

General Government Division

B-251751.

December 23, 1992

The Honorable Bruce F. Vento
House of Representatives



148398

Dear Mr. Vento:

At your request, we have reviewed the Resolution Trust Corporation's (RTC) noncompetitive contract with Mr. John T. Garrity. As agreed with your office, this letter discusses whether (1) RTC followed its policies and procedures for the issuance of the noncompetitive contract to Mr. Garrity, (2) the contract's payments were properly supported, and (3) Mr. Garrity's contract involved an employer-employee relationship that would be prohibited by federal procurement rules for personal services contracts.

RESULTS IN BRIEF

RTC issued a noncompetitive contract to Mr. John T. Garrity for consulting services. Although RTC complied with its noncompetitive contracting procedures, it did not comply with its separate requirements for contractor registration, certifying to fitness and integrity regulations, and completing a background investigation before issuing the contract. Also, RTC paid \$3,468.75 for work done before the contract was signed.

At your request, we reviewed Federal Acquisition Regulation (FAR) standards for determining whether a contract creates a prohibited employee/employer relationship between an agency and a contractor to see how those standards would have applied to RTC's contract with Mr. Garrity. It was not clear from our review how those standards would have applied to Mr. Garrity's contract. More significantly, those standards and FAR's basic prohibition against personal services contracts do not apply to RTC because RTC is not subject to FAR.

BACKGROUND

On November 13, 1991, RTC issued a noncompetitive contract to Mr. John T. Garrity for providing "senior level support in organizational structure, delegations of authority, workflow processes and other related areas." No detailed statement of work was prepared, and no specific products were required for completion of the contract. According to the RTC contracting

GAO/GGD-93-9R, RTC's Garrity Contract

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officer, RTC purchased hours of Mr. Garrity's consulting services.

Under the terms of the contract, Mr. Garrity was to be paid \$125 per hour for up to \$100,000 and would be reimbursed for travel expenses. Although not specifically stated in the contract, according to RTC's Vice President for Administration and Corporate Relations, Mr. Garrity was allowed to bill only for hours worked in RTC's offices. As of September 30, 1992, RTC was billed for 588.25 hours or \$73,531.25 and \$1,598.98 for travel under this contract. Mr. Garrity's contract was completed September 30, 1992.

OBJECTIVES, SCOPE, AND METHODOLOGY

The objectives of this review were to determine whether (1) RTC followed its policies and procedures for the issuance of the noncompetitive contract to Mr. Garrity, (2) the contract's payments were properly supported, and (3) Mr. Garrity's contract involved an employer-employee relationship that would be prohibited by federal procurement rules for personal services contracts.

To meet our objectives, we reviewed (1) the contract and other documents related to its issuance, (2) contract oversight and payment documentation, and (3) documents prepared by Mr. Garrity relating to his completion of the contract. Additionally, we traced payments made to supporting documentation and interviewed RTC officials regarding the issuance and performance of the contract. To analyze issues relating to personal services contracts, we reviewed applicable sections of FAR.

We did our work at RTC headquarters in Washington, D.C., from September to November 1992 in accordance with generally accepted government auditing standards.

COMPLIANCE WITH CONTRACTING PROCEDURES AND FITNESS AND INTEGRITY REQUIREMENTS

Although RTC complied with its procedures for issuing a noncompetitive contract to Mr. Garrity, it did not comply with its fitness and integrity and other contracting requirements. Under applicable RTC procedures at the time this contract was issued, noncompetitive contracts were to be issued only under certain circumstances. In general, noncompetitive contracts were to be allowed in emergency situations; when only one firm was available to provide such services; when the required services demanded the experience and expertise of an individual with

unusual skills or capabilities; or when issuance would have expanded, maintained, or diversified RTC's contractor base. The procedures also required a statement of the reasons for issuing a noncompetitive contract as well as the reasons for selection of the contractor to be documented before award.

For the Garrity contract, the justification and approval stated that RTC had an "urgent requirement to provide advisory and consulting services for the Office of the Chief Executive Officer (CEO)." The justification also stated that Mr. Garrity was eminently qualified to provide these services on the basis of his extensive background in organizational management attained while working in the private, public, and educational sectors and because of his knowledge of the RTC CEO's management philosophy. RTC's CEO approved the noncompetitive award on November 12, 1991.

Additionally, at the time this contract was awarded all potential RTC contractors were required to meet certain statutory and procedural requirements. The Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA) barred certain classes of persons from contracting with RTC. Contractors were required to self-certify that certain conditions specified in FIRREA did not exist.¹ Further, RTC contracting procedures required contractors to register with RTC before contract award, and to pass an initial screening to ensure that they met minimum standards of fitness and integrity. In addition, for contracts of \$50,000 or more RTC was to complete a background investigation of the contractor.

We found that before issuing the contract in question, RTC did not require Mr. Garrity to register as an RTC contractor and did not require Mr. Garrity to certify that he met fitness and integrity standards. Furthermore, RTC did not conduct a background investigation as required by RTC procedures for contracts of \$50,000 or more. The RTC Vice President responsible for contracting and administrative matters stated that RTC staff tried to comply with contracting requirements. However, he agreed that RTC should have obtained the proper fitness and integrity certifications, conducted a background investigation, and complied with registration requirements. He stated that this lack of compliance should be characterized as oversights by RTC staff.

After our inquiries regarding compliance with fitness and integrity requirements, Mr. Garrity completed the appropriate fitness and integrity certifications on September 29, 1992--10

¹12 U.S.C. 1441a(p)(6) and 12 C.F.R. 1606.5

months after the contract was awarded. Also, on October 13, 1992, RTC notified us that it had completed a background investigation of Mr. Garrity. According to RTC officials, the results of the investigation were favorable.

CONTRACT PAYMENTS

We found that, with one exception, the (1) payments to Mr. Garrity under this contract were adequately supported by RTC records and (2) payment approval was made under appropriate internal controls. As previously discussed, RTC purchased hours of Mr. Garrity's consulting services rather than specific reports or other written products. An RTC employee independently monitored and documented Mr. Garrity's hours of service and reviewed his invoices. Further, a senior RTC official approved the invoices for payment. With one exception, which is discussed in the next section, the payments made to Mr. Garrity were appropriate under the contract.

To verify Mr. Garrity's completion of the contract, we also reviewed documents Mr. Garrity wrote related to the contract and interviewed RTC staff who worked with Mr. Garrity. We found that Mr. Garrity actively participated in the RTC Review Program--a project that initiated a series of studies on RTC operations for its new CEO. As part of that project, Mr. Garrity was responsible for developing proposals for studies on RTC's operations, participating as a team member on five projects, and drafting monthly status reports on the RTC Review Program to RTC's CEO.

Payment for Services Before Contract Awarded

RTC paid Mr. Garrity \$3,468.75 for 27.75 hours of work done from November 5 to November 12, 1991, although the contract was not effective until November 13. In reviewing documents prepared by Mr. Garrity, we found one memorandum dated November 4, 1991, and time charge documentation for hours worked between November 1 and 13, 1991.

The RTC official who approved the payment recognized that a payment was made for work before the contract was authorized. However, he said that the payment was approved because he believed that RTC was obligated to pay Mr. Garrity for those services.

APPLICABILITY OF PERSONAL
SERVICES CONTRACTING RULES

FAR prohibits government agencies from making personal services contracts that create an employer-employee relationship between the agency and contractor personnel. Normally, government agencies are required to obtain their employees by direct hire under procedures required by the civil service laws. The prohibition against personal services contracts is designed to prevent agencies from obtaining their employees by contract, in circumvention of civil service hiring procedures.

Under FAR, the determination of whether a contract involves a prohibited employer-employee relationship depends on the facts of each case. FAR identifies a number of factors that may be relevant to this determination, such as whether the contract is to be performed on site, whether the government will provide the principal tools for contract performance, and whether the need for the particular type of service is expected to last beyond 1 year. However, FAR provides that the key question in determining whether a contract involves an employer-employee relationship is whether the government will exercise "relatively continuous supervision and control over the contractor personnel performing the contract."²

It is not clear how these standards would have applied to Mr. Garrity's contract if RTC were subject to personal services contracting rules. As previously discussed, Mr. Garrity performed the contract on site in RTC offices with support provided by RTC staff. However, this contract was not in effect for more than 1 year. Also, with respect to the key issue of supervision, neither the contract documents nor the available facts provided a clear indication of the nature and extent of the supervision of Mr. Garrity's work.

More significantly, RTC, as a mixed-ownership government corporation, is not subject to FAR. RTC has very broad statutory authority to enter into contracts it determines to be necessary and appropriate to carry out its responsibilities. Therefore, FAR's rules against personal services contracts would not in any event have applied to RTC's contract with Mr. Garrity.

²48 C.F.R. 37.104.

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RTC COMMENTS

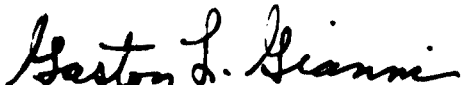
We discussed the issues presented in this correspondence with RTC officials responsible for contracting matters, who agreed with its contents.

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As agreed with your office, unless you publicly release its contents earlier, we plan no further distribution of this correspondence until 30 days from the date of issuance. At that time, we will send copies of this letter to the Ranking Minority Member of the House Committee on Banking, Finance and Urban Affairs, the President and Chief Executive Officer of RTC, the Chairman of the Thrift Depositor Protection Oversight Board, and other interested parties. Copies will be made available to others upon request.

If you have any questions regarding this correspondence, please call me at (202) 736-0479.

Sincerely yours,



Gaston L. Gianni, Jr.
Associate Director,
Federal Management Issues

(247096)

DERESTRUCTION RECEIVED FROM OCR

25-JAN-93

REPORT NUMBER	RELEASE NUMBER	ACCNO	RELEASE DATE	RESCISSION DATE	LOCATION
QOD-92-104BR	92-425		08/05/92	08/06/92	
QOD-93-38	93-128		01/04/93		
QOD-93-9R	93-143	556187 . 148398	01/25/93		IRT
HW-92-88	92-88		01/12/93		
IMTEC-92-19	92-364		06/29/92		
IMTEC-92-78	92-486		09/14/92		
IMTEC-93-13	93-144	556198 . 148399	01/25/93		IRT
NSIAD-92-140	92-388		07/10/92		
RCED-92-20	93-142	556108 . 148397	01/25/93		IRT

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