INDEPENDENT CONTRACTOR VS. PERSONAL SERVICES CONTRACTOR

The Federal Acquisition Regulation ("FAR") makes a distinction between an independent contractor and a personal services contractor. "A personal services contract is characterized by the employer-employee relationship it creates between the Government and the contractor's personnel." FAR 37.104(a). In *John Douglas Burke v. Sec'y of Health and Human Services,* No. 2024-1019 (Fed. Cir. Oct. 25, 2024), the Federal Circuit examined this distinction and provided helpful guidance.

In September 2014, Burke began working with the National Institutes of Health ("NIH") under a series of written purchase orders. These were each written on a two page Optional Form 137 that identified Burke as a contractor and the National Human Genome Research Institute as the administrative office. Follow-on orders continued performance through Sept. 30, 2021. In June 2022, Burke submitted a certified claim for $414,493, seeking the difference between his actual pay and what he believed he should have been paid—asserting that he actually worked as a personal services contractor and should have been paid like a federal employee, not as an independent contractor. He also asserted that the contracts were void or voidable because the provisions in his purchase orders were so minimal, and that the contracts were therefore not enforceable, so he should be paid under an implied-in-fact contract.

The Contracting Officer denied Burke's appeal and also, on motion of the NIH, dismissed the appeal for failure to state a claim because the appellant did not plausibly allege that his contracts were personal services contracts.

The Federal Circuit first examined FAR 37.104, noting that the employer-employee relationship was the key to this dispute. "An employer-employee relationship under a service contract occurs when, as a result of (i) the contract's terms or (ii) the manner of its administration during performance, contractor personnel are subject to the relatively continuous supervision and control of a Government officer or employee. FAR 27.104(c)(1). The Court noted that the principal determinant is the degree of supervision the contracting employees are subject to under the contract.

Nothing in the purchase orders subjected Burke to the level of government supervision necessary to render them personal service contracts. Nothing in the contracts indicated that there was direct supervision of his work.

On appeal, Burke made four arguments, all of which the Court refuted:

(1) The Board incorrectly focused its analysis on the supervision issue-rejected because of the FAR and caselaw.
(2) The Statement of Work ("SOW") showed he was subject to supervision by NIH staff, but this was rejected because the SOW was never attached to the complaint or incorporated into the purchase orders.
(3) The Board overlooked the issue of whether NIH was authorized to issue personal services contracts was rejected because no statute was offered that said this; and
(4) Burke challenged the purchase orders as facially illegal for not incorporating any FAR clauses—rejected because the orders were not too indefinite to enforce because this type of invalidation is disfavored when performance is completed and because mandatory

FAR clauses could be read into the contract by the *Christian* doctrine (if a statute requires the inclusion of a clause, it will be read into the agreement, whether in the contract or not).

The Court affirmed the Board's grant of a motion to dismiss for failure to state a claim.

Takeaway. If you are performing under a simple contract that doesn't even include a statement of work, ask the agency for some type of a statement of work. Had Burke received a statement of work, and had it delineated the nature of supervision, this litigation might never have occurred.

For other helpful suggestions on government contracting, visit:

Richard D. Lieberman's FAR Consulting & Training at https://www.richarddlieberman.com/, and Mistakes in Government Contracting at https://richarddlieberman.wixsite.com/mistakes.