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

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The Honorable Dixy Lee Ray
Chairman, Atomic Energy Commission 743



Dear Dr. Ray:

We reviewed AEC's use of contractor-furnished employees rather than Federal employees to perform work related to licensing nuclear facilities at the headquarters of its Regulatory organization (Regulatory) in Bethesda, Maryland. As of September 30, 1973, Regulatory had 98 contractor-furnished employees¹ working full time in 39 offices or branches. These employees were being obtained for 2-year periods from 10 AEC contractors.

Regulatory began using contractor-furnished employees at headquarters between June and August 1972, when AEC brought 4 such employees from 2 of its national laboratories into Regulatory for about 1 year to work as environmental project managers. These project managers were responsible for (1) directing and coordinating Regulatory's preparation of environmental impact statements for nuclear power plants and (2) assisting AEC in reducing the backlog of environmental impact statements which had to be prepared as a result of the Calvert Cliffs decision rendered on July 23, 1971, by the U. S. Court of Appeals for the District of Columbia Circuit (449 F.2d p.1109).

Starting about November 1972, AEC brought additional employees of its national laboratories and employees of other contractors to Regulatory for 2-year periods to help carry out various aspects of its licensing activities in addition to managing and coordinating environmental reviews.

AEC's use of contractor-furnished employees to augment its in-house capability rather than securing the necessary services through employment is not only improper but also is considerably more costly.

¹

Includes one contractor employee temporarily detailed to AEC's General Manager.

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IMPROPER USE OF CONTRACTOR PERSONNEL
AT REGULATORY

In general, Government agencies may secure personnel services under an appropriate contractual arrangement. Without specific authorizing legislation, however, the use of contractor-furnished employees in a manner that creates an employer-employee relationship between the Government and those employees is improper and an ~~unauthorized manner of contracting.~~¹ Such a relationship becomes the means for circumventing the appropriate procedures which govern Federal employment.

According to the United States Code (5 U.S.C. 2105(a)) an employer-employee relationship exists when:

- A person performs a Federal function under the authority of a law or an executive act.
- He is under the supervision of Federal employees while performing the duties of his position.
- He is appointed by a Federal official.

We interviewed 55 of the 98 contractor-furnished employees working full time at Regulatory. They were assigned to 31 offices or branches within the Directorates of Licensing and Standards. We also discussed the use of these employees with the Deputy Directors for Reactor Projects, Technical Review, and Fuels and Materials, as well as several assistant directors and branch chiefs at Regulatory and persons in the Office of Administration.

From these discussions we concluded that the individuals were performing a Federal function and were subject to supervision by Government employees. In such circumstances, it has been held that the services of the individuals concerned should be obtained through appointment as Government employees because the use of a contract arrangement rather than appointment is not in accordance with the applicable civil service laws. Although AEC is excepted from the generally applicable civil service laws, the provisions of the United States Code (42 U.S.C. 2201(d)) and the regulations issued by AEC thereunder are considered to be binding on AEC in the same manner as the civil service laws are binding on other agencies.

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See the following Comptroller General Decisions--51 Comp. Gen. 561, 50 Comp. Gen. 553, 44 Comp. Gen. 761, and 43 Comp. Gen. 390.

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Our analysis of the existence of the factors of employment is shown below.

Performance of a Federal function

A Federal function is one which is conducted by a Federal agency pursuant to statutory authority and for which public funds have been appropriated. The contractor-furnished employees at Regulatory were performing work identical to work that AEC employees were performing under the authority of the Atomic Energy Act of 1954 (42 U.S.C. 2011). This work included the review, analysis, and evaluation of the safety, environmental, and nuclear materials safeguard matters, as well as the management and coordination of the safety and environmental review of license applications.

Supervision by a Federal employee

While at Regulatory, the contractor-furnished employees have (1) worked with Federal employees, (2) worked the same hours as Federal employees, including overtime, (3) reported to the heads of the branches or offices to which they were assigned, and (4) received all their technical supervision, direction, and instructions from Federal employees. Although two contractors have designated one of their employees at Regulatory to act as a liaison between Regulatory and themselves, these designees did not supervise or direct the other contractor-furnished employees at Regulatory.

We asked Regulatory officials why contractor employees who were performing general studies could not do the work at the contractors' facilities rather than at Regulatory. Regulatory officials replied that they preferred the general studies to be done there so that they could closely supervise and control the work performed by the contractor-furnished employees.

Appointment by a Federal official

Regulatory selected contractor-furnished employees in essentially the same manner as it selects new Federal employees. Regulatory sent descriptions of the types of skills it wanted to AEC contractors, who initially identified employees they believed met these requirements. Then Regulatory representatives visited several of the contractors to interview the personnel so identified. The contractor employees who AEC believed met its requirements were invited to Regulatory to be interviewed by Regulatory technical personnel. Regulatory selected those employees it desired and offered temporary assignments to them through the contractors.

The contractor-furnished employees were not given appointments in the Government service. AEC does not have authority to circumvent the applicable employment provisions by means of securing the services of individuals through contract rather than by appointment. For all practical purposes, these employees were selected by the Government and employed to perform a Federal function under Government supervision. We believe that appointments under applicable Federal laws should have been made.

HIGHER COST OF USING CONTRACTOR PERSONNEL

Regulatory had not compared the costs of using contractor-furnished employees with the costs of using Federal employees at Regulatory. From information provided by the contractors and Regulatory personnel, we estimated that, if Regulatory permitted the full 2-year term to expire before it released the contractor-furnished employees, the total out-of-pocket cost to AEC would be about \$1.8 million more than if Federal employees were used. (The out-of-pocket costs consist principally of temporary living allowances paid to contractor-furnished employees while they are working at Regulatory headquarters and the cost of relocating them.¹)

REASONS FOR USING CONTRACTOR PERSONNEL AT REGULATORY

Regulatory officials told us that additional manpower was needed to (1) reduce the backlog of work created by the Calvert Cliffs court decision and several safety issues which had arisen and (2) keep reviews of license applications from falling behind schedule. They believed contractor-furnished employees could be brought to Regulatory almost immediately and could become fully effective with a minimum amount of training and orientation. However, Regulatory personnel said:

--The backlog of licensing case work created by the Calvert Cliffs court decision was essentially stabilized by the spring of 1973. About 57 percent of the contractor-furnished employees did not arrive at Regulatory until after March 1973, and two-thirds of the 55 contractor-furnished employees we interviewed were working or had worked on current projects.

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One contractor, for example, pays its employees 25 percent of their base salaries as a temporary living allowance.

--The time required for the contractor-furnished employees to become fully effective at Regulatory would vary from almost immediately to 2 or 3 months and, in some cases, to 6 months to a year after they arrived.

Regulatory officials also told us that they needed additional permanent employees to handle their increasing workload and that they expected to offer jobs to many of the contractor-furnished employees during or after their temporary assignments. Regulatory's employment ceiling increased from 1,143 positions in fiscal year 1973 to 1,393 positions for fiscal year 1974, and it expects that additional positions will be required in fiscal year 1975. Regulatory had about 150 open positions for new employees as of October 1, 1973.

RECOMMENDATIONS

In view of AEC's improper use of contractor-furnished employees at Regulatory, as well as the high costs of this practice, AEC should discontinue using contractor-furnished employees at Regulatory. We recognize that the immediate termination of Regulatory's use of contractor-furnished employees could disrupt its licensing program and create a hardship for many contractor-furnished employees. Therefore, we recommend that AEC phase out its use of contractor-furnished employees at Regulatory as quickly as is prudently possible.

Since Regulatory informed us that (1) its need for additional manpower was permanent, (2) it planned to offer jobs to many of the contractor-furnished employees during or after their assignments, and (3) it had enough position vacancies, we recommend that Regulatory determine which contractor-furnished employees it wants to hire as Federal employees and make job offers accordingly.

We also recommend that AEC develop and implement a system of controls to preclude future use of contractor employees in the manner herein described. However, if AEC determines it essential to continue using contractor-furnished employees as it has been using them, it should obtain specific authorization to do so from the Congress.

We understand that Regulatory has decided to terminate its use of the 21 contractor-furnished employees working on fuels and materials activities and has arranged to either hire them or release them in the near future. We would like to be informed of any further actions planned or taken on the matters discussed in this report.

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We appreciate the courtesy and cooperation extended to our representatives during the review.

We are sending copies of this report to the Director, Office of Management and Budget; the Chairman, Joint Committee on Atomic Energy; and the Chairmen of the House and Senate Appropriations and Government Operations Committees. TNT 01100
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Sincerely yours,



Comptroller General
of the United States