



United States  
General Accounting Office  
Washington, D.C. 20548

Accounting and Financial  
Management Division

B-250044

December 22, 1992

The Honorable Robert J. Dole  
Republican Leader  
U.S. Senate

Dear Senator Dole:

Your office requested certain information relating to our recent audit of independent counsels.<sup>1</sup> Specifically, your office requested information on (1) the amount of expenditures by Independent Counsel Lawrence E. Walsh that we found to be inconsistent with laws and regulations and (2) whether Mr. Walsh had requested a waiver of any reimbursements related to those expenditures.

As we stated in our report, we were unable to verify the accuracy and completeness of independent counsel expenditures because of serious internal control weaknesses at offices of independent counsel and the Administrative Office of the U.S. Courts which performs the disbursing and accounting functions for independent counsels.

We found that some expenditures were inconsistent with laws and regulations. Some of the instances we identified may have been attributable to an oversight or ambiguities in the independent counsel law and a lack of comprehensive guidance to help independent counsels understand and follow operational and administrative legal requirements. Other instances were caused by the independent counsels relying on erroneous advice from the Administrative Office of the U.S. Courts.

In our report, we identified overpayments for lodging and meals for Mr. Walsh ranging between approximately \$44,000 and approximately \$78,000 (see page 17 of our report). We also identified overpayments for employees of Mr. Walsh of approximately \$5,000 for lodging and meals (page 17) and approximately \$3,700 for relocation expenses (page 18).

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<sup>1</sup>Financial Audit: Expenditures by Nine Independent Counsels (GAO/AFMD-93-1, October 9, 1992).

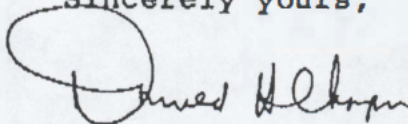
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In addition, the Administrative Office of the U.S. Courts procured more than \$100,000 of computers with special security features for Mr. Walsh on a sole-source basis without required written justification. We were unable to readily quantify the other instances of noncompliance identified in our report.

Mr. Walsh disagreed with our conclusions regarding some of the overpayments, but indicated that he would voluntarily follow our recommendations. He has requested that reimbursement for the overpayments be waived. Under 5 U.S.C. 5584 and regulations issued by our Office (4 C.F.R. parts 91-92), collection of such overpayments may be waived if it is determined that collection would be against equity and good conscience and not in the best interests of the United States. Generally, the criteria for waiver are met where there is no indication of fraud, misrepresentation, fault, or lack of good faith on the part of the recipient of the overpayment. In particular, consideration is given to whether the recipient knew or reasonably should have known of the error.

Waiver determinations depend upon the facts of each case. In general the overpayments we identified appear to be attributable not to any fault on the part of the recipients but to an oversight or ambiguities in the law or to erroneous advice provided to independent counsels, and are appropriate for waiver consideration. We will notify you when we have completed our consideration of Mr. Walsh's waiver request.

Sincerely yours,



Donald H. Chapin  
Assistant Comptroller General

Government, and the agency head must make a determination that advance payments would be in the public interest. See also 48 C.F.R. Subpart 32.4. In order to avoid the necessity of obtaining authorization from the Department of Justice for an advance payment, the contract is drafted so that payments are made upon receipt of a deliverable. Thus, when the initial report is received on or about December 10, 1992, the contractor can be paid for the services entailed in preparing this report (\$20,600). After the simulation is conducted and the final report is delivered on December 20, 1992, the payment can be made for those services (\$32,000).

Your request that the contract include an option to extend these services in any additional case that may be litigated by your office cannot, unfortunately, be accommodated. Applicable procurement statutes, at 41 U.S.C. § 253a(a)(2)(B), prohibit restrictive provisions beyond the extent necessary to satisfy the needs of the agency or as specifically authorized by law. There is much case law applying this or similar principles to the use of noncompetitive procedures. Thus, the scope of a noncompetitive procurement must be limited to only those needs for which the use of noncompetitive procedures can be justified. If a need arises in the future for similar services, undoubtedly, the circumstances may vary from the current ones, so that an option to extend the current contract would not necessarily be appropriate. In the event you can demonstrate that the circumstances would not be different, you may seek a class sole-source justification for jury consultant services. See FAR § 6.303-1(c).

In any event, we would need price information now so that at the time the option is to be exercised the contracting officer could determine that, by exercising the option, it would be the most advantageous method of fulfilling the Government's needs, price and other factors considered. See 48 C.F.R. § 17.207. Since you cannot now define your future requirements with any specificity and cannot solicit a price quote for such undefined requirements, an option clause is not possible. The option your request appears to contemplate really would be tantamount to a new award.

It is apparent from the documentation submitted that Public Response Associates has been engaged to commence performance without the existence of an executed contract and without proper contracting authority. As indicated above, such action generally is inappropriate and cannot form the basis of a valid obligation of the Government, except in very limited circumstances. See Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947). Cf. 31 U.S.C. § 1342. Ordinarily, when a contractor performs services in response to an official's authorization who does not possess proper authority, a ratification is necessary by the official who does have such authority. See 48 C.F.R. § 1.602-3. This assumes there was an underlying agreement that would have been valid but for the lack of contracting authority. If such is not the case, the supplies or services provider would have to file a claim against the United States with the Comptroller General or in a court of competent jurisdiction.

Although Public Response Associates commenced performance on or about November 18, these earlier efforts may be considered an inherent part of the initial draft report that will be delivered on December 10. Therefore, the contract has been prepared to require the performance of two tasks: (1) the preparation of the draft report and the attendant functions necessary to produce the report; and (2) the preparation of the final report integrating both the simulation and the survey. By structuring the contract this way, we can avoid the necessity of obtaining a ratification by both the Director of the Administrative Office and an appropriate official at the Department of Justice.

Based on your review of three sources and the urgency of your proceeding with the contract, we have assumed that you reasonably determined that only Public Response Associates is available to fulfil your needs within the required time frame and that, in its haste, your office simply failed to compile the supporting documentation. Both the Contracts Branch and the Office of General Counsel therefore have given this project high priority and have completed the contract preparation and reviews in an expedited manner. We nevertheless suggest that attention be given to these matters and that your office take appropriate steps to avoid similar problems in future procurements.