



A. Support Services

Support services contracts are a significant portion of the Department's total contracting effort. These types of contracts must be carefully developed and administered to ensure that contractors do not perform inherently governmental functions or personal services.

Support services are of the following types:

- Technical support services;
- Management support services; and
- Maintenance and operations services.

It is 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.

B. Inherently Governmental Functions

A 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.

C. 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:

- Supervisory functions of federal employees;
- Policy determination and development functions;

- Government representation functions;
- Budget and financial management; and
- Procurement functions, for example:
 - Determining acquisition requirements
 - Acting as voting members on acquisition selections
 - Approving contractual documents
 - Awarding and administering federal contracts
 - Program management.

To ensure that inherently governmental functions are not performed, the statement of work shall contain language that reserves these functions for government officials and clearly identifies deliverables to be produced by the contractor. The government shall not direct the contractor how to perform the work, nor shall the government supervise contractor personnel directly.

Furthermore, the Department’s management and operating contractors shall not be directed to award subcontracts to provide support services to a Departmental office, nor shall they be asked to provide a support service if the service is outside their primary mission.

D. What Functions are NOT Inherently governmental?

Services of a purely advisory nature:

- Management and professional services;
- Special studies and analyses;
- Management support services;
- Training; and
- Consulting support.

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 services for federal employees, which are contrary to civil services laws that normally require federal agencies to obtain its employees by direct hire under competitive appointment. Additionally,

specific congressional authorizations 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 onsite;
- 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 an 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; or
- 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
 - 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.

E. 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 the awarding of a contract, the Contracting Officer (CO) performs an analysis to determine the potential for any conflicts. After the award is made, 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.

Role of the Contracting Officer

Extreme care must be taken regarding communications with industry representatives, many of whom work on-site with federal employees. It is important to the government contracting process to maintain the integrity of the process and to avoid any action that may appear to be prejudicial to a particular contractor employee or firm. Only formally appointed COs may commit the government to a course of action, such as authorizing the commencement, continuation, or amendment of work or delivery of material. Improper actions by unauthorized individuals will only complicate and possibly delay the awarding of a procurement activity and may, in fact, preclude it. Such action could lead to embarrassment for all concerned as well as costly claims against the government. Department personnel shall:

- Avoid situations that could adversely affect the integrity of the U.S. Government contracting process;
- Avoid situations that could result in unauthorized commitments; and
- Avoid contacts with industry representatives that would appear to favor one company/firm or representative, i.e., interviews, tests, briefings, or product demonstrations.

Contracting Considerations

The Department is bound by several considerations when contemplating acquisition of support services. Some of the critical issues affecting Energy Efficiency and Renewable Energy (EERE) acquisitions are discussed below.

Socio-economic considerations: It is the policy of the government to provide maximum practicable opportunities in its acquisitions to small business, veteran-owned small business, service-disabled veteran-owned small business, Historically Underutilized Business Zone small business, small disadvantaged business, and women-owned small business concerns.

Performance-based service contracting: It is the policy of the Department to use a performance-based service contracting approach to the maximum extent practicable. Departmental policy further directs that all service contracts in excess of \$100,000 are required to be performance-based unless justified otherwise. Performance-based contracts shift risk of performance to the contractor, and contractors are paid only if their products or services meet the specified requirements.

EERE contracting process: All potential acquisitions must undergo review by the EERE procurement specialists in the Office of Program Execution Support (PES). PES prepares and reviews procurement packages for submission to the appropriate DOE contracting office.

References

Federal Acquisition Regulation Subparts 7.5, 9.5 and 37

An updated version of the Federal Acquisition Regulation may be retrieved from: <http://www.acqnet.gov/far/>

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