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

INTERNATIONAL DIVISION

August 8, 1980


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Mr. William L. Slayton
Deputy Assistant Secretary
Office of Foreign Buildings Operations
Department of State

Dear Mr. Slayton:

Subject: Certain Personal Services Contracts Administered By the Office of Foreign Buildings Operations Are Unauthorized (ID-80-55)

As part of our current review of the Office of Foreign Buildings Operations (FBO) (code 462570), we became aware of the practice of using contracts, rather than civil service appointing procedures, to obtain the services of administrative and support-type personnel in FBO headquarters. These contracts were awarded citing section 5 of the Foreign Service Buildings Act, 1926, as amended, 66 stat. 140, 22 U.S.C. 296.

Examples of individuals whose services have been obtained by contract include one to perform contract specialist duties at a pay rate equivalent to grade GS-9 salary, one to perform clerical assistance and routine office work at pay rates equivalent to grades GS-4 and GS-5 salaries, and one to perform clerical, typing, and administrative functions at a pay rate equivalent to grade GS-5 salary.

The work of these individuals is supervised by Government employees. The functions they perform are similar to those performed by Government employees whose positions are classified under the General Schedule. Their conditions of employment are for the most part indistinguishable from those of Government employees. For example, they

--have a regularly scheduled 40-hour work week,

--are paid biweekly at General Schedule rates,

--are paid time and a half for work in excess of 40 hours a week,

--receive paid holidays,

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--earn annual and sick leave, and

--receive comparability increases in pay when these are granted to General Schedule employees.

As explained below, it is our opinion that FBO's practice is not authorized by law or regulation for the following reasons: (1) the cited statute authorizes the obtaining of "architectural and other expert technical services" only--the kinds of services described in the foregoing examples do not qualify as expert services under criteria prescribed by the Office of Personnel Management; (2) the purpose of the statute is to provide for obtaining services abroad--not in the Washington, D.C., area; and (3) the relationship between FBO and the individuals involved is an employer-employee relationship and not a contractual relationship, i.e., they occupy positions which should have been filled in accordance with civil service laws and not by contract.

CITED STATUTE NOT APPROPRIATE

As originially enacted, section 5 of the Foreign Service Buildings Act, 1926, Public Law 186, 69th Congress, May 7, 1926, 44 Stat. 404, read as follows:

> "The Secretary of State is empowered, subject to the direction of the commission, to collect information and to formulate plans for the use of the commission and to supervise and preserve the diplomatic and consular properties of the United States in foreign countries and the properties acquired under this Act. In the collection of such information and in the formulation of such plans he may, subject to the direction of the commission, obtain such special architectural or other expert technical services as may be necessary and pay therefor, not exceeding in any case 5 per centum of the cost of construction or remodeling of the properties in respect to which said special services are rendered, from such appropriations as Congress may make under this Act, without regard to civil service laws or regulations and the provisions of the Classification Act of 1923."

This provision was amended to its present form by section 3 of the Act of June 19, 1952, Public Law 399,

82nd Congress, 66 Stat. 140, 22 U.S.C. 296. It now reads as follows:

> "For the purposes of this Act the Secretary of State is authorized to supervise, preserve, maintain, operate, and, when deemed necessary, to insure the Foreign Service properties in foreign countries and the other properties acquired in accordance with the provisions of this Act; to rent and insure objects of art; to collect information and formulate plans; and, without regard to civil service and classification laws, to obtain architectural and other expert technical services as may be necessary and pay therefor the scale of professional fees as established by local authority, law or custom, and to make expenditures without regard to that part of 52 Statutes 441 (22 U.S.C. 295a) requiring purchase of articles manufactured in the United States."

The changes in section 5 are explained in reports of both houses of the Congress on H.R. 6661, the bill which became Public Law 399, the relevant parts of which are as follows:

> "(3) 'To obtain architectural and other expert technical services as may be necessary and pay therefor the scale of professional fees as established by local authority, law or custom.' This provision would eliminate difficulties now experienced in many countries in obtaining professional services of this type because the fees demanded are in excess of the 5 percent allowable under the present language. (Emphasis added.)
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> "(4) 'To make expenditures without regard to that part of 52 Stat. 441 (22 U.S.C. 295A) requiring purchase of articles manufactured in the United States.' This provision appears necessary in view of the fact that the program is predicated upon the procurement of materials and services abroad through maximum foreign credit utilization. House of Representatives Report No. 1396, 82nd Congress, 2nd Session, February 20, 1952, p. 6. (Emphasis added.)
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> "The Section also permits the Secretary to secure competent professional services and technical information abroad in accordance with local authority, law, and custom. Finally the Secretary is

> authorized to make purchases for the Foreign Service buildings programs without regard to the provision in United States law (52 Stat. 441 (22 U.S.C. 295A)) which requires him to purchase articles manufactured in the United States. This seems reasonable since the purpose of the legislation is to secure both materials and services abroad through maximum credit utilization." Senate Report No. 1586, 82nd Congress, 2nd Session, May 21, 1952, p. 2. (Emphasis added.)

In our view, the language of this statute, interpreted by these reports, make it clear beyond a reasonable doubt that administrative or support type services of the kinds described in the foregoing examples do not fall within its purview. Certainly these services are not "other expert technical services" paid for on a "scale of professional fees as established by local authority, law, or custom." See definitions of "expert" and "expert position" which are set forth subsequently.

Moreover, it is equally clear from the language and history of the statute, that its purpose was to authorize the obtaining of services abroad. We find nothing to suggest that it might properly be used to obtain services of the kind here involved in FBO offices in the Washington, D.C., area in circumvention of civil service laws.

OPM CRITERIA AND REQUIREMENTS FOR EXPERTS NOT MET

Where a statute expressly excepts "experts" from provisions of either the civil service laws or the classification laws or both, final authority for determining whether a particular position or class of positions falls within the exception rests with the U.S. Office of Personnel Management (OPM) (formerly the Civil Service Commission). 16 Comp. Gen. 703 (1937); 17 Comp. Gen 537 (1938).

In the exercise of this authority OPM has issued instructions to departments and agencies in chapter 304 of the Federal Personnel Manual. Some of the more relevant provisions of this chapter are as follows:

Section 1 - 1b.

> "Expert and consultant employment is controlled by the requirements of this chapter unless a statute clearly provides otherwise.

An agency that thinks it has a statutory exception to these requirements must have the Commission's concurrence in that opinion before it may employ experts and consultants without regard to these requirements. The statutory language must be so plain and unequivocal as to admit no doubt of the exception."

Section 1 - 2a.

"(3) Expert means a person with excellent qualifications and a high degree of attainment in a professional, scientific, technical, or other field. His knowledge and mastery of the principles, practices, problems, methods, and techniques of his field of activity, or of a specialized area in the field, are clearly superior to those usually possessed by ordinarily competent persons in that activity. His attainment is such that he usually is regarded as an authority or as a practitioner of unusual competence and skill by other persons in the profession, occupation, or activity."

"(4) Expert position means a position that, for satisfactory performance, requires the services of an expert in the particular field, as defined in paragraph (3), and with duties that cannot be performed satisfactorily by someone not an expert in that field."

Section 1 - 3b.

"The improper employment of experts and consultants is not only illegal, it is wasteful and destroys the morale of the career specialists. Examples of improper employment of an expert or a consultant are: To do a job that can be done as well by regular employees, do a full-time continuous job, avoid competitive employment procedures, avoid General Schedule pay limits." (See also 30 Comp. Gen. 495 (1951).)

Section 1 - 7a.

"An agency may employ an expert or consultant only with prior approval of the Commission

except when: (1) The Commission concurs in an agency opinion that a statute excepts the employment from Commission jurisdiction or (2) the Commission and the agency have an agreement that permits employment without prior Commission approval of each case."

Secton A - 2b.

"The Commission determines whether the position actually is an expert or consultant position, whether the proposed employee qualifies as an expert or consultant, and whether the statutory authority is appropriate for the employment * * *."

As has been indicated, final authority to determine whether the services here involved are expert services rests with OPM. However, we think it obvious that these services do not meet the criteria and have not been obtained in accordance with the requirements prescribed by chapter 304.

INDEPENDENT CONTRACTOR V. EMPLOYER-EMPLOYEE RELATIONSHIP

Having concluded that the services in question are not expert services and therefore are not properly obtainable under section 5 of the Foreign Service Buildings Act or any other statute authorizing the obtaining of expert services, we then considered whether such services can properly be obtained by contract, rather than in accordance with civil service laws, under any other authority.

The general rule is that purely personal services for the Government are required to be performed by Federal personnel under Government supervision. However, this rule is one of policy rather than positive law and when it is economical, feasible, or necessary for reason of unusual circumstances to have the services performed by non-Government parties, and that is clearly demonstrable, such services may be procured through proper contract arrangement.

A proper contract for services is one in which the relationship established between the Government and the contract personnel is not that of employer-employee. In other words the individual supplying the service must be a bona fide independent contractor or a bona file employee of an independent contractor. In addition, the contract

must comply with policies prescribed by Office of Management and Budget Circular No. A-76 (Revised, March 29, 1979) and the services must be of a type which can properly be delegated to non-Government personnel and which can be accomplished without detailed Government control or supervision over the method by which the required result is achieved.

The test of whether an employer-employee relationship--rather than an independent contractor relationship--exists is based on 5 U.S.C. 2105(a) which provides that a Federal employee is one who is

--appointed in the civil service by a Federal officer or employee;

--engaged in the performance of a Federal function under authority of law or an Executive act; and

--subject to the supervision of a Federal officer or employee while engaging in the performance of the duties of his position.

The third of these requirements--supervision--is the critical one and to determine if it has been met, six supplemental tests have been prescribed which are as follows:

(1) Performance on-site.

(2) Principal tools and equipment furnished by the Government.

(3) Services are applied directly to integral effort of agencies or organizational subpart in furtherance of assigned function or mission.

(4) Comparable services, meeting comparable needs, are performed in the same or similar agencies using civil service personnel.

(5) The need for the type of service provided can reasonably be expected to last beyond 1 year.

(6) The inherent nature of the service, or the manner in which it is provided reasonably requires directly or indirectly, Government direction or supervision of contractor employees in order to

--adequately protect the Government's interest,

--retain control of the function involved, or

--retain full personal responsibility for the function supported in a duly authorized Federal officer or employee.

Failure to meet any one or a number of these tests does not mean that supervision does not exist but that there is less likelihood of its existence. (See in connection with the foregoing B-193035, April 12, 1979; B-183487, April 25, 1977; and Federal Personnel Manual Letters Nos. 300-8, December 12, 1967, and 300-12, August 20, 1968.)

We think it clear that measured by these tests the relationship between FBO and the individuals in question is an employer-employee relationship and that these individuals were not independent contractors. They are engaged in the performance of Federal functions. Their contracts expressly provide for their supervision by Federal employees--and even if they did not so provide, the situations of these individuals meet most if not all of the supplemental tests of such supervision. This being so, we believe the services in question should have been obtained in accordance with civil service laws and obtaining such services by contract was a violation of these laws.

In conclusion, we are bringing this matter to your attention with the recommendation that you terminate the existing contracts for personal services of the type discussed above and that you adopt a plan of action to avoid such contracts in the future.

Because the Office of Personnel Management has responsibility over the competitive Civil Service system, we are sending that office a copy of this letter.

Please keep me current on your decisions on this matter.

Sincerely yours,

Harry R. Finley

Harry R. Finley
Acting Associate Director

cc: Assistant Secretary for Administration