

DECISION**DIGEST - L - CP****THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548**675****FILE:** B-193858**DATE:** October 25, 1979**MATTER OF:** Indian Health Management, Inc. - Purchase
Order for Medical Services

DIGEST: Due to extreme shortage of medical personnel, Rosebud Public Health Service Indian Hospital entered into agreement with and issued purchase order to Indian Health Management, Inc. for services needed. Although the physician assistant services secured under the agreement were improperly provided under circumstances that created an employer-employee relationship, payment for services received may be made in view of the extenuating circumstances involved.

This decision is in response to a request of December 28, 1978, by William E. Wasem, Chief Area Financial Management Branch, Public Health Service, Department of Health, Education and Welfare (HEW), Aberdeen, South Dakota, for a decision as to the allowability of a payment to Indian Health Management, Inc. (IHM) for the services of a physician assistant who worked in the hospital at various times from September 28 through November 6, 1978. This employment was the result of a memorandum of agreement between IHM and the hospital in which IHM agreed to provide the hospital with the services of its physician assistant and nursing staff. This memorandum, covering a 12-month period, also provided that these services would be scheduled by the Service Unit Director of the hospital and that the hospital would be billed monthly. The hospital entered into this agreement because of "an extreme shortage of medical personnel" at the time and because sufficient staff could not be hired by the Indian Health Service.

The Chief, Administrative Services Branch, Aberdeen Area Indian Health Services, after reviewing the above memorandum, made a determination that it involved an "improper personal service procurement" in violation of HEW Procurement Regulation 3-22.101-2, which states in part:

"Services should not be obtained by contract in such manner that the contractor or his employees are in effect employees of the Government.

* * * Generally speaking, contracts which in their

B-193858

substantive effect result in the creation of what is tantamount to an employer-employee relationship between the contractor personnel and the Government are proscribed as violative of the personnel laws.* * *

In cases where the Government agency involved makes a determination and clearly demonstrates that it would be substantially more economical, feasible, or necessary by reason of unusual circumstances to have the work performed by non-Government parties, we have not objected to the procurement of such work through proper contract arrangements. See 31 Comp. Gen. 372 (1952) and 43 *id.* 390 (1963). However, the relationship created between the Government and contract personnel in such an instance must not be that of employer and employee. See 51 Comp. Gen. 561 (1972). The HEW Procurement Regulations, quoted above, reflect these considerations.

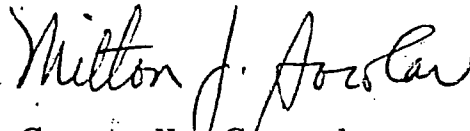
The criteria applicable to determine whether a contract improperly creates an employer-employee relationship are those set forth in 5 U.S.C. § 2105(a) (1976), as amplified by the six elements set forth in Federal Personnel Manual Letters 300-8, dated December 12, 1967, and 300-12, dated August 20, 1968. Based on these factors, this Office has twice held that purchase orders issued for services of medical technologists who were temporarily hired because of staff shortages in Indian Health Service hospitals were improper in that they created employer-employee relationships as between the Government and contractor personnel. See _____, B-190118.1, January 24, 1978, and _____, B-190118.2, January 24, 1978.

The physician assistant services secured under the memorandum of agreement with IHM were used in essentially the same manner as the laboratory services involved in the _____ and _____ cases, cited above. The physician assistant served under the direct supervision of Indian Health Service officials and it otherwise appears that he functioned in essentially the

B-193858

same manner as would any employee appointed to a physician assistant position. Accordingly, our view is that the relationship created under the IHM memorandum of agreement was tantamount to that of employer and employee.

The specific purchase orders may be certified for payment, however, because of the extenuating circumstances involved in this case, provided satisfactory performance was received and the compensation rate is considered to be reasonable for the type of work performed. We have received a letter from the Associate Director for Administration of the Indian Health Service stating that steps have been taken to assure that services of individuals, when secured other than by appointment, are obtained under proper procurement procedures and that the arrangement that results is for independent contract services and does not create an employer-employee relationship as between the Government and contractor personnel.



For the Comptroller General
of the United States