

Faint, illegible text at the top of the page, possibly bleed-through from the reverse side.

Faint, illegible text centered on the page, possibly bleed-through from the reverse side.

Faint, illegible text at the bottom of the page, possibly bleed-through from the reverse side.

Attachment 4

EPA Support Service Contracting Guide

U.S. ENVIRONMENTAL PROTECTION AGENCY (EPA)
OFFICE OF ACQUISITION MANAGEMENT (OAM)

SUPPORT SERVICE CONTRACTING

What You Need to Know as a Federal Employee



SUPPORT SERVICE CONTRACTING

What You Need to Know as a Federal Employee

Background

EPA spends a significant amount of its contracting dollars on support services. While contracting for such services helps the Agency meet its needs, doing so can create a potential risk of overreliance on contractors for critical activities related to an agency's missions and operations. As such, we must analyze our needs and recognize the advantages and limitations of using these types of contracts, as well as the responsibilities associated with their use.

This brochure will provide general key information to those Agency personnel acquiring support services.

What is a Service Contract?

The Federal Acquisition Regulation (FAR) Subpart 37.101 defines a service contract as "a contract that directly engages the time and effort of a contractor whose primary purpose is to perform an identifiable task rather than to furnish an end item of supply."

Contracts for Support Services cover a vast array of professional and technical services, and may include:

Maintenance and operations services: which include, but are not limited to, general housekeeping and custodial services, physical security, employee health services, logistics and maintenance, records management, security support services, consulting services, enforcement support services, audit services, management support services, information technology support, studies, analyses and evaluations.

Technical support services: which include, but are not limited to, development of specifications, system definition, system review and reliability analyses, trade-off analyses, economic and environmental analyses, which may be used in EPA's preparation of environmental impact statements, test and evaluation, surveys or reviews to improve the effectiveness, efficiency, and economy of operations.

SUPPORT SERVICE CONTRACTING WHAT YOU NEED TO KNOW AS A FEDERAL EMPLOYEE

Management support services: which include, but are not limited to, analyses of workload and work flow, directives management studies, manpower systems analyses, assistance in the preparation of program plans, training and education, analyses of Agency's management processes, and any other reports or analyses directed toward improving the effectiveness, efficiency, and economy of management and general administrative operations.

The use of a support service contract can be an economical way to accomplish the Agency's mission. However, it is important for Federal employees to be aware of the vulnerabilities unique to the acquisition of these 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

A basic principle of support service contracting states that contracts are not to be used for the performance of inherently governmental functions. This is why EPA maintains resources to perform its basic governmental functions. An inherently governmental function is defined as one that is so intimately related to the public interest as to mandate performance by Government employees. These activities require the exercise of value judgment in making decisions for the Government.

The following examples illustrate services considered to be inherently Governmental and should not be obtained under contract or performed by a contractor, but by federal employees only:

- The determination of Federal program priorities for budget requests.
- The determination of agency policy, such as determining the content and application of regulations, among other things.
- Speaking before groups as a representative of the Agency.
- Drafting work assignments or technical direction documents under a contract.

SUPPORT SERVICE CONTRACTING WHAT YOU NEED TO KNOW AS A FEDERAL EMPLOYEE

- Preparing cost estimates/Independent Government Cost Estimates.
- Approving any contractual documents, to include documents defining requirements, incentive plans, and evaluation criteria.
- The drafting of Congressional testimony, responses to Congressional correspondence, or agency responses to audit reports from the Inspector General, the Government Accountability Office, or other Federal audit entity.
- Establishing performance goals, priorities, and schedules.

A general list may be found at FAR 7.503(c).

Further, when providing support to the Agency, no EPA contractor shall be asked to provide service outside the scope of the contract.

Functions that are not Inherently Governmental but Require Increased Management Oversight

The following list shows services and actions that are not considered to be inherently governmental functions. However, they may fall in that category because of how the contractor performs under the contract, or the manner in which the Government administers contractor performance. When contracting for such services and actions, agencies should be fully aware of the terms of the contract, contractor performance, and contract administration to ensure that appropriate agency control is preserved.

This is an illustrative listing, and is not intended to promote or discourage the use of the following types of contractor services:

- 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 reorganization and planning activities.

SUPPORT SERVICE CONTRACTING WHAT YOU NEED TO KNOW AS A FEDERAL EMPLOYEE

- 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 in support of acquisition planning.
- Contractors providing assistance in contract management (such as where the contractor might influence official evaluations of other contractors).
- Contractors providing technical evaluation of contract proposals.
- Contractors providing help in the development of statements of work.
- Contractors providing support in preparing responses to Freedom of Information Act requests.
- Contractors providing inspection services.
- Contractors providing legal advice and interpretations of regulations and statutes to Government officials.

A general list may be found at FAR 7.503(d) (See FAR 37.114 for additional insights).

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 is contrary to civil service laws that normally require Federal agencies to obtain its employees by direct hire under competitive appointment.

Personal Services

Contracted support services contracts may be either personal or non-personal in nature. The Contracting Officer is responsible for determining whether the services are personal or non-personal. Personal services contracts **shall not be awarded** unless specifically authorized by Congress.

A personal service contract results when Government personnel assume the role of instructing, supervising, or controlling a contractor employee's work on a continuing basis (i.e., keeping track of their time, requiring contractor employees to report directly to federal employees, referring to contractor employees as, "my contractor or my employees",). When EPA exercises direct supervision and control over contract personnel, the services become personal, and are, therefore, improper and prohibited by law.

The following examples illustrate situations in which the services obtained have become personal services.

- When EPA restricts contractor employee qualifications to a particular person.
- When EPA reviews the performance of contractor personnel rather than the final product or service.
- When the contractor employees are used interchangeably with EPA personnel to perform the same or similar functions.
- When contractor employees are required to follow EPA leave policies.
- When EPA personnel directly advise individual contractor employees on how to perform work assigned to that contractor employee.

The Federal Acquisition Regulation provides adequate guidance and procedural information which, if appropriately followed, should ensure that contracts for support services do not enter the realm of personal services. Appropriate care and attention can prevent personal service problems.

Sharing Space with Contractor Employees

Furnishing or sharing office space with employees of contractors is sometimes critical and necessary. However, use caution to ensure that controls and processes are in place to prevent personal services situations. For example, it is mandatory to have a clear distinction between a contractor and Federal employee (that is, contractor personnel must identify or be identified as a contractor, their badge must clearly state that they are contractors. Efforts should be taken to ensure that they do not occupy the same space with Federal employees unless it is required).

Test

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,” due to either the contract terms or the manner in which the contract is administered, the services are personal in nature, and an improper employer-employee relationship exists.

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

SUPPORT SERVICE CONTRACTING WHAT YOU NEED TO KNOW AS A FEDERAL EMPLOYEE

contract, the contracting officer performs an analysis of the contract 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?
- 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 information 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?

SUPPORT SERVICE CONTRACTING WHAT YOU NEED TO KNOW AS A FEDERAL EMPLOYEE

Resources

For more information, please contact your local procurement office or legal counsel, or research these resources.

- Federal Acquisition Regulation, (Subparts 7.5, 9.5 and Part 37).
- Office of Federal Procurement Policy (OFPP Policy Letters 92-1 and 93-1).
- Environmental Protection Agency Acquisition Regulation (EPAAR).
- Your local Procurement Office.
- Your local Legal Counsel Office.