

DOCUMENT RESUME

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[Legality of a Contract between a Federal Agency and a Private Firm for the Performance of Certain Receiving Functions at a Federal Warehouse]. E-183487. April 25, 1977. 6 pp.

Decision re: Environmental Protection Agency; Small Business Administration; Allied Industrial Services, Inc.; by Robert P. Keller, Deputy Comptroller General.

Issue Area: Personnel Management and Compensation (300);
Facilities and Material Management (700).

Contact: Office of the General Counsel: Civilian Personnel.

Budget Function: General Government: Other General Government (806).

Organization Concerned: Environmental Protection Agency; Small Business Administration; Allied Industrial Services, Inc.

Authority: 5 U.S.C. 2105(a). 6 Comp. Gen. 140. 6 Comp. Gen. 364. 6 Comp. Gen. 474. 24 Comp. Gen. 924. 31 Comp. Gen. 372. 32 Comp. Gen. 427. 43 Comp. Gen. 390. 45 Comp. Gen. 649. 51 Comp. Gen. 561. E-183487 (1975).

The Government employees' union, local 3347, restated its view that a contract between the Small Business Administration and Allied Industrial Services, Inc., was illegal. The protester alleged that the award was for personal services (warehouse receiving functions at an Environmental Protection Agency warehouse) that created the equivalent of an employer-employee relationship. An illegal employer-employee relationship was not created where services rendered did not require Government direction or supervision of contractor employees. (SW)

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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

*W. Herbert
Civ Pers.*

FILE: B-183487

DATE: April 25, 1977

**MATTER OF: American Federation of Government Employees
Local No. 3347, AFL-CIO**

DIGEST: Agency service contract for warehouse receiving function does not create illegal employer-employee relationship where services rendered do not require Government direction or supervision of contractor employees and no supervision is found to exist.

By letters dated July 30 and September 13, 1976, Local No. 3347 of the American Federation of Government Employees has inquired as to the legality of a contract between the Small Business Administration (SBA), and Allied Industrial Services, Inc. (Allied) for the performance by Allied of certain receiving functions at the Environmental Protection Agency (EPA) warehouse in Research Triangle Park, North Carolina. It is the view of the Local that the contract is an illegal personal services agreement since the relationship between EPA and Allied is tantamount to that of employer-employee.

The record shows that prior to the award of the above-described contract, all functions relating to receipt, delivery, and warehousing of materials at the EPA facility were performed by a small group of Civil Service employees. However, to provide an allegedly more efficient operation, it was determined by the local EPA Office of Administration that the receiving function could be best performed by an independent contractor. Accordingly, EPA contracted with SBA to perform the receiving function at EPA's Research Triangle Park warehouse. By contract number 68-02-2127, dated October 1, 1975, SBA subcontracted with Allied for the actual performance of the services. The initial contract period was from October 1, 1975, through June 30, 1976, at a total cost of \$24,208.70. Exercising certain options to renew, the contract was extended through September 1976, for \$7,262.61 and was further extended on October 1, 1976, for an additional 12 months at \$59,282.04. The latter extension increased the scope of the agreement to include similar services for EPA's research center annex at Research Triangle Park.

Local 3347 of the American Federation of Government Employees protested to this Office the initial request for proposals leading to the above contracts. The protest was made on the grounds that the award was for personal services and would create a

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relationship tantamount to that of employer-employee, in violation of Federal personnel laws. In responding to the protest, we noted that, as proposed, the contract would be performed in an area dedicated to the receiving function and that there would be no supervision by Government employees or intermingling of Government and contractor personnel. In those circumstances, we held that there was nothing in the proposal which would violate applicable personnel laws and accordingly denied the protest. B-183487, July 3, 1975. We observed, however, that administration of the contract in violation of the opinions of the Civil Service Commission (CSC) concerning personal services contracts would be inconsistent with the expressed purpose and intent of the proposal. We therefore indicated that we would have a continuing interest in the matter from a management-audit standpoint.

In its present correspondence with this Office, Local No. 3347 has reiterated its views that the Allied contract, as administered, creates the equivalent of an employer - employee relationship. In particular, the September 13, 1976 letter states:

"These [Allied] personnel are holding themselves out to the general public as being EPA employees and are, in fact, signing as EPA employees. It is contemplated that they will be on board much longer than any temporary employment and they are constantly working side-by-side with other Federal employees in unloading trucks; in the use of Government equipment; receiving daily supervision; and in otherwise being treated as employees of the Federal Government in the observing of time on board, holidays, etc. etc."

Thus, Local No. 3347 concludes that in light of the Civil Service Commission's standards this contract is for personal services and is, therefore, illegal.

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 because Government functions should not be performed by contractors who could not be personally held responsible for failure or misfeasance.

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6 Comp. Gen. 140 (1926); id. 364 (1926); id. 474 (1927). See also 32 Comp. Gen. 427 (1953). The format and operation of the contract, whether on a job or end production basis, or whether under conditions suggesting an employer-employee relationship were not stressed.

Since those early decisions, this Office and the Civil Service Commission have recognized that services normally performed by Government personnel may be performed under a proper contract if that method of procurement is found to be more feasible, more economical, or necessary to the accomplishment of the agency's task. Thus, in 43 Comp. Gen. 390 (1963), we stated:

"The general rule is that purely personal services for the Government are required to be performed by Federal personnel under Government supervision. See for example, 8 Comp. Gen. 140; 24 id. 924; and 32 id. 427, which is cited in the letter. However, the requirement of this rule is one of policy rather than positive law and when it is administratively determined that it would be substantially more economical, feasible, or necessary by reason of unusual circumstances to have the work performed by non-Government parties, and that is clearly demonstrable, we would not object to the procurement of such work through proper contract arrangement. 31 Comp. Gen. 372."

A "proper contract" for services as contemplated by the above language has been recognized to be one in which the relationship established between the Government and the contract personnel is not that of employer-employee. 51 Comp. Gen. 561 (1972). Further, the services must be of a type which could properly be delegated to non-Government personnel. In addition, a Government contract for the furnishing of a product or the performance of a service is to be accomplished without detailed Government control or supervision over the method by which the required result is achieved. 45 Comp. Gen. 649 (1966). In determining whether the relationship created by a contract is proscribed, the Civil Service Commission has taken the position that the contract is to be questioned if it permits or requires detailed Government supervision over the contractor's employees. Decisions of this

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Office have referred to the criteria set forth in chapter 304, subchapter 1-4 of the Federal Personnel Manual for ascertaining whether a contract permits or requires supervision. 51 Comp. Gen. 561, supra.

Additional guidance has been provided in the Federal Personnel Manual Letters No. 300-8, dated December 12, 1967, and No. 300-12 dated August 20, 1968, by the Civil Service Commission for review by the agencies of service contracts to determine if they are in accordance with personnel laws. According to these opinions, the basic criteria by which the employer-employee relationship is judged are those set forth in 5 U.S.C. § 2105(a) (1970), namely whether a person is:

- (1) appointed in the civil service by a Federal officer or employee;
- (2) engaged in the performance of a Federal function under authority of law or an Executive act; and
- (3) subject to the supervision of a Federal officer or employee while engaged in the performance of the duties of his position.

In addition, six elements were identified as indicia in the existence of supervision by a Federal officer. These elements are:

1. Performance on-site.
2. Principal tools and equipment furnished by the Government.
3. Services are applied directly to integral effort of agencies or an 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 one year.

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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, or
- To retain control of the function involved, or
- To retain full personal responsibility for the function supported in a duly authorized Federal officer or employee.

The six elements, as indicated above, relate principally to the third statutory criterion concerning supervision of a contractor employee by a Federal office or employee. The absence of any one or a number of these elements would not mean that supervision does not exist but that there is less likelihood of its existence.

To examine the administration of the contract in the present matter, a GAO audit team was sent in November 1976 to the EPA facilities at Research Triangle Park. At the time of the site visit, four contractor employees were in the warehouse receiving area. Two of the employees opened and inspected items which had been received, annotated the cartons and signed the receiving reports, repackaged the items, and placed the cartons in the appropriate storage bins. The receiving reports were placed in a designated pick-up area for later use by Government personnel. The only contacts observed between contractor and Government personnel were that two EPA employees swept and mopped the receiving area floor in the presence of contractor personnel; that an EPA warehouse employee asked the contractor supervisor about the paperwork on a particular item; and that an EPA employee delivered to the contractor for processing several insured items which had previously been received by mail.

With respect to the issues raised in the letter dated September 13, 1976, from Local No. 3347, we have the following observations. From the investigation of our audit staff and examination of the related paperwork, it is our view that in signing receipts for delivery of certain items, the contractor personnel were fulfilling the terms of the contract by performing the required operations. Regarding the use of Government

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equipment, we note that although the contract obligates the Government to furnish a forklift, it was not being used at the time of the site inspection. However, the contractor was using a Government-owned portable conveyor system in unloading incoming shipments. In addition, dollies, handtrucks, work tables, two desks and chairs, three stools, file cabinets, one refrigerator, one locked cabinet, and miscellaneous office equipment were being provided by EPA for contractor use.

Concerning hours of work and observance of holidays, we note that the contract requires Allied to perform services between 8 a.m. and 4:30 p.m., Monday through Friday, except for holidays observed by the Federal Government. Since these hours coincide with those generally used by the Government and business firms delivering shipments and mail, the contractor's hours appear reasonable and practical. Regarding the amount of interaction between and supervision of Allied employees by Government personnel, we note that the receiving area is physically partitioned from the warehouse area and that the contract provides for placing the received materials in a specially designated location for use by EPA employees. Contact between EPA and Allied employees occurs only when EPA employees enter the receiving area to pick up paperwork or to adjust a discrepancy which requires action by the EPA project officer so that the received item can correctly be processed. It appears that, in practice, coordination is between the EPA project officer and the contractor's supervisor. In addition, discrepancy and workload activity reports are made daily and monthly, respectively, to the EPA project officer.

Evaluating the observations of our audit team in light of the sixth element of the Civil Service Commission's standards, we are unable to find that there exists to a substantial degree, direct or indirect Government supervision of the receiving function performed by the Allied Industrial Services.

Our conclusion from the above is that the proscribed employer-employee relationship does not exist between EPA and Allied at the present time.


Deputy Comptroller General
of the United States