

T3.8.2 Service Contracting Revised 10/2008

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### **T3.8.2 Service Contracting** Revised 10/2008

#### **A Service Contracting**

##### **1 General Requirements** Revised 4/2006

- a. A service contract 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. Services may be either nonpersonal or personal, and may be performed by professional or nonprofessional personnel on an individual or organizational basis.
- b. When planning, acquiring, and managing services, the service team should:
  - (1) Clearly define needs, outputs, objectives, or problems to be solved;
  - (2) Ensure Federal employees retain inherently Governmental functions;
  - (3) Avoid personal services relationships, unless approved in advance;
  - (4) Follow ethics requirements and protect against conflicts of interest;
  - (5) Adequately monitor contractor performance; and
  - (6) Appropriately document the basis for decisions.

##### **2 Contractor Versus Government Performance** Revised 4/2006

- a. Government-wide policy is to rely on the private sector for commercial services, if certain criteria are met, consistent with Office of Management and Budget (OMB) Circular No. A-76, (Revised), “Performance of Commercial Activities,” and the Supplement to Circular No. A-76. This Circular requires agencies to:
  - (1) Identify activities performed by Federal employees as either commercial or inherently Governmental;
  - (2) Perform inherently Governmental activities with Federal employees; and
  - (3) Use a cost competition between the private sector and Federal employees to determine if Federal employees should perform a commercial activity.
- b. When a Federal Activities Inventory Reform (FAIR) Act inventory identifies an in-house function as commercial in nature and suitable for public-private competition, the Contracting Officer should refer to OMB Circular A-76 and the Supplement for guidance. (See AMS Procurement Guidance T3.2.1.3 “Implementing OMB Circular No. A-76” for AMS-specific guidance on conducting A-76 competitions).

### 3 Inherently Governmental and Critical Functions Revised 4/2013

#### a. *Inherently Governmental Functions.*

(1) The FAA cannot contract for inherently Governmental functions. Inherently Governmental functions are those activities so closely related to the public interest that only Federal employees can perform the functions. These functions include activities that require either use of discretion in applying Government authority, or use of value judgments in making decisions for the Government. Governmental functions normally fall into two categories:

(a) The act of governing, which requires discretionary use of Government authority; or

(b) Decisions affecting monetary transactions and entitlements.

(2) The following functions are considered inherently Governmental (this list is not all inclusive):

(a) Determining FAA program priorities and budget requests;

(b) Conducting monetary transactions or entitlements;

(c) Interpreting and executing laws that will bind FAA to take or not take some action by contract, policy, regulation, authorization, or order;

(d) Determining FAA policy;

(e) Exercising ultimate control over acquisition, use, or disposal of FAA's property, including collecting, controlling, or disbursing funds, and on what terms;

(f) Determining budget policy, guidance and strategy;

(g) Directing and controlling Federal employees;

(h) Selecting or non-selecting individuals for Federal employment (including interviewing for employment)

(i) Approving position descriptions and performance standards for Federal employees;

(j) Determining and defining supplies or services to be acquired by FAA (the contractor may not identify its own work requirements, or write its own statement of work or task assignments);

(k) Approving contractual documents, such as those documents defining requirements, incentive plans, and evaluation criteria;

(l) Awarding, administering, and terminating contracts (including functions delegated to a Contracting Officer's Representative);

(m) Determining whether contract costs are reasonable, allocable, and allowable; (n) Drafting Congressional testimony, responses to Congressional correspondence, or agency responses to audit reports from the Inspector General, General Accountability Office, or other Federal audit entity;

(o) Approving FAA responses to Freedom of Information Act (FOIA) requests (other than routine responses that do not require the exercise of judgment whether documents are released or withheld), and approving FAA responses to the administrative appeals of denials of FOIA requests;

(p) Approving FAA licensing actions and inspections; and

(q) Performing adjudicatory functions (other than those relating to arbitration or other methods of alternative dispute resolution).

(3) Effort under contracts requiring advice, recommendations, reports, analyses, or other similar work is considered effort closely associated with performing inherently Governmental functions. Such closely associated effort could influence the authority, accountability, and responsibilities of FAA officials. These contracts require active monitoring and administration to ensure contractors do not perform inherently Governmental functions and Federal employees properly exercise their authority.

(4) Prior to issuing a screening information request (SIR) or contract for services, the CO must determine whether the services are inherently Governmental functions.

*b. Critical Functions.*

(1) "Critical functions" are functions necessary for an agency to effectively perform and maintain control of its mission and operations. These functions are typically recurring and long-term.

(2) Examples of critical FAA functions include (this list is not all-inclusive):

- ☐ Aviation safety;
- ☐ Air traffic operations;
- ☐ FAA information systems; and
- ☐ Security and hazardous material safety

(3) Before issuing a SIR or contract for services, the CO and program official should determine if the procurement is in support of a critical FAA function. Where a critical FAA function is not inherently Governmental, both FAA and contractor employees may support the function.

(4) The CO and program official should use informed judgment when determining whether the services support a critical FAA function. In making this determination,

the overall importance of the function to FAA's mission and operations should be considered. The more important the function, the more important it is that FAA have the internal capability to maintain control of its mission and operations. Sufficient internal capability generally requires that FAA have an adequate number of Federal employees having the necessary expertise to oversee any contractors supporting the critical function, and perform the needed work without adverse impact in the event of contractor default. The CO and program official must monitor the contractor performance supporting a critical FAA function during contract performance.

c. *Reporting.* COs will indicate in PRISM at the beginning of the "Inherently Governmental Functions" field whether the services are closely associated with inherently governmental functions, supporting critical functions, or a combination of closely associated with inherently governmental functions and supporting critical functions. If none of these, the services will be indicated as "other functions." If not a services contract, NA (Not Applicable) will be indicated.

#### **4 Support Services Contracting** Revised 10/2020

a. *Description.* Support services contracts require contractor personnel with specific expertise, knowledge, skill, or experience to help implement or improve the FAA's systems, programs, functions, or goals. Although not a comprehensive description, support services include:

*Technical, engineering, and scientific* expertise, advice, analysis, studies, or reports in areas such as: information technology design, programming, networking, installation, operation, data management, and customer support; definition and design of systems, equipment, software and facilities; system engineering; requirements management and specification development; modeling and simulation; risk analysis and management; cost estimating; human factors engineering; information security; testing and operational evaluation; logistics support analysis; technical writing; and expertise and analysis on the effectiveness, efficiency, or economy of technical operations of equipment, systems, services, or procedures.

*Professional, management, and administrative* expertise, advice, analysis, studies, or reports in areas such as: program management, execution, and control; procurement management; employee training and development; payroll and finance administration; budget formulation and execution; cost and benefit analysis; economic and regulatory analysis; environmental analysis; management and organizational evaluation; staffing, workload and workflow analysis; conferences, seminars, and meetings; public events and writing; and expertise and analysis on the effectiveness, efficiency, or economy of management and general administrative operations and procedures.

**Note:** Consistent with the definition of a service contract under "General Requirements" above, support services do not include contracts for leasing facilities or equipment, subscription services, commercial licensing agreements, or anything else furnishing an end item of supply rather than performing an identifiable task. Additionally, services subject to the Service Contract Labor Standards (e.g., janitorial,

grounds maintenance, guard services, mail delivery, etc.) are not support services. Also excluded are services for direct support of FAA operations (e.g., telecommunications, flight services, satellite services, utilities, etc.).

b. *Analysis and Rationale.* The entire service team (Contracting Officer (CO), Contracting Officer's Representative (COR), attorney, and program official) should ensure:

- (1) There is a good business case, considering need, benefit, cost, and alternatives, for acquiring support services;
- (2) Support services do not overlap or duplicate services being acquired elsewhere in FAA;
- (3) There is a solid, well-documented rationale for selecting the contractor; and
- (4) The FAA has the expertise to monitor the contractor's performance.

c. *Acquisition Strategy Review Board (ASRB).* Support services expected to have a total estimated value of \$10 million or more require the review and approval process specified in the Acquisition Strategy Review Board (ASRB) Standard Operating Procedure. The ASRB Standard Operating Procedure is located at the Acquisition & Contracting (AAQ) KSN site (FAA only).

d. *T&M/LH.* When support services are obtained on a time and materials or labor hour basis, the CO and program official/COR should ensure:

- (1) The statement of work clearly defines expected outputs or objectives;
- (2) The contract or task includes only those labor categories necessary to achieve required outputs, and the basis for selecting the labor categories is documented in the contract file;
- (3) The contract identifies specific education, experience, and other appropriate requirements for each labor category;
- (4) The solicitation requires the offeror to propose specific personnel for the labor categories, and to provide a resume for each proposed person. The solicitation may include a provision for submitting resumes within a reasonable time after contract award, subject to CO's approval of each proposed person. The provision should specify any costs incurred before approval of resumes may be disallowed if the CO determines a person's qualifications do not meet the terms and conditions of the contract;
- (5) The source evaluation team reviews the offeror's proposed personnel to ensure that each person meets the position requirements for the labor category. For offerors allowed to submit resumes after award, the CO and program official/COR review resumes to ensure proposed personnel meet position requirements;
- (6) Review of contractor's invoices includes a comparison of labor categories, rates

and hours charged to the contract with the work actually performed;

(7) The contractor submits employee resumes and obtains CO's approval of any personnel changes after contract award, and the contract file is documented with CO's approval of the personnel changes; and

(8) Periodic spot checks of contractor employee's qualifications against contractually-specified qualifications.

e. *Additional Procedures.* Support services obtained through a multiple award schedule or program, e.g., eFAST, must follow all additional required procedures, such as competing task orders or comparing rates and capabilities among multiple sources.

f. *Invoices.* The CO must review and approve all invoices submitted under a service contract. This excludes invoices provided under the purchase card program.

g. *Ceiling.* A contract ceiling established at the time of initial award must have a documented relationship to the amount of work expected to be performed. This applies to contract types in which ceilings are required, i.e., time and materials.

h. *Determining Final Content.* Government personnel, and not contractors who will perform the work, must always determine the final results of market surveys and prepare the final content of statements of work and independent Government cost estimates.

i. *Conflict of Interest.* An apparent or actual conflict of interest must be avoided. Support services solicitations and new contracts with a total value of \$10,000 or more, and modifications of \$1,000,000 or more to existing support services contracts, must include AMS clause 3.1.7-6 "Disclosure of Certain Employee Relationships." The CO must notify legal counsel when the contractor discloses a former FAA employee or relative of a current FAA employee working under the contract, and when the CO has reason to believe the contractor has made an incomplete or improper disclosure. The CO collects facts surrounding each contractor disclosure and, with legal counsel, assesses the information to determine whether an apparent or actual conflict of interest exists. Depending on the assessment, the CO may require the contractor to provide and implement a plan to avoid, neutralize, or mitigate a conflict of interest involving its employee(s). The CO documents this assessment and any actions taken.

j. *Contractor Identification.* Contractors providing support services for FAA, as defined in this Section, must identify themselves as supporting an FAA office or program when there is any reasonable question regarding their status. This identification must be in all forms of support-related communication including meetings and teleconferences, individual phone calls, and email. For example, in meetings where everyone is introducing themselves or when making or receiving calls through the FAA telephone system, such contractors must identify themselves as contract support. At meetings where there is a "sign-in" sheet or similar roster, contractors must identify themselves as contract support. Similarly, the signature block of support contractor personnel using the FAA email system (in addition to the "ctr" in the email address) must identify the individual as a support contractor. Such identification will reduce the potential for appearances of an employer-employee relationship between FAA and its contract support personnel. FAA program managers, CORs, and contracting personnel are

responsible for ensuring compliance with this requirement as part of the administration of individual support contracts.

## **5 Personal Services** Revised 9/2006

a. *Employee/Employer Relationship.* A personal service contract is a contract that, by its express terms, or *as administered*, establishes what is tantamount to an employer-employee relationship between the FAA and the contractor's personnel. Such a relationship is created when an FAA employee exercises relatively continuous supervision and control over one or more contractor employees.

b. *Supervision.* Supervision includes directing or assigning work to specific contractor employees; directing that a contractor employee be hired, fired, promoted, rewarded, transferred or granted leave, or exercising control over how specific contractor employees perform their job. Any one of these elements might create an employer-employee relationship and therefore a personal services contract. In addition, if the nature of the work or ability of the contractor employee(s) is such that they do not require or receive much supervision, but a FAA employee provides what supervision the contractor employee receives, then the contract is for personal services.

c. *Warning Signs.* Possible warning signs of when supervision might be present include: performance of the work in FAA furnished offices or property; principal tools and equipment are furnished by the FAA; the services are applied directly to the integral efforts of the FAA, or an organizational subpart in furtherance of that organization's assigned function or the FAA mission; comparable services are performed in FAA or other agencies using Government employees; and the need for the service provided can reasonably be expected to last beyond one year. The presence (or absence) of one or even all of these factors in a particular contract does not necessarily determine whether a contract is for, or being administered as, a personal services contract. Instead the presence of these factors indicates that the contract as written or administered, must be particularly carefully scrutinized to assure that FAA employees are not supervising contractor employees, and thus creating a personal services contract.

d. *Monitoring/Technical Direction.* Simple monitoring of a contractor's performance, providing technical direction, issuing task orders, or providing comments on the contractors' work, in accordance with the contract's terms, do not in themselves create a personal services contract. Performing any of these functions in a manner not provided for by the contract, however, could create a personal services contract as well as expose the FAA to additional liability.

e. *Determination.* The FAA may award personal services contracts when the vice president of the relevant service organization (for ATO contracts) or head of the line of business (for non- ATO contracts) determines that a personal service contract is in the best interest of the agency after thorough evaluation which includes, but is not limited to the following factors:

- (1) Federal and state income tax requirements;
- (2) Workmen's compensation, social security and related implications;



- (3) The FAA's potential liability for services performed;
- (4) The availability of temporary hires to perform the desired services;
- (5) Demonstration of tangible benefits to the agency;
- (6) A detailed cost comparison demonstrating a financial advantage to the FAA from such contract;
- (7) Potential post employment restrictions applicable to former employees; and
- (8) A legal determination that the work to be performed is not inherently governmental. The required determination is non-delegable and must be reviewed for legal sufficiency by the Office of the Chief Counsel. Additionally, the vice president (for ATO) or head of the line of business (for non-ATO) must provide a copy of each approved determination to the Acquisition Executive.

f. *Benefits to the FAA.* Although personal services contracts are permitted, they should be used only when there is a clear demonstrated financial and program benefit to the FAA. Therefore, this authority should be conservatively applied.

g. *Personnel Involvement.* Prior to entering into a personal service contract, the Contracting Officer should make arrangements with the appropriate personnel office concerning federal, state, and other tax withholding requirements.

## **6 Advisory and Assistance Services** Revised 4/2006

a. Advisory and assistance are services provided under contract by nongovernmental sources to support or improve agency policy development, decision-making, management, and administration, or to support or improve the operation of managerial or hardware systems. Advisory and assistance contracts provide outside points of view from individuals with special skills or knowledge from industry, universities or research foundations. The use of these services helps to prevent too-limited judgments on critical issues, facilitating alternative solutions to complex issues. Examples of advisory and assistance functions include studies, analyses and evaluations; and management and professional support (including consultants, experts and advisors).

b. Before awarding an advisory and assistance contract, the Contracting Officer should consult with legal counsel about any funding restrictions that may apply to the procurement.

## **7 Temporary Services** Revised 4/2006

The FAA may obtain temporary services from private agencies, or may contract directly with individuals, for up to 240 work days during any 24 month period subject to the following:

- a. The guidelines concerning personal service contracts must be met (see "Personal Services

Contracts," above). For example, when obtaining secretarial services on a temporary basis, FAA personnel may not recruit, test, select, reassign, reward, grant leave to, approve time cards, discipline, or separate a temporary help service employee. The contractor is responsible for taking such actions, because it is the employer.

b. Temporary service contracts are appropriate to fulfill a critical need, where use of a temporary appointment (up to one year) or a term appointment (one to four years) is not appropriate or feasible. However, temporary service contracts should not be used to circumvent controls on employment levels. For example, the FAA may not use temporary help services merely because hiring is frozen or ceiling levels are insufficient.

c. Temporary service contracts may not be used in lieu of appointing a surplus or displaced Federal employee as required by the President's memorandum of September 12, 1995, titled "Career Transition Assistance for Federal Employees."

## **8 Concession Contracts** Added 4/2006

a. A concession contract is a specialized contractual agreement between FAA and a contractor (the concessionaire). These contracts are normally used when the FAA requires a service to be performed, the concessionaire performs the service and collects funds from third parties, and the FAA provides significant support, such as facilities. Concession contracts may require the concessionaire to pay the FAA. Examples of concession contracts include food service and day care centers.

b. *General Requirements.* Each concession contract is unique and tailored to the specific situation. Concession contracts need not include the clauses normally required by the FAA. However, the contract must clearly define the rights and responsibilities of the parties. Among the issues that the Contracting Officer must consider:

- (1) What facilities or services will FAA provide to the concessionaire?
- (2) Will the facility be provided at no cost, or will the concessionaire be required to pay a use fee?
- (3) Are other payments to FAA required, and if so, how will they be calculated?
- (4) How will the quality of service be evaluated, and what types of corrective actions may be initiated by FAA for inadequate performance?
- (5) What liabilities will be assumed by each party?
- (6) What labor and/or compensation standards are to be established for concessionaire employees?
- (7) What are the parties' responsibilities for property maintenance, repair and replacement?
- (8) What insurance requirements are advisable?

- (9) Are there public safety and health considerations which must be addressed?
- (10) What termination rights should be included?
- (11) What provisions for changes should be included?
- (12) Is the work to be performed in spaces which subject the concessionaire to FAA policies?
- (13) What services will the FAA require the concessionaire to provide (e.g., hours of operation, full service cafeteria, etc.).
- (14) Will there be any restrictions on who is allowed to use the services? For example, federal laws require 50 percent of children in child care facilities located on federal facilities to be dependents of federal employees. In the case of fitness centers, will membership be limited to federal employees only?
- (15) Will any FAA-furnished property be provided, and if so, how will it be accounted for?
- (16) Are there any licensing requirements which must be met?
- (17) Are there any limitations on the types of service or products that may be sold under the concession contract? For example, cafeterias are prohibited from competing with snack bars being operated under the Randolph-Sheppard Act for items such as pre- packaged goods (candy bars, canned soda, individual packages of potato chips, etc.). Vending services are prohibited from selling or distributing tobacco products on federal property.

## **9 Cafeteria/Vending Services** Added 4/2006

Blind vendors licensed by State licensing agencies designated by the Secretary of Education under the provisions of the Randolph-Sheppard Act (20 U.S.C. 107 et seq.) must be given priority in the location and operation of cafeterias and vending facilities, including vending machines on property owned, leased, or otherwise acquired or controlled by the FAA, provided the location or operation of such facility would not adversely affect the interests of the United States. Additional guidance on implementation of this law is at 34 C.F.R. Part 395 and AMS Procurement Guidance T3.8.4 “Required Sources of Products/Services.”

## **10 Child Care Services** Added 4/2006

Child care services include child protective services (including the investigation of child abuse and neglect reports), social services, health and mental health care, child (day) care, education (whether or not directly involved in teaching), foster care, residential care, recreational or rehabilitative programs, and detention, correctional, or treatment services. These contracts must include requirements for criminal history background checks on employees who will perform

child care services (42 U.S.C. 13041), any special state requirements (such as cleanliness requirements), and security/screening requirements for anyone (including janitors and repairmen) that comes in contact with children.

## **11 Nonpersonal Health Care Services** Added 4/2006

For nonpersonal health care contracts with physicians, dentists and other health care providers, the Contracting Officer should require the contractor to obtain and maintain appropriate levels of malpractice insurance and include similar provisions in its subcontracts with other providers. See AMS clause 3.8.2-15, "Indemnification and Medical Liability Insurance."

## **12 Guard Services** Revised 4/2011

The FAA may contract for guard services. Typical requirements for guard services include, but are not limited to: U.S. citizenship, minimum age of 21, high school diploma or equivalent, firearm training, testing and certification, and other additional technical training specified in the contract scope of work. Each guard must complete the following so that a NACI background investigation can be completed by the Office of Personnel Management:

- a. OMB I-9, Eligibility Verification;
- b. DOT 1681, ID Card/Credential Application;
- c. SF-85, Questionnaire for Low Risk Positions;
- d. OF-306, Declaration for Federal Employment; and
- e. Fingerprint Cards.

## **13 Contractor-Assisted Maintenance of the NAS** Revised 10/2008

Contractor assistance may be used to augment FAA's workforce for maintenance and maintenance and restoration of National Airspace System (NAS) equipment, sub-systems, and systems to accomplish the mission of the NAS. Contractor maintenance support includes all maintenance performed by non-Federal personnel. Maintenance includes, but is not limited to, evaluating equipment and system operation, and evaluating documentation such as facilities logs, data files, technical performance records, and administrative and logistics support. Considerations for contracts for non-Federal personnel for maintenance and restoration of the NAS systems are:

- a. All maintenance performed by contractors on NAS equipment must conform to FAA order 6000.15 "General Maintenance Handbook for National Airspace System (NAS) Facilities," system/sub-systems/equipment technical manuals, and all appropriate FAA directives.
- b. Contractor personnel who perform maintenance activities on NAS equipment must

have at a minimum the same level of knowledge, skills, and abilities required of FAA personnel maintaining the same or similar equipment, sub-systems, or systems. The contractor must provide and maintain the necessary documentation to support its level of knowledge, skill and ability.

c. Certified pre-employment drug testing is mandatory for all contractor personnel before performing work for FAA. Contractor personnel maintaining any part of the NAS must be subject to random drug and alcohol testing according to DOT 3910.1 "Drug and Alcohol-Free Departmental Workplace."

d. Contractor personnel must meet FAA security requirements. Contractor personnel are subject to background investigations and technical inspections at the same level as performed for FAA personnel who are providing maintenance support of the NAS systems.

e. Contracts for maintenance support of the NAS systems are subject to union coordination according to current union contracts, applicable orders, rules, regulations, and any established national and local Memorandum of Understanding (MOU) or Memorandum of Agreement (MOA).

f. Contract limitations on NAS equipment/systems must not exceed the following guidance:

(1) For a period not to exceed two years during which FAA workforce training and/or support requirements are being satisfied.

(2) For a period not to exceed two years during which sufficient FAA employees are recruited and trained to assume full maintenance.

(3) For an extended period not to exceed five years when it is determined to be in the best interest of the Government.

g. Contract for maintenance support are excluded from this guidance if they fall within the follow area:

(1) Local or regional contracts not providing periodic or on-call maintenance for equipment that is an integral part of the NAS reportable facility or service. Examples of exclusions include janitorial, tower maintenance, and buildings and grounds.

(2) Contracts for systems that are in the precommissioned status, even though the testing may consist of periods of operational use.

(3) Contracts that have a duration of less than one year and do not relate to restoration/maintenance of critical NAS equipment, e.g., radar and air traffic control frequencies.

(4) Contracts issued for telephone or other services, e.g., computer repair.

(5) Contracts maintained by the FAA Logistics Center such as exchange and repair.

#### **14 Other Requirements for Service Contracting** Revised 10/2020

- a. *Conflict of Interest and Ethics Requirements.* As applicable, solicitations and contracts must include conflict of interest and ethics-related provisions consistent with AMS policy 3.1.5 - 3.1.7.
- b. *Key Personnel.* Solicitations and contracts should include AMS clause 3.8.2-17 “Key Personnel and Facilities,” or a similar clause, to list named individuals who are considered key for successful performance of a contract. The Contracting Officer must approve substitution of any key personnel.
- c. *Labor Standards.* The Contracting Officer should include applicable labor standards, such as the Service Contract Labor Standards or Davis-Bacon Act, in solicitations and contracts when appropriate. (See AMS Procurement Guidance T.3.6.2 “Labor Laws” for additional guidance for determining when such provisions are appropriate).
- d. *Security Requirements* The service team must take appropriate actions to protect the Government’s interest when contractor employees, subcontractors, or consultants may have access to FAA facilities, classified information, sensitive information, or resources. (See AMS Procurement Guidance T3.14.1 “Security” for additional guidance on security requirements for contractor personnel).
- e. *Insurance Requirements* The contract should require the contractor to obtain appropriate levels of insurance coverage. Some situations may require special types of coverage to address higher risks, such as those for research or health care that involve personal risk where higher than normal insurance premiums are inherent in the requirement.
- f. *State and Local Requirements.* Contracts may include state or local requirements, provided that the FAA does not waive its sovereign immunity. The Contracting Officer should consult with legal counsel about the potential effect of any state or local requirements.

#### **15 Uncompensated Overtime** Added 4/2006

- a. Contractor’s use of uncompensated overtime is not encouraged.
- b. When professional or technical services are acquired on the basis of the number of hours to be provided, rather than on the task to be performed, the solicitation must require offerors to identify in their proposals and subcontractor proposals:
  - (1) Uncompensated overtime hours; and
  - (2) Uncompensated overtime rate for direct charge, Fair Labor Standards Act-- exempt personnel (such as executive, professional, and administrative employees).

This includes uncompensated overtime hours that are in indirect cost pools for personnel whose regular hours are normally charged direct.

c. The Contracting Officer must ensure that use of uncompensated overtime on the basis of the number of hours provided will not degrade the level of technical expertise required to fulfill the Government's requirements. The Contracting Officer must conduct a risk assessment and evaluate, for award on that basis, any proposals that reflect factors such as: unrealistically low labor rates or other costs that may result in quality or service shortfalls, and unbalanced distribution of uncompensated overtime among skill levels and its use in key technical positions.

## **16 Performance-Based Acquisition** Added 4/2006

a. *Performance-Based Acquisition (PBA)*. Performance-based acquisition is a method of structuring all aspects of an acquisition around the purpose of the work to be performed. The contract requirements are described in clear, specific, and objective terms with measurable outcomes, as opposed to describing either the manner by which the work is to be performed or broad and imprecise statements of work. It is the preferred method for describing work in service contracts and should be used when appropriate. PBA typically includes:

- (1) Performance requirements that define work in measurable, mission-related terms where the accomplishment of the effort is measurable;
- (2) Performance standards (i.e., quality, quantity, and timeliness) tied to the performance requirements;
- (3) A Government quality assurance (QA) plan that describes how the contractor's performance will be measured against the performance standards;
- (4) If the acquisition is either critical to agency mission accomplishment or requires relatively large expenditures of funds, positive and negative incentives tied to the government QA plan measurements.

b. *Statements of Work*. When preparing statements of work, the service team should, to the maximum extent practicable:

- (1) Describe the work in terms of "what" is to be the required output rather than either "how" the work is to be accomplished or the number of hours to be provided;
- (2) Establish minimum position requirements but avoid explicit qualification descriptions of personnel (i.e. years' experience, degree(s), certification(s), etc.), with the exception of "key" personnel. If "key" personnel and qualification descriptions are included in a contract, administration of the contract must be in accordance with Headquarters Contracting Divisions' Standard Operating Procedure (SOP) – "Ensuring Compliance with Contractor Personnel Qualifications Requirements" (FAA only), or, if applicable, Region/Center procedures.
- (3) Enable assessment of work performance against measurable performance standards;

(4) Rely on the use of measurable performance standards and financial incentives in a competitive environment to encourage competitors to develop and institute innovative and cost-effective methods of performing the work; and

(5) Avoid combining requirements into a single acquisition that is too broad for the FAA or a prospective contractor to manage effectively.

c. *PBA Resource Information.* The Office of Federal Procurement Policy’s “Seven Steps to PBSA” guide is available online and provides detailed information, examples, and other links for PBA.

d. *Service Team Responsibility.* Service teams should consider PBA as the preferred method to obtain services, if appropriate, and should consider the feasibility of converting existing contracts and tasks to performance-based acquisitions, if appropriate.

## **17 Services Crossing Fiscal Years** Added 4/2006

a. *Services Funded with Annual Appropriations.* When the period of a contract, option, or order does not exceed one year, severable services funded by annual appropriations may begin in one fiscal year and end in the next fiscal year.

b. *Training Services Crossing Fiscal Years.*

(1) *Determining Nonseverability.* In certain instances, training courses may be treated as nonseverable services that permit current fiscal year funds to be used for training occurring in the next fiscal year. When the training obligation is incurred and performance begins in one fiscal year, the entire cost may be charged to that year even though performance extends into the following year. However, if performance does not begin in the fiscal year in which the obligation was made (i.e., execution of the contract), the Contracting Officer should use the following criteria to determine nonseverability and document the determination in writing:

(a) A valid need for training exists in the current fiscal year;

(b) The need cannot be met during the current fiscal year due to circumstances beyond the agency’s control; and

(c) The time period between procurement of the services and performance of the services is not excessive.

(2) *Justifying the Time Lapse.* The Contracting Officer should evaluate whether the time period is not excessive under (1)(a) above on a case by case basis using the specific factors that support the determination. The Comptroller General has determined that a two week lapse of time between the procurement of the services and the date performance began was not excessive where the need for the training arose six months earlier, but the vendor controlled the scheduling of the training class which was not available until the following fiscal year.



## 18 Architect-Engineer Services Revised 7/2013

a. *Description.* Architect-Engineer (A-E) services include:

(1) Professional services of an architectural or engineering nature, as defined by applicable State law, which are required to be performed or approved by a person licensed, registered, or certified to provide such services.

(2) Professional services of an architectural or engineering nature performed by contract that are associated with:

- (a) Research;
- (b) Planning;
- (c) Development;
- (d) Design;
- (e) Construction;
- (f) Alteration;
- (g) Repair or improvement of real property.

(3) Other professional services of an architectural or engineering nature, and incidental services commonly performed by members of the architectural and engineering professions (and individuals in their employ), including:

- (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.

**b. General.**

(1) The statement of work (SOW) for a design contract must require the architect-engineer, when preparing the construction design specifications or other deliverables, to specify compliance with applicable environmental or conservation standards pursuant to AMS Procurement Guidance T3.6.3. These standards include:

- (a) Pollution control, clean air and water;
- (b) Energy and water conservation and efficiency;
- (c) Hazardous material identification and material safety data;
- (d) Use of recovered recycled materials;
- (e) Radioactive material;
- (f) Environmentally Preferable and Energy-Efficient Products and Services;
- (g) Ozone depleting substances;
- (h) Toxic chemical release; and
- (i) Guiding Principles for Federal Leadership in High Performance and Sustainable Buildings

(2) No construction contract may be awarded to the firm that designed the project, unless the project is being solicited and awarded as a design-build.

(3) The SIR should detail the format of the designs and deliverables to be submitted to the FAA; however the SIR should not preclude the firm from proposing use of modern design methods.

(4) Any information deemed Sensitive Unclassified Information (SUI) must be handled, released, or distributed per guidelines established in AMS Procurement Guidance T3.14.1 and FAA Order 1600.75.

*c. Evaluation Criteria.*

(1) The FAA should evaluate offers for A-E services using appropriate criteria. Examples of evaluation criteria that could typically apply to A-E services include:

- (a) Professional qualifications of the A-E firm;
- (b) Specialized experience and technical competence in the type of work required;
- (c) Ability to perform the services in a timely manner;
- (d) Past performance on contracts of a similar scope and complexity, including cost control, quality of work, and compliance with schedules;
- (e) Geographical location and knowledge of the project location, if warranted by the nature and size of the project; and
- (f) Other criteria as needed.

(2) The FAA may conduct design competitions where firms are evaluated based on their conceptual design for a project. Design competitions may be appropriate when:

- (a) Unique situations, such as memorials or structures of unusual national significance, are present;
- (b) Sufficient time is available to submit and evaluate conceptual drawings; and
- (c) Design competition will substantially benefit the project and FAA.

*d. Evaluation Boards.*

(1) If appropriate, FAA may use ad hoc or standing A-E evaluation boards to assess A-E proposals. Duties of these boards may include:

- (a) Review of design packages or proposals;
- (b) Evaluation of offerors according to factors established in the SIR;
- (c) Holding discussions as necessary; and
- (d) Preparing a source selection report.

(2) Evaluation boards should include members specializing in architecture, engineering, construction, and acquisition. Non-Government advisors may serve on these boards.

(3) An offeror cannot be eligible for award while any of its principals or associates are members of the evaluation board.

*e. Liability.*

(1) A-E contractors must be responsible for the professional quality, technical accuracy, and coordination of all services required under their respective contracts.

(2) A-E firms may be liable to the Government for costs resulting from errors or deficiencies in designs furnished under contract. In coordination with technical personnel and legal counsel, the CO must consider the extent to which the A-E contractor may be reasonably liable when modifying a construction contract due to errors or deficiencies in design provided under contract.

(3) After considering the FAA's best interest and all reasonable costs involved in recovery efforts, the CO must include in the contract file a written statement of the basis for the decision to recover or not to recover any costs from an A-E contractor that resulted from errors or deficiencies.

## **19 Cloud Computing Services** Revised 7/2018

a. FAA requires that contracts for cloud computing services (including Software as a Service (SaaS) defined as a software licensing and delivery model in which the software is based on a subscription and is centrally hosted) must:

(1) Adhere to Federal Risk and Authorization Management Program (FedRAMP) compliance requirements.

(2) Select a FedRAMP-certified Cloud Service Provider (CSP).

(3) Be granted Authority to Operate (as defined in FedRAMP website at <https://www.fedramp.gov>) from the designated FAA Authorizing Official (AO).

(4) CSPs granted an Authority to Operate by other agencies or that are in the process of acquiring FedRAMP certification may be selected, but systems being hosted or SaaS licenses being purchased must not be placed into production at the FAA without a signed Authority to Operate from the designated FAA AO.

b. In addition to the use of a FedRAMP-certified CSP and the FedRAMP baseline controls, all FAA cloud-hosted systems must implement additional FAA security controls as defined on the FedRAMP website, applicable FAA Policy, and the DOT Departmental Cybersecurity Compendium to operate securely based on the current DOT and FAA policy.

c. A CSP must maintain their FedRAMP certification throughout the contract and adhere to continuous FAA monitoring that ensures the security posture of the CSP throughout the lifecycle of the service agreement. The security posture of the CSP is the implementation of security controls to protect the information contained on and the infrastructure of CSP systems that must be maintained throughout the life of the contract.

d. The CSP must continue to maintain the security posture of additional FAA security controls upon which the FAA ATO is based. A Third Party Assessment Organization (3PAO) must perform a security assessment on the CSP at least annually. The CSP must inform the FAA if there is a security breach or outage, with the protocol for notifying the FAA as well as the United States Computer Readiness Support Team (US-CERT) of such a breach or outage set by each individual contract.

e. All FAA contracts using cloud technology including SaaS must be documented in the systems security assessment and maintained in FAA FISMA system inventory and follow the Office of Management and Budget (OMB) reporting requirements.

f. All FAA contracts using cloud technology must be coordinated from initial procurement planning with the FAA Office of Cloud Services (AIF-001).

## **B Clauses**

[view contract clauses](#)

## **C Forms** Revised 4/2006

[view procurement forms](#)