

OFFICE OF FEDERAL PROCUREMENT POLICY (OFPP)

May 18, 1994

POLICY LETTER NO. 93-1 (REISSUED) TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: Management Oversight of Service Contracting

1. Purpose. This Policy Letter establishes Government-wide policy, assigns responsibilities, and provides guiding principles for Executive Departments and agencies in managing the acquisition and use of services.

2. Authority. This Policy Letter is issued pursuant to section 6(a) of the Office of Federal Procurement Policy (OFPP) Act, as amended, codified at 41 U.S.C. section 405.

3. Background. On March 15, 1993, the Office of Management and Budget (OMB) Director Leon Panetta requested that 17 major Executive Departments and agencies review their service contracting programs. The purpose of the review was to determine (1) if the service contracts were accomplishing what was intended; (2) whether the contracts were cost effective; and (3) whether inherently governmental functions were being performed by contractors. The results of the reviews indicated that service contracting practices and capabilities are uneven across the Executive branch and that various common management problems need to be addressed.

In addition to the Director's review, the National Performance Review has found that improved support for customers of the procurement system is needed. To do this, it is important that procurement officials work closely with program and other officials to develop clear and precise statements of work for the products and services being acquired. Contracting for services is especially complex and demands close collaboration between procurement personnel and the users of the service to ensure that contractor performance meets contract requirements and performance standards.

This Policy Letter -- which includes appropriate changes from Supplement No. 1 [59 Fed. Reg. 4955 (1994)] -- has been revised to provide agencies with a more results-oriented approach to managing and administering service contracts through the "best practices" concept. One way to achieve excellence in contractor performance is to improve the acquisition, management, and administration of service contracts. This Policy Letter provides guiding principles through the "best practices" concept that should help agencies develop, analyze, and perfect requirements for service contracts which, in turn, should help to improve contract management and administration. Other "best practices" models in contract management and administration will be issued as separate guidance.

The guidance contained in the Office of Management and Budget (OMB) Circular No. A-120, "Guidelines for the Use of Advisory and Assistance Services," has been rescinded by Transmittal Memorandum No. 1, [58 Fed. Reg. 63593 (1993) and 59 Fed. Reg. 789 (1994)].

4. Definition. The following definitions are applicable to the Policy Letter:

- a. Services are identifiable tasks to be performed, rather than the delivery of an end item

of supply. For purposes of this Policy Letter, only services obtained under nonpersonal services contracts are covered.

b. **Best Practices.** For purposes of this Policy Letter, best practices are techniques that agencies may use to help detect problems in the acquisition, management, and administration of service contracts. Best practices are practical techniques gained from experience that agencies may use to improve the procurement process.

5. Exclusions. Excluded from coverage of this Policy Letter are services that are (1) obtained through personnel appointments and advisory committees, (2) obtained through personal services contracts authorized by statute, (3) for construction, as defined in section 36.102 of the Federal Acquisition Regulation (FAR), or (4) obtained through interagency agreements where the work is being performed by in-house federal employees.

Also excluded from coverage of this Policy Letter are services obtained under contracts below the small purchase threshold, and services incidental to supply contracts. However, agencies should ensure that they are in compliance with appropriate OFPP Policy Letters applicable to service contracting and use good management practices and contract administration techniques when using these contracting methods to obtain services.

6. Policy. When contracting for services, it is the policy of the Federal Government that:

a. Program officials are responsible for accurately describing the need to be filled or problem to be resolved through service contracting to assure full understanding and responsive performance by contractors, and should obtain assistance from contracting officials, as needed.

b. Services are to be obtained and used in ways that ensure that the Government retains inherently governmental decision-making authority.

c. Services are to be obtained in the most cost effective manner, without barriers to full and open competition, and free of any potential conflicts of interest.

d. Sufficient trained and experienced officials are available within the agency to manage and oversee the contract administration function.

e. Effective management practices are used to implement the guiding principles contained herein to prevent waste, fraud, and abuse in services contracting.

7. Good Management Practices. While effective management oversight is required for all types of service contracts, some require less oversight than others, as, for example, such routine services as lawn mowing and food preparation. Conversely, services that tend to affect Government decision-making, support or influence policy development, or affect program management are more susceptible to abuse. These, therefore, require a greater level of scrutiny.

The following sections offer guidance to ensure that good management practices are being followed. Agencies should involve procurement and program officials when developing requirements for service contracts. Appendix A contains a series of questions to help analyze and perfect service contract requirements within these guidelines. If the below guidelines apply, and if the response to any of the questions listed in the Appendix is affirmative, agencies should ensure that they are in compliance with appropriate OFPP

Policy Letters applicable to service contracting, and use good management practices and contract administration techniques. Agencies should also continue to comply with the FAR guidance for specialized categories of contracting such as research and development (Part 35) and architect and engineering (Part 36) as they use the guidance in this Policy Letter.

a. **Inherently Governmental Functions.** When contracting for services, agencies must ensure that any final agency action reflects the informed, independent judgement of agency officials. Contractors thus must not be allowed to perform inherently Governmental functions as defined in OFPP Policy Letter 92-1, Inherently Governmental Functions (57 Fed. Reg. 45096 (1992)).

b. **Cost Effectiveness.** When a valid requirement exists, agency officials must ensure that the requirement is obtained in the most cost effective manner. If contractor support is deemed appropriate, agencies should ensure that their acquisition strategy will result in the acquisition of services from a quality vendor that constitute the best value considering costs and other relevant factors, and yield the greatest benefit to the Government.

c. **Control.** When contracting for services, in particular for highly specialized or technical services, agencies should ensure that a sufficient number of trained and experienced officials is available within the agency to manage and oversee the contract administration function. This especially applies to such services as management and professional support, studies, analyses, and evaluations, and engineering and technical support. Agency officials need to be able to make sound judgements on what the requirements should be, the estimated costs, and whether the contractor is performing according to the contract terms and conditions. Agency officials must retain control over, and remain accountable for, policy decisions that may be based, in part, on a contractor's performance and work products. Agency officials must also provide an enhanced degree of management controls and oversight when contracting for functions that closely support the performance of inherently Governmental functions.

d. **Conflicts of Interest.** Agency officials must ensure that any actual or potential conflicts of interest are identified and that appropriate steps are taken to avoid, neutralize, or mitigate them. Service contracts are not to be awarded to any individual or organization that is unable, or potentially unable, to render impartial advice or assistance to the Government, or that has an unfair competitive advantage over competing contractors unless every effort is first taken to mitigate such conflict or advantage. OFPP Policy Letter 89-1, Conflicts of Interest Policies Applicable to Consultants, 54 Fed. Reg. 51805 (1989) and FAR

Subpart 9.5 provide detailed guidance on conflicts of interest.

e. **Competition.** Full and open competition will assure cost effectiveness and reduce the potential for favoritism and conflict of interest. To maximize competition, the Competition in Contracting Act requires thorough acquisition planning and limits exceptions. The Act provides that lack of advance planning is not adequate justification for sole source contracting. Any justification for a noncompetitive contract should provide a detailed explanation as to why competition can not be achieved. Plans should be made to minimize the number of subsequent noncompetitive awards.

8. Responsibilities.

a. **Heads of Agencies.** Agency heads (or their designees) should ensure that:

(1) Requirements for services are clearly defined and appropriate performance standards are developed so that contractor performance meets contract terms and conditions.

(2) Service contracts are awarded and administered in such a manner that will provide the customer its goods and services of significant quality, on time, and within budget.

(3) Specific procedures are in place when contracting for services to assure compliance with OFPP Policy Letters 92-1, Inherently Governmental Functions (57 Fed. Reg. 45096 (1992), 91-2, Service Contracting (56 Fed. Reg. 15110 (1991), and 89-1, Conflicts of Interest Policies Applicable to Consultants, 54 Fed. Reg. 51805 (1989).

(4) Implementation strategies are developed and necessary staff training is initiated to assure effective implementation of these policies.

b. Contracting Officials. Contracting officials should ensure that "best practice" techniques, such as those set forth below, are used when contracting for services:

(1) The corporate experience section of an offeror's proposal should be reviewed to detect conflicts of interest. Usually, the corporate experience

section contains the contractor's prior business clients.

(2) Monthly progress reports should be reviewed to detect whether the contractor may be performing inherently governmental functions.

Contracting officials should also seek other best practices techniques in contract management and administration that may be used within their own contracting activities or other agencies that will help to achieve excellence in contractor performance.

OFPP will also be working to develop governmentwide "best practices" models in contract administration which will be issued as separate guidance.

c. Federal Acquisition Regulatory Council. Pursuant to sections 6(a) and 25(f) of the OFPP Act, as amended, 41 U.S.C. 401 et seq., the Federal Acquisition Regulatory Council shall ensure that the policies established herein are incorporated in the FAR within 210 days from the date this Policy Letter is published in the Federal Register. The 210 day period is considered a "timely manner" as prescribed in 41 U.S.C. 405(b).

d. Inspectors General. The Inspectors General are encouraged to conduct vulnerability assessments of service contracting and, where warranted, include in their annual plans a review of service contracts to ensure compliance with this Policy Letter.

The guidance in section 7 which refers to the questions in Appendix A, or any resulting "best practices" models developed by OFPP should not be viewed as mandatory regulatory guidance for audit purposes.

9. Judicial Review. This Policy Letter is not intended to provide a constitutional or statutory interpretation of any kind and it is not intended, and should not be construed, to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person. It is intended only to provide policy guidance to agencies in the exercise of their discretion concerning Federal contracting.

Thus, this Policy Letter is not intended, and should not be construed, to create any substantive or procedural basis on which to challenge any agency action or inaction on the ground that such action or inaction was not in accordance with this Policy Letter.

10. Information Contact. For information regarding this Policy Letter contact Linda G. Williams, Deputy Associate Administrator, Office of Federal Procurement Policy, 725 17th Street, NW, Washington, DC, 20503. Telephone (202) 395-3302.

11. Effective Date. This Policy Letter is effective 30 days after the date of issuance. While these policies must be implemented in the FAR, it is expected that agencies will take all appropriate actions in the interim to develop implementation strategies and initiate staff training, consistent with section 8a(4), to ensure effective implementation of these policies.

Steven Kelman
Administrator

Appendix A

The following is a series of questions to help agencies analyze and review requirements for service contracts.

A. Inherently Governmental Functions

If the response to the first question is affirmative, the contract requirement is for an inherently Governmental function that must be performed by Government officials; if the response to the second question is affirmative, the contract requirement may be for an inherently governmental function:

- (1) Is the requirement for a function that is listed in Appendix A of OFPP Policy Letter 92-1, Inherently Governmental Functions?
- (2) If the function is not listed in Appendix A, do any of the factors in the "totality of the circumstances" analysis discussed in section 7(b) of Policy Letter 92- 1 indicate that the function may be inherently governmental?

B. Cost Effectiveness

If the response to any of the following questions is affirmative, the agency may not have a valid requirement or not be obtaining the requirement in the most cost effective manner:

- (1) Is the statement of work so broadly written that it does not support the need for a specific service?
- (2) Is the statement of work so broadly written that it does not permit adequate evaluation of contractor versus in-house cost and performance?
- (3) Is the choice of contract type, quality assurance plan, competition strategy, or other related acquisition strategies and procedures in the acquisition plan inappropriate to ensure good contractor performance to meet the user's needs?
- (4) If a cost reimbursement contract is contemplated, is the acquisition plan inadequate to

address the proper type of cost reimbursement to ensure that the contractor will have the incentive to control costs under the contract?

(5) Is the acquisition plan inadequate to address the cost effectiveness of using contractor support (either long- term or short-term) versus in-house performance?

(6) Is the cost estimate, or other supporting cost information, inadequate to enable the contracting office to effectively determine whether costs are reasonable?

(7) Is the statement of work inadequate to describe the requirement in terms of "what" is to be performed as opposed to "how" the work is to be accomplished?

(8) Is the acquisition plan inadequate to ensure that there is proper consideration given to "quality" and "best value"?

C. Control

If the response to any of the following questions is affirmative, there may be a control problem:

(1) Are there insufficient resources to evaluate contractor performance when the statement of work requires the contractor to provide advice, analysis and evaluation, opinions, alternatives, or recommendations that could significantly influence agency policy development or decision-making?

(2) Is the quality assurance plan too general to monitor adequately contractor performance?

(3) Is the statement of work so broadly written that it does not specify a contract deliverable or require progress reporting on contractor performance?

(4) Is there concern that the agency lacks the expertise to evaluate independently the contractor's approach, methodology, results, options, conclusions, or recommendations?

(5) Is the requirement for a function or service listed in Appendix B of OFPP Policy Letter 92-1, or similar to a function or service on that list, such that greater management scrutiny is required of the contract terms and the manner of its performance?

D. Conflicts of Interests

If the response to any of the following questions is affirmative, there may be a conflict of interest:

(1) Can the potential offeror perform under the contract in such a way as to devise solutions or make recommendations that would influence the award of future contracts to that contractor?

(2) If the requirement is for support services (such as system engineering or technical direction), were any of the potential offerors involved in developing the system design specifications or in the production of the system?

(3) Has the potential offeror participated in earlier work involving the same program or activity that is the subject of the present contract wherein the offeror had access to

source selection or proprietary information not available to other offerors competing for the contract?

(4) Will the contractor be evaluating a competitor's work?

(5) Does the contract allow the contractor to accept its own products or activities on behalf of the Government?

(6) Will the work, under this contract, put the contractor in a position to influence Government decision-making, e.g., developing regulations, that will affect the contractor's current or future business?

(7) Will the work under this contract affect the interests of the contractor's other clients?

(8) Are any of the potential offerors, or their personnel who will perform the contract, former agency officials who -- while employed by the agency -- personally and substantially participated in (a) the development of the requirement for, or (b) the procurement of, these services within the past two years?

E. Competition

If the response to any of the following questions is affirmative, competition may be unnecessarily limited:

(1) Is the statement of work narrowly defined with overly restrictive specifications or performance standards?

(2) Is the contract formulated in such a way as to create a continuous and dependent arrangement with the same contractor?

(3) Is the use of an indefinite quantity or term contract arrangement inappropriate to obtain the required services?

(4) Will the requirement be obtained through the use of other than full and open competition?