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B-210518 January 8, 1984

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The Honorable Jack Brooks Chairman, Committee on Government Operations House of Representatives

Dear Mr. Chairman:

This is in response to your inquiry concerning the propriety of the Environmental Protection Agency (EPA) contracting with the law firm of Ropes and Gray to assist EPA in dealing with legal issues arising from the Congressional citation of then-Administrator Anne M. Burford for contempt. The contempt citation resulted from Mrs. Burford's refusal, stated to be at the direction of the President, to provide certain confidential enforcement documents to the Subcommittee on Investigation and Oversight of the House Committee on Public Works and Transportation. You requested that we determine the legality of the contract and of EPA's use of appropriated funds to pay for the legal services. You also requested that we obtain from EPA and provide to you copies of all letters, memoranda, notes and all other documents concerning the negotiations with the firm.

In order to respond to the issues raised by your inquiry, we requested and received a report on this matter signed by Gerald Yamada, Deputy General Counsel, EPA, and the information provided therein was considered in the preparation of our opinion. Copies of the requested documents and correspondence provided to us by EPA are also enclosed.

Factual Background

On December 16, 1982, the House of Representatives adopted House Resolution 632 citing Mrs. Burford for contempt for withholding subpoenaed documents relating to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, from the Subcommittee on Investigations and Oversight of the House Committee on Public Works and Transportation. The next day, the Speaker certified this matter to the U.S. Attorney for the District of Columbia for proceedings against Mrs. Burford in manner and form provided by law. an the same day, however, the Department of Justice instituted an action in the U.S. District Court to have these proceedings declared unconstitutional and refused to proceed against Mrs. Burford.

We have been advised that at that time Mrs. Burford wanted the services of counsel who had extensive background and working experience in the constitutional principles of separation of powers and executive privilege. Since none of the attorneys within the EPA possessed this experience, the services of

the law firm were engaged. The two attorneys who were to provide the primary services were Mr. Thomas Susman and Mr. George Marshall Moriarty. EPA has indicated that since these services were required immediately there was no time to award a formal contract. Instead, the firm began work on December 20, 1982, based upon an oral agreement with the Administrator, and continued to provide services until January 4, 1983. During that time, the firm has stated that it reviewed and provided an analysis of the Government's initial and revised complaints and of Congress' response.

While no formal contract was ever entered, a letter dated January 3, 1983, was signed by Robert M. Perry, Associate Administrator and General Counsel for EPA and Messrs. Moriarty and Susman for the firm, reflecting their understanding of the relationship between EPA and the firm at that time. This letter states:

"The Contract will provide, and we mutually agree, that Ropes & Gray, by virtue of its performance under this engagement, will have no access to any documents pertaining to enforcement or other regulatory activities of EPA. Ropes & Gray will maintain the confidentiality of any privileged or otherwise confidential information or data to which it may gain access and will use such information or data solely for the purpose of providing non- personal services on matters within the scope of this engagement."

The need for this limitation on access was made evident by the next paragraph of the letter which states:

"You have disclosed to me that Hopes & Gray regularly represents clients which currently have, and may be expected during the course of this engagement to have, other unrelated matters before and under the jurisdiction of the EPA. Consistent with the laws and regulations governing the non-personal services contract which will govern our relationship, neither Ropes & Gray nor any of its partners will be disqualified from representing clients in matters affecting the United States and its various agencies and departments, including EPA, on other matters unrelated to the scope of this engagement,"

However, even though the firm's services to EPA were to be limited ones, representation apparently ceased on January 4, 1983, after it was disclosed that the firm also represented Aerovex, Inc., a defendant in an administrative proceeding being brought by the EPA for discharging toxic waste into the harbor of New Bedford, Massachusetts. Congressional concern was expressed regarding the potential for conflict of interest in the firm's representation of EPA at the same time it was representing companies in administrative litigation with EPA.

It was initially envisioned that EPA would pay the firm for services at the rate of $165 per hour for partners and $95 per hour for associates with an estimated total cost of $19,500. EPA planned to charge the cost of services to its 1983 "Salaries and Expenses" appropriation account However, no payments were ever made since by letter dated August 16, 1983, the firm indicated that it had decided to forego any fee for services.

Discussion

Generally, unless otherwise authorized by law, agencies are precluded from hiring attorneys to conduct litigation, but, instead, must refer matters to the Department of Justice for litigation by its attorneys. 5 U.S.C. Sec.3106 and 28 U.S.C. Secs. 516-518 and 547(3). This includes litigation involving employees

sued individually for acts within the scope of their authority. In certain situations, following a request by an employee for representation, the Department of Justice may hire and pay private counsel to do so. 28 C.F.R. Sec. 50.16. Furthermore, there are rare situations where the Department of Justice agrees that representation of an employee is in the interest of the Government and undertakes to do so, but subsequently its counsel becomes unavailable to continue to provide proper representation. In these circumstances agencies then may use appropriated funds to pay private attorneys to represent an employee. J. N. Hadley 55 Comp.Gen. 408 (1975). Also see our decisions involving the claims of Norman E. Guidaboni, 57 Comp.Gen. 444 (1978) and Ellen Damareck, B-195314, June 23, 1980.

However, we have held that under the authority of 5 U.S.C. Sec. 3109 an agency may hire private counsel to render expert advice on an independent contractor basis in situations not involving litigation. For example, we held in our decision involving the U.S. Advisory Commission on Public Diplomacy, 61 Comp.Gen. 69 (1981) that the Commission could procure the services of a law firm to act as an independent contractor to provide a legal analysis of the authority and independence of the Commission since the legal analysis contracted for was not related to litigation or other matters within the sole jurisdiction of the Department of Justice. Furthermore, the payment restrictions set out in 5 U.S.C. Sec. 3109 and in EPA's 1983 "Salaries and Expenses" appropriation with respect to individuals do not apply where no employer-employee relationship exists, i.e., where the relationship is that of an independent contractor. See 61 Comp.Gen. 69, 77. Here, while litigation concerning Mrs. Burford's contempt citation was being handled by the Department of Justice, there was no clear legal prohibition against EPA's contracting for the services of outside counsel on an independent contractor basis to render an ,independent analysis of the issues. See also B-192406, October 12, 1975, and Boyle v. United States, 309 F. 2d 399 (Ct. Cl., 1962).

EPA's 1983 "Salaries and Expenses appropriation, by its terms, is available for services as authorized by 5 U.S.C. Sec. 3109. See Pub. L. 97-272, September 30, 1982, 96 Stat. 1165-1166. Since EPA was authorized to engage the firm as an independent contractor to provide legal advice on issues with respect to which its legal staff had insufficient expertise, we find no basis for legal objection to EPA's decision to retain counseling this case.

We also find nothing inherently incompatible with the firm's advising EPA on constitutional issues while the firm was at the same time representing one or more clients in an administrative proceedings brought by EPA. EPA has stated that:

"To the best of our knowledge, neither Mr. Susman nor Mr. Moriarty had access to any confidential enforcement documents nor did they have access to any of the confidential business information of any competitors of firms represented by Ropes & Gray. In the context of the work they performed in connection with litigation challenging the constitutional validity of the contempt citation, there was simply no occasion for the Ropes & Gray attorneys to examine any confidential documents other than drafts of submissions to court."

Since EPA states that it limited the firm's access to legal documents Involved in the contempt litigation, there appears to have been no opportunity for the firm to benefit in any manner adverse to the interest of the Government.

Furthermore, whether the fact the firm has performed limited services for the Government would in the future provide a basis for seeking to have it disqualified from representing private parties in matters against the EPA would be for the consideration of the courts on a motion by the Government for disqualification. However, the likelihood of this occurring seems remote since EPA knowingly consented to the firm's limited services and limited the firm's access to information for the purpose of receiving the pleadings filed in the contempt proceeding. See Jackson v. J.C. Penney Co., Inc., 521 F. Supp. 1032 (N.D. Ga, 1981); Industrial Parts Distributors, Inc. v. Fram, 504 F. Supp. 1194 (Kan., 1981); and Sierra Vista Hospital, Inc. v. United States, 639 F. 2d 749, (Ct. C1 1981).

Finally, the employment of the firm on an independent contractor basis to advise EPA on issues unrelated to actions be m ing pursued by EPA against clients of the firm is not in violation of EPA's conflict of interest regulations. These regulations preclude access by contractors to proprietary information. Since the firm's access to proprietary and other sensitive information was restricted, these were not violated.

Sincerely yours,

Milton J. Socolar Acting Comptroller General of the United States

Enclosures