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DECISION



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

FILE: B-190118.2

DATE: January 24, 1978

MATTER OF: Jean C. Marrs - Purchase Order for Laboratory
Medical Services

DIGEST: Purchase order issued for medical laboratory services by the Service Unit Director, Public Health Service Indian Hospital, Winnebago, Nebraska, to provide continued laboratory coverage created a relationship that was tantamount to that of employee-employer. Agencies should take timely and appropriate steps to prevent this situation from occurring. However, payment for services received under the extenuating circumstances present may be made since it was impracticable to obtain the needed services through usual channels.

This decision is in response to a request of September 9, 1977, by Ms. Elenor E. Clements, Authorized Certifying Officer, Indian Health Service, Public Health Service, Aberdeen, South Dakota, for an advance decision as to the allowability of a payment to Mrs. Jean C. Marrs, pursuant to purchase order No. 11916, dated September 1, 1977, for medical laboratory services during the period August 19-August 22, 1977.

It is reported by the Service Unit Director, P.H.S. Indian Hospital, Omaha - Winnebago, that Mrs. Marrs was hired for the following reasons:

"It should be explained that without laboratory services, this facility cannot function as a hospital, and that laboratory services cannot be provided unless people with the required qualifications are available to do the work. On all of the occasions cited, there were no qualified government personnel available to do the work, and there was no time to hire through lengthy Civil Service Employment Procedures. It was a matter of either bringing a qualified person in to provide laboratory services or referring all patients to contract facilities. Since this had been done previously with no indication that it should not be, bringing the laboratory technologist in again was not questioned and was obviously the most practical solution.

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"In this geographical area, qualified professionals and paramedics are rarely available or willing to work for short periods of time on short notice. Therefore, when such people are needed to maintain services and keep the hospital functioning, it becomes a matter of very quickly locating 'someone' who is available and willing to come in. We do attempt to set up temporary intermittent positions to be utilized when necessary. However, this is very difficult and usually not possible for the reasons stated, nor it is always practical. For example, there are times when even intermittent employees are unwilling or unable to work when requested; yet, the hospital must continue to function and provide services."

The Director further reports that rs. Marrs was the only person working in the laboratory and there "was nobody in the hospital qualified to advise or assist her."

The general rule established by decisions of this Office and the Civil Service Commission is that personal services may not be obtained on a contractual basis and must be performed by personnel employed in accordance with the civil service and classification laws. However, in prior cases where it was administratively determined by the Government agency involved that it would be substantially more economical, feasible, or necessary by reason of unusual circumstances to have the work performed by non-Government parties, and that was clearly demonstrable, we have not objected to the procurement of such work through proper contract arrangement. See 31 Comp. Gen. 372 (1952); 43 *id.* 390 (1963); 51 *id.* 561 (1972). A "proper contract" for services under such language has been recognized to be one in which the relationship established between the Government and the contract personnel is not that of employer and employee. See 51 Comp. Gen. 561 (1972).

The basic issue is whether a contract creates what is tantamount to an employer-employee relationship between the Government and the employee of the contractor. The criteria by which this relationship is judged are those set forth in 5 U.S.C. § 2105(a) (1970), namely, as to whether an individual is:

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1. appointed in the civil service by a Federal officer or employee;
2. engaged in the performance of a Federal function under authority of law or an Executive act; and
3. subject to the supervision of a Federal officer or employee while engaged in the performance of the duties of his position.

In order to assist agencies to determine whether a contract establishes an employer-employee relationship, the Civil Service Commission has listed six elements. Those elements, which are set forth in FPM letters 300-8, dated December 12, 1967, and 300-12, dated August 20, 1968, are:

1. Performance on site.
2. Principal tools and equipment furnished by the Government.
3. Services are applied directly to integral efforts 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.
5. The need for the type of service provided can reasonably be expected to last beyond one year.
6. The inherent nature of the service, or the manner in which it is provided, requires directly or indirectly Government direction or supervision of contractor employees in order:
 - a. To adequately protect the Government's interest, or

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b. To retain control of the function involved, or

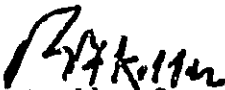
c. To retain full personal responsibility for the function supported in a duly authorized Federal official or employee.

The six elements relate principally to the third statutory criterion concerning supervision of the contractor's employee by a Federal officer or employee. That is, the proscribed supervision is frequently evidenced by these elements. The absence of any one or a number of them, however, would not mean that supervision is not permitted by the contract, or present in the actual work performance, but only that there is less likelihood of its existence.

In applying these criteria to this case, there can be no question that the medical technologist was engaged in a Federal function. While there was no direct appointment by a Federal officer which formally established an employee-employer relationship, the record indicates that the type work in question ordinarily is performed in the laboratory by qualified Government personnel. Presumably the supervision present in Mrs. Marrs' case was the same as that exercised over Government personnel performing such work. Further, Mrs. Marrs could have been dismissed if her services proved to be unsatisfactory. Accordingly, our view is that the relationship created here was tantamount to that of employer-employee.

The specific purchase order may be certified for payment, however, in view of the extenuating circumstances and the indicated satisfactory performance of the services for a compensation rate that is considered to be reasonable for the type of work performed.

When faced with a potential situation such as described by the agency, appropriate and timely administrative steps should be undertaken to obtain services through the personnel system. Leave and travel assignments of employees should be scheduled in a manner to prevent a total absence of necessary Federal personnel from the laboratory.


Deputy Comptroller General
of the United States