

FEDERAL AND CONTRACTOR EMPLOYEE ROLES IN THE FEDERAL WORKPLACE: CONTRACTOR AND CONTRACTOR WORK PRODUCT IDENTIFICATION, INHERENTLY GOVERNMENTAL FUNCTIONS, PERSONAL SERVICES, AND FEDERAL INVOLVEMENT IN CONTRACTOR PERSONNEL DECISIONS



**Federal managers must ensure that contractor employees working in the Federal workplace do not misrepresent themselves as Federal employees, perform inherently governmental functions, or provide personal services. Federal managers generally must not be involved in contractor personnel decisions.**

**When in doubt, consult personnel and legal specialists.**

References: FAR 7.5, 37.000, 37.103, 37.104, 37.114; DEAR 937; Acquisition Guide 3.1, 9.1, 37.1, 37.2, 70.7

## Overview

- The purpose of this guide chapter is to aid in establishing effective management controls for:
  - identification of contractor employees and their work product
  - inherently governmental functions
  - personal services and
  - Federal involvement in contractor personnel decisions
- The Department relies on our contractors to provide innovative and effective support in helping us carry out our mission. This obligates us to remain vigilant in protecting the integrity of the complex process that brings us contractor support. Full compliance with the various laws, regulations, and standards of conduct that apply to government employees and contractors must be a hallmark of our operations.

### I. Contractor Employee and Work Product Identification

- (a) If contractor employees will be working in the Federal workplace and attending meetings, answering Government telephones, sending emails, or working in similar situations where their contractor status is not obvious, they must be required to identify themselves and their work products to avoid creating an impression that they are Government officials or their efforts are those of Federal employees. Federal managers must ensure such contractor employees:
  - (1) Identify themselves as contractor personnel on phone calls and at meetings
  - (2) Use signature blocks that indicate: they are contractor employees; and their company
  - (3) Identify themselves as contractor employees if using a “.gov” email address either by stating they are contractor employees supporting DOE or by their signature block (the word “contractor” must appear in the signature block)

- (4) Wear a distinctive badge that distinguishes them from Federal employees
- (5) Mark documents they produce, when appropriate, as contractor products and
- (6) Indicate the extent of their participation in documents they help produce

## II. Inherently governmental functions

- (a) Contractor employees may perform many functions, but they may never perform inherently governmental ones. In brief, contractor employees perform inherently governmental functions when they exercise discretion in committing the government to a particular course of action and their decisions are not substantially limited by existing policies, procedures, and other guidance. The inherently governmental function issue concerns violating the precept that certain activities are so intimately related to the public interest as to require only Federal employees perform them. Federal managers must ensure contractor employees do not perform inherently governmental functions, including any of following examples, which are listed at FAR 7.503(c):
  - (1) The direct conduct of criminal investigations
  - (2) The control of prosecutions and performance of adjudicatory functions other than those relating to arbitration or other methods of alternative dispute resolution
  - (3) The command of military forces, especially the leadership of military personnel who are members of the combat, combat support, or combat service support role
  - (4) The conduct of foreign relations and the determination of foreign policy
  - (5) The determination of agency policy, such as determining the content and application of regulations, among other things
  - (6) The determination of Federal program priorities for budget requests
  - (7) The direction and control of Federal employees
  - (8) The direction and control of intelligence and counter-intelligence operations
  - (9) The selection or non-selection of individuals for Federal Government employment, including the interviewing of individuals for employment
  - (10) The approval of position descriptions and performance standards for Federal employees
  - (11) The determination of what Government property is to be disposed of and on what terms (although an agency may give contractors authority to dispose of property at prices within specified ranges and subject to other reasonable conditions deemed appropriate by the agency)
  - (12) In Federal procurement activities with respect to prime contracts
    - (i) Determining what supplies or services are to be acquired by the Government (although an agency may give contractors authority to acquire supplies at prices within specified ranges and subject to other reasonable conditions deemed appropriate by the agency)
    - (ii) Participating as a voting member on any source selection boards
    - (iii) Approving any contractual documents, to include documents defining requirements, incentive plans, and evaluation criteria
    - (iv) Awarding contracts
    - (v) Administering contracts (including ordering changes in contract performance or contract quantities, taking action based on evaluations of contractor performance, and accepting or rejecting contractor products or services)
    - (vi) Terminating contracts
    - (vii) Determining whether contract costs are reasonable, allocable, and allowable; and
    - (viii) Participating as a voting member on performance evaluation boards

- (13) The approval of agency responses to Freedom of Information Act requests (other than routine responses that, because of statute, regulation, or agency policy, do not require the exercise of judgment in determining whether documents are to be released or withheld), and the approval of agency responses to the administrative appeals of denials of Freedom of Information Act requests
  - (14) The conduct of administrative hearings to determine the eligibility of any person for a security clearance, or involving actions that affect matters of personal reputation or eligibility to participate in Government programs
  - (15) The approval of Federal licensing actions and inspections
  - (16) The determination of budget policy, guidance, and strategy
  - (17) The collection, control, and disbursement of fees, royalties, duties, fines, taxes, and other public funds, unless authorized by statute, such as 31 U.S.C. 952 (relating to private collection contractors) and 31 U.S.C. 3718 (relating to private attorney collection services), but not including
    - (i) Collection of fees, fines, penalties, costs, or other charges from visitors to or patrons of mess halls, post or base exchange concessions, national parks, and similar entities or activities, or from other persons, where the amount to be collected is easily calculated or predetermined and the funds collected can be easily controlled using standard case management techniques and
    - (ii) Routine voucher and invoice examination
  - (18) The control of the treasury accounts
  - (19) The administration of public trusts
  - (20) The drafting of Congressional testimony, responses to Congressional correspondence, or agency responses to audit reports from the Inspector General, the Government Accountability Office, or other Federal audit entity
- (b) Many functions are not generally inherently governmental, but they could easily become inherently governmental because of their nature, the manner in which the contractor performs them, or the manner in which the Government administers the contract. FAR 7.503(d) provides a not all inclusive list of nineteen examples. Contractor employees may, for example, provide services in support of acquisition planning, but they may not determine what supplies are to be acquired; they may provide technical evaluation of contract proposals, but they may not participate as voting members on source selection boards.

### III. Personal Services

- (a) In short, contractor employees provide personal services when Federal officials exercise continuous supervision and control of their efforts. The personal services issue concerns violating the precept that the Government normally must obtain its employees under competitive appointment or other procedures of the civil service laws. In general, contractor employees may not provide personal services to the Government. Government employees may not:
- (1) Supervise contractor employees
  - (2) Stipulate contractor duty hours
  - (3) Require contractor employees to report to them
  - (4) Maintain contractor personnel records/time cards
  - (5) Approve leave for contractor employees
  - (6) Approve bonuses for contractor employees

- (7) Develop duty rosters including names of contractor employees

#### **IV. Federal Employees' Involvement in Contractors' Personnel Decisions**

- (a) Federal employees generally should not be involved in contractors' personnel decisions. Federal employees' participation in contractors' hiring and firing decisions clouds the traditional and appropriate allocation of contract performance and cost risks between the Government and the contractor. That allocation is embedded in the contract (via the federal procurement process, e.g., by the choice of source selection technique, contract type, terms, and conditions).
  - (1) In rare cases, there are circumstances where, due to the nature of the services or supplies being procured, a pressing Federal interest in the contractor's selection of certain employees may call for some Federal officials' involvement in the hiring decision. In those instances, the risks of violating the prohibitions regarding personal services or inherently governmental functions and of muddying the contractual relationship must be explicitly acknowledged. Then they must be appropriately mitigated, preferably by written communication from the contracting officer that includes the rationale for Federal involvement. An example of a Federal action that would be appropriate in some cases is the contracting officer's expressing to contractor management that a contractor employee performed poorly in a critical area (e.g., safety or security) and should not continue to be assigned to that area. It would not be appropriate for any Federal official to direct or imply to the contractor that the employee should be terminated.
- (b) Federal managers must not:
  - (1) Direct a contractor to hire a particular individual (but they may provide the contractor with the names of individuals that are competent)
  - (2) Direct a contractor to fire a particular individual
  - (3) Design work requirements around a single individual