

**DOCUMENT RESUME**

**08099 - [C3288405]**

**[Protest Alleging Ambiguous Solicitation Clause]. B-192161.  
November 21, 1978. 8 pp.**

**Decision re: Cerberonics, Inc.; by Robert F. Keller, Deputy  
Comptroller General.**

**Contact: Office of the General Counsel; Procurement Law I.**

**Organization Concerned: Department of the Navy.**

**Authority: B-184495 (1976); B-183040 (1975); B-186700 (1977);**

**B-189410 (1977); B-186513 (1977); B-188117 (1977); A.S.P.R.**

**3-805.4; A.S.P.R. 22-102; F.P.H. Letter 300-8; F.P.H. Letter  
300-12.**

A protester alleged that a solicitation clause was ambiguous and created a proscribed personal services contract and that a proposed amendment did not correct solicitation defects. The clause which permitted substitution of personnel during the first 90 days of contract performance under certain circumstances did not usurp the contractor's supervisory authority to a degree which would create a personal services contract. Solicitation provisions were not ambiguous since they were subject to only one reasonable interpretation. The amendment which would have no substantial impact on ranking of offerors should be sent only to those in the competitive range.  
(HTW)

**DECISION**



*R. K. ... PI-1*  
**THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548**

*8405*

**FILE: B-192161**

**DATE: November 21, 1978**

**MATTER OF: Cerberonics, Incorporated**

**DIGEST:**

1. RFP clause which permits substitution of personnel during first 90 days of contract performance only in event of sudden illness, death, or termination of employment does not usurp contractor's supervisory authority to such degree that proscribed personal services contract is created.
2. Amendment to RFP issued after establishment of competitive range and which has no substantial impact on ranking of offerors should be sent only to offerors in competitive range.
3. RFP provisions are not ambiguous if they are subject to only one reasonable interpretation.

The Department of the Navy (Navy) issued request for proposals (RFP) NOO600-78-R-0814 for the procurement of management engineering and technical support services in support of a number of major weapon systems acquisitions programs. The RFP contained the following "Substitution of Personnel" clause.

"(a) The Offeror agrees to assign to any ordered task those persons whose resumes were submitted with his proposal who are necessary to fill the requirements of the task order. No substitutions shall be made except in accordance with this clause.

"(b) The Offeror agrees that during the first ninety (90) days of the contract performance period no personnel substitutions will be permitted unless such substitutions are necessitated by an individual's sudden illness, death, or termination of employment.

In any of these events, the Contractor shall promptly notify the Contracting Officer and provide the information required by Paragraph (c) below. After the initial ninety (90) day period, all proposed substitutions must be submitted, in writing, at least fifteen (15) days, (thirty (30) days if security clearance is to be obtained), in advance of the proposed substitutions to the Contracting Officer, and provide the information required by Paragraph (c) below.

"(c) All requests for substitutions must provide a detailed explanation of the circumstances necessitating the proposed substitutions, a complete resume for the proposed substitute, and any other information requested by the Contracting Officer needed by him to approve or disapprove the proposed substitution. All proposed substitutes must have qualifications that are equal to or higher than the qualifications of the person to be replaced. The Contracting Officer or his authorized representative will evaluate such requests and promptly notify the Contractor of his approval or disapproval thereof.

"(d) The Contractor further agrees to include the substance of this clause in any subcontract which he awards under this contract."

Cerberonics, Incorporated (Cerberonics), filed a protest with the procuring activity alleging that the above-quoted clause was ambiguous. The protest was denied; however, the procuring activity stated that it would issue an amendment to the RFP exempting non-key personnel from the "Substitution of Personnel" clause. Cerberonics subsequently filed a protest with our Office. The bases of protest here are:

1. The "Substitution of Personnel" clause is ambiguous. It may be interpreted to mean that all 32 employees required for contract performance be employees of the offeror at the date of award. If this is a correct interpretation, the clause unduly restricts competition because only the incumbent contractor could comply.

2. The clause may also be construed to mean that the contractor may substitute personnel during the first 90 days of contract performance for good cause with the prior approval of the contracting officer. If substitution during this period may only be made in the event of sudden illness, death, or termination of employment of an incumbent employee, the clause creates a proscribed personal services contract, restricts competition, and precludes an upgrading of personnel.

3. Moreover, GAO implied in HEW Es Co., Incorporated, B-183040, April 18, 1975, 75-1 CPD 239, that an illegal personal services contract would be created if an offeror were required to hire and assign to a contract all those persons for whom resumes had been submitted.

4. The Navy intends to provide the proposed amendment to the RFP, exempting non-key personnel from the "Substitution of Personnel" clause, only to those offerors which are within the competitive range. This limited distribution of the proposed amendment is violative of section 3-805.4(b) of the Armed Services Procurement Regulation (ASPR) (1976 ed.) (now the Defense Acquisition Regulation) and case precedent which require that offerors be able to compete on an equal footing. See Union Carbide Corporation, B-104495, February 26, 1976, 76-1 CPD 234. Further, the proposed amendment does not correct the defects in the solicitation.

The Navy states that resumes are required for evaluation purposes. The proposed employees need not be actual employees of the offeror. However, if the proposed personnel are not employees of the offeror, an agreement signed by the individual must accompany the resume which obligates the person to accept employment with the offeror in the event of contract award.

During the first 90 days of contract performance, substitution of key personnel will be permitted only in the event of sudden illness, death, or termination of employment. The first 90 days of contract performance is critical. The awardee is obligated to provide the key personnel offered in order to prevent diminution of the proposed quality of services. Success of the project is dependent on continuity of personnel. No personal services contract is created because Navy personnel will not supervise contractor employees.

The Navy states further that a total of 503 points could have been achieved by offering qualified personnel. A total of 401 points could have been obtained by offering qualified key personnel. The remaining 102 points could have been obtained by proposing qualified non-key personnel. Key personnel include the project engineer, senior engineer, engineer and programmer. The category of non-key personnel encompasses the junior engineer, engineering aide, technical writer/editor, draftsman, technical typist and clerk typist.

The Navy contends that it is doubtful that there would be any discernible change in the ranking of the offerors if all offerors were given an opportunity to submit revised proposals based on the proposed change of exempting non-key personnel from the "Substitution of Personnel" clause or that a firm that did not submit a proposal would now submit a proposal as a result of the exemption for non-key personnel. It follows that no useful purpose would be served by providing each offeror with the proposed amendment and repeating the lengthy technical evaluation procedure. Consequently, the proposed amendment will be furnished only to those offerors in the competitive range.

Moreover, the Navy contends that the awardee is still required to offer non-key personnel which will satisfy the qualifications set forth in the RFP; however, the awardee will be relieved of the requirement to have proposed substitutes of non-key personnel evaluated and approved by the contracting officer.

Section "D" of the RFP entitled "EVALUATION FACTORS FOR AWARD" provides as follows:

"Each resume shall also either state that the individual is a full time employee of the firm or have attached to it a signed employment agreement stating that the individual will join the firm in the event of contract award."

As the above-quoted provision indicates, the 32 required personnel are not required to be employees of the offeror at the date of award. Consequently, it is our opinion that it is not a practical impossibility for offerors other than the incumbent contractor to comply with the personnel commitment requirement of the contract.

With regard to the allegation concerning the creation of a proscribed personal services contract, we stated in Kelly Services, Inc. - Purchase Order for Secretarial Services, B-186700, January 19, 1977, 77-1 CPD 356, that in order to assist agencies to determine whether a contract establishes an illegal employer-employee relationship between the Government and contractor employees, the Civil Service Commission has listed six elements in FPM letter 300-8, dated December 12, 1967, and 300-12, dated August 30, 1968. The six elements are:

1. The contract is performed at a Government site.
2. The contractor utilizes Government-furnished equipment.
3. The services contracted for are applied directly to an integral effort of the agency.
4. Comparable services, meeting comparable needs, are performed in the same or similar agencies using civil service personnel.

5. The need for the type of service provided can reasonably be expected to last beyond 1 year.

6. The nature of the service, or the manner in which it is provided, requires direct or indirect Government direction or supervision of contractor employees.

We went on to state that the proscribed supervision of contractor employees is frequently evidenced by these six elements. The absence of any one or a number of the elements, however, would not mean that supervision is not authorized by the contract, or present in the actual work performance, but only that there is less likelihood of its existence.

In essence, then, a personal services contract is the procuring of services by contract in such manner that the contractor or his employees are in effect employees of the Government, ASPR § 22-102.1 (1976 ed.). Although there are no definitive rules for characterizing services as personal or non-personal, criteria for recognizing personal service contracts are also set forth in ASPR § 22-102.2 (1976 ed.). The criteria include the nature of the work to be performed and the amount of supervision exercised by the Government.

Although the limited substitution during the first 90 days of contract performance infringes on the traditional supervisory prerogatives to assign personnel to a given task, we do not believe that the elements of Government supervision are present to such an extent that there is an illegal employer-employee relationship between the Government and contractor employees which results in a proscribed personal services contract. The offeror is still at liberty to propose any person which it intends to assign to the contract and, where necessary, propose substitutes with substantially equal qualifications which are required for satisfactory contract performance.

Contrary to Cerberonics' allegation, we did not imply in Hew Es Co., Incorporated, supra, that a personal services contract would be created if an offeror were required to commit personnel for whom resumes had been submitted. In fact, we held in later cases that there was no general rule regarding whether proposed employees must be committed to a contract. QED Systems, Inc., B-189410, December 15, 1977, 77-2 CPD 467. However, if an employment commitment were required, the type of commitment deemed necessary should be unmistakably clear. I Systems, Incorporated, B-186513, January 27, 1977, 77-1 CPD 65.

As noted, Cerberonics contends that the proposed amendment should be sent to all offerors. The case cited by Cerberonics in support of its contention stands for the proposition that an amendment should be sent to all offerors if it is necessary for them to be able to compete on an equal footing. Besides, in the cited case only two offers were submitted, and both offerors were found to be within the competitive range.

ASPR § 3-805.4(b) (1976 ed.) provides that if the competitive range has been established, only those offerors in the competitive range should be sent a copy of any amendment to the RFP, unless the change is so substantial as to warrant complete revision of the solicitation, which is not the case here. In the instant case, the competitive range has been established, and the Navy intends to send the proposed amendment only to the firms in the competitive range. Accordingly, we find no violation of ASPR § 3-805.4(b) (1976 ed.).

Furthermore, we see no indication that offerors did not compete on a common basis. Moreover, we agree with the Navy that in all probability the amendment would neither impact substantially on the rating and ranking of the proposals nor would other prospective contractors, which did not submit a proposal, make an offer, as a result of the proposed amendment to the RFP. In effect, we view the proposed change as de minimis and concur with the Navy that it need be sent only to offerors in the competitive range.

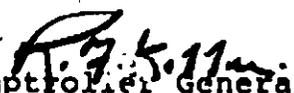
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Sentinel Electronics, Inc., B-188117, September 15, 1977, 77-2 CPD 191. Further, the "Substitution of Personnel" clause is not ambiguous, since in our view it is subject to only one reasonable interpretation.

Moreover, there is no evidence of record to substantiate Cerberonics' unsupported allegation that the "Substitution of Personnel" clause restricts competition because it exceeds the Government's legitimate needs. As noted, the Navy contends that the first 90 days of contract performance is critical.

Based on the foregoing, the protest is denied.

  
Deputy Comptroller General  
of the United States