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B-243283.2, Sep 27, 1991

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DIGESTS: 1. Claim of State Department personal services contractor for both temporary lodging and living quarters allowances for the same period of time may not properly be paid, because the Standardized Regulations which govern such allowances and which were incorporated into the contract specifically prohibit payment of both allowances for the same period. Standardized Regulations have the force and effect of law and may not be waived by contracting officer through amendment to contract. 2. Where agency proffers ample evidence that voucher claiming temporary quarters allowance is tainted by fraud, the claim may not properly be paid.

Agency for International Development-- Request for Advance Decision:

The Agency for International Development (AID) asks whether it may pay a voucher submitted by a personal services contractor claiming both temporary lodging and living quarters allowances for the same period of time. For the reasons that follow, payment would be improper.

On August 17, 1990, AID awarded a 2 year, personal services contract to William P. Kostrewski pursuant to the Foreign Assistance Act of 1961, as amended, 22 U.S.C. Sec. 2396(a)(3), which authorizes contracting with individuals for personal services abroad. Under the contract, Mr. Kostrewski was an assistant project coordinator to the Private Sector Program Office in Honduras providing assistance to the government of Honduras and AID in design and implementation of private sector programs.

Mr. Kostrewski lived in a guest house in Honduras from October 1 through November 19. On November 1, he signed a lease allowing him to occupy a house as of that date. His household effects arrived in Honduras at the end of October, but were held by the Honduran customs service until November 17 because of a dispute between the government of Honduras and the United States Embassy concerning payment of import taxes by diplomats. Even though the house was available to Mr. Kostrewski as of November 1, because he had no household effects to furnish the house he continued to reside in the guest house until November 19. On November 23, Mr. Kostrewski submitted a voucher to AID claiming various moving expenses including allowances for both temporary lodging (for his rented room in the guest house) and living quarters (for the rent on the house) for the period from November 1 through November 19.

AID's voucher examiner and certifying officer disallowed the claim for living quarters allowance for the period from November 1 through November 19 (totaling $546.63) on the basis that both the contract and the Standardized Regulations

prohibit payment of temporary lodging and living quarters allowances for the same period of time. However, on December 19, 1990, the contracting officer determined that, since the delay in Honduran customs was beyond Mr. Kostrewski's control, Mr. Kostrewski was entitled to both allowances for the period from November 6, /1/ until the household effects actually cleared customs on November 17.

On February 20, 1991, the contracting officer and Mr. Kostrewski signed a bilateral modification to the contract, stating that there had been a mutual mistake of fact concerning the release date of the household effects from customs and allowing Mr. Kostrewski to receive both temporary quarters and living quarters allowances for that period. Subsequently, the AID Controller in Honduras objected to paying the contractor both allowances for the same period of time and requested an advance decision from our Office concerning whether the voucher may properly be paid.

The contract stated that Mr. Kostrewski was considered an employee of AID, entitled to certain allowances, including living quarters and temporary lodging. The contract further stipulated that the allowances should be paid in accord with the Department of State's Standardized Regulations (Government Civilians, Foreign Areas), and relevant portions of the Standardized Regulations were restated in the contract.

Under the Standardized Regulations, chapter 100, an employee can be granted temporary lodging allowance after first arriving at a new post in a foreign country in lieu of living quarters allowance, if permanent or residence quarters are not immediately available. However, entitlement to temporary quarters allowance ends when the employee occupies his permanent quarters, at which time entitlement to living quarters allowance commences. Standardized Regulations Secs. 123.2c and 132.11d. Both the contract and section 112 of the Standardized Regulations specifically stated:

"The temporary lodging allowance and the living quarters allowance are never both payable to an employee for the same period of time."

The contracting officer had no authority to modify the terms of the contract to allow payment of both allowances for the same period of time in contravention of the express prohibition of the Standardized Regulations. Where, as here, a contract established that a personal services contractor was to be regarded as an employee of the government rather than as an independent contractor, the entitlement of the personal services contractor to relocation expenses and other allowances was restricted to entitlements specifically authorized by law and implementing regulations. See 63 Comp.Gen. 507 (1984).

The provisions of the Standardized Regulations concerning quarters allowances were issued under authority of the Overseas Differentials and Allowances Act, Pub.L. No. 86-707, 5 U.S.C. Sec. 5923, and, therefore, have the force and effect of law. B-198930, Apr. 6, 1981. Because the Standardized Regulations are statutory regulations, neither the contracting officer nor any other employee of AID has authority to waive their provisions. See 60 Comp. Gen 15 (1980) and B-184068, Aug. 22, 1975. Furthermore, the government cannot be bound beyond the actual authority conferred upon its agents and employees by statute or by regulations. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947); see also 65 Comp.Gen. 679 (1986). Consequently, the contracting officer's modification of the contract in an attempt to authorize payment of both

temporary lodging and living quarters allowance for the same period of time was ineffectual. As he had not yet occupied his permanent quarters, under the terms of the contract and the provisions of the Standardized Regulations Mr. Kostrewski was only entitled to temporary lodging allowance for the period from November 1 through November 19, 1990. See B-224687, Mar. 9, 1987.

We do not believe that even the temporary lodging allowance (totaling $ 2,379) should be paid here, however, since AID has submitted an Inspector General's report and other records which show that Mr. Kostrewski's voucher was tainted by fraud. Specifically, the Inspector General's report states that, among other falsifications, Mr. Kostrewski altered the receipt given to him by the guest house in which he stayed to state that he received no meals when, in fact, he was offered and did eat breakfast every day as part of his rent. Moreover, the record shows that Mr. Kostrewski did not disclose that he had complete kitchen facilities in the guest house. Altering the receipt and failing to disclose the presence of a kitchen were apparently done so that Mr. Kostrewski could submit a false claim for supplementary post allowance /2/ on the same voucher on which he claimed both temporary lodging and living quarters allowances. The Inspector General's report is supported by a record of an interview with the guest house owner, a copy of the original, unaltered receipt given to Mr. Kostrewski, and photographs of the dining and kitchen facilities in the guest house. /3/

In view of the ample evidence that the voucher and supporting documentation were fraudulently submitted, we find that Mr. Kostrewski's claim for temporary lodging allowance should be denied. See 68 Comp. Gen 108 (1988) and 59 Comp.Gen. 99 (1979).

In sum, because payment of both temporary lodging and living quarters allowances for the same period of time is specifically prohibited by the governing regulations as well as under the express terms of the contract, and because AID's Office of the Inspector General has produced ample evidence that Mr. Kostrewski submitted a claim for temporary lodging allowance that is tainted by fraud, neither claim may properly be paid.

/1/ The contracting officer determined that Mr. Kostrewski could not reasonably have expected his household effects to be released from customs before November 5. Therefore, he disallowed the claim for living quarters allowance for the period from November 1 through November 5.

/2/ Under the Standardized Regulations Sec. 232, supplementary post allowance is intended only for those employees who need to eat meals at hotels or restaurants because of the unavailability of suitable quarters having kitchen facilities.

/3/ AID has informed us that Mr. Kostrewski was asked to and did resign after the Inspector General completed his investigation. Furthermore, the matter has been turned over to the Justice Department for possible prosecution.