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B-215651, Mar 15, 1985

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GENERAL ACCOUNTING OFFICE - JURISDICTION - CONFLICT OF INTEREST STATUTES DIGEST: 1. THE COMPTROLLER GENERAL HAS NO AUTHORITY TO ISSUE FORMAL OPINIONS CONCERNING THE APPLICATION OF CRIMINAL CONFLICT OF INTEREST STATUTES. PROPER BASIS EXISTS, HOWEVER, FOR GENERALLY EXCLUDING FEDERAL RETIREES FROM OBTAINING GOVERNMENT CONTRACTS, AND A DENTIST WAS NOT BARRED BY CONFLICT OF INTEREST CONSIDERATIONS FROM PROVIDING SERVICES UNDER CONTRACT TO THE COAST GUARD SIMPLY BECAUSE HE WAS A RETIRED OFFICER OF THE PUBLIC HEALTH SERVICE. PAYMENTS - QUANTUM MERUIT/VALIBANT BASIS - ABSENCE, ETC. OF CONTRACT - GOVERNMENT ACCEPTANCE OF GOODS/SERVICES 2. COAST GUARD MEDICAL STAFF MEMBERS WHO ENTERED INTO AN ORAL AGREEMENT WITH A RETIRING PUBLIC HEALTH SERVICE OFFICER FOR DENTAL SERVICES LACKED AUTHORITY TO ENTER INTO OR ADMINISTER GOVERNMENTS CONTRACTS. THE GOVERNMENT HAS NO LEGAL OBLIGATION TO PAY CONTRACTORS OR OTHERS WHO HAVE PROVIDED UNAUTHORIZED SERVICES. NEVERTHELESS, PAYMENT MAY BE ALLOWED FOR THE REASONABLE WORTH OF UNAUTHORIZED SERVICES WHEN IT APPEARS THAT THE ARRANGEMENT WOULD HAVE BEEN A PERMISSIBLE PROCUREMENT ACTION IF THE FORMAL PROCEDURES HAD BEEN FOLLOWED, AND IT OTHERWISE APPEARS THAT (1) THE GOVERNMENT RECEIVED A BENEFIT, (2) THE CONTRACTOR ACTED IN GOOD FAITH, AND (3) THE AMOUNT CLAIMED REPRESENTS THE REASONABLE VALUE OF THE BENEFIT RECEIVED. THE DENTIST MAY BE PAID ON THAT BASIS.

DR. EDWARD KUZMA, USPHS (RETIRED):

DR. EDWARD KUZMA CLAIMS $12,730 IN RETURN FOR DENTAL SERVICES HE FURNISHED TO THE COAST GUARD BETWEEN OCTOBER 4 AND DECEMBER 15, 1983. /1/ WE CONCLUDE THAT DR. KUZMA MAY BE ALLOWED PAYMENT ON HIS CLAIM.

BACKGROUND

DR. EDWARD KUZMA, A DENTIST, WAS A COMMISSIONED OFFICER IN THE U.S. PUBLIC HEALTH SERVICE (PHS) DETAILED TO THE DISPENSARY AT THE U.S. COAST GUARD TRAINING CENTER, CAPE MAY, NEW JERSEY, FROM JULY 11, 1977, TO OCTOBER 1, 1983. DURING HIS YEARS OF SERVICE DR. KUZMA HAD DEVELOPED A SPECIALTY IN ENDODONTICS, AND DURING HIS ASSIGNMENT AT THE DISPENSARY, HE PROVIDED ENDODONTIC TREATMENT FOR PATIENTS IN ADDITION TO HIS OTHER DUTIES. PRIOR TO HIS RETIREMENT FROM THE PHS EFFECTIVE OCTOBER 1, 1983, DR. KUZMA ORALLY ASSURED THE TRAINING CENTER MEDICAL STAFF THAT HE WOULD RETURN TO THE DISPENSARY AFTER HE RETIRED TO PROVIDE ENDODONTIC SERVICES. THE SERVICES SUBSEQUENTLY PROVIDED BY DR. KUZMA UNDER THIS ARRANGEMENT HELPED TO QUALIFY RECRUITS FOR DUTY IN THE COAST GUARD.

DURING THE FIRST WEEK OF DECEMBER 1983, THE TRAINING CENTER CONTRACTING OFFICER APPROVED THE MEDICAL STAFF'S INITIAL ORAL PROCUREMENT REQUEST DATED OCTOBER 4,

1983. THE CONTRACTING OFFICER AND THE COMMANDING OFFICER OF THE TRAINING CENTER ALSO APPROVED THE INVOICES COVERING HIS SERVICES FOR THE MONTHS OF OCTOBER AND NOVEMBER. THE COMMANDING OFFICER THEN SENT A LETTER TO DR. KUZMA, HOWEVER, OUTLINING HIS CONCERN THAT THIS SERVICE ARRANGEMENT MIGHT PRESENT A CONFLICT OF INTEREST. THE DOCTOR DISCONTINUED HIS SERVICES AS OF DECEMBER 15, 1983. NONE OF THE INVOICES FOR HIS SERVICES DURING DECEMBER HAVE BEEN APPROVED BY EITHER THE CONTRACTING OFFICER OR THE COMMANDING OFFICER. THE TOTAL AMOUNT OF THE INVOICES SUBMITTED FOR THE DOCTOR'S SERVICES BETWEEN OCTOBER 4 AND DECEMBER 15, 1983, IS $12,730.

A VOUCHER IN THE AMOUNT OF $12,730 IN DR. KUZMA'S FAVOR HAS BEEN PREPARED TO COVER HIS CLAIM FOR SERVICES. THE CERTIFYING OFFICER ASKS WHETHER HE IS PRECLUDED FROM PROCESSING THE VOUCHER FOR PAYMENT BECAUSE OF CONFLICT OF INTEREST CONSIDERATIONS, OR BECAUSE OF IRREGULARITIES IN CONTRACTING PROCEDURES.

CONFLICT OF INTEREST

THE CERTIFYING OFFICER QUESTIONS WHETHER PAYMENT TO DR. KUZMA IS BARRED BY THE CONFLICT OF INTEREST PROHIBITIONS INCLUDED IN THE ETHICS IN GOVERNMENT ACT OF 1978, 18 U.S.C. SEC. 207, AND 18 U.S.C. SEC. 208. THE FIRST PROVISION CITED FORBIDS A FORMER GOVERNMENT OFFICER OR EMPLOYEE FROM REPRESENTING OTHERS BEFORE THE GOVERNMENT IN CONNECTION WITH MATTERS IN WHICH THE INDIVIDUAL PARTICIPATED WHEN IN GOVERNMENT SERVICE; THE SECOND PROHIBITS A CURRENT GOVERNMENT OFFICER OR EMPLOYEE FROM PARTICIPATING PERSONALLY AND SUBSTANTIALLY AS A GOVERNMENT OFFICIAL IN ANY MATTER IN WHICH HE OR SHE HAS A FINANCIAL INTEREST.

WE SEE NO BASIS TO SUGGEST THESE STATUTES HAVE BEEN VIOLATED IN DR. KUZMA'S CASE. IN ANY EVENT, THE STATUTES RELATE TO FEDERAL CRIMES, SO THAT THEIR INTERPRETATION AND ENFORCEMENT ARE MATTERS RESERVED PRIMARILY FOR CONSIDERATION BY THE DEPARTMENT OF JUSTICE, RATHER THAN BY US. /2/

THE CERTIFYING OFFICER ALSO ASKS IF THE ARRANGEMENTS MADE BY DR. KUZMA TO SERVE THE COAST GUARD AS A CONTRACT DENTIST FOLLOWING HIS PHS RETIREMENT WERE PROHIBITED BY REGULATIONS APPLICABLE TO THE COAST GUARD, REQUIRING OFFICERS AND EMPLOYEES TO "AVOID ANY ACTION, WHETHER OR NOT SPECIFICALLY PROHIBITED *** WHICH MIGHT RESULT IN OR CREATE THE APPEARANCE OF" USING PUBLIC OFFICE FOR PRIVATE GAIN. /3/ IN OUR VIEW, THIS IS A GENERAL STANDARD DESIGNED TO GUIDE COAST GUARD PERSONNEL IN THE PERFORMANCE OF THEIR DUTIES, AND IT CANNOT PROPERLY BE READ AS A PROHIBITION AGAINST A FEDERAL RETIREE ENTERING INTO A CONTRACTUAL ARRANGEMENT WITH THE GOVERNMENT. /4/ THAT IS, NO PROPER BASIS EXISTS FOR GENERALLY EXCLUDING FEDERAL RETIREES FROM OBTAINING GOVERNMENT CONTRACTS. /5/

WHILE RESTRICTIONS DO EXIST ON THE ELIGIBILITY OF CURRENT FEDERAL EMPLOYEES AND ACTIVE DUTY MEMBERS OF THE UNIFORMED SERVICES TO CONTRACT WITH THE GOVERNMENT, THIS DOES NOT FLATLY PROHIBIT FEDERAL PERSONNEL FROM MAKING TENATIVE PREPARATIONS TO PERFORM SERVICES UNDER A CONTRACT WITH THE GOVERNMENT WHEN SUCH SERVICES ARE TO BEGIN AFTER THE TERMINATION OF THEIR FEDERAL SERVICE. /6/ OUR PRIMARY CONCERN WITH RESPECT TO RETIREES HAS BEEN TO PRESERVE THE INTEGRITY OF THE COMPETITIVE PROCUREMENT PROCESS, AND OUR REVIEW OF THE PROPRIETY OF CONTRACTS BETWEEN THE GOVERNMENT AND FEDERAL RETIREES HAS BEEN PRINCIPALLY CONFINED TO A DETERMINATION OF WHETHER EVIDENCE EXISTS ESTABLISHING THAT A RETIREE OBTAINED THE CONTRACT BY IMPROPER COMPETITIVE ADVANTAGE THROUGH FAVORITISM OR PREFERENTIAL TREATMENT. /7/ HENCE, WE CONCLUDE THAT DR. KUZMA WAS NOT NECESSARILY BARRED BY CONFLICT OF INTEREST CONSIDERATIONS FROM PERFORMING COMPENSABLE DENTAL SERVICES UNDER CONTRACT WITH THE COAST GUARD FOLLOWING HIS

RETIREMENT FROM THE PHS. WE FURTHER CONCLUDE, HOWEVER, THAT FURTHER EXAMINATION IS WARRANTED IN THE MATTER OF WHETHER THE NONCOMPETITIVE PROCEDURES USED HERE WERE IMPROPER.

CONTRACTING PROCEDURES

AS INDICATED, DR. KUZMA CONTINUED TO PERFORM ENDODONTIC WORK AT THE DISPENSARY FOLLOWING HIS RETIREMENT FROM THE PHS SOLELY ON THE BASIS OF VER BAL ASSURANCES FROM MEMBERS OF THE DISPENSARY MEDICAL STAFF THAT HE WOULD BE PAID FOR THAT WORK.

THE UNCERTAINTY REGARDING THE PROPRIETY OF THIS ARRANGEMENT STEMS IN PART FROM DIFFERING INTERPRETATIONS OF THREE COAST GUARD DIRECTIVES DEALING WITH THE PROCUREMENT OF MEDICAL SERVICES. THE MEDICAL STAFF BELIEVED IT HAD AUTHORITY TO CONTRACT VERBALLY FOR NON-FEDERAL MEDICAL CARE NOT EXCEEDING $500 BASED UPON COMMANDANT INSTRUCTION 7000.1; COAST GUARD MEDICAL MANUAL, CHAPTER 2, SECTION A.3(A); AND AN OCTOBER 12, 1983 MESSAGE FROM THE COAST GUARD COMMANDANT. THE MEDICAL MANUAL ALLOWED COAST GUARD MEMBERS TO RECEIVE ROUTINE AND ACCESSORY DENTAL SERVICES UP TO $500 FROM CONTRACT DENTISTS BY OBTAINING PRIOR APPROVAL FROM THE DISTRICT COMMANDER. THE COMMANDANT'S MESSAGE ALLOWED THE MEDICAL ADMINISTRATION OFFICER TO APPROVE NON-FEDERAL MEDICAL CARE REQUESTS NOT EXCEEDING $500. THE CERTIFYING OFFICER, HOWEVER, CITES COMMANDANT INSTRUCTION 7000.1 AND THE OPINION OF COAST GUARD HEADQUARTERS, MEDICAL ADMINISTRATION DIVISION, AS AUTHORITY FOR HIS CONTENTION THAT THE MEDICAL MANUAL AND AMPLIFYING MESSAGE DID NOT DELEGATE CONTRACTING AUTHORITY TO THE MEDICAL STAFF BUT WERE SIMPLY WAIVERS DESIGNED TO FACILITATE THE PROCUREMENT OF SERVICES BASED ON PROPERLY ESTABLISHED SERVICE AGREEMENTS. THE CERTIFYING OFFICER ALSO NOTES THAT COMMANDANT INSTRUCTION 7000.1 AUTHORIZED LOCAL CONTRACTING OFFICERS TO NEGOTIATE AND SIGN SUCH SERVICE AGREEMENTS ONLY AFTER RECEIVING A WRITTEN LETTER OF APPROVAL FROM COAST GUARD HEADQUARTERS.

IN FORWARDING THE REQUEST FOR A DECISION IN THIS MATTER TO US, THE CERTIFYING OFFICER AND A COAST GUARD HEADQUARTERS FINANCE OFFICIAL ESSENTIALLY SUGGEST THAT PROPER PROCEDURES WERE NOT USED TO OBTAIN DR. KUZMA'S SERVICES, BUT QUESTION WHETHER A RATIFICATION OF THE INFORMAL AGREEMENT BETWEEN HIM AND THE DISPENSARY'S MEDICAL STAFF HAS BEEN EFFECTED TO VALIDATE THE ARRANGEMENT.

UNDER 10 U.S.C. SEC. 2304(A)(4) THE COAST GUARD HAS GENERAL STATUTORY AUTHORITY TO ENTER INTO NEGOTIATED FEE-BASIS CONTRACTS WITH PERSONS FOR HEALTH CARE AND PROFESSIONAL SERVICES. GENERALLY, HOWEVER, THE APPLICABLE REGULATIONS AND ADMINISTRATIVE DIRECTIVES IN EFFECT IN 1983 REQUIRED THAT CERTAIN FORMAL CONTRACTING PROCEDURES BE FOLLOWED. FOR EXAMPLE, A SERVICE CONTRACT WAS TO BE IN WRITING AND BE NEGOTIATED THROUGH A CONTRACTING OFFICER, WITH SPECIFIC JUSTIFICATION ASSIGNED IN THE CASE OF A NONCOMPETITIVE PROCUREMENT ACTION. /8/ ALTHOUGH COAST GUARD HEADQUARTERS GAVE LOCAL MEDICAL ADMINISTRATION OFFICERS LIMITED AUTHORITY TO APPROVE REQUESTS FOR MEDICAL CARE FROM NON-FEDERAL SOURCES, IT IS EVIDENT THAT THIS AUTHORIZATION WAS NOT DESIGNED TO ENABLE THEM TO ENTER DIRECTLY INTO SERVICE CONTRACTS WITH HEALTH PROFESSIONALS ON BEHALF OF THE GOVERNMENT. HENCE, WE CONCLUDE THAT THE COAST GUARD DISPENSARY PERSONNEL MISCONSTRUED THE DIRECTIVES IN THIS CASE, AND THAT THEY EXCEEDED THEIR ACTUAL AUTHORITY WHEN THEY ATTEMPTED TO OBLIGATE THE GOVERNMENT THROUGH THEIR INFORMAL AGREEMENT WITH DR. KUZMA.

RATIFICATION

AGREEMENTS MADE BY INDIVIDUALS WITHOUT CONTRACTING AUTHORITY, BUT OTHERWISE PROPER, MAY BE VALIDATED BY RATIFICATION. AN ACTUAL RATIFICATION TO BE EFFECTIVE MUST BE IN THE FORM OF A WRITTEN DOCUMENT CLEARLY STATING THAT RATIFICATION OF A PREVIOUSLY UNAUTHORIZED ACT IS INTENDED, AND MUST BE SIGNED BY A PERSON AUTHORIZED TO RATIFY SUCH ACTS. /9/ IN THE PRESENT CASE, IT DOES NOT APPEAR THAT RATIFICATION OF THE UNAUTHORIZED AGREEMENT WAS UNDERTAKEN IN THE MANNER PRESCRIBED BY REGULATION.

NOTWITHSTANDING THE ABSENCE OF A RATIFIED CONTRACT, HOWEVER, WE HAVE CONCLUDED THAT DR. KUZMA MAY BE PAID FOR THE REASONABLE WORTH OF HIS SERVICES, THAT IS, THAT HE MAY BE ALLOWED PAYMENT ON A QUANTUM MERUIT BASIS.

CERTIFICATION OF THE VOUCHER

AS A GENERAL RULE, THE GOVERNMENT IS NOT LEGALLY OBLIGATED TO PAY CONTRACTORS OR OTHERS WHO HAVE PROVIDED UNAUTHORIZED SERVICES. /10/ EVEN IN THE ABSENCE OF AN ENFORCEABLE CONTRACT, HOWEVER, EQUITY REQUIRES THAT IN CERTAIN INSTANCES THE PARTY RECEIVING THE BENEFIT NOT GAIN A WINDFALL AT THE EXPENSE OF THE PERFORMING PARTY. IN SUCH CASES BEFORE WE WILL AUTHORIZE QUANTUM MERUIT PAYMENT, WE MUST MAKE A THRESHOLD DETERMINATION THAT THE GOODS OR SERVICES WOULD HAVE BEEN A PERMISSIBLE PROCUREMENT, HAD FORMAL PROCEDURES BEEN FOLLOWED. NEXT, WE MUST FIND THAT (1) THE CONTRACTOR ACTED IN GOOD FAITH, (2) THE AMOUNT CLAIMED REPRESENTS THE REASONABLE VALUE OF THE BENEFIT RECEIVED, AND (3) THE GOVERNMENT RECEIVED AND ACCEPTED A BENEFIT. /11/

AS INDICATED, WE HAVE NO REASON TO QUESTION THAT THE PROCUREMENT WOULD HAVE BEEN PERMISSIBLE HAD PROPER PROCEDURES BEEN FOLLOWED. THE COAST GUARD HAD AUTHORITY TO ENTER INTO FEE-BASIS CONTRACTS TO PROVIDE DENTAL CARE FOR ITS MEMBERS.

WE ALSO FIND THAT THE GOVERNMENT RECEIVED AND ACCEPTED A BENEFIT THROUGH THE ARRANGEMENT. THE DENTAL SERVICES WERE REQUIRED TO QUALIFY COAST GUARD RECRUITS, AND WERE OF A SPECIALIZED NATURE. WE HAVE BEEN ADVISED THAT PHS DENTISTS WITH ENDODONTIC EXPERIENCE AND QUALIFICATIONS WERE NOT NORMALLY AVAILABLE FOR DETAIL WITH THE COAST GUARD. AT THE TIME OF DR. KUZMA'S ORAL AGREEMENT, THE COAST GUARD WAS IN THE MIDST OF A RECRUITING CAMPAIGN, AND ENDODONTIC SERVICES WERE REQUIRED TO QUALIFY THE NEW RECRUITS.

WE FIND NO CLEAR EVIDENCE OF A LACK OF GOOD FAITH ON DR. KUZMA'S PART IN ENTERING INTO HIS SERVICE ARRANGEMENT WITH THE COAST GUARD. ALTHOUGH HE MADE THE ARRANGEMENT WITH THE DISPENSARY MEDICAL STAFF ON A NONCOMPETITIVE BASIS AND WITHOUT AN ADVANCE DETERMINATION OF JUSTIFICATION BY PROPER AUTHORITY, THUS GIVING RISE TO A INFERENCE OF IMPROPER FAVORITISM OR UNDUE INFLUENCE, THE INFORMATION OF RECORD TENDS TO REBUT THE INFERENCE AND INDICATES THAT THIS INSTEAD OCCURRED AS THE RESULT OF AN HONEST MISREADING OF THE APPLICABLE DIRECTIVES BY THE DISPENSARY PERSONNEL. THE ARRANGEMENT WAS TERMINATED AS SOON AS IT WAS BROUGHT INTO QUESTION, AND APPARENTLY PROPER CONTRACTING PROCEDURES HAVE BEEN FOLLOWED AT THE DISPENSARY SINCE THEN.

FINALLY, THE AMOUNTS DR. KUZMA HAS REQUESTED FOR HIS SERVICES APPEAR TO BE REASONABLE, PARTICULARLY IN LIGHT OF THE FACT THAT HE CHARGED THE PER ROOT CANAL FEE WHICH WAS PRINTED ON THE COAST GUARD INVOICE FORMS.

ACCORDINGLY, WE WILL ALLOW DR. KUZMA'S CLAIM. THE VOUCHER IS RETURNED AND MAY BE CERTIFIED FOR PAYMENT IF OTHERWISE PROPER.

/1/ THIS DECISION RESPONDS TO A REQUEST FROM LIEUTENANT JOHN K. GUNTHER, AUTHORIZED CERTIFYING OFFICER, U.S. COAST GUARD TRAINING CENTER, CAPE MAY, NEW JERSEY, FOR AN ADVANCE DECISION CONCERNING THE PROPRIETY OF CERTIFYING A VOUCHER IN THE AMOUNT OF $12,730 FOR PAYMENT TO EDWARD KUZMA, D.D.S.

/2/ SEE DEVELOPMENT ASSOCIATES, 56 COMP.GEN. 580 (1977), 77-1 CPD PARA. 310; NATIONAL SERVICE CORPORATION, B-205629, JULY 26, 1982, 82-2 CPD PARA. 76; AND IONICS INCORPORATED, B-211180, MARCH 13, 1984, 84-1 CPD PARA. 290.

/3/ 49 C.F.R. SEC. 99.735-7. THE PROVISIONS OF 42 U.S.C. SEC. 215(A) MAKE THESE REGULATIONS APPLICABLE TO PHS OFFICERS ASSIGNED TO DUTY WITH THE COAST GUARD.

/4/ COMPARE CACI, INC. - FEDERAL V. UNITED STATES, 719 F.2D 1567, 1581 (FED.CIR. 1983); DEVELOPMENT ASSOCIATES, 56 COMP.GEN. AT 585.

/5/ SEE GENERALLY, EDWARD R. JEREB, 60 COMP.GEN. 298, 300 (1981), 81-1 CPD PARA. 178. SEE ALSO 45 COMP.GEN. 81 (1965), CONCERNING SERVICES PERFORMED UNDER CONTRACT BY A RETIRED MEDICAL OFFICER OF THE UNIFORMED SERVICES.

/6/ STERLING MEDICAL ASSOCIATES, B-213650, JANUARY 9, 1984, 84-1 CPD PARA. 60. COMPARE VALIANT SECURITY AGENCY, 61 COMP.GEN. 65 (1981), 81-2 CPD PARA. 367; AND AIR FORCE DENTAL OFFICER, B-207109, NOVEMBER 29, 1982.

/7/ SEE STERLING MEDICAL ASSOCIATES, B-213650, SUPRA; AND STERLING MEDICAL ASSOCIATED, 62 COMP.GEN. 230, 232 (1983), 83-1 CPD PARA. 215. /8/ SEE, GENERALLY, FEDERAL PROCUREMENT REGULATIONS (FPR), 41 C.F.R. SECS. 1-1,207, 1-1.208, 1-1.404, 1-3.107, 1-3.801-2 (1983 ED.); DEPARTMENT OF TRANSPORTATION PROCUREMENT REGULATIONS, 41 C.F.R. SEC. 12-3.301 (1983 ED.); DEPARTMENT OF TRANSPORTATION, UNITED STATES COAST GUARD COMMANDANT INSTRUCTION 7000.1, DATED OCTOBER 12, 1982.

/9/ SEE FPR, 41 C.F.R. SEC. 1-1.405.

/10/ SEE, FOR EXAMPLE, FEDERAL CROP INSURANCE CORP. V. MERRILL, 332 U.S. 380 (1947).

/11/ SEE 40 COMP.GEN. 447, 450-451 (1961); GENERAL CLINICAL RESEARCH CENTER, B-212430, JUNE 11, 1984.