

## NOTICE REGARDING PROHIBITION OF INHERENTLY GOVERNMENTAL SERVICES UNDER MOBIS SIN 874-6

Some acquisition services are inherently governmental in nature and shall not be performed by contractors. Pursuant to the [Office of Federal Policy \(OFPP\) Policy Letter 11-01](#), Performance of Inherently Governmental and Critical Functions, the following federal procurement services are illustrative of inherently governmental activities and thus are **prohibited** under MOBIS:

- 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)
- Participating as a voting member on any source selection boards;
- Approving any contractual documents, to include documents defining requirements, incentive plans, and evaluation criteria;
- Awarding contracts;
- Administering contracts (including ordering changes in contract performance or contract quantities, making final determinations about a contractor's performance, including approving award fee determinations or past performance evaluations and taking action based on those evaluations, and accepting or rejecting contractor products or services);
- Terminating contracts;
- Determining whether contract costs are reasonable, allocable, and allowable; and
- Performing as a voting member on performance evaluation boards

Pursuant to OFPP Policy Letter 11-01, the following acquisition support services are examples of functions closely associated with the performance of inherently governmental functions. This list should be reviewed in conjunction with the list of inherently governmental functions depicted in Appendix A of OFPP Policy Letter 11-01 to better understand differences between the actions identified on each list.

- 1) Services supporting acquisition, including in the areas of:
  - a) Acquisition planning, such as by –
    - i) Conducting market research
    - ii) Developing inputs for government cost estimates, and
    - iii) Drafting statements of work and other pre-award documents;
  - b) Source selection, such as by –
    - i) Preparing a technical evaluation and associated documentation;
    - ii) Participating as a technical advisor to a source selection board or as a nonvoting member of a source selection evaluation board; and
    - iii) Drafting the price negotiations memorandum; and
  - c) Contract management, such as by –

- i) Assisting in the evaluation of a contractor's performance (e.g., by collecting information performing an analysis, or making a recommendation for a proposed performance rating), and
- ii) Providing support for assessing contract claims and preparing termination settlement documents

**If the agency determines that contractor performance of a function closely associated with an inherently governmental function is appropriate, the agency shall –**

- 1) Limit or guide a contractor's exercise of discretion and retain control of government operations by both –
  - a) Establishing in the contract specified ranges of acceptable decisions and/or conduct; and
  - b) Establishing in advance a process for subjecting the contractor's discretionary decisions and conduct to meaningful oversight and, whenever necessary, final approval by an agency official;
- 2) Assign a sufficient number of qualified government employees, with expertise to administer or perform the work, to give special management attention to the contractor's activities, in particular, to ensure that they do not expand to include inherently governmental functions, are not performed in ways not contemplated by the contract so as to become inherently governmental, do not undermine the integrity of the government's decision-making process, and do not interfere with Federal employees' performance of the closely-associated inherently governmental functions;
- 3) Ensure that the level of oversight and management that would be needed to retain government control of contractor performance and preclude the transfer of inherently governmental responsibilities to the contractor would not result in unauthorized personal services as provided by FAR 37.104;
- 4) Ensure that a reasonable identification of contractors and contractor work products is made whenever there is a risk that Congress, the public, or other persons outside of the government might confuse contractor personnel or work products with government officials or work products, respectively; and
- 5) Take appropriate steps to avoid or mitigate conflicts of interest, such as by conducting pre-award conflict of interest reviews, to ensure contract performance is in accordance with objective standards and contract specifications, and developing a conflict of interest mitigation plan, if needed, that identifies the conflict and special actions that will be taken to lessen the potential for conflict of interest or reduce the risk involved with a potential conflict of interest.

If agencies intend to procure services that are closely related to inherently governmental services, GSA recommends that agency officials document the above items in an approved agency-prescribed format (i.e., memorandum to the file, or a Determination and Findings (D&F)) and include this documentation in the procurement file.

## **Special Ordering Instructions for MOBIS SIN 874-6, Acquisition Support Services**

### **Special Instructions Prior to Issuance of Request for Quotation (RFQ)**

Pursuant to [OFPP Policy Letter No. 93-1](#), Managing Oversight of Service Contracting, ordering activities contemplating the use of acquisition support services should address the following questions **prior to** soliciting and/or awarding services under a MOBIS task order. GSA recommends that ordering activities document responses in an agency-prescribed format (i.e., memorandum to the file, or a Determination and Findings (D&F)) which addresses all questions below:

- 1) Is the requirement for inherently governmental services as defined by FAR 7.5, OFPP Policy Letter 11-01, or by the ordering agency? (If the answer is yes, the services **shall not** be solicited under MOBIS. The services must only be performed by qualified government employees. If the answer is no, proceed to the next questions.)
- 2) Are there sufficient resources to evaluate contractor performance when the statement of work requires the contractor to provide advice, analysis and evaluation, opinions, alternatives, or recommendations that could significantly influence agency policy development or decision-making? Identify the resources that will be utilized under a resultant task order.
- 3) Is the statement of work so broadly written that it does not specify a contract deliverable or require progress reporting on contractor performance? (If the answer is yes, the statement of work/RFQ is not yet ready for issuance.) Address how the statement of work addresses these issues to ensure acceptable contractor performance/deliverables.
- 4) Is there concern that the agency lacks the expertise to evaluate independently the contractor's approach, methodology, results, options, conclusions, or recommendations? Explain how the agency will perform/provide the independent evaluation of the contractor's work and ensure control over the function.

### **Special Instructions for Information Contained in RFQ**

Ordering activities using MOBIS to obtain acquisition support services should take the following actions when soliciting, awarding, and managing such services:

- The RFQ should clearly identify the tasks required. If the contractor will be responsible for participating in the development of source selection documents, in the evaluation of proposals, or in the administration of contracts, these tasks should be specifically stated, and the extent of the contractor's involvement in the acquisition support tasks should be clearly explained. Potential contractors should be able to evaluate whether such services will represent a conflict of interest before they take the time and effort to prepare a quote/proposal for the

services.

- Ordering activities should require prospective contractors to include in their quote the following disclosures:
  - Whether and to what extent the offeror has participated in earlier work involving the same program or activity that is the subject of the present contract wherein the offeror had access to source selection or proprietary information not available to other offerors competing for the task order;
  - Whether and to what extent the offeror has information in its possession that the work under the resultant task order would put the offeror in a position to influence Government decision-making, e.g., developing procurement documentations, that will affect the contractor's current or future business;
  - Whether and to what extent the offeror has any information in its possession that the work under a resultant task order affect the interests of the contractor's other clients; and
  - Whether to what extent the offeror or any of its personnel who will perform services under the task order were former agency officials who, while employed by the agency, personally or substantially participated in (a) the development of the requirement for, or (b) the procurement of, these services within the past two years.
  - Offerors should provide resumes for all key personnel they intend to utilize to perform the services under an awarded task order. The personnel resumes should clearly depict the employees' qualifications to perform the required service and their previous work history.
  - As necessary, the RFQ should require all employees of the contractor performing acquisition support services to submit statements/certificates of nondisclosure prior to performing any services under the task order. A sample statement of nondisclosure can be found on the MOBIS website at [www.gsa.gov/mobis](http://www.gsa.gov/mobis).

The responses should be evaluated for potential conflicts of interest and any disclosed conflicts of interest should be addressed with the offerors and the ordering agency's legal counsel as necessary prior to award of the task order.

### **Special Instructions for Award of a Task Order**

Pursuant to [OFPP Policy Letter No. 93-1](#), After receipt and evaluation of quotes, GSA recommends that ordering activities address in writing the following questions regarding

conflict of interest prior to making an award of a task order, via an agency-prescribed format (memorandum to the file or D&F):

- 1) Can the potential contractor perform under the contract in such a way as to devise solutions or make recommendations that would influence the award of future contracts to that contractor?
- 2) Has the potential contractor participated in earlier work involving the same program or activity that is the subject of the present contract wherein the offeror had access to source selection or proprietary information not available to other offerors competing for the task order?
- 3) Will the contractor be evaluating a competitor's work?
- 4) Will the work under the resultant task order put the contractor in a position to influence Government decision-making, e.g., developing regulations, that will affect the contractor's current or future business?
- 5) Will the work under a resultant task order affect the interests of the contractor's other clients?
- 6) Is the potential contractor or any of its personnel who will perform services under the task order former agency officials who, while employed by the agency, personally or substantially participated in (a) the development of the requirement for, or (b) the procurement of, these services within the past two years?

Additionally, ordering activities are encouraged to verify that any additional requirements pertaining to contracting for acquisition support services are met.

Due to the risks associated with contractor performance of acquisition support services, the ordering agency's Inspector General or other interested parties may select task orders for these services to be reviewed for compliance with statutory, regulatory, and policy requirements. Thus, proper documentation of the task order file (addressing the questions/issues described above), along with sufficient management and oversight of the contract, is necessary in order to protect the Government's interests.