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**Employment and Procurement
of Government Experts and Consultants**

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Introduction

Experts and consultants, in the context of Federal employment and procurement, are private persons or firms with special knowledge and abilities, hired temporarily to give advice, solve problems, or perform tasks Government employees are unable or unavailable to perform.

The purpose of this ^{thesis} paper is to explain the methods Federal agencies may use to obtain individual experts and consultants, and the restrictions on their use.

This topic should interest experts and consultants, whose compensation, duties, and conflict-of-interest liability depend on how they are hired and managed, and Government officials, because of the burden of increasingly complex controls on the acquisition, use, and management of consultant services.

Use of outside experts and consultants has been a necessary and acceptable practice in both Government and private industry for many years, even though it requires exceptions to be made to the laws of regular civil service. (102) ←

¹ O'Connor, *The Right Way to Employ Consultants and Experts*, MANAGEMENT (Spring 1982). See H.R. REP. No. 2894, 84th Cong., 2d Sess., 2-5 (1956), stating at 3:

With no thought of minimizing the value of these career public servants and the work they are doing, there has been an ever-growing tendency among the leaders of our Government to call in outside ... experts from all fields of endeavor to consult and advise on different phases of Government operations or to

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The principal methods of obtaining services from experts and consultants are: (1) appointment in the civil service of temporary or intermittent Federal employees; (2) procurement of independent contractors; and (3) appointment of persons as members of Federal advisory committees.² Consultant services are also obtained from organizations, Federally Funded Research and Development Centers (FFRDC's),³ Government-Owned, Contractor-Operated Facilities, and

do special work of a highly specialized nature outside the abilities and qualifications of regular employees, or those generally available for Government employment.

The objectives behind this practice are highly praiseworthy. The career employees' exclusive devotion to public service is not always conducive to their keeping abreast with modern business methods and procedures. Outside experts usually are engaged in a competitive business for profit. Efficient and economical operation is the lifeblood of their business and, to the extent their methods and thinking may be adaptable to Government operations, unquestionably they can render a valuable service and one which should be encouraged rather than discouraged.

To a greater or lesser degree, this basic precept is applicable in the cases of experts and consultants drawn from all fields of endeavor. It is a source of knowledge and experience which this Government prudently cannot ignore.

² Office of Management and Budget Circular A-120, *Guidelines for the Use of Consulting Services* (Apr. 14, 1980 w/Trans. Memo. No. 1) [hereinafter OMB Circ. A-120].

³ Approximately 32 FFRDC's are sponsored by six Federal agencies. The Department of Defense sponsors the following FFRDC's:

Office of the Secretary of Defense:

Institute for Defense Analysis, Arlington, VA
Logistics Management Institute, Bethesda, MD

Department of the Navy:

Center for Naval Analyses, Arlington, VA

Department of the Air Force:

Aerospace Corporation, El Segundo, CA
C3I Division, MITRE Corporation, Bedford, MA
Lincoln Laboratory, M.I.T., Lexington, MA
Project Air Force, Rand Corporation, Santa Monica, CA
Software Engineering Institute, Carnegie Mellon
University, Pittsburgh, PA

through grants, cooperative agreements, and other programs.⁴ This paper will concentrate on the first two methods--appointment of temporary Government employees and procurement of independent contractors.⁵

It should be stated at the outset that I have found little difference between use of the terms "expert" and "consultant."⁶ Although the Federal Personnel Manual defines them slightly differently (the expert is usually a hands-on practitioner, while the consultant is only an advisor)⁷, neither the Federal Acquisition Regulations (FAR) nor Office of Management and Budget (OMB) circulars distinguish between the terms, and include both in the

⁴ *E.g.*, National Foreign Intelligence Program, General Defense Intelligence Program, and the Tactical Intelligence and Related Activities, all of which are excepted from the controls of OMB Circular A-120. For a discussion of grants and cooperative agreements, see R. CAPELLI, *FEDERAL GRANTS AND COOPERATIVE AGREEMENTS* (1982).

⁵ Regarding the third method, appointment to Federal Advisory Committees, see guidelines in Exec. Order No. 11,769 (Feb. 21, 1974) set forth in OMB Circ. A-63, *Advisory Committee Management* (Mar. 27, 1974). Although the authority granted by OMB was transferred to the General Services Administration by Exec. Order No. 12,024 (Dec. 1, 1977), OMB Circular A-63 was left standing as guidance of continuing effect. 61 Comp. Gen. 69, 76 (1981). For a complete list of Federal Advisory Committees as of 1985, see *Federal Advisory Committees: Fourteenth Annual Report of the President, Fiscal Year 1984*, at 51 (1985). See generally Ackerman, *Separation of Powers and Judicial Service on Presidential Commissions*, 53 U. CHICAGO L. REV. 993 (1986).

⁶ Thomas O'Connor, Senior Personnel Staffing Specialist, Office of Policy Analysis and Development, Office of Personnel Management, and author of portions of chapter 304 of the Federal Personnel Manual ("Employment of Experts and Consultants"), was asked what changes in entitlements would result if the classification of any "expert" were changed to "consultant" or vice versa. His reply: "None. The only real difference is how they are counted." Interview of Thomas O'Connor at OPM, Washington, D.C., July 28, 1987.

⁷ OPM, *FEDERAL PERSONNEL MAN.*, ch. 304, para. 1-2 (1973 & Supp. June 25, 1984). The FPM at para. 1-5c discusses "experts for consultation purposes."

category of "consulting services."⁸ Proposed OMB Circular A-120 would add a new definition for "individual experts and consultants," but would not further distinguish them.⁹ In practice, experts can be consultants, but not all consultants would qualify as experts. The term "expert" is commonly understood to refer to a person respected for advanced knowledge in a particular field. The term "consultant," however, has a less favorable connotation.¹⁰ In the words of one Federal agency lawyer, "It's easier to get a contract approved to hire an expert than to hire a consultant."¹¹ In this paper, the terms "consultant" and "consultant services" are generally used to refer to both experts and consultants unless more precise usage is necessary.

The General Rules

A summary of the principles to be discussed in this paper may be helpful:

1. The Federal government is required to obtain its employees

⁸ Federal Acquisition Regs. § 33.201 [hereinafter FAR]; OMB Circ. A-120, para. 5

⁹ Proposed OMB Circ. A-120, *Guidelines for the Use of Advisory and Assistance Services* 52 Fed. Reg. 23,918 (proposed June 25, 1987) [hereinafter Proposed OMB Circ. A-120], *quoted infra* in text accompanying note 99.

¹⁰ The use of the term "Beltway Bandits" to refer to consultants in the Washington, D.C., area indicates the suspicion with which consultants are viewed by the public, as well as by some members of contract approval authorities. *See generally, e.g.,* Guttman & Willner, *Flim-Flam, Double-Talk, and Hustle: The Consulting Industry*, PANTHER (March 1976), *reprinted in* STAFF OF SENATE SUBCOMM. ON REPORTS, ACCOUNTING AND MANAGEMENT OF THE COMM. ON GOVERNMENTAL AFFAIRS, 95TH CONG., 1ST SESS. CONSULTANTS AND CONTRACTORS: A SURVEY OF THE GOVERNMENT'S PURCHASE OF OUTSIDE SERVICES 426 (Comm. Print 1977)

¹¹ Interview of Charles McManus, Office of General Counsel, U.S. Naval Supply Systems Command, at Alexandria, VA, Aug. 13, 1987.

by direct hire under competitive appointment, excepted service, or other procedures required by civil service laws.

2. Persons employed by the Government without the required formalities of appointment may nevertheless be restricted by civil service laws.

3. Congress may exempt any position from operation of civil service laws, and has done so for experts and consultants in numerous statutes, principally 5 U.S.C. § 3109.

4. 5 U.S.C. § 3109 permits experts and consultants to be hired temporarily without complying with the civil service requirements for regular employment. The maximum pay and benefits limits of the General Schedule for Federal employees, however, applies to those appointments, as do most of the Federal conflict-of-interest restrictions.

5. Heads of Federal agencies have inherent authority to contract for goods and services except where limited by statute or regulation.

6. Services performed in such a way as to make a person appear a Government employee are called *personal services*. Personal services cannot be performed under contract unless authorized by statute, such as 5 U.S.C. § 3109.

7. Independent contractors who perform personal services without the benefit of a statutory exemption risk loss of their status as independent contractors and become subject to the limitations imposed upon Federal employees.

8. Services performed under contract to supply the Government with a finished product, where no employer-employee relationship exists between the Government and the contractor, are called *nonpersonal services*

9. Independent contractors are not affected by civil service laws (their compensation is not limited by the General Schedule) provided they perform only nonpersonal services.

10. Experts and consultants may be properly contracted under 5 U.S.C. § 3109 as either temporary Federal employees, subject to civil service laws, or as independent contractors, not subject to civil service laws.

Primary Authorities

The primary authorities affecting the acquisition of experts and consultants are:

Statutes:

5 U.S.C. § 3109, "Employment of experts and consultants; temporary or intermittent;"

Civil Service Reform Act of 1978¹² and related civil service laws contained primarily in title 5, *United States Code*;

Competition in Contracting Act;¹³

Regulations and guidance:

Federal Acquisition Regulation (FAR);¹⁴

Agency acquisition regulations, *e.g.*, Department of Defense FAR Supplement (DFARS).¹⁵ Civilian agency acquisition regulations are also codified in 48 C.F.R.;¹⁶

Office of Management and Budget (OMB) Circulars;¹⁷

Office of Personnel Management (OPM)¹⁸ civil service standards, published as regulations in the Federal Personnel Manual (FPM), and as opinion letters;¹⁹

¹² Pub. L. No. 95-454, 92 Stat. 1111 (1978) (codified in scattered sections of 5 U.S.C.).

¹³ Pub. L. No. 98-369, div. B, tit. IV, §§ 2701-2753, 98 Stat. 494, 1175-1203 (codified as amended in 41 U.S.C. § 251 note, and in scattered sections of titles 5, 10, 31, and 41, U.S.C.).

¹⁴ 48 C.F.R. ch. 1 (1987) [hereinafter all citations to C.F.R. are to 1987 edition unless otherwise stated].

¹⁵ 48 C.F.R. ch. 2.

¹⁶ *E.g.* Transportation Acquisition Regulations (TAR), 48 C.F.R. ch. 12.

¹⁷ *E.g.*, OMB Circ. A-120, Guidelines for the Use of Consulting Services, (Apr. 14, 1980, w/trans. memo. No. 1) [hereinafter OMB Circ. A-120].

¹⁸ Formerly U.S. Civil Service Commission.

¹⁹ *E.g.*, FPM letter 300-8 (Dec. 12, 1965) ("Pellerzi Standards" opinion). Whether the FPM should be accorded the status of a Federal regulation is unsettled. The FPM has been described as the "official" medium for issuing the personnel regulation and instructions, policy statements and related materials on Government-wide personnel programs, to other agencies," *NTEU v. Reagan*, 663 F.2d 239, 243 (D.C. Cir. 1981), but that status was questioned in *Horner v. Acosta*, 803 F.2d 687 (Fed. Cir. 1986).

Decisions and opinions

Federal court decisions, principally the U.S. Court of Appeals for the Federal Circuit and the U.S. Claims Court;

Administrative decisions, principally the Executive branch Boards of Contract Appeals;

Comptroller General's decisions and General Accounting Office reports.

Chapter 1--Federal Policy on Obtaining Services from Outside Sources

It is the general policy of the Federal Government to buy services from the private sector rather than to hire Federal employees to produce them.²⁰ The philosophy is succinctly expressed in OMB Circular A76:

In the process of governing, the Government should not compete with its citizens. The competitive enterprise system, characterized by individual freedom and initiative, is the primary source of national economic strength. In recognition of this principle, it has been and continues to be the general policy of the Government to rely on commercial sources to supply the products and services the Government needs.²¹

There are limits, however, to the types of services that may be obtained from commercial sources. Services needed by the Government may be classified into three general categories: (1) Governmental functions, which must be performed by Government employees; (2) Commercial services, which should be performed by private (non-government) sources; and (3) Consulting services, in neither of the former categories, which should be provided either by Government staff organizations or obtained from private sources, as

²⁰ OMB Circ. No. A-76, Performance of Commercial Activities (Rev. Aug. 4, 1983) [hereinafter OMB Circ. A-76]; FAR 37.102(a). *See generally* J. CHURCH & R. NASH FORMATION OF GOVERNMENT CONTRACTS ch. 1 (2d ed. 1986)

²¹ OMB Circ. A-76, para. 4a.

deemed appropriate by executive agencies following Executive branch guidance.²²

Federal employees who perform governmental functions are not unfairly competing with commercial sources because governmental functions are so intimately related to the public interests as to require performance by Government employees. Such governmental functions are those requiring the exercise of discretion in applying statutory government authority. Examples include the performance of law enforcement and judicial functions, conduct of the national defense and foreign relations, management of Federal employees, regulation of industry and commerce, and monetary transactions such as tax collections and revenue disbursements. OMB Circular A-76 states that these inherently governmental services cannot, unless excepted by law, be purchased. They must be performed by Government employees.²³ Contracts for performance of Government functions would be illegal, and thus payment on the contracts avoidable.²⁴

Federal Policy on Employment

The basic principle of public personnel law is a moral one -- a national policy most simply expressed in the Biblical admonition that

²² OMB Circ. A-120, para. 3.

²³ OMB Circ. A-76, para. 4a.

²⁴ FPM Letter No. 300-8, app. A at 7 (Dec. 12, 1965). *See generally* Bisson, *Statutory Limitations on Contracts for Services of Government Agencies*, 34 *BROOKLYN L. REV.* 197 (1968).

"no man may serve two masters."²⁵ The person paid by the public should be either a Government employee, bound under statute and by common law rules of master and servant, whose authority is delegated by, and who is responsible to, the public; or a contractor, who performs a specific task under the laws of contract, but takes no part in discharging the delegated powers of public trust.²⁶

How Federal Employees Differ from Contractors

As a rule, the terms and conditions of Federal employment are set by civil service statutes and regulations, not by contract (except to a limited extent, as may be established by collective bargaining).²⁷ As stated in *Bigler v. United States*,²⁸ "public employment is presumptively not by contract; it is instead accomplished by appointment and controlled by statute, regulation, and Executive Order."²⁹ And in *Kania v. United States*,³⁰ the Court of Claims stated that "it has long been held that the rights of civilian and military public employees against government do not turn on contract doctrines but are matters of legal status even where

²⁵ Matt. 6:24; *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 549 (1961).

²⁶ See FPM Letter 300-8 (Dec. 12, 1965). See generally GAO, *Civil Servants and Contract Employees: Who Should Do What for the Federal Government?* at ii, Comp. Gen. Rep. No. FPCD-81-43 (June 19, 1981).

²⁷ *Kania v. United States*, 650 F.2d 264 (Ct. Cl. 1981), *cert. denied*, 454 U.S. 895 (1981); *Shaw v. United States*, 640 F.2d 1254, 1260 (Ct. Cl. 1981) ("[P]ublic employment does not ... give rise to a contractual relationship in the conventional sense." (quoting *Urbina v. United States*, 428 F.2d 1280, 1284 (Ct. Cl. 1970))). See generally H. KAPLAN, *THE LAW OF CIVIL SERVICE* ch. 1 (1958).

²⁸ 230 Ct. Cl. 985, 986 (1982).

²⁹ See also *Brown v. United States*, 226 Ct. Cl. 669, 670-71 (1981).

³⁰ 650 F.2d 264 (Ct. Cl. 1981).

compacts are made."³¹ A contract between the Government and one of its employees is possible, but it must be specifically spelled out as a contract,³² and must be made by a person having contracting authority.³³ An employee's right to a pension or retirement pay, for example, is not contractual and, prior to the time the annuity actually becomes payable, may be revoked or altered by the same authority that granted it.

Definition of Federal Employee

Federal employees are defined by statute³⁴ as persons who are: (1) appointed by one of the Federal officers specified by statute; (2) engaged in performing a Federal function; and (3) supervised by another Federal employee. If all three tests are met, the individual

³¹ *Id.* at 268.

³² *United States v. Hopkins*, 427 U.S. 123 (1976).

³³ *Walton v. United States*, 213 Ct. Cl. 755 (1977).

³⁴ 5 U.S.C. § 2105(a) (1982) [hereinafter all citations to U.S.Code are to the 1982 edition unless otherwise cited], stating in part:

For the purpose of this title, "employee", except as otherwise provided by this section or when specifically modified, means an officer and an individual who is--

(1) appointed in the civil service by one of the following acting in an official capacity--

- (A) the President;
- (B) a Member or Members of Congress;
- (C) a member of a uniformed service
- (D) an individual who is an employee under this section;
- (E) the head of a Government controlled corporation; or
- (F) the adjutants general

(2) engaged in the performance of a Federal function under authority of law or an Executive act; and

(3) subject to the supervision of an individual named by paragraph (1) of this subsection while engaged in the performance of the duties of his position.

is a Federal employee and is subject to civil service laws unless exempted by statute.³⁵

A line of recent cases discusses the requirements of 5 U.S.C. § 2105. In *Baker v. United States*,³⁶ plaintiff sought Federal retirement credit for his employment in a Federal-state cooperative program. He based his claim on the facts that he had been appointed to a Federal job by a New York State official, had performed a Federal function, and had been supervised by a Federal employee. The Court of Claims held that Baker failed to satisfy the three-part test of 5 U.S.C. § 2105 because he was not appointed by a Federal officer. His good-faith belief that he had been properly appointed was not sufficient to satisfy the requirement for a bona fide appointment by a Federal official, notwithstanding his satisfaction of the other two parts of the test.

In the widely publicized "Reagan hiring freeze" case, *National Treasury Employees Union v. Reagan*,³⁷ a class of plaintiffs was composed of persons who were issued letters of confirmation by President Carter's Administration of their selection for employment with the Government but who were subsequently informed by President Reagan's administration that their appointments had been withdrawn. The plaintiffs contended they had become Federal

³⁵ *National Treasury Employees Union v. Reagan*, 663 F.2d 239 (D.C. Cir. 1981) (hiring freeze case). Cf. *Horner v. Acosta*, 803 F.2d 687 (Fed. Cir. 1986); *Costner v. United States*, 685 F.2d 407 (Ct. Cl. 1981) (holding an individual cannot become a Federal employee unless all three parts of the test are met).

³⁶ 614 F.2d 263 (Ct. Cl. 1980).

³⁷ 663 F.2d 239 (D.C. Cir. 1981).

employees and that their employment status could not be terminated without the due process rights afforded by civil service statutes and regulations (which had not been used in their cases).

The Court of Appeals held that plaintiffs had been appointed notwithstanding that Standard Form 50's, required by regulation for Federal appointment, had not been filled out. The case turned against the *NTEU* plaintiffs, however, on the issue of whether Federal "appointees" are entitled to the same benefits due Federal employees. Of the three elements required by 5 U.S.C. § 2105, most of the plaintiffs had satisfied only the first element, i.e., appointment. Revocation of their appointments became effective before they had satisfied the remaining elements. (Twenty-two of the plaintiffs had begun performing their jobs before the revocation order and were therefore entitled to the benefits of employee status.) Termination of plaintiffs' appointments (the first element of the test) before they began performing a Federal function (the second element) prevented them from becoming Federal employees.

In *Costner v. United States*,³⁸ a civilian electronics technician provided services to the Air Force under contract with his corporate employer. Having proved that he had satisfied the Federal function and supervision elements of the 5 U.S.C § 2105 test, Costner claimed to have satisfied the appointment element through a "totality of the circumstances" approach, even though he had not been formally

³⁸ 665 F.2d 1016 (Ct. Cl. 1981).

appointed. The Court of Claims rejected Costner's argument, stating that "an abundance of federal function and supervision will not make up for lack of formal appointment."³⁹

Similar arguments for a "totality of the circumstances" substitution for formal appointment were made in *Curran v. OPM*,⁴⁰ which involved Georgetown University professors who contracted with the Army to perform a Federal function under supervision of Federal officers. They later sued for civil service retirement benefits. They had clearly acted as Government agents and had performed Governments functions. The court recognized that the common law master-servant relationship had no formal requirements beyond the exercise of control by the putative employer.⁴¹ The court stated, however, that

a host of consequences attends the federal employment relationship beyond the common law's primary concern with the master's vicarious liability for his servant's tortious conduct. The status of civil servant is *sui generis*, [citation omitted] and it is clear that *bona fide* federal employment does not commence unless and until each of the requirements of law is met.⁴²

Curran contended that evidence of Federal appointment was not limited to any particular documentation but should be found from the intent of the parties as manifested by the totality of the facts

³⁹ *Id.* at 1020.

⁴⁰ 566 F. Supp. 1511 (C.D.C. 1983).

⁴¹ See Restatement (Second) of Agency § 220; PROSSER, LAW OF TORTS at ch. 13, ¶ 70 (4th ed. 1971).

⁴² *Curran v. OPM*, 566 F. Supp. at 1513 (emphasis in original).

surrounding the inception of the relationship. The court rejected that reasoning, stating:

Federal employment must ultimately depend on the execution of some "last-act" ceremony of "appointment," even so humble a rite as the completion of a standard personnel form, which will thereafter evince an unequivocal intent on the part of the government to admit an individual to its service.⁴³

*Horner v. Acosta*⁴⁴ is the most recent and most dispositive case concerning the difference between Federal employment by contract versus appointment. In *Acosta*, the Court of Appeals reversed a decision of the Merit Systems Protection Board (MSPB) holding that plaintiff, although not formally appointed to a Federal position during the period in question, was nevertheless entitled to civil service retirement credit for that period.

Plaintiffs had been hired in 1968 to perform intelligence functions by a clandestine unit of the Department of the Navy. The commanding officer of the unit was authorized to hire persons to carry out its mission. Applicants were not aware of the connection of the job with the Government until after they had been selected for employment. Individuals who were hired signed a contract for personal services, designated a "career provisional contract" or "career contract," with the Navy or a proprietary corporation. Most

⁴³ *Id.* at 1514.

⁴⁴ 803 F.2d 687 (Fed Cir. 1986).

contracts were signed by a contracting officer and by the commanding officer. Civil service forms (SF 50's) were not used. Plaintiffs were then issued Government employee identification cards, official passports, and other documents representing that plaintiffs were Federal employees. Plaintiffs were at all times under the supervision of Naval officers, who determined whether plaintiffs would be retained or discharged from the unit.

Plaintiffs filed claims with OPM, seeking civil service credit for retirement and other purposes based on their employment in the unit. OPM denied the claims on the basis that plaintiffs had not been appointed in the civil service. OPM did not dispute the facts that plaintiffs had performed a Federal function and were supervised by Federal employees. On appeal to MSPB, the Board held that plaintiffs had not been appointed in the civil service but were nevertheless entitled to civil service credit based on a provision of the FPM (which was later rescinded). OPM appealed the Board's decision to the the Court of Appeals. Citing the three-part test of 5 U.S.C § 2105, the court stated:

All three of these test elements must be met for an individual to be a federal employee. The elements have independent significance and are strictly applied. [Citations omitted.] ... [D]efinite, unconditional action by an authorized federal official designating an individual to a specific civil service position is necessary to fulfill the appointment requirement of 5 U.S.C § 2105(a). ... [T]he definition of employee prescribed in § 2105(a),

unless otherwise clearly indicated, applies for all purposes of Title 5....⁴⁵

As a result of this line of cases, there should therefore be little confusion between contractors and Federal employees insofar as their entitlement to Federal employee benefits is concerned; unless the individual has been formally appointed, usually by use of an SF-50, he or she is not a Federal employee.

The President's Authority

Appointment of Federal employees in the Executive branch is based upon the authority of the President as granted by the Constitution,⁴⁶ the Civil Service Reform Act of 1978,⁴⁷ and by other statutes which make exceptions to the general civil service laws.⁴⁸ The President has the authority to make rules for the Executive branch through Executive orders and by delegation to the Office of Personnel Management.⁴⁹ Civil service rules promulgated by the President and by the Office of Personnel Management have the force and effect of law and are part of civil service laws.⁵⁰

Application of Civil Service Laws

⁴⁵ *Id.* at 691, 693, 696.

⁴⁶ U.S. Const. art. II, § 2. cl. 2.

⁴⁷ *Supra*, note 12.

⁴⁸ *E.g.*, 5 U.S.C. § 3109.

⁴⁹ 5 C.F.R. § 1.2.

⁵⁰ *Nadelhaft v. United States*, 131 F.Supp. 930 (Ct. Cl. 1955) (holding the President delegated such authority to Director, OMB, by predecessor to 5 U.S.C. § 3301); 39 Op. Att'y Gen 50 (1937).

Unless excepted by statute, by Executive order, or by a ruling of the Office of Personnel Management, all civilian positions in the Executive branch of Government are subject to the laws of the competitive service.⁵¹ Although Congress may at any time exempt any position from operation of the civil service laws⁵² or limit the President's authority to prescribe qualifications for civil service,⁵³ the only general exemption from civil service laws is provided by 5 U.S.C. § 3109 for the employment of experts and consultants.

Personal and Nonpersonal Service Contracts

A *personal services* contract is defined by FAR section 37.101 as "a contract that, by its express terms or as administered, makes the contractor personnel appear, in effect, Government employees."⁵⁴ The FAR directs that "[A]gencies shall not award personal services contracts unless specifically authorized by statute (e.g., 5 U.S.C. § 3109) to do so."⁵⁵

⁵¹ 5 C.F.R. § 1.2. See FPM Letter No. 300-8, app. A at 7, stating: The power to create Federal positions outside the civil service and personnel laws cannot therefore be implied; it exists only if expressly provided by the Congress. For a properly appointed official to create a relationship that by law must be regarded as an employer-employee relationship, in derogation of the laws and regulations controlling Federal employment is *ultra vires*. To the extent the exercise of official authority and responsibility is in actual practice delegated through such acts to provide private persons or corporations, there is an unlawful delegation or an abdication. To the extent such acts contravene the specific requirements of the civil service laws they are illegal.

⁵² 26 Op. Att'y Gen. 502 (1908).

⁵³ *Jali v. Hampton*, 460 F.2d 923 (U.S. App. D.C. 1972), *cert. denied*, 409 U.S. 887 (1973).

⁵⁴ FAR 37.101.

⁵⁵ FAR 37.104(c).

Guidance on recognizing the key element of employer-employee relationships in personal services contracts is contained in FAR 37.104:

(a) As indicated in 37.101, a personal services contract is characterized by the employer-employee relationship it creates between the Government and the contractor's personnel

(c)(1) An employer-employee relationship under a service contract occurs when, as a result of (i) the contract's terms or (ii) the manner of its administration during performance, contractor personnel are subject to the relatively continuous supervision and control of a Government officer or employee. However, giving an order for a specific article or service, with the right to reject the finished product or result, is not the type of supervision or control that converts an individual who is an independent contractor (such as a contractor employee) into a Government employee.

(2) Each contract arrangement must be judged in the light of its own facts and circumstances, the key question always being: Will the Government exercise relatively continuous supervision and control over the contractor personnel performing the contract? The sporadic, unauthorized supervision of only one of a large number of contractor employees might reasonably be considered not relevant, while relatively continuous Government supervision of a substantial number of contractor employees would have to be taken strongly into account . . . 56

FAR 37.104 also provides a list of other factors that may indicate the existence of a personal services contract:

(d) The following descriptive elements should be used as a guide in assessing whether or not a proposed contract is personal in nature:

(1) Performance on site.

(2) Principal tools and equipment furnished by the Government.

(3) Services are applied directly to the integral effort of agencies or an organizational subpart in furtherance of assigned function or mission.

(4) Comparable services, meeting comparable needs, are performed in the same or similar agencies using civil service personnel.

(5) The need for the type of service provided can reasonably be expected to last beyond one year.

(6) The inherent nature of the service, or the manner in which it is provided reasonably requires directly or indirectly, Government direction or supervision of contractor employees in order to--

(i) Adequately protect the Government's interest;

(ii) Retain control of the function involved; or

(iii) Retain full personal responsibility for the function supported in a duly authorized Federal officer or employee.⁵⁷

When the above elements are present in a service contract, the FAR requires the review and opinion of legal counsel and coordination with the cognizant civilian personnel office.⁵⁸

Nonpersonal services are those in which the contractor neither supervises nor is supervised by other Government employees. No

⁵⁷ FAR 37.104(d).

⁵⁸ FAR 37.104(e), (f).

employer-employee relationship exists. FAR 37.101 defines a Nonpersonal services contract as "a contract under which the personnel rendering the services are not subject, either by the contract's terms or by the manner of its administration, to the supervision and control usually prevailing in relationships between the Government and its employees."⁵⁹

The Federal Government is normally required to obtain its employees by direct hire under competitive appointment or other procedures required by civil service laws.⁶⁰ The Comptroller General has consistently ruled that services involving an employer-employee relationship may not be obtained on a contractual basis and must be performed by personnel employed under the civil service and classification laws unless otherwise permitted by statute.⁶¹

Early decisions of the Comptroller General may be categorized as holding that all services normally performed by, or which could

⁵⁹ FAR 37.101.

⁶⁰ 5 U.S.C. § 3101; FAR 37.104, 48 C.F.R. § 37.104.

⁶¹ 61 Comp. Gen. 69, 72 (1981); 6 Comp. Gen. 140 (1926). *See, e.g.*, 31 Comp. Gen. 372, 373 (1952) (citing 19 Comp. Gen. 594 (1939) and 18 Comp. Gen. (1938) (both decisions holding appropriated moneys could not be used to contract with consultants to obtain credit reports on prospective Government employees in absence of specific authority of law because such activities were personal services of the nature usually performed by Government employees.). *See generally, e.g.*, Office of Gen. Counsel, General Accounting Office, 1 Civilian Personnel Man., ch. 10, subch. II (2d ed. 1983 & Supp. 1986) [hereinafter GAO CPLM]. Several articles contain extensive historical analysis of case law and administrative decisions concerning personal services. *See, e.g.*, Lovitsky, *The Problems of Government Contracting for Consulting Services*, 14 PUB. CON. L.J. 332 (1984); Byers, *Recognizing Personal Service Contracts*, 1983 ARMY LAW. 8-14. For a thorough discussion of applicable authority before 1953, see Mallow, *Experts and Consultants in Government*, 14 FED. BAR J. 357 (1954).

be performed by Government employees were personal services.⁶² Government agencies were not authorized to contract for such services because it was considered those services should not be performed by contractors who could not be held personally liable for improper performance of their duties. Neither the supervisory relationships nor the end-product basis of the contracts were stressed.⁶³ In a 1925 decision regarded as being the first to use the term "personal services," the Comptroller General stated:

Personal services necessary in connection with Governmental activities are for performance by the regular employees of the Government who are responsible to the Government, and such services should not be performed by contractors who can not be held personally responsible for failure or misfeasance in the performance of such duties.⁶⁴

In the 1950's the Comptroller General began to permit contracting out of services normally performed by Government employees where contracting was shown to be more feasible, economical, or necessary to accomplishment of the agency's task.⁶⁵ In 31 Comp. Gen. 372 (1952), for example, an exception to the rule was made in order to permit contracts for the preparation of credit histories of applicants for Government employment. The reports available by contract at a cost of less than a dollar per person would

⁶² Monsma, *Legal Considerations in Contracting for Personal Services*, THE GAO REVIEW 25 (Winter 1970), reprinted in STAFF OF SENATE SUBCOMM. ON REPORTS, ACCOUNTING AND MANAGEMENT OF THE COMM. ON GOVERNMENTAL AFFAIRS, 95TH CONG., 1ST SESS. CONSULTANTS AND CONTRACTORS: A SURVEY OF THE GOVERNMENT'S PURCHASE OF OUTSIDE SERVICES 487 (Comm. Print 1977) [hereinafter GAO REVIEW].

⁶³ *Id.* See 32 Comp. Gen. 427 (1953) (improper purpose to evade personnel ceilings); 6 Comp. Gen. 140 (1926) (tea inspectors performing Governmental function); 6 Comp. Gen. 364 (1927); 6 Comp. Gen. 474 (1927) (janitors).

⁶⁴ 6 Comp. Gen. 140 (1926).

have cost many times that amount if additional Government employees had been hired and trained to produce the reports. Explaining that the exception was applicable "in a few cases where employees were not available or qualified,"⁶⁶ the Comptroller General stated:

[T]he requirement is one of policy rather than positive law and, where it is administratively determined that it would be substantially more economical, feasible, or necessary by reason of unusual circumstances, to have the work involving personal services performed by non-Government parties, and that is clearly demonstrable, this office will not object to procurement of such work through proper contract arrangement.⁶⁷

Inherent in this modification of the former strict rule, however, was the requirement that the contracts be so worded and performed so as not to be tainted with an employer-employee relationship.⁶⁸

If a contract is found to be in violation of civil service laws, termination of the work or conversion to civil service performance is required.⁶⁹ This occurred in several notable cases in which the General Counsel of the Civil Service Commission (now OPM) determined contracts to be illegal because they created

⁶⁶ 31 Comp. Gen. 372, 373 (1952).

⁶⁷ *Id.*

⁶⁸ *See* 44 Comp. Gen. 761 (1965); GAO REV., *supra* note 62, at 25, Comm. Print at 487.

⁶⁹ *See* Comp. Gen. Dec. No. B-133,394 (Nov. 1, 1967); FPM Letter No. 300-8, "Contracting for Personal Services" (Dec. 12, 1965).

employer/employee relationships between the Government and the contractor's employees, thus violating the civil service laws.

*The Fuchu Air Force Base opinion.*⁷⁰ In 1965, a contract under which the contractor agreed to furnish technicians at an American military base in Japan provided that selection of the contractor's personnel was "subject to the approval of the contracting officer," and that the contracting officer could, "if he finds it in the best interest of the Government, direct the contractor to remove ... any employee from an assignment to perform services under the contract." This language was held to give the Government the right to hire and fire contracted employees, thus to establish a prohibited employer/employee relationship.

*The Pellerzi Opinion.*⁷¹ In 1967, General Counsel Pellerzi of the U.S. Civil Service Commission issued an opinion concerning the legality of certain contracts at the Goddard Space Flight Center. The opinion concluded that an impermissible employer-employee relationship existed between the Government and the employees of a contractor, chiefly because key personnel were named in the contracts, the approval of Goddard officials was required before contractor personnel could be hired or transferred, contract statements of work were general, and contract employees performed essentially the same work as civil service employees. In determining

⁷⁰ FPM Letter, "Contracting for Personal Services" (Feb 12, 1965), *reprinted in* H.R. REP. No. 188, 89th Cong., 1st Sess. (1965).

⁷¹ FPM Letter No. 300-8, "Contracting for Personal Services" (Dec. 12, 1965).

that the contracts violated civil service laws, the opinion set forth six specific criteria for determining whether the individuals furnished by contractors were employees of the contractors or of the United States:

[C]ontracts which, when realistically viewed, contain all the following elements, each to any substantial degree, either in the terms of the contract, or in its performance, constitute the procurement of personal services proscribed by the personnel laws

(1) Performance on-site

(2) Principal tools and equipment furnished by the Government

(3) Services are applied directly to integral effort of agencies or an organization subpart in furtherance of assigned function or mission

(4) Comparable services, meeting comparable needs, are performed in the same or similar agencies using civil service personnel

(5) The need for the type of service provided can reasonably be expected to last beyond one year

(6) The inherent nature of the service, or the manner in which it is provided reasonably requires directly or indirectly, Government direction or supervision of contractor employees in order:

- To adequately protect the Government's interest or
- To retain control of the function involved; or
- To retain full personal responsibility for the function supported in a duly authorized Federal officer or employee.⁷²

The Pellerzi opinion stated that if all six criteria were present, an arrangement that had been considered an independent contract should instead be treated as a contract for employment in violation

⁷² *Id.* at attachment, para. D.

of civil service laws. The opinion concluded that in "[a]pplying these standards, the contracts under review and all like them are proscribed unless and agency possesses a specific exception from the personnel laws to procure personal services by contract."⁷³

*The Mondello Supplement.*⁷⁴ In 1968, General Counsel Mondello of the Civil Service Commission issued a letter "to clarify the meaning ... and the scope" of the 1967 Pellerzi opinion, which had been the subject of varying interpretation.⁷⁵ The letter stated in part:

It should be understood that support service contracts are not *per se* proscribed by the Federal personnel laws. In addition, no single provision of a contract, such as the task assignment requirement, a technical direction clause, or a "key personnel" provision, should be used as the sole basis for a determination that a support service contract is or is not proscribed by the Federal personnel laws. Evaluation of the legality of a support service contract must be based on a realistic view of the provisions of the entire contract, and the manner in which it is administered and performed.

The touchstone of legality under the personnel laws is whether the contract creates what is tantamount to an employer-employee relationship between the Government and the employee of the contractor.

The basic criteria by which this relationship is judged are those set forth in 5 U.S.C. 2105(a)....

⁷³ *Id.* (emphasis in original).

⁷⁴ FPM Letter No. 300-12, "Support Service Contracts and Federal Personnel Laws" (Aug. 20, 1968).

⁷⁵ *Id.* at 2.

The six elements recited at the conclusion of the Goddard opinion relate principally to the third statutory criterion concerning supervision of a contractor employee by a Federal officer or employee. If the contract terms permit such a supervision, or if in the actual performance of the contract such supervision is conducted, the test is met.

....

The absence of any one or a number of these elements would not mean that supervision does not exist but only that there is less likelihood of its existence. Moreover, any single element may not be significant unless its presence is felt to a substantial degree. For example, sporadic, unauthorized supervision over an occasional one of a much greater number of contractor employees might reasonably be ignored; whereas, relatively continuous supervision of a substantial number of contractor employees by Government employees would have to be taken into account.

The same reasonable approach should be taken with respect to each element described in the Goddard opinion. . . . The simple question to be determined is whether the proscribed supervision that can be expected from this circumstance has occurred. Use by contractor employees of Government-furnished equipment creates the same facility for supervision, and warrants similar close inquiry. Since Government agencies are responsible for accomplishing their missions, application of contract services to agency efforts integral to accomplishment of the basic mission is likely to be closely supervised. And where that need is felt, it can be expected that most agencies in comparable circumstances will be filling the need with properly appointed civil service personnel.⁷⁶

⁷⁶ *Id.*, attachment at (2) (emphasis in original).

The Pellerzi standards, as modified by the Mondello supplement, create a *presumption* of employment status when those elements are present, but it is a presumption that can be overcome with satisfactory contrary evidence.⁷⁷ A contractor will generally be given the benefit of the doubt in weighing the evidence against such a presumption.⁷⁸

A complaint by Federal employees that contractors were using personal services in violation of civil service laws was directly addressed by a Federal court in 1978. In *Lodge 1858, American Federation of Government Employees v. Webb*,⁷⁹ a reduction in force (RIF) of 166 Federal employees at NASA's Marshall Space Flight Center in 1967 resulted in the loss of plaintiff's jobs. Plaintiffs complained that they, as civil service employees, worked along side of supposedly independent contractor employees who were not subject to the RIF, yet were supervised in such a manner as to make them functionally employees of the United States. Plaintiffs claimed this violated civil service laws and their collective bargaining agreement.⁸⁰ They asked for the contracts be set aside, for the civil service employees (plaintiffs) to be permitted to take over the positions being manned by contractors, and for retroactive benefits.

⁷⁷ Comp. Gen. Dec. No. B-193,035 (Apr. 12, 1979).

⁷⁸ Madden, *Government Consulting Contracts*, 83-3 GOV'T CONT. BRIEFING PAPERS 3 (1983).

⁷⁹ 580 F.2d 496 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 927 (1978).

⁸⁰ The order of retention of employees during a RIF is specified by 5 U.S.C. § 3502. If the contractors' employees were actually employees of the Federal Government, they would have to have been melded into the tenure roster, with the result that fewer of the plaintiffs would have been fired.

After determining that NASA was subject to 31 U.S.C. § 665, which provided that no officer or employee of the United States could "employ personal service or involve the Government in contracts beyond the authority of the law,"⁸¹ the court expressed the crucial question of the case as not what functions the contractors performed, but whether NASA treated the contractor's employees as its own employees, thus requiring them to be appointed and managed under civil service laws. The court found NASA had not treated the contractors as employees because:

(1) the individual contractors, not NASA, were to furnish the necessary management and personnel;

(2) it was the responsibility of each company to supervise, control, and direct the performance of its own employees in fulfilling the contract requirements; and

(3) the contracts required the companies to exercise their independent judgment.

The essential element of supervision of employee by employer was lacking in *AFGE v. Webb*. The court held that although a specific service was not always identifiable in the contracts in question, the absence of supervision, not merely the practice of providing a finished product or specific service, was the convincing factor. As stated by the court:

Employees are distinguished from independent contractors most basically by the detail with which

⁸¹ 31 U.S.C. §§ 665(a)-(b) (1964).

the party for whom the work is eventually produced actually supervises the manner and means by which the work is performed; and *degree of control or supervision* is the principal element that differentiates employees and independent contractors at common law [footnote omitted], in the state statutory context [footnote omitted], and in the context of other federal statutes as well [footnote omitted]. All this is another way of saying that the practice of giving an order for a specific service or article, with the right to reject the finished product or result, is not the type of supervision or control that converts an individual who is otherwise an independent contractor (such as an employee of a contractor) into an employee.⁸²

The court held those contracts did not violate the proscription against personal service contracts because the Government did not directly control the contractor's workers, hence no employer-employee relationship existed. Thus, *AFGE v. Webb* established that physical supervision, not just oversight, is critical in determining whether the existing relationship is that of employer-employee or independent contractor.

⁸² *Id.* at 504, 505.

Chapter 2--What Are Experts and Consultants?

The definitions of "expert" and "consultant" depend on the context in which they are used. Neither term is defined by statute. Civil service regulations use definitions in the Federal Personnel Manual. Procurement of consultant services under the Competition in Contracting Act uses definitions in the FAR and supplemental agency regulations. Statutes and regulations setting standards of personal conduct contain additional definitions limited to that purpose.

Definitions of Experts and Consultants

Federal Personnel Manual

The U.S. Office of Personnel Management (OPM) is responsible for administering civil service laws for Federal employees.⁸³ In that regard the agency has issued the *Federal Personnel Manual* (FPM). Chapter 304 of the FPM, entitled "Employment of Experts and Consultants," contains regulations which apply to the temporary employment of experts and consultants.

⁸³ 5 U.S.C. §§ 1104 (Delegation of authority for personnel management), 1301-02 Rules and regulations of OPM); 5 U.S.C. § 5102 (Definitions and application of classification chapter) (1982 & Supp.V 1987); 5 U.S.C. §§ 5103 (Determination of applicability), 5331 (Definitions and application of General Schedule pay rates chapter); 5 C.F.R. § 212.102; 17 Comp. Gen. 786 (1938).

OPM has jurisdiction to determine what provision of law may be interpreted as excepting positions from the competitive service.⁸⁴ An agency that thinks it has a statutory exception to the FPM requirements must obtain OPM's concurrence in that opinion before it may employ experts and consultants without complying with FPM requirements.⁸⁵ Final authority for determining whether a particular position or class of positions falls within the exception rests with OPM.⁸⁶ Agencies are not required to obtain OPM's approval before making appointment to excepted service positions, however, unless the statute, Executive order, or Schedule A, B, or C authority under which the appointment is to be made specifies that such approval must be obtained.⁸⁷

Improper appointments of experts and consultants generally come to OPM's attention through a request from GAO or an agency inspector general for an opinion concerning the position requirements or individual qualifications.⁸⁸

Experts

FPM Chapter 304 contains instructions to agencies concerning

⁸⁴ FPM, ch. 213, para. 1-2.

⁸⁵ FPM, ch. 304, para. 1-1b.

⁸⁶ 17 Comp. Gen. 537 (1938); 16 Comp. Gen. 703 (1937).

⁸⁷ FPM, ch. 213, para. 1-1d. *See, e.g.*, Schedule A, § 213.3101(a), 5 C.F.R. § 13.3101(a) ("Upon specific authorization by OPM, agencies may make appointments under this section....").

⁸⁸ Interview of Thomas O'Connor at OPM, Washington, D.C., July 28, 1987.

the hiring and managing of experts and consultants. The FPM defines an expert as

a person with excellent qualifications and a high degree of attainment in a professional, scientific, technical, or other field. An expert's knowledge and mastery of the principles, practices, problems, methods, and techniques of a field of activity, or of a specialized area in a field, are clearly superior to those usually possessed by ordinary competent persons in that activity. An expert usually is regarded as an authority or as a practitioner of unusual competence and skill by other persons in the profession, occupation, or activity.⁸⁹

Positions which may be held by experts are classified "expert positions" only if they have duties "that cannot be performed satisfactorily by someone not an expert in that field."⁹⁰

Consultants

"Consultant" is defined by the FPM as

a person who serves primarily as an advisor to an officer or instrumentality of the Government, as distinguished from an officer or employee who carries out the agency's duties and responsibilities. A consultant provides views or opinions on problems or questions presented by the agency, but neither performs nor supervises performance of operating functions.... Generally, a consultant has a high degree of broad administrative, professional, or technical knowledge or experience which should make the advice distinctively valuable to the agency.⁹¹

⁸⁹ FPM, ch. 304, para. 1-2(3).

⁹⁰ *Id.* at para. 1-2(4).

⁹¹ *Id.* at para. 1-2(1).

Positions for consultants are classified as "consultant positions" only if they require "performance of advisory or consultant services, rather than performance of operating functions."⁹²

OMB Circular A-120

Consulting Services

Consulting services are defined by OMB Circular A-120 as follows:

As used for administrative direction in this Circular, Consulting Services means those services of a purely advisory nature relating to the governmental functions of agency administration and management and agency program management. ...

These services are normally provided by persons and/or organizations who are generally considered to have knowledge and special abilities that are not generally available within the agency. The form of compensation is irrelevant to the definition.⁹³

Examples of the types of services which are classified as consulting services by Circular A-120 are:

Advice on or evaluation of agency administration and management, such as:

⁹² *Id.* at para. 1-2(2).

⁹³ OMB Circ. A-120, para. 5 (emphasis in original).

Organizational structures;
Reorganization plans;
Management methods;
Zero-based budgeting procedures;
Mail handling procedures;
Records and file organization;
Personnel procedures;
Discriminatory labor practices;
Agency publications;
Internal policies, directives, orders, manuals, and
procedures; and
Management information systems.

Advice on or evaluation of agency program
management, such as:

Program plans;
Acquisition strategies;
Assistance strategies;
Regulations;
Assistance or procurement, solicited or unsolicited;
technical and cost proposals;
Legal aspects;
Economic impacts;
Program impact; and
Mission and program analysis.⁹⁴

OMB Circular A-120 establishes policy, assigns responsibilities, and sets guidelines to be followed by Executive branch agencies in determining and controlling the appropriate use of consulting services.⁹⁵ Circular A-120 applies to consulting services obtained through personnel appointments, procurement contracts, and advisory committee membership.⁹⁶ OMB circulars are binding on Executive branch agencies, but not on other branches of

⁹⁴ *Id.* at attach.

⁹⁵ OMB Circ. A-120, para. 1.

⁹⁶ *Id.* at para. 4.

Government.⁹⁷

Proposed OMB Circular A-120

Advisory and Assistance Services

OMB issued a proposed revision to Circular A-120 on June 25, 1987, titled "Guidelines for the Use of Advisory and Assistance Services." The revised circular would expand coverage to include direct assistance services and defense-oriented engineering and technical services. It no longer defines "consultant services," but defines a category of "advisory and assistance services" to include consultant services, as follows:

Advisory and assistance services are those services acquired from non-governmental sources by contract or by personnel appointment to support or improve agency policy development, decision-making, management, and administration, or to support or improve the operation of hardware and related software systems. Such services may take the form of information, advice, opinions, alternatives, conclusions, recommendations, training, and direct assistance. Advisory and assistance services include consultant services provided by individual, as defined in the Federal Personnel Manual, Chapter 304.⁹⁸

⁹⁷ OMB Circ. A-1, Bureau of the Budget's System of Circulars and Bulletins to Executive Departments and Establishments, para. 4 (Aug. 7, 1952) ("The provisions of any Circular . . . shall be observed by every executive department, independent commission, board, bureau, office, agency, Government-owned or controlled corporation, or other establishment of the Government . . . but [not by] the legislative or judicial branches of Government.").

⁹⁸ Proposed OMB Circ. A-120, para. 5.

The services of individual experts and consultants would therefore continue to be subject to the controls of the proposed revision to OMB Circular A-120.

Individual Experts and Consultants

The proposed revision to Circular A-120 contains a new section defining individual experts and consultants. Included in the category of advisory and assistance services, individual experts and consultants are defined as

persons possessing special, current knowledge or skill which may be combined with extensive operational experience. This enables them to provide information, opinions, advice, or recommendations to enhance understanding of complex issues or to improve the quality and timeliness of policy development or decision-making. These named individual may either work independently or be assembled into panels, commissions, or committees.⁹⁹

Neither the proposed circular nor the current circular distinguishes between the terms "expert" and "consultant." The proposed circular is not expected to be issued in final form until October or November of 1987 because time is needed to study the large number of comments (chiefly objections) received during the notice period.¹⁰⁰

⁹⁹ OMB Circ. A-120, para. 5A(1).

¹⁰⁰ Interview with Oliver Taylor, Government Operations Division, OMB, in Washington, D.C., Aug. 10, 1987. See, e.g., Letter from Janice M. Sawyer, Director of Administrative and Procurement Programing, Dep't of Labor, to Oliver Taylor (July 31, 1987) ("The Department of Labor strenuously opposes the draft revision. We believe the proposed expanded definition and controls are both unnecessary and conceptually flawed.... [O]ne can summarize the

circular as a reiteration of controls that are already required and existing in the procurement process."); Letter from Frank Gearde, Jr., Director, Office of Operations, Office of the Secretary, Dep't of Agriculture, to Oliver Taylor (n.d.) ("We feel the proposed revision will overregulate the acquisition of services in our agency. Therefore, we recommend that OMB Circular not be revised."); Letter from Gary D. Engebretson, Executive Director, Contract Services Ass'n of America to Oliver Taylor (July 7, 1987) ("The Contract Services Association of America is very concerned and has strong objections to the proposed revisions of OMB Circular A-120.... Our concerns are ... with the broadening of coverage of the Circular to include products and services beyond the current Circular's coverage of the consulting services (i.e., providing advice on governmental functions."); Letter from Virginia Littlejohn, Executive Director, Professional Services Council, to Oliver Taylor (July 30, 1987) ("To the extent changes are needed, they should be in the form of amendments to the FAR.... Because PSC has strong doubts about the need for special OMB guidelines governing acquisition of 'advisory and assistance services,' we are not able to suggest specific improvements in the proposed revisions to Circular A-120 to make them acceptable--the definitions are confusing, the limitation on continuing contracts for advisory and assistance services longer than five years is arbitrary, the administrative review requirements are burdensome and the provisions are redundant or inconsistent with existing regulations."). Concerning the subject of the exemption of FFDRCs from control, *compare* Letter from Virginia Littlejohn, Executive Director, Professional Services Council, *supra*:

We would note one other fundamental problem the proposed revision present in their current form: Federally Funded Research and Development Centers (FFDRCs) are excluded from the scope of the Circular except services provided to agencies other than the sponsoring agency. Consider this provision in light of the special exemption from competition that FFDRCs were granted under CICA. The alarming trend toward noncompetitive awards to FFDRCs will be accelerated by this proposed change. This serious problem will be further aggravated when the requirement is implemented for written approval for all advisory and assistance service arrangements during the fourth fiscal quarter at the second level or higher above the organization sponsoring the activity. One, perhaps unintended, consequence of the Circular is that competition in providing professional and technical services will be sharply curtailed in major areas of federal procurement served by FFDRCs.

Id. (emphasis in original) *with* Letter from Dr. Norman Waks, Chief Management Scientist, The MITRE Corporation, to Oliver Taylor (July 1, 1987) ("You and your colleagues in OMB are to be congratulated on your redraft of OMB Circular A-120.... It should go a long way towards eliminating the confusion that has arisen for so many years over what a 'consulting service' is whenever Congress or various elements of the Executive Branch raise a concern in this area.") (A division of the MITRE Corporation is an FFDRC).

Federal Acquisition Regulations

Consulting Services

The FAR prescribes policies and procedures for acquiring consulting services by contract, whether personal or nonpersonal.¹⁰¹ The FAR has no individual definitions of "expert" or "consultant", but defines "Consulting Services" as:

those services of a purely advisory nature relating to the governmental functions of agency administration and management and program management.... These services are normally provided by persons and/or organizations that are considered to have knowledge and special abilities not generally available within the agency.¹⁰²

The form of compensation for consultant services is irrelevant to the definition.¹⁰³

Comptroller General's Opinions

The Comptroller General, head officer of the General Accounting Office (GAO), is vested with the final authority to rule on questions of the propriety of expenditures of appropriated funds.¹⁰⁴ GAO coordinates with OPM before action on service contracts which

101 FAR 37.200.

102 FAR 37.201.

103 *Id.*

104 *Skinner & Eddy Corp. v. McCarl*, 275 U.S. 1, 4-5, note 2 (1927).

appear to violate civil service laws or regulations.¹⁰⁵ Although authority to determine how Federal employment positions shall be classified rests primarily with OPM,¹⁰⁶ GAO has final authority to withhold compensation of those improperly employed, whether by appointment or by contract.¹⁰⁷ GAO decisions¹⁰⁸ are purportedly binding on the executive branch, but not on private parties, who retain whatever recourse to the courts they would otherwise have.¹⁰⁹

Other Sources

Consultant services are also included in the classes of services designated as "Contract Support Services" (CSS) and "Contracted Advisory and Assistance Services" (CAAS) by Executive order, and by congressional and military sources.¹¹⁰ Most of these services are

¹⁰⁵ GAO Review, *supra* note 62 at 24, Comm. Print at 486.

¹⁰⁶ *See supra* note — and accompanying text.

¹⁰⁷ 5 C.F.R. § 5.4; Comp. Gen. Dec. B-101,093 (1951); 5 Comp. Gen. 450 (1925) ("The authority to determine what evidence shall be required to support payments under a contract and what audit shall be made of accounts and records of the contractors is vested by law in the General Accounting Office, and that office may not, in the absence of specific statutory authority therefor, be divested of its jurisdiction by any contractual agreement entered into by administrative officers of the Government."). *But see* *Bowsher v. Synar* (No. 85-1377, -78, -79, U.S. July 7, 1986), 106 S.Ct. 3181, 92 L.Ed. 583.

¹⁰⁸ Significant decisions are published annually as **DECISIONS OF THE COMPTROLLER GENERAL**, as authorized by 44 U.S.C. § 1311. Unpublished decisions have the same binding effect as published decisions. 28 Comp. Gen. 69 (1948).

¹⁰⁹ *See* *United States ex rel Skinner & Eddy Corp. v. McCarl*, 275 U.S. 1, 4, note 2 (1927); *St. Louis, Brownsville & Mexico Railway Co. v. United States*, 268 U.S. 169, 174 (1925); 54 Comp. Gen. 921 (1975). *But see* *Bowsher v. Synar*, *supra* note 107.

¹¹⁰ *E.g.*, Dep't of Defense Authorization Act, 1986, Pub. L. No. 99-145, § 918, 99 Stat. 583, 690-91 (1985), *codified at* 10 U.S.C. 2304 note (Supp. III 1985); Dep't of Defense Dir. 4205.2, DOD Contracted Advisory and Assistance Services (CAAS) (Jan. 27, 1986) [hereinafter DODDIR 4205.2]; Dep't of Navy Inst. SECNAVINST

coded in the "R" category of the DOD Procurement Coding Manual.¹¹¹ The services excluded from coverage by proposed OMB Circular A-120 are primarily commercial activities covered by OMB Circular A-76, activities covered by other statutes, and technical "hands-on" assistance services.¹¹²

Individual experts and consultants are categorized by the DFARS as one of three kinds of consulting services: (1) Experts and Consultants; (2) Professional and Management Services; and (3)

4200.31B, Contract Support Services (CSS) (proposed) (June 15, 1987 draft) [hereinafter SECNAVINST 4200.31B].

¹¹¹ DOD Procurement Coding Manual, DODDIR 4105.61M, codes 404 to 799 (Oct. 1986).

¹¹² Proposed OMB Circ. A-120, attachment, stating, in part:

The following activities are excluded from the purview of Circular A-120.

1. Contracts entered into as a result of A-76 processes....
2. Architectural and engineering services....
3. ADP/Telecommunications and related services.
4. Research on theoretical mathematics and basic biological, physical, social, psychological or other phenomena.
5. Engineering studies related to specific physical or performance characteristics of existing or proposed systems.
6. The day-to-day operation facilities (e.g., the Johnson Space Center and related facilities.)
7. Government owned, contractor operated facilities (GOCOs)....
8. Clinical medicine.
9. Those support services of a managerial or administrative nature, performed as a simultaneous part of, and non-separable from, specific development, production, or operational support activities....
10. Contracts entered into in furtherance of statutorily mandated advisory committees.
11. Initial training, training aids, and technical documentation acquired as an integral part of the lease or purchase of equipment.
12. Routine maintenance of equipment, routine administrative services....
13. Auctioneers, realty-brokers, appraisers, and surveyors.

Studies and Analysis. The definition of Experts and Consultants is similar to the FPM definitions:

(1) The terms "experts" and "consultants" shall include those persons who are exceptionally qualified, by education or by experience, in a particular field to perform some specialized service. For the purpose of this subsection, an "expert" is an individual who is a recognized professional or highly skilled practitioner normally used to perform an operating function rather than to provide advisory or consulting services. A "consultant" is an individual who primarily serves in an advisory capacity in a particular field, rather than in the performance or supervision of an operating function (or functions). Depending on how they are used individuals may be either experts or consultants.

(2) Stenographic reporting services by individuals is included in the term "expert or consultant services" for purposes of procurement by contract under this section.¹¹³

"Professional and Managements Services" are defined as:

services of a "white collar" nature, e.g., preparation of reports or documentation, software development, development of logistics support plans, and other similar tasks, in support of management and control of programs.¹¹⁴

"Studies and Analyses" are defined as:

the broad class of intellectual activities characterized by the application of the tools of analysis to address a

¹¹³ Dep't of Defense FAR Supp., § 37.104(70)(c) (Jan. 6, 1986) [hereinafter DFARS].

¹¹⁴ *Id.* at 37.20(a).

wide range of problems. Studies are analytic examinations used to support DOD decision-makers and activities. Studies contribute to greater understanding of relevant issues and provide one means for addressing those matters facing the Department.¹¹⁵

It is apparent that the differences between the categories are not distinct. The different definitions for what are essentially experts' and consultants' functions are used for accounting and management purposes to keep these activities from blending in with other service contracts.¹¹⁶

Proper Use of Experts and Consultants

The FPM states temporary or intermittent services of experts and consultants may be used to obtain:

- (1) specialized opinion unavailable in the agency or other agencies;
- (2) outside points of view, to avoid too-limited judgment on administrative or technical issues;
- (3) advice on developments in industry, university and foundation research
- (4) for especially important projects, the opinions of

¹¹⁵ *Id.*

¹¹⁶ See CENTER FOR NAVAL ANALYSIS, *THE PROBLEMS OF POLICIES AND PROCEDURES FOR CONTRACTED ADVISORY AND ASSISTANCE SERVICES (CAAS)* (CRM 85-64) (1985), stating at 8: It is Circular A-120's general definition of "consulting services," however, that has led to much of the confusion and inconsistency at lower echelons. The definition it offers appears, in one form or another, in most DOD and Service documents. . . . Unfortunately, [the Circular A-120] definition does not encompass all of the activities envisaged by the Congress or by the Cabinet Council on Management and Administration as constituting CAAS; nor is it broad enough to be consistent with other regulations that also pertain to managing and reporting services that are currently perceived to be within the scope of "advisory and assistance services."

noted experts whose national or international prestige contributes to the undertaking's success;

(5) the advisory participation of citizens to develop or implement Government programs that by their nature or by statute call for citizen participation;

(6) the skills of specialized persons who are not needed continuously, or who cannot serve regularly or full time.¹¹⁷

Another example from the FPM of a "proper use" for 5 U.S.C. § 3109 is curiously differently from the others. It permits persons pending Senate confirmation of a Presidential appointment to be employed as experts and consultants. The FPM states:

At times, agencies use section 3109 to employ an individual whose nomination for a Presidential appointment is pending Senate confirmation. By appointment under 3109, such an individual becomes a Federal employee and subject to the conditions which apply to other Federal employees. As with any other use of section 3109, agencies should be sure such employment meets the conditions of authority.¹¹⁸

One of the conditions of that authority is the FPM paragraph which states: "An *expert position* is one that, for satisfactory performance, requires the services of an expert in the particular field... and with duties that cannot be performed satisfactorily by someone not an expert in that field."¹¹⁹ Positions for consultants are classified as "consultant positions" only if they require "performance of advisory or consultant services, rather than performance of operating

¹¹⁷ FPM, ch. 213, app. B, para. 1-3a. *See also* FAR 37.204(b).

¹¹⁸ *Id.* at para. 1-5b(2).

¹¹⁹ FPM, ch. 304, para. 1-2(4).

functions."¹²⁰ Although the appointments described above purportedly must meet "the conditions of authority" under section 3109, the established practice of OPM is to approve such appointments without regard to whether they fit the definition of an expert or consultant.¹²¹

OMB Circular A-120 essentially restates the above proper purposes, adding that "[w]hen essential to the mission of the agency," the proper use of consulting services is a legitimate way to "[e]nhance the understanding of, and develop alternative solutions to, complex issues; [s]upport and improve the operation of organizations; [and] ensure the more efficient or effective operation of managerial or hardware systems...."¹²²

Types and Sources of Experts and Consultants

Experts and consultants may be employees borrowed from another agency, employees holding temporary or intermittent appointments, or independent contractors.

Borrowed from Other Agencies

Advisors may be borrowed from, or loaned to, other eligible agencies (including Federal agencies, State, local, or Indian tribal

¹²⁰ *Id.* at para. 1-2(2).

¹²¹ Interview of Thomas O'Connor, *supra*, note 6.

¹²² OMB Circ. A-120, para 7A.

governments, institutions of higher learning, or other eligible organizations).¹²³ Borrowed advisors may either be temporarily appointed in the excepted service or be deemed to be on detail to the Federal agency. Those receiving temporary appointments are entitled to Federal pay and benefits under 5 U.S. Code chapters 51 and 53, and are deemed Federal employees for all purposes except for Federal retirement, life insurance, and health insurance benefits.¹²⁴ The term of appointment or detail under this authority may be up to two years, with extension of two more years.¹²⁵ The assignment must be based upon a written agreement which records the responsibilities of the parties.¹²⁶ Borrowed advisors remain

¹²³ 5 U.S.C. §§ 3373 ("Assignment of employees to State and local governments"), 3374 ("Assignments of employees from State or local governments"), 3376 ("Regulations"); Exec. Order No. 11,589, 3 C.F.R. 557 (1971-1975); 5 C.F.R. pt. 334; FPM, ch. 334. See 5 C.F.R. § 34.102, defining "Other organization" as

a national, regional, Statewide, areawide, or metropolitan organization representing member State or local governments; an association of State or local public officials; or a nonprofit organization which has as one of its principal functions the offering of professional advisory, research, educational, or development services, or related services to governments or universities concerned with public management.

¹²⁴ 5 U.S.C. § 3374. However, a borrowed employee who dies or is injured "while in the performance of his duty," is entitled to the benefits of a Federal employee upon waiver of the benefits of his parent organization. *Id.* at § 3374(d).

¹²⁵ 5 C.F.R. § 334.104(a)-(b), stating:

(a) An assignment may be made up for up to 2 years and may be extended by the head of a Federal agency for up to 2 more years, given the concurrence of the other parties to the agreement.

(b) A Federal agency may not send or receive on assignment an employee who has served under the mobility authority for 4 continuous years without at least a 12-month return to duty with the [agency] from which originally assigned.

¹²⁶ 5 C.F.R. § 334.106(a). See 5 U.S.C. § 3373-75; FPM, ch. 334.

subject to civil service laws appropriate to their permanent status and to supervision by OPM.¹²⁷

Temporary Federal Employees

5 U.S.C. § 3109

The principle source of authority for employing consultants for Government service¹²⁸ is 5 U.S.C. § 3109, entitled "Employment of experts and consultants; temporary or intermittent."¹²⁹ Under this statute, an agency may obtain the temporary (not to exceed one year) or intermittent (defined by the FPM 130 days or less per year¹³⁰) services of experts and consultants, or organizations thereof, without regard to civil service hiring laws, provided the agency is authorized funds for that purpose by additional legislation. Unless other rates are authorized in the specific legislation, maximum pay is limited to the highest daily rate for grade GS-15 under the General Schedule. For certain scientific or professional positions, the daily

¹²⁷ 5 C.F.R. § 334.107(b)-(c), stating:

(b) Federal assignees continue to encumber the positions they occupied prior to assignment, and the position is subject to any personnel actions that might normally occur. . . .

(c) An assignment is terminated, automatically, when the employer/employee relationship ceases to exist between the assignee and his or her original employer.

¹²⁸ Of 3,109 individual expert and consultant appointments reported to OPM in July through September, 1986, 93 percent (2,902) were pursuant to 5 U.S.C. § 3109 authority. OPM, *Expert, Consultant, and Advisory Committee Members by Agency--Fourth Quarter FY 86* at 69 (Dec. 5, 1986).

¹²⁹ Quoted *infra* in text accompanying note 157.

¹³⁰ FPM, ch. 304, para. 1-2(5).

rate for GS-18 is authorized.¹³¹ Section 3109 may also be used as authority to procure experts and consultants as independent contractors not limited by civil service laws.¹³²

Section 3109's purpose is to permit the temporary employment of persons with highly specialized skills who would be unwilling to become permanent Government employees or for whom no permanent need or position exists.¹³³

The decisions of the Comptroller General have gradually established that regardless of the form of the agreement under section 3109 the key to determining which rules applied--those of personnel appointments or procurement contracts--was the presence or absence of an employer/employee relationship. The form and content of the contract of employment, being primarily for administrative convenience, is not determinative of which status the consultant assumes.¹³⁴

Other Statutes

There are more than 60 specific permanent statutory authorities for individual agencies to obtain experts and

¹³¹ See 43 Comp. Gen. 509 (1964).

¹³² 60 Comp. Gen. 452 (1972).

¹³³ See FPM, ch. 304, para. 1-3; 1 GAO CPLM ch. 10-1, para. A.

¹³⁴ 60 Comp. Gen. 452 (1972); 27 Comp. Gen. 695 (1948).

consultants.¹³⁵ The appointment rules discussed for 5 U.S.C. § 3109 apply equally to other statutory authority to appoint experts and consultants unless the enabling statutes expressly provide otherwise or unless OPM concurs in the opinion that they do not.¹³⁶ If an agency thinks it has a statutory exception to the FPM expert and consultant rules, the FPM requires the agency to obtain OPM's concurrence in that opinion before it may employ experts and consultants without regard to these requirements.¹³⁷ The regulation states that "[t]he statutory language must be so plain as to admit no doubt of the exception."¹³⁸

¹³⁵ Letter from Constance Horner, Director, OPM, to Rep. T.P. O'Neill, Jr., Speaker of the House of Representatives (Sept. 11, 1985) ("Speaker Letter" accompanying draft bill to amend 5 U.S.C. § 3109). See, e.g., 5 U.S.C. § 3104 (Supp. IV 1986) ("Employment of specially qualified scientific and professional personnel") (permitting the employment of up to 525 specially qualified scientific and professional personnel in positions established by OPM and the Librarian of Congress. The positions are in the competitive service, but may be made without competitive examination on approval of OPM. 5 U.S.C. § 3325 ("Appointment to scientific and professional positions")); 10 U.S.C. § 583 ("Employment of certain persons without pay") ("The Secretary of Defense may employ, without pay, not more than 10 persons of outstanding experience and ability. ..."); 41 U.S.C. § 5 (1982 & Supp. III 1985) (permitting *inter alia*, purchases and contracts for services without advertising "when the services are required to be performed by the contractor in person and are (A) of a technical and professional nature or (B) *under Government supervision and paid for on a time basis.*" (emphasis supplied)) 50 U.S.C. app. § 2160(b) (authorizing the President, who has delegated the authority to heads of departments and agencies covered by the Defense Production Act of 1950, 64 Stat. 798 (Sept. 8, 1950) (codified as amended in 50 U.S.C. app. §§ 2061-2169), to employ "persons of outstanding experience and ability without compensation" as consultants, and may make appointments "to positions other than advisory or consultive ... only when the requirements of the position are such that the incumbent must personally possess outstanding experience and ability not obtainable on a full-time, salaried basis."); 50 U.S.C. app. § 2160(c) (authorizing payment of "experts or consultants or organizations thereof" employed under 5 U.S.C. § 3109).

¹³⁶ FPM, para. 1-1, 1-4c.

¹³⁷ *Id.* at para. 1-1.

¹³⁸ *Id.*

Positions Created by Regulations

Upon specific authorization by OPM, persons may be appointed under Schedule A of the excepted service in positions "which are not of a confidential or policy-making character ... for which it is not practicable to examine."¹³⁹ More than 20 sections in Schedule A authorize such appointments, several of which are suitable for consultants.¹⁴⁰ One such section is 213.3102(j) of Schedule A.¹⁴¹ Under this authority, persons may be appointed to "positions requiring the temporary or intermittent employment of professional, scientific or technical experts for consultation purposes."¹⁴² An agency head under 5 U.S.C. § 5371 sets the pay rate at not less than the minimum of GS-16 nor more than the maximum of GS-18. The

¹³⁹ 5 C.F.R. § 213.3101.

¹⁴⁰ *E.g.*, 5 C.F.R. §§ 213.3102(j), stating: "Positions requiring the temporary or intermittent employment of professional, scientific, or technical experts for consultation purposes." (An appointment made under section 213.3102(j) must follow the procedures established by the agency for employment of experts and consultants, as discussed in FPM chapter 304. FPM ch. 213, app. C, para. C-1(j) note 1 (Dec. 9, 1985);

213.3102(o), stating: "Positions of a scientific, professional, or analytical nature when filled by bona fide members of the faculty of an accredited college or university who have special qualifications for the positions to which appointed. Employment under this provision shall not exceed 130 days per year";

§ 213.3102(aa), stating: "Scientific and professional research associate positions at GS-11 and above when filled on a temporary basis by persons having a doctoral degree in an appropriate field of study for research activities of mutual interest to appointees and their agencies"; ...

§ 213.3102(bb), stating: "Positions when filled by aliens in the absence of qualified citizens"; ...

§ 213.3199(a), stating: "Positions at GS-15 and below on the staffs of temporary boards and commissions which are established by law or Executive order for specified periods not to exceed 4 years to perform specific projects."

¹⁴¹ 5 C.F.R. § 213.3102(j).

¹⁴² *Id.*

FPM states that section 213.3102(U) of Schedule A is intended primarily for agencies that do not have authority to use 5 U.S.C. § 3109 or other statutory authority to appoint experts and consultants.¹⁴³ Such employees are excepted from competitive examination but not from the General Schedule pay and classification requirements.¹⁴⁴

Temporary appointments may also be made under Schedule C of the excepted service to positions at the GS-15 grade and below during a presidential transition, as a result of changes in department or agency heads, or at the time of the creation of a new department or agency.¹⁴⁵ These positions must be "of a confidential or policy-determining character." Appointments are limited to 120 days, with one additional extension of 120 days. The appointments must be authorized in advance by OPM. The definition of the position permits the appointed person to perform governmental functions and personal services.

Creating New Excepted Positions

¹⁴³ FPM at para. 1-5d(1).

¹⁴⁴ *Id.*

¹⁴⁵ 5 C.F.R. § 213.3302, stating in part (with emphasis added):

(a) An agency may establish temporary positions at the GS-15 grade level and below necessary to assist a department or agency head during the period immediately following a change in presidential administration, when a new department or agency head has entered on duty, or at the time of the creation of a new department or agency. ...

(b) Individual appointments under this authority may be made for 120 days, with one additional extension of 120 days. *These positions must be of a confidential or policy-determining character*, and are subject to instructions issued by the Office of Personnel Management.

If an agency believes that a position not excepted by statute or Executive order should be excepted from the competitive service, it may request an exception by submitting a letter to OPM.¹⁴⁶

Special Government Employees

The "special Government employee" is a general category of certain persons, irrespective of their source of appointment, who perform advisory services for the Government for 130 days or less per year.¹⁴⁷ It is not a unique category of employees or a source of authority for appointments of experts and consultants. The category was created as an exemption for temporary employees from the stringent conflict-of-interest laws for regular Federal employees.¹⁴⁸

Independent Contractors

There are three categories of authority for contracting for experts and consultants: (1) 5 U.S.C. § 3109; (2) the inherent procurement authority of Government agencies,¹⁴⁹ as restricted by statutes (primarily the Competition in Contracting Act), and

¹⁴⁶ FPM, ch. 213, app. B, para. B-1 (June 25, 1984).

¹⁴⁷ 18 U.S.C. § 202(a).

¹⁴⁸ See *Exchange N'tl Bank of Chicago v. Abramson*, 295 F. Supp. 87, 90 (D. Minn. 1969).

¹⁴⁹ *United States v. Tingey*, 30 U.S. (5 Pet.) 115 (1831); *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110 (1954).

regulations (chiefly the FAR and agency supplements to the FAR¹⁵⁰); and (3) special-purpose statutes which apply to certain positions or agencies.

¹⁵⁰ *E.g.*, DFARS subpt. 37.1 ("Service Contracts") (Jan. 6, 1986).

Chapter 3--Use of 5 U.S.C. § 3109

5 U.S.C. § 3109, "Employment of experts and consultants, temporary or intermittent," states in part:

When authorized by an appropriation or other statute, the head of an agency may procure by contract the temporary (not in excess of 1 year) or intermittent services of experts or consultants or an organization thereof, including stenographic reporting services. Services procured under this section are without regard to--

(1) the provisions of this title governing appointment in the competitive service;

(2) chapter 51¹⁵¹ and subchapter III of chapter 53¹⁵² of this title; and

(3) section 5 of title 41¹⁵³ except in the case of stenographic reporting services by an organization. However, an agency subject to chapter 51 and subchapter III of chapter 53 of this title may pay a rate for services under section 5332¹⁵⁴ of this title only when specifically authorized by the appropriation or other statute authorizing the procurement of services.

(c) Positions in the Senior Executive Service may not be filled under the authority of subsection ¹⁵⁵

Purpose of Statute

The original version of 5 U.S.C. § 3109 was section 15 of The

¹⁵¹ 5 U.S.C. ch. 51 ("Classification").

¹⁵² 5 U.S.C. ch. 53, subch. 53 ("General Schedule Pay Rates").

¹⁵³ 41 U.S.C. § 5 ("Advertisements for proposals for purchases and contracts for supplies or services for Government departments; application to Government sales and contracts to sell and to Government Corporations").

¹⁵⁴ 5 U.S.C. § 5332 ("The General Schedule").

¹⁵⁵ 5 U.S.C. § 3109(b)-(c).

Administrative Expenses Act of 1946.¹⁵⁶ Introduced as "a bill to cut down on red tape,"¹⁵⁷ Congress thought it would simplify and standardize the procurement of consulting services previously authorized by dozens of separate annual appropriations.¹⁵⁸ The statute did not have its desired effect. The wording "may procure by contract,"¹⁵⁹ indicating a traditional procurement contract, conflicted with placement of the statute in the U.S. Code chapter governing civil service, and has resulted in considerable confusion and conflicting interpretations of the status of experts and consultants paid under section 3109 authority. In 27 Comp. Gen. 46 (1946), the Comptroller General stated:

I find nothing in that section [section 15 of the Administrative Expenses Act], or in its legislative history, which would warrant a conclusion that the words "by contract" appearing in that section are used in any restricted or limited sense. It seems more reasonable to conclude that those words when used in connection with the authority to procure services "without regard to the civil-service and classification laws" are used in the sense of an employment agreement without intending to distinguish between an employment agreement in the form of an appointment and an employment agreement in the form of a formal contract.

¹⁵⁶ Pub. L. 200, § 15, 60 Stat. 810 (1946).

¹⁵⁷ S. Rep. No. 1636, 79th Cong., 2d Sess. 1 (1946).

¹⁵⁸ See S. Rep. No. 1636, 79th Cong., 2d Sess. 1 (1946) ("The principal purpose of this bill ... is the permanent enactment of numerous provisions which, although of a continuing and general nature, have been included hitherto in the annual appropriations acts.").

¹⁵⁹ 5 U.S.C. § 3109(b).

More recently, the Comptroller General and the courts have recognized that 5 U.S.C. § 3109 may be used to create either an appointed employee or an independent contractor. In 1978 the Comptroller General stated: "[T]he 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."¹⁶⁰

Boyle v. United States, 309 F.2d 399 (1962), which overruled a conflicting Comptroller General's decision, held that an attorney contracted under 5 U.S.C. § 55a, predecessor to 5 U.S.C. § 3109, was an independent contractor, not an employee, because both the written contract and the performance of it indicated such an intention; therefore the attorney's compensation was not limited by civil service laws.

Experts and consultants obtained under 5 U.S.C. § 3109 may therefore be divided into two classes: those appointed as temporary appointees and those hired as independent contractors. A contract for personal services will be subject to the laws of Federal employment, while a contract for nonpersonal services is not.

Funding Under 5 U.S.C. § 3109

¹⁶⁰ Comp. Gen. Dec. No. B-191,865 (1978)

Separate appropriations acts are required for contracts under section 3109 because the phrase, "When authorized in an appropriation or other act,"¹⁶¹ conditions exercise of authority on availability of individual agency funds. Annual DOD appropriations acts authorize expenditures under 5 U.S.C. § 3109, but also impose conditions upon such use of the funds. The fiscal year 1987 DOD appropriations act authorizes section 3109 funds limited by the following conditions:¹⁶²

(1) The contracts must be a matter of public record (clandestine programs may therefore not use 5 U.S.C. § 3109);

¹⁶¹ 5 U.S.C. § 3109(b)

¹⁶² See DOD Appropriations Act, 1986, Pub. L. No. 99-500, tit. VII, secs. 9001, 9003, 9004, 100 Stat. 1783-100, -101 (1986) (identical wording earlier passed and continued effective by technical amendment, Pub. L. No. 99-591, tit. IX, secs. 9001, 9003, 9004, 100 Stat. 3341-100 (Oct. 30, 1986)), stating in part:

Sec. 9001. The expenditure of any appropriation under this Act for any consulting service through procurement contract, pursuant to section 3109 of title 5, United States Code, shall be limited to those contracts where such expenditures are a matter of public record...

.....

Sec 9003. During the current fiscal year, the Secretary of Defense and the Secretaries of the Army, Navy, and Air Force, respectively, if they should deem it advantageous to the national defense, and if in their opinions the existing facilities of the Department of Defense are inadequate, are authorized to procure services in accordance with section 3109 of title 5, United States Code, under regulations prescribed by the Secretary of Defense, and to pay in connection therewith travel expenses of individuals, including actual transportation and per diem in lieu of subsistence while traveling from their homes or places of business to official duty stations and return as may be authorized by law: *Provided*, That such contracts may be renewed annually.

Sec. 9004. During the current fiscal year, provisions of law prohibiting the payment of compensation to, or employment of, any person not a citizen of the United States shall not apply to personnel of the Department of Defense.

(Emphasis in original.)

- (2) The appropriate Service Secretary must determine that:
- (i) the contract will be advantageous to the national defense;
 - (ii) the existing facilities of DOD are inadequate;
- (3) The contracts must follow the regulations of the Secretary of Defense;
- (4) In addition to compensation authorized by 5 U.S.C. § 3109, travel allowance and per diem expenses may be paid; and
- (5) Such contracts may be renewed annually.

Restrictions

Most restrictions imposed on civil service employees apply to experts and consultants as well.¹⁶³ Below are specific prohibitions or restrictions on the use of experts and consultants.

Types of Services Which May Not be Performed

Appointment under 5 U.S.C. § 3109 may not be used:

- (1) to fill a position in the Senior Executive Service;¹⁶⁴
- (2) to give a particular person temporary or intermittent employment solely in anticipation of a career-conditional

¹⁶³ See generally 1 GAO CPLM.

¹⁶⁴ 5 U.S.C. § 3109(c) (Supp. I 1983); FPM, ch. 304, para. 1-5b(3).

appointment;¹⁶⁵

(3) to do a job that can be done as well by regular employees;¹⁶⁶

(4) to do a full-time continuous job;¹⁶⁷

(5) to avoid competitive employment procedures;¹⁶⁸

(6) to avoid General Schedule pay limits¹⁶⁹

(7) to perform work of a policy, decision-making, or managerial nature which is the direct responsibility of agency officials;¹⁷⁰

(8) to bypass or undermine personnel ceilings;¹⁷¹

(9) to give preference to former Government employees;¹⁷²

(10) to aid in influencing or enacting legislation;¹⁷³

(11) where procured through grants and cooperative agreements;¹⁷⁴ and

(12) where obtained for professional or technical advice which is readily available within the agency or another Federal agency, except when the contract is entered pursuant to OMB Circular A-76.¹⁷⁵

165 FPM, ch. 304, para. 1-3b.

166 *Id.*

167 *Id.*

168 *Id.*; OMB Circ. No. A-120, para. 7B(2).

169 FPM ch. 304, para 1-3 b.

170 OMB Circ. No. A-120, para. 7B(1).

171 *Id.* at 7B(2).

172 *Id.* at 7B(3).

173 *Id.* at 7B(4).

174 *Id.* at 7B(5).

175 *Id.* at 7B(6).

The Federal Personnel Manual imposes the following conditions on the use of section 3109:¹⁷⁶

(1) The positions must be bona fide expert or consultant positions. A *consultant position* is one which primarily requires performance of adversary or consultant services rather than performance of operating functions. ... An *expert position* is one that, for satisfactory performance, requires the services of an expert in the particular field ... and with duties that cannot be performed satisfactorily by someone not an expert in that field.

(2) Persons employed must be experts on consultants qualified to perform the duties of the positions.

(3) The needed services must be of such a nature that the agency can meet the need by temporary or intermittent employment.

Full Time Operating Positions

Use of 5 U.S.C. § 3109 relates to obtaining experts and consultants on a temporary or intermittent basis, not for full time employment in positions properly for allocation to a Classification Act grade.¹⁷⁷ The civil service laws and regulations require that regular full time positions set up under the Classification Act and allocated to the appropriate salary grade prescribed therein. 5 U.S.C. § 3109 can't be used as a cover to pay such employees in excess of amounts legally payable to regular civil service employees.¹⁷⁸

¹⁷⁶ FPM, ch. 304, para. 1-5b (emphasis in original).

¹⁷⁷ 1 GAO CPLM, ch. 10, para. F.

¹⁷⁸ 30 Comp. Gen. 495 (1951).

Jobs That Can be Done as Well by Regular Employees.

The FPM states that routine services which may be performed by persons of average skills do not justify employment of experts or consultants.¹⁷⁹ In a case in which an agency successfully argued that the service contract they were using did not call for expert services, the Comptroller General agreed that services may be professional, requiring a high degree of skill, yet not be expert services. The act limiting Forest Service spending on experts and consultants was determined not to apply to a contract for a certified public accountant firm to appraise the value of national forest timber because the appraisal services were routine, not expert.¹⁸⁰

Attorneys

Unless specifically authorized by statute, an agency other than the Department of Justice may not employ private lawyers to conduct Government litigation.¹⁸¹ In limited circumstances the Comptroller General has held that the retention of private attorneys

¹⁷⁹ A position is classified as an "expert position" by OPM only if it has duties "that cannot be performed satisfactorily by someone not an expert in that field," FPM, ch. 304, para. 1-2(4), and as a "constant position" only if it is "one which primarily requires performance of advisory or consultant services rather than performance of operating functions." FPM, ch. 304, para. 1-2(2).

¹⁸⁰ 45 Comp. Gen. 678 (1966).

¹⁸¹ 5 U.S.C. § 3106, 32 Comp. Gen. 118 (1952). *Cf.* 53 Comp. Gen. 301 (1973) and 55 Comp. Gen. 408 (1975).

as experts and consultants under 5 U.S.C. § 3109 was authorized.¹⁸² Where statutory appropriations provide authority to retain lawyers such contracts are not subject to the salary limitations of 5 U.S.C. § 3109.¹⁸³

Nepotism

A public official may not hire a relative (or take other beneficial personnel actions if the relative is already an employee) for a civilian position in an agency in which he is serving or over which he has control.¹⁸⁴

Limits on Duration of Services

Both 5 U.S.C. § 3109 and 18 U.S.C. § 202(a) were enacted because Congress recognized the government's need to hire specialists for short-term projects. Congress wanted to facilitate the use of employee-consultants by relieving them from restrictions

¹⁸² *E.g.*, Comp. Gen. Dec. No. B-192,406 (Oct. 12, 1978). (concluding the (then) Civil Service Commission could hire a private law firm under 5 U.S.C. § 3109 to serve as "special counsel" to the chairman to investigate alleged merit system abuses, since the matter was not covered by 5 U.S.C. § 3106 nor otherwise under the jurisdiction of the Justice Department. *See also* 61 Comp. Gen. 69 (1981); Comp. Gen. Dec. No. B-114,868.18 (Feb. 10, 1978) (Indian Relocation Commission workload was insufficient to justify hiring a full time attorney); Comp. Gen. Dec. No. B-133,381 (July 22, 1977); Comp. Gen. Dec. No. B-141,529 (July 15, 1963). *See generally* 1 GAO CPLM, ch. 10, para. F.

¹⁸³ 53 Comp. Gen. 702 (1974); Comp. Gen. Dec. No. B-180,708 (Jan. 30, 1976).

¹⁸⁴ 5 U.S.C. § 3110

inappropriate to their role and status, including close supervision and restrictions on outside employment.¹⁸⁵

The appointments of employees may be generally grouped into categories corresponding to their benefits and conflict-of-interest liability: full-time, with full benefits and liability; part-time, with partial benefits and liability;¹⁸⁶ and temporary or intermittent, with little or no benefits or liability.¹⁸⁷

Temporary Employment

Temporary employment is defined as: "(a) employment for one year or less (b) on programs, projects, problems, or phases thereof, requiring temporary service for one year or less."¹⁸⁸ It includes periods of temporary continuous employment less than 130 days.¹⁸⁹

Successive Temporary Appointments

An expert or consultant serving under a temporary appointment may be reappointed on a temporary basis in the

¹⁸⁵ Aluminum Co. of America v. FTC, 589 F. Supp. 169, 175 (1984). See 28 Fed. Reg. 985 (1963) ("Memorandum Regarding Conflict of Interest Provisions of Public Law 87-849"). See generally Boyle v. United States, 309 F.2d 399 (Ct. Cl. 1962).

¹⁸⁶ See 5 U.S.C. § 3401; 5 C.F.R. pt. 340.

¹⁸⁷ See 5 C.F.R. pt. 316.

¹⁸⁸ FPM, ch. 304, subch.1, para. 1-2(6).

¹⁸⁹ 63 Comp. Gen. 503 (1984); Comp. Gen. Dec. No. B-180,698 (Aug. 19, 1974); 35 Comp. Gen. 90 (1955).

following year on a temporary basis if the appointment is to a different position.¹⁹⁰

Intermittent Employment

Intermittent employment is "occasional or irregular employment ... on programs, projects, problems, or phases thereof, requiring intermittent service."¹⁹¹ The employment automatically ceases to be intermittent and converts to temporary when the employee works more than one-half of full-time employment, i.e., if he or she is paid for all or any part of a day for more than 130 days in a service year. Under those circumstances, the employee may be reappointed in the next service year only on a purely intermittent basis. If at any time the employee's work is no longer intermittent, "the employment must be terminated immediately."¹⁹²

Intermittent Following Temporary

An expert or consultant serving under a temporary appointment may be reappointed the next service year to the same position on a purely intermittent basis.¹⁹³ Appointment as an intermittent consultant immediately following service as a temporary consultant, however, does not necessarily change the

¹⁹⁰ FPM ch. 304, subch.1, para. 1-3.

¹⁹¹ *Id.* at para. 1-2(5). See 35 Comp. Gen. 90 (1955).

¹⁹² *Id.*

¹⁹³ FPM, ch. 304, subch.1, para. 1-3.

character of employment. It is the actual character of employment that is determinative of its restrictions.¹⁹⁴

When-Actually-Employed Consultants

For civil service retirees who are reemployed as experts or consultants on a "when-actually-employed" basis, the standard employment year (for the purpose of computing annual pay from which the annuity is deducted and for converting the rest to a per diem rate) is 260 days.¹⁹⁵

Renewal of Appointments

The relevance of the distinction between intermittent and temporary appointments is that intermittent appointments may be renewed from year to year, but temporary appointments may not.¹⁹⁶ Experts and consultants may not be employed under a succession of short-term contracts for full or part-time service where the resulting continuous employment would exceed one year. As a general rule, experts and consultants appointed under 5 U.S.C. § 3109 cannot be extended beyond one year, regardless of the period between the employment agreements.¹⁹⁷ Exceptions to this rule

¹⁹⁴ 63 Comp. Gen. 503 (1984); Comp. Gen. Dec. No. B-191,330 (Dec. 4, 1978) (Person rehired as an intermittent consultant after his one-year contract as a temporary employee under 5 U.S.C. § 3109 expired was not entitled to travel expenses normally paid to intermittent employees because the character of his work remained the same in spite of the change of contractual language.).

¹⁹⁵ 36 Comp. Gen. 186 (1958).

¹⁹⁶ FPM, ch. 304, subch. 1, § 1-3.

¹⁹⁷ 28 Comp. Gen. 670 (1949).

exist for intermittent appointments following temporary appointments, and successive but distinct temporary appointments.

Limits on Compensation

The compensation of experts and consultants under 5 U.S.C. § 3109 depends upon whether their contract is considered one for personal or nonpersonal services. In general, the pay of experts and consultants appointed under section 3109 is limited to the pay rate of a GS-15 unless a higher rate is specifically authorized. Those pay restrictions are not applicable to a contract for services of and experts and consultants engaged on an independent contractor basis.¹⁹⁸

Federal Pay Schedules for Employees

It has been estimated that there are over 60 pay systems, schedules, and statutory authorities in the executive branch alone for fixing the compensation of civilian employees.¹⁹⁹ The pay procedures may be grouped into five categories: (1) the General Schedule system; (2) the Senior Executive Service pay system; (3) the Merit pay system; (4) the prevailing rate systems; and (5) other lesser-used systems, schedules, and authorities.²⁰⁰

¹⁹⁸ 61 Comp. Gen. 69, 77 (1981). *See* 55 Comp. Gen. 1237 (1976); 51 Comp. Gen. 224 (1971); 43 Comp. Gen. 509 (1964); 29 Comp. Gen. 267 (1947).

¹⁹⁹ 1 GAO CPLM, ch. 1, para. A.

²⁰⁰ *See generally id.* at ch. 1.

The majority of employees in clerical, administrative, technical, and professional positions, including most experts and consultants appointed under authority other than 5 U.S.C. § 3109 fall within the General Schedule (GS) system unless exempted by statute.²⁰¹

Pay of experts and consultants employed under 5 U.S.C. § 3109 is limited by 5 U.S.C. § 3108, which requires computation of pay on a biweekly basis, not to exceed the rate of pay for Executive Schedule Level V.²⁰² Section 3109 also limits pay to experts and consultants to the daily equivalent of the highest rate payable under the GS pay schedule at 5 U.S.C. § 5332, unless a different rate is set by the appropriation of the statute authorizing the services.²⁰³ The maximum pay rate for experts and consultants appointed to research and development, scientific, and engineering positions is GS-18. Those positions may be filled without numerical limitation upon approval by OPM.²⁰⁴ Appropriations acts often authorize a GS-18 rate.²⁰⁵

Salary Increases

²⁰¹ See 5 U.S.C. § 5301; 5 U.S.C. chs. 51, 53. Specific coverage is described in 5 U.S.C. § 5102, subpt. B, 5 C.F.R. pt. 511, and FPM, ch. 511, subch. 2.

²⁰² 5 U.S.C. § 3108 ("Pay limitation"), stating: "Pay may not be paid, by reason of any provision of this subchapter, at a rate in excess of the rate of basic pay for level V of the Executive Schedule." See 58 Comp. Gen. 90 (1978); 1 GAO CPLM, ch 6, para. E.

²⁰³ 5 U.S.C. § 3109; 5 U.S.C. § 5332 ("The General Schedule") (1982 & Supp. III 1985).

²⁰⁴ 43 Comp. Gen. 509 (1964).

²⁰⁵ E.g., the Department of Labor has statutory authority under the Occupational Safety & Health Act of 1970 to pay experts and consultants at the GS-18 rate. See 51 Comp. Gen. 225 (1971); 1 GAO CPLM at 10-6.

The pay of experts and consultants under 5 U.S.C. § 3109 is fixed by each agency, subject to the maximum rate under section 3109 or other statutory authority. Unless the appointment documents state otherwise, no pay increases are authorized for experts and consultants on the basis of an increase in the General Schedule rate of pay. In other words, a consultant who agrees to work at a GS-15 rate gets no raise when pay raises for other Federal employees go into effect unless he has documentation in his appointment entitling him to such a raise.²⁰⁶

Overtime

Although 5 U.S.C. § 5542 entitles intermittent employees who work over eight hours per day are to overtime pay, that section does not apply to section 3109 experts and consultants.²⁰⁷ A consultant is thus not entitled to pay at an overtime rate but is entitled only to his regular daily rate of pay regardless of the number of hours he works in any day.²⁰⁸

"Double Dipper" Restrictions

²⁰⁶ See Comp. Gen. Dec. No. B-131,259 (July 6, 1976); 1 GAO CPLM at 10-11.

²⁰⁷ 46 Comp. Gen. 667 (1967); 28 Comp. Gen. 328 (1948).

²⁰⁸ Comp. Gen. Dec. No. B-187,389 (July 19, 1978). Cf. 58 Comp. Gen. 90 (1978) (holding an expert or consultant employed on a per diem basis may be paid the rate of basic pay for work exceeding 10 days per pay period, subject to the biweekly pay limitation of 5 U.S.C. § 5308).

Retired Federal employees, civilian and military, may be rehired by the Government as either employees or as independent consultants. The important difference in classification is that retired annuitants (persons receiving Federal retirement pay) must generally forfeit a portion of their retirement pay if they are reappointed as employees ("double dippers") but forfeit nothing if they are paid as independent contractors.

Retired Federal annuitants may be reemployed to serve at the will of the appointing officer,²⁰⁹ but their salaries are subject to deduction of "a sum equal to the retirement annuity allocable to the period of actual employment."²¹⁰ The annuity must be deducted from the annual salary for the position, and the remainder is the total amount authorized to be paid for a full year of employment, or the maximum rate payable for any period less than a year.²¹¹ In other words, unless excepted by statute, their retirement pay is subtracted from their active pay.²¹² The daily setoff amount is 1/260th of the annuity.²¹³

²⁰⁹ 5 U.S.C. § 3323(b).

²¹⁰ 5 U.S.C. § 8344. See FPM, Supp. 831-1, subch. S-15 ((date)). The section 8344 phrase "period of actual employment" has reference to the actual period during which an annuitant holds the position in which he is reemployed, including all periods of leave without pay as well as all regular nonworking days forming a part thereof. 28 Comp. Gen. 693 (1949).

²¹¹ 28 Comp. Gen. 693 (1949); Comp. Gen. Dec. No. B-165,430 (1975).

²¹² 53 Comp. Gen. 654 (1974) (Retired annuitants who are members of the Technology Assessment Advisory Council are not exempt from the requirements of 5 U.S.C. § 8344. That provision covers all positions not specifically exempted, and Congress has not exempted Council members.).

²¹³ 36 Comp. Gen. 186 (1956); Comp. Gen. Dec. No. B-167,670 (Sep. 24, 1969); Comp. Gen. Dec. No. B-159,780 (Oct. 6, 1966).

Retired military officers or persons whose services as experts and consultants are obtained or performed under an employer-employee relationship are subject to the annuity setoff of 5 U.S.C. § 5332.²¹⁴

The requirement that the annuity payable to a reemployed annuitant must be deducted from the annual salary of the position to determine the total salary payable is applicable to experts and consultants payable on a per diem or hourly basis.²¹⁵ The standard employment year for annuitants who are reemployed as experts and consultants on a "when-actually-needed" basis is established as 260 days for the purpose of converting the annual pay to a per diem rate.²¹⁶

Travel Expenses

Whether experts and consultants are entitled to compensation for travel to work and back depends on the contract. If no place for performance of the services is named in the contract, compensation begins the moment the consultant leaves his home or regular place of business.²¹⁷ If the contract provides for compensation "for each

²¹⁴ 51 Comp. Gen. 189 (1971); 42 Comp. Gen. 297 (1962). See 1 GAO CPLM at 10-10.

²¹⁵ See 32 Comp. Gen. 146 (1952); 28 Comp. Gen. 693 (1949).

²¹⁶ 36 Comp. Gen. 186 (1956).

²¹⁷ Comp. Gen. Dec. No. B-218,705 (Oct. 21, 1985); 28 Comp. Gen. 502 (1949);

day worked," payment for travel between the consultant's home and place of business is not authorized.²¹⁸

Intermittent Employees.

Payment of travel expenses, including per diem allowance, is authorized by 5 U.S.C. § 5709 for experts and consultants with intermittent appointments, but not with temporary appointments. The travel must be in connection with the performance of official duty away from the person's home or regular place of business.²¹⁹ Actual irregular employment rather than formal appointment designation determines whether a consultant is an intermittent employee.²²⁰ However, clear intent by the employing agency to have a consultant work only occasionally without regularly scheduled hours may result in intermittent employment status and accompanying travel pay, even though the consultant worked more than 40 hours per week for a short time due to an unexpected heavy workload.²²¹ Payment for travel expenses after 130 days of service is not allowable because at that point the intermittent appointment is converted into a temporary appointment,²²² but in

²¹⁸ Comp. Gen. Dec. No. B-106,176 (Jan 8, 1952). *See* 30 Comp. Gen. 495 (1951); 30 Comp. Gen. 283 (1950). *See generally* 1 GAO CPLM at 10-12.

²¹⁹ 35 Comp. Gen. 90 (1955).

²²⁰ Comp. Gen. Dec. No. B-216,708 (Mar. 29, 1985); Comp. Gen. Dec. No. B-193,170 (1979).

²²¹ Comp. Gen. Dec. No. B-193,170 (May 16, 1979).

²²² *See* 1 GAO CPLM at 10-8.

the following year such expenses could be paid under an intermittent appointment.²²³

Temporary Employees.

Temporarily employed experts and consultants, like full-time Federal employees, are entitled to travel allowances in connection with the performance of their official duties away from their permanent duty station.²²⁴, but are not entitled to the cost of transportation from their residence to their official duty stations.²²⁵

Leave

Experts and consultants employed under 5 U.S.C. § 3109 are entitled to annual and sick leave only if they are eligible as full time employees under 5 U.S.C. chapter 63.²²⁶ In 58 Comp. Gen. 167, the Comptroller general decided that an expert appointed on an intermittent basis was not entitled to leave even though he had worked on substantially a full-time basis. He worked on a project basis and set his own hours. Because he was not required to report

²²³ Comp. Gen. Dec. No. B-194,021 (Feb. 11, 1980); Comp. Gen. Dec. No. B-187,389 (July 19, 1978).

²²⁴ 63 Comp. Gen. 503 (1984); Comp. Gen. Dec. No. B-193,170 (May 16, 1979); 35 Comp. Gen. 90 (1955).

²²⁵ Comp. Gen. Dec. No. B-187,389 (1978), stating:

An expert or consultant employed on a temporary rather than an intermittent basis is in the same position as a regular Government employee with regard to travel expenses and is subject to the well-settled rule that a regular employee must bear the cost of transportation from his place of residence to his place of duty at his official station.

²²⁶ 58 Comp. Gen. 167 (1978).

or stay for a certain time each workday, he was not entitled to leave with pay as is a part-time employee with an established duty day. His argument that he was a *de facto* full-time employee was unsuccessful because he was not required to work a standard work week.²²⁷

Volunteers

Employment of consultants even without pay requires specific authority from OPM or specific statutory exemption from the General Schedule.²²⁸ Statutory exemption is provided by 5 U.S.C. § 3109 for employment without pay except when another authority prescribes what an agency must pay.²²⁹

If an agency has statutory authority to employ consultants without pay but has no authority excepting the positions from the competitive service, the agency may employ them under section 213.3102(k) of Schedule A.²³⁰ Employees who serve without pay are exempted by that authority from OPM examinations provided the appointment of those employees meets the requirements of applicable laws relating to pay.²³¹

²²⁷ *Id.* See also Comp. Gen. Dec. No. B-194,021 (Feb. 11, 1980) (consultant who worked 80 or more hours per week during the 13-month work period was not entitled to leave benefits even though he worked along side of full-time employees because he was not required to serve a regular tour of duty).

²²⁸ FPM, ch. 304, para. 1-6c.

²²⁹ See 5 U.S.C. § 3109(b); FPM, ch. 304, para. 1-6c.

²³⁰ 5 C.F.R. § 1.4; FPM, ch. 304, para. 1-6c.

²³¹ FPM, ch. 304, para. 1-6c; 58 Comp. Gen. 383 (1979); 27 Comp. Gen. 194 (1947).

An intermittent consultant or advisor to an agency of the Government is an "officer or employee" within the meaning of the conflict-of-interest statutes,²³² even when serving without compensation.²³³

Limits for Persons Performing Nonpersonal Services

The pay restrictions imposed by 5 U.S.C. § 3109 are not applicable to a contract for the services of an expert or consultant engaged under 3109 as an independent contractor.²³⁴

In 61 Comp. Gen. 69 (1981), the Comptroller General determined that payments to a law firm which had been procured under a statute which granted a Commission authority to "appoint" additional persons to the staff of the Commission and to "procure temporary or intermittent services to the same extent as is authorized by [5 U.S.C. § 3109] ..." were proper even though the payments exceeded the Federal pay schedule limits of 5 U.S.C. § 3109.²³⁵ Explaining that the services provided by the attorneys

²³² 5 U.S.C. § 99; 18 U.S.C. §§ 281, 283, 284, 434, 1914.

²³³ 42 Op. Att'y Gen. 111 (1962). See *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 552 (1961) (holding 18 U.S.C. § 434 applies to temporary and part-time consultants).

²³⁴ 61 Comp. Gen. 69 (1981); Comp Gen Dec. No. B-191,865 (Nov. 13, 1978). See 26 Comp. Gen. 188 (1946).

²³⁵ "[A]n agency ... may pay a rate for services under this section in excess of the daily equivalent of the highest rate payable under section 5332 of this title only when specifically authorized by the appropriation or other statute authorizing the procurement of the services." 5 U.S.C. § 3109(b).

were the research and production of a finished report, and were therefore nonpersonal services, the Comptroller General stated:

[L]ike the limitation in 5 U.S.C. § 3109, the compensation limitation contained in 22 U.S.C. § 1469 applies only when services are procured from an individual as employee. ... [The General Schedule] 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.²³⁶

In a similar decision in 1978 the Comptroller General considered whether a Department of the Interior contract for consultant services was subject to the compensation limitation of 5 U.S.C. § 3109. The Comptroller General explained the limits of 5 U.S.C. § 3109 regarding appointments of employees compared to the procurement of independent contractors as follows:

[A] limitation is contained in the statute [5 U.S.C. § 3109] 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 authorized 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*

²³⁶ 61 Comp. Gen. 69, 78 (1981) (emphasis in original).

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.²³⁷

In other words, a person who functions as an employee is bound by the General Schedule pay limits stated in 5 U.S.C. § 3109. The compensation limitations for an independent contractor, however, are determined by contract without General Schedule limitations.

Ineligibility of Desired Advisor

Post-Employment Restrictions

Retired members of the military are restricted by statute from employment with DOD for 180 days unless granted a waiver.²³⁸ The statute, entitled "Appointments of retired members of the armed forces to positions in the Department of Defense," states in part:

- (b) A retired member of the armed forces may be appointed to a position in the civil service in or under the Department of Defense (including a nonappropriated fund instrumentality under the jurisdiction of the armed forces) during the period of 180 days immediately after his retirement only if--
- (1) the proposed appointment is authorized by the Secretary concerned or his designee for the purpose, and, if the position is in the competitive service, after approval by the Office of Personnel Management;

²³⁷ Comp. Gen Dec. No. B-191,865 (Nov. 13, 1978) (emphasis added).
²³⁸ 5 U.S.C. § 3326.

- (2) the minimum rate of basic pay for the position has been increased under section 5303 of this title; or
- (3) a state of national emergency exists.

(c) A request by appropriate authority for the authorization, or the authorization and approval, as the case may be, required by subsection (b)(1) of this section shall be accompanied by a statement which shows the actions taken to assure that--

- (1) full consideration, in accordance with placement and promotion procedures of the department concerned, was given to eligible career employees;

- (2) when selection is by other than certification from an established civil service register, the vacancy has been publicized to give interested candidates an opportunity to apply;

- (3) qualification requirements for the position have not been written in a manner designed to give advantage to the retired member; and

- (4) the position has not been held open pending the retirement of the retired member.²³⁹

This restriction applies to personnel appointments, but not to independent contracts. In one case the Comptroller General determined that fee basis physicians who served under contracts as examining physicians at armed forces examining stations when the need arose had been appointed to civilian offices or positions under DOD, and the fact that by contractual arrangement a limit was placed on the total fees any such physician might receive in one day did not change the contractual relationship to that employer-employee. Therefore, the retired pay of a retired Regular Army officer who was placed on a roster of fee basis physicians did not

²³⁹ *Id.*

have to be reduced after the first 30 days period for which he received fees and the 180-day waiting period was not applicable.²⁴⁰

Regulations concerning post-employment restrictions are contained in 5 C.F.R. part 737.

Standards of Conduct

The conflict of interest statutes and regulations for regular civil service employees are generally applicable to experts and consultants. Some protection is afforded experts and consultants by 18 U.S.C. § 202(a),²⁴¹ which exempts those serving for 130 days or less per year from major conflict-of-interest criminal statutes. The source of the protection is Public Law 87-849,²⁴² a 1962 statute designed to reduce the risk of violations of conflict-of-interest laws for temporary experts and consultants.²⁴³ The purpose of the exception in title 18 was "to help the Government obtain the temporary or intermittent

²⁴⁰ 45 Comp. Gen. 81 (1965).

²⁴¹ 18 U.S.C. § 202(a), stating in part:

[T]he term 'special Government employee' shall mean an officer or employee of the executive or legislative branch of the United States Government, of any independent agency of the United States or of the District of Columbia, who is retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days, temporary duties either on a full-time or intermittent basis, a part-time United States commissioner, or a part-time United States magistrate. ...

(For the complete quotation of the above statute, see "Definitions" at appendix, *infra*.)

²⁴² Pub. L. No. 87-849, 76 Stat. 1119 (1962), codified as amended at 18 U.S.C. §§ 202-209 (1982 & Supp. — 198_).

²⁴³ See S. REP. No. 2213, 87th Cong., 2d Sess. 6, *reprinted in* 1962 U.S. CODE CONG. & ADMIN. NEWS 3854.

services of persons with special knowledge and skills whose principal employment is outside the Government.... Public Law 87-849 [imposes] a lesser array of prohibitions on temporary and intermittent employees than on regular employees."²⁴⁴

Management Controls

Management of experts and consultants under 5 U.S.C. § 3109 is controlled by the OMB, OPM (except for independent contractors), and by independent agency regulations.

The management requirements of OMB Circular A-120 are as follows:

Each agency will assure that for all consulting service arrangements:

- (1) Every requirement is appropriate and fully justified in writing. Such justification will provide a statement of need and will certify that such services do not unnecessarily duplicate any previously performed work or services;
- (2) Work statements are specific, complete and specify a fixed period of performance for the service to be provided;
-
- (4) Appropriate disclosure is required, and warning provisions are given to, the performer(s) to

²⁴⁴ Memorandum of Attorney General Robert F. Kennedy (Jan. 28, 1963), reprinted in 28 Fed. Reg. 985 (1963). See *Exchange Nat'l Bank of Chicago v. Abramson*, 295 F. Supp. 87, 90 (D. Minn. 1969) ("The purpose of the exception (for special Government employees) was to permit the government to hire from the ranks of trained private enterprise talent those who could be of aid to specific government projects or agencies for a short duration and who were willing to so serve.").

avoid conflict of interest; and

(5) Consulting service arrangements are properly administered and monitored to insure that performance is satisfactory....

Each agency will establish specific levels of delegation of authority to approve the need for the use of consulting services, based on the policy and guidelines contained in this Circular. Written approval of all consulting service arrangements will be required at a level above the organization sponsoring the activity. Additionally, written approval for all consulting service arrangements during the fourth fiscal quarter will be required at the second level above the organization sponsoring the activity.²⁴⁵

The proposed revision to OMB Circular A-120 would impose the following additional management controls:

C. Each agency will assure that for all advisory and assistance service arrangements:

(1) The elements of the management control system required by this Circular have been observed, and all procurements under this circular are administered in accordance with the requirements of the Federal Acquisition Regulations;

(2) As prescribed by the Federal Acquisition Regulations, written approval of all advisory and assistance service arrangements will be required at a level above the organization sponsoring the activity. Additionally, written approval for all advisory and assistance service arrangements during the fourth fiscal quarter will be required at the second level or higher above the organization sponsoring the activity;

....
 (5) Contracts for advisory and assistance services are competitively awarded and conform to the Competition in Contracting Act of 1984;

²⁴⁵ OMB Cir. A-120, para. 8a, b.

(7) Advisory and assistance service arrangements are properly administered and monitored to ensure that performance is satisfactory;

(8) The service is properly evaluated on the conclusion of the arrangement to assess its utility to the agency and the performance to the contractor; and

(9) To the extent practicable, contracts for these services require a written report. Such reports typically would document the services delivered and may, in part, take the form of software packages.

D. Delegations of Authority.

(1) Each agency head shall designate a single official reporting directly to him or her who shall be responsible and accountable for assuring that the acquisition of advisory and assistance services meets the provisions contained in this Circular. The single official shall have minimum responsibility for the procurement of such services.

(2) Each agency will establish specific levels of delegation of authority to approve the need for advisory and assistance services based on the policy and guidelines contained in this Circular. The senior official shall review each advisory and assistance services request which exceeds an amount to be determined by the agency.²⁴⁶

The requirement for competitive award in proposed paragraph C(5), above, conflicts with the clear exception from competitive procedures under 5 U.S.C. § 3109, and should be redrafted to exclude section 3109 contracts.

Chapter 304 of the FPM also governs management of experts and consultants obtained through personnel appointments by requiring the following internal review procedures:

²⁴⁶ Proposed OMB Circ. A-120, paras. 8C, D.

a. Quarterly review. Agencies are required to maintain effective controls over use of appointees during employment. Control measures must include frequent reviews, generally quarterly, to assure that in each case the:

- (1) duties performed are still those of an expert or consultant;
- (2) time limits are being observed;
- (3) documentation is kept current; and
- (4) duties of record are actually being performed.

b. Exclusion from quarterly review. An agency may exclude from a quarterly review experts and consultants who have worked for 10 days or less during the quarter covered.

c. Documentation from review. Each quarterly review is to be appropriately documented and the record retained for OPM examination, which usually will be performed at the time of the next onsite evaluation. The record of review, signed by the director of personnel or his superior, should describe the conduct of the review, summarize the findings, and describe the actions taken to correct any deficiencies noted in the review. If, in a quarterly review, an agency decides to use all or some part of the exclusion in paragraph b. it should include in the record of review a statement describing the extent of the exclusion. Records of reviews are to be retained until examined by OPM.²⁴⁷

Agencies are required to inform their appointing officials of the following FPM rules:

Each agency is required to communicate at least annually to its appointing officials relevant highlights of this chapter. Communications may be in such

²⁴⁷ FPM, ch. 304, app. A, para. A-2a.

forms as written issuances, orientation sessions for new managers, executive staff meetings, and training modules. They should include:

(1) An explanation of what is permitted under law and instruction and what is not;

(2) Advice on the importance of careful work force planning;

(3) Assurance that agency personnel officials will be available to provide advice and assistance on appropriate staffing methods;

(4) A description of alternative appointing authorities, which, depending on the circumstances, could be more appropriate than the expert or consultant authority for meeting the agency's needs;

(5) A reminder that improper appointment under the expert and consultant authority is a violation of law, representing an illegal exception for civil service appointment and classification laws.²⁴⁸

All agencies are also required to report all personnel actions which are required to be documented on Standard Form 50 (SF-50) forms to the OPM Central Personnel Data File.²⁴⁹

Procedures

The Comptroller General has ruled that contracts with individual consultants who perform personal services under 5 U.S.C. § 3109 must follow the procedures required for civil service appointments, including the completion of an SF-50 Notification of Personnel Action.²⁵⁰

²⁴⁸ *Id.* at para. A-2, -3.

²⁴⁹ *Id.* at para. A-5.

²⁵⁰ 60 Comp. Gen. 452 (1972).

Government-Wide Requirements

All section 3109 appointments must meet the following requirements:

Preappointment Review and Certification. Each proposed appointment (and extension of appointment) must be reviewed and certified by a "high agency management official"²⁵¹ as to seven criteria specified by the FPM.²⁵² The certificate must be prepared for each appointee in the form specified in the FPM²⁵³ and must be retained in each appointee's Official Personnel Folder.²⁵⁴

²⁵¹ FPM, app. A, paras. A-1a, b, stating:

The certifying official must be an agency management official with knowledge of the legal and other requirements applicable to expert and consultant appointments and extensions, with authority to give final approval to selections, and at a high enough level to accept responsibility for an erroneous action. The official must be authorized by the agency head or his designee to certify for the record that each of the required items has been reviewed and that the proposed action is in order.

²⁵² *Id.* at para. A-1a, stating:

Each proposed appointment (and extension of appointment) must be reviewed and certified by a high agency management official in terms of the :

- (1) necessity of the position;
- (2) correctness of the judgment that the position requires the services of an expert or consultant;
- (3) propriety of designating the position as temporary or intermittent;
- (4) soundness of the decision that this is the most appropriate appointing authority to use;
- (5) qualifications of the proposed appointee;
- (6) appropriateness of the intended level of pay in relation to the work to be performed, the qualifications of the proposed appointee, and comparable salaries in the private sector.
- (7) completeness of documentation.

²⁵³ *Id.* at para. A-1c.

²⁵⁴ *Id.*

Official Personnel Folder. Each agency must establish a file containing the following items:²⁵⁵

- The appointment or reappointment certificate described above;
- A description of the position to show that the position requires an expert's or consultant's services;
- A Standard Form 171 or a description of the appointee's background and qualifications to show that they fit the needed position;
- A description of any regularly scheduled tour of duty for a less than full-time employee;
- A Standard Form 50 , Notification of Personnel Action, showing the employment;
- Standard Form 50 showing termination of the employment;
- Certification that a statement of employment and financial interests has been obtained and it has been determined that no conflict of interest exists;
- For all reappointments of intermittent experts and consultants, the number of days worked in the previous service;
- Standard Form 278, Statement of Employment and Financial Interests. New entrant, annual, and termination. SF 278 public financial disclosure forms should be obtained from each individual meeting the reporting requirements of 5-U.S.C. app. 201.

²⁵⁵ *Id.* at para. A-4.

Reporting Data to the Office of Personnel Management

The agency must report all personnel actions required to be documented on SF 50 to OPM's Central Personnel Data File.²⁵⁶

DOD Requirements

Proposed appointments or renewals of appointments of experts and consultants must include:²⁵⁷

- A memorandum outlining the specific duties to be performed;
- The qualifications of the appointee;
- Standard Form 171;
- DD Form 2292, Request for Appointment of Consultant or Expert (or an equivalent DOD Component form);
- A statement from the agency Standards of Conduct Counselor, under DODDIR 5500.7,²⁵⁸ that no conflict of interest exists, based upon review of DD Form 1555;²⁵⁹
- Availability of authorized funds;
- Personnel ceiling authorizations; and
- Appropriate security clearances.

²⁵⁶ *Id.* at para. A-5.

²⁵⁷ DODDIR 4205.2 at encl. 2, para. B.

²⁵⁸ DODDIR 5500.7, *Standards of Conduct* (Jan. 15, 1977).

²⁵⁹ DD Form 1555, *Confidential Statement of Affiliation and Financial Interests*.

Chapter 4--Contracts Under Procurement Statutes

Federal contracting for consultant services outside of 5 U.S.C. § 3109 is done primarily under either of the two major statutes covering most Government procurement: the Federal Property and Administrative Services Act²⁶⁰ and the Armed Services Procurement Act,²⁶¹ both statutes having been extensively amended by the Competition in Contracting Act of 1984.²⁶² As a subcategory of service contracts, contracts for experts and consultants are classified as either personal or nonpersonal, as discussed in chapter one of this paper. Government agencies are prohibited from contracting for personal services unless a statutory exemption has been made because such contracts violate the civil service laws discussed previously in this paper. The Government does not have to pay for such illegal contracts.²⁶³ Contracts for nonpersonal services are legal provided they are for a proper purpose and follow prescribed regulations.

Government contracting for consulting services is regulated primarily by FAR part 37 ("Service Contracting"), and more particularly by FAR subpart 37.2 ("Consulting Services"). Policy and

²⁶⁰ 41 U.S.C. § 251 *et seq.*

²⁶¹ 10 U.S.C. § 2301 *et seq.*

²⁶² Pub. L. No. 98-369, 98 Stat. 1175 (1984). *See generally* J. CHENE & R. NASH, *FORMATION OF GOVERNMENT CONTRACTS* ch. 1 (2d ed. 1986).

²⁶³ *See* Lodge 1858, *American Federation of Gov't Employees v. Webb*, 580 F.2d 496 (D.C. Cir. 1978); *Boyle v. United States*, 309 F.2d 399 (Ct. Cl. 1962); *Comp. Gen. Dec. No. B-191,865* (Nov. 13, 1978).

management controls for consulting service contracts in the Executive branch are set by OMB Circular A-120.

Each Executive branch department implements the FAR and OMB Circular A-120 management requirements with its own procedural requirements. In the Department of Defense, for example, this is accomplished under the DOD FAR Supplement (DFARS). The DFARS requires the following procedures when contracting for consulting services:

(a) Departments shall ensure that for all contract actions for services defined in FAR 37.201 and 37.270 of this supplement:

(1) Each requirement is appropriate; fully justified in writing; does not unnecessarily duplicate any previously performed work or services; and is approved in advance in accordance with (b) below and Departmental procedures.

(2) Work statements are specific and complete to the maximum extent practicable, and specify a fixed period of performance of the services to be provided;

(3) Contracts are competitively awarded to the maximum extent practicable to ensure that prices are reasonable (see 15.507(b)(70) with regard to proposed contracts resulting from unsolicited proposals);

(4) Appropriate disclosure is required of, and warning provisions are given to, prospective contractors to avoid conflicts of interest;

(5) Contracts are properly administered and monitored to ensure that performance is satisfactory;

(6) Contract reports prominently display on the cover of the report the following information:

(i) name and business of the contractor;

(ii) contract number;

(iii) contract dollar amount;

(iv) a statement as to whether the contract was competitively awarded or not; and

(v) name of the sponsoring individual in the agency and his/her office identification and location; and

(7) The sponsoring element, at contract completion, documents the use made of the services or products obtained and their value to the sponsoring organization.

(b) Departments shall further ensure that the approval of the need for the use of the services defined in FAR 37.201 and 37.270 is based on the policy and guidelines contained in this section, and that, for actions greater than \$50,000 the approval authority is not below the SES manager or General or Flag Officer level, except when O-6 personnel are filling such command or management positions or have subordinate SES personnel.²⁶⁴

Proper Subjects for Consultant Services Contracts

The FAR states that contracts for consultant services may be used at all organizational levels, provided they are essential to the agency's mission,²⁶⁵ to obtain:

- (1) Specialized opinions or professional or technical advice not available within the agency or from another agency;
- (2) Outside points of view, to avoid too limited a judgment on critical issues;
- (3) Advice on developments in industry, university, or foundation research;
- (4) The opinion of experts whose national or international prestige can contribute to the success of important projects; or
- (5) Citizen advisory participation in developing or implementing Government programs that by their

²⁶⁴ DFARS 37.205-71.

²⁶⁵ FAR 37.204(a)-(b).

nature or by statutory provision require such participation.²⁶⁶

Agencies are prohibited by FAR 37.204 from contracting for consulting services for the following purposes:

- (1) To perform work of a policy-making, decision-making, or managerial nature that is the direct responsibility of agency officials;
- (2) To bypass or undermine personnel ceilings, pay limitations, or competitive employment procedures;
- (3) To specifically aid in influencing or enacting legislation; or
- (4) In a manner affording preferential treatment to former Government employees.²⁶⁷

Management of consultant services is subject to control by OMB Circular A-120, by the FAR, and by supplemental agency regulations.

OMB Circular A-120 imposes the following controls for contracted consulting services:

- a. Each agency will assure that for all consulting service arrangements:
 - (1) Every requirement is appropriate and fully justified in writing. Such justification will provide a statement of need and will certify that such services do not unnecessarily duplicate any previously performed work or services;
 - (2) Work statements are specific, complete and specify a fixed period of performance for the service to be provided;

²⁶⁶ FAR 37.204(b).

²⁶⁷ FAR 37.204(c).

(3) Contracts for consulting services are competitively awarded to the maximum extent practicable to insure that costs are reasonable;

(4) Appropriate disclosure is required of, and warning provisions are given to, the performer(s) to avoid conflict of interest; and

(5) Consulting service arrangements are properly administered and monitored to insure that performance is satisfactory.

b. Each agency will establish specific levels of delegation of authority to approve the need for the use of consulting services, based on the policy and guidelines contained in this Circular. Written approval of all consulting service arrangements during the fourth fiscal quarter will be required at the second level above the organization sponsoring the activity.²⁶⁸

The proposed revision to OMB Circular A-120 would change the management control requirements to the following:

A. Each agency will assure that it maintains an accounting or information system which effectively monitors and reports advisory and assistance service activities.

B. Each agency's management control system for advisory and assistance services shall at a minimum comply with with the Federal Acquisition Regulations. Agencies are encouraged to apply the same control system to other procurements which in their judgement require similar management attention, notwithstanding the exclusion of those functions or programs from the provisions of this Circular.

C. Each agency will assure that for all advisory and assistance service arrangements:

(1) The elements of the management control system required by this Circular have been observed, and all procurements under this Circular are administered in accordance with the requirements of the Federal Acquisition Regulations;

²⁶⁸ OMB Circ. A-120, para. 8.

(2) As prescribed by the Federal Acquisition Regulations, written approval of all advisory and assistance service arrangements will be required at a level above the organization sponsoring the activity. Additionally, written approval for all advisory and assistance service arrangements during the fourth fiscal quarter will be required at the second level or higher above the organization sponsoring the activity;

(5) Contracts for advisory and assistance services are competitively awarded and conform to the Competition in Contracting Act of 1984;

(9) To the extent practicable, contracts for these services require a written report. Such reports typically would document the services delivered and may, in part, take the form of software packages.²⁶⁹

The proposed revision to Circular A-120 would also impose new accountability requirements and restrictions on delegation of authority:

(1) Each agency head shall designate a single official reporting directly to him or her who shall be responsible and accountable for assuring that the acquisition of advisory and assistance services meets the provisions contained in this Circular. The single official shall have minimum responsibility for the procurement of such services.

(2) Each agency will establish specific levels of delegation of authority to approve the need for advisory and assistance services based on the policy and guidelines contained in this Circular. The senior official shall review each advisory and assistance services request which exceeds an amount to be determined by the agency.²⁷⁰

²⁶⁹ Proposed OMB Circ. A-120, para. 8A-C.

²⁷⁰ *Id.* at para 8D.

Controls imposed by the Federal Acquisition Regulations

Ensuring that a proposed contract for consulting services is proper is primarily the responsibility of the contracting officer. The contracting officer's responsibility is set out in the FAR 37.103 as follows:

- (a) The contracting officer is responsible for ensuring that a proposed contract for services is proper. For this purpose the contracting officer shall--
 - (1) Determine whether the proposed service is for a personal or nonpersonal services contract...;
 - (2) In doubtful cases, obtain the review of legal counsel; and
 - (3) Document the file (except as provided in paragraph (b) below) with
 - (i) the opinion of legal counsel, if any,
 - (ii) a memorandum of the facts and rationale supporting the conclusion that the contract does not violate the provisions in 37.104(b), and
 - (iii) any further documentation that the contracting agency may require.
- (b) Nonpersonal services contracts are exempt from the requirements of subparagraph (a)(3) above.²⁷¹

Contracting officers awarding consulting services contracts are additionally responsible for

determining whether a requested contractual action or solicitation, regardless of dollar value, is for consulting services. The contracting officer's determination shall be final. Before processing any contractual action or solicitation for consulting services, the contracting officer shall ensure that the applicable provisions of

²⁷¹ FAR 37.103(a)-(b).

this subpart [37.2, Consulting Services] and 37.103 [service contracting officer responsibility] and 37.104 [personal services contracts] have been complied with and that the required documentation is complete and included in the contract file.²⁷²

Restrictions

Contracts for consultant services under general Government contracting authority are subject to the limits imposed by the FAR and departmental regulations unless otherwise specifically authorized by statute.²⁷³ Deviations from the FAR (and generally from agency implementation of the FAR) may be authorized by a designated official.²⁷⁴ Deviations most often consist of use of a contract clause differing from the language of the FAR model, use of forms other than those prescribed by the FAR, or omissions of a mandatory contract clause.²⁷⁵

The "consultant services" regulated by FAR subpart 37 are defined as "those services of a purely advisory nature relating to the governmental functions of agency administration and management and program management"²⁷⁶ The FAR also states that "related services, such as studies and professional management services, may

²⁷² FAR 37.205(a).

²⁷³ FAR 37.102-.104. As a subcategory of service contracts, they may also be subject to the wage and fringe benefit provisions of the Service Contract Act of 1965, 41 U.S.C. §§ 351-357.

²⁷⁴ FAR subpt. 1.4.

²⁷⁵ See D. ARNAYAS & W. RUBERRY, *GOVERNMENT CONTRACT GUIDEDOOK* 2-13 (Lim. ed. 1987)

²⁷⁶ FAR 37.201.

also be governed" by FAR subpart 37.2, as supplemented by agency regulations.²⁷⁷

Examples of consultant services subject to FAR subpart 37.2 are:

- (1) Advice on or evaluation of agency administration and management, such as--
 - (i) Organizational structures;
 - (ii) Reorganization plans;
 - (iii) Management methods;
 - (iv) Budgeting procedures;
 - (v) Mail-handling procedures;
 - (vi) Records and file organization;
 - (vii) Personnel procedures;
 - (viii) Discriminatory labor practices;
 - (ix) Agency publications;
 - (x) Internal policies, directives, orders, manuals, and procedures; and
 - (xi) Management information systems.
- (2) Advice on or evaluation of agency program management, such as--
 - (i) Program plans;
 - (ii) Acquisition strategies;
 - (iii) Assistance strategies;
 - (iv) Regulations;
 - (v) Solicited or unsolicited technical and cost proposals;
 - (vi) Legal aspects;
 - (vii) Economic impact;
 - (viii) Program impact; and
 - (ix) Mission and program analysis.²⁷⁸

²⁷⁷ FAR 37.202.

²⁷⁸ FAR 37.203(a)(1)-(2).

Contracts for the "conduct of Research and development" and "technology assessments" are not considered consulting services.²⁷⁹

The Consulting Service subpart also applies "to any contract task assignment for consulting services that is proposed for assignment to a Federally Funded Research and Development Center (FFDRC),²⁸⁰ although FFDRC contracts are specifically excluded from the purview of the proposed OMB Circular A-120.²⁸¹

Extension of an existing consulting services contract by modification also requires compliance with the consulting services FAR subpart.²⁸²

Types of Services Which May Not be Performed

OMB Circular A-120 prohibits use of consultant services for the following purposes:

Inherent Governmental Functions

Although Circular A-76 prohibits contracting out for performance of government functions,²⁸³ it does not prohibit the purchase of *advice* concerning the performance of those functions so

279 FAR 37.203(b).

280 FAR 37.203(b).

281 Proposed OMB Circ. A-120, attach. para. 115.

282 FAR 37.204d.

283 OMB Circ. A-76, para. 5b.

long as the advisor does not cross the line and become the performer.²⁸⁴ Similarly, OMB Circular A120 prohibits the use of advisory and assistance services "in performing work of a policy, decision-making, or managerial nature which is the direct responsibility of agency officials,"²⁸⁵ but at the same time states that using the same services to "enhance understanding of complex issues"²⁸⁶ and to "support and improve the operation of organizations"²⁸⁷ is proper use. It is difficult to tell where permitted "support" stops and prohibited "performance" begins.

The Comptroller General has stated that "performance begins when the contractor's involvement in basic management functions is so extensive ... that an agency's ability to develop options other than those proposed by the contractor is limited."²⁸⁸ GAO has performed dozens of studies criticizing agencies for permitting

²⁸⁴ *Id.* at para. 6e ("Services or products in support of Governmental functions, such as those listed in Attachment A (e.g., "Special Studies and Analyses"), are commercial activities and are not subject to this circular."); GAO REP. No. FPCD-81-43, *Civil Servants and Contract Employees: Who Should do What for the Federal Government?* ii (June 19, 1981).

²⁸⁵ *Id.* at para. 7A(5).

²⁸⁶ *Id.* at para. 5A(1).

²⁸⁷ *Id.* at para. 7A(5).

²⁸⁸ *Id.* at ii.

contractors to perform Government functions in violation of OMB prohibitions.²⁸⁹

Qualified and Available Government Employees

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."²⁹⁰

Publicity Experts

Appropriated funds may not be used to pay publicity experts unless specifically authorized by statute.²⁹¹

Detectives

The Anti-Pinkerton Act²⁹² states: "An individual employed by the Pinkerton Detective Agency, or similar organization, may not be

²⁸⁹ *E.g.*, GAO, *Controls Over DOD's Management Support Service Contracts Need Strengthening*, Comp. Gen. Rep. No. MASAD-81-19 (Mar. 1981); GAO, *Controls Over Consulting Service Contracts at Federal Agencies Need Tightening*, Comp. Gen. Rep. No. PSAD-80-35 (June 19, 1980); GAO, *Review of Practices of Government Agencies and Departments in the Hiring of Individuals as Organizations and Firms for Management Advisory Services*, Comp. Gen. Rep. No. B-143,330 (Jan. 19, 1980); GAO, *Review of the Office of Economic Opportunity's Use of Experts and Consultants*, Comp. Gen. Rep. No. B130,515 (Sept., 1973). *See also* Comp. Gen. Rep. No. FPCD-84-43 (June 19, 1981), and reports listed therein at appendix III ("List of GAO Reports Which Found That Agencies used Consulting Services to Perform Work that Should Have Been Performed by Regular Government Employees").

²⁹⁰ 61 Comp. Gen. 69, 73 (1981) (*quoting* Comp. Gen. Dec. No. B-133,381 (July 22, 1977)).

²⁹¹ 5 U.S.C. § 3107. *But see* Comp. Gen. Dec. No. B-181,254 (Feb. 28, 1975).

²⁹² 5 U.S.C. § 3108.

employed by the Government or the United States or the government of the District of Columbia."²⁹³ In *United States ex rel. Weinberger v. Equifax*²⁹⁴ the court stated that "and organization is not 'similar' to the Pinkerton Detective Agency unless it offers quasi-military armed forces for hire."²⁹⁵

Limits on Duration of Contracted Services

When a contract for consultant services is funded by annual appropriations, the term of the contract can not extend beyond the end of the fiscal year of the appropriation unless authorized by law.²⁹⁶ Contracts may be written chargeable to funds of a new fiscal year before those funds are available provided the contract contains the required "Availability of Funds" clause. An exception is made for contracts for consultant services calling for an end product that cannot feasibly be subdivided for separate performance in each fiscal year.²⁹⁷

Limits on Compensation

²⁹³ *Id.*

²⁹⁴ 557 F.2d 456 (5th Cir. 1977).

²⁹⁵ *Id.* at 463. *See also* FAR 37.109 ("Services of quasi-military armed forces"); Comp. Gen. Dec. No. B-172,418 (Aug. 30, 1971) (Contract for guard services was not an improper personal services contract, and could be awarded as alternative to performance by civil service personnel, because there was no continuous supervision of contractor's employees so as to create a prohibited employer/employee relationship.).

²⁹⁶ FAR 32.703-3, 37.106, . *See, e.g.,* 41 U.S.C. § 11a; 31 U.S.C. § 1308; 42 S U.S.C. § 2459a.

²⁹⁷ FAR 32.703-2

Pay limitations in 5 U.S.C. § 3109, discussed in chapter 3 of this paper, do not apply to contracts for bona fide expert or consultant services where only nonpersonal services are provided.²⁹⁸ That a contract is used to procure the services is not conclusive to the question of fee limitation. If the contractual relationship is tantamount to that of an employer and employee, the expert or consultant will be subject to the pay limitations of 5 U.S.C. § 3109.²⁹⁹

Minimum wages and fringe benefits may be required by the Service Contract Act³⁰⁰ for persons providing contracted consulting services.

"Double Dipper" Restrictions

Persons receiving Federal retirement pay (Federal annuitants) must generally forfeit a portion of their retirement pay if they are reappointed as employees ("double dippers"). There is no reduction, however, in the fee or annuity of bona fide independent contractors who are Federal annuitants.³⁰¹

²⁹⁸ 26 Comp. Gen. 188, 189 (1946), stating, in part:

[S]ince the Classification Act relates to individual services of a purely personal nature and has no effect either to authorize or restrict the payment of compensation to firms or organizations of experts, as such, section 15 predecessor to 5 U.S.C. § 3109)...in a like manner is limited in its scope, and is not for application in the case of firms or organizations when the service contracted is clearly of a nonpersonal nature."

²⁹⁹ 42 Comp. Gen. 395 (1963); 26 Comp. Gen. 188 (1946). See 1 GAO CPLM, ch. 10, para. B.

³⁰⁰ 41 U.S.C. §§ 351-357. See FAR 37.107.

³⁰¹ E.g., *Boyle v. United States*, 309 F.2d 399 (1962). See *supra* notes — — and accompanying text.

Labor Standards Requirements

Government contractors are required to comply with Federal labor standards statutes imposed to prevent substandard wages and working conditions in the contracting area.³⁰² The Service Contract Act applies to each government contract over \$25,000 when its principal purpose is to furnish the labor of service employees, whether contractor or subcontractor.³⁰³ The Act does not cover most contracts for experts and consultants because it excludes from its coverage service contracts performed exclusively by executive, administrative, or professional personnel, or performed primarily by such personnel when service employees are only a minor factor in the performance of the contract.³⁰⁴ The Act specifically excludes contracts for individual personal services.³⁰⁵

Requirements for Competition

Contracts for consultant services generally follow the same competitive procedures as contracts for other services.³⁰⁶ FAR 37.105, "Competition in service contracting," states:

³⁰² *E.g.*, the Davis-Bacon Act, 40 U.S.C. § 276a, *et seq.*; the Contract Work Hours & Safety Standards Act, 40 U.S.C. § 327, *et seq.*; the Walsh-Healey Act, 41 U.S.C. § 35, *et seq.* *See generally* J. CEBEC & R. NASH, *FORMATION OF GOVERNMENT CONTRACTS* 990-1003 (2d ed. 1986)

³⁰³ 41 U.S.C. § 351.

³⁰⁴ 29 C.F.R. § 4.113. *See generally* P. ARNAVAS & W. RUBERRY, *GOVERNMENT CONTRACT GUIDEBOOK* 6-15 (1986).

³⁰⁵ 41 U.S.C. § 356.

³⁰⁶ FAR 37.105(a).

(a) Unless otherwise provided by statute, contracts for services shall be awarded through sealed bidding whenever the conditions in 6.401(a) are met...

(b) The provisions of statute and Part 6 of this regulation requiring competition apply fully to service contracts. The method of contracting used to provide for competition may vary with the type of service being acquired and may not necessarily be limited to price competition.³⁰⁷

Thus, unless otherwise provided by statute, contracts for consultant services must ordinarily be awarded through sealed bidding, but "may not necessarily be limited to price competition."

OMB Circular A-120 requires contracts for consulting services to be competitively awarded "to the maximum extent practicable to insure that costs are reasonable."³⁰⁸

Thus, unless otherwise provided by statute, contracts for consultant services must ordinarily be awarded through sealed bidding. The FAR also states, however, that the method of contracting used to provide for competition "may vary with the type of service being acquired and may not necessarily be limited to price competition."³⁰⁹

Conflict of Interests

The same statutes and regulations that affect the behavior of

³⁰⁷ FAR 37.105.

³⁰⁸ OMB Circ. A-120, para. 8a(3). *See* Proposed OMB Circ. A-120, para. 8C(5) ("Contracts for advisory and assistance services [must be] competitively awarded and conform to the Competition in Contracting Act of 1984.").

³⁰⁹ FAR 37.105(b).

other service contractors similarly affect experts and consultants.³¹⁰ Conflict of interests issues in contracting for consulting services may be categorized as: (1) violations of restrictions applicable to Government employees and special employees, including experts and consultants working under personal service contracts; and (2) conflicts that arise out of organizational interests which may affect the impartiality of the advice the Government receives.³¹¹

A new reporting requirement was enacted in 1987 and codified in 10 U.S.C. § 2397 through 2397c.³¹² The requirement has not been well received by the contracting community. In an article entitled "Conflict of Interests: Papered to Death in the Revolving Door," Professor John Cibinic described the statutes as "a classic case of overkill."³¹³ The new statutes cover DOD, defense contractors and their employees or consultants who are former DOD employees (civilian, military, or consultants), and DOD employees (civilian, military, or consultants) who are former contractor employees.

The statute requires extensive, detailed reports of defense contractor employment by DOD and contractor employees and consultants and by contractors concerning employment or employment contacts by persons involved in procurement functions. DOD personnel are prohibited by 10 U.S.C. § 2397b from accepting any

³¹⁰ See generally J. CIBINIC & R. NASH, *FORMATION OF GOVERNMENT CONTRACTS* ch. 3 (2d ed. 1986).

³¹¹ Madden, *Government Consulting Contracts*, 83-3 *BRIEFING PAPERS* at 5 (1983).

³¹² Interim rules for the statute are contained in 52 Fed. Reg 12,383-01 (1987).

³¹³ Cibinic, *Conflict of Interests: Papered to Death in the Revolving Door*, 1-7 *THE NASH & CIBINIC REPORT* ¶ 55 (1987).

compensation from defense contractors within two years after DOD employment. Professor Cibinic states that although some restraining measures were warranted to control the "revolving door" problems in defense employment, "the problem has not been demonstrated to be so severe as to require the draconian provisions adopted by the statutes."³¹⁴

³¹⁴ *Id.* at 117.

Appendix

Comparative Advantages of Methods of Obtaining Experts and Consultants

ADVANTAGES

DISADVANTAGES

Regular Employees under Civil Service Laws

No limit on length of employment
Available for other projects
Can perform personal services
Can perform Gov't functions
Can be held personally liable
Less likely to cause congressional criticism

Personnel ceilings
Pay limits and double-dipping rule
Competitive requirements
Civil Service due process rights
Complex hiring & firing rules
Conflict-of-interest (C of I) rules
Hatch Act
Use of MSPB grievance system
FLRA jurisdiction

Temporary or Intermittent Appointment under 5 U.S.C. § 3109

Avoid civil service selection rules
Fewer C of I rules
May avoid double-dipping rule
May avoid Hatch Act
Money comes from separate pot
Can perform personal services

Requires enabling statute
Can't perform Gov't functions
Subject to OPM rules
Appointed for one year at a time
Some subject to personnel ceilings
5 USC app. 201; SF 278 Forms

Independent Contractors under 5 U.S.C. § 3109

Exempt from pay limits
No double-dipping rule
Fewer C of I rules
Avoid Hatch Act
Not subject to personnel ceilings

Can't perform Gov't functions
Can't perform personal services
Subject to oversight for contract
Competitive awards preferred
May be subject to labor standards

Independent Contractors under CICA

Exempt from pay limits
No double-dipping rule
Fewer C of I rules
Avoid Hatch Act
Not subject to personnel ceilings

Can't perform Gov't functions
Can't perform personal services
Subject to oversight for contract
Competitive awards preferred
May be subject to labor standards
Recompetition after 5 years
Must obey CICA and FAR

Used only when excepted
appointment can't be (FAR 37.1-3)

Members of Federal Advisory Committees

Generally exempt from C/I rules
Cheap source of advice

Requires concurrence by GSA
Terminated upon completion
Must have "balanced points of
view"
Subject to Gov't in Sunshine Act
Subject to Privacy Act requests
Must have Designated Federal
Official
Usually serve without pay

Grants and Cooperative Agreements

OMB A-120 prohibits use for CAAS

Definitions

Advisory and assistance services

"those services acquired from non-governmental sources by contract or by personnel appointment to support or improve agency policy development, decision-making, management, and administration, or to support or improve the operation of hardware and related software systems. Such services may take the form of information, advice, opinions, alternatives, conclusions, recommendations, training, and direct assistance. Advisory and assistance services include consultant services provided by individuals, as defined in the Federal Personnel Manual, Chapter 304." OMB Circ. A-120, para. 5.

Appointment

"is the act of employing a person for assignment to an authorized position or office in accordance with applicable laws, rules, and regulations. The appointment is made by the head of the department or agency involved or by some other officer or employee of the agency to whom such authority has been delegated under 5 U.S.C. §302(b)." GAO, 1 CPLM, ch. 2, para. B.

Commercial Activity

"is one which is operated by a Federal executive agency and which provides a product or service which could be obtained from a commercial source. A commercial activity is not a Governmental function. ... A commercial Activity also may be a part of an organization or a type of work that is separated from other functions or activities and is suitable for performance by contract." OMB Circ. A-76, para. 6.

Competitive Service

"shall include: (a) All civilian positions in the executive branch of the Government unless specifically excepted therefrom by or pursuant to statute or by [OPM] ... and (b) all positions in the legislative and judicial branches of the Federal Government ... which are specifically made subject to the civil service laws by statute. OPM is authorized and directed to determine finally whether a position is in the competitive service." 5 C.F.R. §1.2 (1987).

Consultant[s]

"means a person who serves primarily as an adviser to an officer or instrumentality of the Government, as distinguished from an officer or employee who carries out the agency's duties and responsibilities. A consultant provides views or opinions on problems or questions presented by the agency, but neither performs nor supervises performance of operating functions (23 Comp. Gen. 497). Generally, a

consultant has a high degree of broad administrative, professional, or technical knowledge or experience which should make the advice distinctively valuable to the agency." FPM ch.304, para. 1-2(1).

"is an individual who primarily serves in an advisory capacity in a particular field, rather than in the performance or supervision of an operating function (or functions)." DFARS 37.104 (70)(c)(1).

"Individuals possessing uncommon, special, current knowledge or skill in a broad area, combined with extensive experience in the application of such knowledge or skill in operational settings. As a consequence, consultants are well recognized outside their peer group." DODDIR 4205.2, encl. 2, para. A3b (Jan. 27, 1986).

Consultant Position

"is one which primarily requires performance of advisory or consultant services, rather than performance of operating functions." FPM ch. 304, subch.1, para. 1-2(2).

Consulting Services

"means those services of a purely advisory nature relating to the governmental functions of agency administration and management and program management. These services are normally provided by persons and/or organizations that are considered to have knowledge and special abilities not generally available within the agency. The form of compensation is irrelevant to the definition." FAR 37.201.

"means those services of a purely advisory nature relating to the governmental functions of agency administration and management and agency program management." OMB Circ. A-120, para. 5.

"means those services of a purely advisory nature relating to the governmental functions of agency administration and management and program management . . . These services are normally provided by persons and/or organizations who are generally considered to have knowledge and special abilities not generally available within the agency. The form of compensation is irrelevant to the definition." Proposed OMB Circ. A-120, para. 5.

Contract Support Services (CSS)

"are those services acquired from non-governmental sources to support the development, acquisition, and operation of specific weapon systems and to support or improve other functions of a generic nature, such as, agency polic, development, decision making, or management and operation of organizations." SECNAVINST 4200.31B, para 4.

CSS includes all categories of CAAS. SECNAVINST 4200.31B, para 3.

Contracted Advisory and Assistance Services (CAAS)

"are those services acquired directly by [DOD] from nongovernmental sources to support or improve agency policy development or decision-making, or to support or improve the management of organizations or the operation of weapon systems, equipment, and components. CAAS consists of the following four categories ... : category A--Individual Experts and Consultants (IEC), ... category B--Studies, Analyses, and Evaluations (SAE), ... category C--Management Support Services (MSS), ... and category D--Engineering and Technical Services (ETS)" DODDIR 4205.2, para. C1. (Jan. 27, 1986).

Employee

"means an officer and an individual who is--(1) appointed in the civil service ... (2) engaged in the performance of a Federal function under the authority of law or an Executive act; and (3) subject to the supervision of an individual named by [the appointing official] while engaged in the performance of the duties of his position." 5 U.S.C. § 2105(a) (1982)

Engineering and Technical Services

"Engineering and Technical Services (technical representatives) take the form of advice, training, or under unusual circumstances, direct assistance to ensure more efficient or effective operation or maintenance of existing platforms, weapons systems, related systems, and associated software." Proposed OMB Circ. A-120, para. 5(4).

Excepted Service

"shall include all civilian positions in the executive branch of the Government which are specifically excepted from the requirements of the Civil Service Act or from the competitive service by or pursuant to statute or by OPM under § 6.1 [authority to except positions from the competitive service] of this subchapter. ... [and] shall have the same meaning as the words 'unclassified service' or ... 'positions outside the competitive civil service'" 5 C.F.R. § 1.4.

Expert[s]

"means a person with excellent qualifications and a high degree of attainment in a professional, scientific, technical, or other field. An expert's knowledge and mastery of the principles, practices, problems, methods, and techniques of a field of activity, or of a specialized area in a field, are clearly superior to those usually possessed by ordinarily competent persons in that activity. An expert usually is regarded as an authority or as a practitioner of unusual competence and skill by other persons in the profession, occupation, or activity." FPM ch. 304, subch.1, para. 1-2(3).

"is an individual who is a recognized professional or highly skilled practitioner normally used to perform an operation function rather than to provide advisory or consulting services." DFARS 37.104 (70XcX1).

"Individuals possessing uncommon, special, current knowledge or skill in a particular field. They are outstanding specialists with a high level of peer recognition." DODDIR 4205.2, encl. 2, para. A3a (Jan. 27, 1986).

Expert Position

"is one that, for satisfactory performance, requires the services of an expert in the particular field, as defined in paragraph (3) [FPM ch. 304, subch.1, para. 1-2(3), defining "expert"], and with duties that cannot be performed satisfactorily by someone not an expert in that field." FPM, ch. 304, subch.1, para. 1-2(4).

Experts and Consultants

"The terms 'experts' and 'consultants' shall include those persons who are exceptionally qualified, by education or by experience, in a particular field to perform some specialized service. ... Depending on how they are used individuals may be either experts or consultants." DFARS 37.104 (70)(c)(1).

"Stenographic reporting services by individuals is included in the term 'expert or consultant services' for purposes of procurement by contract under this subsection." DFARS 37.104 (70)(c)(2).

Government Function

"is a function which is so intimately related to the public interest as to mandate performance by Government employees. Those (?) functions include those activities which require either the exercise of discretion in (?) applying Government authority or the use of value judgment in making decisions for the Government. ...Governmental functions normally fall into two categories:

- (1) *The act of governing*, i.e., the discretionary exercise of Government Authority. Examples include criminal investigations, prosecutions and other judicial functions; management of Government programs requiring value judgments, as in direction of the national defense; management and direction of the Armed Services; activities performed exclusively by military personnel who are subject to deployment in a combat, combat support or combat service support role; conduct of foreign relations; selection of program priorities; direction of Federal employees, regulation of the use of space, oceans, navigable rivers and other natural resources; direction of intelligence and counter-intelligence operations; and regulation of industry and commerce, including food and drugs.
- (2) *Monetary transactions and entitlements*, such as tax collection and revenue disbursements; control of the treasury accounts and money supply; and the administration of public trusts." OMB Circ. A-76, para. 6e (emphasis in original).

Individual Experts and Consultants

"persons possessing special, current knowledge or skill which may be combined with extensive operational experience." OMB Circ. A-120, para. 5(1).

"are persons possessing special, current knowledge or skill which may be combined with extensive operational experience. This enables them to provide information, opinions, advice, or recommendations that enhance understanding or complex issues, or improve the quality and timeliness of policy development or decision-making. These individuals may either work independently or as members of panels, commissions, or committees." DODDIR 4205.2, encl. 2, para. A (Jan. 27, 1986).

Inherent Governmental Functions

See "Governmental Functions."

Intermittent Employment

"means (a) occasional or irregular employment (b) on programs, projects, problems, or phases thereof, requiring intermittent service. When an intermittent expert or consultant works more than one-half of full-time employment, i.e., he or she is paid for all or any part of a day for more than 130 days in a service year, the employment automatically ceases to be intermittent and becomes temporary. Under these circumstances, the employee may be reappointed in the next service year only on a purely intermittent basis, as defined above. If at any time it is determined that the employee's work is no longer intermittent in nature, the employment must be terminated immediately." FPM ch. 304, subch.1, para. 1-2(5).

Management and Professional Support Services

"take the form of advice, training or direct assistance for organizations to ensure more efficient or effective operations of managerial, administrative, or related systems." OMB Circ. A-120, para. 5(3).

Nonpersonal Services Contract

"means a contract under which the personnel rendering the services are not subject, either by the contract's terms or by the manner of its administration, to the supervision and control usually prevailing in relationships between the Government and its employees." FAR 37.101.

Official Responsibility

"For the purposes of sections 205 and 207 of [title 18 U.S.C.], the term 'official responsibility' means the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government action." 18 U.S.C. § 202(b) (1982).

Personal Services Contract

"means a contract that, by its express terms or as administered, makes the contractor personnel appear, in effect, Government employees." FAR 37.101.

Professional and Management Services

"means services of a 'white collar' professional nature, e.g., preparation of reports or documentation, software development, development of logistics support plans, and other similar tasks, in support of management and control of programs." DFARS 37.270 (a).

Service Contract

"means a contract that directly engages the time and effort of a contractor whose primary purpose is to perform an identifiable task rather than to furnish an end item of supply. A service contract may be either a nonpersonal or personal contract. It can also cover services performed by either professional or nonprofessional personnel whether on an individual or organizational basis. FAR 37.101.

Special Government Employee

"For the purposes of sections 203 ["Compensation to Members of Congress, officers, and others in matters affecting the Government"], 205 ["Activities of officers and employees in claims against and other matters affecting the Government"], 207 ["Disqualification of former officers and employees; disqualification of partners of current officers and employees"], 208 ["Acts affecting a personal financial interest"], and 209 ["Salary of Government officials and employees payable only by United States"] of [title 18, U.S.C.] the term 'special Government employee' shall mean an officer or employee of the executive or legislative branch of the United States Government, of any independent agency of the United States or of the District of Columbia, who is retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days, temporary duties either on a full-time or intermittent basis, a part-time United States commissioner, or a part-time United States magistrate. ... [A] Reserve officer of the Armed Forces, or an officer of the National Guard of the United States, unless otherwise an officer or employee of the United States, shall be classified as a special Government employee while on active duty solely for training. ... A Reserve officer of the Armed Forces or an officer of the National Guard who is serving involuntarily shall be classified as a special Government employee. The terms 'officer or employee' and 'special Government employee'...shall not include enlisted members of the Armed Forces." 18 U.S.C. § 202(a) (1982).

Studies, Analyses, and Evaluations

"are organized, analytic assessments needed to provide the insights necessary for understanding complex issues or improving policy developments or decision-making. These analytic efforts result in formal, structured documents containing data or leading to conclusions and/or recommendations." OMB Circ. A-120, para. 5(2).

"'Studies and Analyses' means the broad class of intellectual activities characterized by the application of the tools of analysis to address a wide range of problems. . . ." DFARS § 37.270 (a) (Jan. 6, 1986).

Temporary Employment

"means (a) employment for one year or less (b) on programs, projects, problems, or phases thereof, requiring temporary service for one year or less." FPM ch. 304, subch.1, para. 1-2(6).

Table of Cited Statutes and Regulations

See Index for thesis page numbers.

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- 5 U.S.C. § 3107 (1982) ("Employment of publicity experts; restrictions").
- 5 U.S.C. § 3108 (1982) ("Employment of detective agencies; restrictions").
- 5 U.S.C. § 3104 (Supp. IV 1986) ("Employment of specially qualified scientific and professional personnel").
- 5 U.S.C. § 3109 (1982 & Supp. I 1983) ("Employment of experts and consultants; temporary or intermittent").
- 5 U.S.C. § 3110 (1982) ("Employment of relatives; restrictions").
- 18 U.S.C. § 202(a) (1982) ("Definitions") (defining "special Government employee" for the purposes of certain sections of 18 U.S.C.).
- Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (codified as amended in scattered sections of 5 U.S.C.).
- DOD Appropriations Act, 1987, Pub. L. No. 99-500, 100 Stat. 1783-100, -101 (1986).
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