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

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NOV 7 - 1974

The Honorable Charles McC. Mathias, Jr.
United States Senate



Dear Senator Mathias:

In accordance with your joint request with Representative Gilbert Gude dated November 5, 1973, and agreements with your office, we reviewed the Department of Health, Education, and Welfare's (HEW's) practices in awarding two contracts to Thompson, Lewin and Associates, Inc., for consultant services to the Office of Child Development. Our review also concentrated on the use of temporary employees by the Office at its headquarters during late fiscal year 1973 and early fiscal year 1974.

We identified what we consider to be an unnecessary award of a sole source contract resulting from inadequate planning by the Office and that a strong basis exists for the conclusion that HEW allowed the existence of what was tantamount to a proscribed employer-employee relationship between the Government and the contractor during performance of the two contracts. There were no indications that the Office used excessive numbers of temporary employees at its headquarters during the period you cited.

UNNECESSARY AWARD OF SOLE SOURCE CONTRACT

On June 28, 1972, the Director, Office of Child Development, submitted a request to HEW's Procurement and Contracting Branch for a sole source procurement of management consulting services from Thompson, Lewin and Associates, Inc., in the amount of \$250,000. (This Branch has authority for awarding and administering Office of Child Development contracts.) In his request the Director stated that the Office was undertaking a major effort to provide broad-scale improvement and upgrading of the Head Start program and, as part of this effort, a system was needed to enable Head Start grantees to make changes in their programs during the fourth quarter of fiscal year 1973.

The Director stated that Thompson, Lewin and Associates, Inc., would be expected to provide services necessary to help the Office plan and manage the overall effort, to act in an advisory capacity, and to help coordinate the tasks to be performed as part of the improvement process. He also stated it was crucial that the tasks outlined for the contractor be undertaken quickly, because they were complex and would serve as the foundation for the fiscal year 1973 program.

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Thompson, Lewin and Associates, Inc. (now Lewin and Associates, Inc.), was requested as the sole source on the basis that (1) its knowledge of the program, problems, and needs and its experience in participating with the Office for many months in its planning could not be replicated except at major cost, (2) time and effort required by a contractor other than Thompson, Lewin and Associates, Inc., to replicate that firm's present knowledge, experience, and value to the Office would be costly and time consuming, and (3) a competitive action would cause a 60- to 70-day delay not counting the startup time a new contractor would need to become acquainted with the enormity of the undertaking.

Before this request, Thompson, Lewin and Associates, Inc. (formerly known as Lawrence S. Lewin and Associates, Inc.), had been awarded three contracts by HEW to directly assist the Office of Child Development. The three contracts respectively provided for (1) review and evaluation of Head Start career development and technical assistance programs; (2) study of the Office's role, process, and structure; and (3) review and analysis of day care standards, licensing guidelines, and handbooks.

In a memorandum, dated July 21, 1972, the Chief, Procurement and Contracting Branch, recommended that the request for a sole source contract not be approved for the following reasons:

"After consideration of the sole source nature of the procurement I have concluded that insufficient justification exists at this time to make a sole source award without a clear abuse of my authority. * * * In his June 28, 1972, memo, Secretary Richardson stated, 'Non-competitive contracts should be entered into only as a last resort and only after it has been determined that such procurements are truly sole source.' I cannot in clear conscience make this determination in this instance."

* * * * *

"In summary the sole source is predicated on (1) the contractors [sic] past working relationship with OCD [Office of Child Development]; (2) inadequate lead time to compete; and, (3) the additional cost for familiarizing a new contractor with the program. The first reason does not justify a sole source, the second is primarily a comment on the OCD's lack of planning, and the third is highly speculative and can only be determined in the 'market place.'"

The Assistant Secretary for Administration and Management met on July 26, 1972, with representatives of the Procurement and Contracting

Branch and the Office of Child Development to discuss the request. HEW officials stated that the Assistant Secretary determined at this meeting that the requested management consulting services should be obtained competitively. However, in recognition of the Office's immediate need for assistance and to allow contractor support during the competitive procurement process, the Assistant Secretary decided that initially a sole source contract, not to exceed \$50,000, would be negotiated with Thompson, Lewin and Associates, Inc. Any additional services were to be obtained competitively.

On August 25, 1972, HEW awarded a contract for \$49,642 to this firm. The contract requirements, in part, called for preparing an overall national strategy and detailed action plan for the fiscal year 1973 Head Start effort and developing guidelines, procedures, and formats for use by the regional offices in preparing their plans.

Although the Assistant Secretary acted within the authority granted him by Federal Procurement Regulations and Departmental procedures, we believe the Office of Child Development should have been sufficiently aware of its need for contractor assistance well in advance of June 28, 1972, and should have adequately planned for competitive procurement, thereby avoiding the circumstances which led to the sole source contract. Specifically, as early as November 1971, the Office began discussing plans for Head Start improvement and innovation, and in February 1972, its Program Management Division reported that extensive use of contract personnel, at least through fiscal year 1973, would be required to build the Office's organizational capacity and to launch broad-scale improvement and innovation in Head Start.

In addition, the major tasks to be performed in achieving Head Start objectives for fiscal year 1973 were discussed during a meeting on April 4, 1972, attended by officials of the Office of Child Development and the contractor. At this meeting, certain responsibilities for helping to initiate improvement and innovation were assigned to contractor personnel, who subsequently helped prepare a document titled "FY 1973 Goals and Plans for Improvement and Innovation in Project Head Start," which was forwarded by the Office of Child Development to its Assistant Regional Directors on June 22, 1972.

In a March 1974 interview, the Chief of the Procurement and Contracting Branch maintained that he felt at the time of the request, and still feels, that the Office's justification was not adequate to support a sole source award.

Agency views

Office of Child Development officials stated that, although they had begun discussions in November 1971, concerning the Head Start improvement and innovation effort, it was not until mid-June 1972, that they had finalized their plans in sufficient detail to initiate the procurement request for contractor assistance.

COMPETITIVE PROCUREMENT OF
CONSULTANT SERVICES

On October 12, 1972, the Office of Child Development initiated a procurement request for additional consultant services to provide planning assistance in implementing improvements and innovations for Project Head Start. HEW forwarded the applicable request for proposal to 226 prospective bidders and received 20 proposals, 2 of which were judged acceptable by an evaluation panel composed of 8 Office employees. Of the two acceptable proposals, Thompson, Lewin and Associates, Inc., was the panel's first choice. The evaluation panel's report gave considerable emphasis to the contractor's experience and familiarity with the Office and the Head Start improvement and innovation effort. In addition, the panel stated that the contractor used its experience and familiarity with the improvement and innovation effort to suggest ways to cut the manpower requirement by 30 percent.

Thompson, Lewin and Associates, Inc., was ultimately awarded a cost-plus-fixed-fee contract for \$108,297 on January 31, 1973. The contractor was to provide services from January 31, 1973, through January 30, 1974, but contract modifications later extended the work program and period of performance through June 30, 1974, and provided an additional \$31,650 in costs and fees. The contractor was to assist the Office of Child Development in the following areas:

- Developing Head Start improvement and innovation objectives and plans for fiscal year 1974, which entailed:
 1. Analyzing the status of work on the fiscal year 1973 Head Start tasks.
 2. Identifying and analyzing key issues critical to Head Start planning.
 3. Preparing the fiscal year 1974 plan, including the overall goals and objectives and individual task plans and schedules.
- Developing a process and strategies for the review and support of the implementation of the Head Start improvement and innovation effort in the regional offices.

--Analyzing key issues and preparing discussion papers as an intermediate step in developing the Office's Forward Plan for fiscal years 1975-80.

Because of the emphasis given by the evaluation panel to Thompson, Lewin and Associates, Inc., experiences with national and regional Head Start programs, particularly the improvement and innovation effort, and performance under the sole source contract, it appears that this firm may have enjoyed a competitive advantage during the selection process.

Agency views and GAO analysis

Office of Child Development officials stated that, although the firm's experience with Head Start was considered, selection for award was based primarily on the quality of the firm's proposal and the qualifications of staff which would be assigned to the contract.

We do not take issue with their statements. But, during the review of the two acceptable contractors' proposals, the evaluation panel consistently cited the extensive involvement and experience in the Head Start improvement and innovation efforts by this firm and the lack of such experience by the other contractor. Therefore, it seems clear that the quality of the Thompson, Lewin and Associates, Inc., proposal and the qualifications of its staff were enhanced by the experience gained during performance under the initial contract, an advantage not shared by the other acceptable contractor.

EMPLOYER-EMPLOYEE RELATIONSHIP
BETWEEN GOVERNMENT AND CONTRACTOR

As an expression of national policy, the Civil Service Commission provides that Federal agencies may not contract for personal services without statutory authority to do so. The Commission's position on this matter is expressed in Federal Personnel Manual System Letter 300-8 as follows:

"In the absence of clear legislation expressly authorizing the procurement of personnel to perform the regular functions of agencies without regard to the personnel laws we must insist on scrupulous adherence to those laws and the policies they embody. Accordingly, contracts which, when realistically viewed, contain all the following elements, each to any substantial degree, either in terms of the contract, or in its performance, constitute the procurement of personal services proscribed by the personnel laws.

- "-Performance on-site
- "-Principal tools and equipment furnished by the Government
- "-Services are applied directly to integral effort of agencies or an organizational subpart in furtherance of assigned function or mission
- "-Comparable services, meeting comparable needs, are performed in the same or similar agencies using civil service personnel
- "-The need for the type of service provided can reasonably be expected to last beyond one year
- "-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:
 - a. To adequately protect the Government's interest or
 - b. To retain control of the function involved, or
 - c. To retain full personal responsibility for the function supported in a duly authorized Federal officer or employee."

The Commission modified its position in Federal Personnel Manual System Letter 300-12 by stating that all the above elements need not be present for a proscribed personal services contract to exist.

We found no specific statutory authority under which the Secretary of HEW can contract for personal services such as those involved here. Further, the Department's procurement regulations proscribe the contract procurement of personal services and contain criteria almost identical to those of the Commission in determining whether an employer-employee relationship exists. HEW regulations also state, for example, that Government supervision and control of the contractor's employees, if sufficient in degree, may alone create an employer-employee relationship.

Our review of the scope of work required and performance under the two contracts with Thompson, Lewin and Associates, Inc., indicated that four of the six elements discussed in Federal Personnel Manual System Letter 300-8 were present, as follows:

- The contractor's services were applied directly to an integral effort of the Office of Child Development; that is, planning the Head Start improvement and innovation effort.
- The need for services could reasonably be expected to last beyond 1 year. Although neither contract was originally entered into for longer than 1 year, the second contract provided for contractor assistance which continued the services initiated under the initial contract. With modifications, the two contracts resulted in a continuous effective period of contractor performance for 23 months.
- The services relating to the preparation of fiscal year 1973 and fiscal year 1974 planning documents were comparable to those provided by civil service personnel in the Office of Child Development's Program Management Division and probably should have been performed by Head Start staff.
- The Office engaged in at least indirect supervision of contractor personnel and in direction of the development of the planning documents required of the contractor.

Civil Service officials interviewed concurred with our opinion that the absence of the other two elements--contractor performance onsite and provision of tools and equipment by the Government--would be only marginally significant if other factors, primarily Government supervision, were present to a substantial degree. Project officials of the Office of Child Development informed us that contract support was needed because of vacancies in the Office and that services provided by Thompson, Lewin and Associates, Inc., under the contracts were essentially the normal day-to-day planning and management assistance functions which would have been performed by the Office's Program Management Division personnel. Contractor employees worked closely with officials of the Office of Child Development and ground rules were agreed upon between the Office and Thompson, Lewin and Associates, Inc., that two of these officials were to serve as the primary source of substantive direction and guidance for the study team under the second contract, which consisted of both HEW and contractor employees.

We believe that the supervision and direction by Federal employees was beyond the scope of permissible technical direction specified in the contracts and that a strong basis exists for the conclusion that HEW allowed the existence of what was tantamount to a proscribed employer-employee relationship between the Government and Thompson, Lewin and Associates, Inc., during performance of both contracts.

The award of and performance under the two contracts also appear to have violated the intent of Office of Management and Budget Circular

No. A-76, revised, which states that agencies will perform for themselves those basic management functions necessary to retain essential control over the conduct of their programs, such as planning.

Agency views

Office of Child Development officials stated that:

- The improvement and innovation effort was a one time major overhaul and redirection of the Head Start program that could not have been performed by their employees at the level of quality of Thompson, Lewin and Associates, Inc.
- The contractor did not plan for the program, but prepared planning documents, with options, subject to the Office's review, redirection, and acceptance.
- Their review and redirection of contractor performance was, in their opinion, monitoring not supervising.

Because both contracts have been completed we do not plan to further pursue these matters.

USE OF TEMPORARY EMPLOYEES

The Office of Child Development employs individuals in three general categories of personnel as defined below:

- Full-time: An employee who is regularly scheduled to work the number of hours and days required by the administrative workweek for his employment group or class. These employees may occupy either of two positions:
 1. Permanent: A position which has been established without time limit, or for a limited period of a year or more, or which has been occupied for a year or more (regardless of the intent when it was established).
 2. Temporary: A position which has been established for a limited period of less than a year and which has not been occupied for more than a year.
- Part-time: An employee who is regularly employed on a pre-scheduled tour of duty which is less than the specified hours or days of work for full-time employees in the same group or class.
- Intermittent: An employee who is generally employed on an irregular or occasional basis, with hours or days of work not on

a prearranged schedule, and with compensation only for the time actually rendered.

Because of the changing nature of employment during any given year, we selected two specific points in time to analyze personnel. The following table is our profile of the Office of Child Development's headquarters staff as of March 31 and September 30, 1973.

<u>Employment</u>	<u>Employed as of</u>	
	<u>3-31-73</u>	<u>9-30-73</u>
Full-time:		
Permanent	167	140
Temporary	17	10
Part-time	2	2
Intermittent (note a)	<u>28</u>	<u>4</u>
	<u>214</u>	<u>156</u>
Other employment (note b):		
Management intern	7	6
Washington intern	-	2
Excepted service	3	-
Reimbursable detail	<u>1</u>	<u>1</u>
Total employment	<u>225</u>	<u>165</u>

a/ Represents consultants and experts who worked during March and September, but not necessarily on the specific dates shown.

b/ Not charged against the Office's employment ceilings.

Of the 19 temporary and part-time employees shown for March 31, 1973, 9 were either transferred or terminated before September 30, 1973, and the other 10 were still employed at that date. The other two employees shown for September 30 were hired after March 31. All terminations were consistent with Civil Service Commission rules, regulations, and policies. In addition, the reduction in total employment figures between March and September reflects, in part, the movement of Office of Child Development personnel to other offices within the Office of Human Development, created during an April 1973 reorganization.

In March 1973 the Commission requested HEW to give it specific information on personnel management within the Office of Child Development, including the use of temporary employees. HEW reviewed the Office's personnel management and found indications of inappropriate use of temporary appointing authority. As a result, in July 1973, HEW requested the Office to review all temporary appointments, identify temporary employees as-

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signed to permanent positions, and submit a plan for either (1) converting temporary employees to permanent positions, (2) terminating temporary appointments, or (3) assigning temporary employees to positions with temporary duties. In response to the request, the Office developed a plan to convert 5 of the then 22 temporary employees to permanent positions, terminate 6 temporary employees, and assign 4 other temporary employees to positions with temporary duties.

Although the Office had assigned temporary employees to perform functions or duties which were not temporary--a practice that, according to HEW, could adversely affect employee morale--there were no indications of excessive use of temporary employees at the headquarters during late fiscal year 1973 and early fiscal year 1974.

We are sending an identical report to Representative Gilbert Gude. As your office instructed, we did not obtain formal written comments from HEW; however, the information in this letter has been discussed with officials of HEW, the Office of Child Development, and the Civil Service Commission. We do not plan to distribute this report further unless you or Representative Gude agree or publicly announce its contents.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "R. F. Miller". The signature is written in a cursive style with a large initial "R".

Deputy Comptroller General
of the United States