PLM-I

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

9816

FILE: B-193035 DATE: April 12, 1979

DLG 00041

MATTER OF: Consultant Services - T. C. Associates

[Request for Review of Consultant Services Vouchers]

DIGEST: 1. Under the holding in Lodge 1858, AFGE v. Webb, 580 F.2d 496 (D.C. Cir. 1978), the "Pellerzi Standards" are applicable in determining whether contract services are improperly furnished on a basis tantamount to an employer-employee relationship as between the Government and contractor personnel. However, the critical issue is whether the Government actually exercises "relatively continuous close supervision" of the manner and performance of the details of the jobs of the individual contractor employees.

2. In determining whether the Government rather than the contractor exercises "relatively continuous close supervision" of contractor personnel, the fact that an engineer may require less supervision and may exercise more independence of judgment than a food service worker is not itself determinative. If the Government takes over that degree of supervision that the contractor would otherwise perform with respect to either, the relationship created as between the Government and either individual is tantamount to that of employer and employee.

3. Where a contractor furnishes services under circumstances that evidence the elements of the "Pellerzi Standards," a presumption is raised that the services were not performed on an independent contract basis but that the relationship between the Government and contractor personnel was tantamount to that of employer and employee. Where it is shown that actual supervision of contractor personnel was performed by the contractor rather than Government personnel that presumption is not controlling and the contract is a proper procurement of services.

~~004957~~

4. The circumstances of a contract for the consulting services of a retired Government employee in connection with a closeout of the former National Center for Productivity and Quality of Working Life raise a presumption under the "Pellerzi Standards" that certain of the contract tasks were performed on a basis tantamount to that of employer and employee. However, since the Center's termination has placed the contractor at a serious disadvantage to show lack of actual supervision, and since several contract tasks could be performed independently, the contract will not be viewed as an improper procurement of services.

5. The function of negotiating final prices prior to an agency's award of a contract is integrally related to the contracting officer's authority and is a function which management must perform to retain essential control over the conduct of agency programs. A consulting contract for such services contravenes the policy statement of OMB Bulletin 78-11, May 5, 1978, that consulting services will not be used in performing work of a policy/decision-making or managerial nature which is the direct responsibility of agency officials.

This case involves a request for review and decision concerning two vouchers submitted by T. C. Associates, Inc. totaling $7,675 for services performed under contract with the National Center for Productivity and Quality of Working Life. Administrative support services for the National Center are provided by the General Services Administration (GSA) on a reimbursable basis under 31 U.S.C. § 686. In its administrative capacity, GSA has questioned whether the contract with T. C. Associates creates a relationship tantamount to that of employer and employee as between the contractual parties.

The National Center was established under section 201 of Pub. L. No. 94-136, 15 U.S.C. § 2411, in November of 1975 and was funded for 3 years. Section 401(5) of that law, 15 U.S.C. § 2451(5), authorized the National Center to obtain expert and consultant services in accordance with 5 U.S.C. § 3109 at a rate not to exceed the maximum daily rate prescribed for GS-18. In 1978 the President

determined to assign many of the National Center's functions to existing agencies. Thus, the National Center's authorization was allowed to expire at the end of fiscal year 1978.

The contract with T. C. Associates was awarded on June 23, 1978, in connection with the National Center's termination. The contract stated that T. C. Associates was to provide services to "assist the National Center in an orderly close out of its administrative functions" through September 30, 1978, at a price of $9,900. The contractor was permitted to bill the Government each month for services provided during the prior month. Because GSA refused to certify vouchers for services provided in July and August, the contractor did not continue to provide services through September. The statement of work called for the contractor to provide the following:

"1) Budget and Finance

"a) Provide the Executive Director with a bi-weekly report on all National Center obligations for salaries, travel, contracts, and other obligations to assure the National Center does not exceed the appropriated funds.

"b) Reconcile obligations on a monthly basis with the GSA computer print-out and consult with GSA on any differences.

"c) Consult and advise the Executive Director, Deputy Director and Assistant Directors on budgetary problems to keep them constantly advised on unusual financial problems.

"d) Provide necessary advice and consultation to members of the administrative office in the payment of vouchers and recording obligations in ledgers in accordance with organizational functions of the National Center.

"e) Will maintain liaison with OMB and GSA on budgetary problems as necessary.

"2) Contracts

"a) Prepare all necessary documents with regard to contract awards such as Requests for Proposal, contracts and related correspondence with proposed contractors.

"b) Maintain contact with proposal contractors and negotiate final prices prior to award.

"c) Provide consultation to program officers to ensure the procurement process satisfies the needs of the National Center in accordance with Federal Procurement Regulations.

"d) Will review all pending contracts and provide a report as to deliverables to satisfy the contract obligation. Will alert the Executive Director and Assistant Directors as to all actions needed to complete all contracts that will close by September 30, 1978.

"e) Will provide a report as to which pending contracts will not be closed by September 30, 1978, and assure these files are in proper order to transfer to those agencies assuming the National Center duties."

We understand that T. C. Associates is a small firm established for the primary purpose of furnishing the management consulting services of its president, Mr. T. C. Haaser, a retired Government employee. For this reason, and because the contract required Mr. Haaser to provide solutions to specific National Center problems, to use National Center files and documents and to work in space and with equipment provided by the National Center, GSA questions whether Mr. Haaser's services were provided on an independent contract basis.

Counsel for T. C. Associates cites the holding in Lodge 1858, American Federation of Government Employees v. Webb, Administrator, National Aeronautics and Space Administration, et al., 580 F. 2d 496 (D. C. Cir. 1978), for the principle that a contract for services is not improper in the absence of a high degree of

supervison and control over the contractor's employees by Government officials. He states that Mr. Haaser's performance under the T. C. Associates contract was not supervised by National Center personnel to a degree "which would relegate him to the status of an employee."

The former Executive Director of the National Center has provided an explanation of the circumstances under which the T. C. Associates contract was executed. In the last months of its existence the National Center experienced an accelerated rate of attrition. To cover critical vacancies individuals who had been assigned budget and procurement functions were reassigned operating program responsibilities. Because of difficulties in hiring personnel for the few months left before the end of fiscal year 1978, National Center officials decided to secure the necessary budget and procurement services by contract rather than employment. With respect to the scope of work under the T. C. Associates contract, the former Executive Director pointed out that budgetary and contracting responsibilities for the National Center were performed by GSA and that Mr. Haaser's efforts were principally directed at a reconciliation of the data and a check on the services provided by GSA to assure that the National Center's financial affairs were in order at termination.

We have recognized that services of individuals may be obtained by a proper contract arrangement where it is administratively determined by the agency involved that it would be substantially more economical, feasible or necessary by reason of unusual circumstances to have the work performed by non-Government parties. See 31 Comp. Gen. 372 (1952), 43 id. 390 (1963), and 51 id. 561 (1972). A proper contract for services is one in which the relationship between the Government and contractor personnel is not that of employer and employee. 51 Comp. Gen. 561, supra.

Where services directed at the performance of a Federal function are obtained by contract rather than appointment, the question of whether contractor personnel are functioning in an employer-employee relationship with respect to the Government is one of supervision. If contractor personnel are in fact supervised by a Federal officer or employee, the contract is not one for independent contract services but involves the procurement of services in avoidance of civil service laws and regulations. The test of improper supervision by Government personnel was first enunciated in October

1967 in an opinion issued by the General Counsel of the Civil Service Commission. The six elements of that test, referred to as the "Pellerzi Standards," are set forth in Federal Personnel Manual (FPM) Letter 300-8, December 12, 1967, as follows:

> "1. Performance on site.
>
> "2. Principal tools and equipment furnished by the Government.
>
> "3. Services are applied directly to integral efforts 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.
>
> "6. The inherent nature of the service, or the manner in which it is provided, requires directly or indirectly Government direction or supervision of contractor employees in order:
>
> > "a. To adequately protect the Government's interest, or
> >
> > "b. To retain control of the function involved, or
> >
> > "c. To retain full personal responsibility for the function supported in a duly authorized Federal official or employee."

In a supplement to that opinion, set forth in FPM Letter 300-12, August 20, 1968, the six elements of the "Pellerzi Standards" are explained as follows:

> "The six elements * * * relate principally to the third statutory criterion concerning supervision of a contractor employee by a Federal officer or

> employee. If the contract terms permit such supervision, or if in the actual performance of the contract such supervision is conducted, the test is met.
>
> * * * * *
>
> "The absence of any one or a number of these elements would not mean that supervision does not exist but only that there is less likelihood of its existence. Moreover, any single element may not be significant unless it's presence is felt to a substantial degree. * * *"

In the National Aeronautics and Space Administration (NASA) case cited by counsel for T. C. Associates, the Court of Appeals held that the critical factor in determining whether there is an employer-employee relationship is the presence of actual supervision of contractor personnel by Government officers and employees. In reversing the District Court's holding that 22 of 32 NASA support services contracts were improper, the Court of Appeals found that the lower court had incorrectly focused on whether the nature of the services "reasonably required" supervision and had ignored the "always critical factor of who actually exercises the supervision over the manner and performance of the duties of the position." With respect to all 32 NASA contracts, the Court of Appeals found that the day-to-day supervision of the physical conduct of the details of the job performed by the individual contractor employees was in the independent contractor.

The NASA decision upholds the applicability of the "Pellerzi Standards" to the determination of whether contractor personnel are improperly functioning as Government employees. Its effect is to place the six criteria that constitute that standard in their proper perspective as raising a presumption of supervision. As in the cases of the 32 NASA contracts, where the Government does not retain the right to control contractor personnel and where it is shown that the contractor actually supervises the manner and performance of the duties of its employees' positions, that presumption is rebutted.

The Court in the NASA case held that the type of supervision that evidences an employment relationship is "relatively continuous close supervision." As to the particular contracts there in question, the

Court found no impropriety inasmuch as the "day-to-day supervision of the physical conduct on the details of the job performed by the individuals [employees of the contractor] was in the independent contractor." Counsel for T. C. Associates argues that National Center personnel did not supervise Mr. Haaser's contract performance to such a degree as to create an employer-employee relationship between the two.

We believe that application of the standard of supervision enunciated by the Court requires clarification with reference to contracts for the services of individuals with specialized skills involving a high degree of expertise or independence of judgment. The contracts reviewed by the Court of Appeals were entered into with firms which provided NASA with the services of a number of employees. Those services ranged from menial tasks in the nature of maintenance services to complicated engineering testing and evaluation efforts. While certain of the more skilled contractor employees were capable of exercising independent judgment in the performance of the duties of their positions, such supervision as was necessary was provided by the contractor. From the Court's holding with respect to contracts for skilled services, it is apparent that the requirement for "continuous close supervision" is, indeed, a relative standard that takes into account the extent to which the duties of a particular position are susceptible of supervision. The fact that an engineer responsible for designing test equipment may require less contractor supervision than a food service worker does not make him any less that contractor's employee. If the Government takes over that degree of supervision that the contractor would otherwise perform with respect to either the engineer or the food service worker, the relationship created as between the Government and either individual is tantamount to that of employer and employee.

In each of the contractual situations considered by the Court the contractor provided not only employees with the required skills and abilities, but a superstructure of its own supervisory personnel. The Court found that any ongoing, direct supervisory relationship between NASA personnel and contractor employees was precluded or interrupted by the active and effective presence of the contractor's own supervisory staff. As in the case of T. C. Associates, where the services secured by contract are those of one individual, the question of supervision is complicated by the absence of contractor supervisory personnel.

The Civil Service Commission's regulations on employment of experts and consultants are contained at chapter 304 of the FPM. Therein, the test of an employer-employee relationship is set forth at subchapter 1-4 as follows:

> "a. Ordinarily, when an agency uses the advisory service of someone of consultant caliber, the agency creates an employee-employer relationship governed by this chapter. Pay for personal service usually indicates an employee-employer relationship, but the relationship also exists when service is unpaid. However, the facts in a situation govern whether the relationship exists. For example, persons an agency invites to travel to advise on Government matters are not necessarily Government employees. Although not all the conditions usually associated with the relationship are present, an employee-employer relationship subject to this chapter usually exists when the person:
>
> "(1) Serves under the direction and supervision of a Federal employee;
>
> "(2) Works in space and equipment provided by the Government;
>
> "(3) Has access to agency records and files;
>
> "(4) Analyzes for solution specific agency problems and functions and presents recommendations or reports;
>
> "(5) Ordinarily serves on more than one occasion on the same project, and may serve periodically for some time;
>
> "(6) Works on dates or at hours set by, or required to be reported to, the agency."

These six criteria are an adaptation of the "Pellerzi Standards" to the particular situation of expert and consultant services. As in the case of support service contracts generally, supervision by a Federal employee, the first criterion, is the touchstone of impropriety. The five additional criteria reflect particular

circumstances in which Government supervision is more likely to occur than not. Where those five elements characterize a contract arrangement for expert and consultant services, they give rise to a presumption of supervision. The NASA decision stresses that that presumption should not control where there is evidence that actual supervision is lacking.

We have reviewed the National Center's contract with T. C. Associates in light of the considerations outlined above. As the GSA has indicated, Mr. Haaser's performance of the contract tasks involved the analysis of specific National Center problems, as well as the production of reports. Mr. Haaser had access to the National Center's records and files. Also, he worked in space and with equipment provided by the National Center. The contractor has not challenged the GSA's conclusion that the circumstances of Mr. Haaser's performance under the contract involved the second through fourth of the six criteria listed at chapter 304 of the FPM. While the written record does not indicate whether Mr. Haaser worked at times set by or reported to the National Center, we understand that, in general, Mr. Haaser worked at the National Center throughout the regular workweek on substantially the same basis as the National Center's regular employees. Performance of many of the contractors' responsibilities set forth in the statement of work would appear to require the contractor's presence at the National Center at hours coinciding with the regular work hours of the staff. In this connection, the former Executive Director has indicated that he was unconcerned with Mr. Haaser's work schedule except that he expected to be able to reach Mr. Haaser within a reasonably brief period of time.

The circumstances discussed immediately above suggest that certain of the tasks called for by the T. C. Associates contract were performed in the context of a relationship which raises a presumption of Government supervision. However, other tasks called for under the statement of work apparently were performed independently.

While the circumstances of Mr. Haaser's performance of certain contract tasks give rise to a presumption of improper supervision, in this particular case we cannot overlook the fact that the National Center is no longer in existence and that the contractor is at a serious disadvantage in presenting evidence as to the type and degree of supervision actually exercised over his

work. Where, as here, the presumption of supervision is less than compelling, we feel it would be inappropriate, in view of the holding in the NASA decision, to reach a conclusion on the basis of a presumption alone, particularly where several of the more important contract tasks are clearly susceptible of performance on an independent basis. We therefore believe that the contract may be regarded as a proper procurement of independent services and that the vouchers submitted by T. C. Associates may be certified for payment.

In connection with our review of the T. C. Associates contract, we believe it is appropriate to point out that at least one of the tasks included in the statement of work contravenes Office of Management and Budget Bulletin No. 78-11, May 5, 1978, even though the contractor may not actually have performed that function. In setting forth basic policy and guidelines for use of consulting services, that bulletin specifies that consulting services will not be used in performing work of a policy/decision-making or managerial nature which is the direct responsibility of agency officials. In our opinion the requirement set forth in the statement of work that T. C. Associates "negotiate final contract prices prior to award" contravenes that policy, notwithstanding that the Executive Director continued to function as the contracting officer and retained final signature authority. The authority to negotiate final prices is so integrally related to the contracting officer's authority that we consider it a basic function which management must perform in order to retain essential control over the conduct of agency programs.

R. F. Keller

Deputy Comptroller General
of the United States