

## **Appropriate Role of Contractors Supporting the Government Working Group: Presentation of Recommendations 12/16/2005**

1. OMB should issue new guidance updating the concepts of Inherently Governmental (IG) work to incorporate two types of activities:

A. Common activities across the Government that need to be done by Civil Servants, defined in the FAR, as a matter of policy: a function that is so intimately related to the public interest as to mandate performance by Government employees. This definition is a policy determination, not a legal determination. An inherently governmental function includes activities that require either the exercise of discretion in applying Government authority, or the making of value judgments in making decisions for the Government. Governmental functions normally fall into two categories: the act of governing, *i.e.*, the discretionary exercise of Government authority, and monetary transactions and entitlements.

B. Using OMB criteria, Agencies should determine work that is critical to their core missions that should only be performed by Government employees.

2. Laws and regulations need to be changed to allow greater flexibility in the use of the blended workforce. The current statute for Personal Services Contracts only gives slight latitude in the use of the mechanism; we need more latitude in the ability to use PSC while maintaining areas where it should be restricted in order to more effectively manage the blended workforce. Moreover, we need guidance on the appropriate use and management of the blended workforce (*i.e.* when should it be done; expectations for management; and guidance on how to use it appropriately). {FAR Guidance and Statute on PSCs given on Pages 5-6}

3. OMB should institute training governmentwide to train managers on how to effectively implement the changes above.

## **Subpart 7.5—Inherently Governmental Functions**

### **7.500 Scope of subpart.**

The purpose of this subpart is to prescribe policies and procedures to ensure that inherently governmental functions are not performed by contractors. It implements the policies of Office of Federal Procurement Policy (OFPP) Policy Letter 92-1, Inherently Governmental Functions.

### **7.501 [Reserved]**

### **7.502 Applicability.**

The requirements of this subpart apply to all contracts for services. This subpart does not apply to services obtained through either personnel appointments, advisory committees, or personal services contracts issued under statutory authority.

### **7.503 Policy.**

- (a) Contracts shall not be used for the performance of inherently governmental functions.
- (b) Agency decisions which determine whether a function is or is not an inherently governmental function may be reviewed and modified by appropriate Office of Management and Budget officials.
- (c) The following is a list of examples of functions considered to be inherently governmental functions or which shall be treated as such. This list is not all inclusive:
  - (1) The direct conduct of criminal investigations.
  - (2) The control of prosecutions and performance of adjudicatory functions other than those relating to arbitration or other methods of alternative dispute resolution.
  - (3) The command of military forces, especially the leadership of military personnel who are members of the combat, combat support, or combat service support role.
  - (4) The conduct of foreign relations and the determination of foreign policy.
  - (5) The determination of agency policy, such as determining the content and application of regulations, among other things.
  - (6) The determination of Federal program priorities for budget requests.
  - (7) The direction and control of Federal employees.
  - (8) The direction and control of intelligence and counter-intelligence operations.
  - (9) The selection or non-selection of individuals for Federal Government employment, including the interviewing of individuals for employment.
  - (10) The approval of position descriptions and performance standards for Federal employees.
  - (11) The determination of what Government property is to be disposed of and on what terms (although an agency may give contractors authority to dispose of property at prices within specified ranges and subject to other reasonable conditions deemed appropriate by the agency).
  - (12) In Federal procurement activities with respect to prime contracts—
    - (i) Determining what supplies or services are to be acquired by the Government (although an agency may give contractors authority to acquire supplies at prices within specified ranges and subject to other reasonable conditions deemed appropriate by the agency);
    - (ii) Participating as a voting member on any source selection boards;
    - (iii) Approving any contractual documents, to include documents defining requirements, incentive plans, and evaluation criteria;
    - (iv) Awarding contracts;

(v) Administering contracts (including ordering changes in contract performance or contract quantities, taking action based on evaluations of contractor performance, and accepting or rejecting contractor products or services);

(vi) Terminating contracts;

(vii) Determining whether contract costs are reasonable, allocable, and allowable; and

(viii) Participating as a voting member on performance evaluation boards.

(13) The approval of agency responses to Freedom of Information Act requests (other than routine responses that, because of statute, regulation, or agency policy, do not require the exercise of judgment in determining whether documents are to be released or withheld), and the approval of agency responses to the administrative appeals of denials of Freedom of Information Act requests.

(14) The conduct of administrative hearings to determine the eligibility of any person for a security clearance, or involving actions that affect matters of personal reputation or eligibility to participate in Government programs.

(15) The approval of Federal licensing actions and inspections.

(16) The determination of budget policy, guidance, and strategy.

(17) The collection, control, and disbursement of fees, royalties, duties, fines, taxes, and other public funds, unless authorized by statute, such as 31 U.S.C. 952 (relating to private collection contractors) and 31 U.S.C. 3718 (relating to private attorney collection services), but not including—

(i) Collection of fees, fines, penalties, costs, or other charges from visitors to or patrons of mess halls, post or base exchange concessions, national parks, and similar entities or activities, or from other persons, where the amount to be collected is easily calculated or predetermined and the funds collected can be easily controlled using standard case management techniques; and

(ii) Routine voucher and invoice examination.

(18) The control of the treasury accounts.

(19) The administration of public trusts.

(20) The drafting of Congressional testimony, responses to Congressional correspondence, or agency responses to audit reports from the Inspector General, the General Accounting Office, or other Federal audit entity.

(d) The following is a list of examples of functions generally not considered to be inherently governmental functions. However, certain services and actions that are not considered to be inherently governmental functions may approach being in that category because of the nature of the function, the manner in which the contractor performs the contract, or the manner in which the Government administers contractor performance. This list is not all inclusive:

(1) Services that involve or relate to budget preparation, including workload modeling, fact finding, efficiency studies, and should-cost analyses, etc.

(2) Services that involve or relate to reorganization and planning activities.

(3) Services that involve or relate to analyses, feasibility studies, and strategy options to be used by agency personnel in developing policy.

(4) Services that involve or relate to the development of regulations.

(5) Services that involve or relate to the evaluation of another contractor's performance.

(6) Services in support of acquisition planning.

(7) Contractors providing assistance in contract management (such as where the contractor might influence official evaluations of other contractors).

(8) Contractors providing technical evaluation of contract proposals.

(9) Contractors providing assistance in the development of statements of work.

(10) Contractors providing support in preparing responses to Freedom of Information Act requests.

(11) Contractors working in any situation that permits or might permit them to gain access to confidential business information and/or any other sensitive information (other than situations covered by the National Industrial Security Program described in 4.402(b)).

(12) Contractors providing information regarding agency policies or regulations, such as attending conferences on behalf of an agency, conducting community relations campaigns, or conducting agency training courses.

(13) Contractors participating in any situation where it might be assumed that they are agency employees or representatives.

(14) Contractors participating as technical advisors to a source selection board or participating as voting or nonvoting members of a source evaluation board.

(15) Contractors serving as arbitrators or providing alternative methods of dispute resolution.

(16) Contractors constructing buildings or structures intended to be secure from electronic eavesdropping or other penetration by foreign governments.

(17) Contractors providing inspection services.

(18) Contractors providing legal advice and interpretations of regulations and statutes to Government officials.

(19) Contractors providing special non-law enforcement, security activities that do not directly involve criminal investigations, such as prisoner detention or transport and non-military national security details.

(e) Agency implementation shall include procedures requiring the agency head or designated requirements official to provide the contracting officer, concurrent with transmittal of the statement of work (or any modification thereof), a written determination that none of the functions to be performed are inherently governmental. This assessment should place emphasis on the degree to which conditions and facts restrict the discretionary authority, decision-making responsibility, or accountability of Government officials using contractor services or work products. Disagreements regarding the determination will be resolved in accordance with agency procedures before issuance of a solicitation.

Sec. 3109. Employment of experts and consultants; temporary or intermittent

(a) For the purpose of this section -

(1) "agency" has the meaning given it by section [5721](#) of this title; and

(2) "appropriation" includes funds made available by statute under [section 9104 of title 31](#).

(b) When authorized by an appropriation or other statute, the head of an agency may procure by contract the temporary (not in excess of 1 year) or intermittent services of experts or consultants or an organization thereof, including stenographic reporting services. Services procured under this section are without regard to -

(1) the provisions of this title governing appointment in the competitive service;

(2) chapter 51 and subchapter III of chapter 53 of this title; and

(3) [section 5 of title 41](#), except in the case of stenographic reporting services by an organization.

However, an agency subject to chapter 51 and subchapter III of chapter 53 of this title may pay a rate for services under this section in excess of the daily equivalent of the highest rate payable under section [5332](#) of this title only when specifically authorized by the appropriation or other statute authorizing the procurement of the services.

(c) Positions in the Senior Executive Service or the Federal Bureau of Investigation and Drug Enforcement Administration Senior Executive Service may not be filled under the authority of subsection (b) of this section.

(d) The Office of Personnel Management shall prescribe regulations necessary for the administration of this section. Such regulations shall include -

(1) criteria governing the circumstances in which it is appropriate to employ an expert or consultant under the provisions of this section;

(2) criteria for setting the pay of experts and consultants under this section; and

(3) provisions to ensure compliance with such regulations.

(e) Each agency shall report to the Office of Personnel Management on an annual basis with respect to -

(1) the number of days each expert or consultant employed by the agency during the period was so employed; and

(2) the total amount paid by the agency to each expert and consultant for such work during the period.

### **37.104 Personal services contracts.**

(a) A personal services contract is characterized by the employer-employee relationship it creates between the Government and the contractor's personnel. The Government is normally required to obtain its employees by direct hire under competitive appointment or other procedures required by the civil service laws. Obtaining personal services by contract, rather than by direct hire, circumvents those laws unless Congress has specifically authorized acquisition of the services by contract.

(b) Agencies shall not award personal services contracts unless specifically authorized by statute (e.g., 5 U.S.C.3109) to do so.

(c)(1) 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. However, giving an order for a specific article or service, with the right to reject the finished product or result, is not the type of supervision or control that converts an individual who is an independent contractor (such as a contractor employee) into a Government employee.

(2) Each contract arrangement must be judged in the light of its own facts and circumstances, the key question always being: Will the Government exercise relatively continuous supervision and control over the contractor personnel performing the contract. The sporadic, unauthorized supervision of only one of a large number of contractor employees might reasonably be considered not relevant, while relatively continuous Government supervision of a substantial number of contractor employees would have to be taken strongly into account (see (d) of this section).

(d) The following descriptive elements should be used as a guide in assessing whether or not a proposed contract is personal in nature:

(1) Performance on site.

(2) Principal tools and equipment furnished by the Government.

(3) Services are applied directly to the integral effort of agencies or an organizational subpart in furtherance of assigned function or mission.

(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 inherent nature of the service, or the manner in which it is provided, reasonably requires directly or indirectly, Government direction or supervision of contractor employees in order to—

(i) Adequately protect the Government's interest;

(ii) Retain control of the function involved; or

(iii) Retain full personal responsibility for the function supported in a duly authorized Federal officer or employee.

(e) When specific statutory authority for a personal service contract is cited, obtain the review and opinion of legal counsel.

(f) Personal services contracts for the services of individual experts or consultants are limited by the Classification Act. In addition, the Office of Personnel Management has established requirements which apply in acquiring the personal services of experts or consultants in this manner (*e.g.*, benefits, taxes, conflicts of interest). Therefore, the contracting officer shall effect necessary coordination with the cognizant civilian personnel office.