



DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON 25, D. C.

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JAGA 1953/286

MEMORANDUM FOR: CHIEF, RESEARCH AND DEVELOPMENT, OFFICE OF THE CHIEF OF STAFF

SUBJECT: Contractors for Biological Warfare Research

Reference is made to the prior memorandum of this office (JAGA 1953/270), subject as above, dated 3 April 1953, wherein the views were expressed that the services of military and civilian personnel and volunteers for participation in biological warfare experiments may legally be accepted, that no additional rights against the Government could arise from the disability or death of any such participants as a result of the experiments, and that the Government intends to insure the lives of such personnel under the provisions of Section 1765 of the Revised Statutes (5 U.S.C. 170) which provide for the payment of additional compensation to employees whose deaths are caused by law or regulation.

In accordance with the dispatch of the foregoing memorandum, a representative of this office (Colonel Firehose, Ext. 78188) informally requested an opinion as to whether the stated views would be equally applicable to the persons involved were private citizens not employees of the Government or if they were employees of Government contractors. These two classes of persons are considered below. For completeness, consideration has also been given to the applicability of the stated views to another class of persons, viz., irregular and fee-basis employees.

Private citizens. Section 3679 of the Revised Statutes, as amended (5 U.S.C. 565(b)), provides:

No officer or employee of the United States shall accept voluntary service for the United States or employ personal services in excess of that authorized by law, except in cases of emergency involving the safety of human life or the protection of property.

This statute is aware of no provision of law specifically authorizing the acceptance of voluntary services for the contemplated purpose.

It is the policy of the quoted statute to prohibit the acceptance of voluntary services which may provide a basis for future claims against the Government.

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FOR THE JUDGE ADVOCATE GENERAL
BY: *[Signature]*
DATE: 12 APR 1953

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the Government. The stated policy applies not only where legal claims for compensation may arise from performance of the services, but also where the circumstances surrounding the proffer, such as appear present in the instant case, support a reasonable possibility that the services may provide the basis for seeking remedial legislation from the Congress. This office is therefore of the opinion that the services in question should not be accepted by the Department of the Army. In view of this conclusion, it is unnecessary to consider the extent to which such persons could exert claims against the Government by reason of disability or death resulting from participation in the proposed experiments, or whether benefits on life insurance for the said participants may be paid from appropriated funds.

Contractors' employees. The applicability of the three questions considered in the prior memorandum of this office to contractors' employees is considered below:

(1) Legality of employment. The authority of the Secretary of the Army to contract for services necessary to effectuate research and development activities is contained in section 104 of the act of 10 July 1957 (62 Stat. 322; 5 U.S.C. 235a), quoted in subparagraph 2a of the prior memorandum of this office. There appears to be no provision of law which would prevent a contractor from employing his personnel upon acceptance of the nature contemplated. In the literal sense, no contractual acceptance of the services in question by the Government is implied as the private relation of such an employee is with the contractor rather than the Government.

(2) Claims against the Government. Generally, benefits to which a private employee may become entitled by reason of death or disability resulting from his employment are payable under State, rather than Federal, laws, with the exception of persons covered by the survivor's insurance provisions of the Social Security Act (49 Stat. 323), as amended (42 U.S.C. 402). In some situations the employee may have remedies against his employer under State workmen's compensation or other laws. It is not possible to generalize upon the right of such an employer, where he is a Government contractor, to claim reimbursement from the Government for additional costs by reason of liability to his employees incurred in this regard, as this depends upon the terms of each individual contract. The question of whether any additional rights against the employer-contractor may result from the death or disability of employees participating in biological warfare experiments, by reason of the hazardous nature of the experiments, is likewise not susceptible of any general statement, due to the numerous factors involved. Insofar as claims by such employees against the Government where the disease or injury results from a negligent or wrongful act are concerned, the comments in subparagraph 2b of the prior memorandum of this office are

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applicable. Such persons would not be disqualified from prosecuting claims against the Government under the Federal Tort Claims Act (28 U.S.C. 2671 et seq.). (See also AR 25-70, 2 Mar 1951.)

(3) Purchase of life insurance. In cost-reimbursable type contracts, the expense of maintaining group accident and life insurance plans may be an allowable item of cost under the contract (ASPR 15-204(p)). Group life insurance plans provided voluntarily to contractors' employees on a reimbursable basis are subject to review by heads of procuring activities to determine that greater benefits are not being provided under the cost-reimbursement type contract than those provided to employees under the contractor's regular commercial operations (ASPR 10-351). In special cases, life insurance for employees may be authorized by heads of procuring activities (ASPR 10-302; ASPR 302) even in fixed-price contracts (ASPR 10-301). In order to be applicable, cost principles must be set forth or incorporated in a cost-reimbursement contract (ASPR 15-102). It will be seen from the above that, if a contractor obtains insurance on the lives of his employees while participating in the proposed biological warfare experiments, he may be reimbursed for the expenses involved only where the contract is of a type providing reimbursement and the terms thereof allow recovery as an item of cost.

Regular and fee-basis employees. The stated category comprehends all persons paid from appropriated funds for intermittent services, as distinguished from regular, full-time employees. For example, the Secretary of the Army may procure the temporary or intermittent services of experts or consultants, including stenographic reporting services, without regard to civil service and classification laws at rates not to exceed \$50 per diem (sec. 15, act of 2 Aug 1946 (60 Stat. 812; 5 U.S.C. 55a); sec. 601, Department of Defense Appropriation Act, 1953 (Pub. Law 488, 82d Cong.); see CFR 17.6, par. 6-3). The employment of experts and consultants either on a per diem basis or without compensation is also authorized by section 710, Defense Production Act of 1950 (61 Stat. 819; 50 U.S.C. App. 2160). (See CFR 17.6, par. 6-3.) The Secretary of the Army may also employ architects, engineers, and other technical and professional personnel on a fee basis, without regard to classification laws (sec. 2, act of 7 Aug 1939 (53 Stat. 1240; 5 U.S.C. 221)).

In general, the employment status of such persons must be determined individually from the statutory authority under which they are employed and the terms and conditions of their employment agreements. In some cases it will be found that their status is not that of employees, but of contractors furnishing services to the Government at agreed contract prices. The following observations are made upon the applicability

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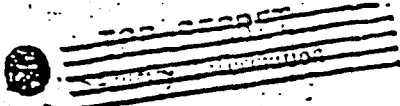
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of the three questions considered in the prior memorandum of this office to the category of persons under consideration:

(1) Legality of accepting volunteers. The terms of the statutory authority for the employment and the provisions of the employment agreement must be inspected in each case to determine whether the particular individual is an employee subject to detail or assignment upon the proposed experiments, or whether his employment is limited to other specific objects. If his employment upon the project is not authorized, it would appear that acceptance of his services for the purpose on a voluntary basis would be prohibited by the considerations discussed in subparagraph 2a, above.

(2) Claims against the Government. The Federal Employees Compensation Act (39 Stat. 742 et seq.), as amended (5 U.S.C. 751 et seq.), is applicable to "all civil officers and employees" of the Government and all "persons rendering personal services of a kind similar to those of civilian officers or employees of the United States... for or without compensation or for nominal compensation, in any case in which acceptance or use of such services is authorized by an Act of Congress in which provision is made by law for payment of the travel or other expenses of such person." The foregoing broad coverage of the act would appear to include most irregular and fee-basis employees. However, the administration of the benefits in question are within the province of the Bureau of Employees Compensation, Department of Labor, and only that agency may provide a definitive ruling with respect to coverage of the individuals in question. With the foregoing reservation, the views of this office set forth in subparagraph 2b of the prior memorandum would appear equally applicable to irregular and fee-basis employees.

(3) Purchase of life insurance. The Comptroller General has approved the payment of surgical and hospitalization expenses of a field employee injured while engaged upon flood control work (3 Comp. Gen. 57 (1923)), on the ground that "the employee's compensation was not fixed by law but was subject to administrative discretion, since, otherwise, payment of the expense by the Government would constitute payment of additional compensation, which is prohibited by section 1753, Revised Statutes" (29 Comp. Gen. 175 (1948)). Subject to such restrictions and limitations as may appear in the statutory authority under which he is employed, it would appear from the foregoing that the Government may legally bear the expense of premiums upon the life of an irregular or fee-basis employee whose rate of compensation is not fixed by law or regulations. In this regard, it may be advisable for the Government to provide an additional allowance to the employee for financing such



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private insurance arrangements as he may wish to make rather than to undertake direct negotiations with insurance carriers for the desired coverage.

FOR THE JUDGE ADVOCATE GENERAL:

Robert H. McCay

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