authority to contract for services, the basic issue is whether the present contract created a relationship between the Government and the law firm of employer and employee--in which case it would be prohibited--or whether the law firm's status is that of an independent contractor--in which case it would not be prohibited. In making this determination our Office has relied primarily on the degree of supervision involved. For example, in B-193035, supra, we said the following:

> "Where services directed at the performance of a Federal function are obtained by contract rather than appointment, the question of whether contractor personnel are functioning in an employer-employee relationship with respect to the Government is one of supervision. If contractor personnel are in fact supervised by a Federal officer or employee, the contract is not one for independent contract services but involves the procurement of services in avoidance of civil service laws and regulations. * * *"

Also see B-183487, April 25, 1977; B-186700, January 19, 1977. (Specific guidelines for determining whether an employer-employee relationship exists are set forth in Federal Personnel Manual Letter 300-8, December 12, 1967.)

We believe that the nature and type of legal services required by the instant contract could necessarily only be performed on an independent contractor basis, with no more than minimal supervision by the Advisory Commission. In essence, the Advisory Commission requested an end product--a legal review of its authority and a determination of the extent of its independence from ICA--and it was the responsibility of the law firm to determine how best to achieve the desired goal. This necessarily required the law firm to perform its own research and to conduct an independent "unsupervised" legal analysis.

Furthermore, our decisions in this area support the view that the contract in question did not violate the limitation on personal service type contracts to perform functions which could otherwise be performed by Government personnel. On several occasions we have upheld the authority of agencies to procure the services of private attorneys for purposes other than the conduct of litigation, which under 5 U.S.C. § 3106 must be conducted by the Department of Justice. For example, in B-133381, July 22, 1977, we upheld the authority of the International Trade Commission (ITC) to contract out for legal services notwithstanding the availability of attorneys within the agency who could have performed that task. In our opinion we said the following:

> "In general, Government agencies may not procure services on a contractual basis where regular employees of the Government are qualified and available to perform the work involved. Thus, where an agency has employees available, whether attorneys or not, to perform a particular task, it should not contract for performance of the same task. Each agency is responsible for determining, in each case, whether the particular services could be performed by agency employees. With respect to the particular contract here under consideration, the ITC apparently determined that its Office of General Counsel could not be asked to represent the Commission's views upon appeal, given its prior advocacy of the opposing position and hence that ITC's legal staff was not able to provide the legal assistance necessary to that appeal. Based on the information that we have been provided, we are unable to conclude that such a determination is altogether lacking in foundation."

Also see B-192406(2), October 12, 1978; B-114868.18, February 10, 1978; and B-141529, July 15, 1963.

The Advisory Commission's rationale for entering into the contractual arrangement with the law firm in the present case is substantially the same as was involved in the above-quoted opinion, i.e., the Advisory Commission's need and desire to obtain a second legal opinion concerning the extent of its independence "unencumbered by a conflict of interest." (Letter dated January 21, 1981 from the Advisory Commission Acting Staff Director to ICA.) Obviously, it would have been impossible for the Advisory Commission to obtain an independent second opinion from the ICA. Therefore, as in B-133381, supra, if the contract is otherwise authorized, we cannot conclude that the Advisory Commission's determination that it was necessary to contract out for legal services was so unjustified and without foundation as to violate the general rule restricting personal services contracts. Furthermore, since the legal services required involved research and analysis of the "statutes and legislative history relative to the mission, status and authority of the Commission," and not litigation or other matters within the sole jurisdiction of the Department of Justice, the contract was not prohibited by 5 U.S.C. § 3106.

The second issue raised by ICA in relation to the Advisory Commission's contracting authority focuses on the specific limitations and restrictions that are applicable to the Advisory Commission because it is an advisory committee. In this connection, ICA points out that the Federal Advisory Committee Act, 5 U.S.C. App. I, requires the parent agency to provide support services (including, presumably legal services) to its advisory committees, unless the establishing authority provides otherwise. Furthermore, the ICA states that since the primary purpose of the Advisory Commission is an advisory one, a review of "Federal Advisory Committee Act procedures and the Commission's own personnel functions may be outside the scope of permissible activity for the Commission, especially if authority for these activities is vested elsewhere."

Ordinarily, we would agree that an advisory committee lacking its own appropriated funds and having no authority to hire staff or contract for services would be required, under Section 12(b) of the Federal Advisory Committee Act, to obtain services of the type involved here from the parent agency. In fact, it is our view that the Advisory Commission would not have had the authority to enter into this contract prior to enactment of Pub. L. 96-60. However, the contract in question was entered into after enactment of Pub. L. 96-60, which granted the Advisory Commission specific authority to "appoint" additional personnel for the staff of the Commission and to "procure temporary and intermittent services to the same extent as is authorized by section 3109(b) of Title 5, of the United States Code * * *." 22 U.S.C. § 1469(b) (Supp. III, 1979). Although ICA suggests that the Advisory Commission's

authority under this provision is insufficient to encompass a contract for the purpose and at the rate of compensation involved here, it is our view, for the following reasons, that the language in 22 U.S.C. § 1469(b) is broad enough to authorize the Advisory Commission to enter into a contract of this type.

First, as recognized by ICA, section 12(b) of the Federal Advisory Committee Act specifically provides that the parent agency is responsible for providing support services to its advisory committee (thereby implying that the advisory committee does not have authority to obtain such services directly) unless the establishing authority provides otherwise. Thus, since 22 U.S.C. § 1469(b) does provide otherwise, it supersedes the requirement in the Federal Advisory Committee Act that the Advisory Commission receive all necessary support services from the ICA.

Second, our Office has, on numerous occasions, upheld the authority of Federal agencies to contract for legal services under the authority of 5 U.S.C. § 3109, which 22 U.S.C. § 1469(b) makes specifically applicable to the Advisory Commission and which defines the extent of its hiring authority. For example, in B-133381, supra, we said the following:

> "* * * Under 5 U.S.C. § 3109, when authorized by an appropriation, as here, the services of experts or consultants may be obtained either on an independent contract or employment basis. In our opinion, since the contract at issue does not appear to involve matters covered by 5 U.S.C. § 3106 or otherwise under the jurisdiction of the Department of Justice, the contract for the services of * * * [the law firm] would appear to be within the authority of 5 U.S.C. § 3109. * * *"

Also see B-192406(2), October 12, 1978, supra.

Our holding in another case--B-114868.18, supra-is of special significance here. In that case we considered whether the Navajo and Hopi Indian Relocation Commission, an independent entity in the executive branch, had the authority to hire outside counsel. Like the Advisory Commission, which receives administrative support from ICA, the Indian Relocation Commission was furnished necessary administrative and housekeeping services by the Department of the Interior pursuant to statute. Also, like the Chairman of the Advisory Commission, the Chairman of the Indian Relocation Commission was authorized to procure the

services of experts and consultants to the same extent allowed by 5 U.S.C. § 3109. Finally, like the Advisory Commission, the Indian Relocation Commission was concerned that representation of the Commission by Interior Department attorneys would create a conflict of interest. We concluded that the Indian Relocation Commission could "execute a contract for legal services with an expert or consultant as an independent contractor—that is, one not subject to the Commission's supervision and control * * *."

With respect to the subject matter of the Advisory Commission's contract, we do not agree that a legal analysis by a private law firm of "Federal Advisory Committee Act procedures and the [Advisory] Commission's own personnel functions" is not the type of service that can be contracted for under the authority of 22 U.S.C. § 1469(b). We believe that no serious argument can be made restricting any Federal entity from reviewing the extent of its own authority either from a substantive or procedural standpoint. In other words, if a Federal entity is otherwise allowed to procure legal services from a private law firm for any purpose, it may exercise such power in order to determine the parameters of its authority.

In accordance with the foregoing, we believe that the Advisory Commission did have authority to enter into a contract with the law firm on an independent contractor basis pursuant to 22 U.S.C. § 1469(b) and 5 U.S.C. § 3109.

The final issue concerning the Advisory Commission's contracting authority is whether the Advisory Commission was authorized to approve a contract in which the total amount of compensation to be paid exceeds the express statutory limitation in 22 U.S.C. § 1469(b) restricting pay for consultants to "rates for individuals not to exceed the daily equivalent of the annual rate of basic pay for grade GS-18 * * *."

Specifically, the Certifying Officer's submission reads as follows:

> "Because the firm charged $2850 for 33.25 hours of work, the daily equivalent of an eight hour workday is $685.68. This far exceeds the maximum daily equivalent of the rate payable for a GS-18 ($192.74 with current pay cap, or $275.90 daily if GS-18 set at $71,734 annual rate)."

The statutory responsibility for establishing the maximum rate for consultant services to Federal advisory committees was granted to the

Office of Management and Budget (OMB) by section 7(d)(1) of the Federal Advisory Committee Act, 5 U.S.C. App. I § 7(d)(1), which provides as follows:

> "The Director, after study and consultation with the Civil Service Commission, shall establish guidelines with respect to uniform fair rates of pay for comparable services of members, staffs, and consultants of advisory committees in a manner which gives appropriate recognition to the responsibilities and qualifications required and other relevant factors.* * *"

Guidelines were issued by OMB pursuant to Executive Order No. 11769, February 21, 1974 and are set forth in section 11 of OMB Cir. No. A-63, March 27, 1974. (Although the authority granted by OMB was transferred to the General Services Administration by Exec. Order No. 12024, December 1, 1977, OMB Cir. No. A-63 was left standing.) With respect to pay for consultants to an advisory commission, section 11(c) of the Circular reads as follows:

> "An agency shall fix the pay of a consultant to an advisory committee after giving consideration to the qualifications required of the consultant and the significance, scope, and technical complexity of the work. The rate of pay shall not exceed the maximum rate of pay which the agency may pay experts and consultants under 5 U.S.C. § 3109."

Together, section 7(d)(1) of the Federal Advisory Committee Act and section 11(c) of OMB Circular No. A-63 would appear to make it the responsibility of the parent agency, rather than the advisory committee, to set the pay of advisory committee consultants. Although that may be true generally, we do not believe that such is the case here. It is our view that the authority provided the Advisory Commission in 22 U.S.C. § 1469(b) to "procure * * * services" carries with it the implied authority to establish the rate of compensation to be paid for those services, subject to any applicable statutory limitations or restrictions.

In our opinion, the pay restrictions imposed by 22 U.S.C. § 1469(b) and 5 U.S.C. § 3109 are not applicable to a contract for the services of a legal consultant engaged on an independent contractor basis. As stated above, under 22 U.S.C. § 1469(b) the Advisory Commission is authorized to procure services to the same extent as authorized by 5 U.S.C. § 3109(b). Ordinarily, the procurement of experts or consultants pursuant to 5 U.S.C. § 3109 is limited to a rate of compensation not to exceed the pay schedule

of a GS-15, unless a higher rate of pay is specifically authorized. See 55 Comp. Gen. 1237 (1976); 51 Comp. Gen. 224 (1971); 43 Comp. Gen. 509 (1964); and 29 Comp. Gen. 267 (1947). However, we have consistently held that the maximum compensation limitation of 5 U.S.C. § 3109 is applicable only to the procurement of personal services on an employer-employee basis. See e.g., 26 Comp. Gen. 188, (1946). For example, in B-191865, November 13, 1978, we considered whether a Department of Interior contract for consultant services was subject to the compensation limitation of 5 U.S.C. § 3109. In that case we said the following:

> "***With respect to procurement of the services from individuals in circumstances amounting to employment, that section [5 U.S.C. § 3109] makes the provisions of title 5, United States Code, governing appointments in the competitive service, classification of positions and pay under the General Schedule inapplicable. However, a limitation is contained in the statute which precludes payment in excess of the daily equivalent of the highest rates payable under the General Schedule unless an appropriation act or other statute authorizes a higher rate. This restriction is applicable when services are procured from an individual as an employee. When services are procured on other than an employment basis the effect of 5 U.S.C. § 3109 is to provide an exception from the formal advertising requirement applicable to Government contracting.
>
> "On the other hand, the limitation of 5 U.S.C. 3109 concerning the rate of compensation is not applicable to a contract for expert or consultant services, which results in an independent contractor relationship. That is, it does not establish an employer-employee relationship between the Government and the contractor. See 26 Comp. Gen. 188 (1946). * * *"

While the language of 22 U.S.C. § 1469(b) raised the maximum permissible rate for experts and consultants hired as employees by the Advisory Commission from the GS-15 level, otherwise mandated by 5 U.S.C. § 3109(b), to that of a GS-18, it did nothing to alter the manner and/or circumstances in which the salary restriction is applicable. In other words, like the limitation in 5 U.S.C. § 3109, the compensation limitation contained in 22 U.S.C. § 1469 only applies when services are procured from an individual as an employee. The actual statutory language in 22 U.S.C. § 1469(b) "but at rates for individuals" clearly supports this view that the GS-18 maximum rate was only intended to apply to individuals hired as employees. Thus,

since the contract in question was entered into on an independent contractor basis, the restrictive language in 22 U.S.C. $ 1467(b) does not limit the total amount of compensation that can be paid to the law firm for the services it rendered.

Having concluded that the Advisory Commission was authorized to contract for the services of a private law firm on an independent contractor basis for the purpose and at the rate of compensation involved here, we must address the second question, concerning the propriety of the contracting procedures that were actually used by the Advisory Commission. In this regard, we believe that the procedures followed by the Advisory Commission were clearly inadequate in several respects.

First, in entering into the contractual agreement with the law firm, the Advisory Commission did not follow a formal contract procedure. For example, except for the invoice prepared by the law firm, the only document supporting the instant claim is the "Request for Supplies/Services" form that the Advisory Commission submitted to ICA for payment. This type of informal procedure is not proper and should not be used. As stated in B-191865, supra, a formal contracting procedure should be followed when expert or consultant services are obtained on an independent contractor basis. Also see B-174226, March 13, 1972 and B-174226, January 12, 1972. In other words, even though 5 U.S.C. § 3109 provides an agency with limited contracting authority, as discussed herein, and specifically exempts an agency from having to comply with the advertising requirements of 41 U.S.C. § 5, it does not relieve an agency from the necessity of satisfying all of the other applicable requirements imposed by the Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 471 et seq., and the Federal Procurement Regulations, 41 C.F.R. Chapter 1, on Government contracts for goods or nonpersonal services. (Although we recognize that the Advisory Commission is obviously not an independent establishment or executive agency, we believe that since 5 U.S.C. § 3109, which ordinarily only applies to the head of an agency, is specifically made applicable to the Chairman of the Advisory Commission, the Advisory Commission should be treated as an agency for the purpose of determining the applicability of the procurement statutes and regulations.)

Second, having no specific appropriation of its own or separate line item included within the ICA appropriation, the Advisory Commission should have advised the ICA of the intended contract before it was agreed to in order to ensure that sufficient funds were available within ICA's appropriation to satisfy the cost of the contract. This would have also allowed ICA to comply with the requirements set forth in 31 U.S.C. § 200, concerning the recording of obligations.

Nevertheless, we have no objection, under the particular facts and circumstances of this case, to ICA's payment of the full amount of the claim. First, it is clear, as explained above, that the Advisory Commission was authorized to enter into a proper contract with the law firm for the purpose and at the rate of compensation involved here. Second, it appears that the law firm was in fact "hired" on an independent contractor basis and, as such, satisfactorily performed its contractual obligations. Third, as stated by the Certifying Officer in his submission:

> "***Because the Commission's authority to procure temporary services is new there was a reasonable basis for confusion about the scope of the authority."

Fourth, ICA obviously does not object to payment of this claim since it specifically recommended payment on a "quantum meruit" basis. Finally, in several other cases of this type in which the contracting agency, under 5 U.S.C. § 3109, used an informal contracting procedure similar to that used here, we did not object to payment of the contract costs after pointing out that formal contracting procedures should have been followed. See B-191865, supra, and B-174226, supra.

In accordance with the foregoing, this claim can be certified for payment by ICA's Certifying Officer in the full amount of $2850.00, if otherwise correct. However, the Advisory Commission should be advised that in future procurements it will have to comply with all of the applicable statutory and regulatory requirements governing Federal procurements and the recording of obligations.

for Milton J. Socolar
Comptroller General
of the United States