

DATE: 03-11-91

CITATION: VAOPGCPREC 15-91
Vet. Aff. Op. Gen. Couns. Prec. 15-91

TEXT:

SUBJECT: Legal Authority to Enter Into Contract for Guard Services.

(This opinion, previously issued as Opinion of the General Counsel 3-68, dated August 12, 1968, is reissued as a Precedent Opinion pursuant to 38 C.F.R. §§ 2.6(e)(9) and 14.507. The text of the opinion remains unchanged from the original except for certain format and clerical changes necessitated by the aforementioned regulatory provisions.)

To: Chief Medical Director

QUESTION PRESENTED:

May a Veterans Administration Hospital enter into a contract with a commercial firm to provide guard services?

COMMENTS:

The Veterans Administration Hospital states that because of the instances of muggings and other misdemeanors on hospital premises, they feel it is necessary to employ personnel from an outside security agency to adequately protect Government property, employees, patients, and visitors. They propose to contract with a commercial firm to provide the station with security coverage from 9:00 P.M. to 5:00 A.M. daily. Such security guards are to be stationed in the admitting area of the hospital, when not patrolling the hospital buildings or grounds.

Before discussing the specific question of the effect of section 213 of title 38, United States Code, on contracts for personal services, it is believed it would be helpful to review the general law in this area, which has been the subject of extensive consideration by the Civil Service Commission and the Comptroller General during the past year.

In an opinion dated October 18, 1967, the General Counsel of the Civil Service Commission held that contracts which result in the creation of an employer-employee relationship between the Government and contractor personnel are proscribed as violative of the personnel laws under which the Government operates. Consistent with the statutory definition of employee set forth in section 2105 of title 5, United States Code, he set forth three basic criteria for determining whether an employer-employee relationship exists, namely, (1) whether the individual is engaged in the performance of a Federal function under

the authority of an Act of Congress or an Executive Order, (2) whether he is performing duties subject to the supervision of a Federal officer or employee, or (3) whether he is appointed in the Civil Service by a Federal officer or employee. The opinion emphasized that whether an employer- employee relationship exists must be determined on the basis of the overall substance of the contract operations. In this initial opinion, the Civil Service Commission emphasizes observance of its criteria, because unauthorized personal service contracts evade all the laws applicable to Federal employment.

In an opinion (B-133394, November 1, 1967), the Comptroller General, concurring in the view of the General Counsel of the Civil Service Commission states:

"We think it is clear from the opinion, however, that no single provision of a contract, such as the task assignment or technical direction requirement, may constitute the basis for a determination that the contract is or is not proscribed by the personnel laws. Rather, the opinion requires before an adverse determination, (1) a realistic consideration of the provisions of the entire contract and the overall substance of the operations thereunder, and (2) a conclusion that each of the stated elements is involved therein to a substantial degree."

In a supplementing opinion dated July 8, 1968, the General Counsel of the Civil Service Commission stated:

"Where the work to be performed under contract is to be on-site, with Government-furnished equipment, involving services applied directly to an integral effort of the agency, of a long duration and where comparable services meeting comparable needs are performed in that or other agencies by civil service personnel; responsible agency officials should recognize the existence of a situation where there is potential for the kind of supervision which evidences an employer-employee relationship."

The factual situation presented clearly reflects that the contract guards will perform an integral function of the agency, on-site, and for an extended period. Moreover, the function is one which is ordinarily performed both in the Veterans Administration and other Federal agencies by Civil Service employees and which gives rise to a potential for the kind of supervision which evidences an employer-employee relationship. Accordingly, it appears manifest that an employer-employee relationship will arise and that the proposed contract will result in the procurement of employees without regard to the Civil Service laws and, in addition, would avoid the provisions of the Veterans Preference Act, now codified at 5 U.S.C. § 3310.

It is therefore the view of this office that unless section 213 of title 38 constitutes a special authority to obtain personal services by contract without regard to Civil Service laws, the proposed contract for guard service is proscribed.

Section 213 of title 38 has been utilized, in the past, by this agency to obtain personal services by contract. In his decision on June 1, 1965 (44 Comp.Gen. 761), the Comptroller General lent some support to the procedure implying, in dictum, that section 213 was authority to make personal service contracts without regard to the Civil Service laws and the Classification Act. This position is no longer tenable, however, as in a later decision (B-161474, June 14, 1967) concerning a proposal to obtain the services of residents and interns by means of contracts with medical schools, the Comptroller General when directly confronted with interpreting section 213 stated:

"General authority to contract for services including personal services, as contained in that provision of law, extends only to contracts made on an independent contractor or task basis except if it otherwise can be shown that the provision of law in question was intended to create an exception to applicable laws regarding the employment of personnel. It is well settled that any exception to the compensation schedules and civil service laws must be based upon a specific provision of law. 26 Op.Atty.Gen. 363, id. 502; 27 id. 95; 37 id. 121; 24 Comp.Gen. 147, 149. Also, exceptions to special provisions of law which relate to certain employees of the Government must be specific. 38 U.S.C. § 213 and the legislative history thereof do not evidence an intent on the part of Congress to exempt the Veterans Administration from all requirements of a law pertaining to the employment of personnel ...

"It is our view that the personal services referred to in 38 U.S.C. § 213 are services which normally are performed by employees such as the services of doctors or dentists. That section gives the Veterans Administration authority to contract for the services of doctors and dentists on a fee basis and to contract for the performance of other personal services on an independent contractor or task basis. However, the authority contained in that section is not broad enough to authorize the Administration to make a contract the result of which is to obtain employees for the Administration without regard to the civil service laws and the provisions of title 38 U.S.Code relating to employment of individuals by the Veterans Administration."

HELD:

It must be concluded that the proposal to obtain guard services by contracting with a commercial firm cannot be accomplished under the authority of section 213 of title 38 or otherwise.

VETERANS ADMINISTRATION GENERAL COUNSEL
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