



**STATE OF VERMONT
OFFICE OF THE STATE AUDITOR**

To: Chris Cole, Secretary of the Agency of Transportation
Keith Flynn, Commissioner of the Department of Public Safety
Date: 23 September 2016
Re: Personal Services Contract with DPS and AOT

Introduction

Following a whistleblower's allegation, the State Auditor's Office reviewed some aspects of a contract managed by the Department of Public Safety from 2013 to 2015 and by the Agency of Transportation (AOT) from 2015 to 2016. The allegations were that invoices were insufficiently detailed, and that the State inappropriately paid for the contractor's insurance.

We found that although the contractor's invoices lacked detail other than hours worked and miles driven, they were accompanied in each case by timesheets and reports containing narrative descriptions of the work done and travel undertaken. This fulfilled the contractual requirements.

The State paid for the contractor's liability and automobile insurance, which, according to an Assistant Attorney General is unusual but not prohibited.

Thus, we found the whistleblower's specific allegations to be unsubstantiated. However, while investigating them we noticed some other weaknesses in the management and classification of this contract.

Background

This contract¹ was awarded in June 2013, by the Department of Public Safety for "liaison with law enforcement" related to the Governor's Highway Safety Program (GHSP), to a retired state police officer. In May 2015 a contract amendment was executed transferring the contract to the Agency of Transportation, extending its duration from two to three years, and increasing its maximum value by 50%, from \$159,000 to \$239,000.

According to VISION, the total paid to the contractor was \$225,000.

¹ Contract number 24500, changed to PS0414 when the contract was transferred to AOT.

Observations

1. Unauthorized Increase in Hourly Rate

The contract specified a rate of pay of \$34 per hour. In June or July 2015, shortly after the contract transferred to AOT, the contractor started invoicing at \$40 per hour. These invoices were approved and paid.

AOT personnel stated that the increase in the hourly rate was implied by the change to the contract limit. We do not believe this is correct: the contract limit was increased by 50%, in proportion to the extension of the contract duration by 50%. Moreover, the contract amendment does not address the hourly rate, and states “Except as modified by this amendment all other provisions of the original contract dated June 6, 2013, shall remain unchanged and in full force and effect.”

AOT personnel also stated that the pay rate increase was approved by GHSP staff. Our review of 17 of the 22 invoices paid during the third year of the contract identified 1,472 hours billed at this unjustified higher rate, for a total observed overbilling of \$8,832.

2. Insurance

- a. State Paid for Contractor’s Auto Insurance: The contractor invoiced the State for reimbursement of auto insurance costs. The contract required (in Attachment C) automotive liability insurance for vehicles used in connection with the contract, and permitted (in Amendment 1) invoicing for “required insurance policies costs.”

The support that the contractor submitted with his invoices did not make it clear whether the auto insurance was for his private vehicle or for one used exclusively in his business, nor whether the invoice was only for the incremental cost of complying with the contract’s requirements.

- b. Payment of Contractor’s Insurance Was in Excess of the Contracted Annual Maximum: DPS paid \$500 of insurance expenses that were billed in the contractor’s very first invoice, along with \$146 in September 2013, both at a time when the contract did not require such payments. Thus, DPS paid \$646 of insurance expenses when not permitted by the contract. A further invoice for insurance expenses (in December 2013) was denied until after the execution in January 2014 of an amendment permitting the payment of a maximum \$1,200 per year for insurance expenses (the amendment did not make it clear whether it was intended to be retroactive). According to our review of 52 of the 71 invoices paid, DPS paid insurance expenses of \$1,278 in the first year of the contract (including the \$646 above), exceeding the \$1,200 annual maximum permissible under the contract. After the contract transferred to AOT, the Agency paid \$1,630 of insurance expenses relating to the third contract year in a single invoice. Our review of 52 of the 71

invoices paid identified an additional \$819 of insurance expenses paid by AOT in the third year, for a total of \$2,449, an excess of \$1,249 over the specified annual maximum.

- c. State Paid Installment Financing Costs: The contractor invoiced for reimbursement of insurance costs that he had chosen to pay by installments, thereby adding a financing charge of \$70 a year to the total paid by the State. Department of Finance & Management's policy is to take advantage of early payment discounts when state agencies pay invoices. This policy does not apply directly to contractors' purchasing decisions, but in this case the State clearly incurred a small additional cost as the result of the contractor's decision.

3. Multiple Factors Suggest an Employment Relationship Existed

The State paid for the contractor's trade name registration, business insurance, membership in a professional organization, and office equipment. Moreover, based on our review of invoices in the first year of the contract, the contractor invoiced on average almost 39 hours per week, which appears equivalent to a full-time position.

The ABC test, established in 21 V.S.A. §1301(6)(B), is used to determine whether an employment relationship exists. Further, per state Bulletin 3.5, Procurement and Contracting Procedures, unless all three of the ABC conditions are met (the agency will not exercise supervision, the service provided is not of the kind usually provided by the agency, and the contractor customarily engages in an independently established occupation or profession) an independent contractor relationship is not appropriate and an employment option is recommended. In this case, the facts suggest that the contractor did not have an independently established business and that the State was the contractor's sole customer. As a result, there is potential for the agency to have employment tax liabilities.²

Recommendations

We recommend that the Secretary of AOT direct the GHSP staff to determine the amount of overpayment due to the contractor's overbilling of insurance expenses and hourly paid work, and take steps to recover the overpayment.

We recommend that the Secretary of AOT direct the GHSP staff to assess whether the law enforcement liaison position was misclassified as an independent contractor, and if so, determine whether the agency has employment tax liabilities.

² While the State uses the ABC test to determine who is an employee versus independent contractor, the IRS assesses the degree of control and degree of independence using many factors. Because of the number of factors and the level of judgment regarding the degree of control and independence, SAO did not assess whether the contractor would be considered an employee or independent contractor for purposes of the IRS.