



The Comptroller General
of the United States

Washington, D.C. 20548

Burkard

Decision

Matter of: W.B. Jolley

File: B-234146

Date: March 31, 1989

DIGEST

Agency contract for aircraft maintenance services does not create illegal employer-employee relationship where the services will not be subject to relatively continuous government supervision and control, and adequate direction is provided to the contractor through detailed written specifications contained in the solicitation.

DECISION

W.B. Jolley protests the issuance by the Army Yuma Proving Ground of invitation for bids (IFB) No. DAAD01-89-B-0201 for helicopter maintenance services. Jolley contends that the award under the IFB would result in a prohibited personal services contract.

We deny the protest.

The IFB was issued December 22, 1988, and, by amendment, bid opening was scheduled for Feb. 16, 1989.^{1/} The IFB requires the successful contractor to perform aviation unit maintenance on 5 UH-1H helicopters for a 6-month base period beginning April 1, 1989, with options to extend for an additional 4 years. The IFB contemplates a firm, fixed-price level-of-effort contract. Bidders were to submit prices on a monthly basis for specified proposed positions such as site foreman, aircraft mechanic, and tool

^{1/} Prior to issuing the IFB, the contracting officer prepared a determination of non-personal services stating, among other things, that the government will not retain the right to supervise the work of contractor employees, either directly or indirectly, that the government will have no part in the hiring and discharge of contractor employees other than as necessary for misconduct or security reasons, and that the government will not reserve the right to prepare work schedules for contractor employees.

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and parts room attendant. In addition, bidders were to submit hourly rates for unscheduled hours as estimated by the agency.

Section H of the IFB states: "The government and the contractor understand and agree that the services to be delivered under this contract by the contractor to the government are non-personal services and the parties recognize and agree that no employer-employee or master-servant relationships exist or will exist under the contract between the Government and the contractor's employees." Section H provides further that "contractor's employees will act and exercise personal judgment and discretion on behalf of the contractor." Moreover, section C of the IFB, which contains a detailed description of the work to be performed, states that the contractor shall provide management and supervisory functions.

The protester argues that the IFB contemplates a personal services contract because, among other things, the government provides the workplace and the tools to be used and establishes the workhours and the work to be done. It argues, essentially, that the presence of certain elements listed in Federal Acquisition Regulation (FAR) § 37.104(d) (FAC 84-40) as factors to be considered in assessing whether a proposed contract is personal in nature renders the contract a personal services contract.^{2/} We do not agree.

A personal services contract is characterized by the employer-employee relationship it creates between the government and the contractor's personnel. Logistical Support, Inc., B-224592, Dec. 23, 1986, 86-2 CPD ¶ 709; FAR § 37.104(a) (FAC 84-40). Each contract arrangement is judged in light of its particular circumstances. Monarch Enterprises, Inc., B-233303 et al., Mar. 2, 1989, 89-1 CPD ¶ _____. While the FAR enumerates various factors to be considered in making this judgment, including whether performance is on site and whether principal tools are furnished by the government, it provides that the "key question" in determining whether a contract is for personal services is: "Will the government exercise relatively

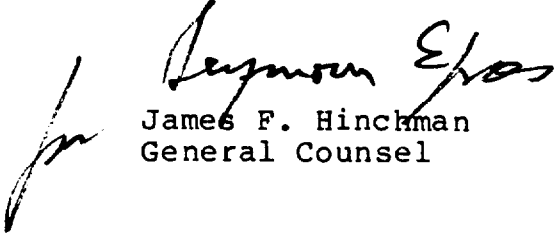
^{2/} Initially, we note that the protester has not demonstrated that its direct economic interest would be affected by the award of the contract under its existing terms. However, the agency has not challenged the protester's status as an interested party under our Bid Protest Regulations. See 4 C.F.R. §§ 21.0(a) and 21.1(a) (1988). We therefore will consider this matter on the merits based on the record as presented to us.

continuous supervision and control over contractor personnel performing the contract." FAR § 37.104(c)(2) (FAC 84-40).

We have carefully reviewed the record, and we find no basis to conclude that the procurement will establish an employer-employee relationship so as to create an unauthorized personal services type contract. While, as stated above, the FAR provides that performance on site and the use of principal tools and equipment furnished by the government are elements to be used as a guide in assessing whether or not a proposed contract is personal in nature, we do not think that the presence of these factors per se renders the contract a personal services contract. Rather, we think that these factors relied upon by the protester are to be used as indicia of continuous supervision and control of contractor personnel by the government. In this case, the protester has failed to show how the presence of these factors demonstrate such supervision and control.

First, many essential characteristics of the employer-employee relationship are not present here in the relationship between the government and contractor employees. Factors such as the contractor's right to hire and fire employees, to grant or deny individual leave requests, and to reassign employees negate the existence of a personal services contract as defined in the FAR. Second, and most importantly, our review of the language contained in the IFB indicates that the contractor is solely responsible for the supervision, management, and inspections of its employees' work under the contract. Specifically, the terms of the IFB provide that contractor employees, not the government, have the duty of overseeing employees and coordinating performance with the contracting officer's representative. See Americorp, B-231644, Oct. 6, 1988, 88-2 CPD ¶ 331. Also, our review indicates that adequate direction is provided to the contractor through detailed written specifications contained in the solicitation. We therefore do not find that the government will exercise relatively continuous supervision and control over contractor personnel performing the contract.

Accordingly, the protest is denied.



James F. Hinckman
General Counsel