

JUN 9 2003



CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Ira E. Hoffman, Esquire
Brian T. Scher, Esquire
Grayson, Kubli, and Hoffman
1568 Spring Hill Road
Suite 300
McLean, Virginia 22102

Re: **Applicability of the Service Contract Act
to Request for Proposal (RFP) for In-Store Deli/Bakery Operations,
DECA02-02-R-0001**

Dear Messrs. Hoffman and Scher:

This is in response to your November 26, 2002 letter, on behalf of the Deli/Bakery Focus Group, requesting a final ruling as to the applicability of the McNamara-O'Hara Service Contract Act (SCA) to the referenced procurement with the Defense Commissary Agency (DeCA). It is your client's contention that the RFP improperly incorporates the SCA rather than the Walsh-Healey Public Contracts Act (PCA). After careful consideration of all of the available information in this matter, we have concluded, as set forth more fully below, that we concur with DeCA that the RFP and subsequent contract is subject to the SCA.

As you are aware, the SCA applies to every contract entered into by the United States or the District of Columbia, the principal purpose of which is to furnish services through the use of service employees. Contractors performing on Federal service contracts must observe minimum wage and safety and health standards, and maintain certain records. Service employees on covered contracts in excess of \$2,500 must be paid not less than the monetary wages and fringe benefit issued by the U.S. Department of Labor for the contract work. In comparison, the PCA applies to contracts, which exceed or may exceed \$10,000, entered into by any agency or instrumentality of the United States for the manufacture or furnishing of materials, supplies, articles, or equipment. The PCA establishes minimum wage, maximum hours, and safety and health standards, and requires the keeping of certain records. Under the PCA, covered employees must be paid not less than the current Federal minimum wage of \$5.15 per hour.

The Department solicited information from DeCA as well as you and your client regarding this matter. In addition, we held several meetings with you,

representatives from the Deli/Bakery Focus Group, and officials from the contracting agency to further our understanding of these contracts and your

position regarding coverage. In making this determination, we have carefully considered all this documentation as well as information contained in the General Accounting Office File Number B-291384, dated November 20, 2002, that dismissed your protest on this same issue.

In making a determination as to whether the RFP at issue is subject to the SCA, we must make a determination as to the principal purpose of the proposed contract. If the principal purpose of a contract is to provide services through the use of service employees, the contract is SCA covered. On the other hand, if the principal purpose of a contract is not to provide services, and any services that may be performed are only incidental to the performance of a contract for another purpose, the contract is not covered. However, no hard or fast rule can be laid down as to the precise meaning of the term principal purpose. The SCA is intended to be applied to a wide variety of contracts and the nomenclature, type, or particular form of the contract used by the procurement agency is not a determinative factor for coverage. The principal purpose of a contract is determined on the basis of all of the facts in each particular case. Even where tangible items of substantial value are important elements of the subject matter of the contract, the facts may show that they are of secondary importance to the furnishing of services in a particular case. See 29 CFR 4.111(a).

In determining the principal purpose of a contract, the most important point of inquiry is the RFP and the contract documents, which have been furnished to us by DeCA. According to DeCA, in 2002 it revised the deli/bakery work statement to emphasize performance-based service contracts that include an "award term plan." This approach affords contractors the discretion to determine how to satisfy the performance objectives while maintaining appropriate quality and obligates DeCA to pay only for services that meet these criteria. These documents show the solicitation to be a fixed price requirements type contract with a base performance period of approximately two years and up to a six option/award periods.

This "Performance Work Statement For Commissary Delicatessen and Bakery Operations" contained in the RFP describes in Paragraph 1 the military commissary "...as a Government facility providing resale items and other merchandise to authorized individuals, termed 'patrons.' It is a facility designed and operated similar to commercial supermarkets. The commissary's goals are to provide a cost savings for patrons when compared to commercial markets, to provide courteous and informative assistance to patrons, to offer a variety of items in quantities to satisfy patron demands, and to make the items available to patrons in a clean, safe, and wholesome environment." Performance Work Statement, Solicitation Number DeCA 02-02-R-001, 5/23/02, Attachment 1, Paragraph 1.1 (copy enclosed).

Paragraph 1.1.1 of the Performance Work Statement further provides that the contactor shall furnish all the personnel, supervision, food products and other items that are necessary to operate a well-stocked deli and/or bakery resale operation. Such resale operation, it continues, shall offer a variety of items in quantities to satisfy customer demands and maximize customer satisfaction at the relevant locations. The Performance Work Statement further states that “[t]he contractor shall provide fast, friendly, courteous services that result in high levels of customer satisfaction and increased sales.” Id at Paragraph 1.1.2.

Finally, Paragraph 2 of the Performance Work Statement discusses staffing and personnel responsibilities. In particular, Paragraph 2.1 requires that the contractor “provide an adequate number of personnel possessing the ‘people skills’ and food handling skills, knowledge, training, licensing, and certifications needed to satisfactorily perform all work required by this contract.” Id at Paragraph 2.1. In Paragraph 2.2, DeCA reserves the right to exclude any personnel whose conduct is deemed “inconsistent with the best interests of the government.” Id at Paragraph 2.2. In such a case, the contractor is responsible to continue the performance of the contract services.

The Performance Work Statement demonstrates that this RFP and subsequent contract is not simply for the supply and delivery of deli foodstuffs and baked goods. Rather, this new contract is for the operation of full service delicatessen and bakery operations within military commissaries. As provided in Paragraph 7 of the RFP, DeCA provides virtually all of the equipment and packaging supplies required on these contracts.

Also, the Award Term Plan for In-Store Deli/Bakery Operations is the tool by which DeCA can assess contractor performance in determining whether to extend the contract for an additional term. The major factors for assessing a contractor’s performance are customer service, continued savings to patrons, increased sales, and product satisfaction based upon variety, quality, mix, etc. The customer service component is based upon “trained, qualified personnel who can provide fast, courteous service to patrons that results in high levels of customer satisfaction.” Award Term Plan, Solicitation Number DeCA 02-02-R-001, 5/23/02, Modification 0004, Attachment 9, Appendix A (copy enclosed).

DeCA reports that a contractor is expected to perform the following types of functions to operate the delicatessens and bakeries:

- Service customers by taking orders, and weigh, slice, and package products for patrons;
- Prepare, merchandise, and market products;
- Prepare deli items, such as party trays, sandwiches and rotisserie-cooked chicken;

- Prepare bakery items that may involve thawing, mixing, proofing, in-store baking, and cake decorating;
- Perform cleaning processes to ensure a sanitary operation; and,
- Manage inventory, by ordering and storing products to ensure adequate and quality stock levels to meet patron demands.

This list clearly shows that the requirements of this contract are far more extensive than simply supplying bread and baked goods to commissaries. As stated by Ms. Harrell, Chief, Acquisition Management for DeCA, with regard to such contracts "...the contractor is actually performing a portion of the commissary's retail operation through the use of service employees. The contractor has total responsibility for running the instore operation, to include providing the products and servicing commissary patrons during all store hours." DeCA memo dated April 1, 1999 (copy enclosed). DeCA estimates that each location will be required to employ approximately five to seven employees to satisfy the service requirements of the contract. These employees will likely be classified as "food service workers" and "bakers," typical service occupations contained in the SCA "Directory of Occupations" and wage determinations. The Department has traditionally treated contracts such as these as subject to SCA.

It is the position of the Deli/Bakery Focus Group that this contract is principally to furnish supplies because the cost of food items and other supplies amounts to between 60 and 65% of the total costs associated with the deli/bakery operations contract. Although the Focus Group does not provide specific data to support these costs figures, the Department agrees that such percentages appear reasonable based on DeCA contract requirements that the contractor provide premium quality tier products. In further support of its arguments, you quote extensively from a January 16, 1997 DeCA memorandum (copy enclosed) which asserts that the deli/bakery contracts be classified as supply contracts because, among other arguments, DeCA is buying a product, not a service.

However, Department of Labor Regulations, 29 CFR Part 4.131 state that "[i]f the principal purpose of a contract is to furnish services in the performance of which service employees will be used, the Act will apply to the contract, in the absence of an exemption, even though the use or furnishing of nonlabor items may be an important element in the furnishing of the services called for by its terms." Thus, while the dollar amount spent in providing food items and other materials is significant, it does not diminish the substantial and significant service requirements previously described in this letter that are a part of the RFP. It is clear that these service requirements are fundamental elements required for operating a full service deli/bakery. As stated by DeCA in an attachment to its January 6, 2003 submission – "The contractor is expected to manage and

operate a multi-million dollar operation¹ within the commissary facility.... Service is a major part of the contract from the onsite full-time bakery attendants to the management of the operation to meet or exceed the performance assessment metrics." (Emphasis added). In addition, we note that Ms. Harrell's previously referenced memorandum dated April 1, 1999 rejected the conclusions drawn in the 1997 memorandum regarding the possible reclassification of deli/bakery operations from service to supply contracts. Ms. Harrell's memorandum further notes that the deli/bakery operations are very different from the "straight to the shelf" effort associated with vendor stocked items and directs that the SCA must continue to be applied to deli/bakery operations.

Accordingly, we affirm DeCA's decision that the referenced RFP and subsequent contract is principally to provide services through the use of service employees and is subject to the labor standards provisions of the SCA. A petition for review of this final decision may be filed with the Department of Labor's Administrative Review Board by an aggrieved party within sixty (60) days of the date of this final ruling in accordance with the Regulations, 29 CFR Part 8, copy enclosed.

Sincerely,

Tammy D. McCutchen
Administrator

Enclosures

¹ DeCA reports that the deli/bakeries located in the six commissaries covered by the referenced RFP had combined sales of \$5,634,415.57 in the 12 month period ending in June, 2002.