

**PART 23**  
**SERVICE CONTRACTS**

**Table of Contents**

23.1	SERVICE CONTRACTS.....	1
23.1.1	Definitions.....	1
23.1.2	Expert/Consultant Services.....	2
23.1.3	Supplemental Labor.....	3
23.1.4	Personal Services Contracts.....	3
23.1.5	Inherently Governmental Functions.....	3
23.1.6	Safety Requirements.....	4
23.1.7	Clause Usage Prescriptions.....	4
23.2	UNAUTHORIZED USE OF COMPUTER SOFTWARE BY CONTRACTORS.....	4
23.2.1	Clause Usage Prescriptions.....	4
23.3	SCREENING CONTRACTOR PERSONNEL.....	5
23.3.1	Background Screenings.....	5
23.3.2	Pre-Registration of Foreign Nationals.....	5
23.3.3	Clause Usage Prescription.....	5
23.50	TEXT OF CLAUSES.....	5
	Clause 23-1 CONTINUITY OF SERVICES.....	6
	Clause 23-2 KEY PERSONNEL.....	6
	Clause 23-3 UNAUTHORIZED REPRODUCTION OR USE OF COMPUTER SOFTWARE.....	6
	Clause 23-4 SCREENING REQUIREMENTS FOR PERSONNEL HAVING ACCESS TO BPA FACILITIES.....	6

**23.1 SERVICE CONTRACTS.**

(a) **INFORMATION:** A service contract requires a contractor to furnish time and effort to perform an identifiable task, rather than to supply a product. A service contract may cover services performed by either professional or nonprofessional personnel whether on an individual or organizational basis.

(b) **POLICY:** BPA may enter into a service contract, so long as the contract is not a personal services contract which is defined at 23.1.4.

(c) **POLICY:** BPA shall not award personal services contracts unless specifically authorized by statute (e.g. 5 U.S.C. 3109) to do so.

(d) **POLICY:** For service contracts, the period of performance for Supplemental Labor and other outsourced services contracts, for recompetition purposes, shall generally be limited to five years, including options. The period of performance for an Expert/Consultant Services contracts, for recompetition purposes, shall generally be limited to two years.

**23.1.1 Definitions**

“Independent Contractor” means a person who does work for BPA by contract, and BPA has the right to control or direct only the result of the work and not the means and methods of accomplishing the result. BPA has adopted the Internal Revenue Service’s general and common law rules to define an Independent Contractor.

“Expert/Consulting Services” means contractors working on project-related work that are hired for specific expertise, or to provide advisory assistance, or for implementation of a project or objective.

## **BONNEVILLE PURCHASING INSTRUCTIONS**

### **PART 23 - Service Contracts**

---

“Service Contract” means a contract that directly engages the time and effort of a contractor whose primary purpose is to perform a task rather than furnish a product.

“Supplemental Labor” means non-federal employee labor contracted and billed on an hourly or daily basis performing tasks for BPA.

#### **23.1.2 Expert/Consultant Services**

(a) **INFORMATION:** Expert/Consultant services provide information, advice, recommendations, options, alternatives, analysis and training to support or improve BPA’s operations, projects, program, policy development, decision-making, management and administrative activities, and may be used to augment or supplement BPA’s knowledge and expertise to enhance BPA’s understanding of complex issues, to provide new insights into alternate solutions, make recommendations on business or decision-making functions or to serve as an expert in any court litigation, administrative hearing or other dispute resolution forum involving BPA, whether or not the expert is expected to testify. Experts/Consultants possess extensive knowledge in a particular field or subject; are independently responsible for the management of work products, quality, and deliverables; may perform their services onsite or offsite.

(b) **POLICY:** Expert/Consultant Services may be used at all organizational levels to help managers achieve maximum effectiveness or economy in their operations.

(c) **POLICY:** Expert/Consultant services shall not be:

- (1) Used in performing work of a policy, decision-making, or managerial nature which is the direct responsibility of agency officials;
- (2) Used to bypass or undermine personnel ceilings, pay limitations, or competitive employment procedures;
- (3) Contracted for on a preferential basis to former employees of the Federal Government; or
- (4) Used under any circumstances specifically to aid in influencing or enacting legislation.

(d) **POLICY:**

- (1) BPA, or an independent third party hired by BPA, shall analyze the facts and determine whether the expert/consultant qualifies as an independent contractor prior to entering into a contract for expert/consultant services.
- (2) If the analysis indicates that a proposed expert/consultant is an independent contractor, BPA may contract directly with that expert/consultant.
- (3) If the analysis indicates a proposed expert/consultant is not an independent contractor, BPA will contract for the services of that expert/consultant through one of its third party supplemental labor contractors. See BPI 22.5.4 for tax policy for Expert/Consultant Services.

(e) **POLICY:** Experts/Consultants services directly related to an investigation or legal proceeding, including any administrative, civil or criminal proceeding to which BPA is a party, may be acquired without regard to section (d) upon a written request from the Executive Vice President, General Counsel, and approved by the Head of Contracting Activity.

(f) **PROCEDURE:** All individuals approved under BPI 23.1.2(e) are required by IRS statutes and regulations to be treated, for income tax withholding purposes, as an employee. COs shall notify Disbursements upon receipt of HCA approval to assure proper setup of withholdings from BPA payments to that individual.

(g) **PROCEDURE:** BPA shall annually review the contracts defined in (e) to insure they do not become personal services contracts. The review will be initiated and documented by Supply Chain Services, with input from the benefitting organization. The HCA shall provide a final

## **BONNEVILLE PURCHASING INSTRUCTIONS**

### **PART 23 - Service Contracts**

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decision to resolve any disagreement between the Supply Chain Services and benefitting organization relating to the review results for these contracts.

#### **23.1.3 Supplemental Labor**

(a) **INFORMATION** Supplemental Labor is non-federal employee labor contracted and billed on an hourly or daily basis performing tasks for BPA. The labor is used to augment existing BPA staff levels or to fill gaps in the Federal Government workforce.

(b) **POLICY:** BPA shall acquire all supplemental labor services through a third party supplemental labor contractor. BPA shall not enter into direct contracts with any individuals for supplemental labor services.

#### **23.1.4 Personal Services Contracts**

(a) **INFORMATION:**

(1) A personal services contract is characterized by the employer-employee relationship it creates between BPA and the contractor's personnel. BPA normally obtains its employees by direct hire under competitive appointment or other procedures required by the civil service laws. Obtaining personal services by contract, rather than by direct hire, circumvents those laws unless Congress has specifically authorized acquisition of the services by contract.

(2) An employer-employee relationship under a service contract occurs when, as a result of the contract's terms or the manner of its administration during performance, contractor personnel are subject to the relatively continuous supervision and control of a BPA officer or employee. However, giving an order for a specific article or service, with the right to reject the finished product or result, is not the type of supervision or control that converts a contractor employee into a BPA employee.

(3) Each contract arrangement must be judged in the light of its own facts and circumstances, and the key question is whether BPA will exercise relatively continuous supervision and control over the contractor personnel performing the contract. The sporadic, unauthorized supervision of only one of a large number of contractor employees might reasonably be considered not relevant, while relatively continuous Federal Government supervision of a substantial number of contractor employees would have to be taken strongly into account.

(b) **POLICY:** Contracts which create personal services relationships are not permitted. See BPI 22.5.5 for tax policy for Supplemental Labor Services.

#### **23.1.5 Inherently Governmental Functions.**

**INFORMATION:**

(a) An inherently governmental function is a function that is so intimately related to the public interest as to mandate performance by employees of the Federal Government. These functions include those activities that require either the exercise of discretion in applying Federal Government authority, or the application of value judgments in making decisions for the Federal Government.

(b) Federal Government functions normally fall into two categories: the act of governing, i.e., the discretionary exercise of Federal Government authority, and monetary transactions and entitlements. Inherently governmental functions do not normally include gathering information for, or providing advice, opinions, recommendations, or ideas to, federal officials, nor do they include functions that are primarily ministerial and internal in nature.

## **BONNEVILLE PURCHASING INSTRUCTIONS**

### **PART 23 - Service Contracts**

---

(c) The following are examples of inherently governmental functions, which may not be contracted. These examples are not intended to be an exhaustive list of inherently governmental functions.

- (1) The determination of BPA policy, such as determining the content and application of regulations.
- (2) The determination of BPA program priorities and budget requests.
- (3) The direction and control of employees of the Federal Government
- (4) The approval of position descriptions and performance standards for employees of the Federal Government.
- (5) The determination of what BPA property is to be disposed of and on what terms.
- (6) The determining what supplies or services are to be acquired by BPA.
- (7) The approval of any contractual documents such as those documents defining requirements, incentive plans and evaluation criteria.
- (8) The awarding, administering, and terminating contracts.
- (9) The determining whether contract costs are reasonable, allocable and allowable.
- (10) The determination of budget policy, guidance and strategy.

(b) **POLICY:** BPA shall not contract for inherently governmental functions. BPA follows the principles outlined in OMB Circular A-76, Performance of Commercial Activities, to determine whether an activity is an inherently Governmental function.

#### **23.1.6 Safety Requirements.**

**POLICY:** While a contractor, including subcontractors, is to be held responsible for its actions with respect to safety, BPA has adopted a safety policy which requires additional safety measures for working on and around transmission lines, substations, rights-of-way and other projects that may place workers in close proximity to energized transmission facilities and other potentially hazardous conditions. BPA safety policy and procedures are found in the BPA's Accident Prevention Manual and in BPI Part 15. (Also, see BPI Parts 11.5, 14.12, and 24.4 for additional purchasing requirements regarding safety).

#### **23.1.7 Clause Usage Prescriptions.**

##### **PROCEDURES:**

(a) The CO may include a clause similar to 23-1, Continuity of Services, in service solicitations and contracts when BPA anticipates the need to facilitate the transition from one contractor to another, or to BPA.

(b) The CO shall include a clause similar to 23-2, Key Personnel, in any solicitations and contracts when specific personnel are essential to the conduct of a project.

#### **23.2 UNAUTHORIZED USE OF COMPUTER SOFTWARE BY CONTRACTORS.**

**POLICY:** BPA shall caution contractors concerning the proper use of copyrighted software licensed to BPA.

##### **23.2.1 Clause Usage Prescriptions.**

**PROCEDURE:** The CO shall include a clause similar to 23-3, Unauthorized Reproduction or Use of Computer Software, in solicitations and contracts where the contractor employees are expected to have access to copyrighted or proprietary software.

## **BONNEVILLE PURCHASING INSTRUCTIONS**

### **PART 23 - Service Contracts**

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#### **23.3 SCREENING CONTRACTOR PERSONNEL.**

**POLICY:** It is BPA policy to protect the agency workforce, facilities, and information by taking steps to ensure that the contractor workforce is properly screened prior to gaining access to BPA facilities and/or computer resources.

##### **23.3.1 Background Screenings.**

(a) **INFORMATION:** BPA policy and procedures regarding security management are found in BPAM Chapter 1070 Security and Emergency Management, and those for identification badges are in BPAM 1077 Personnel Security Program. Federal law establishes the screening procedures which apply to contractors providing child care services at 41 U.S.C 132. Screening procedures for all non-child care contractors are prescribed in Clause 23-4, Screening Requirements for Personnel Having Access to BPA Facilities.

(b) **INFORMATION:** BPA follows the procedures and guidance prescribed in Homeland Security Presidential Directive (HSPD) 12, Policy for a Common Identification Standard for Federal Employees and Contractors, and Federal Information Processing Standards (FIPS) Publication 201: Personal Identity Verification (PIV) of Federal Employees and Contractors, issued by the National Institute of Standards and Technology (NIST).

(c) **PROCEDURE:** Contractor personnel that require access to BPA facilities, and/or sensitive unclassified information and computer systems, must be screened in order to protect BPA property, information, and child day care attendees. The contractor must comply with the procedures established at BPA for screening of new hires, and current staff, as prescribed in HSPD-12 and FIPS 201, as implemented at BPA. The contractor will initiate the screening process by ensuring that its employees present the required forms of personal identification, and complete SF85 - Questionnaire for Non-Sensitive Positions, and submit to the BPA sponsor for processing. The BPA Sponsor may be the COTR or some other person designated to facilitate the contractor employees' entry into BPA facilities and computer systems.

##### **23.3.2 Pre-Registration of Foreign Nationals.**

(a) **INFORMATION:** In compliance with DOE Order 142.3A, Unclassified Foreign Visits and Assignments Program, a contract employee who is a non-US citizen (foreign national) must be pre-registered and approved prior to visits or work assignments at BPA facilities. This process is in addition to the screening process described above. BPA program offices determine the need for, and appropriate work duration, of all contract employees, including non-US Citizens.

(b) **PROCEDURE:** The contract employee must complete BPA form 5632.08e – Foreign Nationals Registration (Short Form) or BPA form 5632.08a – Foreign Nationals Registration (Long Form) and submit it to the BPA Security office for processing.

##### **23.3.3 Clause Usage Prescription.**

**PROCEDURE:** The CO shall include Clause 23-4, Screening Requirements for Personnel Having Access to BPA Facilities, in all solicitations and contracts that require contractor personnel to have access to BPA information resources and/or facilities, including child day care centers, either on a continuing basis or during frequent visits.

#### **23.50 TEXT OF CLAUSES.**

**BONNEVILLE PURCHASING INSTRUCTIONS**  
**PART 23 - Service Contracts**

---

**Clause 23-1 CONTINUITY OF SERVICES (Sep 98)(BPI 23.1)**

(a) The Contractor recognizes that the services under this contract are vital to BPA and must be continued without interruption and that, upon contract expiration, a successor, either BPA or another contractor, may continue them. The Contractor agrees to (1) furnish phase-in training and (2) exercise its best efforts and cooperation to effect an orderly and efficient transition to a successor.

(b) The Contractor shall, upon the Contracting Officer's written notice, (1) furnish phase-in, phase-out services for up to 60 days after this contract expires and (2) negotiate in good faith a plan with a successor to determine the nature and extent of phase-in, phase-out services required. The plan shall be subject to the Contracting Officer's approval. The Contractor shall provide sufficient experienced personnel during the phase-in, phase-out period to ensure that the services called for by this contract are maintained at a high level of proficiency.

(c) The Contractor shall also disclose necessary personnel records and allow the successor to conduct on-site interviews. If selected employees are agreeable to the change, the Contractor shall release them at a mutually agreeable date and negotiate transfer of their earned fringe benefits to the successor.

(d) The Contractor shall be reimbursed for all reasonable phase-in, phase-out costs (i.e., costs incurred within the agreed period after contract expiration that result from phase-in, phase-out operations) and a fee (profit) not to exceed a pro rata portion of the fee (profit) under this contract.

(End of clause)

**Clause 23-2 KEY PERSONNEL (Sep 98)(BPI 23.1)**

The personnel listed below are considered to be essential to the work being performed hereunder. No diversion shall be made by the Contractor without the written consent of the Contracting Officer. (List key personnel below)

(End of clause)

**Clause 23-3 UNAUTHORIZED REPRODUCTION OR USE OF COMPUTER SOFTWARE (Sep 98)(BPI 23.2)**

The contractor shall hold BPA harmless for unauthorized reproduction or use of copyrighted or proprietary computer software and/or manuals or other documentation by the contractor's employees or subcontractors in the performance of the contract.

(End of clause)

**Clause 23-4 SCREENING REQUIREMENTS FOR PERSONNEL HAVING ACCESS TO BPA FACILITIES (Dec 10)(BPI 23.3)**

- (a) The following definitions shall apply to this contract:
- (1) "Access" means the ability to enter BPA facilities as a direct or indirect result of the work required under this contract.
  - (2) "Sensitive unclassified information" means information requiring a degree of protection due to the risk and magnitude of loss or harm that could result from inadvertent or deliberate

## **BONNEVILLE PURCHASING INSTRUCTIONS**

### **PART 23 - Service Contracts**

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disclosures, alteration, or restriction. Sensitive unclassified information may include, but is not limited to: personnel data maintained in systems or records subject to the Privacy Act of 1974, Pub. L. 93-579 (5 U.S.C. 552a); proprietary business data (18 U.S.C. 1905) and the Freedom of Information Act (5 U.S.C. 552); unclassified controlled information (42 U.S.C. 2168, DOE Order 471.3), and critical infrastructure information, energy supply data; economic forecasts; and financial data.

(b) BPA personnel screening activities are based on the Homeland Security Presidential Directive 12 (HSPD-12), and DOE rules and guidance as implemented at BPA. The background screening process to be conducted by the Office of Personnel Management is called a National Agency Check with Inquiries (NACI). The results of the NACI process will provide BPA with information to determine an individual's initial eligibility or continued eligibility for access to BPA facilities including IT access. Such a determination shall not be construed as a substitute for determining whether an individual is technically suitable for employment.

(c) The contractor is responsible for protecting BPA property during contract performance, including sensitive unclassified data. Effective October 27, 2005, all new-hire contract employees expected to work at federal facilities for six or more consecutive months must be screened according to HSPD-12. To initiate the federal screening process discussed in paragraph (b) above, the contractor shall ensure that all prospective contract employees present the required forms of personal identification and complete SF85 - Questionnaire for Non Sensitive Positions and submit it to BPA for processing. All contract employees on board prior to that date will be screened in phases according to length of service. Rescreenings of longer term contract employees will occur at periodic intervals, generally of five years.

(d) As part of the NACI, the government's determination of approval for an individual's access shall be at least based upon criteria listed below. However, the contractor also has a responsibility to affirm that permitting the individual access to BPA facilities and/or computer systems is an acceptable risk which will not lead to improper use, manipulation, alteration, or destruction of BPA property or data, including unauthorized disclosure. Positive findings in any of these areas shall be sufficient grounds to deny access.

- (1) Any behavior, activities, or associations which may show the individual is not reliable or trustworthy;
- (2) Any deliberate misrepresentations, falsifications, or omissions of material facts;
- (3) Any criminal, dishonest or immoral conduct (as defined by local Law), or substance abuse; or
- (4) Any illness, including any mental condition, of a nature which, in the opinion of competent medical authority, may cause significant defect in the judgment or reliability of the employee, with due regard to the transient or continuing effect of the illness and the medical findings in such case.

(e) If the NACI screening process described above prompts a determination to disapprove access, BPA shall notify the contractor, who will then inform the individual of the determination and the reasons therefor. The contractor shall afford the individual an opportunity to refute or rebut the information that has formed the basis for the initial determination, according to the appeal process prescribed by HSPD-12 and supplemental implementing guidance.

(f) If the individual is granted access, the individual's employment records or personnel file shall contain a copy of the final determination as described in paragraph (e) above and the basis for the determination. The contractor shall conduct periodic reviews of the individual's employment records or personnel file to reaffirm the individual's continued suitability for access. The reviews should occur annually, or more often as appropriate or necessary. If the contractor becomes aware of any new information that could alter the individuals' continued eligibility for approved access, the contractor shall notify the COTR immediately.

## **BONNEVILLE PURCHASING INSTRUCTIONS**

### **PART 23 - Service Contracts**

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(g) If a security clearance is required, then the applicant's job qualifications and suitability must be established prior to the submission of a security clearance request to DOE. In the event that an applicant is specifically hired for a position that requires a security clearance, then the applicant shall not be placed in that position until a security clearance is granted by DOE.

(h) In addition to the requirements described elsewhere in this clause, all contractor employees who may be accessing any of BPA's information resources must participate annually in a BPA-furnished information resources security training course.

(i) The contractor is responsible for obtaining from its employees any BPA-issued identification and/or access cards immediately upon termination of an employee's employment with the contractor, and for returning it to the COTR, who will forward it to Security Management.

(j) The substance of this clause shall be included in any subcontracts in which the subcontractor employees will have access to BPA facilities and/ or computer systems.

(End of Clause)