



UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

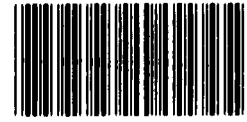
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INTERNATIONAL DIVISION

Mr. Harold H. Saunders
Assistant Secretary for Near Eastern
and South Asian Affairs
Department of State



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DLG 04010

Dear Mr. Saunders:

During the past year, our Far East Branch ^{of} reviewed internal controls over cash receipts and disbursements at the U.S. Embassy in Dacca, Bangladesh. During this review, our staff noted a problem with regard to local national personal services contracting and reported it to the Ambassador. We would like to know what corrective actions have been taken on a specific nonpersonal services contract summarized below and described in greater detail in the enclosure.

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The contract was awarded to the U.S. Commissary in Dacca to provide about 100 employees for maintenance, operations, clerical, and nursing services. Our analysis of this contract disclosed that it had many elements of a personal services contract. As you know, State Department Posts do not have the authority to enter into personal services contracts and, therefore, a question arises as to whether this contract is improper or, possibly, illegal.

The Post itself questioned the propriety of this contract and asked the Department for guidance in an April 30, 1979, cable. This was done in response to a State Department cable, dated March 11, 1979, which reminded Budget and Fiscal Officers that disbursing officers could not provide payroll services for illegal personal service contracts and that certifying officers were responsible for any illegal payments that they certified. The Embassy sought assurances from the Department that its Commissary contract was not an improper personal services contract. The Department responded that the contract might not be illegal but was improper. The Department legal opinion recommended, however, that, given the need for the services and the apparent unavailability of alternate sources, the contract not be terminated until a definitive opinion of propriety was obtained.

We followed up on this matter in Washington with your Bureau's Post Management Officer for Bangladesh to find out whether definitive action had been taken. We were advised that updated information, beyond what we had already developed during our field study, was not available.

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Group III
Report

In view of the questions raised about local national contracting in Bangladesh, we believe the Bureau should have taken definitive action on these matters. There are specific Federal employment laws and regulations to be complied with and personnel ceilings are set for each of the Department's overseas Posts. Except as otherwise authorized, the Department must follow these guidelines in obtaining personnel services abroad. Therefore, in order to show that the Post in Bangladesh is in full compliance with the Department guidelines and local national personnel ceilings, we request that you inform us what actions have been taken to rectify the nonpersonal services contract with the U.S. Commissary.

Sincerely yours,



Frank C. Conahan
Associate Director

Enclosure

GAO FIELD OBSERVATIONS ON A
LOCAL NATIONAL EMPLOYMENT CONTRACT AT THE
U.S. EMBASSY, BANGLADESH

During May and June 1979, our Far East Branch reviewed internal controls over cash receipts and disbursements at the U.S. Embassy in Dacca, Bangladesh. This included a review of disbursements under a U.S. Embassy nonpersonal services contract with the U.S. Commissary for the services of local national employees.

The contract was awarded to the U.S. Commissary in Dacca to provide about 100 employees for maintenance, operations, clerical, and nursing services. Our analysis of this contract disclosed that it had many elements of a personal services contract. Since State Department Posts do not have the authority to enter into personal services contracts, our field staff raised questions with the Post as to whether the contract was improper or, possibly, illegal.

NONPERSONAL SERVICES CONTRACT

The Federal Procurement Regulations (FPR) and Department of State Procurement Regulations (DOSPR) contain the policies and procedures for awarding contracts for supplies and nonpersonal services and implement Title 41 of the U.S. Code which relates to public contracts. Under DOSPR 6-1.404-2(c)(5), Posts have been delegated authority to enter into and administer contracts for the expenditure of funds involved in the acquisition of supplies and nonpersonal services. No authority has been delegated to posts to award contracts for personal services. Such authority, formerly held, was withdrawn in 1967.

Definition of nonpersonal service contracts

In DOSPR 6-1.258-1, nonpersonal services contracts are defined as those providing for services to be rendered to the Government by individuals or organizations under which (1) the Government does not directly supervise the manner of performance of the work, (2) does not reserve the right of selection or dismissal of individual employees, and (3) the services are of such a nature that they are not usually performed by Government employees or they may be more practicably and economically procured by contract.

Personal services contracts

DOSPR 6-1.258-2 discusses personal services contracts, stating that:

"The laws and regulations relating to Federal employment lay down requirements which must be met by the Department in hiring its employees, and establish the governing of employment. In addition, personnel ceilings have been established for the Department and the Foreign Service posts. Except as otherwise authorized by express statutory authority (e.g., 5 U.S.C. 3109 as implemented by the annual Department of State Appropriation Act for expert and consultant services), these laws and regulations must be followed in obtaining personal services. In particular, they shall not be circumvented through the medium of "personal services" contracting, which is the procuring of services by contract in such a manner that the contractor or his employees are in effect employees of the Department. (Underscoring added for emphasis.)

The DOSPR also provides that contracting officers should be alert to the following conditions or circumstances which, if present, could result in an improper personal services contract.

- Office space, equipment, and supplies necessary for contract performance are to be furnished by the Department.
- Contractor-furnished personnel are to be integrated within the organizational structure of the Department.
- Contractor-furnished personnel are to be used interchangeably with Department personnel to perform the same functions.
- The Department retains the right to control and direct the means and methods by which contractor-furnished personnel accomplish the work.

The DOSPR further provides that if, in the opinion of the contracting officer, any of the above conditions or circumstances are present, he will endeavor to resolve all doubts regarding the propriety of the proposed contract. FPR 1-1.403 also requires that:

"No contract shall be entered into unless all applicable requirements of law, Executive orders and regulations have been met. The term "regulations" includes those issued by any regulatory agency whether or not incorporated or referenced in the Federal Procurement Regulations."

We found that the conditions or circumstances mentioned in the DOSPR were present in the Post's contract with the Commissary.

POST'S SERVICE CONTRACT

The Post's original contract with the Commissary became effective March 12, 1978, and was to provide motor pool, maintenance, security, nursing, and agricultural reporting services. The Embassy prepared employment agreements between the Commissary and 81 locally hired employees who were already performing a variety of duties in several sections and units of the Post. These agreements became effective on the same date as the contract. Each employee was advised by letter that "your income will remain the same, your duties and all other work conditions will remain unchanged. The transfer is necessary for administrative purposes."

Prior to that date these employees had been employed under contracts designed as AID personal services contracts. (PSCs). However, we were told that the AID designation was used merely as a convenience because AID had the authority to hire PSCs and State did not. Most of the employees were paid with State FAAS funds, although two were paid out of Department of Agriculture Program funds. The Embassy prepared and maintained the contracts for these "AID" PSCs and exercised control over their employment. Their presence was not reported to Washington Headquarters by either State or AID as required by 3 FAM 928.

Nothing relating to these employees' duties or their conditions of employment changed when they were "transferred" from AID PSCs to Commissary contract employees. The only

change that took place dealt with when they were paid. Prior to the contract with the Commissary they had been paid every 2 weeks (the same as direct hire employees) and afterward they were paid monthly.

When these employees were AID PSCs, their payrolls were prepared and processed by the Foreign Affairs Data Processing Center in Bangkok on the basis of time and attendance cards submitted by the Post. After the Commissary contract was initiated, the employees were paid monthly through payrolls prepared by the Embassy Budget and Fiscal Office, which also prepared the invoices for reimbursing the Commissary for its "services." This practice continued until December 15, 1978, after which time the Commissary was required to handle these functions.

The Budget and Fiscal Officer analyzed the original Commissary contract at the request of the Administrative Officer. In a memo dated August 12, 1978, he concluded that the contract was illegal for the following reasons.

- The employees were directly supervised by Government employees.
- The services were contracted and paid for on a time basis, including paying overtime.
- The contractor did not select, direct, or pay his employees; this was done by the Embassy.
- The type of services being performed under the contract were not of the type normally obtained through nonpersonal services contracts.
- The services performed were of a continuing rather than a temporary or intermittent nature.
- The Commissary was acting merely as an agent of the Government under a "dummy contract" and, in his opinion, an employee-employer relationship existed between the Government and the "employees" of the contractor.

The Budget and Fiscal Officer concluded that it might be impossible to make the contract legal and that "Even if we hired a legitimate contractor the services contracted for are under direct government supervision and are of a continuing nature." Accordingly, he concluded that a personal service contract existed.

In our opinion the original contract contained many weaknesses; among the more significant were that (1) it provided for unlimited services and did not specify a dollar amount and (2) it was not specific about the services to be performed.

The Post spent several months rewriting its contract with the Commissary in an attempt to make it legal. A memo dated November 20, 1978, from the Budget and Fiscal Officer to the Administrative Officer recommended changes in the contract terms. The contract was revised and renewed on December 16, 1978. The revised version considered the Budget and Fiscal Officer's recommendations and was more specific about services to be performed and provided specific amounts to be reimbursed for the services.

Although the revised contract was an improvement over the original one, there is some doubt that it was a valid nonpersonal services contract because, among other things, the Embassy or its employees

- directly supervised the contractor's employees;
- controlled who was added to the contractor's payroll and where they would be assigned;
- initiated promotion actions for the contractor's employees (one promotion was blocked because of an Embassy grade restriction); and
- prepared and maintained the contracts and files between the Commissary and its employees.

In addition, the contract employees for the most part were commingled with their direct-hire counterparts. We further noted that these employees were issued identification cards which stated that they were a "Contractual Bangladeshi Employee of the United States Government Commissary." This implies that these employees and the Commissary are a part of the U.S. Government, which they are not.

Details of the contract with the Commissary were reported to the Bureau of Near Eastern and South Asian Affairs in Washington on April 30, 1979. This was done because of State's cable of March 11, 1979, which reminded Budget and Fiscal Officers that disbursing officers could not provide payroll services for illegal personal service contracts and that certifying officers were responsible for any illegal payments that they certified. The Embassy sought assurances from the Department that its contract with the Commissary was not an improper personal services contract

According to a Department of State legal opinion, such assurances could not be given because:

The Commissary probably cannot be considered an independent contractor, since it is too dependent on the Embassy for its existence and functions. A similar contract between the American Embassy in Bonn and the Recreation Association there was found by the Internal Revenue Service to be a sham and the contract employees were declared to be employees of the United States Government for income tax purposes.

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Para. 2(D) of the Reftel (telegram from the Mission) indicates that the contractor's employees are directly supervised by the United States Government employees. The courts, the Civil Service Commission (now the Office of Personnel Management), and the General Accounting Office have all agreed that the element of direct supervision is the most crucial one in distinguishing the personal services contract from the nonpersonal services contract. * * *

The legal opinion stated that no specific provision in the statutes made unauthorized personal services contracts illegal. Rather, it said, their illegality has been inferred from their tendency to conflict with and undermine Federal personnel law. (It referred to FPM Letter No. 300-8, Dec. 12, 1967, superseded). The legal opinion further stated that such contracts are also declared to be an evasion of personnel ceilings set by the Office of Management and Budget. (Reference was made to OMB Circular A-64, June 28, 1965). Finally, the opinion stated that, in support of these policies, the Comptroller General has consistently held that an agency's contracting authority will not, absent specific authorization, extend to contracts for personal services that establish an employer-employee relationship between the Government and the contractor or its employees. (Reference was made to 44 Comp. Gen. 761 (1965))

The legal opinion recommended that, given the need for the services and the apparent unavailability of alternate sources, the contract not be terminated until a definitive opinion of its propriety was obtained

The number of employees covered by this contract increased from 81 on March 12, 1978, to 103 as of May 29, 1979. This included an American nurse who was hired locally

on April 1, 1978. We were told that another 10 employees were to be added in June 1979. Based on work performed, we are not in a position to comment on the validity of the need for these employees.

U.S. EMBASSY COMMENTS AND
GAO FOLLOW UP AT THE BUREAU

The Ambassador told us that the employees covered by the Embassy's contract with the Commissary were essential to achieve the Post's program objectives. He said that, because of State Department staffing restrictions, he had no other alternative for providing necessary services.

In a July 1979 memorandum commenting on our internal control review, the U.S. Embassy advised us that it was continuing efforts to find a solution to the nonpersonal services contract problem. The Embassy stated that it would persist in seeking an appropriate solution to accomodate what it considered essential services.

In October 1979 we followed up in Washington with the Bureau of Near Eastern and South Asian Affairs Post Management Officer for Bangladesh to find out whether definitive action had been taken on this matter. We were advised that updated information beyond what we had already developed during our field study was not available. Thus, we concluded the Bureau should take action to show that the Post in Bangladesh is in full compliance with Department's contracting guidelines and local national personnel ceilings.

We believe the Post and the State Department should take action to resolve this matter.