MAY 0 4 2015

UNITED STATES DEPARTMENT OF COMMERCE
Chief Financial Officer and
Assistant Secretary for Administration
Washington, D.C. 20230

PROCUREMENT MEMORANDUM 2015-05

ACTION

MEMORANDUM FOR: BUREAU PROCUREMENT OFFICIALS
HEADS OF CONTRACTING OFFICES

FROM: Barry E. Berkowitz
Senior Procurement Executive
and Director for Acquisition Management

SUBJECT: Maintaining Proper Relationships with Support Services Contractors

Purpose
The purpose of this Procurement Memorandum is to address the importance of maintaining proper relationships with support services contractors through the Department of Commerce's (DOC) acquisition management and contracts administration.

Background
Federal agencies, including the Department of Commerce, are increasingly dependent on contractors to provide support services alongside of federal employees as part of a "multi-sector" or "blended" federal workforce. Acquiring professional, administrative, management, and other types of support services can create risks that the government must consider and manage. This Procurement Memorandum provides a broad overview of major legal issues commonly associated with the use of support services contractors. Additionally, a list of "Do's and Don'ts" is attached to offer practical tips in maintaining proper relationships with support services contractors.

Discussion
Inherently Governmental Functions
Contractors are prohibited from performing "inherently governmental functions," which is defined under federal law as functions that are "so intimately related to the public interest as to require performance by Federal Government employees." Generally speaking, actions that bind the government's decision making processes are considered inherently governmental, along with functions tied to traditional sovereign powers (e.g., taxation authority and criminal prosecutions). Federal Acquisition Regulation (FAR) Subpart 7.5 provides a list of specific actions that are, or are usually not, considered inherently governmental. For example, contractors are barred from determining agency/regulatory policies, budget strategies, and controlling public funds, but can typically perform services *related to*, or *in support of*, these functions.

The use of contractor personnel in connection with the management of other contractors is an area that warrants special scrutiny. FAR Subpart 7.5 bars contractors from approving contract documents, awarding contracts, ordering contract changes, determining whether contract costs are "reasonable, allocable, and allowable," and participating as a member of source selection or performance evaluation boards. On the other hand, these regulations allow contractors to provide technical evaluation of contract proposals, assistance in developing statements of work, and services "in support" of acquisition planning, management, and that "involve or relate" to the evaluation of another contractor.

More broadly, FAR 7.503(d) discusses examples of support services that are not necessarily "inherently governmental functions," but "may approach being in that category because of the nature of the function, the manner in which the contractor performs the contract, or the manner in which the Government administers contractor performance." The government must exercise additional care where a contractor's support services closely relate to inherently governmental functions, such as a contractor providing advice, recommendations or technical expertise to aid government decision-making. Accordingly, contracting officials must not become over-reliant on the contractor by "rubber stamping" their advice or recommendations without making an informed, independent judgment.

The Office of Federal Procurement Policy (OFPP) issued Policy Letter 11–01 in 2011 that provided further guidance on managing the performance of inherently governmental functions. In addition to providing details to the existing framework set forth in FAR Subpart 7.5, the Policy Letter added discussion concerning contractors performing "critical" functions. A "critical" function is a function that is "necessary to the agency being able to effectively perform and maintain control of its mission and operations."

Critical functions may be provided by contractors, provided they are not also considered to be inherently governmental functions. However, OFPP states that agencies must maintain sufficient "in-house" expertise for these critical functions to both adequately oversee and manage the contractors and continue operations in the event of a contractor's default. The Policy Letter notes that meeting the fiduciary responsibility to taxpayers "generally requires" that an agency have "an adequate number of [these critical] positions filled by Federal employees with appropriate training, experience, and expertise." To date, the FAR has not yet been revised to incorporate the additional guidance provided in OFPP's Policy Letter.

Personal Services Contracts

The federal government is generally restricted from entering into "personal service contracts", which FAR 37.104(a) defines as contracts that are "characterized by the employer-employee relationship it creates between the Government and the contractor's personnel." This restriction prevents circumvention of federal civil service laws that are applicable to hiring federal employees, including competitive appointment procedures. FAR 37.104 offers six illustrative elements to be used as a guide in assessing the existence of a personal services contract. However, the presence of any or all of these elements does not necessarily establish the existence of a personal services contract. Such a finding can only be established based on a case-by-case analysis of the totality of the circumstances in each case. These six elements include:

1. Performance on-site.
2. Principal tools and equipment furnished by the government.
3. Services are applied directly to the integral effort of the agency or an organizational subpart in furtherance of its 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 services 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 (a) adequately protect the Government's interest; (b) retain control of the function involved, or (c) retain full personal responsibility for the function supported in a duly authorized Federal officer or employee.

Despite the general restriction on personal services contracts, there are statutory exceptions that permit such contracts in limited situations. The primary exception, found at 5 U.S.C. § 3109, permits agencies to contract for the services of "experts" or "consultants" on an intermittent or temporary (limited to 1 year) basis. Other legal authorities to enter into personal services contracts may apply in limited circumstances.

Agency acquisition officials must remain vigilant in avoiding prohibited personal service contract practices during both contract formation and performance. The distinction between a personal services contract and a non-personal services contract can be murky and requires a case-by-case analysis based on the facts of each circumstance – especially where contractors are working side by side with government counterparts. A key question to consider is whether the government will exercise relatively continuous supervision and control over the contractor personnel that are performing the contract. The government should not be involved in purely supervisory or management activities of the contractor—such as hiring, leave approval, and performance ratings. Each contract's statement of work should be carefully drafted to prevent these situations of continuous supervision and control over contractor personnel. Additionally, proper contract oversight is needed to ensure that such practices do not occur during contract performance.

Organizational Conflict of Interest

The FAR's provisions on organizational conflict of interest (OCI), found at FAR Subpart 9.5, identify three broad situations that may constitute an OCI for a contractor on a procurement. In these situations a contractor's experience on related contracts may affect a procurement by causing: 1) biased ground rules; 2) impaired objectivity; 3) or unequal access to information. The OCI rules apply to all types of government contracts, but contracts for support services can be particularly susceptible to OCIs because of a contractor's involvement on other procurements or access to sensitive information. Each of the three basic types of OCIs will be briefly discussed.

Under FAR 9.505-2, a contractor that performs services related to the development of another government contract is generally prohibited from providing the system, services, or supplies in that future contract. Otherwise, a contractor would be unfairly allowed to set the "ground rules" of its own competition. This situation is commonly recognized when a contractor develops the specifications or statement of work for a future procurement. However, the concept applies more broadly to include preparation of cost estimates, testing guidelines, and any other plan or document that influences the plan for evaluating proposals.

Similarly, FAR 9.505-3 prohibits a contractor from providing services to the government to evaluate its own performance or products, or those of its competitors. In these situations, a contractor's advice to the government may be clouded by its own commercial interests.

Lastly, FAR 9.505-4 addresses OCIs that stem from a contractor's unequal access to information. If a contractor has received confidential information from the government, including proprietary information of competitors, during the course of performing a contract, the contractor is limited in competing on other procurements where access to this information creates an unfair competitive advantage.

Significant revisions to the FAR's OCI regulations have been discussed and proposed, but have not been promulgated to date. The Commerce Acquisition Regulation (CAR) includes additional procedures for the government's identification, mitigation, and avoidance of actual and apparent OCIs, as well as various disclosure requirements for contractors. Contracting officers are instructed to include CAR

1352.209-74 (Organizational Conflict of Interest) in all solicitations and CAR 1352.209-70 (Potential Organizational Conflict of Interest) in solicitations where the CO has identified there may be a potential OCI. Additionally, CAR 1352.209-71 (Limitation of Future Contracting) must be included when the awardee will be limited in eligibility for future or concurrent contracts based on the nature of the subject contract. This provision includes several alternate versions that apply where contractors provide specifications/work statements, proposal evaluations, or will have access to proprietary information. Contracting officials should identify the unique circumstances and risks of each procurement in addressing potential OCIs and complying with the FAR and CAR requirements.

Personal Conflict of Interest

Subpart 3.11 of the FAR was added to address "personal conflicts of interest" (PCI). These regulations look to the individual conflicts of interest of a contractor's "covered" employees, as opposed to the contractor organization as a whole (i.e. through an OCI analysis discussed above). This subpart specifically applies to contractor employees—and a contractor's self-employed subcontractors—who perform acquisition functions "closely associated with inherently governmental functions." These functions include providing advice or recommendations with respect to acquisition planning, developing contract documents, evaluating proposals, determining contract costs, ordering contract changes, and giving technical direction during contract performance.

In contracts for these types of services that exceed the Simplified Acquisition Threshold (SAT) (currently $150,000), the contracting officer is instructed to include FAR 52.203-16 – Preventing Personal Conflicts of Interest. The contract clause requires an assessment of the potential PCIs of covered individuals that could impair their ability to provide advice that is impartial and in the best interest of the government. The assessment of a PCI considers a range of factors related to an individual's financial, personal, and employment background.

Contractors are required to implement a framework to vet and report the potential PCIs of its employees to the government. More specifically, contractors must obtain disclosure statements from covered employees addressing their personal interests, in addition to nondisclosure agreements that restrict them from using nonpublic information for personal gain. In turn, contracting officers must make determinations on whether potential PCIs have been satisfactorily resolved and report any suspected PCIs that have not been disclosed. Agencies can waive or mitigate PCIs only in "extraordinary circumstances." Contracting officials must recognize the importance of addressing PCIs as a related but distinct inquiry from an OCI analysis.

Required Actions

DOC contracting personnel shall exercise care in entering into and managing its contractual relationships with contractors performing support services. Contracting activities shall be vigilant in identifying situations where support services contractors may be performing inherently governmental functions or personal services. Additionally, strong oversight is required to detect and address potential OCIs and PCIs, both of which may be more likely in the context of support services contracts. DOC contracting personnel shall work closely with the Office of General Counsel/Contract Law Division (OGC/CLD) for advice related to these and other issues associated with maintaining proper relationships with support services contractors.

Additionally, DOC contracting personnel must engage with program offices to ensure that best practices are followed in their day-to-day interactions with contractor personnel. It is important for contractor employees to identify themselves in their e-mail signature lines, in meetings, on the phone, and be mindful of situations where their status as contractors is not obvious to all parties. Contractor

personnel should not be put in the position of appearing to have authority that is reserved for government officials. Management practices that treat contractor personnel and government employees interchangeably can lead to significant regulatory violations. Care in managing the daily interactions between the government and support services contractors will limit risks and protect the integrity of the procurement process. Attached is a list of "Do's and Don'ts" that provides practical tips in maintaining proper relationships with support services contractors.

Effective Date
This guidance is effective immediately.

Please share this Procurement Memorandum with your Contracting Officer Representatives, Program Managers and Project Officers.

The point of contact for this matter is Nancy Barrere, who may be reached at 202-482-5519, or nbarrere@doc.gov.

Attachment

cc: Acquisition Community

Tips for Maintaining Proper Relationships with Support Services Contractors

DO's:

1. Remember that contractor personnel are not interchangeable with government employees.
2. Identify contractor personnel as such with distinctive badges.
   (a) Clearly identify the contactor's work area.
   (b) Contractor identification should also extend to e-mail accounts. E-mail and signature blocks should clearly identify contractor personnel.
3. Respect the employer-employee relationship between a contractor and their employees.
4. Promptly report suspected violations of law, regulation, or agency policy by contractor personnel.
5. Be sensitive to appearances created by close relationships between government and contractor personnel. Unduly close personal relationships with contractor personnel can create the appearance of favoritism, and may call into question the integrity of the procurement process.
6. Safeguard proprietary, sensitive and nonpublic information. Release of certain types of information to unauthorized contractor personnel could violate the Procurement Integrity Act, the Trade Secrets Act, the Privacy Act, and/other laws that could subject the releaser to civil and/or criminal penalties.
7. Clearly describe the scope of work for support services contracts. Monitor any changes in contractual scope during performance, especially when contractors are supporting "inherently governmental" functions.
8. Ensure that only the supervisors of contractor personnel (e.g. program manager, task leader) directly assign tasks to their staff.
9. Maintain the in-house capabilities of government employees needed to oversee and manage contractors performing "critical" functions.
10. Lead by example in setting high ethical standards. Address potential ethical issues promptly and confer with legal counsel.

DON'Ts

1. Don't become so involved as a government official in the operations and policies of the contractor that your judgment alone forms the basis for contractor actions such as:
   (a) Selecting or recruiting contractor personnel.
   (b) Directing, scheduling, or critiquing individual contractor tasks on a continuous basis.
   (c) Supervising contractor personnel.
   (d) Rating individual contractor personnel performance.
   (e) Hiring or firing individual contractor personnel.
   (f) Determining who should perform contract tasks or how they should be done
   (g) Pressuring the contractor to use "favorite" personnel, or insisting on particular personnel actions.
2. Don't use government and contractor personnel interchangeably.
3. Don't intervene in the contractor's chain of command.
4. Don't merely "rubber stamp" the advice or recommendations provided by a support services contractor. Decisions that bind the government's discretionary functions must represent the independent judgment of the requisite government official.
5. Don't give the incumbent contractor a competitive advantage by including its personnel in re-competition meetings or by allowing the contractor's personnel to overhear or gain access to planning information.
6. Don't solicit or accept gifts from contractor personnel. Contractor employees are "prohibited sources" and the rules for giving and getting gifts are very strict. Government employees may not solicit contractors and their personnel to provide or contribute to office gifts such as a retirement gift. In addition, government employees may not solicit Combined Federal Campaign (CFC) contributions from contractor personnel. Before accepting any gift from a contractor, whether from the company as an organization or a specific employee, you should consult with DOC's Office of General Counsel/Contract Law Division.