

DEPARTMENT OF THE NAVY
NAVAL SEA SYSTEMS COMMAND
WASHINGTON, DC 20362-5101

IN REPLY REFER TO
NAVSEAINST 4200.19
OPR 901
25 JAN 1990

NAVSEA INSTRUCTION 4200.19

From: Commander, Naval Sea Systems Command

Subj: SERVICE CONTRACT RESTRICTIONS AND SAFEGUARDS

Ref: (a) OMB Circular A-120
(b) FAR Part 37
(c) NAVSEAINST 5910.2C
(d) NAVSEAINST 4200.17
(e) NAVSEAINST 4295.1B

Encl: (1) Business/Financial Management Matrix

1. Purpose. To publish limitations and safeguards when using service contracts.

2. Exception. The provisions of this instruction do not apply to nuclear propulsion matters under the cognizance of the Director, Naval Nuclear Propulsion Program (SEA 08).

3. Definitions

a. Business Sensitive Data. Information generated by Government personnel or information submitted by contractors which, if released or disclosed to the public without authorization, might jeopardize the competitive procurement process or cause substantial competitive harm.

b. Contracting Officer's Technical Representative (COTR). The Government Official appointed in writing by the Procuring Contracting Officer (PCO) and designated in the contract to perform functions as the technical representative of the PCO. The COTR serves as liaison between the Government and the contractor for technical aspects of a contract, monitors contract performance and provides technical advice to the contracting officer.

c. Service Contract. A contract that directly engages the time and effort of a contractor whose primary purpose is to perform an identifiable task, rather than to furnish an end item of supply. Service contracts include Contracted Advisory and Assistance Services (CAAS) contracts, as defined in references (a) and (b) and which require special budgetary reporting requirements, as well as other non-CAAS contracts. The provisions of this instruction apply to all service contracts.

d. Personal Services. An employer-employee relationship created when a contract that, by its express terms or as administered, makes the contractor personnel appear, in effect, Government employees. Reference (b) prohibits the award of personal services contracts unless specifically authorized by statute.

e. Governmental Functions. Governmental functions include activities of a policy-making, decision-making or managerial nature, i.e., activities which require the exercise of discretion in applying Government authority or the use of value judgment in making decisions for the Government.

4. Background. Service contracts traditionally have been used by NAVSEA to procure a broad spectrum of services. These services have consisted primarily of Management Support Services (a CAAS category) and Systems Engineering (a non-CAAS category) to perform engineering assessments, prepare reports, and develop technical or management products used by NAVSEA in support of execution of Navy programs. Where the risk of compromising business sensitive information does not outweigh the need for and utility of contractor services, use of contractors is permitted provided measures are taken to protect against such risk, performance of government functions is not permitted, and compliance with all existing requirements for service contracts is ensured.

5. Policy and Procedures

a. General. Contractors are not to be used for inherently Governmental functions. It is important to distinguish between the policy/decision-making function, which must be retained by the Government, and the implementation of those policies and decisions within the system. Therefore, while it is proper to use contractors to develop products or draft technical inputs which the Navy may use in the decision process, Government personnel are prohibited from using contractors for formulating Government policy, developing acquisition strategies, or defining the Government's needs. Once decisions have been made, contractor personnel may participate in the preparation of required documentation subject to the prohibitions stated herein.

b. Personal Services Awareness and Avoidance. Managers must be cognizant of the support contracts under their control and eliminate personal services in contract execution. The requirements of reference (b) are to be strictly adhered to. Whether or not an employer-employee relationship has been established can be determined only on a case-by-case basis,

depending upon the amount of supervision and control the Government exercises over the contractor personnel. Reference (b) provides criteria used to assess whether a personal services situation exists. No one criterion, or a given combination of criteria, is determinative in establishing the existence of personal services; however, the more affirmative responses to the descriptive elements listed below, the more likely it is that the services are personal. Descriptive elements used as a guide to assess whether a contract is for personal services are:

- (1) whether performance is at the Government's site;
- (2) whether principal tools and equipment for the services are furnished by the Government;
- (3) whether the services are applied directly to the integral effort of the agency or command in furtherance of their assigned missions;
- (4) whether comparable services, satisfying comparable requirements, are performed in the same agency or command or in similar DOD agencies using Government personnel;
- (5) whether the need for the particular service is reasonably expected to last beyond one year; and
- (6) whether the inherent nature of the service, or the manner in which it is provided, reasonably requires Government direction or supervision of contractor personnel in order to protect the Government's interest, retain control of the function, or retain full responsibility for the function.

It is stressed that these criteria are not to be used as a rigorous checklist, but rather as subjective guidance in determining and eliminating potential personal services situations.

c. Administration of On-Site Contractor Personnel. Headquarters components and shore activities are to employ strict management control over the on-site use of contractor support personnel in accordance with reference (c). Other than for attendance at occasional meetings, contractor personnel are not to occupy NAVSEA spaces without prior approval of the cognizant Deputy Commander or Executive Director. Authorization responsibility cannot be further delegated. Contractors are not to be given access to combinations of storage containers, left in charge of an office, given unrestricted access to classified containers or information, authorized to hand-carry business sensitive documents,

or provided access to data not authorized for contractor review. The NAVSEA Inspector General's Office (SEA 00N) shall review and enforce compliance with guidelines in reference (c).

d. Contractual Clauses and Non-Disclosure Agreements.

Contract clauses and tasking statements must preserve the Government's responsibility for control over its programs. Accordingly, contracts shall not require the contractor to directly support the acquisition documentation or source selection process, or to develop final budget, financial or other business sensitive information. However, contractors may be used, to the extent otherwise authorized, to prepare technical inputs, assessments or draft documents which NAVSEA managers then may either incorporate into a final NAVSEA product or use in the Navy decision process. Where contractor personnel may be exposed to business sensitive information in the development of assessments or evaluations, conflict of interest/non-disclosure clauses shall be made a part of the contract, and individual agreements shall be signed by the contractor employees.

e. Instructions to Contractors Under Service Contracts.

Statements of work (SOWs) and technical instructions for service contracts must be detailed and call for specific deliverables. They shall not entail or give the appearance of direct supervision of contractor employees by Government employees. A general statement of work or technical instruction, including statements such as "assist the Government in carrying out the XYZ Program" or terms such as "as directed by," "as needed by," "as requested by," "respond to action items," "assist," and "support" are improper and shall not be used. Technical instructions must be written to:

- (1) describe specific details of work required,
- (2) include specific deliverables, quantities and due dates,
- (3) approve the contractor's estimate of such items as funding, labor mix and period of performance (except where such items are specifically identified in the contract statement of work), and
- (4) allow "third party" review and approval. For example, if the technical instruction is originated by an individual other than the COTR, the COTR's approval is sufficient; if it is originated by the COTR, it must be approved at a level higher than the COTR.

Technical instructions should make general reference to the portion of the contract SOW that is the subject of the technical instruction, so that reviewing managers and auditor or oversight groups can verify that the work is within the scope of the contract. The written technical instruction should be provided to the contractor for an estimate of the labor mix and all associated costs to complete the effort. In addition, these contractor estimates (no Navy estimates are to be provided to the contractor) can serve as the basis for Government review of the in-progress work to ensure compliance with efforts as proposed in the offeror's original proposal and in the review of the deliverables.

f. COTRs

(1) Designation and Appointment of COTRs. Procedures of reference (d) are to be followed for designation and appointment of COTRs.

(2) Qualifications and Training. Prerequisite qualifications for COTR appointment are contained in reference (d). Individuals will not be appointed as COTRs unless they have completed the mandatory initial COTR training required by reference (d). Periodic COTR refresher training is to be provided under the cognizance of SEA 02 as prescribed in reference (d).

(3) Duties and Responsibilities

(a) COTR - Duties are to be assigned in the Procuring Contracting Officer (PCO) letter of appointment. Assignment of clerical or routine administrative duties shall be minimized; however, the COTR should be prepared to provide the PCO any assistance required in expediting the contracting process. Typical areas of assistance to the PCO may include participating in the development of justifications and approvals, drafting procurement requests for incremental funding, and preparing responses to contractor requests for information. Contracting officers shall avoid undue concentration of duties that can lead to abuse; for instance, if the COTR is responsible for originating requirements, it is inappropriate to assign the COTR responsibility for approving the resulting work. COTR responsibilities include maintenance of an arms-length relationship with the contractor to ensure that personal services do not arise. COTRs shall monitor the contractor's progress and notify the PCO of all deficiencies in contract performance or other instances of non-compliance with contract terms and conditions. COTR duties shall not be redelegated, except in writing by the PCO, and then only to individuals with required training and qualifications. COTR duties and responsibilities are provided in reference (d).

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(b) COTR Supervisors - Program Managers or Requiring Office Heads will perform periodic reviews of their COTR performance. Managers will ensure that all assigned duties and responsibilities are performed in accordance with applicable regulations. Technical instructions and contractor progress reports will be evaluated to ensure adherence to NAVSEA policies and restrictions on the use of contractors in procurement, business, and financial areas. Managers are to be sensitive in their reviews to the existence, or appearance, of prohibited personal services. Results of evaluations are to be used by managers to rate COTRs in annual performance appraisals. The cognizant PCO shall provide input to assist COTR supervisors in the appraisal rating process upon request.

(c) PCO and Oversight Officials - PCOs are required to review COTR performance to ensure that assigned duties are performed satisfactorily and in compliance with guidance. The Contracts Directorate (SEA 02) shall maintain a list of all active NAVSEA COTRs and annually review the files and performance of approximately one-third of active COTRs. Results of reviews are to be provided to COTR supervisors and program managers for action. In addition, the NAVSEA Office of Command Evaluation and Review (SEA 00F) shall review COTR performance periodically. The NAVSEA Inspector General's Office (SEA 00N) shall review those instances where impropriety appears to exist. Oversight responsibilities are further discussed in reference (d).

(4) Tracking COTR Assignments and Training. To ensure COTR training and oversight reviews are performed, SEA 02 will maintain a consolidated data base of NAVSEA COTRs, in accordance with reference (d).

g. Acquisition Process

(1) Any use of contractors in the acquisition process must conform to applicable statutory and regulatory guidance. Where the risk of compromise of the acquisition process is perceived to exist, contractors will not be used. The risk of compromise is most critical in those areas where the services involve an essential function of the Command in accomplishing its assigned mission. In such cases, the Government must retain full responsibility for the Command function. Where the Program Manager or Requiring Office Head has determined that the risk of compromise does not outweigh the need for and utility of contractor services, use of contractors will be permitted, provided identified measures are taken to protect against such risk, and compliance with all existing requirements for service contracts is ensured.

However, the risk of compromise is most easily minimized by avoiding the use of contractors in the selection of the method of acquisition and in the selection of a source for the Navy's needs, where this can be accomplished without unduly infringing upon the accomplishment of source selection.

(2) Ultimate determination and development of the Navy's needs, acquisition methods to be used, acquisition plans and strategies, evaluation factors for awards, and all other elements of the acquisition process requiring decision-making are to be performed by government personnel, as they are inherently Governmental functions.

(3) Specific guidelines relating to the various phases of the acquisition process are discussed below:

(a) In the "requirements definition" phase, contractors may be used in an advisory capacity. However, ultimate determination of the Navy's needs rests with decisions made by Government personnel.

(b) In connection with procurement requests and solicitations, contractors may draft specifications, Contract Data Requirements Lists (CDRLs) and schedules, provided Government direction is detailed and clear, permitting no contractor determination of requirements, but solely compilation and transcription of requirements or reported reviews or analyses of specifications, CDRLs, or schedules from which the Government will determine the ultimate composition of the requirements. For example, contractors may be the source of cost data but may have no involvement in the establishment of Government estimates, Government "should cost" analyses, or other Government cost positions developed during the solicitation process.

(c) During the "source selection" phase, contractors will not have access to source selection plans or other source selection documents. Clerical or administrative contractor support shall not be used in the development of acquisition plans, procurement requests, source selection plans, or in the proposal evaluation process. Contractors shall have no involvement in proposal evaluation or access to proposals, unless, in a technical area, the expertise to evaluate an offeror's technical method of proposed performance or product characteristics is not available in the Government. In these cases (i) appropriate safeguards shall be employed, (ii) the contractor shall be operating in an advisory capacity, not a decision-making one, (iii) the consent of offerors shall be obtained, and (iv) contractor involvement shall be limited

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to the specific area of expertise required. When contractor technical expertise is used, the expert is to report to the evaluation chairperson who shall determine the evaluation rating to be accorded each proposal in the area where contractor expertise was used. All contractor employees participating in an advisory capacity in the evaluation of proposals will submit non-disclosure statements to the Source Selection Advisory Council or Contract Award Review Panel Chairperson prior to receiving access to the proposals. Contractors shall have no involvement in the evaluation of contractor price proposals.

(d) Contractors shall not have access to Acquisition Plans, Procurement Requests, Requests for Proposals or Invitations For Bids prior to public release, Justifications and Approvals, Determinations and Findings, business clearances or other documents which divulge cost estimates, negotiating positions, acquisition strategies, source selection criteria or similar business sensitive information. For example, it is acceptable to require a contractor to provide an analysis on the impact of adopting a particular acquisition strategy; however, the final acquisition strategy chosen by the Navy (such as would be documented in the Acquisition Plan) must be held strictly under Government control. Similarly, a contractor may appropriately be required to provide a cost analysis for a specific system; however, the final cost estimate derived by the Navy from that analysis (such as may be found in the Procurement Request or Justification) must not be allowed outside of Navy hands. As a final example, a contractor may, with appropriate safeguards, properly be requested to provide advice (only) on the technical merits of an offeror's proposal, when the specific expertise required is not available within the Government. However, the final Government evaluation of the offeror (such as may be documented in business clearances) must not be released to the contractor.

h. Business/Financial Areas. Contractor involvement in business or financial areas shall be limited so as to ensure that business sensitive information is safeguarded. Enclosure (1) provides a matrix of NAVSEA business/financial management functions and restrictions on the level of contractor involvement.

i. Safeguards for Business Sensitive Information. NAVSEA organizations will take whatever steps are necessary to protect business sensitive information from unauthorized disclosure or compromise. Safeguards for control of business sensitive contractor cost data are contained in reference (e). The following list, although not all-inclusive, contains minimum safeguards that shall be employed for all business sensitive information:

(1) Contractor personnel will not be allowed to occupy or work in NAVSEA spaces without the contract COTR obtaining authorization in accordance with reference (c).

(2) Sign-in/sign-out logs will be used to record contractor visits to NAVSEA work spaces and will be maintained at directorate or office entrances, as appropriate, for monitoring.

(3) Entrances to NAVSEA work spaces accessed by contractors will have signs posted requiring contractor personnel to report to reception areas for clearance authorization.

(4) Contractor personnel in NAVSEA work spaces will at all times be required to wear building passes as prescribed by reference (c).

(5) Access to business sensitive information in on-line computer storage devices, word processing systems and data bases (e.g., STARS, program office management information systems, etc.) shall be restricted by use of passwords or access codes. Contractor access to the on-line STARS data base or other ADP data bases shall be limited to only that particular program with which the contractor is involved. Program managers are responsible for limiting and controlling their contractor access to such systems.

(6) All procurement, budget, financial documents, exhibits, or reports containing business sensitive information shall be clearly marked or stamped "Business Sensitive Information - Not To Be Released Without Proper Government Approval."

(7) All documents, reports, and ADP storage devices, such as floppy disks containing business sensitive information, will be physically secured under lock or in safes. Business sensitive information will not be left unsecured in work areas or on computer terminal screens. NAVSEA codes with business sensitive information will enforce a "clean desk" policy.


(8) Contractor spaces will not be used for evaluation of contractor proposals during the source selection process or for related meetings and discussions of business sensitive information and topics. Additionally, contractor spaces will not be used for storage of business sensitive information.

(9) Contractors authorized to perform in clerical or administrative capacities will not be used to receive or distribute incoming correspondence. Additionally, contractor mail slots or pickup boxes are to not be located near internal office mail distribution slots or boxes.

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(10) Personnel discussing business sensitive information and data are to take precautions to keep such discussions secure from unauthorized personnel.

6. Action. Effective immediately, headquarters components and shore activities shall follow the guidance provided in this instruction and applicable references. If, because of the ongoing nature of a procurement or for other reasons, immediate compliance is not practicable, the Program Manager or Requiring Office Head must provide an impact statement to the appropriate Deputy Commander together with a proposal for conformance. Any waiver to the policies outlined above, for ongoing or future procurements, shall require Deputy Commander level authorization, be documented in the contract file and be reported to the Commander.



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BUSINESS/FINANCIAL MANAGEMENT MATRIX

FUNCTIONS	CONTRACTOR INVOLVEMENT		BUSINESS SENSITIVE
	NO	YES	
I. PROGRAM PLANNING			
IDENTIFY TECHNICAL REQUIREMENT PARAMETERS		X	
PROGRAM FORMULATION AND PHASING	X		
ACQUISITION PLAN	X		X
SOURCE SELECTION PLANS	X		X
PROGRAM ENDORSEMENT MEMORANDUMS (PEMS)	X		X
ILS PLAN		X	
ACQUISITION POLICY	X		X

Contractors may provide technical advice and assistance only. All decisions will be made by the Government. Contractors may not determine or develop requirements or slant them toward their own capabilities. Contractors will not be involved with determining acquisition strategies or policies. Hardware exclusion agreements and non-disclosure agreements are required.

II. PROGRAMMING			
RECEIVE, INTERPRET, ISSUE GUIDANCE	X		
DETERMINE CONTENT OF POM INPUTS, ISSUE PAPERS	X		X
DETERMINE PRIORITIES, SUBMISSIONS	X		
PRESENT, DEFEND (EXTERNAL)	X		
UNLIMITED ACCESS - MAINTAIN POM DATABASE (FYDP)/DISSEMINATIONS	X		X

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FUNCTIONS	CONTRACTOR INVOLVEMENT		BUSINESS SENSITIVE
	NO	YES	

Contractors may provide technical or financial advice but may not make or directly influence decisions of the Government official. Contractors may be used, with appropriate safeguards, in a clerical or administrative capacity in preparing POM inputs and issue papers. Assistance in maintaining the POM data base (FYDP) shall be restricted to discrete program management information for only the particular program with which the contractor is involved. Contractors shall not have access to complete copies of Resource Allocation Displays and FYDP data bases. Program managers shall use discretion and non-disclosure agreements.

III. BUDGET FORMULATION

RECEIVE, INTERPRET, ISSUE GUIDANCE	X		
DETERMINE CONTENTS OF REQUIRED EXHIBITS	X		X
DETERMINE PRIORITIES, SUBMISSIONS	X		X

Contractors may advise or assist in preparation. Contractors may not make or directly influence decisions of Government officials. Program managers shall use discretion and non-disclosure agreements.

IV. BUDGET PRESENTATION

PRESENT, DEFEND AT BUDGET/ APPORTIONMENT HEARINGS	X		X
RECEIVE, DISTRIBUTE MARKS PBDs, ETC.	X		X
DEVELOP/DETERMINE RECLAMAS	X		X
SUBMIT RECLAMAS	X		X

Contractors shall not be used to make reprogramming or other reclama decisions for the Government. Contractors, with proper safeguards, may provide technical or financial expertise and assist with exhibit preparation in a clerical or administrative capacity. Program managers shall use discretion and non-disclosure agreements.

FUNCTIONS	CONTRACTOR INVOLVEMENT		BUSINESS SENSITIVE
	NO	YES	
V. BUDGET EXECUTION			
ESTABLISH, MAINTAIN CHART OF ACCOUNTS	X		X
RECEIVE/DISTRIBUTE NAVSEA ALLOCATIONS	X		X
REPROGRAM FUNDS WITHIN COMMAND	X		X
PREPARE GOVT. EXECUTION DOCUMENTS (e.g. WRs, POS, REQs, MIPRs)		X	
PREPARE TASKING DOCUMENTS (SEATAKs/SPDs)		X	X
PREPARE CONTRACT FISCAL SHEETS		X	X
PREPARE NON-GOVT. EXECUTION DOCUMENTS (PRs)	X		X
REVIEW FINANCIAL/FUNDING DOCUMENTS FOR COMPLIANCE WITH BUDGETS, OBLIGATION AUTHORITY, LAWS, REGS.	X		
PARTICIPATE IN CONTRACT NEGOTIATIONS	X		X
PREPARE OBLIGATION PLANS		X	X
ISSUE GOVT. FUNDING DOCUMENTS (SIGNATURE AUTHORITY)	X		
UNLIMITED ACCESS - MAINTAIN FUND CONTROL SYSTEM (STARS)	X		X
RECEIVE, INTERPRET, PROMULGATE ACCOUNTING GUIDANCE	X		

FUNCTIONS	CONTRACTOR INVOLVEMENT		BUSINESS SENSITIVE
	NO	YES	
ESTABLISH, MAINTAIN, MONITOR FINANCIAL SYSTEMS		X	X

Contractors may provide technical or financial advice, analysis and assistance in preparing accounting documents, and tasking documents. Contractors may assist in record keeping efforts such as tracking the reprogramming of funds and expenditures. Contractors may assist in tracking and planning obligations. Contractors may not make or directly influence decisions of Government officials. Contractor access to STARS shall be limited to only that particular program with which the contractor is involved. Program managers are responsible for limiting and controlling their contractor access to STARS. Program managers shall use discretion and non-disclosure agreements.

VI. COMMAND EVALUATION AND REVIEW			
CONDUCT INTERNAL REVIEWS	X		
ADVISE ON ORGANIZATION STAFFING		X	
LIAISON/ASSISTANCE TO EXTERNAL AUDITORS & IGs	X		
VALIDATING CORRECTION OF DEFICIENCIES	X		

Contractors may assist with analysis of review results and preparation of internal review reports in a clerical or administrative capacity. Contractors may assist with preparation of background documents analysis, etc. used to respond to audits. Non-disclosure agreements shall be required.

VII. COST ESTIMATING			
NEW CONSTRUCTION/ CONVERSION SHIP COST ESTIMATING	X		X
SHIP OVERHAUL/MODERNIZATION COST ESTIMATING	X		X

FUNCTIONS	CONTRACTOR INVOLVEMENT		BUSINESS SENSITIVE
	NO	YES	
EQUIPMENT/SYSTEM LIFE-CYCLE COST ESTIMATING	X		X
SUPPORT COST ESTIMATING	X		X
COST PROPOSAL EVALUATION (SOURCE SELECTION)	X		X
LIFE-CYCLE COST ESTIMATING POLICY	X		X

Contractors may be used for their expertise in cost estimating and as the source of cost data. Contractors shall have no involvement in the establishment of Government estimates, Government "should cost" analyses, or other Government cost positions developed during the solicitation process. Program managers shall use discretion and non-disclosure agreements.

VIII. PROGRAM APPRAISAL REPORTING			
VARIANCE REPORTING ON OBLIGATION PLANS		X	X
ANALYZE PROGRAM/FUND STATUS AT FIELD ACTIVITY CONTRACTORS (e.g., CPR, CSSR, CFSR)		X	X
PREPARE SCA/MID-YEAR REVIEW MATERIAL	X		X
STATUS REPORTING/ ANALYSIS		X	X
PROGRAM MONITORING (e.g., ACQUISITION STRATEGY REPORT, SAR, UCR, DAES)	X		X
MANAGEMENT INFORMATION SYSTEMS		X	X

Contractors may provide advice and assistance only. Program managers shall use discretion and non-disclosure agreements.

