

Appropriate Role Working Group Findings and Recommendations

The following **Findings**, as revised, were provisionally adopted by the Acquisition Advisory Panel during Public Meeting held on **August 10, 2006**

Finding 1

- Several developments have led Federal agencies to increase the use of contractors as service providers.
 - Limitations on the number of authorized FTE positions
 - Unavailability of certain capabilities and expertise among Federal employees
 - Desire for operational flexibility
 - Need for “surge capacity”

Finding 2

- The existence of the “blended” or “multi-sector” workforce, where contractors are co-located and work side-by-side with federal managers and staff, has blurred the lines between:
 - Functions that were considered governmental and those that were considered commercial
 - Personal and non-personal services

Finding 3

- Agencies need to retain core functional capabilities that allow them to:
 - Properly perform their missions
 - Provide adequate oversight of agency functions performed by contractors.

Finding 4

- Some agencies have had difficulty in determining strategically which functions need to stay within government and those that may be performed by contractors.

Finding 5

- The term “Inherently Governmental” is inconsistently applied across government agencies.

Finding 6

- Contractors are increasingly performing functions previously done by civil servants.
- The degree of use and functions performed appear to vary widely both within agencies and among agencies.
- There is no clear and consistent government-wide information in this area.

Finding 7

- There is a need to assure that the increase in contractor involvement in agency activities does not undermine the integrity of the Government’s decision making processes.

Finding 8

- The increase in the use of contractors to perform functions that in the past were performed by Federal employees, coupled with increased consolidation in many sectors of the contractor community, has increased the potential for organizational conflicts of interest.

Finding 9

- There are numerous statutory and regulatory provisions governing the activities of Federal employees that are designed to protect the integrity of the government's decision-making process.
 - Recent incidents involving current/former civil servants were adequately dealt with by existing laws and processes. The Panel has not seen evidence that additional laws or regulations governing civil servant conduct are needed at this time.

Finding 10

- Most of the statutory and regulatory provisions that apply to federal employees do not apply to contractor employees, even when they are performing similar functions.

Finding 11

- A blanket application of the government's ethics provisions to contractor personnel raises issues in:
 - Cost
 - Enforcement
 - Management direction

Finding 12

- As the extent of service contracting has grown, the current ban on personal services contracts (PSC) has created two unfortunate situations.
 - In some cases people have taken steps to avoid entering into PSC by creating cumbersome and difficult processes, which often causes the management of those contracts to be inefficient.
 - In other cases people have simply ignored the PSC ban in an effort to improve the effectiveness of their contract management.

The following **Recommendations**, as revised, were provisionally adopted by the Panel during Public Meetings held **August 10 and August 29, 2006**.

Recommendation 1

- OFPP should update the principles for Agencies to apply in determining which functions must be done by Civil Servants.

Recommendation 2

- Agencies must then ensure that those functions are adequately staffed with Civil Servants.

Recommendation 3

- In order to reduce artificial restrictions and maximize effective and efficient service, Congress should remove the current statutory prohibitions on Personal Services.
 - Within the scope of these types of contracts, the Government should be allowed to direct a service contractor's workforce on the substance of the work and/or task performed.
 - Prohibitions on Government involvement in supervisory activities (e.g. hiring, approval of leave, promotion or performance ratings, etc.) should remain in place.

Recommendation 4

- Consistent with Congressional action, OFPP should provide specific policy guidance which defines where, to what extent, under which circumstances, and how agencies may procure personal services.
- Within 5 years of adoption of this policy, the GAO should study the impact resulting from this change.

Recommendation 5

- The FAR Council should review existing rules and regulations, and to the extent necessary, create new, uniform, government-wide policy and clauses dealing with Organizational Conflicts of Interest, Personal Conflicts of Interest, and Protection of Contractor Confidential/Proprietary Data, as described in more detail in the following sub-recommendations.

Recommendation 5-1

- Organizational Conflicts of Interest (OCIs)
 - Consider development of a standard OCI Clause, or a set of standard clauses if appropriate, for inclusion in solicitations and contracts that set forth the contractor's responsibility to assure that its employees, and those of its subcontractors, partners, and any other affiliated organization or individual in the instant effort, as well as policies prescribing their use. The policy and clauses should address conflicts that can arise in the context of developing requirements and/or statements of work, the selection process and contract administration. Potential conflicts of interest to be addressed may arise from such factors as financial interests, unfair competitive advantage, and impaired objectivity (on the instant or any other action), among others.

Recommendation 5-2

- Personal Conflicts of Interest (PCIs)
 - The FAR Council should determine when PCIs need to be addressed, and whether greater disclosure, specific prohibitions, or reliance on specified principles will accomplish the end objective of ethical behavior.
 - The FAR Council should consider whether development of a standard ethics clause or a set of standard clauses would be appropriate for inclusion in solicitations and contracts that set forth the contractor's responsibility to perform the contract with a high level of integrity, along the lines of the Defense Industry Initiative.

Recommendation 5-3 (previously 5-4, renumbered when 5-3 was withdrawn)

- Protection of Contractor Confidential/Proprietary Data
 - The FAR Council should provide additional regulatory guidance for contractor access and for protection of contractor and third party proprietary information, including clauses for use in solicitations and contracts regarding the use of non-disclosure agreements, sharing of information among contractors, and remedies for improper disclosure.

Recommendation 5-4 (previously 5-5, renumbered when 5-3 was withdrawn)

- Training
 - FAR Council should work with DAU/FAI to develop and provide training to:
 - Help procurement personnel identify potential OCIs and PCIs, techniques for addressing them and remedies to use should either occur.
 - Train procurement personnel and others on how to appropriately apply additional tools for the protection of confidential data.

Recommendation 7 (previously 7-1, renumbered)

- As the goal is ethical conduct, not technical compliance with a multitude of specific and in some cases confusing rules and regulations, the Federal Government's rules and regulations in their entirety should *not* be imposed on contractors.

Recommendation 7-1 (previously 7-4)

- Since contractor employees will be working with Civil Servants on a daily basis, and because Civil Servant ethics rules are not all self-evident, consideration should be given to a requirement that would make receipt of the agency's annual ethics training (same as given to Civil Servants) mandatory for all service contractors operating in the blended workforce environment.

Recommendation 8

- Enforcement

- In order to reinforce the standards of ethical conduct applicable to contractors, including those addressed to contractor personnel in a blended workforce, and to ensure that ethical contractors are not forced to compete with unethical organizations, agencies shall ensure that existing remedies, procedures, and sanctions are fully utilized against violators of these ethical standards.