



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

B-157192

July 30, 1965

Dear Mr. Morris:

We refer to your letter of July 6, 1965, requesting our comments on the statements made by \_\_\_\_\_ of Albuquerque, New Mexico, in his letter to you of May 28, 1965, concerning the termination of a contract between the Air Force Special Weapons Center, Kirtland Air Force Base, New Mexico, and the University of New Mexico for the furnishing of qualified students to assist Government employees as mathematical and scientific aides.

Four contracts designated "Contract for: Non-personal services in the form of a data reduction and analysis program to be performed at Kirtland Air Force Base, New Mexico" have been entered into between the parties in question for successive periods beginning October 26, 1961, and ending September 30, 1965. The contract currently in effect, AF 29(601)-6641, October 28, 1964, requires services to be performed as follows:

"The Contractor shall furnish qualified mathematical aide and scientific aide personnel to provide the technical assistance described in the attached exhibit(s) \* \* \*."

Payments made by the Government are on the basis of the number of hours worked by personnel the contractor (University of New Mexico) supplies at hourly rates of \$1.73, \$2.01 and \$2.30 of which \$1.50, \$1.75 and \$2 respectively is paid to the employee. The remainder is "to cover the cost of indirect charges incurred in the performance of the work \* \* \*." The contract also provides that personnel eligible for employment thereunder will be students at the University of New Mexico or the College of St. Joseph's on the Rio Grande "who have been interviewed by the Air Force and have been determined to have sufficient academic background for the work in which they will be engaged."

Regarding the conduct of the students performing services the contract contains the following provision:

"Personnel provided by the contractor shall at all times be recognized as employees of the contractor and under his administrative control. However, the contractor and contractor personnel shall, in the performance of the services called for hereunder, be guided by and will comply

with the directions and requirements of the Director of the Air Force Weapons Laboratory or his authorized representative under whose authority said services shall be performed in a satisfactory manner."

In the decision of June 1, 1965, B-156219, 44 Comp. Gen. \_\_\_\_, copy enclosed, we said:

"The generally accepted test of Federal employment includes three requirements; first, performance of a Federal function; second, appointment or employment by a Federal officer; and third, supervision and direction by a Federal officer. The individuals working under contracts such as those in question perform a Federal function. Although individual workers employed under those contracts are not appointed in the usual manner by a Federal officer, control over their employment is exercised by the Government since the Government has the right to require immediate replacement of any individual determined to be unsatisfactory.

"Regarding the supervision test for Federal employment the contracts do not specify except in a very general manner the work which is to be done by the contractor-furnished personnel. The clerical and typing contract specifically provides for Government supervision and we do not have evidence indicating that the work to be done under either contract can be properly performed or is performed without detailed instructions and close supervision by Government personnel. We must emphasize here that supervision over the individuals performing the work required under a contract remains in the hands of Government personnel even if the contractor provides an additional employee to act as supervisor and relay instructions of Government personnel to other contractor-furnished personnel, and that the test of supervision by Government personnel must be applied to a contract as it operates even though its terms do not call for supervision.

"It would seem evident from the prototype contracts furnished that they are contracts under which the contractors' prime contribution is to furnish people who are managed and supervised by Government officials. We must hold on the basis of the evidence presented that

the contracts in question properly are to be classified as personal service contracts and the relationship between the Government and the individuals concerned is tantamount to an employer-employee relationship. \* \* \*

The contracts between the Air Force Special Weapons Center and the University of New Mexico involve the performance of a Federal function. The Air Force exercises direct control over the selection of the students who will work under the contract and it is our understanding that a student is not retained for work under the contract if Government personnel inform the University that they are not satisfied with his work. The type of work performed under the contract, assisting in the conduct and analysis of experiments, does not appear to be a type of work which could be performed without the direct supervision of the Government personnel.

On the basis of the information available to us and in the light of our decision of June 1, 1965, it appears that the relationship created between the Government and the contractor's employees is tantamount to that of employer-employee and that personnel performing such work should be employed in accordance with the civil service laws and the Classification Act.

The Air Force Special Weapons Center calculated the additional cost which would result from having the required services performed by civilian employees rather than by contract at approximately \$98,712 annually. That estimate was based upon the approximate number of hours of work performed by the contractor's employees and upon the determination that under civil service standards employees at grades GS-4 and GS-5 would be required to perform the work. The Special Weapons Center assumed that the students who now perform the work would be replaced by regular full time civilian employees. It may be that the Air Force Special Weapons Center will be able to utilize the services of students on a part time or intermittent basis as employees of the United States. In that connection we have been advised that the Air Force has consulted with the Civil Service Commission regarding an acceptable means of acquiring personnel to perform the needed services.

We note that the projected additional cost to the Government for performance of the work in question by civil service personnel results from the fact that the rates of pay allowed the college students employed by the University apparently are less than the rates of pay prescribed for this type of work if performed by regular Government

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employees. Specifically, the students are paid \$1.50 to \$2 per hour under the contract whereas the Air Force has determined that employees hired under the Classification Act for the work in question would be entitled to from \$2.15 to \$3.12 per hour. However, the factor of additional cost is not here material since there is involved a practice not permitted by law. As indicated in our decision of June 1, 1965, if an agency desires to continue such a practice it should obtain specific legislative authority to that effect.

We trust that the information provided herein is sufficient for the purpose of your inquiry.

Sincerely yours,

FRANK H. WEITZEL

Acting Comptroller General  
of the United States

Enclosure

The Honorable Thomas G. Morris  
House of Representatives