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[Contracts with Agents for Unnamed Informants]. B-137762.32. July 11, 1977. 7 pp.

Decision re: Internal Revenue Service; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Law Enforcement and Crime Prevention (500).
Contact: Office of the General Counsel: General Government Matters.
Budget Function: Law Enforcement and Justice: Law Enforcement Assistance (754).
Authority: Supplemental Appropriations Act [of] 1955, sec. 1311 (31 U.S.C. 200(a)). (P.L. 94-363; 90 Stat. 963; 90 Stat. 965). 41 U.S.C. 253. F.P.R. 1-1.301-1. Treasury Regulation, sec. 301.7623-1. Internal Revenue Code of 1954, as amended, sec. 7623. 3 Comp. Gen. 499. 15 Comp. Gen. 566. 53 Comp. Gen. 522. 53 Comp. Gen. 528. 16 Comp. Gen. 583. 16 Comp. Gen. 589. 53 Comp. Gen. 364. 51 Comp. Gen. 30. 46 Comp. Gen. 895. 50 Comp. Gen. 589. 24 Comp. Dec. 430. 18 Comp. Dec. 779. 18 Comp. Dec. 781. 26 C.F.R. 301.7623-1. B-143132 (1960). B-95951 (1950). B-154351 (1964). B-164244 (1968). B-183922 (1975). B-82599 (1949).

The Assistant Secretary of the Treasury requested a decision with regard to the authority of the Internal Revenue Service to contract with an attorney representing an unnamed informant for information concerning an unidentified taxpayer. Reward is to be paid only if the information leads to the collection of unpaid taxes. The informant's true identity must be disclosed prior to the payment of the reward. (Author/SC)

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

Kielman
GGM

FILE: B-137762.32 DATE: July 11, 1977

MATTER OF: Internal Revenue Service - Contracts with agents for unnamed informants

DIGEST: 1. Proposed agreement between IRS and attorney/agent for unnamed informant for information concerning unidentified taxpayer is not precluded by Comptroller General decisions against United States contracting with agent or through agent for undisclosed principal, since decisions arose in context of Federal procurement wherein identity of contracting party is necessary in order to determine whether it is qualified source (i.e. responsible, eligible bidder). Instant proposal contemplates unilateral contract under which responsibility and capacity of informant is of no consequence at this stage, since IRS offers only to evaluate worth of information and pay reward only if information leads to collection of unpaid taxes.

2. Treasury Regulation section 301.7623-1, which implements IRS' authority under section 7623 of Internal Revenue Code to pay rewards to informants, requires disclosure of informant's true name prior to reward payment. Thus, while informant need not be identified prior to evaluation of information and its use in collection of unpaid taxes, identification is mandatory under non-waivable statutory regulation before payment of reward. Extent of disclosure of informant's identity can, of course, be limited to achieve maximum protection of informant.

3. Under proposed agreement between IRS and attorney/agent for unnamed informant obligation by Government to make payment as reward for information arises only after full evaluation of worth of information and use of information to collect unpaid taxes. Accordingly, no appropriation obligation is recordable under 31 U.S.C. § 200 until these conditions are met. This approach is consistent with current practice under Treasury Regulation, of recording obligation only upon determination to actually pay reward.

This decision to the Secretary of the Treasury responds to an inquiry from the Assistant Secretary (Administration), dated May 13, 1977, concerning the authority of the Internal Revenue Service (IRS) to contract with an attorney representing an unnamed informant who wishes to make certain information concerning an unidentified taxpayer available to the IRS for a stipulated fee.

The submission indicates that the attorney's client offers to provide the information for IRS evaluation and use for a stipulated fee to be paid after underpaid taxes and penalties, if any, are assessed and collected. However, the client has insisted upon absolute anonymity. Moreover, we have been informally advised that the attorney has refused to deal directly with the IRS in a capacity other than as agent. The submission suggests, therefore, that the IRS can only obtain the information by dealing directly with the attorney as agent for the unnamed informant.

The Assistant Secretary's submission presents, in effect, two questions for decision:

1. May the IRS enter into the proposed agreement with the unnamed informant's attorney, acting as agent?

2. If so, when is a valid obligation to be recorded under section 1311 of the Supplemental Appropriation Act, 1955, 31 U.S.C. § 200(n)?

The authority of the IRS to expend appropriated funds for payments to informants is contained in section 7623 of the Internal Revenue Code of 1954, as amended, which provides as follows:

"SEC. 7623. EXPENSES OF DETECTION AND PUNISHMENT OF FRAUDS.

"The Secretary, under regulations prescribed by the Secretary, is authorized to pay such sums, not exceeding in the aggregate the sum appropriated therefor, as he may deem necessary for detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws, or conniving at the same, in cases where such expenses are not otherwise provided for by law."

For over 100 years, under the authority of section 7623 and its predecessors,* the IRS has offered to pay rewards for information leading to the detection and punishment of persons who violate the internal revenue laws. The reward program is currently operating under the authority of Treasury Regulation section 301.7623-1, 26 C.F.R. § 301.7623-1(1976). Although section 7623 does not expressly authorize the payment of rewards to informants, it has long been so construed. See 24 Comp. Dec. 430 (1918); 15 Op. Atty. Gen. 133, 138 (1876); Crano v. United States, 23 Ct. Cl. 94 (1888). Moreover, we have held that this provision also provides authority for payment of rewards to informants for information that results in the collection of taxes unlawfully withheld. 3 Comp. Gen. 499 (1924). Payments to informants are properly chargeable to IRS' annual appropriation (currently Pub. L. No. 94-363, 90 Stat. 963, 965, July 14, 1976), which generally authorizes expenditures for "necessary expenses * * * for investigation and enforcement activities * * *." Cf. Internal Revenue Service "informant/witness" expenditures, B-183922, August 5, 1975. It is clear, therefore, that the IRS possesses authority under this provision to pay rewards to informants for information leading to the detection and punishment of violators of the internal revenue laws, and the recovery of tax underpayments. In this regard, the Treasury regulation, 26 C.F.R. § 301.7623-1(f), provides that although information will be accepted by the IRS from informants who use other than their true names, no reward will be paid unless and until the informant files a formal claim for reward, signed with his true name.

As the submission points out, our Office has long adhered to the rule that the United States cannot contract with an agent, even for a disclosed principal. B-164244, June 12, 1968; B-154351, June 16, 1964; B-95951, August 11, 1950. Moreover, an agent may sign a contract on behalf of a principal only upon presentation of a properly executed power of attorney, and may not, therefore, contract on behalf of an undisclosed principal. 15 Comp. Gen. 566 (1935); B-143132, August 10, 1960. Therefore, where the fact of agency is disclosed but the identity of the principal is concealed (i.e. partially disclosed principal), the Government is barred by these rules from entering into a contract. In

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* This provision was first enacted as section 7 of the Act of March 2, 1867, ch. 169, 14 Stat. 471, 473, and reenacted without substantial change as section 3463 of the Revised Statutes of 1874, and later as section 3792 of the Internal Revenue Code of 1939.

those instances where the fact of agency is not disclosed, and the United States enters into a contract with an agent, assuming he is the principal, the agent is held liable and responsible under the contract and is deemed to have contracted as principal. B-95951, August 11, 1950. In such instances the Government may choose whether to hold the agent or principal liable and responsible under the contract. B-155919, February 4, 1965. If upon investigation, the Government determines that there is an undisclosed principal and that the undisclosed principal is capable of fulfilling the contract, it may choose to allow him to complete the contract and to receive all payments thereunder. 18 Comp. Dec. 779, 781 (1912).

We have indicated that the foregoing rules are designed to prevent frauds upon the Government. B-164244, June 12, 1968. In Federal procurement, evaluation of the capacity of the parties to perform is most important, and disclosure of the party actually performing is therefore necessary. This is so because the basic principle underlying Federal procurement is that full and free competition is to be maximized to the fullest extent possible in order to provide qualified sources with an equal opportunity to compete for Government contracts. See, 41 U.S.C. § 253 (1970); FPR §1-1.301-1; 53 Comp. Gen. 522, 528 (1974). Determination of whether a potential contractor is a qualified source (including his responsibility, eligibility for the contract, and compliance with any applicable laws) requires that the principal for whom an agent is contracting be disclosed. Cf. 16 Comp. Gen. 583, 589 (1936); B-82559, March 22, 1949.

The prohibition against contracting with a partially disclosed principal through an agent was therefore required in order to carry out the basic principles behind Federal procurement law. However, where such principles are not involved, the prohibition would not appear to be applicable. This was, in effect, recognized in B-172827, July 6, 1971, wherein we waived application of the rule to the executed sale of surplus Government property, for which the responsibility and capacity of the buyer to perform were irrelevant.

Although the proposed agreement between the attorney, as agent for an undisclosed informant, and the United States is discussed in the submission in the context of contract law, it is clear that Federal procurement principles are not involved. The responsibility and capacity of the informant to perform, and consequently his identity, is irrelevant at this stage since payment is only to be made if the information turns out to be useful to the IRS after an "evaluation of its worth" and after any "underpaid taxes and penalties have been assessed and collected." If the information provided by the informant is not useful, no payment

will be made. Moreover, the informant would not be bound to provide any information under the proposed agreement, since there is no bilateral contract, as would generally be the case in Federal procurement. Thus under the proposed agreement IRS would incur no risk or obligation in terms of the responsibility of the informant.

In view of the foregoing, we believe that the rule against contracting with a partially disclosed principal through an agent is not for application, and the proposed agreement may be entered into if otherwise proper.

However, as noted previously, the Treasury regulation does require disclosure of an informant's true name before a claim for reward can be paid. Thus subsection 301.7623-1(f) of the regulation provides in part:

> "(f) Filing claim for reward. An informant who intends to claim a reward under section 7623 should notify the person to whom he submits his information of such intention, and must file a formal claim, signed with his true name, as soon after submission of the information as practicable. If other than the informant's true name was used in furnishing the information, the claimant must include with his claim satisfactory proof of his identity as that of the informant. * * *"

This is a statutory regulation, pursuant to section 7623 of the Internal Revenue Code, supra, and it seems clear that the requirement for ultimate disclosure of the informant's true name is a substantive provision of the regulation. Therefore, this requirement cannot be waived. See, e.g., 53 Comp. Gen. 364 (1973); 51 Comp. Gen. 30 (1971), and decisions cited therein.

Accordingly, while disclosure of the potential informant's identity is not required for purposes of the instant agreement to evaluate his information--or even prior to use of the information and collection of any unpaid taxes and penalties--disclosure must eventually be made if and when the reward becomes payable. The extent of disclosure is, of course, a matter within the discretion of IRS. We assume that disclosure can and will be limited so as to afford every possible protection to the informant. We assume further that the need to ultimately disclose the principal's identity will be communicated to the agent before consummating the agreement to receive and evaluate the information.

With respect to the second question presented, section 1311 of the Supplemental Appropriation Act, 1955, 31 U.S.C. § 200(a) (1970), provides in pertinent part as follows:

> "(a) After August 26, 1954 no amount shall be recorded as an obligation of the Government of the United States unless it is supported by documentary evidence of--
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> "(1) a binding agreement in writing between the parties thereto, including Government agencies, in a manner and form and for a purpose authorized by law, executed before the expiration of the period of availability for obligation of the appropriation or fund concerned for specific goods to be delivered, real property to be purchased or leased, or work or services to be performed * * *."

We are of the view that the proposed agreement does not change the essential nature of the reward program operated pursuant to Treasury Regulation section 301.7623-1. Both under subsection (c) of the regulation and the proposed agreement an evaluation of the worth of the information must be made by IRS prior to any payment. Pursuant to subsection (c) the evaluation includes consideration of such factors as the value of the information furnished in relation to the facts developed by IRS investigation. Moreover, "[a]ll relevant factors" are to be considered, presumably including the accuracy of the information and whether or not IRS already had access to the information. We assume that IRS will consider the same factors when it conducts the "evaluation of the worth" of the information presented by the potential informant here involved.

Therefore, no contractual liability to make any payment exists until after an evaluation by the IRS of the information and the assessment and collection of underpaid taxes and penalties, if any. This is analogous to the situation discussed in 46 Comp. Gen. 895 (1967) wherein we approved a proposed revised accounting procedure which resulted in the Veterans Administration charging the appropriation current at the time a physician's claims for reimbursement for medical services rendered were approved by the agency. Under the proposed procedures, participating physicians' bills underwent an agency quasi-adjudicative review to determine whether liability should be accepted by the Government (even though the amount to be paid, if approved, was presumably fixed). We held therein that agency approval constituted the initial acceptance of the liability and contractual obligation. Compare 50 Comp. Gen. 589 (1971).

Similarly, under both the regulations and the proposed agreement here involved, there is no obligation on the part of the United States to make a payment until after the evaluation is made and after any unpaid taxes or penalties have been assessed and collected.

We have been informally advised that the obligation for the payment of rewards under the Treasury regulation is not recorded until, in the usual case, the applicable division director determines that a reward should be made and the amount thereof. In light of the foregoing we have no objection to this practice; moreover, no reason appears to handle payments made under the proposed agreement differently. Accordingly, at the time a determination is made to make payment to the informant, after a full evaluation of the worth of the information and the collection of any underpaid taxes and penalties, a recordable obligation under 31 U.S.C. § 200(a) would arise.

Deputy Comptroller General
of the United States