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Legal Considerations in Contracting for Personal Services 421498

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This article is intended to provide guidelines for evaluating the relationship between the Government and the employees of service-type contractors in connection with possible violations of the civil service laws in contracts for personal services.

During the past few years the policies and practices of Government agencies in the field of contracting for the performance of personal services have received the critical attention of the General Accounting Office (GAO), the Civil Service Commission (CSC), and several committees of the Congress.¹ Much of the GAO work in that regard has been concerned with the comparative cost of contractor v. in-house performance. Such cost evaluations are of prime importance when the procurement of the services by the contract involved is authorized by law. There are, however, certain legal principles under which the propriety of contracts for services must be determined.

¹ H. Rept. 100, 90th Cong., 1st sess. (House Committee on Post Office and Civil Service); Hearings before Senate Committee on Government Operations on Government Policy and Practice with respect to Contracts for Technical Services, 90th Cong., 1st sess.; Hearings before the House Committee on Government Operations on Government Procurement and Contracting on H.R. 474, 91st Cong., 1st sess., part 7.

CSC is responsible for the administration and enforcement of the civil service laws, rules and regulations, and the pay provisions applicable to the single largest group, General Schedule (GS), of Federal employees. (5 U.S.C. 1104(a)(5); *id.* 1301; *id.* 1302; *id.* 3301; *id.* 3302; *id.* 5102; *id.* 5103; *id.* 5331.) Therefore, GAO has coordinated its actions with CSC or consulted with CSC prior to final actions taken by GAO on service contracts which appeared to be in violation of such provisions of law, rules, and regulations. CSC has studied the legal aspects of this problem and in opinions of its General Counsel certain specific contracts and the general rules of law applicable have been discussed and applied. GAO is the agency vested with enforcement powers under its authority to disallow payments made pursuant to contracts which have been found to be illegal. (See 5 Comp. Gen. 450.)

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Personal Services

Some confusion in the application of the rules set by GAO and the principles enunciated by CSC has resulted from the fact that the term "personal services" has been given various meanings and connotations.

The term "personal services" as used in early decisions of the Comptroller General included all services normally performed by Government employees and all services which could be performed by incumbents of existing civil service positions. It was held in those decisions that Government agencies were not authorized to contract for the performance of such services. It was considered that those services should not be performed by contractors that could not be held personally responsible for failure or misfeasance in the performance of such duties. The format and operation of the contract, whether on a job or end-product basis or under conditions clearly suggesting an employer-employee relationship, were not stressed. (See 6 Comp. Gen. 140; *id.* 364; *id.* 474. See also 32 Comp. Gen. 427; *Turei v. Delaney*, 32 NE 2d 774 (New York, 1941).)

More recently it has been emphasized that services normally performed by Government personnel may be performed under a proper contract with a Government agency if that method of procurement is shown to be more feasible, more economical, or necessary to the accomplishment of the agency's task. Inherent in this modification of the prior strict rule was the requirement that the contract be so worded and carried out in a manner so as not to be tainted with an employer-employee re-

lationship. (31 Comp. Gen. 372; *id.* 510; 33 *id.* 143; 44 *id.* 761.) Also inherent in that modification was the restriction that the services involved in any contract were services which could properly be delegated to non-Government personnel.

The recent examinations of contracts which have been performed by CSC were concerned with the lack of legal authority on the part of Government agencies to secure personal services by contract with a firm in lieu of securing such services under the provisions of the civil service laws. Basically, the position taken by CSC is that, if the terms of the contract permit or require detailed Government supervision over the contractor's employees or the manner in which the services are performed under the contract leads to the same result, the contract must be questioned on a legal basis. Contracts for service which are in fact performed under detailed Government supervision and control have been referred to as contracts which are "performed on a personal service basis" or more loosely as "personal service" contracts.

The various uses of the term "personal services" have caused some misunderstanding with regard to the legal conclusions of GAO and CSC. It should be clearly understood that the legality of contracts for services which are to be performed on a nonpersonal service or independent contractor basis has not been questioned even though the services involved may be performed by an individual contractor himself or may be services normally performed by Government employees. (See 43 Comp. Gen. 390; 28 *id.* 296; *id.* 50; 26 *id.* 442; *id.* 188.)

Two aspects involved in the legal examination of personal service contracts are discussed herein: first, the relationships created by contracts between the Government and individuals performing the services required by such contract and, second, the justification for the rule that contracts which result in an improper relationship between the Government and the individuals performing the services required are illegal.

The Government and "Contractors' Employees"

It has been assumed by many Government officials that any person working on a Government project under a contract between a company and the Government and paid by the contractor is, for all purposes, the employee of the contractor. Although that is normally the case, the existence of a contract and the terms thereof do not always conclusively determine the legal relationship created between the individual performing work required by the contract and the parties to the contract. The law relating to the master-servant or employer-employee relationship must be used to determine who is the employer. The "personal service" relationship between the Government and individuals performing services under a contract which is created by the operation of certain Government contracts is tantamount to the legal relationship of master and servant, or of employer and employee.

The factors which determine whether the master-servant or employer-employee relationship exists have been applied in determining whether a Gov-

ernment contract creates a personal service as distinguished from a non-personal service relationship. Such factors include (1) the degree of supervision and control exercised over the individuals performing the service, (2) the right to dismiss individuals from performance of work required by the contract, (3) the furnishing of materials, supplies, facilities, or clerical or other assistance, (4) payment on a time, as opposed to a job, basis, and (5) the furnishing of a completed product or service. (See 56 C.J.S. Master and Servant § 3(2), 3(8).)

In the analysis of contracts which have come to the attention of GAO, the primary test of whether the contract calls for services to be performed on a personal service basis is the degree of supervision and control to be exercised by Government personnel over the details of the work which is performed by contractor employees under the contract. Corollary to that test is the control exercised by the Government in the selection of the individuals to perform work under the contract and the extent to which the Government may require the dismissal of an employee performing work under the contract if he is not considered to be satisfactory.

The investigation which resulted in the correspondence printed in House Report 188, Eighty-ninth Congress, dated March 18, 1965 (the "Fuchu" case), showed that the Government contractors agreed to furnish personnel with qualifications specified in the contract. Those personnel were used by the agency concerned to augment their in-house capability. The obligations of

the contractors were to furnish personnel while the work done by the individuals furnished was assigned by Government supervisors and performed under the detailed direction of such supervisors. Government personnel and contractor personnel worked at the same jobs, no distinction being made between the two classes of personnel as to work assignments or degree of supervision. Payments were made to the contractors on the basis of time worked by the personnel that the contractors had furnished. Furthermore, the contracts contained provisions which gave the Government the right to require that a contractor-furnished employee be dismissed from further performance of duties under the contract.

The contracts involved in 44 Comp. Gen. 761 (June 1, 1965) were described at page 762 as follows:

• • • In the case of prototype contracts which you have furnished the contractor will supply personnel to assist the Government in the performance of Government functions when made necessary by reason of a temporary requirement for doing work during peak-load periods or by reason of emergency conditions. The contracts provide that the individuals supplied by the contractor will be able to perform the type of work which is the subject of the contracts—typing and clerical services or telephone and teletype operator services—in accordance with the minimum standards set forth in the contracts and that if an individual supplied does not perform satisfactorily the contractor will furnish another individual.

The operation of those proposed contracts was described at page 763 as follows:

• • • 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.

In both of those cases the contractors' primary duties were to supply specific types of personnel who were to work for the Government as directed by Government supervisors. No real distinction between the work performed by contractor-furnished personnel and by Government employees who were assigned the same type of work was evident. The relationship created between contractor-furnished personnel and the Government under those conditions was tantamount to the employer-employee relationship. Therefore, it was held that the contracts were improper in that they were to be performed on a personal service basis.

The opinion of the General Counsel, CSC, in the "Goddard" case, issued October 17, 1967, and supplemented July 8, 1968, involved a more complicated set of facts than those involved in the "Fuchu" case or the decision 44 Comp. Gen. 761. The contracts involved in the "Goddard" case were contracts for technical assistance. Contractor responsibilities were not defined ex-

licity in the contracts but were to be assigned under task orders. CSC concluded that many of the task orders could not be performed by the contractor without direct supervision and control by Government employees over contractor employees or supervision by Government employees relayed through a contractor supervisor who could not supervise but merely passed on the directions of Government personnel to contractor employees. Because a substantial number of contractor employees worked under supervision of the Government it was concluded that the contracts should be terminated as being in violation of the civil service laws.

The criteria used by the CSC to determine what positions should be filled in accordance with Federal personnel laws are (1) the incumbent performs a Federal function, (2) the incumbent is employed or appointed by a Federal officer, and (3) the incumbent is under the supervision and direction of a Federal officer. (See *Stapleton v. Macy*, 304 F. 2d 954 (CADC, 1952); 5 U.S.C. 2105(a).)

The first mentioned criterion recognizes that a Federal employee must be engaged in the performance of the work of the Federal Government. The other two criteria are for use in determining the existence of the employer-employee relationship to the Federal Government. Implicit in those criteria is the fact that the existence of a Federal position is predicated not solely upon the work which is to be done but also upon the relationship of the Government to the individual performing the work. Thus, services ordinarily

may be performed for the Government by contractors on a nonpersonal service or independent contractor basis without regard to the civil service laws or pay laws governing Federal employees, but the creation of a relationship between an individual and the Government which is tantamount to that of employer-employee must be in accordance with the civil service laws and the pay must be in accordance with the Government pay system applicable to the job.

In most instances a Government agency is in a position to determine whether it will accomplish a certain task by the use of a nonpersonal service contract. If the agency decides to use the contract method, however, it must be willing and able to entrust the performance of the required task to the contractor under the terms of the contract and forego the exercise of detailed control over contractor employees during the performance of the contract.

It should be recognized that there are certain functions of the Government, such as those requiring personal discretionary actions by the head of an agency and others involving the making rather than the implementation of Government policy, which may not properly be performed other than "in-house." Broad guidelines in this area are contained in Bureau of the Budget Circular No. A-76; however, neither GAO nor, to our knowledge, CSC has in recent years purported to formulate rules as to what functions may or may not be contracted out. Each case must be viewed on the basis of the particular facts and law involved; and, if it is determined to be a function which may properly be

exercised only by persons who are responsible to the Government as officers or employees, such function may not be performed by a private firm under contract.

Violation of the Civil Service Laws and Government Compensation Schedules

Agencies are not free to avoid the civil service system and the pay schedules applicable to Federal employees by the simple expedient of making a contract for the performance of the required service if the contract by its terms or in its operation results in the creation of a relationship tantamount to that of employer-employee between the individuals performing the services and the Government. GAO and CSC have questioned and will continue to question the legality of such contracts under the requirements of the civil service laws and Federal employee pay provisions.

The Attorney General has held that an individual employed to perform the work of the United States must be hired in accordance with the civil service laws unless a specific exclusion of his position is provided by statute. The absence of a formal appointment and the non-compliance with civil service laws cannot be used as a means of excluding a position from the civil service.

In 25 Op. Atty. Gen. 341 (1905), the Attorney General held that assistant engineers at the U.S. Military Academy were to be appointed within the framework of the civil service laws and that appointments made by the Superintendent of the Academy which did not comply with those laws were invalid.

Similarly, it was held in 26 Op. Atty. Gen. 363 (1907), that deputy collectors of Internal Revenue were to be employed only in accordance with the civil service laws. (See also 26 Op. Atty. Gen. 502 (1908); 27 *id.* 95 (1908); 37 *id.* 121 (1933).) In those cases the Attorney General was concerned primarily with statutory language necessary to exclude an appointment made by a Federal officer from the requirements of the civil service laws. The general conclusion reached was that statutory authority given an official to appoint persons to fill specific positions or to appoint personnel necessary to accomplish a certain purpose did not authorize such appointments to be made outside the civil service laws.

Similarly, CSC and GAO have long held that, in the absence of a specific statutory exemption, all Federal agencies are required to comply with the civil service laws and fix the salary rates of personnel in accordance with the applicable pay schedule. (24 Comp. Gen. 147, 149.) Also, in 44 Comp. Gen. at page 763 the Comptroller General held that broad authority given an agency to contract for the furnishing of supplies and services did not authorize that agency to enter into a contract for the furnishing of services on a personal service basis.

Relating to the classification of Government positions, 5 U.S.C. 5102(b) provides:

Except as provided by subsections (c) and (d) of this section, this chapter applies to all civilian positions and employees in or under an agency.

The exception contained in 5 U.S.C. 5102(c) (20) covers "employees em-

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ployed on a fee, contract, or piece work basis." Similar language contained in section 202(29) of the Classification Act of 1949 (now 5 U.S.C. 5331) was explained in reports of both the House of Representatives and the Senate on the proposed Classification Act as exempting "employments on a fee, contracts, piece work basis when authorized by other law." (S. Rept. 847, 81st Cong., 1st sess., p. 33; H. Rept. 1264, 81st Cong., 1st sess., p. 7.) Therefore, that exception is not to be interpreted as exempting persons employed by Federal agencies through contracts which operate on a personal service basis, but must be considered as exempting from the classification and pay provisions only persons employed by contract under authority such as that contained in 5 U.S.C. 2376(d) (1964 ed.).

Thus, employees of the United States must be appointed or employed and must be compensated in accordance with law unless a specific exemption from an applicable law has been approved. The Congress has not authorized a general exception from the civil service laws and applicable pay schedules for all persons who stand in a relationship to the United States tantamount to that of employee under the terms and operation of contracts made with the person or with a firm.

The application of those laws was not intended to be a matter within the discretion of the heads of Government departments and agencies. Agency heads are not authorized to procure services which are furnished on the basis of a relationship tantamount to that of employer-employee without regard to the requirements of the civil service laws and employee compensation provisions.

Conclusion

In 44 Comp. Gen. 761 and in the "Fuchu" and "Goddard" cases, certain rules are stated which are designed to bring about compliance with the laws applicable to the civil service of the United States so that persons working directly for the United States will be employed in accordance with such laws, compensated at rates set by or in accordance with the applicable pay laws, and be afforded the protection and other benefits authorized by law for employees of the United States. Noncompliance with such rules would necessarily erode the protections, benefits, and principle of equal treatment set forth in the various laws, rules, and regulations applicable to Government employees.