

Subchapter 3037.1 Service Contracts-General

3037.103 Contracting officer responsibility.

(a) Ensure that procurement requests for Departmental branding strategies, seals and logos or similar services are consistent with guidance and policy contained in the Management Directive (MD) 0030, Use of Department of Homeland Security Seal.

(e) Consistent with FAR 7.503, contracting officers must review all requirements for services to ascertain whether a prohibition on contractor support in drafting congressional testimony, responses and reports (or other prohibitions identified in FAR 7.503(c)(20)) should be included within any resultant solicitation, contract or order. For those requirements identified by the contracting officer as requiring such a prohibition: ensure that all solicitations, contracts and orders for services include a prohibition against any form of contractor support in the preparation of congressional testimony, responses and reports (or other prohibitions identified in FAR 7.503(c)(20)); further, ensure that all interagency agreements that may result in assisted acquisitions contain an identical prohibition with respect to any contracts or orders for services to be awarded by a servicing agency on behalf of DHS.

3037.104 Personal services contracts.

3037.104-70 Personal services contracts.

(a) *Definition.* Urgent homeland security need, as defined in this subsection, means a need of the Department, a Component, Directorate, or Office that requires immediate attention or action. Such a need may be in support of a front-line operational mission; a managerial or administrative function (including, but not limited to policy, personnel security, life, or safety); activities required by a court order; activities required by Congress including committees and subcommittees thereof; or the official needs of DHS employees.

(b) *Authorities.* The Homeland Security Act (see 6 U.S.C. 391(b) and 6 U.S.C. 392); 5 U.S.C. 3109; and Section 505 of the DHS Appropriations Act of Fiscal Year 2004 (see P.L. 108-90) authorize the Secretary to award personal service contracts (PSCs) for experts and consultants (or organizations thereof) subject to the following statutory limitations:

(1) *Duration.* The duties are of a temporary nature and the expert or consultant will work temporarily for a maximum of one year; or, the duties are of an intermittent nature (that is, without a regularly scheduled tour of duty).

(2) *Compensation.* The rate of pay for services rendered by an expert or consultant generally cannot exceed the daily equivalent of the maximum rate payable for a GS-15, Step 10 (excluding locality pay or any other additional pay) position under 5 U.S.C. 3109 for PSCs authorized under the above referenced statutes. If the services are necessary due to an urgent homeland security need, under 6 U.S.C. 391(b)(2) and 6 U.S.C. 392 pay limitations do not apply (See 5 U.S.C. 5332). However, price reasonableness must be documented.

(c) *Requirements.* In addition to the statutory limitations for awarding a PSC, contracting officers must satisfy the following requirements to use the authority.

- (1) Verify it would not be practicable to obtain such services by other means (See FAR 37.104 for the definition of a PSC).
- (2) Verify that the contract will not involve the following:
 - (i) A position requiring Presidential appointment;
 - (ii) A Senior Executive Service Position;
 - (iii) Work currently and routinely performed by the Department's regular employees who possess the requisite qualifications such as education, expertise, knowledge, or skills;
 - (iv) Filling in for staffing shortages resulting from delays in the personal hiring process; and
 - (v) Providing that individual a career appointment.
- (3) Prepare a determination and findings (D&F) in accordance with FAR 1.7 and include a determination supported by the findings that states the following:
 - (i) The duties are of a temporary nature and the expert or consultant will work on a full-time basis for a maximum of one year; or, the services are of an intermittent nature;
 - (ii) The work to be performed requires specific education, unique skills, or expertise that is not readily available among DHS personnel;
 - (iii) The contract will not fill a staffing shortage resulting from delays in the hiring process nor serve as a mechanism for circumventing civil service hiring requirements;
 - (iv) The nature of the work requires the position to manage or supervise federal employees (include only when applicable);
 - (v) A non-personal services contract is not practicable;
 - (vi) If the pay limitation of 5 U.S.C. 3109 is exceeded, the D&F supports the rationale and includes the finding that the services are necessary due to urgent homeland security needs to include a description of the urgency and the potential harm or injury to the Government if the services are not obtained; and
 - (vii) Any other determination required by statute has been made.
- (4) Coordinate benefits, taxes, personnel ceilings, or conflict of interest matters with the cognizant civilian personnel office (e.g., your Component Office of the Chief Human Capital Officer) in accordance with FAR 37.104(f).
- (5) Legal review is required for personal services contracts in accordance with FAR 37.104(e).
- (6) The Chief of the Contracting Office (COCO), without redelegation, shall approve the required D&F unless the personal services contract for experts and consultant services are acquired without regard to the pay limitation of 5 U.S.C. 3109 in which case, the Head of the Contracting Activity (HCA) shall approve.

(d) *Additional Considerations.* The contract may provide for the same per diem and travel expenses authorized for a Government employee, including actual transportation and per diem in lieu of subsistence for travel between home or place of business and official duty station and only for travel outside the local area in support of the statement of work.

3037.106 Funding and term of service contracts.

(b) The HCA, with authority to redelegate to the contracting officer, is authorized to enter contracts, options, or orders under contracts for severable services for a period beginning in one fiscal year and ending in the next, provided the period of the basic contract, option or order does not exceed one year. Documentation of the approval shall be retained in the contract file and may be included in other contract file documents, e.g., acquisition plan, price negotiation memorandum, etc.

3037.112 Government use of private sector temporaries.

(a) *Definitions.* The following words and terms are used in and defined for this subsection.

“*Critical need*” means a sudden or unexpected occurrence; an emergency; a pressing necessity; or an exigency. Such occasions are characterized by additional work or deadlines required by statute, executive order, court order, regulation, or formal directive from the Secretary of Homeland Security or designee. A recurring, cyclical peak workload, by itself, is not a critical need.

“*Federal supervisor*” means an individual employed by DHS to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment.

“*Parental and family responsibilities*” means situations such as absence for pregnancy, childbirth, child care, and care for elderly or infirm parents or other dependents.

“*Temporaries*” means those employees of a temporary help service firm who are supervised and paid by that firm and whom that firm assigns to perform the contract work assignments.

“*Temporary help service firm*” means a contractor which provides services that are performed by its pool of employees possessing the appropriate work skills for brief or intermittent periods. The firm is the legally responsible employer and maintains that relationship during the time its employees are assigned to the contract. The firm recruits, tests, hires, trains, assigns, pays, provides benefits and leave to, and as necessary, addresses performance problems, disciplines, and terminates its employees. The firm is responsible for payroll deductions and payment of income taxes, social security (FICA), unemployment insurance, and worker's compensation, and any required liability insurance and bonding.

(b) *Policy.* Temporary help services may be acquired for the brief or intermittent use of the skills of private sector temporaries. Acquisition of these services is subject to the following conditions:

(1) The temporary will be performing the work of an employee who will be absent from the position for a temporary period (short-term) because of a personal need including emergency, accident, illness, parental or family responsibilities, or mandatory jury service.

(2) In the judgment of the head of the requesting office, the temporary help is for a critical need which cannot be delayed.

(c) *Exceptions.* Temporary help services cannot be acquired--

(1) To displace a Federal employee;

(2) For the work of managerial or supervisory positions;

(3) For the work of or to fill an Senior Executive Service (SES) employee or position; or

(4) To circumvent the regular recruitment and hiring procedures under the civil service laws for permanent appointment in the competitive civil service.

(5) To circumvent controls on employment levels; or

(6) In lieu of appointing a surplus or displaced Federal employee as required by 5 CFR Part 330, Subpart F (Agency Career Transition Assistance Plan for Displaced Employees) and Subpart G (Interagency Career Transition Assistance Plan for Displaced Employees).

(d) *Certification of need.* The requirements office must submit a Checklist for Private Sector Temporary Personnel, Appendix T, with the procurement request (PR) for temporary help services. The entire checklist must be completed, including the certification of the regulatory requirements by the Chief Human Capital Officer or Component servicing Human Resource Official.

(e) *Acquisition and contract requirements.* The contracting officer shall comply, as applicable, with all of the policy and procedures of the FAR to acquire temporary help services by contract. The following limitations apply:

(1) The contract shall not create or imply an employer-employee relationship between the Government and the contractor's temporary, and the temporary shall not be eligible for civil service employee benefits, including retirement; and

(2) *Time limit on use of temporary help service firm.* The contract shall not require the use of a temporary help service firm in a single situation, as defined at HSAM 3037.112(a), initially for more than 120 workdays. However, if the Government employee's absence or DHS's critical need continues to exist beyond the initial 120 workdays, the temporary help services may be extended up to a maximum limit of 240 workdays.

(3) *Time limit on use of individual employee of a temporary help service firm.* The contract shall not require that a temporary at an office work for more than 120 workdays

in a 24-month period. The 24-month period begins on the first day of assignment. However, the temporary may work up to a maximum of 240 workdays if it is determined that using the services of the same individual for the same situation will prevent significant delay.

(f) *Approval for extended services by the Component personnel office.* If the requiring office desires to retain the services of the same temporary help service firm beyond 120 workdays, or needs to use a temporary beyond the 120 workdays, the requiring office must submit information to the Component personnel office for approval. The Component personnel office should receive the notification at least 10 working days before the 120 workday period expires. The information required for submission is:

- (1) A full justification for the extension beyond the 120 workday period;
- (2) The new termination date or number of extra workdays needed;
- (3) The total number of days worked by the current temporary and the reason for using the individual;
- (4) The importance of the work to be done and the impact of delay or interruption; and
- (5) The actions taken to find other solutions, and the availability of external and internal candidates.

(g) *Contract administration.* The office receiving the temporary shall ensure that an employer-employee relationship is not established with the contractor's temporary. However, technical advice, assignment of task, task-related instructions, office orientation, and review of the temporary's work products are necessary to ensure that the temporary performs the requisite services.

3037.112-70 Stenographic reporting services.

(a) The contracting officer is delegated authority under 5 U.S.C. 3109 to procure stenographic services by contract.

3037.113-1 Waiver of cost allowability limitations.

(a) The Head of the Contracting Activity (HCA) is delegated this authority.