

# A COR's Guide to Personal Services Contracts

**A** personal services contract is one that, by its express terms or as administered, makes the contractor personnel appear to be government employees. In a personal services contract relationship, the contractor is treated much like the government staff, frequently performing the same or similar work. The government normally is 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.

## What is the government policy on personal services contracts?

In general, government policy prohibits agencies from acquiring the services of individuals by contract in such a way that the individuals become, in effect, employees of the government activity, unless specific authorization is given by statute (Federal Acquisition Regulation [FAR] 37.104(b)). Such "personal services" contracts are disallowed because they can be used to avoid ceilings on personnel staffing levels and salaries. Conversely, contracts for nonpersonal services, properly issued and administered, are an approved resource for the accomplishment of many government programs and projects.

Personal services contracts are discussed in FAR 37.104.

## Can any agency award a personal services contract?

No. Agencies must be authorized by statute to award personal services contracts. Many agencies have been authorized by statute to award personal services contracts. The scope and type vary depending on the authority granted. For example, the Centers for Disease Control (CDC) has personal services authority that allows it to "employ U.S. citizens or third country nationals

and are limited to services provided outside the United States."<sup>1</sup>

Consequently, if an agency determines that a personal services contract is needed, it must ensure it is authorized by statute. In addition, the contracting officer should consult with legal counsel before entering into a personal services contract. As stated in FAR 37.104(e), "when specific statutory authority for a personal service contract is cited, obtain the review and opinion of legal counsel."

## When does an employer–employee relationship occur?

FAR 37.104(c)(1) provides guidance:

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.

In summary, in determining whether an employer–employee relationship exists, the key question always will be: Will the government exercise relatively continuous supervision and control over the contractor personnel performing the contract? Examples include:

- Contractor employees working on a schedule controlled by a government official instead of the contract or the contractor's project director. Note that this does not eliminate the contractor's requirement to adhere to a duty schedule stipulated in the contract.
- Leave, holidays, and other time off being directly controlled by a government official instead of the contractor's project director.
- A government official implying or specifying who a contractor should hire.

### What should the government consider when deciding if a contract is for personal services?

The following questions should be considered in determining if a contract is for personal services:

- Is performance on-site?
- Does the government furnish the principal tools and equipment?
- Are the services applied directly to the integral effort of agencies or an organizational subpart in furtherance of assigned function or mission?
- Are comparable services, meeting comparable needs, performed in the same agency or similar agencies using civil service personnel?
- Can the need for the type of service provided reasonably be expected to last beyond one year?
- Does the inherent nature of the service, or the manner in which it is provided, reasonably require, directly or indirectly, government direction or supervision of contractor employees to adequately protect the government's interest; to retain control of the function involved; or to retain full personal responsibility for the function supported in a duly authorized federal officer or employee?

A positive response to any or all of these questions does not necessarily make a contract a personal services contract per se, but it should be noted that supervision and control of a contractor or its employees, if present in a sufficient degree, may alone render the services personal in nature. If you have a services contract or are planning to award a services contract with some of these elements, you need to proceed with caution and reevaluate your requirements document (statement of work, performance work statement, or statement of objectives) to ensure government personnel will not be directing or supervising contractor employees to accomplish the contract performance requirements.

### I don't think my agency has personal services authority, but I've seen contractors treated like employees. Is this a problem?

Unfortunately, this is a common problem. Regardless of the express terms of a nonpersonal services contract, if a contract is administered improperly, an improper personal services relationship can result. For example, the Government Accountability Office (GAO) denied a

protest challenging the cancellation of a solicitation for clerical and administrative support services where the government agency's actual requirement was for personal services. Although the contract started off small and included temporary, short-term positions for a limited portion of the agency, the requirements quickly grew into permanent clerical and administrative positions throughout the agency. The contractor's personnel in these positions worked at the agency's offices alongside government employees, performing the same or similar work using government supplies and equipment. Government managers supervised contractor personnel by directing, reviewing, and approving their work. GAO decided cancellation of this solicitation was reasonable and proper because the agency no longer needed temporary personal services for short-term positions; rather, the purpose of this contract was to satisfy the agency's need for full-time, permanent staff.<sup>2</sup>

### How can an agency prevent a nonpersonal services contract from becoming a personal services contract?

The best way an agency can avoid even the appearance of an improper personal services contract is to ensure that only the contracting officer's representative (COR) or the contracting officer provides direction to the contractor, and that the contract specifically names the contractor representative (by position) who will be the sole individual who can accept such direction. No instructions or directions are ever given to a contractor employee other than the contractor's named representative.

### Key Takeaways

- A personal services contract is one that, by its express terms or as administered, makes the contractor personnel appear to be government employees.
- Agencies must be authorized by statute to award personal services contracts.
- Nonpersonal services contracts may become personal services contracts if administered improperly.
- To avoid engaging in unauthorized personal services contract, ensure the contract names a contractor employee, such as the project director, who is the sole contractor individual who may accept direction from the COR or contracting officer. ♦

**Endnotes**

- 1 See Global Health, Centers for Disease Control and Prevention; <http://www.cdc.gov/globalhealth/employment/psc.htm>.
- 2 See Matter of: Encore Management, Inc. (B-278903.2), Government Accountability Office, February 12, 1999; <http://archive.gao.gov/legald426p8/161678.pdf>.

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