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In the private sector, traditionally, corporations have obtained needed legal services not only by hiring attorneys to work full-time as their employees but commonly by contracting with private lawyers or firms to furnish advice or other assistance. The escalating cost of legal services has caused reevaluation of this practice,[1] though reliance on outside counsel, particularly in the area of litigation, remains substantial.[2]

Contracting for legal services by the Federal Government has been, and continues to be, the exception rather than the rule. Legal services are generally provided by agency staff or the Department of Justice (Justice). However, the Federal Deposit Insurance Corporation (FDIC) and the Federal Savings and Loan Insurance Corporation (FSLIC) contract out a sizeable amount of their legal work, a large portion of which is litigation-related. Their expenditures for outside counsel have grown geometrically since the early 1980's as more and more banking institutions within their respective jurisdictions have experienced serious financial problems. In 1985 it was reported that these two government entities together accounted for eighty percent of all fees paid by the federal government to outside counsel during 1983 and 1984.[3] Moreover, according to that article, eighteen federal agencies and departments (in-

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An earlier version of this article was prepared by the author as a report to the Administrative Conference of the United States. The report appears in the 1987 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES REPORTS AND RECOMMENDATIONS, Vol. I at 279. At its June 1987 Plenary Session the Conference adopted recommendations to federal agencies relating to the use of outside counsel. *See* 1 C.F.R. § 305.87-3 (1988). This article, however, represents the views of the author. It has not been adopted by the Conference on any of its committees. An earlier draft report dealing with federal agency hiring of outside counsel was prepared for the Administrative Conference by the law firm of Wolf, Block, Schorr, and Solis-Cohen. The article that follows draws, to some degree, on the research and interviews conducted by that prior consultant, though the analysis and conclusions contained herein differ substantially from the Wolf Block Report. The footnotes herein cross-reference the appropriate portions of that draft report when it is expressly relied upon.

Many federal officials took the time to discuss with me the issues raised in this article as well as to review earlier drafts. Obviously the final product reflects my findings and judgments, not necessarily theirs. Of particular assistance were William S. Coleman, Jr. (Deputy Associate Administrator, Office of Federal Procurement Policy), Thomas A. Rose (Deputy General Counsel) and Carroll R. Shifflett (Assistant General Counsel) of the Federal Deposit Insurance Corporation, and Ronald J. Oberle (Associate General Counsel) of the Federal Home Loan Bank Board. Moreover, Jeffrey Lubbers and David Pritzker of the Administrative Conference provided their guidance and insight throughout the completion of my study. Finally, the author would like to acknowledge the efforts of three University of Pittsburgh students, Elizabeth C. Detwiler, Stephen M. Rosenblatt, and Marianne G. Emig, whose assistance was invaluable.

1 *See, e.g.*, Fischer, *The Changing Role of Corporate Counsel*, 4 J. L. & COM. 45 (1984).

2 *See generally The Role of Corporate Counsel in Litigation*, ALI-ABA COURSE OF STUDY MATERIALS (1986) [hereinafter "ALI-ABA Materials"].

3 Nat'l Law. J., Feb. 4, 1985 at 1, col. 3.

cluding the FDIC and FSLIC) paid a total of approximately fifty million dollars in 1983 and 1984 for the services of private lawyers.[4] The statistics thus collected indicated that the practice of legal service contracting extended far beyond the banking agencies.[5]

While reliance by private corporations on both in-house and outside attorneys is hardly a matter of public concern and debate, the Federal Government's similar practice has provoked both publicity and debate, though the scope of the government's use of private counsel is, in most instances, less on a relative scale than in the case of many private corporations. There appear to be at least three basic sources of these differing reactions:[6]

a. While elimination or encouragement of the government's reliance on private attorneys will hardly balance the federal budget by itself, the current concern over mounting federal deficits and the need for effective control translates into a perceived need to ensure that all government operations are conducted on a cost-effective basis to the extent that the law permits. Since government personnel costs attributable to full time employee-attorneys may be substantially less (or more) than the cost of obtaining private legal assistance, the "make or buy" decision with regard to legal services is potentially a fruitful area for examination.

b. While "favoritism" in choosing a legal advisor may be bad business for a corporation, it may present even greater problems in the public sector. This has a variety of aspects, the most important being that the government presumably does not operate for the benefit of private entities or individuals who have an inside track on obtaining its largesse. It is expected that government monies will be used largely for "public" purposes not "private" advantage. The very legitimacy, and effectiveness, of the government requires that both the fact and substantial appearance of "favoritism" be avoided in government contracting.

c. Finally, the place of the law and the lawyer in government must be considered. It is impossible to divorce the ideas of government and law, at least as traditionally conceived in this country. Law is what knits the various parts of the governmental organism together and law is generally perceived to be the exclusive preserve of the lawyer. From this it can be argued that, unless the government's lawyers owe exclusive fealty to the government in their work (i.e. are its employees which it can control), the distinction between the public and private sector vanishes and

4 *Id.* The FDIC spent in excess of $30 million in 1983-4 and the FSLIC in excess of $8 million during that period. Most of this was charged against the estates of the failed institutions, not appropriated funds.

5 *Id.*

6 In addition, the size of the corps of lawyers in the employ of the United States Government no doubt prompts a questioning reaction when it is revealed that private sector lawyers are also relied upon. Statistics indicate that in 1985, the government employed over 20,000 lawyers (not counting the federal judiciary). *See* B. CURRAN, SUPPLEMENT TO THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 1985 3 (1986) (3.1% of all 655,191 lawyers).

with it the idea that the government exists to a large degree to control private activity for a "greater good."[7]

Regardless of the difficulties of categorizing governmental action as "executive," as opposed to "judicial" or "legislative" for various separation of powers issues,[8] most would concede that the authority to sue in a judicial proceeding to enforce federal law is an "executive power."[9] Traditionally the lawyer is the principal actor in the execution of this power by his monopoly of access to the courts. As the Supreme Court indicated, responsibility for conducting civil litigation in the courts of the United States to vindicate "public rights" must be vested in "Officers of the United States" appointed by the President[10] or, if Congress permissibly so authorizes, by "the Courts of Law" or the "Heads of Departments."[11] Unless a private attorney retained to litigate for the government is appointed as an "officer," the contract may involve an unconstitutional delegation of power where an "Officer of the United States" does not possess or in fact does not exercise sufficient control over the activities of the private attorney in his or her handling of the litigation.[12]

Moreover, governmental policy-making itself is a function that must ultimately be vested, if not in Congress, then in the President or an "Officer of the United States" appointed in the manner prescribed by Article II of the Constitution.[13] To the extent that the activities of a private attorney retained by the government can be considered to involve policy-

7 This is not to say, however, that the public/private sector boundaries in the United States are clearly distinct. *See generally* Symposium, *The Public/Private Distinction*, 130 U. PA. L. REV. 1289 (1982).

8 *See, e.g.*, Bowsher v. Synar, 106 S. Ct. 3181 (1986); Immigration & Naturalization Service v. Chadha, 462 U.S. 919 (1983). *But see* Morrison v. Olson, —— U.S. ——, 48 S. Ct. Bull. (CCH) B4006, B4037 (June 29, 1988) (In discussing the classification of officers as "executive," "quasi-legislative," "quasi-judicial," or other, the Court noted that while a classification of functions may be relevant, "the real question is whether the removal of restrictions are of such a nature that they impede the President's ability to perform his constitutional duty. . . .").

9 *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 138 (1976).

10 *Id.* at 138-39, 140.

11 U.S. CONST. art. II, § 2.

12 *Cf.* Morrison v. Olson, —— U.S. ——, *supra* note 8 at B4006, B4042 ("[T]hese features of the [Ethics in Government Act of 1978] give the Executive Branch sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties.") "Officers of the United States" do not include all "employees" of the United States; "employees" are "lesser functionaries subordinate to officers of the United States." 424 U.S. at 126 n.162. As noted later, the distinguishing characteristic of a federal "employee" for statutory, and presumably constitutional purposes, is the degree of control exercised over his or her work. *See infra* and accompanying text notes 45-53. *See generally* Friedlander v. United States Postal Service, 64 ADMIN. L. 2d (P & F) 1337 (D.D.C. 1987) (The court rejected a claim that the Postal Service is a business enterprise wholly independent of the executive branch of government and therefore functions unconstitutionally. In part the court's reasoning focused on the degree of control exercised by the executive officials, including the Attorney General, over the USPS and its activities, including litigation.).

13 *See* Buckley v. Valeo, 424 U.S. at 126 ("any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States' "); at 140-41 ("rulemaking . . . represents the performance of a significant governmental duty exercised pursuant to a public law . . . [and] may . . . be exercised only by persons who are 'Officers of the United States.' "). "Policy-making" delegated by Congress to the President or his appointees is currently viewed as an "executive function." *See* Bowsher v. Synar, 106 S. Ct. at 3192 (1986); Immigration and Naturalization Service v. Chadha, *supra* note 8 at 954 n.16.

making, the need for sufficient control by "officers" of the United States is similarly present.[14]

Finally, aside from any constitutional arguments, there are a variety of pragmatic considerations which must be considered in connection with the government's use of private counsel to perform both litigation and non-litigation services and the degree of control required.[15]

Adequate control presumptively exists when a full-fledged employer-employee relationship has been established. This is not to say, however, that there are no circumstances where countervailing considerations, including the need to conduct operations in a cost-effective manner, may not justify some departures from the norm.

Traditionally, most federal agencies have relied on their own legal staffs for non-litigation services. Congress has largely concentrated litigation services for the government in the Department of Justice.[16] There have been instances, however, where a federal entity has been given the power by statute to litigate through its own employees[17] or even through outside counsel.[18] Moreover, on occasion Justice has entered into memoranda of understanding with certain agencies permitting the latter to represent their interests in court through their own attorneys.[19]

The article that follows examines the legal (including policy) issues presented by agency use of outside counsel for litigation and non-litigation services. The basic questions are (1) whether and when such legal services contracting is permitted as a matter of law; (2) what considerations should govern the decision to seek outside assistance where the necessary authority exists; and (3) what procedures must or should be followed in the procurement of those services. The three concerns discussed above are central to the treatment of these matters.

The fundamental conclusion of this article is that the government may justifiably contract out for legal services where it will be cost-effective to do so, but only in a such a manner as to avoid the fact or appearance of favoritism and only where close control over attorney conduct is

14 *See* Melcher v. Federal Open Mkt. Comm., 644 F. Supp. 510, 523 n.26 (D.D.C. 1986) (composition of Federal Open Market Committee to include other than governmental officials held to be constitutional, in part because of the nature of the authority exercised and the degree of control retained by governmental officials). *See also* Bruff, *The Constitutionality of Arbitration in Federal Programs*, 1987 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES REPORTS AND RECOMMENDATIONS, Vol. I at 533, 550-56.

15 *See infra* note 42.

16 *See* 5 U.S.C. § 3106 (1982):

> Except as otherwise authorized by law, the head of an Executive department or military department may not *employ an attorney or counsel* for the conduct of litigation in which the United States, an agency, or employee thereof is a party, or is interested, or for the securing of evidence therefor, but shall refer the matter to the Department of Justice . . . .

(emphasis added). *See also* 28 U.S.C. §§ 516, 518, 519, 547(2) (1982). *See generally infra* note 43 for the reasons.

17 *See, e.g.*, 7 U.S.C. § 228a (1982) (Department of Agriculture); 15 U.S.C. § 56 (1982) (Federal Trade Commission); 15 U.S.C. § 2061(e) (1982) (Consumer Product Safety Commission); 42 U.S.C. § 7605 (1982) (Environmental Protection Agency).

18 *See, e.g.*, 10 U.S.C. § 1037 (1982) (Department of State); 15 U.S.C. § 637(b)(1)(E) (Small Business Administration); 22 U.S.C. § 2504 (1982) (Peace Corps); 26 U.S.C. § 9010 (1982) (Federal Election Commission).

19 *See, e.g.*, 42 U.S.C. § 7605(b) (1982) (EPA).

either clearly present or unnecessary in order to protect the constitutional and other previously noted concerns.[20]

Unfortunately, in practice this general proposition is easier to state than apply. For example, it may be cheaper in monetary terms to use inside counsel on a case. Because of the lack of expertise of agency attorneys, however, the likelihood of a satisfactory result may be less in some, perhaps unknown degree than if outside counsel is used. Unless a statute mandates that a particular procedure be followed in procurement, difficult choices may be presented in fashioning a procedure that both mitigates the costs of delay and at the same time substantially dissipates appearances of favoritism. Finally, the degree of control necessary in a particular case cannot be decided in the abstract. Only close attention to the particular facts and the surrounding context can result in a satisfactory resolution of this problem.

As a point of departure, the first section to follow examines current corporate practices with regard to retaining outside counsel. This offers some insights into practices and procedures that may help ensure cost-effective government use of the legal services of non-government attorneys. The next section discusses the law of procurement and civil service as it applies to service contracting. The 1986 Debt Collection Amendments,[21] which authorize the Department of Justice to contract with private attorneys to collect delinquent loans, are then discussed in detail for the light they shed on the issues presented. A survey of current agency practice focusing on the experience of the FDIC and FSLIC follows this. After a short discussion of the applicability of federal conflict of interest law, general conclusions and recommendations are set forth.

I. Corporate Practice in Retaining Outside Counsel: A Point of Comparison

As noted at the outset, the federal government is not the only entity that both employs a staff of attorneys on a full-time basis and also retains outside counsel to provide it with legal services. This is common practice for most corporations and other business entities, though in recent years the escalation of the costs of legal services has been a potent factor forcing reconsideration of traditional approaches in this area.[22] Still, apparently forty percent of the expenditures of corporate legal departments are for outside counsel.[23] Obviously there are significant distinctions between the federal agency and the private sector purchaser which must be considered in drawing on the latter's experience and practices. In this regard the most significant differences include the congressional policy

20 *See supra* notes 8-15 and accompanying text.

21 Pub. L. No. 99-578, — Stat. — (approved October 28, 1986).

22 *But see* ALI-ABA Materials, *supra* note 2, at 9 ("The results [of survey] tend to show that despite the large amount of publicity which has been given to the growth of in-house litigation departments, the bulk of corporate litigation is still handled in the traditional way, by outside counsel"). The Charts reprinted in notes 29, 32 and 37 *infra* were prepared as part of the 1985 survey of corporate law departments by Price Waterhouse. They are reprinted here with permission. All rights reserved.

23 *Id.* at 23.

of vesting the Department of Justice with most of the litigation authority of the federal government,[24] along with the public interests at stake in government litigation and other legal matters.

Nevertheless, examination of private sector practice may be a source of good ideas that can defensibly be emulated by the various federal agencies and other entities. In fact, as will be seen later,[25] at least some federal agencies do follow practices that find clear analogies in the corporate area. There is no reason to believe that by continuing to study each other's approaches to the problems of retaining outside counsel, the practices of each cannot be improved.[26]

As part of the research for this study, an informal survey was conducted of corporations with regard to their practices in retaining outside counsel. The subjects included businesses involved in manufacturing, service and other areas.[27] In addition various published materials dealing with corporate practices were reviewed.[28] The survey and literature disclosed a considerable lack of uniformity in the manner in which corporations deal with the matter of outside counsel as well as some practices that, on their face, might be profitably adopted by federal agencies.

A. *The Presence of Written Guidance*

Some corporations have no internal documents that relate to the retention and supervision of outside counsel. This may be due to the fact that use of outside counsel is infrequent. Alternately, only one or a few persons may generally be involved in the hiring decision and the follow-up and it is not considered essential to write down what procedures must be observed.

Where memorialization of the practices exists, it ranges from the general to the very specific. Matters covered in the guidance documents

24 *See supra* notes 16-19 and accompanying text.

25 *See infra* notes 316-425 and accompanying text.

26 The American Corporate Counsel Association is a source of information for federal agencies interested in learning more regarding corporate practice.

27 This survey included H.J. Heinz Co., PPG Industries, Inc., USX Corporation, Westinghouse Electric Corp., Equimark Corp., USAir, Allegheny International, Mellon Bank Corp., Dravo Corp., Consolidated Natural Gas Co., Rockwell International, Koppers Co., Inc., and the Aluminum Company of America. Since some of the companies consider their approaches to retaining and supervising outside counsel "confidential," there is no specific attribution in this report for various statements.

The questionnaire to these companies indicated the following areas of interest:

1. The type or types of legal services which are provided to the company through outside counsel.
2. The reasons for seeking outside legal advice where the corporation already employs attorneys.
3. The process used to choose a firm or attorney (e.g., some type of competitive bidding arrangement).
4. The criteria employed to choose a particular firm or attorney and whether these criteria or the process of choice are described in any internal written document.
5. The type of supervision or control maintained and the means for doing this (e.g., weekly status reports).
6. Conflict of interest or other ethical problems that have arisen and how the likelihood of these problems can be reduced.
7. The range of fees for attorney, paralegal and support services paid to outside counsel.

28 *See* ALI-ABA Materials, *supra* note 2.

include the criteria for deciding when to contract-out for the services, the considerations relevant to the choice of a particular attorney or firm to handle a problem, the nature of the supervision expected of inside counsel over the outside attorney, and reporting and billing practices.

B. *Reasons for Seeking Outside Counsel*

There are a variety of stated reasons for seeking outside legal services.[29] For some corporations, litigation is always, or almost always, the preserve of outside counsel. Often one of the principal motivating factors in the hiring decision is the limit on staff resources and time to do necessary work. Somewhat related to this is the need for specialized expertise that cannot be found within the corporation's ranks. However, where a particular type of legal problem is likely to recur, the argument for hiring additional staff to deal with that situation may prevail depending on a variety of factors, including the cost of hiring outside counsel on a regular basis to handle such cases. Where lack of in-house expertise is cited as a reason, often the legal issues presented are governed by local or state law or by certain aspects of federal law that are generally within the domain of specialists.

In some instances corporations ask for the legal advice of outsiders because of a particular need for "independence" in the rendering of the opinion or as a check on an opinion rendered internally in an area where the inside lawyer may have less experience than outside counsel and some "comfort" might be obtained by confirmation of the inside view. In other cases outside counsel, because of prior contacts with the decisionmaker or otherwise, may have superior knowledge of the decisionmaker's concerns; or outside counsel may simply be perceived by the decisionmaker as someone who should be listened to closely. Similarly, a local judge or jury may view with skepticism or hostility presentations by attorneys coming from outside the district. Or, finally, the cost for the corporation of transportation to and lodging in the geographical location of trial may be so great that the only cost-effective manner of proceeding is to hire locally.

C. *Procedures for Choosing Counsel*

The survey disclosed few instances where a formal bidding procedure for hiring outside counsel was adopted.[30] Apparently an underlying assumption is that competitive procedures may not adequately permit examination of the quality of the service provider, though, as will be noted below, procedures for competition can be designed to consider both cost and other relevant factors.[31] While formal competitive procedures might be eschewed by corporations, however, firms often engage in informal cost comparison.

A corporation may have a continuing relationship with a firm (or firms) in a particular geographical area (or areas). This relationship may

29 *See generally id.* at 30, 50-53.
30 *Id.* at 31-32.
31 *See infra* notes 164-67 and accompanying text. *But see infra* note 201.

Chart 1—Policy Reasons for Retaining Outside Counsel

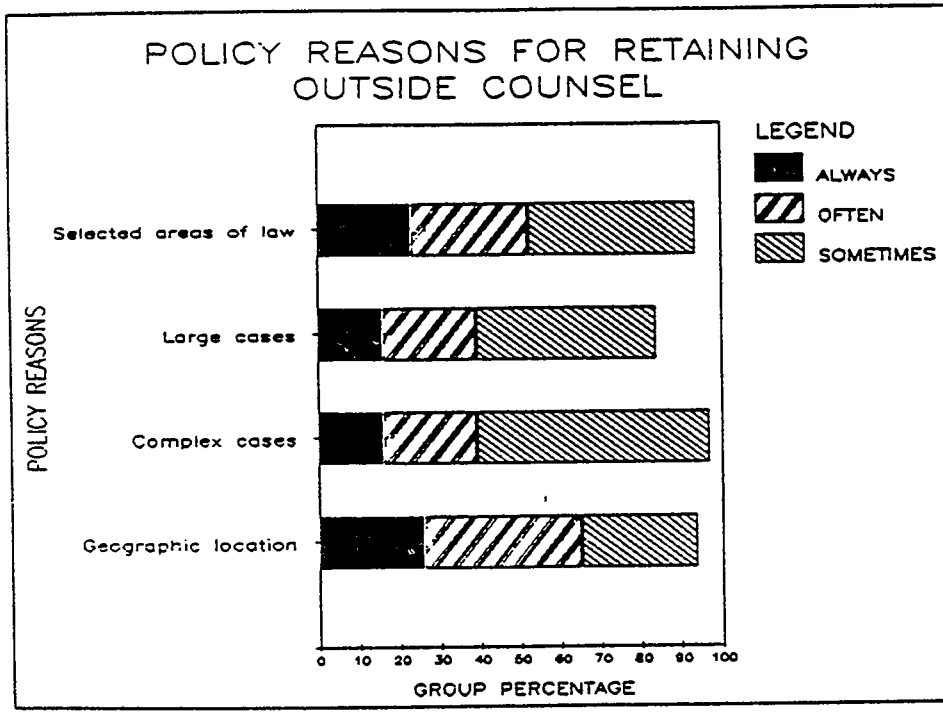
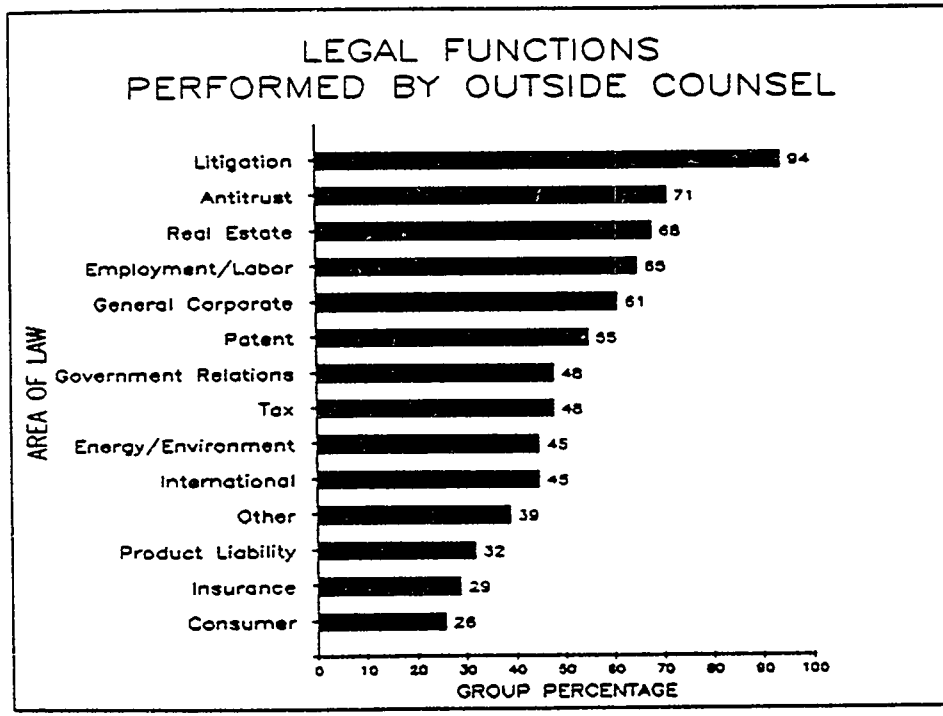


Chart 2—Legal Functions Performed by Outside Counsel



give the client confidence that the firm will provide good work at an economical price and, therefore, little shopping around for alternatives may be required as needs for legal services arise. These firms can also provide references to other lawyers where the firms cannot, for one reason or another, provide needed assistance to the corporation.

Many companies surveyed maintained lists of firms which had been used in the past as a starting point for the search for a lawyer. In one case the corporation maintains a computerized list of firms presently employed or those used in the recent past along with a list of firms which have not been relied upon for several years. This listing, periodically updated, includes evaluations of the firms and their lawyers based on the quality of work product, promptness, responsiveness and depth of research, cost of handling matters, and results obtained on prior occasions. That listing also includes the rates charged in past and pending cases and the types of work performed by the firms listed.

Where written criteria exist for determining when to go outside and whom to choose, there may be instructions to staff regarding the considerations that should be taken into account to insure that the hire is cost-effective.

D. *Supervision and Control*

The degree of supervision and control of the work of outside counsel by corporate employees varies from little to a "team" approach

whereby inside and outside counsel work hand in hand.[32] In some instances corporate legal departments routinely exercise close control. For other corporations the extent of control is decided on a case by case basis. Even where corporate counsel is not part of the "team," he may have to be copied on all pleadings, motions, and correspondence prepared, at least where they are deemed "significant" by the outside attorney handling the matter. There may be a requirement imposed generally or in specific cases for prior approval of any pleadings, motions and other documents of importance. In some instances the corporation may reserve the right to approve all discovery or it may in fact take over the pretrial aspects of a case entirely.

At the time a matter is referred to outside counsel, a general plan for handling the case may be jointly agreed upon by corporate counsel and the attorney retained. A litigation budget of some detail may also be agreed upon and periodically updated as a method of cost control.[33] Written status reports may be required, although some corporations seem to think that this is not a cost-effective way to maintain control and supervision. It may create billable attorney time which can be saved by a phone call. Moreover, corporate counsel may be involved in approving the particular associates and paralegals who work on the case or at least may sign off on a general proposal for staffing. Outside counsel may be instructed that the corporation will not pay for the time necessary to edu-

32 *See* ALI-ABA Materials, *supra* note 2, at 32.

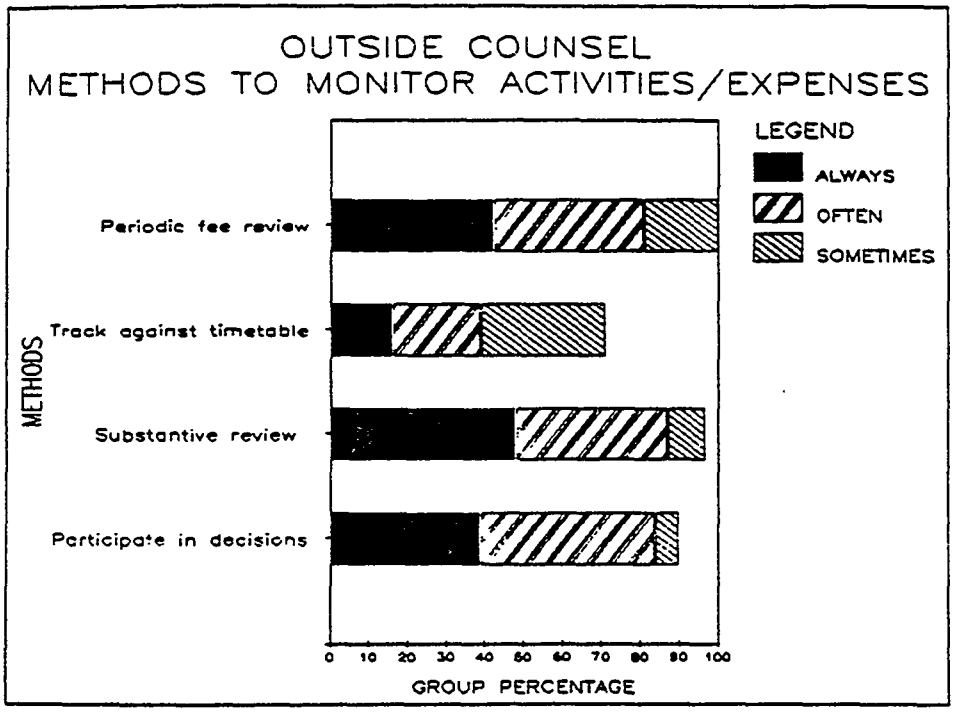


Chart 3—Outside Counsel Methods to Monitor Activities/Expenses

33 *Id.* at 138.

cate new members of the "team" regarding the case and the issues raised where there are staffing changes during the case. Time for basic legal research in an area necessary to educate firm lawyers may not be billable to the client.[34] Management programs, including proprietary, standardized forms and associated software, are available to control litigation costs.[35]

In order to avoid misunderstandings regarding the expectations and restrictions applicable to the outside counsel in handling legal work assigned, the corporation may distribute to outside attorneys a written description of the procedures that apply to the handling of the case.[36] For this or other reasons, the decision to go outside, the choice of counsel, and the supervision activities may be concentrated in the general counsel's office of the corporation.

E. *Fees*

Naturally, fee arrangements vary with the type of work.[37] Where hourly rates are charged, they generally range from $80 up to $300 depending on the nature of the problems presented, the geographical location where the services are rendered, and the expertise and repute of the lawyer or firm hired. Fees for paralegals generally range from $25 to

34 *Id.* at 74.
35 *Id.* at 93-123.
36 *Id.* at 66-80 (for an example of a written description of the procedures which apply to a firm when handling a case for CIBA-GEIGY Corp.).
37 *Id.* at 31.

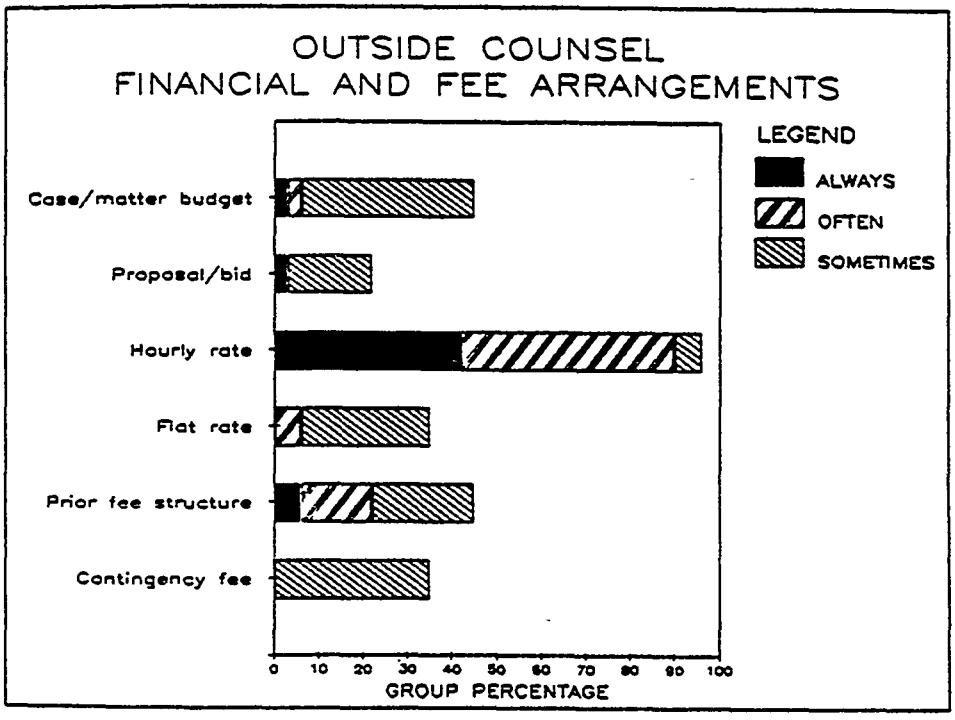


Chart 4—Outside Counsel Financial and Fee Arrangements

$70. Flat fees and "sharing" arrangements are used on occasion. However, it is often not the hourly rate that is crucial in the decision to retain outside counsel because, for example, the overall bill for an experienced, but high-priced, attorney may be less than if the work is billed at a lower rate by one who has had little exposure to the issues raised. Of course, even if the cost is greater, the quality of work may justify the larger fee.

Discounts in normal fees are often negotiated and fee comparisons between firms may be made before the choice of an attorney. Moreover, once the relationship is established, the corporate client may require notice and advance approval before a rate schedule for partners, associates and paralegals is increased and the client is expected to pay the increased fees. Some corporations specify the type of overhead charges for which it will be responsible.[38] They may also indicate that where work is done on their behalf that might be used for other clients (and for which those clients may be billed) an appropriate discount of the fees charged to the corporate client is expected. Furthermore, cost control may be achieved by refusing to pay for case-familiarization of partners, associates and paralegals who replace other such personnel in handling the matter.

F. *Billing Practices*

Requiring monthly invoices is not uncommon. This allows the corporate client to keep a close watch on costs before they skyrocket out of control. Information requested from outside counsel on invoices for payment generally includes the names of the individuals performing the services during the reporting period, their hourly billing rates, the dates of work, description of the work done and time spent, miscellaneous charges for which reimbursement is sought, and the aggregate amount of the fees billed on the matter to date.

Clearly many corporations are increasingly taking steps to insure that the use of outside counsel is cost-effective.[39] It is also the case that where a corporation does a significant amount of litigation in-house, one of the main reasons for this is the perceived need for more control.[40] The control factor is an extremely important consideration with regard to federal agencies' use of outside counsel.[41]

II. Government Use of Outside Counsel: In General

In obtaining legal services, whether or not of a purely advisory nature, a number of inquires must be made by contracting agencies.[42] Moreover, two bodies of law are potentially relevant: the law of civil ser-

38 *Id.* at 75.
39 *Id.* at 49-50.
40 *Id.* at 18 (cost is also a principal factor).
41 *See supra* notes 8-15 and accompanying text.
42 The agency must answer these questions:
1. Is there authority, statutory or otherwise, for the retention? While the agency's organic statute may seem to permit it, detailed analysis of both the relevant statutes and the type of relationship sought to be established is required. For instance, where the attorney will litigate, even though the agency may have statutory authority to enter into an "employment" relationship with outside lawyers in some circumstances, the statutes vesting litigation responsibility in the Department of Justice may limit what appears to be a broad grant of authority.

vice and public contract law. The former is largely in the domain of the Office of Personnel Management (OPM). The latter is regulated to a great degree by the General Services Administration and the Department of Defense, as well as by the Office of Federal Procurement Policy (OFPP) within the Office of Management and Budget. The relationship between the agency and the person providing services may fall wholly within the civil service regime, wholly within the realm of government procurement law, or span both systems of regulation. Generally speaking, when an employer/employee relationship has been established, civil service law provides the applicable governing restrictions. When the service provider is acting as an independent contractor, procurement principles alone control. In determining how to characterize the relationship, the degree of government supervision and control over the work of the service provider is of utmost importance.

Viewing matters in this manner, one of the principal issues raised by agency retention of outside counsel relates to the question of control. In view of the governmental, public and private stakes at issue where legal services are rendered, should an agency use other than full-time employees which it can control and supervise on a continuing basis? Where the agency wants to obtain merely an outsider's legal evaluation, the need for close control over the performance of the attorney's work would appear generally unnecessary. However, where the attorney litigates on behalf of the government, there are serious questions as to whether the agency should (or can in some instances) surrender that degree of control necessary to permit characterization of the contractor as "independent" as that term is generally used in government personnel law.[43] The

2. Has there been a demonstration of need sufficient to justify seeking assistance from other than agency staff? A strong showing of need may in fact impact on the resolution of the first issue, that is, the authority to contract out the service (e.g. inherent authority).

3. What procedures and restrictions (such as compensation limits) apply to the hire? This requires statutory analysis, examination of trans-agency and agency-specific rules in addition to examination of the type of relationship created by the contract.

43 The Justice Department has noted:

> The authority of the Attorney General over litigation is recognized by law, *see* 5 U.S.C. § 3106 and 28 U.S.C. §§ 516, 518, 519, and 547(2). This authority is supported by both constitutional doctrine and eminently practical considerations. . . .
>
> [T]he Supreme Court has held that "primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights" may be vested only in "Officers of the United States" who have been appointed in conformance with the provisions of the Appointments Clause. *Buckley v. Valeo*, 424 U.S. 1, 140 (1976). If the private counsel who are hired to represent the United States are not appointed as officers of the United States, it is questionable whether they may execute the law by engaging in negotiation, compromise, settlement, and litigation on behalf of the Attorney General. In particular, we do not believe that individuals who are not officers of the government may commit or dispose of the property of the United States as would be implicated in the power to initiate or settle a claim.
>
> The practical considerations include the risk of inconsistent positions being put forward on legal issues, the possible resulting burden on the citizenry, and the waste resulting from duplication of effort. The benefits of having the government's legal business concentrated in one well-trained and experienced corps of litigators, committed to government service and subject to the supervision of the nation's chief legal officer, are obvious.
>
> The broad use of private attorneys for litigation on behalf of the United States would, almost inevitably, result in inconsistent litigating positions. Further, private law firms may not be familiar with general litigating policies of the government or with the government's interests in other areas of the law. The uncoordinated activities of private attorneys could

degree of control requisite in furnishing legal services in matters falling between these extremes is less clear cut: aside from constitutional concerns,[44] the need to protect the governmental and public interests at stake would seem, as a policy matter, to create at least a presumption in favor of substantial supervision and control. Agencies may not be able to both retain close control and escape the restrictions applicable to government employees filling legal service positions. Where supervision and control of an outside attorney is sufficient to justify a classification of the attorney as an "employee" of the government, the agency will have to point to specific statutory authorization for the hire and, in addition, may be subject to certain aspects of government personnel law.

Moreover, other considerations may influence an agency's structuring of its relationship with the legal service provider. On the one hand, limitations on compensation and conflicts of interest which attach to employment, but not independent contractor, status may inhibit obtaining the service provider that the agency wants to retain. On the other hand, competitive procedures attach to the procurement of services and limit agency discretion to a degree that may be undesirable. There may be no ideal resolution of the tensions thereby created. Moreover, as noted previously, in some cases (perhaps rare ones) both systems of regulation may attach to some degree.

The discussion that follows focuses first on the crucial distinction between "personal" and "nonpersonal" services, essentially another way to phrase the employee/independent contractor dichotomy. These distinctions largely determine whether a particular relationship is subject to OPM or OFPP jurisdiction. Statutes authorizing the hiring of attorneys as "employees" are examined in this part. Then attention turns to the

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thus have a detrimental effect not only on the conduct of particular litigation but also on the government's litigating efforts generally.

Lack of adequate supervision and control is also likely to result in increased governmental exposure to suits seeking damages for the acts and omissions of such private counsel. Attorneys without experience in representing the government, and without day-to-day supervision by experienced government officials, would be unfamiliar with the special problems of public practice and the special standards of conduct to which government attorneys are generally held. Conversely, for the Department to expend the substantial resources necessary adequately to supervise private counsel . . . would almost certainly make the retention of private attorneys uneconomical and impractical.

All of these problems would be compounded if agencies other than the Department of Justice were given authority to contract for private litigation services. The possibility of inconsistent positions being taken in litigation would become a virtual certainty, with a predictably adverse impact on the government's general litigating program. Decentralization could increase the risk of losing otherwise meritorious cases, and of adding to the government's liability in terms of counterclaims and negligence actions. If it would be difficult for the Department effectively to supervise and efforts of private counsel without the expenditure of substantial attorney resources, it seems doubly unlikely that the Department or any agency could do so with respect to attorneys hired by other agencies.

Letter of Arnold I. Burns, Deputy Attorney General, Department of Justice to the Honorable Marshall J. Breger, Chairman, Administrative Conference of the United States (Nov. 10, 1986) [hereinafter "Burns Letter"].

It should be noted that the thrust of this letter is to support vesting litigation power in the Department of Justice. Congress has not always done so. *See supra* notes 17-19 and accompanying text. Where it has not, however, many of the same arguments invoked by the Department of Justice argue for close control by the agency vested with litigation authority.

44 *See supra* note 14 and accompanying text.

standards for determining whether an agency should exercise its discretion to obtain the services of non-governmental personnel where they will serve as independent contractors or otherwise. Finally, the procurement procedures mandated by statute and regulation that apply to personal and nonpersonal service contracts, particularly those relevant to the area of attorney services, are outlined in general terms.

A. *The Personal/Non-Personal Distinction*

In determining whether a person should be considered an "employee,"[45] the Civil Service Commission (now the Office of Personnel Management) adopted the so-called "Pellerzi Standards" and the "Mondello Supplement."[46] When the relationship between the government and the service provider becomes that of employer/employee, a contract for such services is denominated "personal."

The Federal Acquisition Regulation (FAR) succinctly explains the situation as follows:

> [A] personal service contract is characterized by the employer-employee relationship it creates between the Government and the contractor's personnel. The Government is normally required to obtain its employees by direct hire under competitive appointment or other procedures required by the civil service laws. Obtaining personal services by contract, rather than by direct hire, circumvents those laws unless Congress has specifically authorized acquisition of the services by contract.[47]

Differentiating between "personal" and "non-personal" services in concrete settings poses significant difficulties for procurement officials.[48] An employee/employer relationship may occur either as a result of the contract's terms or the manner of its administration during performance.[49] The key question in each case is whether the contractor's personnel are subject to the "relatively continuous supervision and control of a Government officer or employee."[50] Each contractual arrangement must be assessed in light of its own circumstances.[51]

The FAR lists various elements which are considered in determining whether an employer/employee relationship has been established.[52] Of

45 An "employee" within the meaning of the civil service laws is a person:

(1) appointed or employed in the civil service by a Federal officer or employee performing in an official capacity;

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

(3) supervised and directed by a Federal official or employee. 5 U.S.C. § 2105(a) (1982). *See also* FEDERAL PERSONNEL MANUAL, Ch. 304 at 304-3.

46 *See generally* Lodge 1858, Am. Fed. of Gov't Emp. v. Webb, 580 F.2d 496, 499-500 (D.C. Cir. 1978). For a restatement of these standards, *see infra* notes 52-53 and accompanying text.

47 48 C.F.R. § 37.104(a) (1986).

48 *See generally* Lovitky, *The Problems of Government Contracting for Consulting Services*, 14 PUB. CONT. L.J. 332, 341 (1984); Byers, *Recognizing Personal Services Contracts*, D.A. Pam. 27-50-121.

49 48 C.F.R. §§ 37.101, 37.104(c)(1) (1986).

50 *Id.* § 37.104(c)(1) (1986). *See also* Lodge 1858, Am. Fed. of Gov't Emp. v. Webb, *supra* note 46 at 504.

51 48 C.F.R. § 37.104(c)(2) (1986).

52 *Id.* § 37.104(d). *See also* Lovitky, *supra* note 48, at 341-2.

the six listed, at least three seem to be particularly relevant in the area of attorney services:

> (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 . . . .
> (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.[53]

With regard to the services of attorneys in the conduct of litigation, element (6) would appear to be particularly implicated, though no one factor may be dispositive in finding that services are personal.[54] For example, as will be noted below, the 1986 Debt Collection Amendments authorize the retention of private attorneys to collect non-tax indebtedness owed to the federal government.[55] The legislative history and the executive interpretation of the law[56] emphasize the need for substantial control over the efforts of these contractors.

As Professor Rotunda has observed,[57] while an attorney possesses a certain degree of autonomy in performing services for a client, there is a considerable area subject to client control. The more sophisticated the client the more likely control will (and perhaps should) be exercised. The federal government is obviously such a sophisticated "client." Where an attorney gives more than his legal opinion and, in addition, his actions based on his judgment have a direct impact on members of the general public, as a matter of good administrative policy (and also in recognition of constitutional concerns) close supervision and control by the agency would appear to be called for in many instances. This would seem to be particularly true in the area of litigation, where historically the government and public interests at stake have counselled in favor of a concentration of authority in the Department of Justice.[58]

At the same time, several opinions by the General Accounting Office (GAO) discuss consulting contracts for legal services and classify the ar-

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53 *Id.* § 37.104(d)(3), (4), (6). The other elements mentioned are: (1) performance on site, (2) tools and equipment furnished by the government, and (5) the need for the type of service can be expected to last beyond one year. *Id.*, § 37.104(d)(1), (2), (5).

54 *See supra* note 50 and accompanying text.

55 *See infra* notes 222-23 and accompanying text.

56 *See infra* notes 245-66 and accompanying text. *See also* Burns Letter, *supra* note 43 ("Moreover, it is intended that there will be close, day-to-day supervision of such private counsel. . . .").

57 *See* Rotunda, *Ethical Problems in Federal Agency Hiring of Private Attorneys*, 1 GEO. J. LEGAL ETHICS 85, 111-116 (1987).

58 *See* 5 U.S.C. § 3106 (1982); 28 U.S.C. §§ 516, 518, 519, 547(2) (1982) and Burns Letter, *supra* note 43. By their terms these statutes forbid an agency's litigating on its own regardless of whether the person litigating is a full-time employee or otherwise. While statutory exceptions to the norm are contemplated, the general thrust of these statutes concentrating litigation in DOJ, given their policy, would seem to be to require *clear* statutory authorization for an agency's hire of outside counsel for litigation. (This mirrors the approach to personal services contracting: specific statutory

rangements as non-personal. A "consulting" contract is one calling for services of an advisory nature.[59] In one case the GAO found that government supervision of the attorney's performance would not be required due to the lawyer's extensive knowledge of the field.[60] In another, where a legal opinion was solicited regarding the scope of the agency's authority, the Comptroller General found that:

> [T]he [agency] requested an end product—a legal review of its authority and a determination of the extent of its independence from [the parent agency]—and it was the responsibility of the law firm to determine how best to achieve the desired goal. This necessarily required the law firm to perform its own research and to conduct an independent "unsupervised" legal analysis.[61]

Viewing matters in that way suggests that many consulting contracts for legal services would be deemed "non-personal."[62]

Where an attorney is employed in more than a purely "advisory" capacity, as where he or she drafts contracts, negotiates real estate transactions or otherwise acts on behalf of the government in dealing with third persons, the major decisions must presumably be the agency's. These instances may fall somewhere between contracts for litigation

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authority is required. *See infra* note 64 and accompanying text. This, however, is primarily intended to protect the integrity of government personnel regulation.)

As will be noted below, however, agencies differ in the degree to which they view close control of private litigators necessary and, even within the same agency, differing degrees of control may be exercised depending on the nature of the case. *See infra* notes 356-79, 403-07, 423-25 and accompanying text.

59 *See, e.g.*, 48 C.F.R. § 37.201 (1986).

60 Personal Services—Private Contract v. Government Personnel—Former Employees, 53 Comp. Gen. 702 (1974).

61 *In re*: United States Advisory Comm'n on Public Diplomacy, 61 Comp. Gen. 69, 73 (1981).

See also Comptroller General's opinion in B-133381, (July 22, 1977) (unpublished). In this case, the International Trade Commission was found by the Civil Service Commission to be in violation of CSC's rules as a result of its organization. The ITC General Counsel initiated the CSC inspection. The ITC thereafter voted to appeal the CSC report. It contracted with two private attorneys to prepare a statement for submission to the CSC over the signature of the ITC chairman stating the views of the ITC regarding the CSC report and to prepare a memorandum to the ITC explaining the work done and items in the report which they found objectionable and those which they found not subject to objection.

The Comptroller General found on the basis of the apparently limited information available that:

1. the ITC had sufficiently demonstrated the need to contract for the services because its Office of General Counsel had initiated the investigation and therefore, the ITC needed an "independent" judgment;

2. 5 U.S.C. § 3109 along with the ITC appropriation act granted the relevant contracting authority;

3. the services performed were not within the statutory jurisdiction of the Department of Justice; and

4. the relationship established as a result of the contract was, as far as could be determined from the information available, not that of employer/employee, but purely contractual.

While only the last cited finding of this Comptroller General opinion is relevant to the topic discussed in the text, it highlights the general types of issues that must be confronted in dealing with any procurement problem in the legal services area. *See infra* notes 85-104 and accompanying text for a discussion of the topic encompassed by finding (1); *infra* notes 64-84 and accompanying text for a discussion of finding (2); *infra* notes 103-04 and accompanying text for a discussion of finding (3).

62 *See* Lovitky, *supra* note 48, at 344. *But see* GAO opinion in *In re* Navaho and Hopi Indian Relocation Comm'n, B-114868.18 (Feb. 10, 1978) (unpublished) (if attorney serves as general counsel, the supervision may create personal services contract).

services and those for mere legal advice in terms of the appropriate amount of supervision and control.[63]

Because of the impact on the scheme of civil service regulation, agencies must rely on "specific" statutory authorization in order to justify the award of a personal services contract, whether for legal services or others.[64] This requirement for "specificity" may arguably be satisfied in a variety of ways. For example, a statute may authorize an agency to establish an employee/employer relationship by expressly empowering the agency to enter into "personal service" contracts. Such is the case with the Veterans' Administration,[65] although the statute does not refer to the particular type of services, thus raising the question of whether it encompasses legal services, or more specifically, the power to conduct litigation.[66]

Some statutes expressly empower the agencies to use private attorneys to conduct litigation, though they do not on their face classify the services to be rendered as "personal." Where it is contemplated by Congress that the attorneys retained under the authority of these provisions will be subject to close agency supervision and control, such statutes may also satisfy the requirement for "specific" statutory authorization necessary to exempt the hire from all or part of the scheme of OPM regulation.[67] Both the 1986 Debt Collection Amendments[68] and a Veterans' Administration statute may fall into this category.[69]

Moreover Congress has enacted a statute, 5 U.S.C. Section 3109,[70] which permits the head of an agency to "procure by contract" the tempo-

63 As with litigation, though, different types of cases may call for different treatment in terms of the degree of control exercised.

64 48 C.F.R. § 37.104(b) (1986). Needless to say, whether a statute is "specific" in the relevant sense may often be a debatable issue. Presumably this rule mirrors the assumption that if Congress wants to exempt a hire from otherwise applicable personnel regulation, it says so clearly.

65 38 U.S.C. § 231 (1982).

66 Regarding this latter inquiry, the statutes vesting litigation authority in the Department of Justice "except where statutes otherwise provide" must be considered. *See supra* note 58.

67 Of course the extent to which the hire, if it creates an employee/employer relationship, is subject to or partially exempt or fully exempt from the civil service regime is a question of statutory construction. *See infra* notes 105-16 and accompanying text.

68 *See infra* notes 245-66 and accompanying text.

69 The Veterans' Administration statute provides in part:

> [With the concurrence of the Attorney General of the United States], the Administrator may acquire the services of attorneys, other than those who are employees of the Veterans' Administration, to exercise [the right of the United States to bring suit in court to foreclose a loan made or acquired by the Administrator and to recover possession of any property acquired by the Administrator]. The activities of attorneys in bringing suit under this section *shall be subject to the direction and supervision of the Attorney General* and to such terms and conditions as the Attorney General may prescribe.

38 U.S.C. § 1830(a) (Supp. IV 1986) (emphasis added). This statute and the 1986 Debt Collection Act might be construed as grants of authority to enter into either personal or non-personal service contracts, within the discretion of the agency.

70 5 U.S.C. § 3109 (1982) which provides in relevant part:

> (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 U.S.C. §§ 5101 *et seq.*, 5331 *et seq.*]; and

rary (not in excess of one year) or intermittent personal services of experts and consultants or an organization thereof without regard to the statutes governing appointment in the competitive civil service. This authority is "triggered" only by some other statute, including an appropriation. What happens in practice apparently is that this other statute expressly refers to section 3109.[71]

The Comptroller General has interpreted section 3109 "procure by contract" language to authorize appointment to the excepted civil service.[72] However, any appointments of consultants under section 3109 must be obtained in accordance with the procedural formalities applicable to civil service appointments.[73] The authority is limited to the services of "consultants"[74] and "experts,"[75] but contemplates that the persons or organizations retained can perform work of a type normally provided by persons in the regular civil service.[76] Agreements calling for the performance of personal services by consultants may, therefore, be obtained under the authority of section 3109 in conjunction with a specific appropriation act.[77]

The FAR itself expressly acknowledges that section 3109 qualifies as a statutory authorization for personal service contracting.[78] Therefore, it would seem that where an attorney will function as an "expert" or "consultant" within the meaning of section 3109 in furnishing legal services to an agency, the classification of the contractual relationship as "personal" will not necessarily be fatal where there is the requisite appropriation or other statutory authorization which triggers section 3109. This assumes, of course, that the particular appropriation or other statute can be construed to encompass services of a legal nature.

Where the legal services at issue are deemed "non-personal," the agency can rely on "general contracting authority" to justify its procure-

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(3) section 5 of title 41 [41 U.S.C. § 5], 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 [5 U.S.C. §§ 5101-5115, 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 [5 U.S.C. § 5332] only when specifically authorized by an appropriation or other statute authorizing the procurement of the services.

(c) Positions in the Senior Executive Service may not be filled under the authority of subsection (b) of this section.

71 An example is the Department of Defense 1983 Continuing Appropriations Act which provides in part:

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.

Pub. L. No. 97-377, sec. 703, 96 Stat. 1830, 1849.

72 Lovitky, *supra* note 48, at 333.

73 *Id.* at 334. *See generally* FEDERAL PERSONNEL MANUAL, Ch. 304, Employment of Individual Experts and Consultants.

74 Consultants function in a purely advisory capacity. Lovitky, *supra* note 48, at 336. *See also* 48 C.F.R. § 37.201 (1985).

75 "Experts" are used in a primarily operational capacity. Lovitky, *supra* note 48, at 336.

76 *Id.* at 333-34.

77 *Id.* at 334.

78 48 C.F.R. § 37.104(b) (1986).

ment.[79] In this regard it should be noted that section 3109 has also been interpreted as a statutory grant of authority to secure services (including legal services) by "contract or appointment" where the triggering appropriation is present.[80] However, the section is limited to the services of experts and consultants.[81]

Where contracting authority, whether general or specific, is present, a finding that a contract is "non-personal" means that the firm or individual retained is deemed to be an "independent contractor."[82]

Finally, it is worth noting that a statutory grant of contracting authority may not be required, at least in all instances, to justify the retention of attorneys, whether as consultants, experts or otherwise, where they function as independent contractors. Although courts have recognized the inherent power of the executive branch of government to enter into procurement contracts,[83] Congress could presumably limit this authority to some degree if it did so clearly.[84]

B. *Standard for Procurement*

Where a contract is classified as calling for personal services, the specific statutory authority required to justify the procurement must be consulted initially to ascertain the standard (if any) to be applied in determining *when* the agency can retain outside attorneys.[85] Moreover, where personal consulting services are involved, the Federal Acquisition Regulation[86] specifies that an agency may contract for personal consulting services only "when *essential* to the agency's mission,"[87] and such services may not "unnecessarily duplicate any previously performed work or services."[88]

With respect to non-personal services, examination of any relevant statutory authority for the contracting would similarly be called for. As in the case of personal services, any agency-developed standards must be consistent with the statutory authority.[89] But even without statutory guidance, the FAR mandates that the agency consider the "relative costs of Government and contract performance . . . where Government performance is practicable. . . ."[90] "In no event may a contract be awarded for

79 *Id.* § 37.102(d).

80 *See, e.g.*, Boyle v. United States, 309 F.2d 399, 401 (Ct. Cl. 1962). *See also* 61 Comp. Gen. 69 (1981) and GAO opinion in Matter of Navaho and Hopi Indian Relocation Commission, B-114868.18 (Feb. 10, 1978) (unpublished) (discussed at 61 Comp. Gen. 69, 75-76 (1981).).

81 *See* 5 U.S.C. § 3109 (1982).

82 *See* 61 Comp. Gen. 69, 72 (1981).

83 Lovitky, *supra* note 48, at 339. *See, e.g.*, United States v. Tingey, 30 U.S. (5 Pet.) 115, 127 (1831); United States v. Salon, 182 F.2d 110, 112 (7th Cir. 1950); United States v. Maurice, 36 F. Cas. 1211, 1216-17 (C.C.D. Va. 1823) (No. 15,747).

84 *Cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring).

85 *See, e.g., supra* note 71 and accompanying text.

86 48 C.F.R. pts. 1-51 (1985). *See infra* notes 185-93 and accompanying text.

87 48 C.F.R. § 37.204(b) (1986) (emphasis added).

88 *Id.* § 37.205(b)(1).

89 *See, e.g., infra* note 330 and accompanying text.

90 48 C.F.R. § 37.102(c) (1986). This seems to apply also to personal service contracting. *See generally id.* § 37.102.

the performance of an inherently governmental function."[91] With respect to non-personal consulting services, the FAR imposes the same acquisition standards as it does in the case of personal consulting contracts.[92]

The General Accounting Office has indicated that, where Congress has not provided otherwise, with regard to legal services of a non-personal nature, the agency must determine that contracting out is "more feasible, more economical, or necessary to the accomplishment of the agency's task."[93] "Thus, where an agency has employees available, whether attorneys or not, to perform a particular task, it should not contract for performance of the same task. Each agency is responsible for determining in each case, whether the particular services could be performed by agency employees."[94]

When consulting services are at issue, whether of a personal or non-personal nature, the FAR permits contracts to obtain, for example, "[s]pecialized opinions or professional or technical advice not available

91 *Id.* § 37.102(b). OMB Circular No. A-76 (Rev. Aug. 4, 1983) states in part:

b. *Retain Governmental Functions In-House*. Certain functions are inherently Governmental in nature, being so intimately related to the public interest as to mandate performance only by Federal employees. These functions are not in competition with the commercial sector. Therefore, these functions shall be performed by Government employees.

e. A *Governmental function* is a function which is so intimately related to the public interest as to mandate performance by Government employees. These 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. Services or products in support of Governmental functions, such as those listed in Attachment A, are commercial activities and are normally subject to this Circular. 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.

Arguably certain legal services, including litigation of some types, might fit this description in certain circumstances, though Attachment A to the Circular does include a category, "legal/litigation studies."

92 48 C.F.R. § 37.204(b) (1986). *See supra* notes 87-88 and accompanying text.

93 *See* 61 Comp. Gen. 69, 72 (1981) (citing earlier opinion at 51 Comp. Gen. 561, 562 (1972)) (consulting services at issue here).

94 GAO opinion in B-133381 (July 22, 1977) (unpublished) quoted at 61 Comp. Gen. 69, 73 (1981). In one case the agency retained an attorney to provide legal assistance necessary to an appeal because its General Counsel's Office had previously advocated the opposing position. The Comptroller General determined that in these circumstances a sufficient showing of need had been made. *Id.* The same result obtained in another case where an advisory commission used a law firm to research the parameters of its legal authority after its parent agency had offered its own opinion on the same subject. Specifically, that later opinion related to the extent of the contracting agency's independence from the parent agency. An alleged conflict of interest tainted the first opinion and justified a request for another view. *See* 61 Comp. Gen. 69, 74 (1987). The Comptroller General there reiterated his opinion, expressed on other occasions, that the pay limits found in 5 U.S.C. § 3109(b), *see supra* note 70, applied only to appointed consultants and not to consultants serving as independent contractors. *Id.* at 77, citing 26 Comp. Gen. 188 (1946).

within the agency or from another agency,"[95] and "[o]utside points of view, to avoid too limited a judgment on critical issues. . . ."[96] Agencies may not, however, contract for consulting services where the contracts involve the performance of "work of a policy-making, decision making, or managerial nature that is the direct responsibility of agency officials,"[97] that will "bypass or undermine personnel ceilings, pay limitations, or competitive employment procedures,"[98] "specifically aid in influencing or enacting legislation,"[99] or afford "preferential treatment to former Government employees."[100] While such activities are forbidden for "consulting contracts," it is not clear whether classification of a contract as other than one for consulting services may avoid some of these restrictions,[101] as for example, if the contract could be considered one for "expert" services under 5 U.S.C. § 3109.[102]

Finally, note that even where there is apparent authority to enter into a services contract, whether personal or non-personal and whether for consulting or other services, and a sufficient showing of need for the services can be made, there may be other statutes that have to be examined in order to determine whether Congress has in fact forbidden the contracting-out attempted.[103] Examples of such statutes are the various provisions in the United States Code[104] which largely reserve the power to litigate on behalf of the United States to the Department of Justice.

C. *Procurement Procedures*

1. The Personal/Non-Personal Distinction

Since personal services contracts must be based on "specific" statutory authorization,[105] such authorizing legislation must initially be consulted in order to determine what procedures and restrictions, if any, Congress intended to accompany obtaining of the services.

Several examples are of particular interest here. The Federal Election Commission (FEC) is authorized to "appoint" counsel to represent it in certain types of litigation.[106] Such appointments are "without regard to the provisions of title 5, United States Code, governing appointments in the competitive service" and the compensation may be fixed "without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title."[107] The Comptroller General may apply to the district courts to enforce its subpoenas "by counsel whom he may employ without regard to the provisions of Title 5 governing appointments

95 48 C.F.R. § 37.204(b)(1) (1986).
96 *Id.* § 37.204(b)(2).
97 *Id.* § 37.204(c)(1).
98 *Id.* § 37.204(c)(2).
99 *Id.* § 37.204(c)(3).
100 *Id.* § 37.204(c)(4).
101 Such as *id.* § 37.204(c)(1).
102 *See supra* note 70.
103 *See, e.g.*, 61 Comp. Gen. 69, 73-74 (1981).
104 *See* 5 U.S.C. § 3106, 28 U.S.C. §§ 516, 518(b), 519, 547(2) (1982).
105 *See supra* note 64 and accompanying text.
106 26 U.S.C. § 9010 (1982). *See also id.* § 9040; 2 U.S.C. § 437c(f)(4)(B) (1982).
107 26 U.S.C. § 9010(a) (1982).

in the competitive service, and the provisions of chapter 51 and subchapters III and VI of chapter 53 of such Title, relating to classification and General Schedule pay rates."[108] A final example is section 3109 of Title 5 which authorizes the appointment of legal consultants "without regard to . . . the provisions of this title governing appointment in the competitive service . . . [and] chapter 51 and subchapter III of chapter 53 of this title" but subject to certain compensation limits.[109]

Where a statute uses the term "appointment," the position may likely fall within the regulatory jurisdiction of the OPM. Such is apparently the case with regard to FEC counsel. The grant of authority to the Comptroller General is similar. On the other hand, section 3109 of title 5 uses the phrase, "procure by contract" which on first glance suggests that the experts and consultants retained are to be independent contractors. However the fact that by the terms of section 3109 such contracts are exempt from both certain civil service provisions[110] *and* from procurement advertising requirements[111] has been relied upon to support an interpretation of this statute as a grant of both appointment and procurement authority,[112] the former subject to OPM and the latter to OFPP jurisdiction.[113] With regard to the 1986 Debt Collection Amendments, and perhaps the similar Veterans' Administration authority referred to previously,[114] it could be argued that while Congress intended that supervision should be close, even to the point of creating what otherwise could be considered a personal services contract, the contracts were to be considered subject only to the procurement regime.[115] Alternatively Congress may have assumed that the contracts would be subject to both OPM and OFPP regulations to some degree. (Or Congress may never have considered the potential for OPM jurisdiction.)

Outside of those instances where statutes indicate that the hire is subject exclusively to civil service or other regulation, personal service contracting would seem to be subject to the requirements of the Competition in Contracting Act (CICA) or to both that statute and some regulation by the OPM.[116] The FAR expressly contemplates that the competition requirements which it lays down, which to a great extent mirror the CICA, apply to all services contracts, whether personal or

108 42 U.S.C. § 1320(a)-24(b) (1982).

109 5 U.S.C. § 3109(b) (1982). *See generally* Lovitky, *supra* note 48, at 338.

110 5 U.S.C. §§ 3109(b)(1), (2) (1982).

111 *Id.* at § 3109 (b)(3).

112 *See* Lovitky, *supra* note 48, at 333-34.

113 *Id.* at 334, 337-38.

114 *See supra* notes 68-69 and accompanying text.

115 Under these two statutes, if they authorize "personal service" contracts, it is a "nice" question whose employees the attorneys would be: Justice's or the agency relying on the collection services.

See also 15 U.S.C. § 634(b)(7) (1982) (SBA power to procure attorney services by contract for loans); 39 U.S.C. § 409(d) (1982) (With prior consent of the Attorney General, the Postal Service may employ attorneys by "contract *or otherwise* to conduct litigation. . . .") (emphasis added) (This may be a grant of both appointment and procurement authority.); 42 U.S.C. § 3211 (1982) (Secretary of Commerce may procure attorney services by contract for loans).

116 The Office of Personnel Management has adopted a set of instructions applicable to the retention of experts and consultants in positions excepted from the competitive service by statute or by the OPM. FEDERAL PERSONNEL MANUAL, ch. 304. These apply to appointments under, *inter alia*, 5 U.S.C. § 3109 (1982). They also apply to individual expert or consultant services procured by con-

tract if an employer-employee rather than an independent contractor relationship is created. FEDERAL PERSONNEL MANUAL, ch. 304.

An agency considering hiring an expert or consultant would obviously be concerned with the restraints and conditions thus imposed. They may suggest that structuring the contractual relationship with the service provider as that of an independent contractor is the preferable course to take.

It may, therefore, be helpful to summarize the significant parts of these instructions:

1. "Intermittent appointments can be renewed from year to year . . . temporary appointments cannot," though there are exceptions. *Id.* 1-3(c).
2. "While persons appointed under . . . Section 3109 are excepted from the position classification and General Schedule grade and pay laws, Section 3109 states that agencies otherwise subject to those laws generally may pay up to the daily equivalent of the highest rate payable under the General Schedule; . . . that rate is limited to the rate payable for level V of the Executive Schedule. The Comptroller General has held that highest rate payable is the top step of grade GS-15." *Id.* 1-6(a).
3. "Because experts and consultants generally are paid on a daily rate basis, they are not entitled to more than the daily rate prescribed in the appointment documents for each day of service regardless of the number of hours worked." However, "an expert or consultant, employed on a daily basis may be paid the rate of basic compensation for work on days outside the prescribed tour of duty, provided compensation within any biweekly pay period does not exceed the rate of basic pay for level V of the Executive Schedule." *Id.* 1-6(e).
4. Experts and consultants hired as employees are employees within the coverage of the Fair Labor Standards Act, though most experts and consultants are exempt from the minimum wage and overtime pay provisions. *Id.* 1-6(f).
5. Unless the hiring agency otherwise provides, an expert or consultant is not entitled to a pay increase on the basis of an increase in the General Schedule. *Id.* 1-6(g).
6. "Unless the appointment documents expressly provide for holiday pay, an expert or consultant employed on a per diem basis is not entitled to compensation for holidays on which no work is performed." *Id.* 1-6(h).
7. "Certain former members of the uniformed services are subject to reduction in retired pay if employed in the Federal service." *Id.* 1-6(2)(i).
8. "An expert or consultant who serves *intermittently* may be allowed travel or transportation expenses." *Id.* 1-6(k).
9. "An expert or consultant . . . who serves on an intermittent or other basis without a prearranged regular tour of duty *does not* earn annual and sick leave [but one who is on] a regularly prescribed tour of duty *does* earn such leave." *Id.* 1-7(a).
10. "An expert or consultant whose service is intermittent or temporary for one year or less is not covered under the civil service retirement system and is ineligible for life insurance and health benefits." *Id.* 1-7(b).
11. Statutory prohibitions on conflict of interest apply to many experts or consultants as "special government employees." *Id.* 1-9. *See also* FEDERAL PERSONNEL MANUAL ch. 735, Appendix C.
12. "Experts and consultants who serve as employees are subject to the same conditions and restrictions which apply to other Federal employees who are in the excepted service and who work on a temporary or intermittent basis." ch. 304, 1-10(a).
13. "Each proposed appointment (and extension of appointment) must be reviewed and certified by a high agency management official in terms of," inter alia, the need for the position, the correctness of judgment that the position requires an expert or consultant, the qualifications of the proposed appointee, and the appropriateness of the intended level of pay. *Id.* Appendix A, A-1(a).
14. A suitable certification attesting that all the requirements listed in item 13 have been met must be prepared and signed by the certifying official. *Id.* A-1(c).
15. "Agencies are required to maintain effective controls over use of appointees during employment." Such control includes frequent reviews, generally quarterly, to assure that in each case the duties performed are still those of an expert or consultant, time limits are being observed, documentation is kept current, and duties of record are actually being performed. *Id.* A-2(a).
16. Each quarterly review is to be documented and the record retained for OPM examination. *Id.* A-2(c).
17. "For each expert or consultant employed, full-time or part-time or intermittently, whether employed by appointment or by contract, . . . each agency must establish an Official Personnel Folder" to contain designated documents, including a description of the position, a description of the appointee's background and qualifications, a Standard Form notification of personnel action showing the employment, and a standard form showing termination of the employment, a certification that a statement of employment and financial interests has been obtained and it had been determined that no conflict of interest exists. *Id.* A-4(a).
18. The agency should obtain from each expert and consultant a statement of employment and financial interests at the time of formal employment. *Id.* A-4(b).

non-personal, unless a statute otherwise requires.[117] Moreover, the CICA applies by its terms to contracting for "services" and makes no express distinction between personal and non-personal services.[118] In fact, there is no reason inherent in the distinction between personal and non-personal service contracts to require different treatment with regard to competitive procedures.

Prior to the CICA, the GAO had clearly indicated that procurement of non-personal services pursuant to section 3109 was subject to general federal procurement regulations.[119] Nothing in the CICA expressly changes that result.

2. Legal Services

The Competition in Contracting Act of 1984 applies to "services,"[120] without any distinction as to type, such as professional or non-professional,[121] attorney or accountant. In fact section 2753 of the Act[122] mandated a study and the development of recommendations regarding ways to "increase the opportunities to achieve full and open competition on the basis of technical qualifications, quality, and other factors in the procurement of *professional*, technical, and management services."[123] This provision suggests that the drafters of the Act intended that it apply to professional services, which clearly include attorney services.[124] Moreover, given the concerns underlying the

19. Employing agencies must report their employment actions to OPM on designated forms. *Id.* A-5.

Some expert and consultant contracts may be subject to regulation by both the OMP and OFPP. *See id.* ch. 304, 1-10. Attorneys providing other than expert or consultant services but still considered "employees" may be subject in part to restrictions similar to those detailed above or others within the jurisdiction of the OPM. It should be noted, however, that even full-time attorney positions are exempt from important parts of the civil service regime, most importantly the competitive examination system and many of the tenure protection provisions.

117 48 C.F.R. § 37.105 (1986).

118 *See* 41 U.S.C. § 253(a)(1) (1982). Technically, the 1984 CICA was an amendment to the Federal Property and Administrative Services Act of 1949. *See* Pub. L. No. 98-369, § 2711(a)(1), 98 Stat. 1175. The declaration of purpose of the latter statute indicated an intent to encompass only "non-personal" services, *see* 40 U.S.C. § 471(a) (1982), which it defined as "contractual services, other than personal and professional services." *See id.* § 472(j) (1982). *See also id.* § 481(a)(1) (1982). This gives rise to an argument that the CICA is limited to "non-personal" services and apparently some officials so view it.

Other officials do not agree, as is evidenced by the FAR, and they would seem to stand on higher ground on this issue. The CICA refers to "services" generally. It would be an odd bit of drafting to define "non-personal services" at one point and intend that any time the term "services" is used it is meant to refer to "non-personal services." Such drafting would directly undermine the usefulness of a definitional section. In fact, prior to the CICA, the Federal Property and Administrative Services Act contained an exemption from its advertising requirements for "personal or professional services," *see* 41 U.S.C. § 252(c)(4) (1982), which exemption was not continued in express terms by the CICA.

119 *See* 61 Comp. Gen. 69, 78-9 (1981) (citing prior opinions). This opinion dealt with legal services. *See also* Lovitky, *supra* note 48, at 338-39.

120 41 U.S.C. § 253(a)(1) (1982).

121 *See also supra* note 118.

122 Pub. L. No. 98-369, § 2753, 98 Stat. 1203.

123 *Id.* (emphasis added).

124 The Conference Committee noted:

> The conference substitute requires the Office of Federal Procurement Policy to recommend to Congress a plan for increasing the use of full and open competition in the procurement of professional, technical and managerial services. This category of procurements

legislation[125] there is no reason to think that Congress in 1984 intended to exempt legal services from the purview of the CICA. Nothing in the legislative history expressly supports such an exemption. In fact, in passing the Debt Collection Amendments of 1986, Congress expressed its view that the CICA applied to attorneys services, at least in the litigation context.[126] If it applies there, it is difficult to believe that Congress would distinguish between litigation and non-litigation services with regard to procurement procedures.

Finally, prior to the enactment of the CICA, the GAO clearly found that at least in the context of non-personal attorney consulting contracts entered into pursuant to 5 U.S.C. section 3109, federal procurement requirements applied.[127]

Thus where there is a contract for services, the applicability of the CICA is not affected by the fact that attorney services are being procured, at least where public funds are used to pay the bills. Where any attorneys retained will be paid from non-appropriated funds,[128] it might be argued that at least some of the concerns prompting the passage of

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often involves the use of evaluation criteria, other than price, in the selection of the winning vendor.

The Office of Federal Procurement Policy is directed to recommend competitive selection procedures for procurements where price is not a significant factor and the agency has determined a legitimate need for the best or highest quality proposal. Such a plan should include requirements for the agencies to follow to ensure that all responsible vendors are allowed to compete for the above procurements and that fair and reasonable prices are paid for the service. OFPP should consider, as a possible alternative prior to designing a plan, a system in which all qualified persons capable of providing specified services are placed on a list maintained by the government, in which each of those persons is encouraged to submit a competitive proposal in response to each solicitation for such services, and in which the award is made to the bidder on the list who can perform the service for the lowest overall cost.

The Office of Federal Procurement Policy should also, in conducting the study, consult with experts in such fields as soil engineering, real estate appraising, surveying and mapping, and other professional services which do not fit within the traditional concept of Federal procurement procedures.

Deficit Reduction Act of 1984, H. R. REP. 861, 98th Cong., 2d Sess. at 1438 (1984). *See also* H. R. REP. 1157, 98th Cong., 2d. Sess. at 28 (1984).

These Reports demonstrate that Congress in 1984 realized that in obtaining professional services price should not always be the sole basis for choice but that the problems in obtaining such services on a competitive basis might justify special procurement procedures.

125 *See infra* notes 129 and 134 and accompanying text.

126 *See infra* notes 297-309 and accompanying text.

127 61 Comp. Gen. 69, 78-79 (1981). *See generally* Lovitky, *supra* note 48, at 338-9.

Prior to the 1984 Act, professional services contracts, including those under § 3109, were exempt from advertising. *See* 5 U.S.C. § 3109(b)(3) (1982); 41 U.S.C. § 5 (1982); 41 U.S.C. § 252(c)(4) (1982). After the 1984 Act the advertising requirements of § 5 do "not apply to the procurement of property or services [made] by an executive agency pursuant to this subchapter [the CICA]." 41 U.S.C. § 260 (1982). That legal services may be exempt from advertising under 41 U.S.C. § 5 (as amended in 1983) as professional services does not, however, establish that they are exempt from the CICA. Exemptions from the latter must be "express." *See* 41 U.S.C. § 253(a)(1) (Supp. III 1985).

The 1984 Act further provides that "[a]ny provision of law which authorizes an executive agency . . . to procure any property or services without advertising or without regard to said section 5 of this title shall be construed to authorize the procurement of such property or services pursuant to the provisions of this chapter relating to procedures other than sealed-bid procedures." 41 U.S.C. § 260 (Supp. III 1985). This provision has obvious reference to 5 U.S.C. § 3109, *see id.* at § 3109(b)(3), and arguably confirms the continued viability of 61 Comp. Gen. 69, 78-79 (1981).

128 As in the case of the Federal Deposit Insurance Corporation. *See infra* notes 335-37 and accompanying text.

the Act are not implicated and the agency need not comply with the CICA.[129] Since, however, the possibility of favoritism is present even where public funds are not at stake and such favoritism adversely impacts the public's view of its government, there are some good reasons not to construe the statute so restrictively. In fact the construction of the CICA as applicable to non-appropriated funds is supported by the fact that in enacting the 1986 Debt Collection Amendments Congress indicated both that the CICA applied to the contracting for legal services there authorized *and* that contingency fees (*i.e.*, non-appropriated funds) would be the usual mode of payment for attorneys retained.[130]

3. Competition in Contracting Act[131]

In 1984 Congress amended the Federal Property and Administrative Services Act[132] and the Armed Services Procurement Act.[133] It determined that two of their principal shortcomings were their failure to "give proper accordance to negotiation as a legitimate competitive procurement procedure" and to "adequately restrict the use of noncompetitive negotiation."[134] The focus of the following discussion of the new requirements applicable to procurement, which were adopted to solve these problems, is on procurement in the civilian sector, though similar procedures apply to military procurement.[135] Even here, there are some provisions of the CICA which appear largely irrelevant to procurement of attorney services[136] or whose application in that context is likely to be rare.[137] Such provisions will not be discussed. Moreover, the analysis will attempt to give a general overview of the statute, rather than probe its subtleties.

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129 *See, e.g.*, S. Rep. No. 297, 98th Cong., 1st Sess. 3 (1983): "The last, and possibly the most important, benefit of competition is its inherit appeal of 'fair play.' Competition maintains the integrity in the expenditure of *public funds* by ensuring that government contracts are awarded on the basis of merit rather than favoritism." *Id.* (emphasis added).

By its terms the FAR applies only to the use of appropriated funds. *See* 48 C.F.R. §§ 1.103, 2.101 (1986). This may, however, merely reflect the fact that the statutory procurement counterpart to the CICA in the defense area is made expressly applicable only to services "for which payment is to be made from appropriated funds." 10 U.S.C. § 2303(a) (Supp. III 1985). It is significant that the CICA lacks such a provision.

130 *See infra* notes 233-39 and 276-85 and accompanying text (though, of course, the loans recovered here may have originally come from appropriated funds). However, payment of expenses of suit such as filing fees will apparently come out of appropriated funds. *See Private Lawyers See Riches in Federal Debt Collection*, Legal Times, Feb. 16, 1987 at 1.

131 Pub. L. No. 98-369 98 Stat. 1175, July 18, 1984.

132 41 U.S.C. §§ 251-60 (1982).

133 10 U.S.C. §§ 2301-16 (1982).

134 *See, e.g.*, H. R. REP. 861, 98th Cong., 2d Sess., at 1421 (1984). *See generally* Cohen, *The Competition in Contracting Act*, 14 PUB. CONT. L.J. 1 (1983).

135 *See* 10 U.S.C. §§ 2301-16 (Supp. III 1985).

136 *See, e.g.*, 41 U.S.C. § 253b(f) (Supp. III 1985) (planning solicitation for award of a development contract for a major system).

137 *See, e.g., id.* § 253d (delivery of technical data).

Except as otherwise expressly authorized by another statute[138] or by various provisions contained in the CICA itself,[139] executive agencies[140]

138 Section 252(a) mandates that "executive agencies" make contracts for services in accordance with 41 U.S.C. §§ 251-60. *See* 41 U.S.C. § 252(a) (1982). It provides, however, that those sections do not apply "when this chapter is made inapplicable pursuant to section 474 of Title 40 or any other law." *Id. See also* Andrus v. Glover Const. Co., 100 S. Ct. 1905, 1911 n.19 (1980) (reading § 252(a)(2) "to refer exclusively to statutory provisions that . . . in express terms exempt procurements from §§ 251 through 260 of Title 41 or from the FPASA in its entirety"). Section 253(a)(1) basically reiterates this by specifying, *inter alia*, that "except in the case of procurement procedures otherwise expressly authorized by statute," executive agencies must procure services through "full and open competition." *Id.* § 253(a)(1) (Supp. III 1985). In short, in the civilian procurement area, the competitive scheme of the CICA applies unless another statutory clearly provides otherwise.

Section 252(a) further indicates that when the CICA "is made inapplicable by any such provision, section 5 . . . of this title [41 U.S.C. § 5 which requires advertising for proposals] shall be applicable in the absence of authority conferred by statute to procure without advertising or without regard to said section 5 of this title." 41 U.S.C. § 252(a)(2) (1982). One of the statutes referred to in the last clause of § 252(a)(2) is 5 U.S.C. § 3109 (Supp. III 1985). *See supra* note 70 for the full text of the latter provision. However, § 260 of the CICA further provides:

> Sections 5, 8 and 13 of this title shall not apply to the procurement of property or services made by an executive agency pursuant to this chapter. Any provisions of law which authorize an executive agency (other than an executive agency which is exempted from the provisions of this chapter by section 252(a) of this title), to procure any property or services without advertising or without regard to said section 5 of this title shall be construed to authorize the procurement of such property or services pursuant to the provisions of this chapter relating to the procedures other than sealed-bid procedures.

41 U.S.C. § 260 (Supp. III 1985). The last sentence of § 260 thus clearly indicates that when 5 U.S.C. § 3109 is relied upon as a source of procurement (not appointment) authority, the competitive procurement procedures of the CICA *may* ("shall be construed to authorize," not require) be followed. Moreover since § 3109 purports to be merely an exemption from 41 U.S.C. § 5 and not from §§ 251-60, procurement of services under § 3109 is subject to the CICA.

In short unless a statute otherwise provides, CICA applies in the civilian sector to the procurement of services. Where a statute clearly makes CICA inapplicable, procurement of services is subject to the advertising requirements of 41 U.S.C. § 5—unless there is a statutory exception to that provision. Section 3109 is a statutory exception to § 5 but not §§ 251-60.

139 *See, e.g.*, 41 U.S.C. § 253(b), (c), (g) (Supp. III 1985).

140 *See* 41 U.S.C. § 252(a) (1982). The term, "executive agency" is not defined in § 259 of the Act which is the definitional provision. *See* 41 U.S.C. § 259 (Supp. III 1985). It is, however, defined in 40 U.S.C. § 472 (1982) and that definition has been taken to be applicable to the competition provisions. *See, e.g.*, Flight Int'l Group, Inc. v. Fed. Reserve Bank of Chicago, 583 F. Supp. 674, 679-80 (N.D. Ga. 1984).

Section 472(a) provides that the term "executive agency" means "any executive department or independent establishment in the executive branch of the Government, including any wholly owned government corporation." 40 U.S.C. § 472(a) (1982). The FAR is in accord. *See* 48 C.F.R. § 2.101 (1987) ("executive department, military department, or any independent establishment within the meaning of 5 U.S.C. §§ 101, 102 and 104(1), respectively, and any wholly owned Government corporation within the meaning of 31 U.S.C. § 9101."). *See also* 41 U.S.C. § 403(1) (Supp. III 1985).

The executive departments are defined in 5 U.S.C. § 101 (1982) to include State, Treasury, Defense, Justice, Interior, Agriculture, Commerce, Labor, Health and Human Services, Housing and Urban Development, Transportation, Energy and Education. (However, the Department of Defense, the Coast Guard, and the National Aeronautics and Space Administration are expressly exempt from 41 U.S.C. §§ 251-60 (though similar procurement provisions apply to them under 10 U.S.C. §§ 2301-2316). Under 5 U.S.C. § 104 (1982), an "independent establishment" is "an establishment in the executive branch (other than the United States Postal Service or the Postal Rate Commission) which is not an Executive department, military department, Government corporation, or part thereof, or part of an independent establishment" and the GAO. *But see* Flight Int'l Group, Inc. v. Fed. Reserve Bank of Chicago, 583 F. Supp. at 679 n.4 (rejecting that the meaning of "independent establishment" in section 472(a) necessarily is defined by 5 U.S.C. § 104). A "government corporation" is a corporation owned or controlled by the government of the United States. 5 U.S.C. § 103 (1982). The distinction between a "mixed-ownership Government corporation" and "a wholly owned Government corporation" is drawn in 31 U.S.C. § 9101 (1982) by a specific identification of which government corporations fall into these two categories. For example, the FDIC and Federal Home Loan Banks, the National Credit Union Administration Central Liquidity Facility are

conducting a procurement for services are required to "obtain full and open competition"[141] and "use the competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement."[142] The term, "full and open competition," means that all responsible sources are permitted to submit competitive proposals on the procurement.[143]

While sealed bids constitute one type of competitive procedure sanctioned (and sometimes required) by the statute,[144]it is probably *not required* in the case of procurement of attorney services, since in most, if not all instances, such contracts will not be made solely on the basis of price and other price-related factors.[145] Therefore a request for competitive proposals (RCP) will be the requisite method of competitive procurement.[146]

The statute provides seven general exceptions from the requirements of full and open competition and use of competitive procedures.[147] Three appear to be of more than passing relevance with regard to legal services contracts:

> (1) the property or services needed by the executive agency are available from only one responsible source and no other type of property or services will satisfy the needs of the executive agency;[148]
> (2) the executive agency's need for the property or services is of such an unusual and compelling urgency that the Government would be seriously injured unless the executive agency is permitted to limit the number of sources from which it solicits bids or proposals.[149]
> . . . .

designated as "mixed ownership." The FSLIC and Pension Benefit Guaranty Corporation are "wholly owned."

Significantly for present purposes, it would therefore appear that except to the extent statutes otherwise provide, the so-called "independent agencies," such as the FTC, and the wholly owned government corporations, like the FSLIC and PBGC, are subject to the CICA, at least with regard to certain of their functions.

141 41 U.S.C. § 253(a)(1)(A) (Supp. III 1985).

142 *Id.* at § 253(a)(1)(B). Congress has indicated that "a fair proportion of the total purchases and contracts for property and services for the Government shall be placed with small-business concerns." 41 U.S.C. § 252(b) (Supp. III 1985). "Competitive procedures" within the meaning of the CICA include "procurements conducted in furtherance of Section 644 of title 15 as long as all responsible business concerns that are entitled to submit offers for such procurements are permitted to compete." 41 U.S.C. § 259(b)(4) (Supp. III 1985). Finally, the CICA expressly provides that an "executive agency may provide for the procurement of property or services covered by . . . [§ 253] using competitive procedures, but excluding other than small business concerns in furtherance of sections 638 and 644 of Title 15." 41 U.S.C. § 253(b)(2) (Supp. III 1985).

The regulations of the Small Business Administration include "legal services" as a category of "small business" where the size of the business concern is not more than $3.5 million in annual receipts. 13 C.F.R. § 121.2 (1986). The FAR itself contains regulations for procurement as it affects small businesses, *see* 48 C.F.R. § 19 (1986), but it appears to impose a $2 million cap on receipts of a provider of legal services in order to qualify as "small." *Id.* at § 19.102-5.

143 *Id.* 41 U.S.C. §§ 259(c), 403(7) (Supp. III 1985).

144 *Id.* at § 253(a)(2)(A).

145 *Id.* at § 253(a)(2)(A)(ii). *See supra* note 124.

146 *Id.* at § 253(a)(2)(B).

147 *Id.* at § 253(c).

148 *Id.* at § 253(c)(1). Where, for instance, in the geographical area where the services are to be rendered, only one lawyer or firm has the necessary expertise, this section may be applicable. This exception has in fact been relied upon by agencies in obtaining legal services.

149 *Id.* at § 253(c)(2).

(7) the head of the executive agency
(A) determines that it is necessary in the public interest to use procedures other than competitive procedures in the particular procurement concerned, and
(B) notifies the Congress in writing of such determination not less than 30 days before the award of the contract.[150]

Even where exception (2) applies, the agency is required to "request offers from as many potential sources as is practicable under the circumstances."[151] Moreover, an agency may not award a contract using procedures other than competitive procedures based on exceptions (1) or (2) unless the contracting officer justifies the action in writing and certain approvals are obtained.[152] If, however, exception (2) is relied upon, the required justification and approvals may be made after the contract is awarded.[153] The format for the justification is prescribed.[154] The statute requires, in part, that the agency expressly determine that the anticipated cost will be fair and reasonable.[155] It is not permissible to justify the use of procedures other than competitive procedures "on the basis of the lack of advance planning."[156]

The language of the exceptions and the procedures that accompany their use suggest that they should be only sparingly invoked.[157] With regard to attorneys' services, they would appear to be of relatively limited use.[158]

There is one additional exception from the requirement that agencies "obtain full and open competition though the use of competitive procedures" that might be significant from the point of view of legal services contracts. Specifically, in the case of contracts for an amount which does not exceed $25,000,[159] the statute authorizes the adoption of "special simplified procedures"[160] "[i]n order to promote efficiency and economy in contracting and to avoid unnecessary burdens for agencies and contractors."[161] However, in using these procedures, an agency

150 *Id.* at § 253(c)(7)(A), (B).
151 *Id.* at § 253(e).
152 *Id.* at § 253(f)(1).
153 *Id.* at § 253(f)(2).
154 *Id.* at § 253(f)(3).
155 *Id.* at § 253(f)(3)(C). The justification must also include a description of the agency's needs, identification of the exception relied upon, a demonstration based on the contractor's qualifications or nature of procurement of the reasons for using the exception, a description of the market survey conducted or reasons why it was not conducted, a listing of sources expressing interest in procurement, and a statement of actions the agency may take to remove barriers to competition in the future. *Id.* § 253(f)(3)(A), (B), (D)-(F). This justification must be available for public inspection. *Id.* at § 253(f)(4).
156 *Id.* at § 253(f)(5)(A).
157 *See* Ruttinger, *Acquiring the Services of Neutrals for Alternative Means of Dispute Resolution and Negotiated Rulemaking*, 1986 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES RECOMMENDATIONS AND REPORTS at 881 ("... the market surveys, sole source determinations, and gamut of agency approvals required by Parts 6 and 7 of the FAR may make it difficult for an agency to proceed on a sole source basis in a timely fashion.").
158 *See infra* notes 415-18 and accompanying text.
159 41 U.S.C. § 253(g)(2) (1982).
160 *Id.* at § 253(g)(1).
161 *Id.*

must "promote competition to the maximum extent practicable."[162] Further discussion of those procedures will be postponed until the examination of the FAR.[163]

The CICA requires that each solicitation for competitive proposals (other than for small purchases) must include at a minimum a statement of all significant factors, including price, which the agency expects to consider in evaluating the proposals, along with the relative importance assigned to each of those factors.[164] In the case of competitive proposals, there must be "a statement that the proposals are intended to be evaluated with, and awards made after, discussions with the offerors, but might be evaluated and awarded without discussions with the offerors."[165]

The time and place for submission of proposals must also be included in the solicitation.[166] Specifications included in the solicitation must be developed "in such manner as is necessary to obtain full and open competition with due regard to the nature of the . . . services to be acquired."[167]

Except where one of the exceptions from the use of competitive procedures is applicable,[168] agencies intending to solicit proposals for a contract for services for a price expected to exceed $10,000 must furnish the Secretary of Commerce a notice for publication in the *Commerce Business Daily*.[169] Among other things, this notice must accurately describe the services contracted for.[170] If interested in submitting a proposal, a prospective contractor can then make a business judgment whether to request a copy of the solicitation.[171] Where these notices are required, agencies are limited with respect to the time when they may issue a solicitation and with regard to setting deadlines for the submittal of proposals.[172]

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162 *Id.* at § 253(g)(4). *See also* Ruttinger, *supra* note 157, at 888-95 for a discussion of various specific procurement techniques that may [or may not] be applicable to obtaining attorney services—small purchases, indefinite supply contracts, basic ordering agreements, blanket purchasing agreements and supply schedules.

163 *See infra* notes 191-93 and accompanying text.

164 41 U.S.C. § 253a(b)(1)(A); (B) (1982).

165 *Id.* at § 253a(b)(2)(B)(i).

166 *Id.* at § 253a(b)(2)(B)(ii).

167 *Id.* at § 253a(a)(1)(C). In preparing for the procurement the agency must also "specify its needs and solicit bids or proposals in a manner designed to achieve full and open competition," and "use advance procurement planning and market research." *Id.* at § 253a(a)(1)(A), (B). Each solicitation must include specifications which permit full and open competition and "include restrictive provisions or conditions only to the extent necessary to satisfy the needs of the executive agency or as authorized by law." *Id.* at § 253a(a)(2)(A), (B). The type of specification shall depend "on the nature of the needs of the executive agency and the market available to satisfy such needs." *Id.* at § 253a(a)(3).

168 41 U.S.C. § 416(c)(2) (1982). Exception (1) (sole source) to § 253 is not exempt from the notice requirements. *See id.* at § 416(2). *See also id.* § 416(3) (no notice if determination it would not be "reasonable" or "appropriate" to issue it).

169 *Id.* at § 416(a)(1).

170 *Id.* at § 416(b)(1).

171 *Id.*

172 *Id.* at § 416(a)(3).

The statute requires the agency to evaluate competitive proposals based solely on the factors specified in the solicitation.[173] It may reject all proposals if the agency head determines that such action is in the public interest.[174]

The agency has the discretion to have discussions with offerors with regard to their proposals prior to any award.[175] If it chooses to do so, it must conduct discussions, oral or written, with all responsible sources who submit proposals within the competitive range. Such sources are identified by considering only price and the other factors included in the solicitation.[176] Or the agency can award the contract without such discussions "when it can be clearly demonstrated from the existence of full and open competition or accurate prior cost experience with the . . . service that acceptance of an initial proposal without discussions would result in the lowest overall cost to the Government."[177] Unless all proposals are rejected, the agency must award the contract with "reasonable promptness to the responsible source whose proposal is most advantageous to the United States, considering only price and the other factors included in the solicitation."[178] A "responsible source" means a prospective contractor[179] who, *inter alia*, "has a satisfactory performance record,"[180] "a satisfactory record of integrity and business ethics,"[181] and who "has the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain such organization, experience, controls, and skills."[182]

In addition the statute regulates the types of contracts that may be executed[183] and requires that any contract awarded expressly permit examination of the relevant books and records of the contractor by the GAO.[184]

4. Federal Acquisition Regulation

The Federal Acquisition Regulation, which is found in title 48 of the Code of Federal Regulations, chapter 1,[185] is prepared, issued and maintained jointly by the Secretary of Defense, the Administrator of General

173 *Id.* at § 253b(a). *See* GAO opinion in Matter of Wolf, Block, Schorr and Solis-Cohen, B-221363.2 (May 28, 1986) (unpublished) (contract award protest rejected on basis that while the protester promised a lower price, technical qualifications of another proposal justified award to another law firm).

174 41 U.S.C. § 253b(b) (1982). There are also provisions for "qualification requirements" (designed for quality assurance) that might perhaps apply to the legal services area. *Id.* at § 253(c).

175 *Id.* at § 253b(d)(1).

176 *Id.* at § 253b(d)(2). In retaining attorneys, such pre-award discussion would appear to be a likely occurrence.

177 *Id.* at § 253b(d)(1)(B).

178 *Id.* at § 253b(d)(4).

179 *Id.* at §§ 259(c), 403(8).

180 *Id.* at § 403(8)(C).

181 *Id.* at § 403(8)(D).

182 *Id.* at § 403(8)(E). It has been estimated that the full competition process consumes a minimum of two to three months. *See* Ruttinger, *supra* note 157, at 879. *See also infra* note 205 and accompanying text.

183 41 U.S.C. § 254(a), (b) (1982).

184 *Id.* at § 254(c).

185 48 C.F.R. ch. 1 (1986).

Services, and the Administrator of the National Aeronautics and Space Administration under their respective statutory authorities.[186] It applies to acquisitions of property and services by contract with appropriated funds.[187] By its terms, therefore, this system of regulations would appear to be inapplicable in the case of executive agencies in those instances where attorneys' fees are paid out of the funds collected.[188] Such may be the case with respect to the 1986 Debt Collection Amendments pursuant to which contingency fee agreements may be used and are in fact the preferred fee arrangement.[189]

For current purposes the contents of the FAR largely repeat the statutory requirements for competitive procurement described above and need not be repeated here.[190]

The procedures for so-called "small purchases" (acquisitions of services in the amount of $25,000 or less) apply only to non-personal services contracts.[191] Purchases of $1,000 and under may be made without securing competitive quotations if the contracting officer considers the price to be reasonable.[192] For contracts in excess of that amount, there is a requirement of solicitation of quotations from a reasonable number of sources in order to promote competition to the maximum extent practicable.[193]

5. OFPP's Study of Professional Services Contracting

Section 2753 of the Competition in Contracting Act of 1984 directed that

> Not later than January 31, 1985, the Administrator of the Office of Federal Procurement Policy complete a study of alternatives and recommend to the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House of Representatives a plan to increase the opportunities to achieve full and open competition on the basis of technical qualifications, quality, and other factors in the procurement of professional, technical, and managerial services.[194]

The study[195] was completed on schedule and transmitted to Congress. While legal services were considered to be "professional services" within the meaning of the statute,[196] "the associations of many professions, including . . . law . . . did not submit comments or participate in the proceedings of the study."[197] The final report suggests that this appar-

186 *Id.* at § 1.102(b). Agencies may, within limits, issue acquisition regulations that implement or supplement the FAR. *Id.* at § 1.301(a)(1).
187 *Id.* at § 2.101.
188 *But see supra* note 130.
189 *See infra* notes 236-39 and accompanying text. *But see supra* note 130.
190 *See, e.g.*, 48 C.F.R. pt. 6 (1986).
191 *Id.* at §§ 13.000, 13.101.
192 *Id.* at § 13.106(a)(1).
193 *Id.* at § 13.106(b)(1).
194 Pub. L. No. 98-369, 98 Stat. 1203 (1984).
195 Office of Federal Procurement Policy, STUDY OF PROFESSIONAL SERVICES CONTRACTING (Jan. 1985) [hereinafter "OFPP Study"].
196 OFPP Study, *supra* note 195, Appendix C at 35.
197 *Id.* at 3.

ent lack of interest might have been attributable to satisfaction with the present contracting process.[198]

In summarizing its findings, the report noted that those private organizations participating in the study identified what they believed were various problems prevalent in the contracting practices of many government agencies:[199]

(1) the tendency of price to dominate in the contractor selection process;[200]
(2) the difficulty of developing good statements of work;[201]

198 *Id.*

199 Notes 200-05, *infra*, extensively cite from OFPP Study because of the background information dealing with government contracting contained therein that is relevant generally to the legal service area as well as for the observations that may be specifically relevant to the hiring of outside counsel.

200 *Dominance of Price*

Traditionally, the preferred method of procurement within Government has been formal advertising. Under the formally advertised, sealed bid method, the work to be performed is described in sufficient detail to permit award to the lowest, responsive, responsible bidder without pre-award discussions. Price is the sole criterion for selecting a contractor from among the responsive, responsible bidders.

In service contracting, pre-award discussions are generally considered necessary, because it is difficult to develop a sufficiently detailed description and understanding of the work to be performed to permit award of a contract without discussion. The procurement regulations provide for pre-award discussions and the use of "the negotiated method of procurement" where sufficiently detailed specifications cannot be developed to permit formal advertising.

The negotiated method of procurement, in addition to permitting discussions, permits a contract award to be based on factors other than price. Price, in terms of dollars, however, is easily understood and simple to apply as a selection criteria. One of the recurring criticisms received from the private sector during the course of the study was that the Government tends to "take the easy way out" and accept low-priced offers rather than justify the acceptance of higher-priced, technically superior ones.

The tendency of price to be a dominant factor in selecting a professional service contractor is a long-standing issue. In 1972, Congressman Jack Brooks recognized the ingrained nature of price competition in Government procurement and sponsored and guided into law H.R. 12807 (now The Brooks A-E Selection Statute-Pub. L. No. 92-582). The statute effectively prohibits the selection of architects-engineers for Government work on the basis of price competition.

The controversy over the respective roles of "price" and "technical merit" as factors influencing the selection of a contractor to perform professional services has continued during the 12 years since the enactment of the statute. Competition and *price* competition are often thought of as synonymous. Competition is fundamental to Federal procurement, and even though the procurement regulations encourage technical competition, it is perceived by many that the spirit in which the regulations are implemented often stresses price. This has caused problems in professional services contracting, and the Government is sometimes accused of being "penny-wise and pound-foolish" when it accepts offers primarily on the basis of price. OFPP Study, *supra* note 195, at 4.

201 *Poor Statements of Work*

The definition of the work to be performed under a service contract is crucial. If the work is not properly defined and described, the result will be a misunderstanding and controversy. Unfortunately, there is no universal method for writing high quality statements of work. Each statement must be tailored to the particular task to be performed and the quality level of services required. Some tasks lend themselves to explicit definition; others are best described in terms of mission need or performance requirements.

The statement of work is a part of the contract and is binding on both the contractor and Government. Since the written words in the statement translate into cost and profit, poorly written statements may create misunderstandings and lead to adversary or unproductive relationships between the Government and its contractors. Some contractors offering comments on the study indicated there is no such thing as a perfect statement of work. These contractors state that the only way the Government can protect itself and be assured of obtaining the best value is to negotiate the exact task to be performed (not how it will be performed) after a contractor is selected. Otherwise, the contractors maintain, gamesmanship will occur.

The form of gamesmanship alluded to by the contractors purportedly occurs when a contractor spots a flaw, omission, or ambiguous term in the statement of work, but does not mention it until

(3) the use of procedures that result in technical leveling;[202]

after the contract has been awarded. If the contractor spotting the flaw or omission is awarded the contract, the problem is then brought to the attention of the Government, and a change order is required. The contractor, then, has the opportunity to "get well" on the change order, as competition no longer exists.

In any event, the Government's best protection against the occurrence of gamesmanship is to express the services to be performed in clear, simple, and legally enforceable terms. In all situations, however, the Government is, to a certain extent, dependant on the professionalism of the contractor performing the task. There is no method totally effective in preventing gamesmanship. Industry spokesmen suggested that the circulation of draft work statements would help improve the overall quality and specificity of the statements. Government personnel indicated that detailed discussions of the statement of work during negotiations, when coupled with thorough cost analysis, examination of a contractor's past performance, and the establishment of negotiated ceilings on certain cost elements, were generally adequate to protect the Government from possible gamesmanship and from the problem of buy-ins. OFPP Study, *supra* note 195, at 5.

202 *Technical Leveling*

Section 15.610 of the FAR defines technical leveling as, "helping an offeror to bring its proposal up to the level of other proposals through successive rounds of discussion, such as by pointing out weaknesses resulting from the offeror's lack of diligence, competence, or inventiveness in preparing the proposal."

Although prohibited by the FAR, technical leveling was, perhaps, the most frequent complaint received from the private sector during the course of this study. One of the organizations testifying at the September 13, 1984, public meeting described technical leveling as:

> Technical leveling . . . typically occurs in a negotiated procurement situation where technical portions of proposals are initially evaluated and scored, along with the cost proposals. After the initial evaluation and scoring, there ensues a process (commonly referred to as discussions, negotiations, or offer clarification) where the technical scores are converged to the point where at least the top two or three proposals are not only in a competitive range, but very close, often separated by only a few points on a scale of 100. This results in a level profile of technical proposals within the competitive range which, *de facto*, shifts the attention to cost as the factor to determine the ultimate selection. Cost, in turn, is often "lowballed" or simply unrealistic in terms of the nature of the service requirement.
>
> The combination of the technical leveling and the consequent shift to cost as the award determinant is bureaucratically and politically compelling; that is, source selection authorities and source evaluation board members find it difficult to not simply take the safe course of action, which is to select the low bid if it can be rationalized as "realistic."
>
> The net effect of the above process for the Government manager seeking highest quality is truly perverse: he or she is forced to accept a source who may be *just qualified*, as opposed to a source who is demonstrably the *best qualified* and *most competent* and most likely to perform satisfactorily against demanding high quality requirements; and he or she often faces a significant possibility of a cost overrun and/or serious performance shortfall.

In considering technical leveling, as described above, it must be kept in mind that a legitimate role of negotiations is to clarify ambiguities and identify deficiencies in the proposals of all offerors having the potential to receive an award so that the offerors are given an opportunity to meet the Government's requirements. In those instances when discussions result in the elimination of technical problems, the Government is often justified in making an award, based on cost, between equally satisfactory proposals.

In May 1984, the GAO issued a decision (B-212675) involving Harrison Systems Ltd., who protested the award of a contract by the United States Information Agency. The contract was for the design and installation of a studio control room and technical operations facilities. The decision illustrates the complexity and subtlety of the judgments required to prevent technical leveling and, at the same time, protect the Government. In its decision, GAO ruled:

> Even though the solicitation states that technical factors will be weighted 70 percent and price 30 percent, and award will be made to the offeror with the highest combined point total, the agency may properly award to a lower technically rated, lower priced offeror with lower combined point total because the contracting officer made a reasonable determination that there was no significant technical differences between the proposals and award to the lower priced offeror was most advantageous to the Government, notwithstanding that there was a 14.4 percent difference in the technical scores of the highest scored offeror and the offeror receiving the award.

GAO had previously issued decisions on both sides of the issue regarding a contracting officer's discretion in implementing the award criteria specified in the solicitation. In an RCA Service Company decision (B-202871), August 22, 1983, GAO ruled that:

(4) the lack of cost realism and the occurrence of "buy-ins;"[203]

Even where the RFP evaluation factors indicated that award would be made to that offeror with the highest point score, we have held that before the contracting agency can award to the highest priced (or higher cost) technically superior offeror, the contracting agency is required to justify such award in the light of the extra expenditure required.

In its Telecommunications Management Corporation decision, 57 Comp. Gen. 251, 1978, GAO indicated that:

Where the solicitation sets forth a precise numerical evaluation formula, including price, and provides that the awardee will be selected on the basis of total score, the contracting agency must award to the highest scored offeror if the source selection official agrees with the scoring.

GAO, in issuing B-212675, acknowledged that the RCA and Telecommunications Management Corporation decisions were "somewhat inconsistent." GAO summed up its views by stating:

While we think that both cases were decided correctly, the relevant statements went beyond what was necessary to decide the cases. We now think that both views are too extreme. The better view, which we adopt, is that when the RFP contains a precise numerical evaluation formula, including cost/price, and a statement that award will be made to the highest point scored offerors, the contracting officer or other source selection authority retains the discretion to examine the technical point scores to determine whether a point differential between offerors represents any actual significant difference in technical merit. If it does not, then award may be made to the lower cost or priced proposal, even though its total point score is lower. In effect, the contracting official would be rescoring the technical proposals conceptually, but not mechanically, and would not really be altering the predetermined cost/technical tradeoff. If, however, the source selection official determines that the point difference represents actual technical superiority and he agrees with the scoring, then he must abide by the formula and award to the offeror with the highest total point score. He may not decide that the technical superiority is not worth the cost difference. That would alter the predetermined cost/technical tradeoff. Additionally, we think that if the award is to be made to a more expensive higher total point scored offeror in accordance with the formula, there is no necessity for the contracting agency to make a separate determination that the extra expense is justified, since that determination is made when the formula is devised.

OFPP Study, *supra* note 195, at 7-9.

203 *Buy Ins*

Buy ins may occur in service contracting, as in other types of contracting, when a contractor knowingly understates the estimated cost and, therefore, the proposed contract price. This may be done in expectation of obtaining the proposed contract and then increasing the price through change orders or during follow-on contracts. Buy ins also occur, however, in certain instances, when a contractor is attempting to "break into" the market. These contractors are sometimes willing to take an initial contract at cost, or even at a loss, in order to establish a performance record for future contracts.

Evaluating proposals received in response to a service requirement and ascertaining whether the proposed work can be performed for the offered price is sometimes difficult. The capability of offerors to meet the Government's needs is based almost entirely on information submitted by the offerors, each of whom has a vested interest in obtaining the proposed contract. The equipment, facilities, and personnel capabilities required to perform some services can be evaluated with some certainty. The performance of many services, though, requires intellectual skills and creativity. It is difficult, at best, to estimate, with the value of that knowledge, or how the personnel will use their expertise to efficiently and effectively perform a task or service.

Several persons and organizations suggested that past performance on comparable contracts (particularly with regard to cost realism) is the best way to judge an offeror's probability of performing in the future. They recommended that past performance carry "more weight" in selecting contractors for future work and that Government personnel be given specific training in evaluating price proposals.

Acceptable past performance, of course, is based on a contractor's past history of performing the required tasks at the desired quality level, on time, within budget, and in conformance with all contractual requirements. A contractor who has performed in this manner in the past will "have a good track record." That does not mean, however, that new offerors may not also perform well or even better. It, also, does not mean that good track records should not be discounted when the purchasing official has a reasonable basis to believe they no longer accurately reflect the offeror's ability or willingness to perform. OFPP Study, *supra* note 195, at 6.

(5) the shortage of highly trained contracting personnel;[204] and
(6) the length of time required to award a contract.[205]

Of course, it is possible that the same or similar problems exist in the area of government procurement of legal services. The lack of complaints by the legal contracting sector during the study may have reflected either satisfaction or simply ignorance that the study was proceeding.

The Government contracting community apparently was largely satisfied with the existing contracting process[206] and agency representatives to the OFPP task group did not agree with industry perceptions regarding the pervasiveness of the problems noted above.[207] "Contracting officials stated that current procedures provide for the proper consideration of both cost and technical factors and that contract award can now be made on the basis of technical and quality factors when appropriate to do so."[208] Apparently the OFPP study had little generative significance in the contracting area.

III. Debt Collection Amendments of 1986

A. *Introduction*

On November 3, 1986 President Reagan approved Pub. L. No. 99-578 which establishes a pilot program for the retention of attorneys engaged in private practice in an effort to collect the non-tax indebtedness owed to the United States. In enacting this legislation Congress addressed various issues that are relevant outside the area of debt collec-

204 *Need for Better Trained Personnel*

In addition to revealing the complexities involved in developing and administering criteria for awarding professional services contracts, GAO's ruling in B-212675 indicates that contracting is not an exact science or a mechanical process. Trained contracting personnel are essential to maintaining the delicate balance required within the system between sufficient operating flexibility to protect the Government's interests and the structure required to maintain its integrity.

Contracting, whether for services or hardware, requires the exercise of sound judgment. There is no substitute for skilled, competent personnel. Trained personnel will often succeed in obtaining a good contract, notwithstanding the constraints imposed by the contracting methodology employed. Conversely, untrained personnel may produce an unworkable contract, notwithstanding an effective contracting process.

Several major organizations commented that the current problem in professional services contracting stems from attitudes of the personnel doing the contracting and not necessarily from inadequate regulations or procedures. Training in professional services contracting was stressed as a means of altering the perception attributed to many contracting personnel that, rightly or wrongly, the "low offer is always the best and safest." OFPP Study, *supra* note 195 at 9-10.

205 *Long Procurement Lead Times*

Procurement administrative lead time (PALT) is generally regarded as the total time required to process a procurement action, beginning with the time a procurement request is received in the procurement office and ending with the award of the contract. Industry and Government officials, both, acknowledge that the procurement cycle "simply takes too long." The Professional Services Council reported that, in their members' experience: (1) it usually takes a year between the drafting of a scope of work and the award of a contract; and (2) it almost always takes from 4-6 months for an agency to award a contract after receipt of proposals. Problems occurring as a result of the long processing times include: higher prices because of built-in escalation factors; difficulty of scheduling and retaining key personnel; a change in requirements over time; and a reduction in the number and quality of competing firms. OFPP Study, *supra* note 195, at 10.

206 *Id.* at 3.

207 *Id.*

208 *Id.* at vii.

tion. For that reason, detailed consideration of the new statute and its legislative history is required.

As of September 30, 1985, non-tax delinquent debts owed to the federal government had grown to $23.6 billion, double the $11.7 billion reported outstanding in fiscal year 1981.[209] Without litigation to recover these amounts it was estimated that $6.7 million was lost each day due to the running of the statute of limitations.[210] Under existing law, judicial enforcement of claims fell to the Department of Justice[211] which, given other matters deemed to be of higher priority,[212] purportedly lacked the resources to mount an effective debt collection campaign in the courts.[213] Moreover, since efficient and effective debt collection was believed to require some experience with debtor psychology and techniques to avoid payment as well as knowledge of state laws with regard to post-judgment remedies,[214] employment of private counsel appeared to Congress to be a viable alternative method of collection.[215] Testimony at hearings held on the legislation indicated that several states had used the services of private attorneys for debt collection with considerable success.[216]

The legislation that was enacted as the "Debt Collection Amendments" originated in the Senate where hearings were held by the Subcommittee on Energy, Nuclear Proliferation, and Government Processes of the Committee on Governmental Affairs. The full Senate approved the committee-reported bill without amendments on March 19, 1986.[217] Similar bills were considered in the House by the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary. The full Committee reported a bill which was adopted by the House without amendment on September 29, 1986.[218] Some relatively minor differences between the bills passed by the Senate and House were resolved when the Senate voted to accept the House version on October 8, 1986.[219] The President approved the bill on November 3, appending, however, a signing statement regarding his interpretation of the legislation.[220]

The enacted legislation amends section 3718 of title 31 of the United States Code.[221] Prior to the 1986 amendments, that provision authorized the head of an executive or legislative agency to make con-

209 S. REP. No. 256, 99th Cong., 2d Sess. 2 (1986) [hereinafter S. Debt Report].
210 *Id.*
211 *See* 5 U.S.C. § 3106; 28 U.S.C. §§ 516, 518(b), 519, 547(2) (1982).
212 *See* H. REP. No. 909, 99th Cong., 2d Sess. 4, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5605, 5606 [hereinafter H. Debt Report]; S. Debt Report, *supra* note 209, at 2, 3.
213 H. Debt Report, *supra* note 212, at 4; S. Debt Report, *supra* note 209, at 3.
214 *See Federal Debt Revovery Act of 1985: Hearing S. 209 Before the Subcomm. on Energy, Nuclear Proliferation, and Government Processes of the Senate Comm. on Governmental Affairs*, 99th Cong., 2d Sess. 92 (1986) [hereinafter 1986 Sen. Hearings] (statement of William Guice III).
215 *See* S. Debt Report, *supra* note 209, at 6.
216 *See* 1986 Sen. Hearings, *supra* note 214, at 35-83.
217 132 Cong. Rec. S2989 (daily ed. March 19, 1986).
218 H.R. 5541, 99th Cong., 2d Sess., 132 Cong. Rec. H8563 (daily ed. September 29, 1986).
219 S. 209, 99th Cong., 2d Sess., 132 CONG. REC. S15616 (daily ed. October 8, 1986).
220 Statement By President Ronald Reagan Upon Signing S.209, 22 WEEKLY COMP. PRES. DOC. 1464 (Nov. 3, 1986), *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5619-20.
221 31 U.S.C. § 3718 (1982 and Supp. II 1983).

tracts with collection agencies to recover indebtedness owed to the United States Government.[222] Now those same officials "may, subject to the approval of the Attorney General, refer to a private counsel . . . claims of indebtedness owed the United States arising out of activities of that agency."[223] Referral is, however, limited to private counsel retained by the Attorney General pursuant to contracting authority expressly granted and conditioned by the new legislation.[224]

For a variety a reasons, including presumably a concern for the abuses that might arise in its administration, the legislation is limited in a variety of ways which demonstrate that the program is only experimental. First of all, the new act is effective for only three years, commencing on the effective date of implementing regulations issued by the Attorney General.[225] Those regulations are mandated by the legislation and must be submitted to Congress at least sixty days before they become effective.[226] Congress did not expressly specify a date by which the regulations must be issued. However, it did require that within 180 days of the enactment of the new legislation, the Attorney General submit to Congress a report of the actions taken under his new contracting authority.[227] This might be taken to suggest an assumption by Congress that the implementing regulations would be in place no later than that date.

The other significant limitation is not temporal but geographical. The contracting authority can be exercised to obtain legal services in no more than ten federal judicial districts.[228] While part of the new legislation appears to vest the Justice Department with total discretion in deciding whether or not to exercise its new authority,[229] it was apparently contemplated that Justice would in fact exercise it in at least five districts.[230]

B. *Program Detail*

1. Services Covered

"The Attorney General may make contracts retaining private counsel to furnish legal services, including representation in negotiation, compromise, settlement and litigation."[231] While the literal language of the statute could be construed to cover legal services that do not arise directly from or are not directly related to litigation, the clear focus of

222 31 U.S.C. § 3718(a) (1982).

223 Act of Oct. 28, 1986, Pub. L. No. 99-578, § 1(4), 100 Stat. 3305, 3306 (codified as amended at 31 U.S.C. § 3718 Supp. II 1984) (adding subsection 3718(b)(2)).

224 Pub. L. No. 99-578, § 1(4).

225 *Id.* at § 5.

226 *Id.* at § 4.

227 *Id.* at § 2.

228 *Id.* at § 3.

229 *Id.* at § 1(4).

230 *Id.* at § 3. The five districts initially chosen encompass Miami, Los Angeles, Detroit, Houston and New York. Legal Times, Feb. 16, 1987, at 1.

231 Act of Oct. 28, 1986, Pub. L. No. 99-578, § 1(4), 100 Stat. 3305, 3306 (codified as amended at 31 U.S.C. § 3718 Supp. II 1984).

the legislation was on permitting the retention of attorneys to pursue collection efforts in the courts.[232]

2. Contract Terms

a. *Fees*

Each contract is to include "such terms and conditions as the Attorney General considers necessary and appropriate."[233] One of the most important of these relates to the compensation paid attorneys who are hired. Contracts must specify "the amount of the fee to be paid . . . or the method for calculating that fee"[234] and "may provide that a fee a person charges . . . is payable from the amount recovered."[235] The statutory language thus indicates that contingency fees are authorized but not necessarily required in all instances.[236] However the legislative history indicates that in the debt collection area payment is generally by contingent fee[237] and Congress expected that in all, or almost all, instances such a fee arrangement would be the prescribed method of compensation.[238] The prospect of collection of money owed the government without substantial taxpayer cost[239] proved particularly alluring. At the same time the statute directs that "the amount of the fee payable . . . may not exceed the fee that counsel engaged in the private practice of law in the area or areas where the legal services are furnished typically charge clients for furnishing legal services in the collection of claims of indebtedness . . . ."[240] Among other things, this provision would seem to mean that in an area where collection attorneys are not paid on a contingency basis and the fee charged under the fee structure prevailing there would be less than that paid under a contingency contract, the Attorney General can (and must) make a fee arrangement in accordance with the local practice.[241]

The statute gives no guidance as to how to identify the "typical fee." Since competitive procedures will be utilized to award these contracts, the proposals themselves may be some evidence of the "typical fee" in the area, but it would be difficult to justify reliance solely on those proposals. Some additional investigation, such as a letter survey of a sub-

232 *See, e.g.*, S. Debt Report, *supra* note 209, at 2-4.

233 Act of Oct. 28, 1986, Pub. L. No. 99-578, § 1(4), 100 Stat. 3305, 3306 (codified as amended at 31 U.S.C. § 3718 Supp. II 1984) (adding a new subsection 3718(b)(1)(A)).

234 *Id.*

235 Act of Oct. 28, 1986, Pub. L. No. 99-578, § 1(2), 100 Stat. 3305, 3306 (codified as amended at 31 U.S.C. § 3718) (amending and redesignating subsection 3718(b)).

236 *See also* H. Debt Report, *supra* note 212, at 6 ("Such contracts could be made on a fixed fee or contingent basis.").

237 *See, e.g.*, H. Debt Report, *supra* note 212, at 5.

238 *See* S. Debt Report, *supra* note 209, at 7; H. Debt Report, *supra* note 212, at 5.

239 There may be some taxpayer cost to the extent filing, service and other fees and costs of suit must be advanced from appropriated funds and are not ultimately recovered from the debtor. *See supra* note 130.

240 Act of Oct. 28, 1986, Pub. L. No. 99-578, § 1(4), 100 Stat. 3305, 3306 (codified as amended at 31 U.S.C. § 3718) (adding a new subsection 3718(b)(1)(A)).

241 Also if the debt instrument provides for the debtor's payment of attorneys' fees, the government's attorneys can collect their compensation along with the debt at no cost to the government. S. Debt Report, *supra* note 209, at 7. Contracts with counsel should anticipate that possibility and limit attorney compensation accordingly.

stantial portion of the local collection bar and inquiries directed to local bar associations, would appear to be minimal steps necessary to give some clear guidance on this matter.

The legislation does, however, indicate that differences in fees charged by the same attorney for different claims can be justified on the basis of "the amount, age, and nature of the indebtedness and whether the debtor is an individual or a business entity."[242] This language suggests that the factors thus enumerated are the only ones that can be used to support differentials in fees charged for the collection of different debts. The assumption seems to be that these are factors that generally enter (or should enter) into the calculation of the "typical fee" of a collection attorney.

Congress apparently expected that Justice would write contracts with particular attorneys to cover not just one claim but a large number.[243] In fact, the testimony at the subcommittee level suggested that the economies of debt collection and facilitation of supervision of attorneys' work argued in favor of using few rather than many attorneys or firms.[244] On the assumption, therefore, that a contract under the new act covers a multitude of debts which vary considerably in amount, age, and nature of the claim and debtor, it is likely that, even where only contingent fees are provided for, the provisions regarding fees charged are likely to be rather complicated where in fact the "typical" practice of attorneys in the area is to vary fees based on such factors.

b. *Control*

Maintenance of control by the federal government over the activities of private counsel taken pursuant to these contracts was obviously a matter of highest import for Congress in drafting this legislation.[245] Moreover, President Reagan in signing the legislation indicated that he did so "knowing that the Attorney General will take all steps necessary to ensure that any contract entered into with private counsel contains provisions requiring ongoing supervision of the private counsel so that all fundamental decisions, including whether to initiate litigation and

242 Act of Oct. 28, 1986, Pub. L. No. 99-578, § 1(4), 100 Stat. 3305, 3306 (codified as amended at 31 U.S.C. § 3718 Supp. II 1984).

243 *See, e.g.*, S. Debt Report, *supra* note 209, at 7; *Federal Claims Collection Act Amendment Hearing on H.R. 979 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. 79 (1986) [hereinafter House Hearings] (statement of Deputy Assistant Attorney General Robert Ford).

244 *See, e.g.*, 1986 Sen. Hearings, *supra* note 214, at 80 (statement of Dr. Dolores Gross).

245 Concerns regarding control and the constitutional problems thereby implicated, *see supra* notes 8-15 and accompanying text, have been voiced regarding this program. *See* Legal Times, Feb. 16, 1987, ("Private Lawyers See Riches in Federal Debt Collection").

For statements in the legislative history indicating the assumption that close control was expected *see, e.g.*, H. Debt Report, *supra* note 212, at 4 ("In granting this [contract] authority to the Attorney General, the Committee emphasizes the importance of the protection it has included in the bill to ensure its proper use"); 132 Cong. Rec. S2987 (daily ed. March 19, 1986) (Statement of Sen. D'Amato) ("Under the *careful supervision* of DOJ, and subject to provisions which would protect the rights of debtors, the use of private counsel will greatly enhance the ability of the Federal Government to recover outstanding debt.") (emphasis added). *See also* H. Debt Report, *supra* note 212, at 14-15 (letter from Milton J. Socolar, Acting Comptroller General of the United States) (emphasizing needs for control over private attorneys).

whether to settle or compromise a claim, are executed by an officer of the United States, as required by the Constitution."[246]

The legislation requires that contracts permit the Attorney General "to terminate either the contract or the private counsel's representation . . . in particular cases if the Attorney General finds that such action is for the convenience of the Government."[247] Another mandated contractual provision retains for the head of the agency referring a claim the authority "to resolve a dispute regarding the claim, to compromise the claim, or to terminate a collection action on the claim."[248] Monthly reports will have to be submitted by counsel to the Justice Department and the federal agency referring the claim relating to the services rendered during the month and the progress during the month in the collection efforts.[249]

While the statute expressly vests the power to enter into these contracts for legal services in the Attorney General, subdelegation within the Justice Department of the contracting power is apparently permitted.[250] Whether the Attorney General can delegate it not to his subordinates but to other federal agencies is less clear. The legislative history itself focuses on the Justice Department's involvement in the contracting process and this suggests a negative answer. Realistically speaking, the chance that Justice would want to delegate the power away seems remote, particularly given the fact that this is only a pilot program. If the program were expanded, however, the mechanics of the procurement and monitoring processes might threaten to consume so much of Justice's resources that delegation to the General Services Administration or to some of the agencies with the largest amount of debt outstanding might prove inviting. At that point, express statutory authorization for the delegation could be sought.

Actual referral of particular cases is expressly vested in the "head" of executive and legislative agencies "subject to the approval of the Attorney General."[251] Testimony regarding the legislation suggested that the Department of Justice would not try to review each case for referral[252] and Congress apparently did not intend to mandate otherwise.[253] Presumably Justice will formulate criteria indicating which types of cases should be referred and at what point in the collection effort involvement of collection counsel is appropriate.[254] For example, where an indebtedness exceeds a particular amount (such as $30,000) Justice may consider that it should handle the litigation rather than outside counsel. Since

246 22 WEEKLY COMP. PRES. DOC. 1464 (Nov. 3, 1986), *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5619. *See also supra* note 55.

247 Act of Oct. 28, 1986, Pub. L. No. 99-578, § 1(4), 100 Stat. 3305, 3306 (codified as amended at 31 U.S.C. § 3718 (Supp. II 1984)) (adding a new subsection 3718(b)(5)(A)).

248 *Id.* (adding a new subsection 3718(b)(5)(B)).

249 *Id.* (adding a new subsection 3718(b)(5)(C)).

250 *See, e.g.*, 28 U.S.C. § 510 (1982). *See generally*, K. DAVIS, ADMINISTRATIVE LAW TREATISE 3.16-.18 (1978).

251 Act of Oct. 28, 1986, Pub. L. No. 99-578, § 1(4), 100 Stat. 3305, 3306 (codified as amended at 31 U.S.C. § 3718 (Supp. II 1984)) (adding a new subsection 3718(b)(2)).

252 House Hearings, *supra* note 243, at 78 (statement of Deputy Assistant Attorney General Robert Ford).

253 S. Debt Report, *supra* note 209, at 8.

254 *Id.*

Justice must under the statute transmit to Congress annual reports dealing with its collection efforts and those of private counsel,[255] it will maintain continuing general supervision over the collection program.[256] With respect to agency referral decisions, the General Accounting Office commented on the proposed legislation, noting, among other things, the bill's assumption that "referrals would be made in accordance with uniform standards provided in the" Federal Claims Collection Standards.[257]

There was considerable discussion during the legislative consideration of the new act regarding whether or not private collection agencies should be authorized by their contracts to refer particular claims to attorneys hired by Justice.[258] The collection agency lobby argued for that power and, when the bill was first before the Senate, one of the sponsors of the legislation suggested that the legislation did not prohibit such referrals.[259] The statutory language vests the referral power in the "head" of federal agencies, though subdelegation is not expressly forbidden. The real problem presented here is the extent of discretion which the agency can grant by contract to the collection firm regarding whether and when to refer claims to attorneys hired by Justice and to whom a reference for litigation can be made. The General Accounting Office urged that strict controls be placed on such referrals.[260]

One of the strongest arguments with respect to such direct referral was that, when it comes to collection efforts, the debtor will most likely respond to the request for payment by a collection agency if he or she knows that the lack of a prompt response will be met with prompt institution of suit.[261] Requiring agency referral or agency consent to referral in all cases might undercut the effort of this legislation to give some bite to the prelitigation efforts at collection. It was also argued by the collection agency lobby that such firms could undertake much of the task of attorney supervision and monitoring that would otherwise consume the time of the federal agency to whom the debt is owed.[262] These arguments seemed to be directed to establishing a relatively substantial role for collection agencies in the referral process with discretion perhaps vested there regarding when and to whom reference should be made.

255 Act of Oct. 28, 1986, Pub. L. No. 99-578, § 1(4), 100 Stat. 3305, 3306 (codified as amended at 31 U.S.C. § 3718 (Supp. II 1984)) (adding a new subsection 3718(c)).

256 *See* S. Debt Report, *supra* note 209, at 8.

257 H. Debt Report, *supra* note 212, at 14. *See* 4 C.F.R. §§ 104.1-104.4 (1987) (standards for the administrative collection, compromise, and termination of agency collection efforts, and referral to GAO and Justice of claims for litigation).

258 *See* 1986 Sen. Hearings, *supra* note 214, at 106-150; House Hearings, *supra* note 243, at 142-85.

259 *See, e.g.*, 132 Cong. Rec. S2986 (daily ed. March 19, 1986) (statement of Sen. D'Amato).

260 H. Debt Report, *supra* note 212, at 14.

261 1986 Sen. Hearings, *supra* note 214, at 122.

262 *Id.* at 142.

Despite these arguments, the House Report[263] and, perhaps to some lesser degree, the Senate Report[264] suggest that the principle role for the collection agency in attorney referral is limited to transferring the file to the attorney chosen by the agency. The decision to litigate and the choice of litigator must apparently be made by the agency.

Whether or not cases are referred by the federal agency itself or by its collection agent, the power of compromising a claim or terminating an action remains with the federal agency.[265] However, the statute does not expressly forbid contractual provisions with attorneys granting them some discretion on these matters, as for example, where the debt may be relatively small in size.[266] Otherwise the statute does not describe the type or degree of supervision over the activities of outside counsel expected of the referring agency or the Justice Department.[267]

c. *Miscellaneous provisions*

Contracts with attorneys for collection could justifiably contain various other provisions to protect both the interests of the government and the public. Some of those suggested during the legislative consideration of the amendments include agreements holding the government harmless from claims made by debtors (or others) arising out of the efforts of

263 H. Debt Report, *supra* note 212, at 5:

> In the situation where the agency chose to use a debt collection service, and the service was unable to collect the debt, the agency may then determine that private legal services are needed. In such a case, the agency itself must select the law firm to handle the debt, although the debt collection service may, pursuant to contract or agency direction, actually transfer the file to the law firm selected by the agency. In the case of such a decision, the debt collection service must return the entire file on the debt to the agency or transfer it at the agency's direction to the selected law firm.

264 S. Dept Report, *supra* note 209, at 9:

> In order to facilitate referrals, a federal agency may send its cases directly to private counsel that has been retained by the Department of Justice to handle such a case or class of cases. When claims of indebtedness are pending with a private collection agency under a contractual agreement, the federal agency head may direct those cases to be transferred from the collection agency to the approved private counsel. Such direct transferal of the case documentation and other information will facilitate timely litigation.
>
> This legislation does not prohibit an executive or legislative agency from including in its contract with a private collection agency a provision authorizing a collection agency to transfer *prior-approved claims* of indebtedness to a private counsel which has been retained by the Department of Justice to take legal action on the particular case or class of cases.

(emphasis added).

The emphasized portion of the Senate Report could be construed to suggest that an agency may give advance approval referrals, leaving it up to the collection agency to decide whether and when to refer. Since the House Bill was enacted in lieu of the Senate Bill and the House Report (Sept. 27, 1986) was issued and available to the Senate at the time of the Senate's final action (Oct. 8, 1986), it can be argued that any difference between the two Reports should be resolved in favor of the House view. In fact the Senate "debate," when the House version was before it, seemed to accept the House approach. *See* 143 CONG. REC. S15616 (daily ed. Oct. 8, 1986) (statement of Sen. D'Amato) (collection agency "to transfer all the documents related to the claim to private counsel retained by the Attorney General to whom claims have been referred by the Federal agency should legal services be required").

265 Act of Oct. 28, 1986, Pub. L. No. 99-578, § 1(4), 100 Stat. 3305, 3306 (codified as amended at 31 U.S.C. § 3718 (Supp. II 1984)) (adding a new subsection 3718(b)(5)(B).

266 *See* H. Debt Report, *supra* note 211, at 15 (letter of Acting Comptroller General).

267 *But see supra* text at notes 245-46.

private counsel to collect debts[268] and/or requiring that counsel have insurance to protect the government from such claims.[269]

Provisions permitting periodic auditing of the accounts of retained attorneys,[270] for segregated trust funds to hold government moneys,[271] and prompt remittance of collections to the federal agency[272] have been used in other contexts and seem equally applicable on the federal level. While the Debt Collection Amendments expressly make counsel subject to various provisions of the Fair Debt Collection Practices Act,[273] a contractual provision highlighting this fact along with the potential applicability of other federal and state laws relating to debt collection would seem particularly appropriate.[274] Similarly, failure to comply with applicable standards of professional responsibility and conflict of interest regulations and prohibitions[275] could be specifically referred to as a basis for contract termination. Finally, contract termination could be expressly authorized in the case where the contractor fails satisfactorily to pursue one or more claims where the contractor has been assigned responsibility for a whole class of debts.[276]

3. Selection Process

The legislative history clearly demonstrates that competition was to characterize the process of selection of attorneys for debt collection.[277] The requirement that the Attorney General use his "best efforts" to obtain "at least four such contracts for legal services with private individuals or firms" in each judicial district chosen for the pilot program was seen to be related in some way to ensuring competition.[278] More significantly, the statute as finally enacted expressly provides that nothing in it "shall relieve the Attorney General of the competition requirements set forth in title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. § 251 and following)".[279] This provision evidences the assumption that the Competition in Contracting Act of 1984[280] applies to the procurement of the services of private attorneys generally and, in particular, the services of debt collection lawyers hired by Justice under this program. While some of the exemptions from "full and open competition"[281] might conceivably apply to some instances of retention

268 *See* 1986 Sen. Hearings, *supra* note 214, at 32.
269 *Id.* at 81.
270 *Id.*
271 *Id.* at 88.
272 *Id.* at 81.
273 15 U.S.C. § 1692 (1982). *See* Act of Oct. 28, 1986, Pub. L. No. 99-578, § 1(4), 100 Stat. 3305, 3306 (codified as amended at 31 U.S.C. § 3718 (Supp. II 1984)) (adding a new subsection 3718(b)(6)).
274 *Cf.* 31 U.S.C. § 3718(a)(1)(B) (1982).
275 *See infra* note 447 and accompanying text.
276 *See* 1986 Sen. Hearings, *supra* note 214, at 81 (which lists other conditions imposed by New York).
277 *See* S. Debt Report, *supra* note 209, at 8; H. Debt Report, *supra* note 212, at 4-5.
278 *Id.*
279 Act of Oct. 28, 1986, Pub. L. No. 99-578, § 1(4), 100 Stat. 3305, 3306 (codified as amended at 31 U.S.C. § 3718 (Supp. II 1984)) (adding a new subsection 3718(b)(1)(A)).
280 *See supra* notes 131-84 and accompanying text.
281 *See, e.g.*, 41 U.S.C. § 253(c) (Supp. III 1986).

of debt collection counsel,[282] Congress seems to have assumed that generally the statutorily compelled competition procedures would be followed in the implementation of this program.[283] The legislative history in the House is particularly emphatic on this point.[284] Since the assumption seems to have been that contracts awarded would not apply simply to one claim but many,[285] the expense, including the delay, introduced by competitive procedures was presumably viewed as justifiable given the potential benefits; this is, after all, only a pilot program. Some of the states which have used private attorneys for debt collection have eschewed competitive bidding, though New York has not and believes it has saved considerably in opting for that type of procurement process.[286]

While the statute focuses to some substantial extent on the type and magnitude of fee charged for collection services, it is clear that Congress[287] did not believe that price alone should determine the selection of an attorney for a contract. Thus, sealed bids are not required.[288] Accordingly while the Debt Collection Amendments do not lay down in detail the considerations deemed relevant to the selection of contractors, it was apparently expected that the Justice Department would consider, along with proposed fee arrangements, the "experience, skills, reputation and resources of the competing contractors."[289]

In addition to the foregoing considerations, the Debt Collection Amendments direct the Attorney General to "use his best efforts to enter into contracts . . . with law firms owned and controlled by socially and economically disadvantaged individuals."[290] Widespread advertising of the opportunity to compete for these contracts was seen as one way to ensure that such firms have an adequate opportunity to compete.[291] Moreover, if such contracts are entered into, each agency must "use its best efforts to assure that not less than 10 percent of the amounts of all

282 *See supra* notes 147-63 and accompanying text.

283 *See* S. Debt Report, *supra* note 209, at 8; H. Debt Report, *supra* note 212, at 5.

284 *See, e.g.*, House Hearings, *supra* note 243, at 64-69.

285 *See* S. Debt Report, *supra* note 209, at 7.

286 *See* 1986 Sen. Hearings, *supra* note 214, at 35-41.

287 The House Report noted that "[o]f course, these competition requirements do not mandate that the Attorney General always select the low bidder; he may consider such factors as experience in the field and previous performance in collecting debts in selecting firms for contracts." H. Debt Report, *supra* note 212, at 5. Similarly, the Senate Report indicated that "the most important consideration in debt collection contracting should not be the contingency fee percentage, but rather, the net amount of dollars returned to the Government." S. Debt Report, *supra* note 209, at 7.

288 *See* 41 U.S.C. § 253(a)(2) (1982).

289 *See* S. Debt Report, *supra* note 209, at 7. Specifically the Senate Committee on Governmental Affairs expects that:

> the Department will retain firms with debt collection experience, a trained collections staff, and the capability to handle a large volume of cases, which may require automated litigation support. The reputation of the law firm for responsible practices in the collection of consumer and commercial debts must also be considered. Attorneys selected should meet the highest ethical standards and be members in good standing in the state bar. The Committee would expect the Department to contact the American Bar Association, the Commercial Law League, and state and local bar associations, as well as creditors who have used law firms, to determine their reliability, recovery rates, and performance.

Id.

290 Act of Oct. 28, 1986, Pub. L. No. 99-578, § 1(4), 100 Stat. 3305, 3306 (codified as amended at 31 U.S.C. § 3718 (Supp. II 1984)) (adding subsection 3718(b)(1)(B)).

291 S. Debt Report, *supra* note 209, at 8.

claims referred to private counsel by that agency are referred to law firms owned or controlled by socially and economically disadvantaged individuals."[292]

The administration-supported bill proposed that judicial review of the procurement decisions of the Justice Department under this program be expressly precluded.[293] Such a provision does not appear in the final version and in fact the Senate Report expressly contemplates that such review would be available with Justice Department "criteria and guidelines for selection" to guide the reviewing court.[294]

4. Program Reports

The Attorney General is required by the statute to annually report to Congress on the activities of the Department of Justice to recover indebtedness owed the United States, including not only its own litigation but that conducted by private counsel retained under the pilot program.[295] Moreover at the conclusion of the three year life-span of the program, the Comptroller General is required to conduct an audit of the actions of the Department of Justice under the statute, including the extent of the competition among private counsel to obtain contracts awarded, the reasonableness of the fees provided in those contracts, the efforts to retain the services of law firms owned and controlled by socially and economically disadvantaged individuals, and the results of private debt collection efforts.[296]

5. The Justice Department's Implementing Regulations

Implementing regulations required by the Debt Collection Act were adopted by the Department of Justice on June 18, 1987[297] with an effective date of August 31, 1987. While the Department anticipates that eventually additional rules regarding private debt collection may be adopted,[298] this initial set does very little to elaborate on the content of the program.

The Assistant Attorney General for Administration is delegated the authority to "develop and administer" the pilot program, including the establishment of policies and procedures and entering into contracts

292 Act of Oct. 28, 1986, Pub. L. No. 99-578, § 1(4), 100 Stat. 3305, 3306 (codified as amended at 31 U.S.C. § 3718 (Supp. II 1984)) (adding subsection 3718(b)(3)).

In his signing statement accompanying the bill, the President noted his understanding that such "objectives will be pursued in a race-neutral manner with respect to the actual award of contracts, and that the criteria for identifying socially and economically disadvantaged contractors will not contain preferences or presumptions based on race or ethnicity." 22 WEEKLY COMP. OF PRES. DOC. 1464 (Nov. 3, 1986) *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5619. The President also observed that "[i]mplementation of these provisions in any other manner would be of doubtful constitutional validity because the goal is not premised on findings of actual discrimination in the granting of contracts." *Id.*

293 *See, e.g.*, 1986 Sen. Hearings, *supra* note 214, at 30-31.

294 S. Debt Report, *supra* note 209, at 8.

295 Act of Oct. 28, 1986, Pub. L. No. 99-578, § 1(4), 100 Stat. 3305, 3306 (codified as amended at 31 U.S.C. § 3718 (Supp. II 1984)) (adding subsection 3718(c)).

296 *Id.* § 6 at 3306-07.

297 *See* 52 F.R. 24448 (July 1, 1987).

298 *Id.*

with private attorneys.[299] Subdelegation of this authority is provided for.[300] However the sole responsibility for designating the pilot districts apparently lies with this Assistant Attorney General.[301]

United States Attorneys in the pilot districts must direct "the full cooperation and assistance of their respective offices in implementing the program."[302] An Assistant United States Attorney in each district will be "responsible for assisting the contracting officer by *supervising* the work of the private counsel in their respective districts and providing *necessary* approvals with respect to the initiation or settlement of lawsuits or similar matters."[303]

The reference to "supervision" raises the specter of personal service contracting and the issues implicated thereby.[304] This part of the regulation obviously reflects the constitutional and policy concerns regarding the vesting of litigation authority outside the government which have bedeviled the Department from the outset.[305] At the same time the regulations do not indicate when "approvals" of initiation and settlement of suits are "necessary" or whether the "approvals" referred to are those of the Department of Justice or the agency with a claim against the debtor. In short, the manner in which control over the efforts of private counsel will be exercised is not clarified to any substantial degree by the regulations.

Finally, the regulations note that contracts for legal services for debt collection will be awarded "in accordance with competitive procurement procedures mandated by Federal law . . . ."[306] They also indicate in a general way the manner in which participation in the debt collection program by law firms owned and controlled by socially and economically disadvantaged individuals will be encouraged.[307]

6. Program Administration

Five judicial districts have been selected for participation in the pilot program — Los Angeles, Miami, Detroit, Houston, and Brooklyn, New York — and an additional five districts will be selected later. The Department of Justice estimated that the number of commercial and consumer debts that may be initially referred to private counsel totalled, at a minimum, 1,115 (amounting to $4,864,900) in Los Angeles; 898 (amounting to $4,021,600) in Miami; 1,412 (amounting to $4,939,900) in Detroit; 2,685 (amounting to $7,185,700) in Brooklyn, New York; and 8,655 (amounting to $24,980,400) in Houston.

Much of the detailed framework for the debt collection program is contained in the request for proposals (RFP) which was issued by the

299 28 C.F.R. § 11.1 (1988).
300 *Id.*
301 *Id.* at § 11.2.
302 *Id.*
303 *Id.* (emphasis added).
304 *See supra* notes 114-15 and accompanying text.
305 *See supra* notes 56 and 246 and accompanying text.
306 28 C.F.R. § 11.3 (1988).
307 *Id.*

Department on October 19, 1987. In response to that, interested private attorneys and law firms were required to submit both business management and technical proposals to be evaluated under competitive procedures. Over 1,000 lawyers and law firms in the five pilot districts had previously written the Justice Department asking for the RFP when issued.[308] Eighty-five law firms and lawyers submitted proposals in response to the RFP. As of February 1, 1988, however, no contracts had been awarded in any pilot district, though awards in at least one were expected in the near future.

Under the RFP the Department retains the right to select cases for referral directly to U.S. Attorneys based on criteria of its own choosing. Federal agencies with outstanding debts will send cases to a Central Intake Facility (CIF) operated by a vendor (not a private attorney) which will be selected by a separate procurement. U.S. Attorneys will also send cases which they want placed with a contractor to this CIF. The CIF will evaluate each case file and enter relevant information in a central computer database. After this initial screening at the CIF, the case files will be forwarded either to U.S. Attorneys or to legal services contractors.

The RFP emphasizes that all collection, litigation, and enforcement efforts by the contractor must be in compliance with applicable federal, state, and local law and governing ethical standards, including the American Bar Association's Model Rules of Professional Responsibility (1983). Any violation of these will be considered a sufficient cause for termination of the contract. All collection, litigation, and judgment enforcement services furnished by a contractor will be under the direction of the Contracting Officer's Technical Representative (COTR), who will be an Assistant United States Attorney in each judicial district chosen for the pilot program.

For present purposes some of the most important aspects of the RFP are those provisions which detail the degree of control to be exercised by the Department over the performance of each contractor in its collection efforts. First of all, the contractor will be required to sue the debtor immediately if he or she does not pay the entire outstanding balance within thirty days of the contractor's initial contact with the debtor or does not agree to an installment repayment plan. The choice of forum for the litigation will be left to the contractor's professional judgment unless the amount of indebtedness exceeds $10,000, in which case suit must be brought in a federal district court. Where the contractor intends to use form letters or pleadings, it will have to obtain advance approval from the COTR. But, once that approval is obtained, letters and pleadings, if in the approved form, can be sent in all cases. Otherwise, if a debtor answers a complaint or contests the debt in any way, the contractor will provide the COTR with a copy of any motions or pleadings that the contractor intends to file in response before they are filed. Moreover, the contractor will furnish the COTR with copies of any and all pleadings and motions which it subsequently files after the COTR's approval.

308 Letter from Robert N. Ford, Deputy Assistant Attorney General to author (Oct. 20, 1987).

A contractor will be required to request a judgment for all principal, interest, penalties, costs, and attorneys fees to the extent permitted by the debt instrument or applicable law. Where a debtor acknowledges the debt and wants to enter into an installment repayment plan, the contractor must insist that the debtor execute a consent judgment and, if full payment is not received within thirty days, the executed judgment must be entered with the court even if a repayment plan is agreed to. Repayment plans must result in repayment of the outstanding amounts due within the shortest time practicable based on the financial resources of the debtor. In all cases, satisfaction of the amount due must occur within three years. Otherwise, the contractor is entitled to use its professional judgment in arriving at a repayment schedule, though the minimal monthly amount may not be less than $50 unless the COTR approves. Compromises of any amount due from the debtor require prior written authorization from the COTR, who has the right to direct the terms and conditions of the settlement for any debt.

Whenever a defendant debtor raises a significant question of law or another issue which could result in an adverse precedent or have an impact on the Department of Justice's rights or its collection efforts, the contractor must immediately notify the COTR prior to making any written or oral argument on the issue. Moreover, the contractor must mail to the COTR a copy of any pleading or motion filed by the debtor which raises a counterclaim or affirmative defense. The COTR will decide how to proceed in these cases and has the discretion to withdraw the case from the contractor when this is deemed appropriate. Where the defendant appeals a judgment or order obtained by the contractor, the COTR must similarly be informed and that officer will decide how to proceed with the case, including possible recall of the case from the contractor. In fact, the Department retains the right to require the contractor at any time to return a case for any reason including, but not limited to, those instances when in the COTR's judgment the case is not being handled satisfactorily.

Each contractor must report to the COTR any change in the status of a case as it occurs and, in addition, must file a monthly activity report. That report must include, for the reporting period, the number of complaints filed, the number of judgments entered, the number of new repayment plans, the number of cases paid in full, and the number of cases received, pending, and returned, as well as a brief narrative of the significant events, accomplishments, and problems associated with contract performance. Reporting requirements do not appear nearly as detailed as those mandated by the Federal Deposit Insurance Corporation and described below.[309]

Overall, the Department of Justice's Request for Proposals suggests that contractors will be kept on a reasonably short leash in dealing with debtors. In view of the fact that these contractors will not be enforcing the criminal statutes of the United States or other regulatory enactments and in view of the degree of control that apparently will be exercised, it is

309 *See infra* note 379 and accompanying text.

unlikely that a constitutional challenge to the debt collection scheme will be successful.[310] Whether the degree of control is sufficient to avoid characterization of the contractual relationship as a personal services contract is somewhat more questionable.[311]

C. *Concluding General Observations*

In enacting the Debt Collection Amendments of 1986, Congress added to those comparatively rare instances where it has expressly authorized the use of private attorneys for litigation purposes. The limited nature of this program in terms of both its temporal and geographical scope along with the extensive reporting and auditing requirements evidence congressional awareness of the potential risks, at least in the area of debt collection, which are posed to both governmental and private interests by widespread reliance on outside litigation counsel. The controls on the activities of the attorneys hired which are mandated by the statute or imposed by agency regulation, contract, and practice will hopefully mitigate these problems and moot any potential constitutional challenge.[312] At the same time, however, the degree of control provided may subject these attorneys to some regulation by OPM[313] and, as we shall see, bring them within the coverage of the federal conflict of interest statutes.[314]

The legislative history of the Amendments indicates Congressional awareness that in the area of legal services contracting, an agency may, and perhaps should in most cases, be guided not merely by the lowest price available but by other less easily quantifiable considerations. At the same time, Congress has made it clear that competitive procurement of services should be the rule and not the exception even with regard to attorneys.

Finally, the program established by the Amendments in effect represents a congressional judgment that it may in some instances be more cost effective to use private counsel than government lawyers.[315] One of the alternatives in 1986 was to appropriate additional funds to expand the staffs of the various United States Attorneys offices sufficiently to handle the debt collection effort entirely in-house, an approach that apparently even the Department of Justice did not seriously advocate. Because of various factors, including the expertise of collection attorneys, the choice was made that "privatization" should be seriously pursued, if only on a trial basis.

IV. Agency Use of Outside Counsel: A Survey

This survey of agency use of outside counsel to perform legal services is based on a variety of sources. First of all, several years ago, pursu-

310 *See supra* notes 7-14, 245-46 and accompanying text.
311 *See supra* notes 45-84 and accompanying text.
312 *See supra* notes 8-15 and accompanying text.
313 *See supra* notes 114-15 and accompanying text.
314 *See infra* note 447 and accompanying text.
315 *See, e.g.*, S. Debt Report, *supra* note 209, at 19.

ant to the Freedom of Information Act,[316] *The National Law Journal* filed requests with various agencies for documentation related to this issue. The materials which were furnished in response to these requests were examined for this study, though they were somewhat dated at the time this article was prepared. In order to obtain more complete and current information, in early 1987 the Administrative Conference directed a questionnaire[317] to several agencies, including the Departments of Transportation, Interior, Housing and Urban Development, the Environmental Protection Agency, and the Veterans Administration. The responses to this were analyzed. Finally, various interviews were conducted with agency officials[318] as well as attorneys[319] who have worked under contract with the government. The results of this survey follow.

In view of the fact that currently the largest consumers of private attorney services among federal agencies are the Federal Deposit Insurance Corporation (FDIC) and the Federal Savings and Loan Insurance Corporation (FSLIC) and that more detailed information was available regarding their practices than those of other agencies, the following descriptions of their use of private attorneys are relatively elaborate. While the situation confronting other agencies may be unique in one or more

316 5 U.S.C. § 552 (1982).

317 *Administrative Conference of the United States*
Administrative Survey of Government Use of Private Attorneys
Agency/Department:
Hiring or contracting office: General Counsel or Solicitor
Other agency office (specify)
(If hiring or contracting was by an office other than the agency's legal office, please indicate below what role, if any, the agency's legal office has in the decision to seek outside counsel or to use the particular attorney.)
Name of attorney or firm
Location
Relationship of attorney with agency: Contractor
Subcontractor
Special Government Employee Other (specify)
Period covered by contract or employment
Fee paid per hour $ Total number of hours worked
Was the fee less than the normal rate in that location?
Was the fee less than the normal rate for that attorney or firm?
(If yes to either question, please explain below.)
What was the statutory authority for hiring or contracting with the attorney?
Why did the agency choose to use an outside attorney?
Did the agency follow the provisions of the Competition in Contracting Act?
How were competitive bids sought? (If exempt from the Act, please explain.)
How did the agency determine that the attorney had no conflict of interest?
General description of work to be performed:
Remarks:

318 The author interviewed officials of the Federal Deposit Insurance Corporation and the Federal Home Loan Bank Board, among other agencies. The law firm of Wolf, Block, Schorr & Solis-Cohen, the prior consultant on this study of federal agency use of private attorneys, conducted other interviews of officials, the findings of which are referenced, where appropriate, in the footnotes to Appendix A to this article (though the specific interviewee is not named in this article, only a reference to the relevant page of the Wolf Block Report is given [hereinafter Wolf Block Report]). In addition, ACUS held a public hearing [hereinafter ACUS Hearing] on May 26, 1986 at which various officials testified. Where information from that hearing is relied upon, the footnotes to Appendix A so indicate.

319 The prior consultant, Wolf, Block, Schorr and Solis-Cohen, conducted these interviews, the substance of which is contained in its draft report.

ways, the experience of the FDIC and the FSLIC may be a source of guidance for them where appropriate.

The time constraints applicable to the preparation of this article precluded an in-depth examination of the practices of these other agencies. Moreover it appears that record-keeping with regard to the use of outside counsel is not always provided for in such a manner that it is relatively easy to identify the exact scope and nature of all legal work which has been contracted out. Available statistics on non-banking agencies is, therefore, somewhat sketchy. Nevertheless the existing data conveys a general sense of the scope of use of outside counsel throughout the federal government. In addition that data provides other significant insights into agency practices with regard to retaining private attorneys. Accordingly, following the discussion of the FDIC and the FSLIC, a general overview of the situation in the rest of the government is provided along with Appendices A, A-1, and A-2, which summarize the information available with regard to specific agencies.

A. *Federal Deposit Insurance Corporation*

1. Background

The Federal Deposit Insurance Corporation functions in two distinct capacities: (1) the insurer of deposits and the primary federal regulator of state-chartered banks which are not members of the Federal Reserve System; and (2) the receiver or liquidator of insured banks that have failed.[320] From its origin in 1933, the FDIC has retained private attorneys in connection with the liquidation of assets acquired from closed, insured banks.[321] By statute the Corporation has the authority "[t]o make contracts," "[t]o sue and be sued . . . ," "[t]o act as receiver," "[t]o prescribe . . . rules and regulations . . ." and "[t]o exercise . . . such incidental powers as shall be necessary to carry out the powers so granted."[322] These are the provisions apparently relied upon as a basis for the retention of private attorneys for litigation and other purposes.[323] In fact in one unreported opinion, a challenge to the authority of the FDIC to use private attorneys to collect debts was rejected on the basis of this statute.[324]

In recent years almost all of the legal services for the FDIC by outside counsel have been performed in connection with failed banks and the FDIC's receivership and liquidation activities and in connection with assistance transactions involving failing or potentially failing

320 Memorandum to Honorable Doug Barnard, Jr., Chairman, Commerce, Consumer and Monetary Affairs Subcommittee, Committee on Government Operations, U.S. House of Representatives (March 15, 1985) [hereinafter Barnard Memorandum] at 1.

321 Interview with Thomas A. Rose, Deputy General Counsel and Carroll R. Shifflett, Assistant General Counsel, FDIC (March 12, 1987) and materials supplied to Commerce, Consumer, and Monetary Affairs Subcommittee of the House Committee on Government Operations (June 1988) [hereinafter FDIC Interview].

322 12 U.S.C. § 1819 (1982).

323 FDIC Interview, *supra* note 321.

324 FDIC v. Barrasso, Case No. 82-725-Civ.-T-GC (U.S. Dist. Ct., M.D. Fla., Tampa Div., March 22, 1983) (relying on the power of the Board of Directors to prescribe rules and regulations).

banks.[325] As of December 31, 1987, there were 22,719 cases in litigation (including bankruptcy cases), 11,737 of which were being handled in-house by the Corporation's employees. Contract attorneys were in charge of 10,287 cases and another 695 were considered "joint", that is inside and outside counsel formed a "team" for their management.[326] On a percentage basis, in 1987 more litigation was being handled by FDIC employees than at any time in the agency's history.[327] In terms of expenditures for legal fees related to receivership and liquidation activities, the Corporation paid $7,586,957; $9,368,412; $21,341,407; $26,603,645; $36,019,337; $43,307,249; and $52,547,054 in the fiscal years 1981-1987 respectively. The agency estimated an expenditure of $52,408,000 in outside counsel fees in the 1988 fiscal year.[328]

In the FDIC's status as receiver or liquidator, outside counsel engage in a variety of types of legal work: loan restructurings, collection suits, foreclosure actions, bankruptcy matters, claims based on bankers' blanket bonds, and defensive litigation usually involving claims against a failed bank which the FDIC, as receiver or liquidator, is obligated to defend. The Corporation has also engaged outside counsel on legal matters relating to potentially failing banks and in connection with open-bank assistance transactions, such as FDIC-assisted mergers and the Continental Illinois assistance transaction.[329] The most common reason for seeking outside assistance is not the need for special expertise, though that may be a factor in some cases, but rather the lack of manpower in the agency to handle all legal matters in which the FDIC becomes involved.[330]

In order to increase its capacity to handle matters in-house, the Corporation has dramatically increased its lawyer-employees from approximately 40 in 1982 to 371 nationwide in December 1987.[331] The Legal Division was reorganized in 1984 as part of an overall decentralization of the FDIC's operations.[332] In May 1987, seventy-nine full-time attorneys worked at the Corporation's Washington office, thirty-four of whom dealt with legal problems associated with the FDIC's liquidation and receivership functions. The Regional and Corporate Affairs Branch is responsible for legal services provided in the agency's six regional offices to support both supervisory and liquidation activities.[333] In mid-1987 seventy-eight full-time attorneys staffed the regional offices, sixty of whom handled liquidation matters. Some of the FDIC's newly hired lawyers were employed under special hiring authority providing for one year

325 Barnard Memorandum, *supra* note 320, at 1.

326 FDIC Interview, *supra* note 321.

327 *Id.*

328 *Id.* The figures do not include fees related to the Continental Illinois National Bank and Trust Co. of Chicago and the First National Bank and Trust Co. of Oklahoma City.

329 Barnard Memorandum, *supra* note 320, at 6-7. In most instances the legal fees and expenses of outside counsel are paid by the institution receiving FDIC assistance.

330 FDIC Interview, *supra* note 321. *See also* Barnard Memorandum, *supra* note 320, at 7 ("volume of bank failures is probably the most dominant" reason for going outside).

331 FDIC Interview, *supra* note 321.

332 Barnard Memorandum, *supra* note 320, at 4.

333 *Id.*

renewable appointments. In the spring of 1987 one hundred and fifty-six of these were so-called "liquidation-graded" attorneys. These lawyers work at field site offices. This type of hiring authority permitted the Corporation to meet its short and intermediate term needs without taking on the burden of additional permanent staff.[334]

Since the predominant use of outside counsel is in the area of the FDIC's capacity as receiver or liquidator, it is important to note how the fees for these services are paid. Expenses from collection efforts (including allocable FDIC personnel costs for its lawyer-employees) are paid from the proceeds of the collections or absorbed by the Permanent Insurance Fund created by assessments on the deposits of insured banks.[335] Appropriated funds are not involved.[336] Moreover, since the proceeds of collections and other actions benefit private parties and not the United States Treasury, the Department of Justice has suggested that it would be inappropriate for the United States itself to pay for the services through representation by the Department.[337]

2. Written Guidance

The FDIC has rather elaborate written guidance applicable to the hiring of outside counsel. For example, the purely internal directives set forth criteria for the selection and termination of outside counsel,[338] considerations to be observed in negotiation of the fee,[339] questions to be kept in mind in reviewing a fee bill,[340] and general directions regarding how to handle problems arising in the relationship between the FDIC and the outside counsel. Some of these documents, such as the criteria for choosing an attorney, are similar to those found in the corporate area.[341] Others, such as the fee bill checklist, had no counterparts—at least in the degree of detail and insight—among the corporate materials examined as part of this study. While some of these documents may appear to state the obvious (again the criteria for choice document is, to an extent, an example of this), the guidance is a training tool for new employees and may help to "jog the memory in appropriate cases."[342]

334 *Id.*
335 *Id.* at 3-4.
336 FDIC Interview, *supra* note 321.
337 Barnard Memorandum, *supra* note 320, at 4.
338 These include the repute of the attorney or firm in the legal profession and in the locality served; the experience of the attorney or firm in the type of legal work required or expected; the ability of the attorney or firm to handle the anticipated volume of work; the geographic location of the attorney or firm; whether the fee rates are reasonable; whether the attorney or firm can make available an adequate number of attorneys to handle related matters of a routine or less important nature and at a lower fee rate; possible conflicts of interest; the degree of cooperation expected; the responsiveness to the FDIC's needs to be kept informed; and whether the FDIC is a major client of the firm.
339 These include the volume of work directed at the firm and the treatment of various expenses such as LEXIS, typing, filing and secretarial overtime.
340 For example, has FDIC been credited for the "learning curve" when the firm shifts attorneys for its own purposes; was there excessive senior attorney review or excessive paralegal time; did some attorneys regularly bill 6-8 hours a day; are there excessive reviews of file or status reports; are continuances on behalf of FDIC requested because the firm is not ready?
341 *See supra* note 30 and accompanying text.
342 FDIC Interview, *supra* note 321.

Aside from internal policies, the FDIC has in the past incorporated its restrictions and expectations with regard to the activity of outside counsel in connection with bank liquidation matters in an elaborate employment of counsel letter which was in 1987 replaced in large degree by a "Guide for Legal Representation" to be distributed to all attorneys, both full- and part-time employees and outside counsel.[343] For clarity of presentation most of the matters covered in these documents are discussed separately below. It should be noted here, however, that the "Guide" stresses the FDIC's desire to obtain "quality legal representation in a timely, efficient and cost-effective manner."[344] The outside attorney is also reminded that the Corporation "places great importance on the professional skills and conduct of all attorneys representing" it and that its status as a public instrumentality "mandates that our attorneys, whether inside or outside, demonstrate the highest standards of ethics, professionalism, and competence."[345]

3. Procurement Procedures

Apparently the FDIC is not subject to the civil service regime as a matter of law but has brought itself under its strictures as a matter of policy.[346] Among other things, this would appear to mean that the distinction between "personal" and "non-personal" services contracts which has such significance for other governmental entities in their procurement of services has,[347] at the least, diminished significance in the case of this corporation. Neither the internal directives nor the employment-related documents supplied outside counsel make a point of identifying the attorney as an "independent contractor." All this means that the FDIC can legally exercise substantial supervision over the efforts of outside counsel without undue concern for unwittingly bringing the contractual relationship within the restrictions applicable to personal service contracting. As will be seen, in fact the FDIC often exerts such close control.[348]

As a "mixed ownership" corporation, the FDIC is not subject to the Competition in Contracting Act of 1984.[349] This does not mean, however, that the agency does not attempt to conduct its procurement in a manner which may achieve much the same purposes as that legislation. When time and circumstances permit, and the attorney to be retained has not been previously used by the agency, three or four firms are identified and contacted in order to determine their interest in representing the agency. Representatives of the firms are interviewed[350] with regard to their fees and other matters including those covered by the "criteria"

343 *Id.*
344 FEDERAL DEPOSIT INSURANCE CORPORATION GUIDE FOR LEGAL REPRESENTATION [hereinafter FDIC Guide] 1.
345 *Id.* at 2.
346 FDIC Interview, *supra* note 321.
347 *See supra* notes 45-84 and accompanying text.
348 *See infra* notes 356-79 and accompanying text.
349 *See supra* note 140 and accompanying text. *See also* Letter of Michael B. Burgee, Deputy General Counsel, to Marshall J. Breger, ACUS Chairman (Nov. 10, 1986).
350 FDIC Interview, *supra* note 321.

document.[351] Evaluation of the responses may narrow the field to one or two. Then those lawyers who will actually perform the work are interviewed.[352] This process is also employed when the agency has not been dissatisfied with a firm it has used in the past but merely wishes to insure that it is getting the best services for the best price.[353]

Given the immediate need for counsel in cases of unexpected bank failures,[354] as well as the desire to avoid advance publicity of potential failures and the inevitable public reaction, full and open competition within the meaning of the CICA may simply not be feasible for the FDIC in many instances.[355]

4. Case Management, Supervision and Control

It is the policy of the FDIC "that attorneys in its Legal Division should always be responsible for managing any legal assignment or litigation, even though a matter has been referred to outside counsel."[356] Therefore, an FDIC attorney's approval is required for "all major strategic or tactical decisions,"[357] at least where a case involves important issues or large sums.[358] The degree of FDIC involvement in a case varies in practice from instances where a "joint" approach is taken and substantial control resides in the Corporation to "routine" matters requiring relatively little overall supervision.[359] The degree of involvement may vary depending on the extent of experience with and trust in the attorney or firm retained.[360]

At the outset of a referral of a case, the FDIC attorney assigned the matter develops with the outside counsel a "case plan"[361] which covers, inter alia, anticipated discovery, the issues requiring research, and a strategy of achieving a negotiated settlement.[362] In addition counsel is asked for an initial assessment of the likely outcome of litigation, time required to conclude the matter and fees and expenses to be incurred.[363] A litigation budget may be drafted.[364] Compliance with the case plan and budget, as initially agreed upon or later modified, is monitored closely as a cost control technique.[365] Particularly at the beginning of the relationship with outside counsel, pleadings and other filings may be reviewed by the FDIC attorney in charge prior to filing.[366] Correspon-

351 *See supra* note 338.
352 FDIC Interview, *supra* note 321.
353 *Id.* The agency maintains a "List of Counsel Utilitzed" and has adopted written procedures detailing when and how counsel not on the list can be retained.
354 *Id.*
355 *See also infra* notes 417-18 and accompanying text.
356 FDIC Guide, *supra* note 344, at 3.
357 *Id.* at 3.
358 *Id.* at 3. *See also* FDIC Interview, *supra* note 321.
359 FDIC Guide, *supra* note 344, at 3. *See also* FDIC Interview, *supra* note 321.
360 FDIC Interview, *supra* note 321.
361 FDIC Guide, *supra* note 344, at 3.
362 *See id.* at 12.
363 *See id.* at 13.
364 *See id.* at 13-14.
365 *Id.* at 4, 13.
366 *See id.* at 15.

dence and other documentation, whether from retained or opposing counsel, are also forwarded to the FDIC.[367]

Retained attorneys are given a variety of instructions regarding their conduct of the case in the written guidance documents supplied by the FDIC. Specifically, outside counsel are advised to avoid multiple representation of the firm at meetings or depositions, rotating lawyers knowledgeable about FDIC matters and using FDIC work to train personnel.[368] To avoid costly duplication of research efforts, the FDIC has a "brief bank" which contains the results of all major research projects.[369] These documents are made available to outside counsel, who are, accordingly, cautioned not to embark on a significant research project until it has been determined whether the materials in the brief bank contain relevant information.[370] There are certain legal issues of special interest to the Corporation because of, for example, the need for a nationwide approach. Counsel are directed to contact FDIC staff before researching or drafting on these issues.[371] Relevant research or statements of agency policy may be provided to counsel or the FDIC may take over the part of the case raising issues of particular interest to the Corporation.[372] In areas of the country where the FDIC has an office, as a cost control mechanism[373] or for other reasons,[374] the Corporation's legal staff may take over discovery or other projects.

In addition, retained counsel are advised regarding various aspects of FDIC's litigation and settlement philosophy and procedures. Specifically, attorneys are told that the Corporation does not want to take extreme positions unlikely to have a substantive impact on litigation and that coercive, delaying or obstructive tactics should be avoided.[375] Where possible, cases should be settled at a very early stage.[376] All settlement offers must be immediately reported to the FDIC attorney in charge.[377] Finally, counsel is directed to be alert to opportunities for using non-judicial dispute resolution approaches.[378]

Upon the filing of the complaint or answer, the outside counsel must submit a "commencement of action" report which includes the docket number, claim amount, the statute of limitations date, and the date the complaint was filed, among other things. Along with fee bills, counsel must quarterly file written "status reports" which include the next hearing date, the current estimated cost of litigation, the current success ratio, current estimated time of completion, cumulative fees and expenses, and estimate of judgment size and collectibility.[379]

367 *See id.* at 15.
368 *Id.* at 6.
369 *Id.*
370 *Id.*
371 *Id.*
372 *Id.* at 6-7.
373 *Id.* at 7.
374 FDIC Interview, *supra* note 321.
375 FDIC Guide, *supra* note 344, at 8.
376 *Id.* at 8.
377 *Id.* at 8-9.
378 *Id.* at 9.
379 *Id.* at 14.

5. Fees

Since the FDIC wants to "maximize recovery and minimize the expense," it does not always require that a fee be based on an hourly rate or a contingency. Rather, a variety of fee arrangements are possible. The Corporation wants to retain its ability to choose the option that is best in the circumstances.[380] Often firms give the FDIC a discount from their normal rates.[381] It is the total cost of legal services and the results achieved that is generally viewed as more important than the mere rate of compensation.[382] In 1987 the average hourly rate paid by the FDIC to outside counsel was $86.92.

Apparently the Corporation makes it clear to retained counsel that a case should be handled by the member of a firm who is both capable of an adequate job and yet billed at the lowest rate.[383] Fee bills are to be submitted on a quarterly basis and are to include the date(s) of service, name(s) of the individual service provider(s), description(s) of service(s), time(s) billed for service, hourly rates, expenses billed, and total hours and expenses billed on the case.[384] The agency has an internal written procedure specifying the levels of authority at which fee bills of various amounts have to be approved, setting forth auditing procedures, and listing criteria for review of each bill.

6. Conflicts of Interest

Outside counsel are informed that the FDIC expects "the highest ethical standards in [their] representation of the FDIC."[385] At the time of his or her retention, the attorney (or firm) must provide the Corporation with a list of potentially conflicting representations. Thereafter, any potential conflict must be discussed with the FDIC as soon as its existence is recognized. The Corporation retains the right to determine whether an actual or potential conflict exists.[386] The conflicts referred to include those covered by the "Code of Professional Responsibility and applicable federal or state provisions."[387] The Guide, therefore, does not clearly answer the question whether (or when) retained attorneys are subject to federal conflict of interest law contained in Title 18 of the United States Code.[388] It does not impose those standards regardless of their applicability of their own force.

380 FDIC Interview, *supra* note 321.
381 *Id.*
382 Barnard Memorandum, *supra* note 320, at 11.
383 *Id.*
384 FDIC Guide, *supra* note 344, at 18.
385 *Id.* at 4.
386 *Id.*
387 *Id.*
388 It would appear, however, that the conflict of interest provisions contained in 18 U.S.C. §§ 201-05 (1982) do apply to the FDIC. *See, e.g.*, 5 U.S.C. § 105 (1982) ("executive agency" means a government corporation); 18 U.S.C. § 6 (1982) ("agency" includes government corporations); 18 U.S.C. § 205 (1982) (employees of "executive branch" and "agency"). Only "employees" are covered but, given the control exercised over at least some FDIC outside counsel, it is an open question whether they are not also subject to Title 18. *See infra* notes 439-47 and accompanying text.

The FDIC currently has an outside Counsel Conflicts Committee to deal with conflicts issues as they arise and to help avoid their treatment on a purely ad hoc, potentially inconsistent, basis.[389] It has been charged with producing guidelines for future use.

7. Tracking and Evaluation of Outside Counsel Program

The initial and subsequent status reports, along with the quarterly fee bills, provide information that is computer-accessible as part of the FDIC's case management system. As such, it can support an elaborate method of tracking both individual matters and the general flow of litigation for cost control and other purposes.

There is also an "outside counsel working group" made up of in-house attorneys and an outside consultant to evaluate the use of private attorneys by the FDIC and to suggest improvements in the general system or even to offer advice on specific cases.[390] The Guide itself was a product of its efforts.[391] In addition, meetings are held involving agency in-house attorneys both from Washington and the regions for training and discussion purposes related to the retention of outside counsel.[392]

The FDIC's experience with hiring outside counsel since 1933, and particularly after the current rash of bank failures began in the early 1980's, appears to dwarf that of many (or most) private corporations. That experience is clearly reflected in the elaborate memorialization of procedures, policies, criteria and approaches. In fact the agency may deem itself more "expert" in this area than most other entities, public or private, and that those have much to learn from it.[393]

The Corporation has not been free from criticism by its legal contractors, though that criticism may not be repeated in the future in all respects given recent changes evidenced by the production of the Guide and higher staffing levels. In the past the following problems have been identified by outside counsel: weak supervision, frequent turnover of agency personnel requiring re-education regarding pending cases, delay in paying bills, elaborate billing and reporting requirements, and lack of coordination among supervisory groups.[394] The FDIC has admitted that such complaints have been leveled at it and that some problems may have existed; though the Corporation may not see at least some of the identified concerns as "problems" but necessary off-shoots of its need to control costs and protect its interests.[395]

389 FDIC Interview, *supra* note 321.
390 *Id.*
391 *Id.*
392 *Id.*
393 *Id.*
394 *See* Wolf Block Report, *supra* note 318, at 101-14.
395 *See* ACUS Hearing, *supra* note 318, at 113-14, 117-19 (testimony of Michael B. Burgee, Deputy General Counsel, FDIC).

B. *Federal Home Loan Bank Board and the Federal Savings And Loan Insurance Corporation*

The Federal Home Loan Bank Board (FHLBB) is the operating head of the Federal Savings and Loan Insurance Corporation. The former is organized in various offices including the Office of the FSLIC and the Office of the General Counsel, the latter of which itself contains divisions that provide in-house legal services to the FSLIC. The services of outside counsel have, on rare occasions, been retained for operations of the Board other than those regarding the statutory duties of the FSLIC. At present, however, all of the legal work contracted out involves the operations of the FSLIC.[396] For statutory authority to hire attorneys, the FSLIC relies in part on the power to "make contracts" and to "sue and be sued."[397]

It may be helpful at the outset to compare and contrast the situation at the FSLIC with that at the FDIC. The FSLIC is now the largest consumer of private legal services in the federal government based on available data. It paid outside counsel $22.8 million during the 1985 fiscal year, $37.3 million in 1986 and $85.86 million in 1987.[398] Approximately 40% of those amounts were spent on litigation and the remaining 60% were incurred for other legal services such as business counsel, investigations and insurance determinations.[399]

The dominant rationale given for seeking outside assistance is different for each agency. The FDIC explains its use of private attorneys largely as a matter of lack of staff resources to handle the volume of legal work, not the lack of "expertise." On the other hand, the FSLIC's contracting is required not only because of a lack of staff resources, but by the need for "expertise" with respect to issues of local law.[400] In terms of in-house legal resources, the FDIC, with over 370 attorneys staffing both Washington, regional, and site offices, outdistances the Board with approximately 200 who work in Washington.[401]

Furthermore, written memorialization of the practices relating to controlling outside counsel and the directions to them was, as of the spring of 1988, more extensive at the FDIC.[402] The FSLIC procedures for selection and oversight of outside counsel are a combination of written and unwritten policies and evolving agency practice.

In addition, apparently the degree of control exercised by the FDIC over the conduct of litigation by outside counsel is significantly greater in

396 Interviews with Ronald Oberle, Associate General Counsel for Contracting and Procurement Law, Office of General Counsel, FHLBB (March 12, 1987 and May 15, 1987) [hereinafter FHLBB Interview].

397 12 U.S.C. § 1725(c) (1982). *See also* 5 U.S.C. § 3109 (1982).

398 Letter of Jordan Luke, General Counsel, FSLIC, to the Honorable Doug Barnard, Chairman, Commerce, Consumer and Monetary Affairs Subcommittee, House Committee on Government Operations (June 6, 1988).

399 *Id.*

400 FHLBB Interview, *supra* note 396.

401 *Id.*

402 During 1987 and 1988, the FSLIC prepared a more extensive written memorialization of its practices than had existed previously.

many or most instances than the control relied upon by the FSLIC.[403] While the FDIC is not by law subject to the civil service regime and, therefore, less likely to concern itself with the legal issues presented by the distinction between "personal" and "non-personal" services contracts,[404] the Board and FSLIC[405] are under the jurisdiction of the OPM and the civil service regime and in fact are very aware of the restrictions applicable in the personal services area.[406] The FSLIC's legal services contracts specifically indicate that the services provided are non-personal, that no employer-employee relationships exist or will exist under the contract, and that the contractor will not be subject to the supervision of federal employees. To the extent that the efforts of the FSLIC in its receivership capacity impact most directly and immediately on private interests and not public interests,[407] perhaps this degree of control is justifiable, though apparently the FDIC does not so view its obligations in dealing with its outside counsel in a somewhat similar context.

With regard to procurement procedures, legally speaking the FSLIC and the FDIC find themselves in somewhat different situations. As a mixed-ownership government corporation, the FDIC is not subject to the Competition in Contracting Act.[408] On the other hand, the FSLIC is a wholly owned government corporation and subject to the Act with respect to at least its insurance and supervisory functions, though perhaps not when it acts as receiver or liquidator.[409] Legal fees for the latter functions at both the FDIC and the FSLIC are initially charged against the estate of the failed bank or thrift institution. However, the insurance fund that may absorb some of these charges is technically different, with the FSLIC's considered appropriated and the FDIC's non-appropriated funds.[410]

Despite these differences, the procurement procedures followed by both entities are not all that far apart in many cases. For one thing while in the case of the FSLIC, it is subject to the CICA with regard to certain of its functions, that statute contains an "urgency" exception[411] which might be invoked by the FSLIC to dispense with many of the more formal competitive requirements of the CICA given the need to act quickly on the failure of a thrift institution.[412] In such circumstances the CICA requires that the FSLIC "request offers from as many potential sources as is practicable under the circumstances."[413] Even when acting as receiver or liquidator and arguably not subject to CICA, employees of the

403 FHLBB Interview, *supra* note 396.
404 *See supra* notes 346-48 and accompanying text.
405 Except, perhaps, in its receivership capacity.
406 FHLBB Interview, *supra* note 396.
407 While the efforts of the FSLIC and the FDIC with regard to troubled institutions redound directly to the benefit of private parties, ultimately there are large public interests at stake that justified in the first place Congressional authorization of the programs which these corporations now administer.
408 *See supra* note 140 and accompanying text.
409 FHLBB Interview, *supra* note 396.
410 *Id.*
411 *See supra* note 149 and accompanying text.
412 FHLBB Interview, *supra* note 396.
413 41 U.S.C. § 253(e) (Supp. III 1985).

FSLIC prior to retaining outside counsel for a particular matter are directed to contact several firms to solicit their interest, discuss possible fee arrangements, potential conflicts of interest, and other matters of concern to the FSLIC. Enough firms must be contacted to identify at least three firms without conflicts of interest, willing to propose to do the work, and technically qualified to perform the services. Such firms are compared "on technical and cost bases" and the proposal "most advantageous to government, price and other factors considered" is recommended for selection.[414] As noted previously, such informal competitive procedures are often found at the FDIC.[415] As in the case of the FDIC, widespread solicitation of proposals, which may be required by Title 41, would create such problems for a potentially failing thrift institution and other interested persons[416] that as a practical matter a more flexible procurement process is dictated in many instances.[417] One FHLBB official interviewed indicated his emphatic view, however, that some form of competition does save substantially in costs of legal services for the government where the decision has been made to contract out.[418]

Having surveyed these matters, much of the picture of the FSLIC as a consumer of legal services has been drawn. Nevertheless certain additional information should be noted.

1. Written Documentation of Practices

The principle documents that currently exist relating to the FSLIC retention and control of outside counsel include a Guide to the Formation and Administration of Legal Services Contracts, a checklist for negotiating legal services contracts, a "contact" form memorializing discussions with attorneys or firms contacted as part of the informal solicitation of proposals, an internal form memorandum requesting approval of the retention of a particular attorney or firm, a funding document, the form contract with attachments, and Guidelines for the Management and Control Over Outside Attorneys.

The Guide describes in general the method of source selection (including issues to be discussed with firms contacted), internal agency process for contract approval and matters related to contract administration and negotiation.[419] A "checklist"[420] and "contact" form[421] are prepared for each firm contacted and list information that should be conveyed to outsiders regarding FSLIC practices (such as its billing procedures) and information to be collected from firms (such as firm expertise and hourly rates charged). The memorandum "request for contract"[422] is prepared for each contract proposed by agency staff for approval by the FSLIC's

414 FHLBB Guide to Formation and Administration of Legal Services Contracts.
415 *See supra* notes 349-53 and accompanying text.
416 *See supra* notes 354-55 and accompanying text.
417 *See also* 41 U.S.C. § 253(c)(7) (Supp. III 1985) (public interest exception to CICA but requiring notification to Congress not less than 30 days before award of the contract).
418 FHLBB Interview, *supra* note 396.
419 Letter from Ronald J. Oberle, Associate General Counsel, FSLIC, to author (Sept. 14, 1987).
420 *Id.*
421 *Id.*
422 *Id.*

contracting officers and includes information such as how many firms were contacted, the name of the firm recommended to provide the services, projected billings, the reasons for the firm's selection, and the scope of work to be done. The Guidelines include in part a list of the factors to be taken into account (experience, capacity, geographic proximity, cost and conflicts of interest) in selecting an attorney.

2. Types of Legal Services

Outside counsel perform the bulk of legal work required when the FSLIC becomes involved with a troubled thrift institution. This may include litigation pending in favor of or against the institution, reorganizations, transfers of assets and other work related to the receivership. The FSLIC may provide financial and other assistance directly to the problem institution before failure or may seek to facilitate an acquisition of a troubled thrift by providing such assistance. Contract lawyers may prepare all documents for the proposed transaction and assist in negotiation of the assistance agreement.

3. Contractual Undertakings by Outside Counsel and Oversight by FSLIC

As noted previously, one of the principal documents relating to retention of outside counsel is a form contract.[423] It is intended to memorialize various understandings between the FSLIC and the service provider.

The contractor is advised that it is to provide the services in accordance with directions given by the General Counsel's Office and under the general direction of the General Counsel. The contractor is also told to promptly advise the FSLIC regarding any matter that may give rise to a conflict of interest or other ethical bar to representation. As noted above the document indicates that the contract is not for the performance of personal services. As long as the relationship in a particular case is so viewed, the federal conflict of interest statutes may not apply.[424]

OGC legal staff must approve all major strategic and tactical decisions and work closely with outside counsel to develop case plans and budgets and otherwise monitor the work of outside counsel by, for example, reviewing drafts of pleadings, briefs and other documents. Outside counsel must discuss proposed staffing with the assigned OGC attorney before any case assignments are made.

Currently the FSLIC is in the process of developing a Litigation Manual to further standardize its oversight of outside counsel and to train new OGC attorneys. In the interim the OGC has adopted a set of preliminary guidelines which describe the reporting requirements imposed on legal services contractors along with the methods for monitoring their performance. There is supposed to be an annual evaluation of each private attorney's cooperation with the agency, work quality, rapport, success, and responsiveness to OGC direction, among other things.

423 *See supra* note 419 and preceding text.

424 *See infra* note 442 and accompanying text. *But see infra* note 445 and accompanying text.

Payment for services is based on hourly rates, the range of which is specified in the legal services agreement with the FSLIC. The negotiated rate can be changed only by written amendment to the contract and firms may not propose or charge rates in excess of those it is charging the FSLIC on other matters. Reimbursement for certain expenses, at cost, is provided. The negotiations for the contract will involve discussions regarding such matters as the extent to which the FSLIC will pay for certain expenses. The FSLIC is always able to obtain discounts in fees from private attorneys because of the volume of the work assigned.[425]

Invoices are required to be submitted monthly. The content of these is prescribed to include the names of agency personnel who reviewed the work in question, a description and cost of the services, including the name(s) of the individual(s) performing them and the time expended. Also on a monthly basis the contractor must file a report detailing the total billings for the month for both fees and expenses, cumulative total billings for all months, names of subcontractors used, and, with regard to litigated matters, the estimated recoverable damages. An agency attorney is designated as the General Counsel's Official Representative whose duties include placing orders for services and inspecting a contractor's work for compliance with the statement of work and standard of performance prior to payment for services rendered.

The FSLIC has spent a considerable time developing a computerized Legal Information Management System ("LIMS"), the first phase of which became operative during the spring of 1988 with regard to FSLIC corporate matters. Similar to the FDIC Case Management System, the LIMS is designed to provide up-to-date standardized information about all legal cases or matters being handled by outside counsel, including estimated and incurred fees, issues raised, settlements, judgment and success ratios. The system will eventually be extended to matters related to FSLIC as a receiver of failed thrifts.

C. *Other Federal Departments and Agencies*

With regard to other federal departments and agencies, the available data relating to their use of outside counsel is several years old in many instances and incomplete with regard to some of the issues canvassed by this report. Nevertheless, there appears to be a sufficient basis on which to draw several general conclusions.

First of all, legal work of all types, from the purely advisory to litigation, is contracted out. Some agencies use litigation counsel frequently; others rarely or not at all. The reasons for procuring the services of private counsel appear to be similar to those relied upon by the FDIC, the FSLIC and private corporations.[426] Written agency guidelines with regard to retention of outside counsel and other matters do exist in some cases, and vary from sketchy to relatively elaborate. Competitive procedures are utilized on occasion; at other times some of the exceptions under CICA to full and open competition are relied upon. The relation-

425 FHLBB Interview, *supra* note 396.

426 *See supra* note 29 and accompanying text, and *supra* notes 400-01 and accompanying text.

ship generally established with the service provider appears to be considered purely contractual, not employer-employee. Fees paid and fee arrangements vary significantly, to some degree apparently reflective of the type of work involved. Control over retention appears to usually rest in the agency's General Counsel Office. Finally, while contracting out may be the exception rather than the rule in the case of most agencies, a substantial amount of public funds appears to be spent each year for attorneys' services when the expenditures by all agencies are combined.

A tabular summary of the available data is presented in Appendix A to this article.

V. Conflicts of Interest

A person performing services for the government may be subject to a variety of statutory prohibitions on receipt of salary[427] and compensation[428] from private sources, participating in governmental decisions in which he or his associates has a financial interest,[429] acting as attorney or agent in certain proceedings at the same time he is working for the government,[430] and serving as an agent or attorney with respect to certain matters following his departure from government employment.[431]Violations are subject to criminal penalties.

These restrictions apply to "officers" and "employees" of the United States, including so-called "special Government employees." They are not limited to attorneys but apply to all persons falling within the ambit of these terms. Attorneys are subject to other conflict of interest regulation pursuant to state codes of professional responsibility,[432] which codes may be more demanding in various respects than the federal criminal law or perhaps less stringent in others. In the latter case, of course compliance with federal law is not excused.

Special government employees are subject to somewhat less restrictions than "regular" employees with regard to the prohibitions on receipt of salary[433] and "compensation" for their services,[434] representation activities while in government service,[435] and activities following their federal employment.[436] With respect to the prohibitions relating to acts affecting a personal financial interest, no distinction is

427 *See* 18 U.S.C. § 209 (1982).
428 *Id.* at § 203.
429 *Id.* at § 208.
430 *Id.* at § 205.
431 *Id.* at § 207. Section 207(g) imposes certain prohibitions on partners of special government employees.
432 *See generally* Rotunda, *supra* note 57.
433 18 U.S.C. § 209(c) (1982).
434 *Id.* at § 203(c).
435 *Id.* at § 205.
436 *Id.* at § 207(c).

made between special government employees[437] and other employees.[438]

In the context of agency retention of outside counsel, it may be crucial to determine whether the attorney chosen is an "employee" within the meaning of these statutes. If he is, performance of "duties" pursuant to contract for more than the designated 130 days a year will mean that he is subject to the more comprehensive conflict of interest restrictions; if for 130 days or less, then the less restrictive, though still substantial, conditions attach. If he is not an "officer" or "employee," then the restrictions do not apply of their own force, though an agency might choose to incorporate them in any contract awarded.

Attorneys *appointed* as temporary experts or consultants pursuant to 5 U.S.C. § 3109[439] clearly fall within these conflict of interest provisions.[440] Similarly outside counsel *appointed*, for example, as litigators for the Federal Election Commission pursuant to 26 U.S.C. § 9010[441] may be covered. If, however, a service provider is deemed to be an "independent" contractor, the statutes do not apply.[442] As a general matter, the greater the supervision and control exercised over the contractor's work, the more likely the contractor may be deemed an "employee" for the purposes of title 18.[443] While some interpretations of these federal conflict-of-interest statutes have referred to the civil service definition of "employee,"[444] which emphasizes the element of "supervision,"[445] this has not always been accepted as the only appropriate approach. One court has indicated that a temporary consultant appointed under section 3109 and a special government employee within the meaning of 18 U.S.C. § 202(a) need not meet the civil service definition of "employee" and the alleged "strict supervision" test incorporated therein.[446] It, therefore, appears that a respectable argument might be made that attorneys retained under the 1986 Debt Collection Amendments may be considered "employees" within the purview of the conflict of interest provisions given the degree of control over their activities

437 A "special Government employee" means:

> 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.

Id. at § 202(a).

438 *Id.* at § 208(a).

439 *See supra* notes 70-78 and accompanying text.

440 *See generally* Federal Personnel Manual, Chapter 735 Appendix C.

441 *See supra* notes 106-10 and accompanying text.

442 *See, e.g.*, Office of Legal Counsel, Department of Justice, Memorandum Opinion for the Deputy Associate Attorney General (prepared by Larry A. Hammond, Mar. 23, 1979).

443 *Id.* n.2.

444 *Id. See also* Memorandum from J. Jackson Walter, Director, Office of Personnel Management to Heads of Departments and Agencies of the Executive Branch Re Members of Federal Advisory Committees and the Conflict-of-Interest Statutes (July 9, 1982) at 6 [hereinafter Walter Memorandum].

445 5 U.S.C. § 2105(a)(3) (1982).

446 *See* Aluminum Co. of America v. F.T.C., 589 F. Supp. 169, 175-6 (S.D.N.Y. 1984).

which is apparently contemplated by the legislation, regulations, and contract documents.[447]

An agency seeking to retain outside counsel may believe that the restrictions applicable under the conflict of interest provisions of title 18 will unduly restrict its ability to obtain the type of attorney or firm it believes it needs to adequately perform the services. Where this is the case, surrender of substantial control, where permitted by law, may be the only way to avoid this result, though it may in fact not always be sufficient in and of itself.[448] On the other hand, where an agency believes that any attorney retained should adhere to the statutory restrictions, it has more freedom in structuring its relationship with the contractor and, even where the contractor is deemed "independent", the agency could impose the prohibitions of title 18 by contract.

Where these restrictions do apply, the agency should examine for potential conflicts at the stage where it is considering which firm or attorney to retain and also require disclosure by the contractor of actual or potential conflicts as soon as they become evident after contract execution.[449] At the outset of the relationship the contractor should be clearly advised that the prohibitions of title 18 apply[450] (if they do).

VI. General Summary, Conclusions and Recommendations

Clearly, retaining outside counsel to provide legal services to the federal government is the exception rather than the rule for most agencies. Other than those instances where there might be a lack of legal authority, this pattern may be attributable to a variety of factors, including historical practice and a concern for the morale of government attorneys who might view such service contracting as suggesting a less than confident agency evaluation of their legal abilities. More importantly, the relative infrequency of seeking outside legal assistance may implicitly reflect judgments that it is indeed more cost effective to rely on in-house expertise than outside counsel in most cases, that consideration of the government and public interest is more likely to be uppermost in the minds of full-time employees than outsiders, and that control over the rendition of the services by a contractor in order to avoid potential constitutional and other problems is more realistically achievable where a full-fledged employer-employee relationship exists. Opinions of the General Accounting Office suggest that, before an agency seeks outside legal assistance, it should assure itself that its staff is not in a position to provide the advice or other services needed.[451] In some instances the

447 *See supra* notes 245-46 and accompanying text. *See also* Lovitky, *supra* note 48, at 345-48.

448 *See* Walter Memorandum, *supra* note 444.

449 *See, e.g.*, 48 C.F.R. § 37.205(b)(4) (1987) (in consulting contracts, disclosure to be required and warning given regarding conflicts).

450 *Cf.* FEDERAL PERSONNEL MANUAL, ch. 375, app. C at 2. Other than the provisions of title 18 dealing with conflicts of interest, the Code of Federal Regulations contains numerous provisions dealing with employee responsibilities and conduct. *See, e.g.*, 5 C.F.R. § 735 (1986). Moreover the FAR itself has provisions dealing with organizational conflicts, *see* 48 C.F.R. § 9.508 (1986), which are applicable to service contracting. *Id.* at § 37.110(d).

451 *See supra* notes 93-94 and accompanying text.

staff of other agencies may be in a position to help out and this option may profitably be explored.

Departures from historical practice, even if clearly justified, may have unsettling effects on citizens' perceptions of their government and argue for some degree of caution, or at least clear explanation for these changes. In taking various procurement actions, failure to consider their impact on employee morale may result in the loss of competent and dedicated professionals to the private sector. However, where it is more cost effective to retain outside counsel than perform the services by full-time employees, where sufficient control can be exercised over the legal contractor to protect the government's and public's interests, and where adequate mechanisms are in place to protect against conflicts of interest, legal service contracting can be justified and should at least not be discouraged as long as the contracting agency fully considers those less easily quantifiable effects of its procurement activities. Moreover in calculating the economic costs of obtaining outside assistance, the agency must consider those costs imposed by the procurement process itself (including delay) and the needs for supervision over any attorney(s) retained.

In the private sector, corporations have increasingly scrutinized their practices of going outside for legal assistance to determine whether or not they are economically justified. The upshot of this reevaluation has resulted in many cases in expansion of in-house staffs. For most federal agencies, the question may in fact present the "flip side" of the problem facing the private firm: whether they should increase the number of instances where they seek the legal services of private attorneys.

In determining cost-effectiveness it is clear that the situation confronting each agency must be individually considered; generalizations may be of little help.[452] One thing is clear though—price should not be considered in the abstract. The per hour salary cost for in-house assistance may be $40 and that of outside counsel may be $140, but if the likelihood of a successful result is ten times greater in the case where a private attorney is utilized because of his or her experience with the problem, reliance on the governmental employee for the work may be difficult to justify. In view of this, mandatory imposition by legislation of "fee caps"[453] on the amounts paid private attorneys is simply not a good idea since it may prevent the government from obtaining the quality of legal service that it needs to adequately carry out its functions.

For agencies which only occasionally require legal services of a particular kind, it may make little economic sense to argue that the permanent staff size should be augmented for the sole purpose of dealing with these cases. Choosing the optimal full-time staff size is, however, hardly an exact science. For example, putting aside the difficulties in obtaining congressional approval of funds for staff augmentation, the advisability of significant additions to in-house legal staff in the case of the FDIC and

452 *See generally* Fischer, *supra* note 1.

453 *See, e.g.*, S. 1580, 99th Cong., 1st Sess. ($75 per hour limit on private counsel for litigation).

the FSLIC is made problematical by uncertainty regarding how long the current rash of bank failures will continue.

In determining the optimal size for an in-house legal staff, an agency may profit from the techniques of analysis being developed in the private sector.[454] However, in making that calculation, consideration must be given to resource needs related to supervision exercised over outside counsel by full-time staff. In that regard, moreover, as the nature of required legal services changes—from purely advisory, to actively dealing with third parties on behalf of the government as in a labor negotiation, to the conduct of litigation—the need for close control over outside counsel may substantially increase based on both constitutional and other considerations. Unlike the situation facing a private corporation, this increased need for and exercise of control can result in the imposition of a variety of legal restrictions relating to the retention of outside counsel.[455] This in turn may prevent successfully contracting out where, in purely economic terms, it is fully justified. Or it may make it more expensive to contract for needed services. For example, due to mandated pay limits or conflict of interest restrictions, private lawyers may be unwilling to furnish requested services or may be willing to do so only at a cost which is prohibitive for the government. This is not to suggest, however, that "control" need be seen as purchased at too high a price in these instances.

Where control of varying degrees is authorized, the techniques currently found in the private sector[456] and in the practices of the FDIC and FSLIC[457] may be worthy of emulation, with appropriate modifications, by other federal instrumentalities. It should be noted that these procedures attempt to insure that costs are minimized throughout the performance of the contract.

It is questionable whether a particular federal agency should now be authorized or required to draft mandatory criteria and practices applicable to contracting for legal services by other agencies. First of all, experimentation in the area of improving cost-effectiveness in the provision of legal services is of relatively recent origin in the private sector. It may, therefore, be premature to draft any set of trans-agency regulations. Secondly, the situations facing various agencies may be unique in ways that argue against trans-agency practices in this area. When it comes to litigation by outside counsel, the experience of the banking agencies is more impressive than many other agencies, including the Department of Justice. Yet much of their expertise may be conditioned by the peculiarities of the problems facing them.

Accordingly, each agency, including the Department of Justice, should experiment with its practices in retaining outside counsel, keeping in mind both cost-effectiveness and the needs for control of decision-making. No one agency should be vested with the power of overview and

454 *See generally* Fischer, *supra* note 1.

455 *See, e.g., supra* notes 105-16 and accompanying text.

456 *See supra* notes 32-36 and accompanying text.

457 *See supra* notes 356-79, 423-25 and accompanying text.

regulation of these practices at the present time. An exception to this could be made in those instances where the Department of Justice is granted by statute the authority to permit (and restrict) an agency's use of outside counsel for litigation[458] or where the only basis for the agency's litigation authority is a memorandum of understanding with Justice. Here an argument exists that Justice should at least have the power to review and veto an agency's choice of criteria and procedures for contracting for litigation services.

At the same time all agencies should be encouraged to communicate among themselves and with the private sector with regard to techniques for insuring that the use of outside counsel is cost-effective. It may be also advisable in many cases to require that the agency's Office of General Counsel approve all legal services contracts to insure overall supervision and control of the extent of legal service contracting.[459] In addition, written documentation should be prepared by each agency that may need to retain private attorneys, considering such matters as the criteria for deciding when to retain outside counsel, which attorneys to retain, and guidance to firms or attorneys chosen regarding agency practices and expectations. Written documents are useful for training purposes and to jog memory as well as avoid misunderstandings with outside counsel. In drafting these, appropriate attention should be given to similar documents prepared by other agencies and private corporations.

In terms of the procedures for choosing which attorney or firm should provide a particular service, Congress has been reasonably explicit on this matter with the enactment in 1984 of the Competition in Contracting Act.[460] That statute provides exemptions from its formal competitive requirements in particular cases, such as where there is a need for immediate action, so that agencies may not be unduly hampered in many instances, though one study has suggested that the procedures mandated by the Act and the Federal Acquisition Regulation may significantly slow procurement.[461] Even where the costs, in terms of delay or otherwise, of allowing full and open competition are significant and the economic savings from competition are small, the noneconomic benefits of competition in dispelling to some degree the fact or appearance of favoritism may still be substantial.

It is clear, moreover, that savings to the government resulting from competition, whether formally or informally conducted, can be significant and that cost-saving competitive procedures can be structured to apply to legal services even though the lowest price may not be the sole consideration.[462] Accordingly, even where the CICA is not by its terms

458 *See, e.g.*, 38 U.S.C. § 1830(a) (1982); *supra* note 69.

459 *See* ACUS Hearing, *supra* note 318, at 27-28 (statement of Joseph Welsh, former Inspector General, U.S. Department of Transportation).

460 *See supra* notes 131-84 and accompanying text.

461 *See* Ruttinger, *supra* note 157, at 20, 24, 35 (whether or not an exemption applies). *See also* ACUS Recommendation 86-8, Acquiring the Services of "Neutrals" for Alternative Means of Dispute Resolution, 1 C.F.R. § 305.86-8 (1987) (changes in FAR may be required).

462 *See supra* notes 124 and 349-53 and accompanying text.

applicable, agencies should be encouraged to develop and experiment with competitive procedures to the extent appropriate where legal services contracting is involved.

Finally, while legal services contracting should not be discouraged, the role of the attorney in government[463] is such that the amount of such procurement should be publicly documented. Accordingly, where feasible, each agency should prepare an annual public report or otherwise maintain a publicly available list indicating for each legal services contract the name of the attorney retained, the type of work involved, the reason for seeking outside assistance, what, if any, competitive procedures were used, and the fee paid.

463 *See supra* note 7 and preceding text.

Appendix A
Agency Use of Outside Counsel

Agency	Type of Legal Work Done by Outside Counsel	Dates of Service or Frequency of Procurement	Fees Paid or Fee Arrangement	Fee Range	Procurement Procedure	Reason for Seeking Outside Counsel	Hiring or Contracting Office	Contract or Employee
Agency for International Development	1. issues related to loan by AID to a Costa Rican private sector development institution 2. opinion letter on taking security interest in foreign borowers' U.S. bank account	1983-84	N/D[1]	Partners: $175/hour Associates: $95/hour (on the average)	N/D	Did not have the staff available to handle these projects; expertise.	N/D	contract
Department of Agriculture	1. collection of delinquent debts (This department employs a collection agency which employs an attorney.) 2. others of undetermined nature (under $10,000)	N/D	N/D	Collector: $11.78/hour Clerk: $5.74/hour	A bidding system used.	N/D	N/D	contract
Department of the Air Force	patent and state of art searches	In 1983, this Department signed 5 contracts with outside legal counsel. In 1984, this Department signed 4 contracts with outside legal counsel.	1983 — approximately $10,000 1984 — approximately $6,000	Varies from firm to firm; patent search may cost $200; state of art search may cost $225.	N/D	N/D	N/D	contract

Appendix A (continued)

Agency	Type of Legal Work Done by Outside Counsel	Dates of Service or Frequency of Procurement	Fees Paid or Fee Arrangement	Fee Range	Procurement Procedure	Reason for Seeking Outside Counsel	Hiring or Contracting Office	Contract or Employee
Department of the Army[2]	1. sale of assets of major defense contractor 2. patent searches and applications	N/D	N/D	N/D	N/D	expertise, save cost	N/D	N/D
Civil Aeronautics Board	NONE	1983-84						
Consumer Product Safety Commission	NONE	1983-84						
Department of the Defense[3]	1. land use and natural resource litigation 2. state and local taxation 3. overseas cases 4. special studies 5. conflict of interest cases	N/D	N/D	N/D	N/D	expertise conflicts of interest	N/D	N/D
Dept. of Education[4]	1. advice on collective bargaining agreement 2. attorneys as members of the Education Appeal Board 3. matters requiring adjudication	1983-84—one contract for advice on collective bargaining agreement	$42,308 was spent for the collective bargaining agreement advice	N/D	N/D	N/D	General Counsel	contract
Department of Energy[5]	1. restructuring government corporations responsible for coal gasification 2. nuclear weapons programs	N/D	N/D	N/D	N/D	expertise	N/D	N/D

Appendix A (continued)

Agency	Type of Legal Work Done by Outside Counsel	*Dates of Service* or Frequency of Procurement	*Fees Paid or* Fee Arrangement	Fee Range	Procurement Procedure	Reason for Seeking Outside Counsel	Hiring or Contracting Office	Contract or Employee
Environmental Protection Agency (EPA)[6]	1. analysis of options for approaches to waste treatment 2. analysis of permit approaches under National Pollutant Discharge *Elimination System* 3. patent applications, amendments, and appeals	During 1983 and 1984, this agency signed 11 contracts for outside counsel.	Task orders used for subcontract work. Fixed price on patent contracts.	$125 to $1990 per project	Choice by prime contractors; small purchase procedures under CICA[7] in patent area.	specialized needs	General Counsel	contract or subcontract
Equal Employment Opportunity Commission	NONE	1983-84						
Federal Communications Commission[8]	NONE		1983-1984					
Federal Election Commission	NONE	1983-84						
Federal Emergency *Management Agency* (FEMA)	This agency hired outside *counsel for:* 1. litigation related to flood insurance issued by the National Flood Insurance Program. 2. analysis of legal authority for reducing consequences of major terrorism incidents.	1. N/D 2. 1982	1. N/D 2. $21,500.00	1. N/D 2. fixed price	1. N/D 2. negotiation	1. N/D 2. N/D	1. N/D 2. N/D	1. contract 2. contract

Appendix A (continued)

Agency	Type of Legal Work Done by Outside Counsel	Dates of Service or Frequency of Procurement	Fees Paid or Fee Arrangement	Fee Range	Procurement Procedure	Reason for Seeking Outside Counsel	Hiring or Contracting Office	Contract or Employee
Federal Home Loan Mortgage Corp.	general litigation	This office signed 2 contracts for outside legal services during 1980 & 1981.	1980: $94,690.90 1981: $9,225.90	1980: Partner: $129.60/hour Associate: $81-$51.40/hour Paralegal $29.70/hour 1981: Partner: $141.30/hour Associate: $91.50-$54/hour Paralegal: $34.20/hour	N/D	N/D	N/D	N/D
Federal Labor Relations Authority	NONE	1983-84						
Federal Maritime Commission	NONE	1983-84						
Federal Mediation & Conciliation Service	investigation of Merit Systems Protection Board	3/84 to 7/84	The total amount spent on this project was $23,156.78.	partners: $150/hour associates: $75/hour.	competitive bidding	expertise in federal civil service law	N/D	contract

Appendix A (continued)

Agency	Type of Legal Work Done by Outside Counsel	Dates of Service or Frequency of Procurement	Fees Paid or Fee Arrangement	Fee Range	Procurement Procedure	Reason for Seeking Outside Counsel	Hiring or Contracting Office	Contract or Employee
Federal Reserve Banks[9]	1. check, personnel, trademark and other litigation 2. personnel matters 3. labor 4. real estate tax 5. courier rate cases 6. procurement 7. contract (among other things)	varies from bank to bank	The total amount spent by the 12 banks in 1983, excluding matters still in litigation, was $369,603.55. The total in 1984, as of October 26, 1984 was $308,560.64.	N/D	varies from bank to bank	1. size and complexity of the legal matter 2. specialized nature of the legal issues	N/D	contract
Federal Reserve System	pension work	During fiscal years 1983 & 1984	N/D	N/D	N/D	N/D	N/D	contract
Federal Trade Commission[10]	consulting	N/D	N/D	N/D	N/D	N/D	employee generally	N/D
General Services Administration	NONE	1983-84						

Appendix A (continued)

Agency	Type of Legal Work Done by Outside Counsel	Dates of Service or Frequency of Procurement	Fees Paid or Fee Arrangement	Fee Range	Procurement Procedure	Reason for Seeking Outside Counsel	Hiring or Contracting Office	Contract or Employee
Dept. of Health & Human Services[11]	1. conduct patentability searches 2. prosecute foreign & domestic patent and trademark applications for inventions by scientists working for the government 3. independent advice to agency 4. advice regarding litigation, including patent litigation	N/D	$166,000 was allocated for patent applications in 1983 and $191,000 in 1984. Patent prosecutions paid for by the job, not the hour	N/D	CICA	expertise, conflicts of interest, lack of staff resources	General Counsel	contracts
Subdivision: National Institute on Drug Abuse	drug abuse project	1978-84	grant award	Total cost was $382,050.00	N/D	N/D	N/D	contract
Dept. of Housing & Urban Development[12]	1. foreclosure actions on defaulted mortgages 2. admiralty law 3. tax law 4. closing agents 5. bond counsel 6. real estate financing 7. litigation related to HUD owned property including evictions and rent collections 8. title reports 9. training on conciliation techniques	subcontract for foreclosure agent: Dec. 6, 1984 - Dec. 6, 1987	In some instances, hourly rates; other times flat fee.	routine foreclosure: $150-$1400 deed in lieu: $75-$250 possessory action: $100-$400	subcontract for foreclosure agent awarded competitively; some of other contracts awarded competitively including sealed bids	Too much work to be handled by in-house counsel; need for unique expertise in a sophisticated field; proximity to property.	Office of Procurement and Contracts, General Counsel, Regional Counsel, or Property Disposition Branch	contract

Appendix A (continued)

Agency	Type of Legal Work Done by Outside Counsel	Dates of Service or Frequency of Procurement	Fees Paid or Fee Arrangement	Fee Range	Procurement Procedure	Reason for Seeking Outside Counsel	Hiring or Contracting Office	Contract or Employee
Dept. of the Interior[13]	patent searches, patent applications, patent prosecutions	N/D	Fiscal year 1984 approximately $20,000 Fiscal year 1985 approximately $18,000 Fiscal year 1986 approximately $14,000	attorney: $60-$100/hour patent agent: $50/hour.	CICA (firms submit quotations) Firms selected on basis of: 1. geographical proximity to Patent Office (<30 miles) 2. diversity of experience in technologies 3. past experience with Department	more economical to go outside	Individual Bureaus on recommendation of Branch of Procurement and Patents, Division of General Law, Office of the Solicitor	contract
International Trade Commission	NONE	1983-84						
Interstate Commerce Commission	NONE	1983-84						

Appendix A (continued)

Agency	Type of Legal Work Done by Outside Counsel	Dates of Service or Frequency of Procurement	Fees Paid or Fee Arrangement	Fee Range	Procurement Procedure	Reason for Seeking Outside Counsel	Hiring or Contracting Office	Contract or Employee
Department of Justice[14]	1. *Bivens* case work 2. foreign litigation	N/D	During 1983 & 1984, this Dept. spent $273,168 on outside counsel. Between 1974 and 1982, expenditures on *Bivens* cases was about $4 million.[15]	For *Bivens* cases, the top rate is $75/hour.	N/D	expertise, conflict of interest	N/D	N/D
1. Tax Division	NONE	1983-84						
2. Antitrust Division	NONE	1983-84						
3. Office of Legal Policy	NONE	1983-84						
4. Executive Office of U.S. Attorneys	NONE	1983-84						
Department of Labor[16]	collection of fines and penalties under various statutes	N/D	N/D	N/D	N/D	N/D	N/D	N/D
National Aeronautics & Space Administration	patent matters	NASA contracted with seven firms during 1983 and 1984.	N/D	$20-70 per hour	N/D	N/D	N/D	contract
National Credit Union Administration[17]	litigation involving bankruptcies of credit unions	N/D	paid from non-public funds	N/D	N/D	N/D	N/D	N/D

Appendix A (continued)

Agency	Type of Legal Work Done by Outside Counsel	Dates of Service or Frequency of Procurement	Fees Paid or Fee Arrangement	Fee Range	Procurement Procedure	Reason for Seeking Outside Counsel	Hiring or Contracting Office	Contract or Employee
National Science Foundation	NONE	1983-84						
Department of the Navy[18]	1. representation of Navy personnel abroad 2. advisory opinions on unique issues	N/D	N/D	N/D	N/D	N/D	N/D	N/D
Nuclear Regulatory Commission.[19]	consulting	N/D	N/D	N/D	N/D	N/D	N/D	N/D
Office of Personnel Management	NONE	1983-84						
Pension Benefit Guaranty Corp. (PBGC)[20]	1. assistance in negotiation of term loan agreements 2. litigation arising from failure of pension plans or companies 3. advice in securities area	N/D	N/D	N/D	public solicitation	expertise	N/D	contract
Securities and Exchange Commission[21]	attorneys retained in connection with investigations requiring appearances in foreign countries	1983-87	N/D	N/D	N/D	N/D	Division of Enforcement	N/D
Selective Service System	EEOC complaint arbitration	This agency signed one contract with outside counsel during FY '83 & '84.	Total estimated cost was $18,000.00.	$80/hour	N/D	N/D	N/D	contract

Appendix A (continued)

Agency	Type of Legal Work Done by Outside Counsel	Dates of Service or Frequency of Procurement	Fees Paid or Fee Arrangement	Fee Range	Procurement Procedure	Reason for Seeking Outside Counsel	Hiring or Contracting Office	Contract or Employee
Small Business Administration[22]	disaster situations; complex and unique problems	N/D	N/D	N/D	N/D	N/D	temporary employees in disaster situations	N/D
Department of State[23]	1. amending contracts 2. presenting claims at Iran-U.S. Claims Tribunal 3. renewing contracts for adjudicators 4. foreign pre-litigation and non-litigation (e.g. real estate transfers) 5. advisory assistance 6. international adjudication before International Court of Justice	This office signed 14 contracts during FY '83 & '84during relating to 1, 2 & 3.	Total spent '83 & '84 $139,469.44 relating to 1, 2 & 3.	N/D	CICA	N/D	N/D	contract
Tennessee Valley Authority	1. conduct litigation (including uranium cartel cases) 2. settle claims 3. research legislative matters 4. consult as to procurements and generally advise the Board 5. bankruptcy 6. patent work 7. foreign trade agreements	N/D	Total spent during '83-'84 (excluding uranium litigation) was $292,495.21.	N/D	N/D	Uses outside counsel when local court rules require or when otherwise appropriate.	N/D	N/D

Appendix A (continued)

Agency	Type of Legal Work Done by Outside Counsel	Dates of Service or Frequency of Procurement	Fees Paid or Fee Arrangement	Fee Range	Procurement Procedure	Reason for Seeking Outside Counsel	Hiring or Contracting Office	Contract or Employee
Department of Transportation (in general)[24]		During 1983, 17 contracts and 16 contract modifications	In 1983, $2.4 million					contract
Subdivisions:								
1. Office of Secretary[25]	1. advice regarding sale of Conrail 2. air traffic, controllers strike 3. transfer of airports to local government 4. teaching workshop for regulatory drafting	1. March to Sept. 1985 2. 1981-85 3. Jan. 1985 to Sept. 1986 4. N/D	N/D	1. $32.92/hour 2. Associate: $75/hour Partner: $150/hour 3. $175/hour 4. $62.50/hour	1. sole source procurement 2. predated CICA 3. sole source procurement 4. sole source procurement /urgent need	unique expertise and/or emergency	Office of Secretary in cooperation with General Counsel	contract
2. U.S. Coast Guard[26]	real property title searches/title insurance	Contracts let in 1984, 1985, 1986	flat fee	title search: $300-660 title insur.: $100	In one case sole source available for service, In others request for quotations	need for local counsel	District Legal Office concurred	contract
3. Federal Railroad Administration (FRA)	1. transfer Alaska Railroad to state of Alaska 2. legal services related to sale of Conrail[27]	1. during FY '83 & '84 2. Oct. 1986 to date	1. ceiling of $200,000 2. hourly rate	1. $110.00/ hour 2. $37.50 to $240 per hour	1. DOT regs. 2. urgency exception to CICA-informal solicitation	1. N/D 2. lack of expertise	1. General Counsel 2. General Counsel	1. contract 2. contract

Appendix A (continued)

Agency	Type of Legal Work Done by Outside Counsel	Dates of Service or Frequency of Procurement	Fees Paid or Fee Arrangement	Fee Range	Procurement Procedure	Reason for Seeking Outside Counsel	Hiring or Contracting Office	Contract or Employee
4. Federal Aviation Administration (FAA)[28]	1. regulatory analysis 2. general litigation 3. recommendations concerning safety regulations 4. examine legal ramifications of private firms providing FAA flight services 5. trial preparation for DOTCAB appeal(s) 6. lecture to non-legal staff regarding FAA enforcement 7. See Appendix A-1[29]	1. 1984-86 (intermittently) 2. 1982-1984 3. 1987 4. 1985 5. 1982-85 6. 1986-87	1. N/D 2. hourly rate 3. hourly rate 4. hourly rate 5. hourly rate 6. hourly rate	1. N/D 2. $40-$150/hr. 3. $32.50/hr. 4. $50/hr. 5. $30-$100/hr. 6. $106.00/hr.	1. subcontract, exempt from CICA 2. sole source 3. sole source 4. competition 5. N/D 6. CICA	1. expertise 2. need for additional counsel given urgency and/or expertise 3. expertise 4. need for independent opinion 5. expertise, lack of resources 6. lack of resources	1-4 General Counsel or other offices 5. Aeronautical Center Counsel 6. FAA Academy	contract or subcontract
Department of Treasury			$384,043 was spent by the Treasury on outside counsel during 1983 & 1984.			1. cost 2. expertise 3. potential conflicts of interest	General Counsel	
Treasury agencies: 1. Chrysler Corp. Loan Guarantee Bd.	Sale by the U.S. of warrants to purchase 14,400,000 shares of Chrysler common stock	This agency signed one contract during FY '83-84.	The cost of this project was $69,043.95.	N/D	N/D	N/D	General Counsel	contract
2. U.S. Mint	NONE	1983-84						

Appendix A (continued)

Agency	Type of Legal Work Done by Outside Counsel	Dates of Service or Frequency of Procurement	Fees Paid or Fee Arrangement	Fee Range	Procurement Procedure	Reason for Seeking Outside Counsel	Hiring or Contracting Office	Contract or Employee
3. U.S. Customs Service[30]	Collective bargaining	1982-83	N/D	N/D	N/D	N/D	N/D	N/D
4. Secret Service	NONE	1983-84						
5. Savings Bond Division of Bureau of Public Debt	NONE	1983-84						
6. Bureau of Engraving and Printing	NONE	1983-84						
7. Federal Law Enforcement Training Center	NONE	1983-84						
8. Bureau of Alcohol, Tobacco & Firearms	NONE	1983-84						
9. Gov't Financial Op.	NONE	1983-84						
10. Comptroller of the Currency	1. landlord-tenant case 2. employees named as defendants 3. real estate and pension issues	During 1983-1984, this agency signed five contracts for the retention of special counsel.	minimum retainer or ceiling fee including hourly rates	partners: $75-205/hour senior assoc.: $55-120/hour junior assoc.: $30-90/hour law clerk: $20-85/hour	N/D	N/D	General Counsel	contract

Appendix A (continued)

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U.S. Information Agency	negotiating a lease	This agency signed one contract with outside counsel during 1983 and 1984.	N/D					
U.S. Postal Service[11]	1. negotiations relating to collective bargaining agreements 2. FLSA case 3. Title VII class action 4. Counsel to the Board of Governors[12]	Since 1980, an outside Counsel to the Board has been retained.	Counsel to Board paid based on hourly rates	partners: $160/hour associates: $140/hour (Counsel to Board)	N/D	N/D	N/D	contract
U.S. Railway Association	1 coordinate defense of litigation arising from conveyance of properties to Conrail 2. banking issues for investment of federal funds in Conrail	N/D	The total expenditure for outside counsel during 1983 and 1984 was $271,650.00.	Partners: $145/hour Associates: $80/hour Paralegals: $30/hour	N/D	N/D	N/D	N/D

Appendix A (continued)

Agency	Type of Legal Work Done by Outside Counsel	Dates of Service or Frequency of Procurement	Fees Paid or Fee Arrangement	Fee Range	Procurement Procedure	Reason for Seeking Outside Counsel	Hiring or Contracting Office	Contract or Employee
Veterans Administration[33]	Administration of the loan guaranty program (close direct loans, close sales of VA acquired properties, conduct court actions); litigation involves evictions, collection on judgment debts, title matters; see also Appendix A-2.[34]	In 1980, fee attorneys handled approximately 4,300 home loan matters and were paid approximately $537,000. During last six months of 1981 fiscal year, fee attorneys handled 1,870 matters and were paid $242,000.	The fees are determined by agreement between the field station director, local loan guaranty officer and district counsel.	paid locally prevailing fee for service, not per hour; fee varies from state to state	Each one of the 55 District Counsels is authorized to employ a private attorney to meet local needs. CICA allegedly inapplicable	Performance of work by a V.A. attorney would be untimely or uneconomical	General Counsel	no contracts (fee for service attorney)

FOOTNOTES TO APPENDIX A

1. "N/D" indicates that there is no available information with regard to the matter to which it applies. Unless otherwise indicated in these footnotes, the data used to compile Appendix A was furnished in response to requests filed under the Freedom of Information Act, 5 U.S.C. § 552 (1982), by the National Law Journal several years ago. *See* Nat'l L.J. Feb. 4, 1985, at 51. The National Law Journal (NLJ) compiled the following list of agencies along with their legal services expenditures in 1983-84:

How Much Government Agencies Spent

Federal Agency	Amount Spent 1983-'84
Federal Deposit Insurance Corp.	$34,197,137*
Federal Home Loan Bank Board/Federal Savings and Loan Insurance Corp.	$8,418,453**
Department of Transportation	$1,293,408
Veterans Administration	$950,000
Legal Services Corp.	$792,192***
Federal Reserve Banks	$578,164
Department of Treasury (Including Comptroller)	$384,043
Tennessee Valley Authority	$374,584
U.S. Postal Service	$300,000
Department of Justice, Civil Division	$273,168
Federal Emergency Management Agency	$229,247
Department of Housing and Urban Development	$176,000
Department of Agriculture	$100,000
Department of Interior	$44,123
Department of Education	$42,308
Department of International Development	$38,000
U.S. Air Force	$24,939
Federal Mediation and Conciliation	$23,137
Selective Service System	$18,000
Environmental Protection Agency	$7,492

*Through first nine months of 1984.
**1983 only.
***Preliminary estimate.

Agencies surveyed that reported no use of outside counsel included: Internal Revenue Service, Federal Trade Commission, Civil Aeronautics Board, U.S. Army, U.S. Navy, Department of Labor, Securities and Exchange Commission, Office of Personnel Management, Consumer Product Safety Commission, Interstate Commerce Commission, Nuclear Regulatory Commission, National Science Foundation, Federal Communications Commission, Federal Election Commission, General Services Administration, Tax and Antitrust Divisions of the Deparment of Justice, Equal Employment Opportunity Commission, Federal Labor Relations Authority, the Bureau of Alcohol, Tobacco and Firearms, and the Bureau of Government Financial Operations.

A close examination of Appendix A indicates some relatively minor differences between NLJ figures and those derived from this consultant's review of the FOIA and other material. The reasons for these discrepancies are unclear at this time.

Finally, it should be noted in connection with Appendix A, that data contained under one heading may not always relate to that under another for the same agency, thus introducing certain possible misperceptions. Unfortunately, the lack of complete data at this time prevented a perfect matching.

2. Wolf, Block, Schorr and Solis-Cohen, Draft Report to the Administrative Conference of the United States (hereinafter "Wolf, Block Report") at 68.
3. *Id.* at 69.
4. *Id.* at 70.
5. *Id.* at 70-71.
6. Administrative Conference [ACUS] Questionnaire Response from Francis S. Blake, General Counsel, EPA to Marshall Breger, Chairman, ACUS (Mar. 6, 1987).
7. "CICA" refers to the Competition in Contracting Act of 1984, now codified in 41 U.S.C., §§ 251 *et seq.*

8. Wolf, Block Report *supra* note 2, at 80.
9. There are internal guidance documents applicable to the retaining of outside counsel by Federal Reserve Banks.
10. Wolf, Block Report, *supra* note 2, at 83-84.
11. *Id.* at 71-72; ACUS Questionnaire Response from Darrel J. Grinstead, Associate General Counsel, HHS, to Marshall Breger, Chairman, ACUS (Mar. 30, 1987).
12. ACUS Questionnaire Responses from Stuart C. Sloame, Deputy General Counsel, HUD to Marshall Breger, Chairman, ACUS (Feb. 20, 1987 and May 19, 1987) and Wolf, Block Report, *supra* note 2 at 72-73. The Department has internal guidance documents regarding fee schedules.
13. ACUS Questionnaire Response from Howard H. Shafferman, Associate Solicitor, Division of General Law, Department of the Interior, to Marshall J. Breger, Chairman, ACUS (no date).
14. Wolf, Block Report, *supra* note 2, at 73-75. The Department of Justice has both regulations and written internal guidance documents dealing with the hiring of private counsel. *See* 28 C.F.R. § 50.15, 50.16 (1987) and Administrative Directive 2120 (Sept. 20, 1982) (Civil Division).
15. *See* General Accounting Office, JUSTICE EXPENDITURES FOR PRIVATE COUNSEL AND JUDICIAL FEE AWARDS IN ANTITRUST AND SECURITIES CASES (GAO/GGD-84-2, Oct. 7, 1983).
16. Wolf, Block Report, *supra* note 2, at 75.
17. *Id.* at 84.
18. *Id.* at 76.
19. *Id.* at 84-85.
20. Public Hearing Record, Federal Agency Hiring of Private Attorneys, convened by Administrative Conference of the United States, May 29, 1986, Washington, D.C. (Testimony of Frank McCulloch, Special Counsel, PBGC).
21. Letter of Daniel L. Goelzer, General Counsel to Marshall Breger, Chairman, ACUS (May 13, 1987).
22. Wolf, Block Report, *supra* note 2, at 86-87.
23. *Id.* at 76-77.
24. In several cases DOT has also hired outside counsel to pursue administrative level procurement. *See id.* at 78-79. The Department has written internal guidance relating to the hiring of experts and consultants. *See* DOT Order 4200.15 (March 5, 1981).
25. ACUS Questionnaire Response from Neil R. Eisner, Assistant General Counsel for Regulation and Enforcement, DOT, to David Pritzker, ACUS (no date).
26. *Id.*
27. ACUS Questionnaire Response from Neil R. Eisner, Assistant General Counsel for Regulation and Enforcement, DOT, to David Pritzker, ACUS (Apr. 6, 1987). *See also* General Accounting Office, CONRAIL SALE: DOT'S SELECTION OF INVESTMENT BANKS TO UNDERWRITE THE SALE OF CONRAIL (GAO/RCED 87-88). (In this instance a law firm was involved in the selection of investment banks to serve as co-lead managers for the sale of Conrail.)
28. ACUS Questionnaire Responses from Neil R. Eisner, Assistant General Counsel for Regulation and Enforcement, DOT, to David Pritzker, ACUS (one not dated; the other dated April 2, 1987).
29. Appendix A-1 was compiled from information furnished in response to the National Law Journal FOIA request.
30. Wolf, Block Report, *supra* note 2, at 79.
31. *Id.* at 87-88.
32. *See* General Accounting Office, POSTAL SERVICE: BOARD OF GOVERNOR'S CONTRACT FOR LEGAL SERVICES (GAO/GGD-87-12).
33. ACUS Questionnaire Response under cover letter from Frederic L. Conway, Special Assistant to the General Counsel, VA, to David Pritzker, ACUS (Feb. 12, 1987). The VA has both regulations and written internal guidance dealing with hiring outside attorneys. *See, e.g.*, 38 C.F.R. § 14.515(b) (1987).
34. Appendix A-2 was compiled from information furnished in response to the National Law Journal FOIA request.

Appendix A-1
Federal Aviation Administration

A. Alaska

Regional Office (RO) hired attorney for research on the impact of aboriginal land claims under Alaska Native Claims Settlement Act (ANCSA). It was estimated that this project would cost $5,600.00

B. California

RO signed contracts amounting to, respectively, $19,998.40, $21,000, $17,000 and $20,000 to provide trial counsel for fired air traffic controllers.

C. District of Columbia

RO signed three contracts for outside legal counsel during fiscal years 1983 and 1984. The first contract was for trial work for the government's case against COMSAT before DOT's contracts appeal board. The pay schedule for the contract was:

		partners	$150/hour
associate	>	4 years	$125/hour
associate	<	4 years	$115/hour
		paralegal	$ 35/hour

The estimated cost of the project was $125,000.

The second contract was for litigation against General Dynamics. The estimated cost of the litigation was $195,000 and the pay schedule was:

senior partner	$140/hour
senior associate	$ 95/hour
junior associate	$ 75/hour
paralegal	$ 30/hour

The third contract was for work dealing with a labor agreement between the FAA and the air traffic controllers. This was modified frequently and the pay schedule was:

partner	$150/hour
associate	$ 75/hour

D. Massachusetts

RO signed contract to try ex-air traffic controller removal cases. The estimated cost of the legal work was $9,000.

E. Oklahoma

RO signed two contracts during fiscal years 1983 and 1984 for defending a case filed by Mike Mahonroney Aeronautical Center. One contract was for an estimated cost of $133,160 and the other contract was for an estimated cost of $20,000.

Appendix A-2

Veterans' Administration

1. Alabama: uses outside counsel for evictions and foreclosures; in 1983 $13,454.00, in 1984 $23,358.24.

2. Arizona: for evictions and foreclosures in outlying counties surrounding Phoenix, staff attorneys do evictions locally; in 1983 and 1984, paid a total of $20,750.00 for foreclosures; during the same period, $430.00 on evictions.

3. California: for eviction proceedings, during 1983 and 1984, contracted out 18 evictions at a fee of $75.00 each, for a total expenditure of $1,350.00.

4. Colorado: spent $2,094.08 for outside counsel to represent the agency in eviction hearings in 1983 and the first half of 1984 and spent $2,050.13 for the same from 1/84 through 7/84.

5. Connecticut: employed one law firm during fiscal years '83 and '84; firm was retained to do a title search for a fee of $100.00.

6. Washington, D.C.: contracted with four firms during fiscal years '83 and '84 for eviction and foreclosure proceedings in Maryland, Virginia and the District of Columbia; the following is a break-down of the fees paid to outside counsel—

	Evictions	Foreclosures	Total
1983	7,957.58	2,210.00	10,167.58
1984	3,420.60	3,960.00	7,380.60

7. Georgia: retained outside counsel for many actions related to its loan guaranty program and spent $24,738.82 between 1/4/83 and 9/20/84.

8. Idaho: spent $480.00 during 1983 for outside counsel for trustee and foreclosure sales.

9. Illinois: hired outside counsel for forcible detainers; in 1983, the fees totalled $74,268.24; in 1984, the fees totalled $84,384.47.

10. Iowa: in 1983 and 1984, spent $1,313.21 to retain outside counsel to work on eviction proceedings.

11. Indiana: during fiscal year 1983, spent $6,375.00 to retain outside counsel for 51 eviction proceedings; during fiscal year 1984, spent $4,364.06 to retain outside counsel for 25 eviction proceedings; during both '83 and '84, spent $175.00 for outside counsel for three loan closings. The total spent on outside counsel during '83 and '84 was $10,914.06.

12. Louisiana: in 1983 and 1984, spent $44,937.00 in retaining outside counsel for sale closings, recording deeds, foreclosure filings, evictions and sheriff sales and used 49 different law firms.

13. Maine: in 1983 and 1984, spent $9,920.63 in retaining outside counsel for title updates, eviction and foreclosure proceedings and title searches.

14. Maryland: in fiscal year 1983, employed three firms for eviction proceedings and title searches and spent $1,955.00; in 1984; employed 10 firms for title searches, foreclosures and evictions and spent $3,070.00; the total spent on outside counsel was $5,025.00.

15. Massachusetts: during fiscal years 1983 and 1984, employed nine firms in sixty-six actions and spent $3,705.00.

16. Michigan: during fiscal years '83 and '84, employed twenty-eight firms for eviction and foreclosure proceedings and sale closings and spent $80,269.00.

17. Minnesota: during fiscal years '83 and '84, employed outside counsel for loan closings and foreclosures and spent $25,965.00.

18. Missouri: spent approximately $600.00 on outside counsel during fiscal years '83 and '84.

19. Montana: employed fourteen firms for trustee sales, evictions, removing direct loans from bankruptcy and accountings for guardianship actions and spent $3,343.69.

20. New Hampshire: employed nine law firms to perform foreclosure and eviction proceedings and spent $10,833.48.

21. New Jersey: employed thirteen law firms for sale closings and eviction proceedings and spent $32,415.00.

22. New York:

a. Buffalo: only used outside counsel for eviction proceedings at the request of the Loan Guaranty Division; in 1983, four firms were used in nine eviction proceedings for $1,676.33; in 1984, four firms were used in seven eviction proceedings for $500.90.

b. New York: use of outside counsel was limited solely to operation of the loan guaranty program; outside counsel handled 418 evictions and 520 foreclosure sales for fees totalling $221,433.69.

23. North Carolina: employed fourteen firms to handle 83 foreclosure proceedings at the cost of $20,750.00.

24. Ohio: spent $68,444.97 on outside legal counsel during 1983 and 1984; counsel retained for handling sheriff sales.

25. Oregon: spent $2,150 in 1984 for eviction proceedings handled by outside counsel and $681.15 in 1984 for foreclosures handled by outside counsel.

26. Pennsylvania: outside counsel retained only for eviction proceedings; during 1983 and 1984, employed 15 attorneys and spent $47,592.00.

27. Tennessee: employed outside counsel for 169 eviction cases and 2 guardianship cases and spent $17,485.72.

28. Texas:

a. Waco: employed five attorneys for forcible entry and detainer actions.

b. Houston: spent $19,936.90 on outside legal counsel during 1983 and 1984.

29. Utah: spent $100.00 on outside counsel for two trustee sales.

30. Vermont: retained ten firms for title searches and sale closings and spent $1,957.90.

31. Virginia: retained eighteen firms for foreclosure and eviction proceedings and spent $8,830.00.

32. Washington: began using outside counsel in 1984 and spent $3,802.41.

33. West Virginia: employed outside counsel for two eviction proceedings and spent $416.05.

34. Wisconsin: two fee attorneys employed by the Veterans' Administration in connection with the closing of direct loans with specially adapted housing grants in Wisconsin and spent $390.00.

The total spent by all of the reporting officers was $909,765.25.