COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON 25

B-82269 APR 5

The Honorable,

The Secretary of Commerce.

My dear Mr. Secretary:

There has been considered your letter of December 15, 1948, requesting a decision as to (1) whether the services under certain contracts entered into by the Weather Bureau for janitor, ground keeping and grass cutting services are to be regarded as personal services for which payments are to be made on pay roll forms with necessary deductions for withholding taxes; (2) whether the decision, if affirmative, would be the same if the janitors were required to furnish mops, buckets, soap, etc., and the persons who care for grounds were required to furnish the necessary equipment to mow the lawn, rake the leaves, etc.; and (3) whether the contracts could be considered as covering casual labor not in the course of the Weather Bureau's business as described in paragraph 5(d), page 4 of Circular W-T (Revised) 1945, of the Bureau of Internal Revenue and therefore exempt from the withholding tax.

There were forwarded with your letter, as examples, copies of contracts numbered C-3wb-70, Cwb-6796, and C1-wb-32. The first two contracts provide that the contractor will furnish janitor service at the rates of $0.75 and $1.10 per hour, respectively, the second one of which specifies that all tools and materials will be furnished by the Government. The third contract provides that the contractor will furnish labor for cutting grass at rate of $3 for each complete mowing of Weather Bureau grounds, and is silent as to which party shall furnish the necessary equipment.

The request for decision arises by reason of the stated views of auditors of the General Accounting Office performing the site audit of pay rolls in Chicago and New York that the involved contracts are deemed to be personal service contracts because the services are rendered by individuals upon a time basis and that, in accordance with decision of May 17, 1948, B-76060 (27 Comp. Gen. 695), such payments should be made on pay rolls and that deductions should be made for withholding taxes. It is stated in your letter that the Weather Bureau has hired janitors at field stations on a contract basis ever since the receipt of the decision of June 10, 1927, A-18680.

The determination as to whether the services to be rendered under a particular contract are personal or nonpersonal will depend upon the terms of and the circumstances surrounding that contract. Generally, persons engaged under contract on other than a personal service basis are those who do not perform their work under the supervision and control of the Government. 23 Comp. Gen. 425.

And, while the furnishing of supplies and equipment to the person so engaged, would frequently indicate that such person was an employee, that rule would not necessarily hold good in all cases. An agreement could be made that one party will, by means of supplies and equipment supplied by the other, accomplish in his own way and in his own time a specified result and that payment will be made of an agreed amount from the accomplishment of such result. Such a case is easily distinguished from an agreement under which one person performs certain actions at the direction and under the supervision of the other, has no responsibility for the result obtained, and is paid a specified sum for a specified period of time.

Contract Cl-wb-32 provides for the furnishing of labor on grounds (cutting grass) at the rate of "Three Dollars ($3.00) for each complete mowing of Weather Bureau grounds with power mower, including trimming out with hand mower wherever necessary." Payments under that and similar contracts may continue to be made on Standard Form 1034.

With reference to the contracts for janitor services it is stated in your letter that the phrase, "when and as directed", used in some of the contracts does not mean that the janitor works under the direct supervision of a Weather Bureau official; that the employee is advised as to what his duties are and there is no specific control of his time except that his actual time of reporting and leaving is checked; and that the Weather Bureau has not considered that an employer-employee relationship exists, nor that the requirement for withholding taxes applies. Accordingly it may be concluded that such contracts likewise are nonpersonal service contracts and that payment for such service is not required to be made on pay roll forms. However, a final determination as to whether deduction of withholding taxes should be made from such payments properly is within the jurisdiction of the Treasury Department, Bureau of Internal Revenue and, until that Bureau has ruled otherwise, this Office will not insist that such deduction be made.

In view of such conclusion, reply to the second and third questions is not deemed necessary.

Respectfully,

Comptroller General
of the United States.