CHAPTER 5 – SPECIAL CATEGORIES OF PROCUREMENTS

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Part 5.1. Personal Services Contracts

5.1.1. General

a. Personal service contracts are those which include terms or administration practices which create a relationship tantamount to that of employer-employee and makes the contractor personnel appear, in effect, to be government employees. Restrictions on the use of personal service contracts must be considered separately from any other procurement limitations.

b. **Prohibition** Personal service contracts are strictly prohibited, with limited exceptions (as described in 5.1.1.c. and 5.2. below). The judiciary is required to obtain employees by direct hire under competitive appointment or under other personnel procedures. Thus, when the judiciary engages the services of a contractor to perform identifiable tasks, the nature of the relationship between the judiciary and the contractor must be as an independent contractor. It must not, in effect, create an employer-employee relationship subject to the supervision by a judiciary employee. Also the contractor must not be placed in a position which requires contractor supervision of any judiciary employees.

c. Personal service contracts are only authorized under limited circumstances which require statutory authority. The Director of the Administrative Office (AO) has statutory authority to procure personal services only in the following circumstances:

(1) Under 28 U.S.C. § 602 (c), personal services are authorized by 5 U.S.C. § 3109 for an "expert" or "consultant" for services which are not available within the judiciary (see 5.2.1.). However, this circumstance does not allow the use of contractors to perform the duties which normally would be performed by judiciary employees.

(2) Under 28 U.S.C. § 612 (a), personal services are authorized for the effective management, coordination, operation, and use of information technology equipment, purchased by the Judiciary Information Technology (JIT) fund.

d. When considering a service procurement, the CO must consider all the personal services indicators by answering the following questions.

(1) Will the individual(s) require frequent direction and supervision?

(2) Will the services be performed on the judiciary site?

(3) Will the principal tools and equipment necessary for performance of the services be provided by the judiciary?

(4) Will the services be applied directly to the integral effort of the judicial organization, and are they in direct furtherance of its assigned function or mission?

(5) Will comparable services, meeting comparable needs, be performed elsewhere in the judiciary using judiciary employees?

(6) Will the need for the type of provided services be reasonably expected to last beyond one year?

(7) Will the inherent nature of the service, or the manner in which it is provided, reasonably require direct, or indirect, judiciary supervision of contractor employees in order to:

(a) adequately protect the judiciary's interest;

(b) retain control of the function involved; or

(c) retain full personal responsibility for the function supported in a duly authorized judiciary officer or employee?

e. A "yes" answer to any of the above questions, may indicate that the proposed procurement is "personal" in nature. The existence of any of these elements may indicate the likelihood that supervision exists. However, the existence of any one of the indicators in 5.1.1.d. alone, must not necessarily lead the CO to conclude that services are "personal." There is no acid test as to how many of the indicators must be present to result in a conclusion that personal services exist. Instead, this is necessarily a subjective judgment that is made by the CO, based on the individual circumstances, and documented in the file.

f. Clause

Clause 5-1 "Payments under Personal and Professional Services Contracts" is included in solicitations and contracts for personal services.

Part 5.2. Expert and Consultant Services Contracts

5.2.1. General

a. Authority The judiciary is authorized to obtain expert and consultant services under 5 U.S.C. § 3109.

b. These services are not required to be competed or advertised. When retaining the services of a consultant or expert pursuant to 5 U.S.C § 3109, the CO is not required to prepare a sole source justification, inasmuch as there is no competition requirement. However, the file documentation must reflect that these services are acquired under the authority of section 3109 so that anyone reviewing the contract file will understand why the requirement was not competed or advertised.

c. A purchase/delivery/task order cannot be used for expert and consultant services. A formal written contract must be used. The contract must contain all the requisite terms and conditions of a formal government contract. It must contain some price or cost analysis, indicating that the compensation paid is fair and reasonable. This may require an informal market survey (see 2.1.6.), or other objective facts, which demonstrate the reasonableness of the price (see 4.7.2.).

d. Prior to acquiring the services of an individual or business entity as an expert or consultant, the CO must determine that the individual or business entity qualifies as an "expert" or "consultant" under section 3109.

e. An "expert" is defined as one with a high degree of attainment in a professional, scientific, technical, or other field and with excellent qualifications, skills, and knowledge above those of the ordinary person in the field. An expert's knowledge and mastery of the practices, problems, methods and techniques of a field of activity, or of a specialized field, are clearly superior to those usually possessed by ordinarily competent persons in that activity. An expert usually is regarded as an authority or as a practitioner of unusual competence and skill by other persons in the profession, occupation, or activity. An individual or business entity must meet all of the criteria in this definition in order to satisfy the definition of an "expert."

f. A "consultant" is defined as one who provides views on opinions or problems, but does not supervise or carry out operating functions. The person or business entity serves primarily as an adviser to an officer or instrumentality of the judiciary, as distinguished from an officer or employee who carries out the judiciary's duties and responsibilities. A

consultant provides views or opinions on problems or questions presented by the judiciary, but neither performs nor supervises performance of operating functions. Generally, a consultant has a high degree of broad administrative, professional, or technical knowledge or experience which must make the advice distinctively valuable to the agency.

g. The use of consultants or experts under section 3109 is only appropriate when:

(1) the work of the position is temporary or intermittent, as opposed to continuous and full time. "Temporary" is defined as one year or less and is continuous. It includes periods of less than 130 days and must not exceed one year in duration. Therefore, it is not appropriate to include options. "Intermittent" is occasional or irregular work on programs, projects and problems requiring intermittent services as distinguished from continuous. An intermittent service contract cannot exceed 130 days in a service year, but may be renewed from year to year;

(2) the position does not involve policy, management, or operating duties of judiciary employees; and

(3) the individual or business entity possesses the necessary skills and expertise to qualify as an expert or consultant (see 5.2.1.e. and f.).

h. **Applicability** Expert or consultant viewpoints must include the alternatives considered and the rationale for the recommended point of view. The recommendation may include suggestions for the decision, but the ultimate decision is made by the judiciary. The following examples of the purposes for which it is appropriate to procure expert and consulting services include, but are not limited to, obtaining:

(1) specialized opinions, professional or technical advice not available within the judiciary or from another federal agency;

(2) outside viewpoints, to avoid too limited a judgment on critical administrative or technical issues;

(3) advice on developments in industry;

(4) the opinions of experts whose national or international prestige can contribute to the success of an important project; or

(5) the skills of specialized persons who are not needed continuously.

i. **Restrictions** A CO cannot contract for expert or consulting services for any of the following purposes:

(1) to perform work of a policy-making, decision-making, or managerial nature that is the direct responsibility of judiciary officials;

(2) to bypass, circumvent, or undermine personnel ceilings, pay limitations, or competitive employment procedures. Also a consultant or expert may not be hired in anticipation of career appointments;

(3) The expert or consultant must not be tasked to perform duties which otherwise would be duties required by a judiciary employee, even if the judiciary position is considered as an expert or consultant;

(4) Experts or consultants can not be used for full-time, continuous work or to perform a job that can be done by judiciary employees; or

(5) services of experts or consultants may not be procured under a succession of short-term contracts for full or part time services where the resulting continuous employment would be in excess of one year.

(6) The CO must ensure that a contract for expert or consulting services does not establish or allow any of the following:

(a) an employer-employee relationship between the judiciary and the contractor, including detailed control or supervision by judiciary

personnel of the contractor or its employees with respect to the day-to-day operations of the contractor or the methods of accomplishment of the services; or

(b) supervision of judiciary employees by the contractor.

j. For procurement of expert or consulting services, the CO must ensure that the following are accomplished:

(1) each requirement is appropriate and fully justified in writing. The justification must include:

(a) a statement of need; and

(b) the requesting official must certify that the services do not unnecessarily duplicate any previously performed work or services;

(2) each work statement is specific and complete, and states a fixed period of performance within which the services are to be provided;

(3) each contract file contains documentation as to the justifications and determinations for the expert or consultant service as discussed in this section;

(4) appropriate disclosure is required of, and warning is given to, contractor personnel to avoid conflicts of interest;

(5) each contract is properly administered and monitored to ensure that performance meets the requirements of the contract; and

(6) each proposed contract action is properly authorized by a written, signed document.

(7) Before processing any contractual action or solicitation for expert or consulting services, the CO must ensure that the applicable provisions of this chapter have been complied with and that the required documentation is complete and included in the contract file.

k. Since "temporary" services by definition are not to exceed one year, a contract for temporary expert and consulting services must not include an option and cannot be extended by modification. When additional services are required, a new contract must be awarded subject to the requirements and limitations of this section. If in fact the requesting office is interested in procuring services which will be more than a year, they are probably not appropriately "expert" or "consulting" services under section 3109. However, intermittent services can be renewed from year to year. (See definitions in 5.2.1.g.)

l. **Former government employees** There is no *per se* prohibition on this, and it can in fact be appropriate, depending upon the circumstances. The individual must meet the definition of an "expert" or "consultant." However, the definition prohibits procuring services which are to be performed by full-time government employees. Simply because the individual has expertise in a particular matter, which was obtained because of their work on that matter as a government employee, does not mean that they automatically meet the definition of an "expert" or "consultant" under section 3109. An abuse of this would be procuring the services of former government employees to perform the operating duties of the government workforce or to continue with work the individual was involved in as a regular government employee. Then the requesting office could consider other alternatives instead of contracting with the individual, such as re-employment. This would not necessarily be on a full-time basis, but could be worked out through the personnel office on a temporary or intermittent basis as the circumstances deem appropriate. If the individual satisfies the section 3109 criteria as an "expert" or "consultant," the nature of the relationship may in fact be personal services rather than that of an independent contractor. This is largely determined by the degree of

supervision by the government over the individual's work. The fact that the individual may work independently, does not alone satisfy the independent contractor test. The essence of the test is whether the government, on a close and continuous basis, controls what is done and how the individual contractor employee performs the work

m. **Travel Reimbursement** The contract establishes the travel reimbursement terms agreed to by the parties. As a practical matter, however, contractors must not be reimbursed at levels greater than judges.

n. **Licenses** When purchasing expert or consulting services for which individuals are normally required to be licensed (such as medical, legal, accounting, and architecture), the solicitation must require a license as a prerequisite to award. Acceptable licenses may be limited to those issued by a particular state or entity, but only when it is necessary for successful contract performance to limit the award to local expertise.

o. **Provisions and Clauses** All contracts for experts or consulting services must include the following clauses, unless otherwise indicated:

(1) Clause 1-5, "Conflict of Interest" is included in solicitations and contracts for experts and consultant services.

(2) The CO must include Clause 2-65, "Key Personnel" in contracts for professional services. Professional services are those which are provided by an individual whose position requires a license or certification, such as a doctor or a certified public accountant. The clause requires use of the key personnel identified in the contractor's offer, unless the CO approves substitution. It provides for contract termination for failure to comply. The CO will appropriately fill in the clause's blank spaces.

(3) Clause 5-1, "Payments under Personal and Professional Services Contracts;"

(4) Clause 5-5, "Nondisclosure (Professional Services);"

(5) Clause 5-10, "Inspection of Professional Services" which provides for inspection of the professional's work product and acceptance of only those products that meet reasonable professional standards;

(6) Clause 7-125, "Invoices," with Alternate I, must be included in all non-fixed-price contracts for professional services. The clause requires presentation of invoices showing who performed the services, the hours and partial hours of service provided each day, and the services provided each hour or partial hour. Contractors may be allowed to set minimum charges for partial hours or days.

(7) Clause 5-20, "Records Ownership" which gives the judiciary ownership of procurement files, including copies of all contractor work papers; and

(8) Provision 5-25, "Identification of Uncompensated Overtime" is inserted in all solicitations valued above the judiciary's small purchase threshold (see 3.4.1.c. and *Guide* Volume 1, Chapter 8, Part B) for professional or technical services to be acquired on a labor-hour, time and materials, or cost-reimbursement basis.

(9) Clause 6-70, "Work for Hire" is inserted in solicitations and contracts when the contract involves the acquisition of professional services and it is determined by the contracting officer that the contract should be treated as a "work for hire." (See 6.5.9.b.)

p. **Contract Type** Firm fixed priced contracts are preferred. When a firm fixed price contract is not suitable, the CO must first document the reasons. A labor-hour contract may be used, but it is only suitable when the CO includes a ceiling price that the contractor exceeds at its own risk.

Part 5.3. Architect-Engineer Contracts

5.3.1. Architect-Engineer Services

a. **Delegation** This type of procurement is only delegated to COCP Levels 2, 6, and 7. For those COs delegated at Level 2 this is only delegated, if there is a GSA building delegation for the particular building location (see *Guide*, Part B, Exhibit B-2). When there is a GSA building delegation, this section is not applicable. Then the building delegation specifies that the judiciary must follow the GSA rules and regulations. (Also see *Guide*, Volume 1, Chapter 8, Part C, Paragraph 4F.)

b. The following services are considered architect-engineer services for the purpose of this section:

(1) professional services of an architectural or engineering nature, as defined by applicable state law, which the state law requires to be performed or approved in writing by a registered architect or engineer;

(2) professional services of an architectural or engineering nature associated with design or construction of real property;

(3) other professional services of an architectural or engineering nature or services incidental thereto that logically or justifiably require performance by registered architects or engineers or their employees. These services include:

(a) studies;
(b) investigations;
(c) surveying and mapping;
(d) tests;
(e) evaluations;
(f) consultations,
(g) comprehensive planning;
(h) program management;
(i) conceptual designs;
(j) plans and specifications;
(k) value engineering;
(l) construction phase services;
(m) soils engineering;
(n) drawing reviews;
(o) preparation of operating and maintenance manuals; and
(p) other related services;

(4) professional surveying and mapping services of an architectural or engineering nature. Surveying is considered to be an architectural and engineering service and must be procured from registered surveyors or architects and engineers. Mapping associated with the research, planning, development, design, construction, or alteration of real property is considered to be an architectural and engineering service. However, mapping services that are not connected to traditionally understood or accepted architectural and engineering activities, are not incidental to such architectural and engineering activities or have not in themselves traditionally been considered architectural and engineering services and must not be procured pursuant to this section.

c. Sources for contracts for architect-engineer services must be selected in accordance with the procedures in this chapter rather than the solicitation or source selection procedures prescribed elsewhere in this manual.

d. Publicizing

(1) The judiciary must publicly announce all requirements for contracts of architect-engineer services and negotiate contracts for these services based on the demonstrated competence and qualifications of prospective contractors to perform the services at fair and reasonable prices.

(2) The CO must evaluate each potential contractor based on the following criteria:

(a) professional qualifications necessary for satisfactory performance of the required services;

(b) specialized experience and technical competence in the type of work required;

(c) capacity to accomplish the work in the required time;

(d) past performance on contracts with the judiciary, other governmental entities, and private industry in terms of cost control, quality of work, and compliance with performance schedules; and

(e) acceptability under other appropriate evaluation criteria.

e. Data Files The PE must encourage firms engaged in the lawful practice of their profession to submit annual statements of qualifications and performance data.

5.3.2. Architect-Engineer Evaluation Board

a. When procuring architect-engineer services, the PLO in the court unit or FPDO, or the PE in the AO, must establish one or more architect-engineer evaluation boards composed of at least three members. Two members are acceptable for projects where the anticipated fee is not over the judiciary's small purchase threshold. All three members must be individuals who are highly qualified professional employees of the judiciary and who, collectively, have experience in architecture, engineering, construction, and related matters.

b. One member of each board must be designated as the chairperson. Neither the CO nor anyone delegated to conduct architect-engineer contract negotiations for a given project may be a member of the evaluation board for that project.

c. No firm can be eligible for award of an architect-engineer contract during the period in which any of its principals or associates are participating as members of the awarding evaluation board.

5.3.3. Architect-Engineer Evaluation Board Functions The evaluation board must perform the following functions under the general direction of the CO:

(1) review the current data files on eligible firms, including firms furnishing qualification statements in response to any notice publicizing the contemplated contract;

(2) evaluate the firms in accordance with the prescribed criteria in 5.3.1.d.(2) above;

(3) hold discussions with at least three of the most highly qualified firms about concepts and the relative utility of alternative methods of furnishing the required services;

(4) prepare for the CO a selection report recommending, in order of preference, at least three firms that are evaluated to be the most highly qualified to perform the

required services. The selection report must include a description of the discussions and evaluation conducted by the board. This report will allow the CO to review the considerations upon which the recommendations are based.

5.3.4. Architect-Engineer Selection

a. The CO must:
(1) review the recommendations of the evaluation board, and
(2) with the advice of appropriate technical and staff representatives, make the final selection.

b. The final selection must be a listing, in order of preference, of the firms considered most highly qualified to perform the work.

c. If the firm listed as the most preferred is not recommended as the most highly qualified by the evaluation board, the CO must include in the contract file a written explanation of the reason for the selection. All firms on the final selection list must be considered "selected firms" with which the CO may negotiate.

d. The CO cannot add firms to the selection report. If the firms recommended in the report are not deemed to be qualified, or the report is considered inadequate for any reason, the CO must record the reasons and return the report through channels to the evaluation board for appropriate revision.

e. The CO must promptly inform the evaluation board of the final selection.

5.3.5. Architect-Engineer Selection Process for Small Purchases

a. When authorized by the delegated CO (See 5.3.1.a..), the short process set forth in this section may be used as an alternative to the processes set forth in 5.3.3. and 5.3.4. to select firms for contracts not estimated to exceed the judiciary's small purchases threshold (3.4.1.c.), if so delegated.

b. When the CO decides that formal action by the board is not necessary in connection with a particular selection, the following procedures must be used:
(1) the chairperson of the board must perform the functions of the board in accordance with 5.3.3.;
(2) the CO must review the report and approve it or return it to the chairperson for appropriate revision; and
(3) upon receipt of a written approved report, the CO is authorized to commence negotiations.

5.3.6. Cost Estimate for Architect-Engineer Contracts

a. Before the CO can negotiate any proposed contract or contract modification is initiated, an independent cost estimate for the required Architect-Engineer services must be developed based on a detailed analysis of the costs expected to be generated by the work.

b. The estimate must be prepared by the requiring organization and be sent to the CO with the request for services.

c. Access to information concerning the cost estimate must be limited to judiciary personnel and agents whose official duties require knowledge of the estimate.

5.3.7. Negotiations of Architect-Engineer Contracts

a. The CO must first attempt to negotiate a contract with the first firm on the list (see 5.3.4.) for the required services at a price which the CO determines in writing to be fair and reasonable. Negotiations must be conducted in accordance with 3.8. The CO must ordinarily request an offer from the firm, ensuring that the solicitation does not inadvertently preclude the firm from proposing the use of modern design methods.

b. The CO must ensure that the firm has a clear understanding of the scope of work, specifically the essential requirements involved in providing the required services, and determine whether the firm will make available the necessary personnel and facilities to perform the services within the required time.

c. The CO must limit the firm's subcontracting to firms agreed upon during negotiations or through a formal contract modification.

d. If a mutually satisfactory contract cannot be negotiated, the CO must notify the firm that negotiations are terminated. The CO must then initiate negotiations with the next qualified firm rated on the list. This procedure must be continued until a mutually satisfactory contract has been negotiated.

e. If unable to negotiate a satisfactory contract with any of the selected firms, the CO must request a listing of additional firms from the evaluation board and continue negotiations in accordance with this section until an agreement is reached.

f. Architect-Engineer contracts are normally of the fixed-price type. However, any contract type authorized in Chapter 4 may be used, if approved in writing by the PE.

g. In addition to provisions/clauses prescribed in Chapter 4 for particular contract types, the following clauses are inserted in solicitations and contracts for architect/engineer services:

(1) Clause 5-30, "Authorization and Consent;" The clause with Alternate I will be used in all research and development (R&D) solicitations and contracts (including those for architect-engineer services calling exclusively for R&D work or exclusively for experimental work). When a proposed contract involves both R&D work and products or services, and the R&D work is the primary purpose of the contract, the CO will use this alternate. The CO will use the clause with Alternate II if the solicitation or contract is for communication services with a common carrier and the services are unregulated and not priced by a tariff schedule set by a regulatory body.

(2) Clause 5-35, "Payments under Fixed-Price Architect-Engineer Contracts" when a fixed price contract is contemplated;

(3) Reserved

(4) Clause 5-45, "Design Within Funding Limitations," when the project must be designed so that construction costs do not exceed a contractually specified dollar limit (funding limitation);

(5) Clause 5-50, "Responsibility of the Architect-Engineer Contractor" when a fixed price contract is contemplated;

(6) Clause 5-55, "Work Oversight in Architect-Engineer Contracts;"

(7) Clause 5-60, "Requirements for Registration of Designers;"

(8) Clause 5-65, "Subcontractors and Outside Associates and Consultants (Architect-Engineer Services);"

(9) Clause 5-70, "Termination (Fixed-Price Architect-Engineer)," is included when a fixed price contract is contemplated; and

(10) Clause 5-75, "Suspensions and Delays."

5.4. Commercial Use Agreements

5.4.1. General

a. Commercial agreements, license agreements (including software licenses), and special use agreements are frequently requested by contractors as conditions to entering into contracts with the judiciary for the purchase of products, services, and commercial meeting or conference facilities. These agreements are usually written for commercial entities rather than federal agencies and contain terms and conditions that must be modified or removed.

b. COs must not sign commercial agreements. Instead the CO should issue a judiciary contract containing the appropriate judiciary terms and conditions. If this is not possible, then the following steps must be taken before the modified agreement is signed:

(1) the CO must review the commercial agreement and negotiate with a representative from the company to delete or modify the following terms and conditions:

(a) *Credit Application/Master Account* Credit provisions are not applicable to the judiciary and must be deleted;

(b) *Attorney Fees* Any attorney fees included in the agreement must be negotiated out;

(c) *Automatic Renewals of Agreements* Provisions that automatically renew the commercial agreement from year-to-year must be negotiated out;

(d) *Payments in Advance* The judiciary cannot pay in advance, unless it is charges for a publication. This must be deleted;

(e) *Taxes* If the court unit or FPDO is issuing a purchase order, the judiciary is immune from paying taxes and this must be deleted;

(f) *Insurance* Insurance provisions must be removed because the judiciary is self insured;

(g) *Availability of funds* When the procurement is being conducted in the current fiscal year to be delivered or served in a future fiscal year, a statement that the agreement is subject to the availability of funds must be included;

(h) *Indemnification and/or Hold Harmless* These provisions must be replaced with the following:

> "Notwithstanding any other term or provision of this agreement, the liability of the judiciary with respect to any claim for personal injury, death, property loss or damage pursuant to this agreement, is limited by and subject to the procedures and terms of the Federal Tort Claims Act, the Anti-deficiency Act and all other applicable federal laws and regulations."

(i) *Damage Deposits* Any damage deposits must be negotiated out, since the above paragraph will cover damages to the facility.

(2) It is ***strongly recommended*** as being in the best interests of the judiciary that the CO attempt to modify the following commercial agreement provisions:

(a) *Governing Law* The agreement should contain a choice of law clause that makes federal law applicable. However, often the agreement lists the governing law as the law of the particular state where the agreement is being performed. If the CO is unable to negotiate the applicability of federal law and state law remains the governing law, then the CO should

ensure that the Clerk of Court is aware that any litigation concerning the agreement against the court would be decided based on state law.

(b) *Interest* Any interest charges should be negotiated out as the government is not liable for interest in the absence of express provisions in statutes or a lawful contract. If the requirement to pay interest remains in the agreement, then sufficient funds must be available to pay any such interest charges to avoid violation of the Anti-Deficiency Act, 31 U.S.C § 1341(a)(1).

(c) *Cancellation*

1) Any schedule or fixed rate of liquidated damages or fees associated with the cancellation or reduction of the service should be negotiated out;

2) if the vendor insists on damages for cancellation, replace any schedule of damages with language that states:

> "In the event of cancellation or reduction, the vendor agrees to make every effort to resell the cancelled or reduced product or service, and any revenue received by the vendor from the resale will be deducted from the amount owed by the judiciary. In the event the vendor is unable to resell all the cancelled or reduced products or services, the judiciary will be responsible for such amounts that reflect the actual losses sustained by the vendor."

(d) *Subject to Change without Notice* Any language that indicates that the terms of the agreement are subject to change without notice should be negotiated out;

(e) Provisions specific to commercial meeting or conference facilities:

1) *Early Departure Fee* Any fees for changing departure dates to an earlier date after check-in should be negotiated out;

2) *Food and Beverage Policy* Restrictions that require all food and beverages consumed at the facility to be purchased at the facility should be negotiated out;

3) *Group Commitment* Charges based upon actual number of attendees rather than an estimated number should be negotiated out; and

4) *Deposit* The judiciary can provide a "reasonable" deposit in exchange for the hotel or facility to reserve or guarantee a space. NOTE: The funds must be obligated for any deposit paid.

c. (1) The CO must ensure that:

(a) either a new commercial agreement is generated which incorporates all the negotiated changes; or

(b) both parties have initialed all modifications made to the original commercial agreement.

(2) If the contractor and the CO cannot agree to the terms, the CO must:

(a) identify and recommend options that may be available to the judiciary. Options could include a recommendation that the product or service be procured elsewhere; or

(b) contact PMD for assistance, if the provisions at issue are those specified in paragraph **b**.(1) above.

(3) In the event the CO is unable to negotiate the provisions in paragraph **b**.(2) as recommended above and proceeds with the agreement, then the CO must

calculate any potential increase in cost that may be incurred to obtain or use the products, services, commercial meeting or conference facility under such terms that may not be favorable to the judiciary. The cost will be calculated using a "worst case scenario" [Note: Sufficient funds must be reserved to cover the costs of the worst case scenario at the time the purchase order is awarded].

5.5. Interagency Agreements (IAs) and Memoranda of Understanding (MOUs) for Obtaining Products and Services

5.5.1. General

a. The Director has authority to enter into interagency agreements (IAs) and memoranda of understanding (MOUs) (See *Guide*, Vol 1, Chapter 8, Part A.8.A. and L.). This *JP3* section prescribes procedures applicable to IAs and MOUs for obtaining products and services. The Director has delegated to all chief judges and FPDs the authority to obtain products or services from other federal agencies through IAs or MOUs, for amounts not-to-exceed their delegation authority (see *Guide*, Vol 1, Chapter 8, Part B.5.C.(8)).

b. The judiciary may enter into four types of IA or MOU transactions for obtaining products and services. The first three types *require* an IA or MOU and the judiciary provides funding to the providing agency directly. Under the fourth type (multi-agency contracts) the judiciary provides funding directly to the contractor. This fourth type *may* or *may not require* an IA or MOU with the providing agency. In these instances, the judiciary CO will check with the providing agency's CO to determine if an IA or MOU is required. If required, the CO will follow the procedures outlined in this section to establish the IA or MOU. The four types of IA or MOU for obtaining products and services are those:

(1) with another federal agency (hereinafter referred to as the providing agency). In this type, the providing agency will perform work for, or provide services to, the judiciary;

(2) with a providing agency who will contract with a vendor to provide products or services to the judiciary;

(3) with a providing agency for work to be performed under an existing contract held by the providing agency;

(4) in which the judiciary issues a task or delivery order directly to a providing agency's contractor following the procedures contained in *JP3* 3.1.6., Other Federal Agency Contracts. The task or delivery order must be issued by an employee with at least a COCP Level 3 delegated procurement authority (see *Guide* Vol 1, Chapter 8, Part B.; Section 5.C.(8)) or COCP Level 2 as specified by the special delegated program.

5.5.2. Limitations

a. IAs and MOUs:

(1) can be made only with a federal agency. (Also see *Economy Act Transactions* in 5.5.3.c.);

(2) must comply with the bona fide needs rule (See Exhibit 1-1);

(3) may not be used to circumvent conditions or limitations on the use of appropriated funds; and

(4) may not be used to make prohibited purchases, whether prohibited by the judiciary or by the other agency.

b. An IA or MOU must be in writing. As in any contract situation, the agreed upon written terms establish the scope of the undertaking and the rights and obligations of the parties. Also, the written IA or MOU can establish a not-to-exceed amount on the judiciary's financial obligation. If the other agency does not provide an agreement or if the judiciary is the providing agency, then the IA/MOU template (see Procurement webpage) may be used. The IA or MOU should specify at least the following:

(1) a citation of the statute or authority authorizing the IA or MOU;
(2) period of duration;
(3) responsibilities of the providing agency and the judiciary;
(4) description of services to be provided or products to be furnished;
(5) the cost of performance, including appropriate ceilings when cost is based on estimates. This estimated cost cannot be obligated beyond the fiscal year;
(6) mode of payment - advance or reimbursement (see 5.5.4.);
(7) any applicable special requirements or procedures for assuring compliance;
(8) mutual termination provisions. The judiciary and providing agency should agree to procedures for the resolution of disagreements that may arise under an IA or MOU, including resolution by the PE. It should also include the requirement and procedures for the providing agency to notify the judiciary if it appears that performance will exceed estimated costs and to cease or curtail performance as may be necessary. This is an important safeguard to protect the judiciary from a potential Anti-Deficiency Act violation; and
(9) approvals and signatures by authorized officials (see **c.** below).

c. The chief judge, FPD, (or the PLO, if delegated) shall approve the use of IAs or MOUs for obtaining products or services from another federal agency subject to the following limitations:

(1) the IA or MOU must not exceed the procurement delegation authority amount (see *Guide*, Vol 1, Chapter 8, Part B.5.C.(8)). If it is expected to exceed the delegation authority, then see (4) below;
(2) the IA or MOU is signed by the chief judge, FPD, or (if delegated) a CO, certified at the appropriate COCP level;
(3) adherence to applicable statutory and/or regulatory requirements, including appropriations law. This means, for example, that the judiciary may not enter into IAs or MOUs which obligate funds prior to or beyond the current fiscal year. However, the IA or MOU may include yearly option periods which, if the CO exercises the option, will require the obligation of fiscal year funds available for the option period through the execution of a new order with the providing agency;
(4) Reserved
(5) At the AO, the PE must approve all IAs and MOUs.

d. Authority is *not* delegated:

(1) to the Courts or Federal Public Defenders to be *providers* of products or services to another federal agency;
(2) for the detail of personnel between the judiciary and another federal agency, whether paid or unpaid;
(3) for any IA or MOU exceeding the delegation authority amount (see *Guide*, Vol 1, Chapter 8, Part B.5.C.(8)).

e. Proposed IAs or MOUs which exceed the delegation authority, or for which authority is specifically not delegated under paragraph **d.** above, must be forwarded to the PE for review, approval and issuance of a one-time delegation of authority.

5.5.3. Requirements

a. IAs and MOUs are authorized under one of the following categories:
(1) specific statutory authority for the purchase; or
(2) the Economy Act (31 U.S.C. § 1535).

b. For those IAs or MOUs entered pursuant to specific statutory authority, the Determination and Finding is not required. However, the applicable statutory authority must be specified in the procurement documentation. An example of an IA or MOU for obtaining products and services under specific statutory authority is a GSA Reimbursable Work Authorization (RWA).

c. For those IAs and MOUs entered pursuant to specific statutory authority, contact the PE to validate the applicability of the statutory authority.

d. *Economy Act Transactions* The Economy Act (Act) applies when more specific statutory authority does not exist or when the specific authority does not apply to the judiciary. For example, the Clinger-Cohen Act, 40 U.S.C. § 11314, which authorizes government-wide agency contracts (GWACs), does not apply to the judiciary and thus the Economy Act must be relied upon. The Act does not provide authority to enter into IAs or MOUs with state or local agencies. All IAs and MOUs under the Act must be supported by a Determination and Finding (see **e.** below and Exhibit 5-1) which shall be maintained in the procurement file.

e. *Economy Act Determination and Finding* Before entering into an IA or MOU pursuant to the Act, the CO must prepare and sign a Determination and Finding. If the providing agency requires a copy of the judiciary's Determination and Finding, this should be provided with the IA or MOU. The Determination and Finding must determine:
(1) that use of an IA or MOU for obtaining products or services, made pursuant to the Economy Act (31 U.S.C. § 1535) is in the best interest of the judiciary; and
(2) the products or services cannot be provided by contract as conveniently or cheaply by a commercial enterprise.
(3) In order to make the determinations required in (1) and (2) above, the following must be considered and included in the Determination and Finding and file documentation:
  (a) total cost analysis of obtaining the products or services from the providing agency;
  (b) determination if there are any pricing advantages to using an IA or MOU for obtaining products or services;
  (c) consideration of intangibles, such as ease of use, time savings, etc.;
  (d) comparison of the expenditure of effort and associated costs with placing an order or contract under other procedures; and
  (e) identification of other restrictions (e.g. length of time during which the IA or MOU will remain in force and effect; or specified procedures imposed by the providing agency as a condition of the agreement).
(4) For IAs and MOUs within the delegated procurement authority (see *Guide*, Vol 1, Chapter 8, Part B.5.C.(8)), the Determination and Finding must be approved by the chief judge or FPD (or PLO, if delegated). For IAs and MOUs above the

delegated procurement authority, and at the AO, the Determination and Finding must be approved by the PE.

f. *Economy Act Costs* Payment under the Act, whether in advance, with subsequent adjustment, or by reimbursement, must be based on the actual costs of products or services provided (including a minimal administrative fee) in order to avoid unauthorized augmentation of either agency's appropriations. It cannot include "profit" to the providing agency. Actual costs include all direct costs attributable to the performance of a service or the furnishing of products. It also includes only those indirect costs that are funded out of the providing agency's currently available appropriations and which bear a significant relationship to the service or work performed or materials furnished.

g. *Transfer of Funds* Other federal agencies may require that payment be made by transferring funds via the Department of Treasury's Intra-Governmental Payment and Collection (IPAC) system. It is preferable for court units and FPDOs to pay for the products/services by check rather than through IPAC. If the providing agency requires that payment be made via the IPAC system, the purchasing CO shall provide the agency location code in the IA/MOU template (see Procurement webpage) or provide it in the other federal agency's form. These set forth the accounting information for both the providing and purchasing agencies, in addition to other relevant details. Because IPAC transfers can only be accomplished at the AO, the CO shall seek assistance, if necessary, from the Accounting and Financial Systems Division (AFSD) and ensure that the template/form is properly completed, executed, and a copy forwarded to AFSD. The template/form must be signed by the chief judge or FPD (or PLO, if delegated) as the Authorizing Official, indicating concurrence. At the AO the PE will sign it. These discussions should be carried out and all the funding issues resolved prior to requesting chief judge, FPD, PLO or PE approval of the IA or MOU.

h. The CO must provide a copy of *all* new or renewed IAs or MOUs to the PE marked as "Information Only." Also see 5.5.2.c.(4) above concerning transactions above the delegation authority.

5.5.4. Payment

a. Payments to federal agencies may be made in advance or upon receipt of the products or services.

(1) *Advance* The provisions of the written IA or MOU may permit advance payment for all or part of the estimated cost of furnishing the products or services. If payment is made in advance, then any adjustments on the basis of actual costs must be made as agreed to by the providing agency and judiciary. Amounts in excess of actual costs must be returned to the judiciary. Bills rendered or requests for payment are not subject to audit or certification in advance of payment.

(2) *Reimbursement* If approved by the providing agency, payment for actual costs may be made by the judiciary after the products or services have been furnished on a reimbursement basis.

b. If the IA or MOU is under the Economy Act, see the information in 5.5.3.**f.** above.

c. In most instances, an IA, MOU, or an order placed directly with another agency's contractor obligates the judiciary's appropriations and is recorded as the obligation. If this is an Economy Act transaction, then the amount obligated is deobligated to the extent that the providing agency has not incurred obligations, before the end of the period of availability of the appropriation, in:

(1) providing products or services; or
(2) making an authorized contract with another person to provide the requested products or services.

Exhibit 5-1
DETERMINATION AND FINDING FOR A PROCUREMENT USING AN INTERAGENCY AGREEMENT (IA) OR MEMORANDUM OF UNDERSTANDING (MOU) PURSUANT TO THE ECONOMY ACT (TITLE 31 U.S.C. § 1535)

As required by the Economy Act, the attached documentation includes facts which demonstrate that (1) amounts are available to meet the proposed cost; (2) the order is in the best interest of the judiciary; (3) the agency to fill the order is able to provide, or get by contract, the ordered products and services; and (4) the ordered products or services cannot be provided by contract as conveniently or cheaply by a commercial enterprise.

To the best of my knowledge and belief, I hereby certify that the information provided in this Determination and Finding, including the attached supporting documentation, is accurate and complete.

Typed Name: _____

Signature: _____

Title: _____

Typed Name of Approving Official: _____

Signature of Approving Official: _____

Title of Approving Official: _____
(Chief Judge or FPD, within their delegation authority (or PLO, if delegated), or at the AO the Procurement Executive)