Subpart 37.1 - Service Contracts-General

Parent topic: Part 37 - Service Contracting

37.101 Definitions.

As used in this part-

Adjusted hourly rate (including uncompensated overtime) is the rate that results from multiplying the hourly rate for a 40-hour work week by 40, and then dividing by the proposed hours per week which includes *uncompensated overtime* hours over and above the standard 40-hour work week. For example, 45 hours proposed on a 40-hour work week basis at $20 per hour would be converted to an *uncompensated overtime* rate of $17.78 per hour ($20.00 x 40 / 45 = $17.78).

Child care services means child protective services (including the investigation of child abuse and neglect reports), social services, health and mental health care, child (*day*) care, education (whether or not directly involved in teaching), foster care, residential care, recreational or rehabilitative programs, and detention, correctional, or treatment services.

Nonpersonal services contract means a contract under which the personnel rendering the services are not subject, either by the contract's terms or by the manner of its administration, to the supervision and control usually prevailing in relationships between the Government and its employees.

Service contract means 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. A *service contract may* be either a nonpersonal or personal contract. It can also cover services performed by either professional or nonprofessional personnel whether on an individual or organizational basis. Some of the areas in which *service contracts* are found include the following:

(1) Maintenance, overhaul, repair, servicing, rehabilitation, salvage, modernization, or modification of *supplies*, systems, or equipment.

(2) Routine recurring maintenance of real property.

(3) Housekeeping and base services.

(4) *Advisory and assistance services*.

(5) Operation of Government-owned equipment, real property, and systems.

(6) Communications services.

(7) Architect-Engineering (see subpart 36.6).

(8) Transportation and related services (see part 47).

(9) Research and development (see part 35).

Uncompensated overtime means the hours worked without additional compensation in excess of an average of 40 hours per week by direct charge employees who are exempt from the Fair Labor

Standards Act. Compensated personal absences such as holidays, vacations, and sick leave *shall* be included in the normal work week for purposes of computing *uncompensated overtime* hours.

37.102 Policy.

(a) *Performance-based acquisition* (see subpart 37.6) is the preferred method for acquiring services (Public Law106-398, section 821). When acquiring services, including those acquired under supply contracts or orders, agencies *must*-

(1) Use *performance-based acquisition* methods to the maximum extent practicable, except for-

(i) *Architect-engineer services* acquired in accordance with 40 U.S.C. 1101 *et seq.*;

(ii) *Construction* (see part 36);

(iii) Utility services (see part 41); or

(iv) Services that are incidental to supply purchases; and

(2) Use the following order of precedence (Public Law106-398, section 821(a));

(i) A firm-fixed price performance-based contract or *task order*.

(ii) A performance-based contract or *task order* that is not firm-fixed price.

(iii) A contract or *task order* that is not performance-based.

(b) Agencies *shall* generally rely on the private sector for *commercial services* (see OMB Circular No. A-76, Performance of Commercial Activities and subpart 7.3).

(c) Agencies *shall* not award a contract for the performance of an *inherently governmental function* (see subpart 7.5).

(d) Non-personal *service contracts* are proper under general *contracting* authority.

(e) Agency program officials are responsible for accurately describing the need to be filled, or problem to be resolved, through service *contracting* in a manner that ensures full understanding and responsive performance by contractors and, in so doing, *should* obtain assistance from *contracting* officials, as needed. To the maximum extent practicable, the program officials *shall* describe the need to be filled using *performance-based acquisition* methods.

(f) Agencies *shall* establish effective management practices in accordance with Office of Federal *Procurement* Policy (OFPP) Policy Letter 93-1, Management Oversight of Service *Contracting*, to prevent fraud, waste, and abuse in service *contracting*.

(g) Services are to be obtained in the most cost-effective manner, without barriers to *full and open competition*, and free of any potential conflicts of interest.

(h) Agencies *shall* ensure that sufficiently trained and experienced officials are available within the agency to manage and oversee the contract administration function.

(i) Agencies *shall* ensure that *service contracts* that require the delivery, use, or furnishing of

products are consistent with subpart 23.1 (see 23.103(c)).

(j) Except for DoD, see 15.101-2(d) for limitations on the use of the lowest price technically acceptable source selection process to acquire certain services.

37.103 Contracting officer responsibility.

(a) The *contracting officer* is responsible for ensuring that a proposed contract for services is proper. For this purpose the *contracting officer shall-*

(1) Determine whether the proposed service is for a personal or *nonpersonal services contract* using the definitions at 2.101 and 37.101 and the guidelines in 37.104;

(2) In doubtful cases, obtain the review of legal counsel; and

(3) Document the file (except as provided in paragraph (b) of this section) with-

(i) The opinion of legal counsel, if any,

(ii) A memorandum of the facts and rationale supporting the conclusion that the contract does not violate the provisions in 37.104(b), and

(iii) Any further documentation that the *contracting* agency *may* require.

(b) *Nonpersonal services contracts* are exempt from the requirements of paragraph (a)(3) of this section.

(c) Ensure that *performance-based acquisition* methods are used to the maximum extent practicable when acquiring services.

(d) Ensure that contracts for *child care services* include requirements for criminal history background checks on employees who will perform *child care services* under the contract in accordance with 34 U.S.C. 20351 and agency procedures.

(e) Ensure that service contractor reporting requirements are met in accordance with subpart 4.17, *Service Contracts* Inventory.

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.

37.105 Competition in service contracting.

(a) Unless otherwise provided by statute, contracts for services *shall* be awarded through sealed bidding whenever the conditions in 6.401(a) are met, (except see 6.401(b)).

(b) The provisions of statute and part 6 of this regulation requiring competition apply fully to *service contracts*. The method of *contracting* used to provide for competition *may* vary with the type of service being acquired and *may* not necessarily be limited to price competition.

37.106 Funding and term of service contracts.

(a) When contracts for services are funded by annual appropriations, the term of contracts so funded *shall* not extend beyond the end of the fiscal year of the appropriation except when authorized by law (see paragraph (b) of this section for certain *service contracts*, 32.703-2 for contracts conditioned upon availability of funds, and 32.703-3 for contracts crossing fiscal years).

(b) The head of an *executive agency*, except NASA, *may* enter into a contract, exercise an *option*, or place an order under a contract for severable services for a period that begins in one fiscal year and ends in the next fiscal year if the period of the contract awarded, *option* exercised, or order placed does not exceed oneyear (10 U.S.C. 3133 and 41 U.S.C. 3902). Funds made available for a fiscal year *may* be obligated for the total amount of an action entered into under this authority.

(c) Agencies with statutory multiyear authority *shall* consider the use of this authority to encourage and promote economical business operations when acquiring services.

37.107 Service Contract Labor Standards.

41 U.S.C. chapter 67, *Service Contract* Labor Standards, provides for minimum wages and fringe benefits as well as other conditions of work under certain types of *service contracts*. Whether or not the *Service Contract* Labor Standards statute applies to a specific *service contract* will be determined by the definitions and exceptions given in the *Service Contract* Labor Standards statute, or implementing regulations.

37.108 Small business Certificate of Competency.

In those *service contracts* for which the Government requires the highest competence obtainable, as evidenced in a *solicitation* by a request for a technical/management proposal and a resultant technical evaluation and source selection, the small business Certificate of Competency procedures *may* not apply (see subpart 19.6).

37.109 Services of quasi-military armed forces.

Contracts with "Pinkerton Detective Agencies or similar organizations" are prohibited by 5 U.S.C.

3108. This prohibition applies only to contracts with organizations that *offer* quasi-military armed forces for hire, or with their employees, regardless of the contract's character. An organization providing guard or protective services does not thereby become a "quasi-military armed force," even though the guards are armed or the organization provides general investigative or detective services. (See 57 Comp. Gen. 524.)

37.110 Solicitation provisions and contract clauses.

(a) The *contracting officer shall* insert the provision at 52.237-1, Site Visit, in *solicitations* for services to be performed on Government installations, unless the *solicitation* is for *construction*.

(b) The *contracting officer shall* insert the clause at 52.237-2, Protection of Government Buildings, Equipment, and Vegetation, in *solicitations* and contracts for services to be performed on Government installations, unless a *construction* contract is contemplated.

(c) The *contracting officer may* insert the clause at 52.237-3, Continuity of Services, in *solicitations* and contracts for services, when-

(1) The services under the contract are considered vital to the Government and *must* be continued without interruption and when, upon contract expiration, a successor, either the Government or another contractor, *may* continue them; and

(2) The Government anticipates difficulties during the transition from one contractor to another or to the Government. Examples of instances where use of the clause *may* be appropriate are services in remote locations or services requiring personnel with special security clearances.

(d) See 9.508 regarding the use of an appropriate provision and clause concerning the subject of conflict-of-interest, which *may* at times be significant in *solicitations* and contracts for services.

(e) The *contracting officer shall* also insert in *solicitations* and contracts for services the provisions and clauses prescribed elsewhere in the FAR, as appropriate for each *acquisition*, depending on the conditions that are applicable.

37.111 Extension of services.

Award of contracts for recurring and continuing service requirements are often delayed due to circumstances beyond the control of *contracting offices*. Examples of circumstances causing such delays are bid protests and alleged mistakes in bid. In order to avoid negotiation of short extensions to existing contracts, the *contracting officer may* include an *option* clause (see 17.208(f)) in *solicitations* and contracts which will enable the Government to require continued performance of any services within the limits and at the rates specified in the contract. However, these rates *may* be adjusted only as a result of revisions to prevailing labor rates provided by the Secretary of Labor. The *option* provision *may* be exercised more than once, but the total extension of performance thereunder *shall* not exceed 6 months.

37.112 Government use of private sector temporaries.

Contracting officers may enter into contracts with temporary help service firms for the brief or intermittent use of the skills of private sector temporaries. Services furnished by temporary help firms *shall* not be regarded or treated as personal services. These services *shall* not be used in lieu of regular recruitment under civil service laws or to displace a Federal employee. *Acquisition* of these services *shall* comply with the authority, criteria, and conditions of 5 CFR Part 300, SubpartE, Use of Private Sector Temporaries, and agency procedures.

37.113 Severance payments to foreign nationals.

37.113-1 Waiver of cost allowability limitations.

(a) The *head of the agency may* waive the 31.205-6(g)(6) cost allowability limitations on severance payments to foreign nationals for contracts that-

(1) Provide significant support services for-

(i) Members of the armed forces stationed or deployed outside the *United States*, or

(ii) Employees of an *executive agency* posted outside the *United States*; and

(2) Will be performed in whole or in part outside the *United States*.

(b) Waivers can be granted only before contract award.

(c) Waivers cannot be granted for-

(1) Military banking contracts, which are covered by 10 U.S.C. 3744(d); or

(2) Severance payments made by a contractor to a foreign national employed by the contractor under a DoD *service contract* in the Republic of the Philippines, if the discontinuation of the foreign national is the result of the termination of basing rights of the *United States* military in the Republic of the Philippines (section1351(b) of Public Law102-484, 10 U.S.C.1592, note).

37.113-2 Solicitation provision and contract clause.

(a) Use the provision at 52.237-8, Restriction on Severance Payments to Foreign Nationals, in all *solicitations* that meet the criteria in 37.113-1(a), except for those excluded by 37.113-1(c).

(b) When the head of an agency has granted a waiver pursuant to 37.113-1, use the clause at 52.237-9, Waiver of Limitation on Severance Payments to Foreign Nationals.

37.114 Special acquisition requirements.

Contracts for services which require the contractor to provide advice, opinions, recommendations, ideas, reports, analyses, or other work *products* have the potential for influencing the authority, accountability, and responsibilities of Government officials. These contracts require special management attention to ensure that they do not result in performance of *inherently governmental functions* by the contractor and that Government officials properly exercise their authority. Agencies *must* ensure that-

(a) A sufficient number of qualified Government employees are assigned to oversee contractor activities, especially those that involve support of Government policy or decision making. During performance of *service contracts*, the functions being performed *shall* not be changed or expanded to become inherently governmental.

(b) A greater scrutiny and an appropriate enhanced degree of management oversight is exercised when *contracting* for functions that are not inherently governmental but closely support the performance of *inherently governmental functions* (see 7.503(c)).

(c) All contractor personnel attending meetings, answering Government telephones, and working in other situations where their contractor status is not obvious to third parties are required to identify themselves as such to avoid creating an impression in the minds of members of the public or Congress that they are Government officials, unless, in the judgment of the agency, no harm can come from failing to identify themselves. They *must* also ensure that all documents or reports produced by contractors are suitably marked as contractor *products* or that contractor participation is appropriately disclosed.

37.115 Uncompensated overtime.

37.115-1 Scope.

The policies in this section are based on Section 834 of Public Law101-510 (10 U.S.C. 4507).

37.115-2 General policy.

(a) Use of *uncompensated overtime* is not encouraged.

(b) When professional or technical services are acquired on the basis of the number of hours to be provided, rather than on the task to be performed, the *solicitation shall* require *offerors* to identify *uncompensated overtime* hours and the *uncompensated overtime* rate for direct charge Fair Labor Standards Act-exempt personnel included in their proposals and subcontractor proposals. This includes *uncompensated overtime* hours that are in *indirect cost* pools for personnel whose regular hours are normally charged direct.

(c) *Contracting officers must* ensure that the use of *uncompensated overtime* in contracts to acquire services on the basis of the number of hours provided will not degrade the level of technical expertise required to fulfill the Government's requirements (see 15.305 for competitive negotiations and 15.404-1(d) for *cost realism* analysis). When acquiring these services, *contracting officers must* conduct a risk assessment and evaluate, for award on that basis, any proposals received that reflect factors such as-

(1) Unrealistically low labor rates or other costs that *may* result in quality or service shortfalls; and

(2) Unbalanced distribution of *uncompensated overtime* among skill levels and its use in key technical positions.

(d) Whenever there is *uncompensated overtime*, the *adjusted hourly rate (including uncompensated overtime*) (see definition at 37.101), rather than the hourly rate, *shall* be applied to all proposed hours, whether regular or *overtime* hours.

37.115-3 Solicitation provision.

The *contracting officer shall* insert the provision at 52.237-10, Identification of *Uncompensated Overtime*, in all *solicitations* valued above the *simplified acquisition threshold*, for professional or technical services to be acquired on the basis of the number of hours to be provided.