

NATIONAL SCIENCE FOUNDATION
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ARLINGTON, VIRGINIA 22230



April 11, 2006

BUSINESS ANALYSIS: NATIONAL SCIENCE BOARD PROCUREMENTS

Introduction

In a letter of April 7, 2006, Dr. Warren Washington, Chairman, National Science Board (Board), requested that the Office of Inspector General (OIG) provide a business analysis regarding the propriety of the Board office's use of its appropriated funds "to procure the contractual services of an external legal firm for the purpose of obtaining independent legal research and analysis that will supplement the work of the Board office permanent staff on an "as needed" basis." (See attachment).

Executive Summary

Public Law 109-108¹ expressly provides for the Board's "employment of experts and consultants" to carry out its responsibilities under the National Science Foundation Act of 1950.² This statutory language authorizes the Board to contract under the provisions of the Federal Acquisition Regulations³ and OMB Circular Number A-76⁴ for non-litigation legal services from an independent contractor.

The NSF 2006 Appropriations Act⁵ explicitly provides that the Board may use its funds to employ experts and consultants. As such, in accordance with existing law and applicable GAO rulings, the Board office may use appropriated funds to procure contractual legal services for purposes other than litigation. The OIG business analysis in support of this conclusion follows.

¹ Fiscal Year 2006 *Science, State, Justice, Commerce, and Related Agencies Appropriations Act*. See, also, H.R. 2862.

² 42 U.S.C. § 1863 (articulates the duties and responsibilities of the National Science Board).

³ 48 CFR et seq.

⁴ This circular establishes federal policy for the competition of commercial activities.

⁵ Public Law 109-108.

Background

The National Science Foundation (NSF) was established as an independent executive branch agency in 1950.⁶ The Foundation consists of a National Science Board and a Director.⁷ The statutory responsibilities of the Board and the Director are independent but overlapping.⁸

The NSF Director generally has hiring authority for the Foundation's staff.⁹ However, the Board employees are appointed by the Board Chairman, assigned at the direction of the Board,¹⁰ and paid from the Board Office appropriation.¹¹

The National Science Foundation Authorization Act of 2002¹² provided new staffing and budgetary authorities for the Board, including the authority to enter into contracts.¹³ Senator Christopher S. Bond, Chairman of the Appropriations Subcommittee for the Foundation's budget,¹⁴ expressed the intent of Congress in providing the Board with the new authorities in the following exchanges with Dr. Warren M. Washington¹⁵ and Dr. John H. Marburger, III,¹⁶ in a hearing on April 3, 2003:

Senator BOND. Let me move on with funding for the National Science Board, a question for Dr. Washington, then I might ask Dr. Marburger to comment on it.

The 2003 appropriations act and NSF reauthorization act provided the Board with tools to ensure fully effective statutory responsibility, execution, and providing independent science policy advice and overseeing the budget. The administration zeroed out the Board's budget despite what I thought was rather clear in the law. I understand the Board intends to comply with the law. Dr. Washington, does that mean that you expect OMB and the administration to submit a budget amendment?

Dr. WASHINGTON. I am still working that issue, but the feeling of the Board is that we would, of course, comply with the authorization act, so we will be preparing materials and presenting them to the Congress as requested.

⁶ See Public Law 81-507.

⁷ 42 U.S.C. § 1861.

⁸ See, generally, 42 U.S.C. § 1863 and 42 U.S.C. § 1864.

⁹ 42 U.S.C. § 1873(a).

¹⁰ 42 U.S.C. § 1863(g), as amended (see PL107-368 § 15c).

¹¹ See Public Law 109-108 (November 22, 2005), Public Law 107-368 § 15c.

¹² Public Law 107-368 (2002), Enacted H.R. 4664.

¹³ In pertinent part, for fiscal year 2003, Section 5(a)(2)(e) provided: "\$3,500,000 shall be made available for the National Science Board, including salaries and compensation for members of the Board and staff appointed under section 4 of the National Science Foundation Act of 1950 (42 U.S.C. 1863), travel and training costs for members of the Board and such staff, general and Board operating expenses, representational expenses for the Board, honorary awards made by the Board, Board reports (other than the report entitled "Science and Engineering Indicators"), and contracts[.]"

¹⁴ Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations for Fiscal Year 2004.

¹⁵ Chair, National Science Board

¹⁶ Director, Office of Science and Technology Policy

Dr. MARBURGER. The administration intends to comply with the law, sir.

Senator BOND. Well, I have got a suggestion. I trust you will take that back. Where the Congress has provided the Board, Dr. Washington, with the authority to hire its staff, I understand the Board is about to hire an executive officer. I hope the Board will also hire its own legal counsel so that the Board understands the laws that we pass, confusing as they may be, but I would like to get an update from you on where you are going with that authority and what you are doing with that. . . .

Questions Submitted by Senator Christopher S. Bond . . .

Question. The Congress provided the National Science Board with authority to hire its own staff. I am a big proponent of this measure because it helps ensure the independence of the Board and helps the Board meet its oversight responsibilities.

Dr. Boesz,¹⁷ do you have your own legal counsel?

Answer. Yes; in carrying out audits, investigations, and other activities that are the responsibility of the Office of Inspector General (OIG), I periodically need legal advice and assistance. It is important that the OIG have its own counsel, to minimize conflicts of interest for the attorney serving in this position and to preserve the operational independence of the OIG. The OIG counsel reports directly to me.

Question. Dr. Boesz, do you believe the Board should hire its own legal counsel?

Answer. Yes; for the same essential reasons that the OIG has its own counsel, separate from the National Science Foundation Office of General Counsel, I believe it is important that the Board have its own counsel. The reasons are to minimize conflict of interest for the attorney serving the Board and to support Board independence.¹⁸

This dialogue suggests that the Congress was concerned about ensuring Board independence and provided budgetary authority to the Board to enable it to fulfill its statutory responsibility to provide independent science policy advice and oversight of the National Science Foundation.¹⁹ In support of this observation, the Board's current appropriation provides a more explicit mandate from the Congress concerning the use of the Board's appropriated funds. In pertinent part, Public Law 109-108 (November 22, 2005) provides:

¹⁷ Dr. Christine C. Boesz is the National Science Foundation Inspector General.

¹⁸ April 3, 2003, Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations for Fiscal Year 2004, U.S. Senate, Subcommittee of the Committee on Appropriations hearing. Honorable Senators Christopher S. Bond and Barbara Mikulski presiding.

¹⁹ 42 U.S.C. § 1863(4)(a).

OFFICE OF THE NATIONAL SCIENCE BOARD

For necessary expenses (including payment of salaries, authorized travel, hire of passenger motor vehicles, the rental of conference rooms in the District of Columbia, and *the employment of experts and consultants* [emphasis added] under section 3109 of title 5, United States Code) involved in carrying out section 4 of the National Science Foundation Act of 1950 (42 U.S.C. 1863) and Public Law 86-209 (42 U.S.C. 1880 et seq.), \$4,000,000. . . .

Discussion

The general rule is that “personal services may not be obtained on a contractual basis and must be performed by personnel employed in accordance with the civil service and classification laws.”²⁰ However, an exception to the general rule, allowing services normally performed by Government personnel to be performed under a proper contract with a private contractor, has been commonly recognized “if that method of procurement is found to be more feasible, more economical, or necessary to the accomplishment of the agency’s task.”²¹

In this regard, a “proper contract” for services is one in which the relationship between the Government and the contractor is not that of employer and employee.²² Given the Board’s statutory authority to contract for services,²³ the only issue is whether a proposed contract would create an employer-employee relationship between the Government and the law firm. If so, the contract would be prohibited.²⁴ However, if the law firm is an independent contractor, the contract would be permissible.²⁵ This determination is based primarily on the degree of supervision involved.²⁶

²⁰ 61 Comp. Gen 69 (1981).

²¹ *Id.*; 51 Comp. Gen. 561, 562 (1972); 45 Comp. Gen. 650 (1966); and, 43 Comp. Gen. 390 (1963); *see, also*, Federal Acquisition Regulations at 48 CFR Part 37.203-205 (2005).

²² 51 Comp. Gen. 561.

²³ Public Law 109-108 (November 22, 2005)(H.R. 2862, Science, State, Justice, Commerce, and Related Agencies Appropriations Act, 2006) provides: “Office of the National Science Board. For necessary expenses (including payment of salaries, authorized travel, hire of passenger motor vehicles, the rental of conference rooms in the District of Columbia, and the employment of experts and consultants under section 3109 of title 5, United States Code) involved in carrying out section 4 of the National Science Foundation Act of 1950 (42 U.S.C. 1863) and Public Law 86-209 (42 U.S.C. 1880 et seq.), \$4,000,000: *Provided*, That not more than \$9,000 shall be available for official reception and representation expenses.”

²⁴ 61 Comp. Gen 69.

²⁵ *Id.*, *See, also*, Federal Acquisition Regulations, 48 CFR Part 7.5(d)(18) (Inherently Governmental Functions) which provides: “The following is a list of examples of functions generally not considered to be inherently governmental functions. However, certain services and actions that are not considered to be inherently governmental functions may approach being in that category because of the nature of the function, the manner in which the contractor performs the contract, or the manner in which the Government administers contractor performance. This list is not all inclusive: . . . (18) Contractors providing legal advice and interpretations of regulations and statutes to Government officials. . . .”

²⁶ *Id.*

The Comptroller General of the United States has upheld the authority of agencies to procure the services of private attorneys under 5 U.S.C. § 3109²⁷ for purposes other than the conduct of litigation, which under 5 U.S.C. § 3106 must be conducted by the Department of Justice.²⁸ However, when an agency contracts under the authority of 5 U.S.C. § 3109 with a consultant on an independent contractor basis, it is required to follow formal contracting procedures and otherwise comply with the applicable statutory and regulatory provisions governing Federal procurements and the recording of obligations.²⁹

The hiring of outside counsel by the Federal Government is a common practice that has been employed by a number of agencies.³⁰ The Foundation itself, in fact, contracted with a former NSF General Counsel in 1976 to prepare a report with recommendations on the relationship of the Board to the Director. The counsel's report noted that the Director "has two voices – one as a member of the Board, the other as Director – and being subject to the constraints of the Administration of which he is part may not always be able to support a Board position."³¹ This observation highlights a potential conflict of interest if a single counsel attempts to serve both parties. The client of the Foundation's General Counsel is unambiguously the Director, whose legal needs he or she is obligated to meet first and foremost. The independent authority of the Board to contract with outside attorneys can be used to prevent possible conflicts of interest and ensure that the Board obtains reliable and objective legal advice when it is considering a position that may diverge from that of the Director.

²⁷In pertinent part, 5 U.S.C. § 3109 provides: "Employment of experts and consultants; temporary or intermittent (a) For the purpose of this section – (1) "agency" has the meaning given it by section 5721 of this title; and (2) "appropriation" includes funds made available by statute under section 9104 of title 31. (b) 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 51 and subchapter III of chapter 53 of this title [5 USCS §§ 5101 et seq. and §§ 5331 et seq.]; and (3) section 5 of title 41, except in the case of stenographic reporting services by an organization. However, an agency subject to chapter 51 and subchapter II of chapter 53 of this title [5 USCS §§ 5101 et seq. and §§ 5331 et seq.] 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. * * *" In short, under 5 U.S.C. § 3109, when authorized by an appropriation, the services of experts or consultants may be obtained either on an independent contract or employment basis. See B-133381, July 22, 1977; 61 Comp. Gen. 69.

²⁸ See 61 Comp. Gen. 69; Also see B-133381, July 22, 1977; B-192406(2), October 12, 1978; B-114868.18, February 10, 1978; and, B-141529, July 15, 1963.

²⁹ See 61 Comp. Gen. 69; *see, also*, Federal Acquisition Regulations, 48 CFR Sub Part 37.2 (Advisory and Assistance Services) and OMB Circular A-76.

³⁰ See *Contracting By the Federal Government for Legal Services: A Legal and Empirical Analysis* (63 Notre Dame L. Rev. 399, 471-485 (Appendix A – Agency Use of Outside Counsel) (1988)

³¹ See *A Study Prepared for the National Science Foundation*, May 28, 1976, by William J. Hoff (Mr. Hoff was a former NSF General Counsel retained by the Foundation to prepare a report containing the historical record of the relationship and role of the Board and the Director and to make recommendations for certain operational changes).

Conclusion

The 2002 Authorization Act for the Foundation authorizes the Board to enter into contracts, and the 2006 Appropriations Act specifically provides that the Board may use its appropriated funds to employ experts and consultants, including non-Government legal services for purposes other than litigation.

National Science Board

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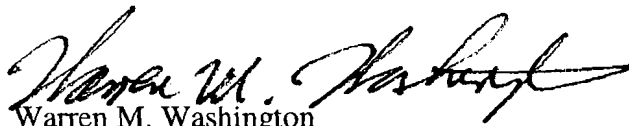
April 7, 2006

Dr. Christine C. Boesz
Inspector General
National Science Foundation

Dear Dr. Boesz,

In my capacity as Chairman of the National Science Board, I have authorized the Board Office to procure the contractual services of an external legal firm for the purpose of obtaining independent legal research and analysis that will supplement the work of Board Office permanent staff on an "as needed" basis. For example, such additional services will be useful for cases of possible conflict of interest. Please provide me with your opinion about issues associated with use of the Board's appropriated funds for such a contract.

Sincerely,


Warren M. Washington
Chairman