

Tidewater Government Industry Council

Tidewater Government Industry Council
P.O. BOX 2021
Norfolk, VA 23501

May 13, 2005

Acquisition Advisory Panel
C/O: Ms. Laura Auletta (DFO)
General Services Administration
1800 F Street, Room 4006
Washington, D.C. 20405

**Subj: PUBLIC STATEMENT TO SARA ACQUISITION ADVISORY PANEL CONCERNING
CONTRACTING FOR PERSONAL SERVICES**

In January 2005 the Tidewater Government Industry Council submitted a letter to the Director, Defense Acquisition Regulations Council requesting a change to FAR Part 37.104 concerning contracting for personal services. Ms. Anne Terry at OMB recommended that TGIC submit the issue to the Acquisition Advisory Panel (AAP). The TGIC requests AAP review of the attached letter, considered to be our public statement.

The TGIC thanks the panel in advance and we look forward to a favorable endorsement or other appropriate feedback.

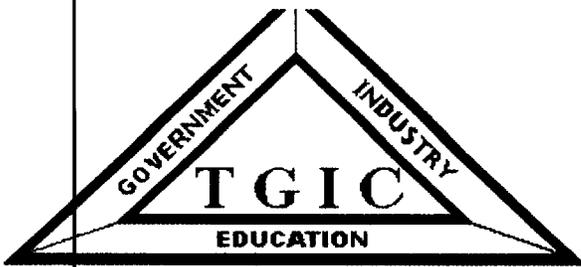
Most respectfully,

Ray Rodriguez

RJ Rodriguez
Government Co-Moderator

Steve Liberman

SL
Industry Co-Moderator



Tidewater Government Industry Council

Tidewater Government and Industry Council
P.O. BOX 2021
Norfolk, VA 23501

January 28, 2005

Director, Defense Acquisition Regulations Council
Attention: IMD 3D139
PDUSD (AT&L)\
3062 Defense Pentagon
Washington, D.C. 20301-3062

Dear Director,

The Tidewater Government Industry Council (TGIC) is an all volunteer organization founded in 1989 to improve the relationships between government and industry (contractor) personnel. The purpose of the TGIC is to provide for effective avenues of communication, cooperation and consultation between the Government and private sector contracts professionals with the aim of improving the contracting function and the quality of the end product for the mutual benefit of the Government and industry.

As part of our continuing effort, we form sub-committees to explore areas of concern or potential areas for improvement and to recommend changes to applicable policies and regulations through appropriate channels. In that spirit of group intent, there is a specific area that the group has researched and, as a result, offers the following observations to support a revision of FAR part 37.104 governing the prohibition of contracting for personal services.

The TGIC believes the current clause unduly limits contracting for personal services. We believe this limitation is unnecessary in the current environment of transformation. In addition, there is also the situation where the government is "de facto" employing personal services in conflict with the requirements of the clause. It is our recommendation that the current FAR clause 37-104 be modified to limit the personal services prohibition only to truly inherently governmental functions. The enclosure to this letter provides our rationale in the prescribed format. The proposed revisions reflect realistic language that supports the concept that if the requirement is not an "Inherently Governmental Responsibility"; it can and should be contracted for if in the best interest of the government, all factors being considered.

We would be most appreciative if we could obtain a prompt and favorable reply on this important and sensitive topic.

Most respectfully,


Donna Reuss

Co-Moderator


Dona Storey

Co-Moderator

REQUESTED FAR REVISION

I. PROBLEM:

FAR clause 37.104 which addresses Personal Services Contracts does not clearly identify what constitutes personal services and is therefore misleading. The ambiguity of the clause fosters an environment conducive to the creation of situations where “de facto” personal services are in fact performed, resulting in mismanagement of contractual services.

II. RECOMMENDATION:

FAR clause 37.104 should be modified to clearly link the applicability of the clause to truly inherently governmental functions. A recommended 37.104 is provided below this restatement of the current clause.

37.104 as currently written:

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.

PROPOSED CHANGE TO THE CLAUSE FOLLOWS:

The revised clause 37-104 would read as follows:

a. All services can be contracted for subject to determination by the responsible government party that these services are commercial in nature and not prohibited by definition as being “inherently governmental”. (The prohibition would only be applicable for services that are defined as those that are an “Inherent Government Responsibility”. If defined as an inherently governmental responsibility, that work can not be contracted for. This guidance should clearly allow for all support which might lead the inherently governmental responsible person toward a decision that may be provided by contractors).

b. [Delete as there are personal service contracts that can be awarded, e.g. medical consultants and experts.]

c. [Delete]

d. [Delete]

e. [unchanged]

f. [unchanged]

In summary, the recommended revision of FAR clause 37-104 would properly reflect the current state of service contracts and focus on Inherently Governmental Services rather than serve as a barrier to good business practices and efficient management of contractor support services. In the opinion of the Tidewater Government-Industry Council, these recommended changes would facilitate the high priority objective of transformation within the Department of Defense and all of its operations.

III. DISCUSSION:

The true basis for the prohibition in the FAR against the awarding of personal service contracts is difficult to ascertain; however, as it is described in the FAR, the prohibition centers on the concern that a personal service contract could create an employer-employee relationship between the government and the contractor’s personnel. Over the years this concern has

been diminished by the fact that contractor personnel cannot become federal employees by virtue of a contract alone. Putting aside the concern that a contractor employee could become a government employee by virtue of a government contract, the proper analysis focuses on the legitimate concern that contracts shall not be used for the performance of inherently governmental functions. (See FAR 7.503.)

The FAR factors for analyzing the existence of an improper personal service contract are based on an October 1967 opinion issued by the United States Civil Service Commission General Counsel. The Comptroller General adopted that opinion later that year. These “Pellerzi Standards” are incorporated into Part 37 of the FAR. (See FAR 37.104(d).)

It appears that the primary concern about contracts for personal services is that a contract employee will seek to establish or represent that he or she is a government employee entitled to the benefits of government employment. These benefits include compensation, retirement benefits and certain processes for hiring, evaluating, transferring and removing government employees. However, by strict interpretation of the requirements for federal employment, the courts have put to rest concerns about inadvertently hiring federal employees through service contracts. Arguments that personal service contracts violate Civil Service laws do not withstand close scrutiny.

One of the requirements for an individual to become a government employee is appointment in the Civil Service by a qualified official. The appointment process requires a significant degree of formality. Definite, unconditional action by an authorized federal official designating an individual to a specific Civil Service position is necessary to fulfill the appointment requirement. In other words, a contract for personal services does not fulfill the appointment requirement and cannot cause a person to become a government employee.

A review of discussions of the ban against personal service contracting shows that the real concern is the policy that contractors should not perform inherently governmental functions. As early as 1927, the Comptroller General overturned a Navy contract for the sampling of tea because the contract involved services necessary in connection with governmental activities which are for performance by regular employees of the government who are responsible to the government. The Comptroller General held that such services should not be performed by contractors.

Although in the intervening years the personal service contract ban grew from Civil Service concerns, recent statutes and regulatory changes have brought the analysis back to the question of inherently governmental functions. With the enactment of the Federal Activities Inventory Reform Act of 1998 (FAIR), the FAR now contains a definition of inherently governmental functions and a statement of policy regarding inherently governmental functions. It would follow that the personal service contract ban no longer has relevance. The ban should either be narrowed specifically to only those personal service contracts that involve performance of inherently governmental functions, or should be removed from the FAR altogether.

The increase in service contracting has forced a shift in the culture of the workforce, creating an increase in areas of administration and accountability with regard to the proper use of all resources. The government workforce, once accustomed to performing the technical and functional mission, is now expected to share that responsibility with a contracted workforce without the traditional organizational structure. The lack of a common definition for personal services further confuses the issue. An examination of the respective patterns or trends in contract administration seems to indicate that personal services have evolved into an accepted practice in its subjectivity.

Addressing the problem of personal service contract restrictions offers potential rewards in the form of efficiencies yielded through reduced administrative costs and effectiveness in the achievement of more realistic management and performance of contract services. Streamlined regulations will improve the effectiveness and provide for achievement of efficiencies sought through the transformation of the DoD.

IV. COLLATERALS: None

V. DEVIATIONS: None