



Comptroller General
of the United States

Washington, D.C. 20548

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December 29, 1989

The Honorable David Pryor
Chairman, Federal Services, Post Office
and Civil Service Subcommittee
Committee on Governmental Affairs
United States Senate

Dear Mr. Chairman:

This responds to your letter dated September 29, 1989, requesting our opinion on whether the Department of Energy (DOE) and the Environmental Protection Agency (EPA) are using contractors to perform inherently governmental functions. You have provided our Office with three instances of work performed by contractors for these two federal agencies: a DOE contract for hearing examiners to review the granting or denial of security clearances, a DOE contract for the preparation of testimony and other materials for congressional hearings, and an EPA contract to run a "Superfund Hotline" to respond to telephone inquiries. In connection with our review, we requested and received comments from DOE, EPA, and the Office of Management and Budget (OMB) on these contracts.

For the reasons set forth below, we conclude that the contracts by DOE for hearing examiners and for the preparation of testimony involve inherently governmental functions which should be performed by federal employees. We recommend that the agencies modify or terminate these contracts to ensure that these inherently governmental functions are not performed by contractors. In addition, we conclude that, to the extent the EPA contractor interprets agency regulations in responding to Superfund Hotline inquiries, such actions are also inherently governmental functions. We recommend that EPA review this contract and its performance, and if necessary modify the contract, to assure that the contractor does not interpret agency regulations.

BACKGROUND

The federal policy for the contracting out of commercial activities by federal agencies and for the use of advisory

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and assistance (consultant) services by federal agencies is set forth in Office of Management and Budget Circulars No. A-76, Aug. 4, 1983, and No. A-120, Jan. 4, 1988. Circular A-76 provides that certain functions are inherently governmental in nature and, therefore, shall be performed by federal employees. Such a governmental function is defined in Circular A-76 as:

" . . . a function which is so intimately related to the public interest as to mandate performance by Government employees. These functions include those activities which require either the exercise of discretion in applying Government authority or the use of value judgment in making decisions for the Government. . . ." 1/

Circular No. A-120 provides guidelines for the use of "advisory and assistance" (consulting) services. This Circular identifies functions for which advisory and assistance services may not be utilized, including "work of a policy, decision-making or managerial nature which is the direct responsibility of agency officials." 2/

In several decisions, our Office has expressed the view that, in the context of OMB Circulars No. A-76 and A-120, certain functions are so related to the agency's mission that it would be inappropriate to contract out such functions. For example, we held in B-198137, June 3, 1982, that certain legally required auditing tasks could not be contracted out because they involved making discretionary decisions regarding the disposition of disputed monetary claims against the government. However, we identified certain auditing activities which were proper for contracting since they were restricted to examining vouchers, verifying invoice amounts and identifying billing errors. B-198137, supra. Similarly, we held in B-192518, Aug. 9, 1979, that the decision to accept or reject a particular candidate for a Young Adult Conservation Corps (YACC) program, and thus confer or deny a valuable federal benefit, should not be contracted out. We had no objection, however, to contracting for all other aspects of administering the YACC program which did not involve the exercise of discretion or making judgments for the government. 3/

1/ OMB Circular No. A-76, para. 6e.

2/ OMB Circular No. A-120, para. 7B.

3/ See also 64 Comp. Gen. 408 (1985); 64 Comp. Gen. 149 (1984); 62 Comp. Gen. 339 (1983).

DISCUSSION

In the context of OMB policy and our decisions concerning inherently governmental functions, as summarized above, we will now analyze the three contracts presented in this case.

DOE Hearing Officer

The DOE contracted with the Maxima Corporation to provide Hearing Officers who conduct administrative hearings and Personnel Security Review Examiners who review findings concerning the eligibility of individuals for DOE security clearances.

Under 10 C.F.R. §§ 710.20-710.39, procedures are established for administrative review of questions concerning eligibility for a DOE security clearance. The manager of a DOE operations office appoints a Hearing Officer who considers evidence at a hearing, makes specific findings of fact concerning an individual, and recommends to the DOE manager the granting, denial, or revocation of the individual's security clearance. Among other responsibilities, the Hearing Officer (1) determines whether evidence, oral or written, is material and admissible at the hearing, (2) considers the credibility of witnesses, and (3) rules on the admissibility of documentary evidence. 10 C.F.R. §§ 710.26-710.30. The determination of the Hearing Officer may be reviewed by three DOE Personnel Security Review Examiners as provided in 10 C.F.R. §§ 710.30 and 710.31. As noted above, these Examiners are also contract personnel.

The question presented is whether these functions of the Hearing Officer and the Personnel Security Review Examiner are inherently governmental functions that should only be performed by federal employees. The report to us from DOE, which focuses on the Hearing Officer position, states that the functions of the Hearing Officer are not inherently governmental since that individual provides only an advisory recommendation to the Assistant Secretary for Defense Programs, who makes the final determination whether to grant or deny the security clearance. The DOE contends that the contractor is providing a "support service" in the form of advisory recommendations, and that the use of independent parties as Hearing Officers "enhances the integrity of the administrative review process and fosters greater due process for the individuals concerned."

The report to us from OMB states that the Hearing Officer functions should be performed by government personnel. The OMB points out that the Hearing Officer "considers and

rules on evidence in a disputed matter, makes specific findings as to the truth of the information provided, and determines whether the access should be granted, denied, or revoked." OMB concludes that the contractor is exercising discretion in applying government authority, which is contrary to OMB Circular No. A-76.

We agree with OMB's analysis of the contract. In our opinion, the Hearing Officer and the Personnel Security Review Examiner provide quasi-judicial services which are inherently governmental functions that should not be procured by contract. Circular No. A-76 specifically includes "judicial functions" as an example of an act of governing that should not be contracted out. Furthermore, the Hearing Officer exercises broad discretionary authority and makes individual value judgments for the government in virtually every aspect of the hearing process. Clearly, the Hearing Officer's exercise of discretion is an integral part of the hearing process.

DOE argues that this work is not inherently governmental since it is advisory in nature and the ultimate decision-maker is a government official. However, the policies established by the OMB Circulars and decisions of this Office do not focus solely on the outcome of a decision-making process or on the ultimate decision-maker. Rather, our decisions and the policy established by OMB Circulars are based on the degree of discretion and value judgment exercised in the process of making a decision for the government.^{4/}

That the final determination whether to grant or deny an individual's security clearance is made by the Assistant Secretary for Defense Programs does not obviate the need for personal deliberation, individual decision and considered value judgment on the part of the Hearing Officer in arriving at a recommendation. It is precisely that process which is the focus of any analysis of whether a function is an inherently governmental one that should not be contracted out.

DOE Preparation of Testimony

The DOE contracted with Systematic Management Services for support services for the Office of the Assistant Secretary for Defense Programs. Based on statements of prior work, it appears that the contractor provided briefing materials to DOE officials testifying before Congress; prepared

^{4/} See B-198137, supra; B-192518, supra.

answers to congressional inquiries resulting from confirmation hearings for the Secretary of Energy; prepared testimony, talking points, briefing books, materials and viewgraphs for the Secretary for congressional hearings; and prepared a draft statement for the Secretary's use in appearances before congressional committees.

Under DOE regulations, a contractor may not initiate or originate draft testimony or present, as a representative of the government, testimony before a congressional committee or regulatory body.^{5/} DOE indicates that a contractor employee has provided comments on proposed draft testimony and on at least one occasion has written a full draft of testimony. The agency admits that there has been a failure to comply with the DOE order in this case.

Apart from the violation of the DOE order, we believe that these contractor activities represent inherent governmental functions. In our opinion, a contractor who drafts testimony exercises discretion, makes value judgments for the government, and is in a position to establish policy for the agency. Therefore, we believe these services are inappropriately procured by contract. The OMB comments agree that the functions of testimony writer, as summarized in the task descriptions, are inherently governmental functions that should only be performed by government employees.

The DOE comments state that agency personnel review all drafts of proposed testimony before adopting and presenting them as the official statement of the agency before Congress. However, we cannot agree with DOE that editing and reviewing contractor-generated materials effectively removes the inherently governmental aspects of the position of testimony writer. On the other hand, we would not object to a contract which provides for writer-editor services in the preparation of statements or congressional testimony where the government's policy or position on a particular topic has been established and the contractor is responsible only for preparing a draft to reflect that agency policy or position.

EPA Superfund Hotline

Since 1980, EPA has contracted with GEO/Resource Consultants, Inc. (GRC) to operate a "Superfund Hotline" to answer telephone questions from government agencies, industry, and the public related to certain environmental laws. According

^{5/} DOE Order 4200.3B, Oct. 3, 1985.

to the EPA, GRC provides and maintains its own facility in Washington, D.C., including its own research library. The Hotline staff consists of Information Specialists and Team Leaders trained to answer the telephones and to respond to inquiries concerning the agency's regulatory programs.

The EPA states that the Hotline staff answers approximately 80 percent of questions received while the caller remains on the telephone line and that generally these are routine questions involving a recitation of the regulations and policies previously developed and furnished by EPA. Questions that cannot be answered immediately are researched by GRC staff who then contact the caller with the response.

In the event the GRC staff cannot confidently answer the initial question or cannot find a clear answer in the regulations or other research materials, the GRC staff will contact EPA. Approximately 60 calls per month are referred to EPA staff. The determination of whether to refer a question to EPA for resolution is made by the GRC staff.

The EPA contends that the Superfund Hotline contract does not fall within any of the examples of inherently governmental functions enumerated in OMB Circular No. A-76. According to EPA, contractor employees do not exercise discretion in applying government authority or use value judgments in making decisions for the government. The agency argues that the contractor is merely a conduit for information.

OMB comments that the operation of a hotline would normally be considered a commercial activity but that if the contractor is interpreting agency regulations, as opposed to providing responses based on prior government interpretations, that function should be performed by government employees.

We believe that aspects of the EPA contract raise questions concerning the amount of discretion and value judgment exercised by the contractor. For example, while 80 percent of the questions received by the contractor are routine in nature, requiring mere recitation of the "plain meaning of regulations" and policies or interpretations developed by EPA, 20 percent require additional research and some of these questions are referred to EPA personnel for resolution. The agency states that in determining whether to refer an issue to EPA, the contractor applies a "reasonable doubt" standard.

It is conceivable that a "plain meaning" may be derived from the highly technical and complex regulations controlling hazardous waste, but it is also possible that there is substantial room for the exercise of discretion and value judgment in researching and responding to these questions. Additionally, it is contractor staff who, using their value judgment, ultimately determine whether to refer questions to agency personnel. Finally, it appears that callers to the Hotline are not informed that a contractor employee is responding to the question.

We agree with OMB that the interpretation of agency regulations should be performed by federal employees. Accordingly, we recommend that EPA review the contract and, if necessary, modify it to assure that the contractor does not provide original interpretations of EPA's regulations. We further recommend that the contractor be required to identify to all callers that the Hotline is staffed by contractor personnel and that interpretations of EPA regulations must be handled by EPA personnel.

Sincerely yours,

for 
Comptroller General
of the United States