

Burford



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Four Star Maintenance

File: B-229703

Date: April 7, 1988

---

### DIGEST

Even though a solicitation contains requirements for work in the nature of servicing and maintenance, in addition to construction work, the Service Contract Act does not apply where the proposed contract is not principally for services.

---

### DECISION

Four Star Maintenance protests invitation for bids (IFB) No. DAFK01-87-B-0081, issued by the Department of the Army for painting, flooring, maintenance and repair of military family housing at the Presidio of San Francisco, Fort Baker, Fort Barry, and Fort Mason, California. We deny the protest.

The solicitation divides the work to be performed under a requirements contract into four categories: Basic Maintenance, Additional Maintenance, Flooring, and Painting. Under the Basic Maintenance line item, when a housing unit becomes unoccupied the contractor will enter the unit, inspect all of the items on a checklist, and perform such tasks as replacing missing house numbers, recaulking bathtubs, and securing loose hardware. If more substantial repairs are needed, such as repairing dry rot or replacing damaged woodwork, the contracting officer will order such work as Additional Maintenance. Floor refinishing and painting also will be ordered as needed. Four Star contends that the solicitation improperly classifies all of this work as being subject to the Davis-Bacon Act, 40 U.S.C. § 276(a) (1982). The Davis-Bacon Act generally covers construction activity, as distinguished from service or maintenance work covered under the Service Contract Act, 41 U.S.C. § 351 et seq. (1982). The protester alleges that much of the work under Basic Maintenance and Additional Maintenance will involve service or maintenance, not construction, and that the agency's misclassification of the work inflates the cost

041843

of performance because Davis-Bacon wages are appreciably higher than Service Contract Act wages.<sup>1/</sup> This results, it concludes, in needlessly higher costs to the government.

The Army concedes that some of the Basic Maintenance tasks could constitute maintenance, but contends that others (such as securing loose flooring) are more properly classified as repair work covered by the Davis-Bacon Act. The Army argues that since the types of Basic Maintenance work needed in a particular unit will not be known until the contractor enters the unit, it would be difficult, if not impossible, for the contract to segregate potential Service Contract Act work from the Davis-Bacon Act work. The Army contends that it was therefore not unreasonable for the contracting officer to classify all of the Basic Maintenance work as covered by the Davis-Bacon Act. With respect to Additional Maintenance, the Army contends that this work is not covered by the Service Contract Act because it is not routine maintenance. Cf. Federal Acquisition Regulation § 37.101 (listing routine, recurring maintenance of real property as an activity that may be the subject of a service contract).

The responsibility for determining whether Davis-Bacon Act provisions apply to a particular contract rests primarily with the contracting agency, which must award, administer, and enforce the contract. Dynalectron Corp., 65 Comp. Gen. 290 (1986), 86-1 CPD ¶ 151. In this regard, the determination of whether items of work involve basic maintenance within the coverage of the Service Contract Act, or are more in the nature of construction, alteration, or repair within the scope of the Davis-Bacon Act, is largely a matter of judgment. Yamas Construction Co., Inc., B-217459, May 24, 1985, 85-1 CPD ¶ 599. With respect to repair work, we have recognized that while it may be difficult to determine which Act applies, repair activity that is in the nature of "servicing or maintenance" work rather than "construction activity" should not be considered Davis-Bacon Act work. ITT Base Services, Inc., B-220518.2, Nov. 10, 1986, 86-2 CPD ¶ 541.

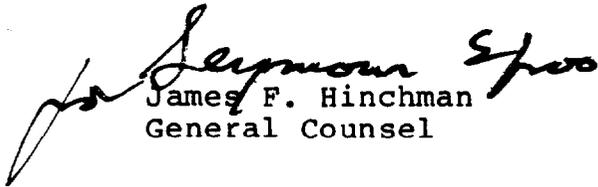
Here, it appears to us that most, if not all, of the tasks listed in the Basic Maintenance checklist are in the nature of maintenance. The same is true of a small number of the Additional Maintenance items. In order for the Service Contract Act to apply, however, the "principal purpose" of

---

<sup>1/</sup> Painting and floor refinishing are not at issue here, and in any event are generally regarded as construction work. RG&B Contractors Inc., B-225925.2, Mar. 10, 1987, 87-1 CPD ¶ 272.

the contract must be the furnishing of services. 41 U.S.C. § 351(a). Even assuming that all of the Basic Maintenance and some of the Additional Maintenance is in the nature of services, we would have no basis for questioning the Army's conclusion that the IFB contemplates a contract principally for construction activity, not services. In this connection we note that the Army estimates that the Basic Maintenance line item will constitute only 15 percent of the total work under the contract. Four Star does not contest this estimate. Adding to this the small amount of services categorized as Additional Maintenance still would not be sufficient to make this a solicitation principally for services such as to trigger application of the Service Contract Act.

The protest is denied.

  
James F. Hinchman  
General Counsel