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**DECISION**



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

**FILE:** B-198040

**DATE:** June 19, 1981

**MATTER OF:** Carolyn Barnes - Personal Services Contract

- DIGEST:**
1. Agency for International Development contracting officer has not exceeded his authority by negotiating a clause in a personal services contractor's agreement for payment of a retirement allowance equivalent to that paid for an agency direct hire although such clause may contravene agency policy since the agency is also contributing to Social Security on behalf of the contractor, that is, contributing to two retirement systems on the contractor's behalf.
  2. Retirement allowance received by Agency for International Development personal services contractor is considered part of the contractor's salary although it is designated in the contract as an "allowance" and the contractor has requested that it be paid into an individual retirement account in a financial institution. The tax (FICA and income) consequences of such payment is a matter for the Internal Revenue Service.

This is in response to a request for an advance decision, dated February 22, 1980, by Gary L. Byllesby, Authorized Certifying Officer, Agency for International Development (Agency), on the propriety of a clause concerning retirement contributions, in addition to social security, in Carolyn Barnes' personal services contract.

In January 1977 Carolyn Barnes and the Agency entered an agreement (contract no. 686-023-77) whereby Ms. Barnes was to provide her services, as a rural development specialist, to assist a foreign government. The contract was for 1 year with plans to extend the contract for at least 1 more year. The estimated contract amount was \$53,600, which included the Agency's contribution under the Federal Insurance Contributions Act (social security) on Ms. Barnes' behalf.

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In December 1977 the contract was amended to extend Ms. Barnes' services for 1 year. It retained the Agency's social security contribution and, in addition, the amendment contained a clause stating that:

"The Contractor [Ms. Barnes] will be paid retirement allowance in an amount equivalent to that paid by the U.S. Government for an AID direct hire FSR 5, step 7 employee. \$ 1,780."

The contracting officer's intent in including this "retirement allowance" as reported in the record, was to equalize the benefits of direct hires and contractors. This was in keeping with the Agency's policy to provide personal service contractors generally the same benefits as direct hires. Thus, the contract included this clause for providing a retirement allowance equivalent to the Government's contribution to Foreign Service retirement for direct hires.

The Agency's Washington contracts office, commenting on Ms. Barnes' contract, stated that although the retirement allowance is not necessarily unallowable it puts the Agency in the position of contributing to two retirement funds--social security and Ms. Barnes' individual account--an advantage not enjoyed by direct hires. The Agency's certifying officer now questions whether the contracting officer exceeded his authority by authorizing retirement contributions to both an individual retirement plan and social security. Further, he asks if Ms. Barnes had been a participant of a recognized pension plan, then would the contracting officer be able to authorize contribution to that plan in lieu of social security. Finally, he questions the relationship of such a contribution to salary negotiations; e.g., would it be part of the salary package or independent of the salary offer.

This contract was negotiated pursuant to the Foreign Assistance Act of 1961, as amended, section 636(a)(3), which authorizes use of appropriated funds for "contracting with individuals for personal services abroad." Pub. L. 87-195, 75 Stat. 457 (22 U.S.C. § 2396(a)(3) (1976)). Neither that statute nor any other statute or regulation of which we are aware would preclude the contracting

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officer from negotiating with a contractor, a clause to compensate the contractor an additional amount for contribution to a retirement fund. We note that the certifying officer's question concerns the contracting officer having authorized a retirement contribution to an individual retirement plan. However, the contract does not specify that the contribution be made directly to Ms. Barnes' individual retirement account. It merely states that Ms. Barnes will be paid a retirement allowance equivalent to that paid for a direct hire at the FSR 5, step 7, level. If Ms. Barnes has properly authorized an allotment of that amount of her compensation, we see no reason for the Agency not to deposit the funds directly into her individual retirement account at the designated financial institution. See 31 U.S.C. § 492(b) and (d) (1976).

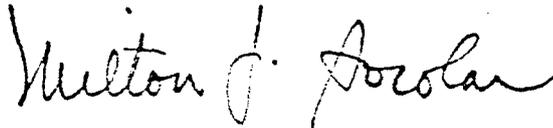
With regard to social security taxes, those matters are primarily within the jurisdiction of the Internal Revenue Service, Department of the Treasury, and not our Office. 49 Comp. Gen. 233, 242 (1969). However, generally the law provides for mandatory participation unless the employee is a Federal employee contributing to his/her respective Government retirement program (with other exceptions not relevant here). 26 U.S.C. § 3121 (1976). Thus, if Ms. Barnes' participation in the social security program is required, it would appear that the contracting officer could not authorize a contribution to Ms. Barnes' own pension plan in lieu of social security. However, for an authoritative determination on that matter, it should be presented to the Internal Revenue Service.

The retirement allowance provided for in the amendment to the contract is part of Ms. Barnes' salary. The mere fact that it is itemized as an allowance, as opposed to including the amount in Ms. Barnes' salary, does not alter the nature of the allowance as part of her compensation. As to the tax (FICA and income) consequences of that amount being paid into an individual retirement account or some other retirement plan, those too are matters for determination by the Internal Revenue Service.

In conclusion, although this contract clause may not be in accordance with Agency policy to equate the benefits of direct hires and personal service contractors, we are

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aware of no restriction on the contracting officer's authority in negotiating the contract which would preclude payment of the retirement allowance. Accordingly, payment of the retirement allowance may be made to Ms. Barnes. The voucher submitted is being returned.

A handwritten signature in cursive script, reading "Milton J. Jordan".

Acting Comptroller General  
of the United States