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OFFICE OF THE ASSISTANT SECRETARY OF THE ARMY
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12 DEC 2005

SAAL-PP

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Contractors in the Government Workplace

This memorandum reiterates key statutory and regulatory requirements concerning performance-based service contracting. It stresses the prohibitions against personal service contracts unless authorized; improper disclosure of procurement information; ethical conduct of Government/contractor interaction in the workplace, management oversight of service contracts; and understanding what is meant by inherently governmental function. My goal is to remind Headquarters, Department of the Army (HQDA) Principals, Army Commanders, Requiring Activities, Contracting Officers, Contracting Officer Representatives, and Government managers and employees of their responsibilities and permissible activities when working with and/or using contractors in the workplace.

The use of contract services is vitally important to help the Department of the Army operate; however, it is equally important that laws and regulatory requirements for service contracting be adhered to. I have included an attachment that summarizes key statutory and regulatory requirements as well as discusses frequently asked questions and answers. I encourage dissemination throughout your organization.

The point of contact for this action is Kimberly Carroll, at 703-604-7104, or e-mail: Kimberly.carroll@saalt.army.mil.


Claude M. Bolton, Jr.

Assistant Secretary of the Army
(Acquisition, Logistics and Technology)

Enclosures

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INFORMATION PAPER

September 12, 2005

SUBJECT: Contractors in the Government Workplace

1. Purpose. To reiterate key statutory and regulatory requirements concerning performance-based contracting.

2. Facts:

a. Contractors are required to perform all tasks identified in the Performance Work Statement (PWS); however, they may not perform "inherently governmental functions." All Government workers who request contractor support, award contracts for services, manage contractors in the Government workplace, and work next to contractors in the Government workplace must remain aware of the responsibilities and limitations associated with their employment.

b. Performance Work Statement (PWS). The requirement for contract service is described in the PWS. The PWS clearly defines the responsibilities and tasks to be performed by the contractor while ensuring that performance of inherently governmental functions remain with Government employees. The Federal Activities Inventory Reform Act of 1998, Public Law 105-270, section 5(2)a, in part, defines an "inherently governmental function" as a function "...that is so intimately related to the public interest as to require performance by Federal Government employees." The Federal Acquisition Regulation (FAR) Subpart 7.5 lists examples of functions that are inherently governmental as well as functions that are closely associated with being inherently governmental.

c. Concurrent with sending a PWS to the contracting officer, FAR Subpart 7.503(e) requires the designated requirements official to provide the contracting officer 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.

d. In developing the PWS, include the requirements that contractor personnel will:

- display name and the name of the company while in the work area
- wear and display a building pass at all times;
- include the company's name in his or her e-mail display; and

- identify themselves as contractors when attending meetings, answering Government telephones, or working in situations where their actions could be construed as official Government acts.

e. Contracting Officer. Contracting officers will accept only a PWS that clearly defines the responsibilities and tasks, to be performed by the contractor, while ensuring that performance of inherently governmental functions remain with Government employees. The Contracting Officer will ensure that the acquisition requirements package includes a written determination that none of the functions to be performed are inherently governmental.

The contracting officer may assign a Contracting Officer Representative (COR) to a contract for contractual services.

f. Government Managers of Contractors in the Government Workplace. To avoid any perception that a contractor is performing functions that are inherently governmental, Government managers should familiarize themselves with the FAR and the relationship between Government personnel and contractors supporting their organization. Government and contractor personnel should also ensure that the work is related to a recognizable portion of the PWS.

Contractors are precluded from performing inherently governmental functions; however, the FAR does not prevent contractors from performing duties closely associated with inherently governmental functions. Contractors may gather information or provide advice, opinions, recommendations, or ideas in these areas. They may develop draft policy and assist in planning and preparing budgets. In the contracting process, they may technically evaluate contract proposals, assist in developing Statements of Work (SOW), and serve as technical advisors to source selection boards. They may also participate as voting or nonvoting members of performance evaluation boards. What contractors may not do is render a final decision. Nor will they supervise Government employees, make mission decisions, or represent the organization at policy decision group levels, particularly in financial matters.

To mitigate the risk of contractors performing inherently governmental functions, consider using a responsibility matrix.

Contracting Officer, COR, Program Manager, and the Defense Contract Management Agency performs, reviews, monitors, and approves each activity/task. The matrix would show a list of tasks, columns for the organizations involved, and a legend that shows the extent to which the organizations are involved in the task and what Government personnel performed the final approval function.

The Government manager must determine whether information may be disseminated to contractors. Identify information that is specifically protected by the Procurement Integrity Act (Title 41 United States Code (U.S.C) Section 423) and the Trade Secrets Act (Title 18 U.S.C Section 1905). Before giving information to a contractor to develop visual aids, create a database, provide consultations, or attend a meeting, the Government manager must ensure that it is proper for the contractor to have access to the information. Even if an improper disclosure does not violate any specific law, the result may impact competition, impugn integrity and initiate protests and litigation.

While it is preferred that contractor personnel work in company office space, if Government and contractor personnel must be co-located in the same office space, then, to the maximum extent possible, the contractor personnel should have separate, and separated, space to ensure that proprietary information is not inadvertently "shared." Adjacent work stations and shared printers/faxes should be avoided whenever possible. Government workers should be aware that hallways, bathrooms, lunchrooms, and other common areas are not secure areas for discussing sensitive information.

The Government manager must be aware that Reservists in the Government workplace may be employed by a defense contractor. Educate the Reservist of his/her responsibilities while in the Government workplace. Consider having the Reservist sign a nondisclosure document that will prevent Reservist from revealing sensitive information to his/her employer.

g. COR/Contracting Officer's Technical Representative (COTR). Contractors are managed through contracting channels based on the terms and conditions of the contract and the COR and/or the COTR identified in the governing contract. The COR/COTRs assist in technically monitoring and administering the contract.

The COR/COTR must ensure that the contractor employee displays their name and the name of the company while in the work area, wears and includes the company's name in his or her e-mail display, and displays a distinctive building pass that identifies the individuals as a contractor employee at all times.

The COR should identify high risk areas that demand Government oversight, such as contractors providing assistance in evaluating other contractors, development of statements of work, resolution of issues, submission of invoices for payment, vouchering, award fee board/procedures and past performance assessment of contractors.

The COR/COTR must provide--in writing or e-mail--verification of the contractors' security clearance and/or need to know when a Government manager wishes to send a contractor to any type of meeting where classified or sensitive unclassified material may be presented.

h. HQDA Principals and Army Commanders. HQDA Principals and Army Commanders must ensure that there are a sufficient number of experienced and trained Government personnel available to exercise effective oversight of their programs that use contractor personnel. Ultimately, department heads and agencies are responsible for approving contracted work.

i. Finally, the Army policy is that sexual harassment and other forms of discrimination are unacceptable conduct in the U.S. Army workplace whether committed by or against its Government or contractor employees. Violations of this policy could result in joint liability for both the Army and contractor(s). The HQDA Principals and Army Commanders are responsible for enforcing the Army policy.

Ms. Kimberly Carroll/604-7104

Frequently Asked Questions and Answers

Q: What is a "personal services contract" and is my office allowed to utilize such contracts?

A: FAR Subpart 37.104 states that "personal services" contracts are "...characterized by the employer-employee relationship [they create] between the Government and the contractor's personnel." Paragraph 47.104(c)(1) states that: "[a]n 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." In deciding whether or not your office is allowed to utilize such personnel, each contract arrangement must be judged in the light of its own facts and circumstances; the key question is: "Will the Government exercise relatively continuous supervision and control over the contractor personnel performing the contract?" If so, and unless your office has specific legislation allowing personnel services contracts, such as 5 U.S.C.3109 which allows the head of an agency to contract for temporary (not in excess of 1 year) or intermittent services of experts or consultants or an organization thereof, including stenographic reporting services, you may not use personal services contracts.

Q: May contractor support personnel be delegated COR responsibility on Government contracts?

A: No. Contractor personnel are not identified (in regulation or guidance) as individuals who can be assigned the role of the COR on any contract. The DoD uses the guidance in the DFARS 201.602—the COR must be a Government employee appointed by the Contracting Officer.

Q: May contractor employees attend the same training class that Government personnel attend?

A: Generally, if a specific knowledge or skill is required, it should be identified in either the SOW or under the personnel qualifications section of the contract. Companies are responsible for the individual development, including training, of their employees. Government funding of training necessary to meet contract qualification requirements would not be appropriate as it relieves the contractor of his responsibility to assure his personnel are properly trained.

Q: May a contractor be directed to hire a specific person to work on a given support contract?

A: As a Government official, avoid compromising objectivity when asked for recommendations on contractor employees. You may provide the contractor with the names of individuals you know to be competent and qualified, but you cannot tell a contractor they should/must hire a particular individual nor may you design the work requirements around a single individual. Be aware that the contractor may misinterpret your "suggestion" as a mandate. The contractor is solely responsible for selection of their employees.

Q: The contractor wants to take the team out to dinner to celebrate a job well done—can Government workers go?

A: You cannot accept gifts from a contractor or their employees. Accepting a gift from contractors is prohibited except for modest items of food and refreshment—coffee, donuts, afternoon snacks, etc.—lunches and dinners would not be acceptable. Please consult your ethics advisor for clarification of a given situation.

Q. What are examples of improper disclosure of information to a contractor in the Government workforce?

A. A Government employee may not:

a. Give the support contractor statistical data to chart graph and prepare slides, which will be used for a planning briefing concerning the recompetition of the incumbent's contract.

b. Give a contractor employee an acquisition plan to type, print and put in binders, where the contractor is a potential source for the procurement.

c. Give the support contractor access to information relating to the trade secrets, processes, operations, style of work, or other confidential statistical or financial data of some other person or firm, where the person or firm providing the information did not agree to the disclosure.

Q. What information should a contractor employee be given when reporting for duty in the Government workplace?

A. Ensure that the contractor who provides support services receives the following information and abides by these requirements:

a. Contractor personnel will wear a distinctive security (ID) badge readily identifying the individual as a contractor employee; the badge will be worn in a conspicuous place at all times when performing work under the

contract, including attendance at Government meetings and conferences that take place outside of the Government facility.

b. Contractor personnel will identify themselves as a contract employee when answering or placing calls on a Government telephone and when leaving outgoing and incoming messages on voice mail; use of acronyms in this identification is insufficient to meet the requirement.

c. All e-mail accounts established in Government electronic mail systems for prime contractor or subcontractor personnel will identify individuals as contractor personnel in the "address book" display and on an individual's e-mail. Detailed "properties" for the account will include the name of the individual's employer and the name of the customer for the contract, e.g., "Mr. John Smith, CONTRACTOR-ABC Corporation."

d. When prime contractor or subcontractor personnel send e-mail messages as part of contract performance, or otherwise relating to contract matters, each sender will include his/her first and last name, applicable e-mail address, and the full name of the individual's employer.

Q. What type of information should not be shared with a contractor's employee?

a. Advanced procurement information (e.g., upcoming requirements, acquisition schedules, funding limitations, requirements development) should not be shared to avoid organizational conflict of interest for the contractor and the organizations they represent.

b. Information protected by the Procurement Integrity Act (source selection information and contractor bid or proposal information—see FAR 3.104-3).

c. Other sensitive nonpublic information, i.e., information you would not release under the Freedom of Information Act.

Q. May a command/organization be represented solely by a contractor's employee during discussions, position development, or negotiations; as such activities could be construed as inherently Governmental functions?

A. No. Such activities go beyond technical support. In these situations the contractor's participation should be limited to support activities. In addition, all prime contractor and subcontractor personnel serving as "subject matter experts," will be verbally identified as contractor personnel and the name of their employer provided before the start of all Government meetings. In addition, all prime contractor and subcontractor support personnel, such as those operating AV equipment or serving as "scribes," will be verbally

identified as contractor personnel and the name of their employer provided before the start of all Government meetings.

Q. Are there any rules/regulations regarding the interaction between the Government and industry contractors working on Government sites?

A. While there is nothing illegal *per se* with co-locating Government and contractor personnel; it is highly advisable for Government and contractor work spaces to be segregated and for Government and contractor personnel to be easily identifiable. When someone calls in on the phone, that person should know whether they are talking to a Government representative or a contractor.

In addition, only the contractor can manage or supervise their employees. Government supervisors and managers **CANNOT**:

- a. supervise contractor employees,
- b. stipulate contractor duty hours (except for that directed in the contract),
- c. require contractor employees to report to Government personnel,
- d. maintain contractor personnel records/time cards,
- e. approve leave for contractor personnel,
- f. approve bonuses for contractor personnel, or
- g. develop duty rosters including names of contractors.

Q. What conflicts of interest concerns may arise during contract performance?

A. In addition to vigilance during contract performance by the contracting officer and COR/COTR, the contracting office may use the opportunity to exercise an option to consider other factors under FAR 17.207 (c)(3), such as any contractor activity which could cause a conflict of interest which may impair its ability to render unbiased advice/recommendations or which may create an unfair competitive advantage as a result of knowledge/information/experience gained during performance.

The contracting officer may ask the contractor to certify to a list of statements such as:

a. Contractor to identify all relevant facts concerning any past, present or planned interest (financial, contractual, organizational, or otherwise, as contractor, subcontractor, or consultant) which does or may affect the requirements under the contract.

b. Contractor agrees not to enter into any contract with the item supplier to provide any support, analysis or consulting services, through completion of the final task order.

c. Contractor/subcontractors, at any tier/consultants are prohibited from analyzing, assessing, and/or making recommendations on any effort/documentation, hardware, software, or components which they produced in any capacity as a prime/subcontractor at any tier/consultant.

Checklist for Working with Contractors in the Government Workplace

The greater the degree of reliance on contractors, the greater the need for Government oversight.

- Remember, contractor employees are ***not*** Federal employees.
- Identify contractor employees in the work area through their distinctive security badge.
- Protect documents, disks, CD-ROMs, slides, and other media on which "inside" information is stored. Do not leave it on your desk for the casual observer to read.
- Watch what you discuss and where you discuss it. The hallways, bathrooms, lunchrooms, and other common areas are not secure areas for discussing sensitive information. Many offices are not secure because of the proximity of contractor personnel.
- When you attend a meeting in which sensitive information is about to be discussed, ensure that you know who is in the room and determine whether the information can be disseminated to them. If you have any doubt, ask the contracting officer or legal office.
- In addition to avoiding accidental disclosure, ensure that you don't purposely disclose sensitive information. Before you turn over information to a contractor to develop visual aids, create a database, provide consultations, and before you invite a contractor employee to a meeting, ensure that it is proper for the contractor to have access to the information.
- Respect the employer-employee relationship between contractors and their employees. Do not interfere with it by inviting their employees to attend Federal employee events, e.g., organization days, pressuring the contractor to use "favorite" employees, or insisting on some personnel action.
- Be aware of intellectual property rights consequences of contractor employee work products created in the Federal workplace. Generally, the contractor will be able to commercially exploit software or inventions that it creates in the Federal workplace.

- Avoid giving the incumbent contractor an unfair competitive advantage by including its employees in meetings to discuss aspects of a recompetition, or by accidentally allowing the contractor's employees to overhear or gain access to planning information.
- Identify possible conflicts by contractor employees. If it would be a crime (conflict of interest) or violate the Standards of Ethical Conduct (appearances of partiality) for a Federal employee to participate in an official matter, we should insist that the contractor provides employees free of the same conflicts or appearances.
- Safeguard proprietary, Privacy Act, and other sensitive and nonpublic information. Release of certain types of information to contractor employees to analyze, create charts and graphs, enter into databases, etc., could violate the Procurement Integrity Act, the Trade Secrets Act, the Privacy Act, or other laws or regulations that could subject the releaser to civil and/or criminal penalties to include removal.
- Beware of gifts from contractor employees. Even if they work in the Federal workplace, they are "outside sources" and the rules for their gifts are very different from the rules for gifts between employees. For example, contractors and their employees may not be solicited to provide or contribute to a retirement gift for a Federal employee.
- Do not assign contractor employees "out of scope" work, personal services, or work that is "inherently governmental." The services a contractor is required to provide through its employees are sent out in the contract. There are no "other duties as assigned." When we contract, we give up control and flexibility.
- Resolve inappropriate appearances created by close relationships between Federal and contractor employees. For example, if a Federal employee develops a close personal relationship with the contractor's site manager, the Federal employee probably should not be assigned or continue as the COR.
- Identify a shared drive with Government-only data files for use by Government workers only. Identify an alternate shared drive for use of Government and contractors.

REFERENCES

FAR Part 3.104-4, FAR Part 3.104-10, DFARS 203.104-5, and DFARS 203.104-10 address prohibition on disclosing procurement information

FAR Subpart 3.601, Conflict of Interest

FAR Subpart 7.501, 7.503(a) Inherently Governmental Functions

FAR Subpart 9.5, Organizational and Consultant Conflict of Interest

FAR Subpart 37.104, Personal Services

FAR Subpart 37.203, Service Contracting

AFARS Part 5137, Service Contracts

OMB Circular No. A-76 Revised

OFPP Policy Letter No 92-1, September 23, 1992, Inherently Governmental Functions

OFPP Policy Letter No 93-1 (Reissued), Management Oversight of Service Contracting

Department of the Army, Contractors in the Government Workplace, 17 August 1999

Procurement Integrity Act, (41 U.S.C. 423) restricts the release of source selection and contractor bid and proposal information, and provides civil fines and criminal penalties for improper release

Trade Secrets Act, (18 U.S.C. 1905), makes it a crime to improperly release contractor trade secrets and other confidential business information outside the Government

Department of the Army Memorandum, Contractors in the Government Workplace, 17 August 1999

Federal Activities Inventory Reform Act of 1998, Public Law 105-270, an Act to provide a process for identifying the functions of the Federal Government that are not inherently governmental functions, and for other purposes

Standards of Ethical Conduct for Employees of the Executive Branch