

**Contracting for**



# **Support Services**

**What You Need to Know As A Federal Employee**

U.S. Department of Energy  
Office of Procurement & Assistance Management

**PM**

## Contracting for Support Services



### What You Need To Know As A Federal Employee

The Department of Energy, like most federal agencies, spends a significant amount of its contracting budget on support services. While these contracts fulfill continuing and essential needs of the Department, this type of contracting arrangement can present unique situations that require special diligence on the part of federal employees to ensure that applicable statutes, regulations and management practices are followed.

Contracts for support services cover a wide range of areas, and may include:

- ✓ Maintenance, overhaul, repair, and servicing of equipment.
- ✓ Housekeeping services.
- ✓ Advisory and assistance services.
- ✓ Transportation services.
- ✓ Recurring maintenance of real property.

It's very important that all Federal employees are aware of the vulnerabilities unique to the acquisition of support services, especially regarding matters involving the type of work performed by contractors and the working relationship that exists between Federal employees and contractor employees.

### Inherently Governmental Functions

One basic tenet of support service contracting states that contracts are not to be used for the performance of inherently governmental functions. An inherently governmental function includes activities that require either the exercise of discretion in applying Government authority, or developing value judgments in decision-making for the Government. These functions generally fall into two categories - the act of governing, i.e., the discretionary exercise of Government authority, and monetary transactions and entitlements.



## What Functions are Inherently Governmental?

The following are some of the types of services that are considered to be inherently Governmental and should be performed by Federal employees, not contractors:



- ✓ Determining agency policy, such as the content and application of regulations.
- ✓ Supervising Federal employees.
- ✓ Directing and controlling intelligence and counter-intelligence operations.
- ✓ Selection or non-selection of individuals for Federal Government employment, including the interviewing of individuals for employment.
- ✓ The approval of position descriptions and performance standards for Federal employees.
- ✓ In Federal procurement activities with respect to prime contracts -
  - 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).
  - Participating as a voting member on any source selection boards.
  - Approval of any contractual documents, to include documents defining requirements, incentive plans, and evaluation criteria.
  - Awarding contracts.
  - 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).
  - Terminating contracts.

- Determining whether contract costs are reasonable, allocable, and allowable.
- Participating as a voting member on performance evaluation boards.

- ✓ The determination of budget policy, guidance, and strategy.
- ✓ 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.

### What Functions are NOT Inherently Governmental?



These are some services that are generally considered not to be inherently Governmental:

- ✓ Services that involve or relate to budget preparation, including workload modeling, fact finding, efficiency studies, and should-cost analyses, etc.
- ✓ Services that involve or relate to analyses, feasibility studies, and strategy options to be used by agency personnel in developing policy.
- ✓ Services that involve or relate to the development of regulations.
- ✓ Services that involve or relate to the evaluation of another contractor's performance.
- ✓ Services in support of acquisition planning.
- ✓ Contractors providing assistance in contract management.
- ✓ Contractors providing technical evaluation of contract proposals.
- ✓ Contractors providing assistance in the development of statements of work.
- ✓ Contractors providing inspection services.
- ✓ Contractors providing legal advice and interpretations of regulations and statutes to Government officials.

In some situations, there can be a fine line between these two broad categories. DOE employees should consult with their local counsel and procurement personnel when dealing with any of these situations.

### Employer - Employee Relationships

Another critical area of support service contracting focuses on the kind of working relationship that exists between Federal employees and contractor employees. Inappropriate relationships may lead to situations where contractor employees perform personal services for Federal employees, which is contrary to civil service laws that normally require Federal agencies to obtain its employees by direct hire under competitive appointment. Additionally, specific Congressional authorization must be obtained to acquire personal services through the contracting process.



In reviewing performance under support service contracts, the Department uses the following Government-wide criteria to determine whether a contract is personal in nature:

- Performance is on-site.
- Principal tools and equipment are furnished by the Government.
- Services are applied directly to the integral effort of agencies or an organizational subpart in furtherance of assigned function or mission.
- Comparable services, meeting comparable needs, are performed in the same or similar agencies using civil service personnel.
- The need for the type of service provided can reasonably be expected to last beyond one year.
- 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 -
- adequately protect the Government's interest;
  - retain control of the function involved; or
  - retain full personal responsibility for the function supported in a duly authorized Federal officer or employee.

Each contract arrangement must be judged on its own facts and circumstances, but the key question always will be:

***“Will the Government exercise relatively continuous supervision and control over the contractor personnel performing the contract?”***

If the answer is “Yes,” either due to the contract terms or the manner in which the contract is administered during performance, the services are personal in nature, and an improper employer-employee relationship exists. However, giving an order for a specific article or service, with the right to reject the finished product or result, is not the kind of supervision or control that would convert a contractor employee into a Government employee.

It is equally inappropriate for contractor employees to supervise, control, or direct Federal employees. The responsibility for supervising federal employees is inherently governmental and may not be contracted out.

### **Conflicts of Interest**

Another potential area of concern involves conflicts of interest. A conflict of interest occurs when a person is unable to render impartial assistance or advice to the Government because of other activities or relationships, or when a person has an unfair competitive advantage. Contractor personnel can be in unique positions



where, due to their contractual responsibilities, they may provide advice to the Government, or they may have access to source selection information or proprietary information of competing contractors. It is important to ensure that these contractor personnel are objective and impartial in their business relationships with the Government, and that they do not gain an unfair competitive advantage in seeking future Government work. Prior to award of a contract, the contracting officer performs an analysis to determine the potential for any conflicts. After award, proper contract management practices require that both program and procurement personnel actively monitor the contractual effort to identify and mitigate potential conflicts. Awareness of these issues helps to ensure that the Government's best interests are not compromised.

The following guidelines may be applied to determine the potential for conflicts of interest:

- Can the potential offeror perform under the contract in such a way as to devise solutions or make recommendations that would influence the award of future contracts to that contractor?
- If the requirement is for support services (such as system engineering or technical direction), were any of the potential offerors involved in developing the system design specifications or in the production of the system?
- Has the potential offeror participated in earlier work involving the same program or activity that is the subject of the present contract wherein the offeror had access to source selection or proprietary information not available to other offerors competing for the contract?
- Will the contractor be evaluating a competitor's work?
- Does the contract allow the contractor to accept its own products or activities on behalf of the Government?

- Will the work, under this contract, put the contractor in a position to influence Government decision-making, e.g., developing regulations, that will affect the contractor's current or future business?
- Will the work under this contract affect the interests of the contractor's other clients?
- Are any of the potential offerors, or their personnel who will perform the contract, former agency officials who — while employed by the agency — personally and substantially participated in (a) the development of the requirement for, or (b) the procurement of, these services within the past two years?

### **Where Can You Learn More About Support Services Contracting?**

- Federal Acquisition Regulation, (Subpart 7.5, Subpart 9.5, and Part 37)
- Office of Federal Procurement Policy (Policy Letters 92-1, and 93-1)
- DOE Acquisition Regulation (Subpart 909.5)
- DOE Acquisition Guide (Chapters 9 and 37)
- The Office of Procurement and Assistance Policy website - [www.pr.doe.gov](http://www.pr.doe.gov)

### **Who Can Give You More Information About Support Services Contracting?**

- Your local Procurement Office.
- Your local Office of General Counsel.
- The DOE Office of Procurement and Assistance Policy.

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