

CHAPTER 9

Obtaining Services Through Simplified Acquisition Procedures

This Chapter:

- Provides examples of areas in which contracts for services are generally made (Section 9A)
- Discusses government policy prohibiting contracts for personal services and provides guidelines for compliance with that policy (Section 9B)
- Details steps to be followed in soliciting offers and awarding purchase orders for requirements subject to the Service Contract Act (Section 9C)
- Discusses the scope of and limitations on ARS' authority to acquire advisory and assistance services (Section 9D)
- Discusses policy and procedures for contracting with temporary help service firms for meeting short-term work needs (Section 9E)

Cross-References:

- Chapters 7 and 8 present requirements and steps applicable to all acquisitions, whether of services or goods, effected by simplified acquisition procedure.
- Chapter 10 discusses requirements and procedures which apply specifically to contracts for construction services.
- Appendix III presents "distinctive items" that must be acquired from special sources, through unique procedures, or with other special handling.

SECTION 9A

INTRODUCTION

A service contract is one which calls directly for a contractor's time and effort rather than for a concrete end product. When initiating service contracts by purchase order, purchasing personnel must comply not only with the simplified acquisition policies and procedures established by regulation and policy; they must also comply with statutes and acts which are aimed at protecting both civil service employees and employees of service contractors.

This chapter discusses major considerations and requirements that arise when the government enters into contracts for services. It focuses on issues which Purchasing Agents must address. Further guidelines on the acquisition of services may be found in FAR Part 37 and in AGAR Part 437.

The Wage and Hour Division's Service Contract Act Directory of Occupations (Directory) contains standard job titles and definitions (descriptions) for many commonly utilized service employee occupations. Purchasing Agents shall use this Directory to the maximum extent possible in listing service employee classes on the SF-98a (FAR 22.1008-2(b)(1)).

The chart on the next page presents areas in which contracts for services are generally found.

Common Service Contract Areas

Arbitration

Architect-Engineering

Auctioneering

Communications services

Data processing

Engineering and technical services

Advisory and assistance (consultant)

Housekeeping services

Installation of equipment obtained under separate contract

Maintenance, overhaul, repair, servicing, rehabilitation, salvage, and modernization or modification of supplies, systems, and equipment

Maintenance, repair, rehabilitation, and modification of real property

Medical services

Operation of government-owned equipment, facilities, and systems

Photographic, printing, and publication services

Research and development

Stevedoring

Test services

Training and education

Transportation and related services

Warehousing

SECTION 9B

COMPLYING WITH THE PROHIBITION AGAINST PURCHASING PERSONAL SERVICES AND WITH OTHER SERVICE CONTRACTING POLICIES

PROHIBITION AGAINST PERSONAL SERVICE CONTRACTS

Government policy generally (as expressed in civil service laws and regulations and the Classification Act) prohibits acquiring the services of individuals by contract in such a way that the individuals become, in effect, employees of a government activity unless specific authorization is given by statute (FAR 37.104(b)). Such "personal services" contracts are disallowed because they can be used as devices for avoiding ceilings on personnel staffing levels and salaries. On the other hand, contracts for nonpersonal services, properly issued and administered, are an approved resource for the accomplishment of ARS programs and projects.

Requisitioners and Purchasing Agents must be aware of the sensitivity of this issue and must ensure that applicable statutory and regulatory procedures contained in FAR Subpart 37.1 are met.

PERSONAL SERVICE CONTRACTS WITHIN USDA

The Agriculture Acquisition Regulation (AGAR) 437.104, provides the authorities necessary to allow ARS to contract for personal services under certain circumstances. USDA's authorizing statute for personal services contracting is 7 U.S.C. 2225 which provides that while the Department of Agriculture may employ persons or organizations, on a temporary basis, by contract or otherwise, "no expenditures for such temporary employment shall be made unless provision is made therefore in the applicable appropriation and the cost thereof is not in excess of limitations prescribed therein."

This authority does not negate any of the other prerequisites of contracting. Specifically, the requirements for competition, wage determination, Commerce Business Daily synopsis, etc., still are fully applicable. FAR 37.104(e) requires that "When specific statutory authority for a personal service contract is cited, obtain review and opinion of legal counsel." Contact your PAO when the acquisition of personal services pursuant to USDA authority is being considered.

CRITERIA FOR RECOGNIZING PERSONAL SERVICES SITUATIONS

"A personal services contract is characterized by the employer-employee relationship it creates between the government and the contractor's personnel" (FAR 37.104). To determine whether a contract is personal in nature, it is necessary to examine not only how the contract is written, but how it is to be performed and administered. In a personal services contract situation, the government is essentially contracting for the services of people who receive their assignments from government personnel, work under the direct supervision of government personnel, and

whose relationship with the government is thus no different from that of a government employee

except that the contractor employee does not have a Civil Service appointment.

There are no published definitive rules for determining whether particular contract services are "personal" or "nonpersonal." Many factors, of varying importance, must be considered (See FAR 37.104). The determination in a particular case, however, cannot be made by simply counting factors. It can only be made as a result of using good judgment in balancing all the factors in accordance with their relative importance. Questionable situations should be elevated to the Director, PPD, for resolution. (See Exhibit 9B(i)) for a sample listing of these factors.)

The Issue of Supervision

Determining whether or not personal services are being rendered under a contract often hinges on the issue of supervision. An employer-employee relationship (thus a personal services relationship) exists when a Federal official must have the controlling influence over an individual's work performance in areas including, but not limited to:

- Controlling or directing the way the work gets done.
- Setting and adjusting the individual's work priorities.
- Effecting disciplinary and other kinds of personnel actions including hiring, firing, setting pay rates and raises, etc.
- Setting the individual's work schedule.
- Approving absences from work.

As stated in the Pellerzi Opinion (October 1967), the *inherent nature* of the work to be performed, or the manner in which it is provided, may reasonably require the government's direction and/or supervision of contractor employees in order to:

- Adequately protect the government's interest;
- To retain control of the function involved; or
- To retain full personal responsibility, in a duly authorized Federal office or employee, for the function supported.

A personal services relationship with contractor employees can and must be avoided when:

- The government's requirements can be defined sufficiently in the contract's Statement of Work or in a task order issued against the contract to allow for unsupervised performance by the contractor.
- The government evaluates the results of the completed work.
- Contractors control their individual employees.
- The responsibility for a function can be turned over to a contractor.

ARS Policy

The following summarizes the ARS policy on personal services contracting:

- The preferred methods of obtaining human resources in support of ARS programs are regular personnel appointment procedures and nonpersonal service contracts.
- Expert and consultant appointments under the provisions of 5 U.S.C. 3109 will be made only by the Human Resources Division (See Section 9D).
- Personal services authority, when otherwise proper, may be used only for temporary, seasonal, or intermittent needs. Long term needs may not be satisfied by issuing a succession of personal services contracts to the same or different individuals.
- Personal services contracting will not be used to (a) give a particular person a temporary or intermittent appointment in anticipation of a career-conditional appointment; (b) to do a full-time continuous job; or (c) to avoid competitive employment procedures.
- When personal services authority is utilized, all other applicable procurement laws and regulations (e.g., the requirement for full and open competition) must be followed.

Support Services

It should be understood that support services contracts are not prohibited by the Federal personnel laws (in fact under OMB Circular A-76 many such services may be "contracted-out" depending upon the results of a cost-comparison analysis). Evaluation of the legality of a support services contract must be based on a realistic view of the provisions of the entire contract, and the manner in which it is administered and performed.

When ARS is involved in contracting for support services, it has the initial and primary responsibility to review and identify those contracts and contract operations which create the proscribed employer-employee relationship in violation of the personnel laws, and to take appropriate action where necessary. The Office of Personnel Management has the continuing responsibility to ensure compliance with the personnel laws.

Examples of Personal versus Nonpersonal Services

Exhibit 9B(ii) at the end of this section provides *examples* of personal service contracts and nonpersonal service contracts. These examples are provided for illustrative purposes only. *Do not use them as the basis for a determination in any specific case.*

GUIDELINES

In essence, the factors which are essential to ensuring that a contract is for nonpersonal, as opposed to personal services are (1) clear, concise specifications (or Statements of Work), and (2) careful, intelligent contract administration. It should be noted that a personal services contract results when the government assumes the right to instruct, control, or supervise a

contractor's employee, *either* by the terms of the contract or by the actual day-to-day relationship

with the contractor. Prudent contract administration is critical to avoiding a personal services problem.

Both of these factors (specifications and administration) require preacquisition planning between requisitioners and contracting personnel. As a part of this process, decisions must be documented and an affirmative determination made that the effort will not result in personal services. It is far easier to prevent personal services problems than to cure them.

To make this determination, Purchasing Agents must review the documentation submitted by the requisitioner, including the Statement of Work or specifications. Purchasing Agents must also review all the circumstances discussed earlier which can have a bearing upon whether an illegal personal services contract may arise and seek advice from the PAO in any case which seems questionable.

It is important that the evaluation of the propriety of a support service contract be based on a realistic view of the *entire* contract and the manner in which it is written, administered and performed. *Sound judgment is paramount.*

If the requirement is determined to be an unauthorized personal service, document and return requirement to requisitioner. If practicable, include recommendations for revising Statements of Work or reorganizing functions to render services nonpersonal. If the requirement is determined to be nonpersonal initiate procurement action.

OTHER POLICIES TO BE OBSERVED

Requirement for Competition

The statutes and regulations requiring competition are fully applicable to service contracts. The Purchasing Agent must obtain competition to the maximum practicable extent, as for any simplified acquisition. See Section 7C.

Organizational Conflict of Interest in Service Contracting

In acquiring services by contract, provisions of FAR Subpart 9.5 and AGAR 409.5, with respect to organizational conflicts of interest, must be observed. When required, include an appropriate conflict of interest provision in the solicitation. In case of any question regarding the application of organizational conflict of interest regulations, purchase agents should consult the PAO.

Prohibition Against Contracts With Detective Agencies

There is a statutory prohibition (See FAR 37.109) against entering into a contract with a detective agency or its employees, regardless of the character of the contract services to be performed (5 U.S.C. 3108). However, this prohibition has been judicially interpreted to allow contracts with a detective company that is not a "quasi-military force." The Purchasing Agent may consider quotations from detective agencies including the Pinkerton Agency but should check with the appropriate higher authority before processing a requirement of this type.

Prohibition Against Contracts with Government Employees

Approval Requirements

FAR Subpart 3.6 prohibits the award of contracts to government employees or with organizations owned or controlled by them unless approved by the agency head. AGAR Subpart 403.6 delegates this authority to the HCAD (Director, PPD).

Exception for Special Government Employees

In accordance with FAR 3.601(b) special government employees (defined in 18 U.S.C. 202 as individuals who can not work more than 130 days during any period of 365 days or who are not required by law to receive compensation) performing services as experts, advisors, or consultants, or as members of advisory committees, are not considered government employees for purpose of FAR Subpart 3.6, unless:

- the contract arises directly out of the individual's activity as a special government employee;
- the individual is in a position to influence the award of the contract; or
- another conflict of interest is determined to exist (they are required to file confidential or public disclosure statements and are subject to certain post-employment restrictions).

Use of Private Sector Temporaries

See Section 9E.

Exhibit 9B(i)

Criteria For Recognizing Personal Services

Factors	Explanations/Qualifications
<p>1. The Nature of the Work</p> <ul style="list-style-type: none"> • To what extent can the Government obtain civil servants to do the job? Does the contractor have specialized knowledge or equipment which is unavailable to the Government? • To what extent do the services represent the discharge of a governmental function which calls for the exercise of personal judgment and discretion on behalf of the Government. • To what extent are the requirements for services to be performed continuing rather than short-term or intermittent? 	<p>This factor is one which might be useful in a doubtful case, but it should not in itself create doubt about services which are otherwise clearly nonpersonal.</p> <p>This factor, if present in a sufficient degree, may alone render the services personal in nature.</p>
<p>2. Contractual provisions concerning the contractor's employees.</p> <ul style="list-style-type: none"> • To what extent does the Government specify the qualifications of, or reserve the right to approve. • To what extent does the Government reserve the right to assign tasks to and prepare work schedules for contractor employees during performance of the contract. 	<p>Supervision and control of the contractor or the contractor's employees, if present in a sufficient degree, may alone render the services personal in nature.</p> <p>Granting or denying security clearances and providing for necessary health qualifications are always permissible. It is permissible to some extent to specify in the contract the technical and experience</p>

Exhibit 9B(i) (Continued)

Factors	Explanations/Qualifications
<ul style="list-style-type: none"> • To what extent does the Government retain the right to supervise the work of the contractors employees either directly or indirectly? • To what extent does the Government reserve the right to supervise or control the method in which the contractor performs the service, the number of people employed, the specific duties of individual employees, and similar details. • To what extent will the Government review performance by each individual contractor employee, as opposed to reviewing a final product on an overall basis after completion of the work? 	<p>Qualifications of contractor employees, if that is necessary to assure satisfactory performance.</p> <p>This factor does not preclude including work schedules in the contract at its inception or establishing times of performance for orders issued under a level of requirements or other indefinite delivery type of contract.</p> <p>Significant, whether actually exercised or not.</p> <p>It is always permissible to provide in the contract that the contractor's employees must comply with regulations for the protection of life and property; also, it is permissible to specify a recommended, or occasionally even a minimum, number of people the contractor must employ, if this is necessary to assure performance. In those events, it should be made clear in the contract that this does not in any way minimize the contractor's obligation to use as many employees as are necessary for proper contract performance.</p>

Exhibit 9B(i) (Continued)

Factors	Explanations/Qualifications
<ul style="list-style-type: none"> • To what extent does the Government retain the right to have contractor employees removed from the job for reasons other than misconduct or security? 	
<p>3. Other provisions of the contract.</p> <ul style="list-style-type: none"> • Can the services be properly defined as an end product? • Does the contractor undertake a specific task or project that is definable either at the inception of the contract or at some point during performance, or is the work defined on a day-to-day basis? • Will payment be for results accomplished or solely according to time worked? • To what extent will the Government furnish the office or working space, facilities, equipment and supplies necessary for contract performance? 	<p>A report is not considered a concrete end product if the primary purpose of the contract is to obtain the contractor's time and effort and the report is merely incidental to the purpose.</p> <p>This factor does not preclude use of an indefinite delivery type of contract, provided that the nature of the work is specifically described in the contract, and that orders are formally issued to the contractor rather than to individual employees.</p> <p>This is a factor which might be useful in a doubtful case, but should not in itself create doubt about services which are otherwise clearly nonpersonal.</p>

Exhibit 9B(i) (Continued)

4. Contract Administration Factors which must be Considered are:

- To what extent will contractor employees be used interchangeably with Government personnel to perform the same functions?
- To what extent will contractor employees be integrated into the Government's organizational structure?
- To what extent will either of the elements cited above be present in the administration of the contract, regardless of whether they are provided for by the terms of the contract?

Exhibit 9B(ii)

Personal versus Nonpersonal Service Contracts

Examples Provided as Illustrations Only

Personal Services: Not Allowed

- Contract for furnishing of ordinary, day-to-day stenographic and secretarial services in a government office under government supervision that is exercised either directly or through a contractor supervisor, even if only for a peak work period of two weeks. (However, see Section 9E.)
- Contract for preparation of a staff type of report on the operation of a particular government office or installation, where no specialized skills are required and where the report would ordinarily be prepared by the regular officers or employees of the office or installation, even if there is to be no government supervision and even if payment is to be for an "end product" report.
- Contract for the furnishing of persons to perform the various day-to-day functions of contract administration for a government agency, even if there is no government supervision. (This does not preclude the use of architect-engineers as "construction managers.")
- Contract with an accounting firm to come in to perform day-to-day accounting functions for the government.

Nonpersonal Services: Allowed

- Contract for an expert in a given area to review grant applications received and make recommendations for grant award. (See Section 8C on consulting services.)
- Contract for field engineering work requiring specialized equipment and trained personnel unavailable to the government but not involving the exercise of discretion on behalf of the government, where the contractor performs work adequately described in the contract, free of government supervision.
- Contract with an individual for delivery of lectures without government supervision, at specific places, on specific dates, and on a specialized subject, even if payment is by the hour.
- Contract for janitorial services, where the contract provides for specific tasks to be performed in specific places, free of government direction, supervision, and control over the contractor's employees, at a fixed price for the work to be performed.
- Furnishing of equipment and personnel to plow a field, harvest a crop, or weed a plot when the job is done on a fixed-price basis.

Exhibit 9B(ii) (Continued)

- Research and development contract, providing a fixed price for a level of effort, as long as the work is performed by the contractor independently of government direction, supervision, and control.

SECTION 9C

COMPLYING WITH REQUIREMENTS OF THE SERVICE CONTRACT ACT

The Federal Government has traditionally used its purchasing power to promote fair compensation for workers and to protect workers' health and safety. This section addresses provisions of the most important of the statutes requiring labor standards in service contracting: the McNamara-O'Hara Service Contract Act of 1965, 41 U.S.C. 351, referred to in this section as the "Act." This Act provides that the Secretary of Labor shall determine the minimum wages and fringe benefits to be paid "service employees" working under Federal contracts *in excess of \$2,500*. FAR Subpart 22.10 outlines basic policies and procedures relating to the Act.

This section briefly describes the Act's provisions and coverage, as applicable to the small purchase process. It also outlines steps which Purchasing Agents need to take in compliance with the Act.

COVERAGE OF THE ACT

Definition of Service Employee

As defined in the Act, the term *service employee* includes guards, watchmen, and any person engaged in a recognized trade or craft, or other skilled mechanical craft, or in unskilled, semiskilled, or skilled manual labor occupations, as well as any other employee--including a foreman or supervisor--in a position having trade, craft, or laboring experience as the paramount requirement. It applies to all such persons regardless of any contractual relationship that may exist between a contractor or subcontractor and such persons.

While the law originally covered only blue-collar workers, its provisions were amended by Public Law 94-489 to extend coverage to white-collar workers. Accordingly, the protection of the Act extends to all workers other than persons employed in a bona fide executive, administrative, or professional capacity (as those terms are used in the Fair Labor Standards Act of 1938 and in 29 CFR 541).

In distinguishing between the terms "white-collar" worker (person covered by the Act) and "bona fide executive, administrative, or professional" employee (person exempt from the Act), the definitions shown in Exhibit 9C(i) may be helpful.

Types of Service Contracts Covered and Exempted

The types of contracts effected for the furnishing of services through the use of service employees are too numerous and varied to permit an exhaustive listing. Exhibit 9C(ii) provides illustration of some of the services called for by contracts that have been found to come within the coverage of the Act. It also provides illustrations of areas which are exempt from coverage. Purchasing Agents should review FAR 22.1003-3, Statutory Exceptions, and especially FAR 22.1003-4, Administrative Limitations, Variations, Tolerances and Exemptions.

Any questions about the coverage of the Act may be referred to the U.S. Department of Labor, Wage and Hour Division (Employment Standards Administration).

PROVISIONS OF THE ACT

Under the Service Contract Act, the Secretary of Labor determines the minimum wages to be paid employees working under Federal contracts in excess of \$2,500. Wage levels vary by type of service and by locality. The wage determination is made an attachment to the contract, and the contractor and any subcontractor are obligated to comply with it. Consequently, the Purchasing Agent or CO must obtain from the Department of Labor, prior to the award of a service contract, the determination of prevailing wages for the locality in which the contract is to be performed.

The Act further provides that--regardless of the contract amount--no contractors or subcontractors performing work under a Federal contract for services shall pay any of their employees actually engaged in performing such services less than the minimum wage specified in Fair Labor Standards Act of 1938, as amended. (Because the Department of Labor wage determinations required in contracts over \$2,500 normally are higher than the minimum wages specified in the Fair Labor Standards Act, the practical effect of the Fair Labor Standards Act is usually limited to contracts under \$2,500.)

The Act also authorizes the Secretary of Labor to establish occupational health and safety standards which are applicable to contractor and subcontractor employees. These standards are stated in 29 CFR 1900-1919. They contain the provision that:

No part of the services covered by this Act will be performed in buildings or surroundings or under working conditions, provided by or under the control or supervision of the Contractor or any subcontractor, which are unsanitary or hazardous or dangerous to the health or safety of service employees engaged to furnish the services.

In relation to that provision, contractors and subcontractors must maintain records of all work injuries for a period of 3 years.

STEPS REQUIRED OF PURCHASING AGENTS

Department of Labor Regulations

Pursuant to the Service Contract Act of 1965, the Department of Labor (DOL) has issued Parts 4 and 1516, Title 29, Code of Federal Regulations, providing for the administration and enforcement of the Act. The regulations include coverage of the following matters relating to the requirements of the Act:

1. Service contract labor standards provisions and procedures (Subpart A, Part 4 (29 CFR)).
2. Equivalentents of determined fringe benefits (Subpart B, Part 4 (29 CFR)).
3. Application of the Service Contract Act of 1965 (rulings and interpretations) (Subpart C, Part 4 (29 CFR)).
4. Safe and sanitary working conditions (Part 1516 of Title 29 CFR).

Online Access to SCA Wage Determinations

In accordance with FAR 22.1007, the Purchasing Agent must obtain wage determinations for an anticipated service contract by filing a completed copy of Standard Form 98, "Notice of Intention to make a Service Contract and Response to Notice," Standard Form 98a (an attachment) directly to the DOL. Under a Memorandum of Understanding (MOU) between the Department of Labor and USDA, USDA Contracting offices can obtain current wage determinations through an on-line USDA wide subscription service known as the "WDOL Program". The WDOL Program provides both Service Contract Act Area and Davis-Bacon Act general wage determinations for official use in federal contract actions. (These forms are shown as Exhibits 9C(iii) on page 9-24 and 9C(iv) on page 9-26 at the end of the section.) The online determinations are available from the website provided by DOL. This website can be assessed via USDA's Toolkit at www.usda.gov/da/procure/toolkit/tools.htm and also includes USDA's Wage Determination On-Line Program User's Guide (September 1997). When selecting a SCA wage determination from the on-line subscription service, the Purchasing Agent must also submit an SF-98/98a notice to DOL informing DOL of the contract action and wage determination selection. Because the notice must be submitted not less than 60 days prior to the earlier issuing of the solicitation and prior to commencing negotiations with offerors for any contract expected to exceed \$2,500, it is important to take into account the administrative time that will be needed. In response to the notice, the DOL will provide the applicable wage determinations. For unplanned and/or emergency procurements, the SF-98 may be submitted to DOL 30 days prior to issuing the solicitation or commencing negotiations.

When services are already being provided under contract or when renewal of a service contract is being considered, the purchasing activity must obtain any collective bargaining agreement between the present contractor and its employees, as well as other information required by FAR 22.1008-3. These items must be submitted with SF-98.

The back of SF-98 (Exhibit 9C(iii)) contains instructions for its completion. (Only the original and three copies are to be forwarded.) Whenever the detailed information requested is not readily available, pertinent general information that is available should be provided. For example, if meaningful estimates of the number of service employees in various classes to be used on the contract cannot be made, estimates of the total number of employees may be supplied. The "Response" portion of the original of the form will be completed by the Wage and Hour Division and returned.

The form must be accompanied by a completed SF-98a, Attachment A, listing:

1. Classes of service employees expected to be employed under the contract;
2. Number of employees expected to be employed in each class; and
3. Hourly wage that would be paid for each class if the employee were a Federal employee.

The "Additional Wage Data" notice in the form's instructions encourages the procuring office to submit any further wage determination and fringe benefit data, or any explanatory information.

Supplies of SF-98 and SF98a are available in all GSA supply depots, under stock number 7540-00-926-8972.

Purchasing Agents will need to check with their personnel officers to determine comparable wage rates for activity employees in the grades and classifications of the contractor's employees. This information is necessary to complete SF 98a.

If the Purchasing Agent is unable to file the notice on time, he or she should submit it as soon as possible with a detailed explanation of the circumstances which prevented filing. In such a case, the Request for Quotations (RFQ) should contain a statement similar to the one that follows:

The Provisions of the Service Contract Act of 1965 may apply to this solicitation. If a wage determination by the Department of Labor is applicable, an amendment to this RFQ will be issued indicating a minimum hourly wage.

CLAUSES FOR RFQs AND PURCHASE ORDERS

Clauses for Contracts Over \$2,500

The CO must insert the clause in FAR 52.222-41 Service Contract Act of 1965, as amended, in solicitations and contracts when the contract is subject to the Service Contract Act of 1965 and is (i) for over \$2,500 or (ii) for an indefinite dollar amount and the CO does not know in advance that the contract amount will be \$2,500 or less. With respect to Blanket Purchase Agreements, the amount to be compared to the dollar threshold is the total dollar amount of orders reasonably anticipated to be placed in a one-year period.

Statement of Equivalent Federal Wage Rates

FAR 22.1016 includes a clause on "Statement of Equivalent Rates for Federal Hires" (FAR 52.222-42). This clause implements the requirement (41 U.S.C. 351(a)(5)) that contracts state the minimum hourly compensation (wages and fringe benefits) that would be paid or furnished the various classes of service employees involved if they were employed directly by the agency and therefore, 5 U.S.C. 5341 or 5332 applied to them. This clause shall be inserted in solicitations and contracts if the amount is expected to be over \$2,500 and the Act is applicable.

Other Related Provisions and Clauses

The Purchasing Agent should review FAR 22.1006 for other provisions and clauses which may be applicable. For example FAR 22.1006(e)(1) prescribes the clause at FAR 52.222-48, Exception from Application of the Service Contract Act, where it is believed that the Service Contract Act does not apply as might be the case where maintenance of data processing or word processing equipment by a manufacturer or supplier of equipment. (See FAR 22.1003-4).

Contract Modification to Incorporate a Wage Determination

If a required wage determination is not included in a contract (because the notice was not filed or was not filed in time) and if a wage determination from the DOL is received within 30 days of the late filing of the notice or the discovery by the DOL of the failure to include a required wage determination, the Purchasing Agent must attempt to negotiate a contract modification to:

- Incorporate the wage determination, which is to be effective as of the date of issuance unless otherwise specified, and
- Equitably adjust the contract price to compensate for any increased cost of performance under the contract which is caused by the wage determination.

See FAR 22.1015 and the discussion of modifications in Section 14B.

Provision of Department of Labor WH Publication 1313

The Purchasing Agent must give the DOL WH Publication 1313, Notice to Employees Working on Government Contracts, to the contractor at the time of issuing of the purchase order (See Exhibit 9C(v)). The form must be in the possession of the contractor for appropriate posting prior to performance of the contract.

The form advises employees of their benefits under the Service Contract Act and satisfies the requirement of the contract clause pertaining to the Act which states that contractors must post the form at a prominent and accessible place at the worksite. FAR 22.1018(c) requires that a copy of the wage determination be attached to the WH-1313.

Supplies of the form may be obtained from normal supply channels or from the Workplace Standards Administration, U.S. Department of Labor, Washington, D.C. 20210.

Inquiries Concerning the Service Contract Act

Contractors or contractor employees who inquire concerning the Act should be advised that rulings regarding such matters fall within the jurisdiction of the DOL and should be given the address of the appropriate Regional Director of the Wage and Hour Division of the DOL.

Overview

The checklist in Exhibit 9C(vi) summarizes documents and steps with which Purchasing Agents need to be concerned in connection with service contracts covered by the Act.

Exhibit 9C(i)
Definitions Of "Bona Fide Executive, Administrative, And Professional Personnel"

As provided by 29 CFR 541

An *executive* employee is one:

1. Whose main responsibility is managing the enterprise (or a recognized subdivision) in which he or she is employed.
2. Who regularly directs the work of two or more employees.
3. Who has hiring and firing authority, or whose recommendations in these areas have particular weight.
4. Who makes decisions regularly.
5. Who devotes at least 80 percent of his or her work time to the above related activities (60 percent for individuals employed in a retail or service establishment).
6. Who is paid not less than \$155 per week (within the 50 States and the District of Columbia).

Note: An employee paid at least \$250 per week (within the 50 States and the District of Columbia) whose main responsibility is managing the enterprise (or a subdivision) and supervising at least two employees is judged to meet all of the above requirements.

An *administrative* employee is one:

1. Whose main responsibility is either performing: (a) office work relating directly to management policies or general business operations of her or his employer or customers, or (b) administrative functions in a school system or educational establishment which relate directly to instruction or training.
2. Who makes decisions regularly.
3. Who regularly assists an executive (see above) or administrator (or who works in specialized or technical areas requiring special knowledge) and receives only general supervision.
4. Who performs special assignments while receiving only general supervision.
5. Who devotes at least 80 percent of his or her work time to the above activities (at least 60 percent for individuals employed in a retail or service establishment)

Exhibit 9C(i) (Continued)

6. Who is paid not less than \$155 per week (within the 50 States and the District of Columbia).
7. Who, if academic personnel, is paid according to 6 above or at a rate equal to that paid to entrance-level teachers in the academic establishment.

Note: Academic employees paid at least \$250 per week (within the 50 States and the District of Columbia) who perform work listed under 1 and 2 above are judged to meet all of the above requirements.

A *professional* employee is one:

1. Whose main work is: (a) an advanced type in science or learning which generally requires lengthy study and which differs from a general education, apprenticeship, or training in routine skills, or (b) original and creative in a recognized field (as opposed to work performed by persons with general educations and abilities), or (c) teaching within a school system or educational establishment.
2. Who makes decisions regularly.
3. Whose work is intellectual and varied (as opposed to *routine* manual or mental labor) and cannot be standardized within a set time period.
4. Who devotes at least 80 percent of his or her work time to the above activities.
5. Who is paid not less than \$170 per week (within the 50 States and the District of Columbia).

Note: Number 5 above does not apply to: licensed lawyers; medical doctors, residents, or interns; or teachers. Employees performing work as described in 1(a) or (b) and who are paid at least \$250 per week (within the 50 States and the District of Columbia) are judged to meet all of the above requirements.

Exhibit 9C(ii)

Service Contract Areas Covered And Not Covered By The Service Contract Act

Types of Contracts Which Have Been Found to Be Covered

Aerial spraying
Aerial reconnaissance for fire detection
Ambulance service
Cafeteria and food service
Chemical testing and analysis
Clothing alteration and repair
Custodial and janitorial services
Drafting and illustrating
Electronic equipment maintenance and operation
Flight training
Forest fire fighting
Geological field surveys
Grounds maintenance
Guard or watchman service
Landscaping (other than part of construction)
Laundry and dry cleaning
Linen supply service
Lodging and meals
Mail handling
Maintenance and repair of motor equipment
Maintenance and repair of office equipment
Miscellaneous housekeeping
Motor pool operation
Packing and crating
Parking services
Snow removal
Stenographic reporting
Support services at military installations
Taxicab services
Tire and tube repairs
Transporting property or personnel
Trash and garbage removal
Warehousing or storage

Exhibit 9C(ii) (Continued)

Service Contract Areas Covered And Not Covered By The Service Contract Act

Types of Contracts Which Are Exempt

- Contracts for construction or repair (see Chapter 10)
- Contracts under the Walsh-Healey Public Contracts Act
- Contracts for carriage of freight or personnel
- Contracts for communication services
- Contracts for public utility services
- Employment contracts
- Contracts with the U.S. Postal Service
- Contracts for services that are furnished outside of the
United States
- Contracts for maintenance and repair of certain ADP,
scientific, medical, and office/business equipment
(see FAR 22.1003-4(b)(4))
- Any other contract exempted by the Secretary of Labor

Exhibit 9C(iii)
Standard Form 98, Notice Of Intention To Make A Service Contract

STANDARD FORM 98 Rev. Feb. 1973 U.S. DEPARTMENT OF LABOR EMPLOYMENT STANDARDS ADMINISTRATION	NOTICE OF INTENTION TO MAKE A SERVICE CONTRACT AND RESPONSE TO NOTICE <i>(See Instructions on Reverse)</i>	A. NOTICE NO. <div style="font-size: 2em; font-weight: bold; text-align: center;">A</div>									
MAIL TO: <div style="border: 1px solid black; padding: 10px; margin: 10px auto; width: 80%;"> Administrator Wage and Hour Division U.S. Department of Labor Washington, D.C. 20210 </div>		2. Estimated solicitation date <i>(use numerals)</i> <table border="1" style="width:100%; border-collapse: collapse;"> <tr> <td style="width:33%;">Month</td> <td style="width:33%;">Day</td> <td style="width:33%;">Year</td> </tr> </table> 3. Estimated date bids or proposals to be opened or negotiations begun <i>(use numerals)</i> <table border="1" style="width:100%; border-collapse: collapse;"> <tr> <td style="width:33%;">Month</td> <td style="width:33%;">Day</td> <td style="width:33%;">Year</td> </tr> </table> 4. Date contract performance to begin <i>(use numerals)</i> <table border="1" style="width:100%; border-collapse: collapse;"> <tr> <td style="width:33%;">Month</td> <td style="width:33%;">Day</td> <td style="width:33%;">Year</td> </tr> </table>	Month	Day	Year	Month	Day	Year	Month	Day	Year
Month	Day	Year									
Month	Day	Year									
Month	Day	Year									
5. PLACE(S) OF PERFORMANCE		6. SERVICES TO BE PERFORMED <i>(describe)</i>									
SAMPLE ONLY											
7. INFORMATION ABOUT PERFORMANCE A. <input type="checkbox"/> Services now performed by contractor B. <input type="checkbox"/> Services now performed by Federal employees C. <input type="checkbox"/> Services not presently being performed											
8. IF BOX A IN ITEM 7 IS MARKED, COMPLETE ITEM 8 AS APPLICABLE											
a. Name and address of incumbent contractor		b. Number(s) of any wage determination(s) in incumbent's contract									
c. Name(s) of union(s) if services are being performed under collective bargaining agreement(s). <i>Important:</i> Attach copies of current applicable collective bargaining agreements		<div style="text-align: center; font-weight: bold;">RESPONSE TO NOTICE</div> <i>(by Department of Labor)</i> A. <input type="checkbox"/> The attached wage determination(s) listed below apply to procurement. <hr/> B. <input type="checkbox"/> As of this date, no wage determination applicable to the specified locality and classes of employees is in effect. C. <input type="checkbox"/> From information supplied, the Service Contract Act does not apply <i>(see attached explanation)</i> . D. <input type="checkbox"/> Notice returned for additional information <i>(see attached explanation)</i> . Signed: _____ <div style="text-align: center; font-size: 0.8em;">(U.S. Department of Labor)</div> <hr/> <div style="text-align: center; font-size: 0.8em;">(Date)</div>									
9. OFFICIAL SUBMITTING NOTICE											
SIGNED:	DATE										
TYPE OR PRINT NAME	TELEPHONE NO.										
10. TYPE OR PRINT NAME AND TITLE OF PERSON TO WHOM RESPONSE IS TO BE SENT AND NAME AND ADDRESS OF DEPARTMENT OR AGENCY, BUREAU, DIVISION, ETC.											

Exhibit 9C(iii) (Continued)
Standard Form 98, Notice of Intention to Make a Service Contract (Continued)

GENERAL EXPLANATION

The amended Service Contract Act requires the Secretary of Labor to issue wage determinations applicable to employees engaged in the performance of service contracts in excess of \$2,500. Standard Form 98, Notice of Intention to Make a Service Contract, with Attachment A, provides an orderly procedure for a contracting agency to request such a wage determination and for the Department of Labor to respond. Any questions as to whether a notice is required in a particular procurement situation should be resolved by reference to Title 29, Part 4, Code of Federal Regulations, or by submission of the question to the Department of Labor.

Under normal circumstances the Department of Labor will respond to a notice within 30 days of receipt. If there is urgent need for more expeditious handling, this should be explained when the notice is submitted. In the event the necessary response is not received by the contracting agency on a timely basis, the Department of Labor should be contacted.

In any case where section 4(c) of the Act requires adherence to compensation provisions of a collective bargaining agreement applicable under a predecessor contract and the agency desires to request a hearing on the issue of substantial variance between the wages and fringe benefits provided under such agreement and those prevailing in the locality, the request should be submitted with the notice of intent, in accordance with the provisions of 29 CFR 4.10, and sufficiently far in advance of the need for the wage determination to allow time for appropriate action as provided in that section of the regulations.

The notice is divided along functional lines: (1) that part which must be completed by the contracting agency, Items 2 through 10 of the basic form and Items 11 through 14 of the attachment; and (2) the Response to Notice to be completed by the Department of Labor. The basic form and its attachment are provided in quadruplicate sets with carbon inserts. The original and two copies of the basic form and of each set of attachments used (with snap-out carbons removed and the forms fastened together) are to be sent to the address preprinted on the basic form. One copy of the basic form and one copy of the attachment are to be retained by the agency.

INSTRUCTIONS- AGENCY PORTION OF NOTICE

Entries on Basic Form

Item 1—This number is preprinted on the basic form for identification and control purposes. Refer to this number when contacting the Department of Labor about the notice.

Item 2—Enter the estimated solicitation date.

Item 3—Enter the date the bids or proposals are expected to be opened or the negotiations started.

Item 4—Enter the date contract performance is expected to begin.

Item 5—The entry as to place of performance depends on a variety of factors. If the place of performance is fixed, as with a contract for janitorial services at a particular installation, enter the appropriate city, county and State. If performance is to be at several known places, attach a list. If the contract is for transportation services between points, enter the city, county and State of origin and of destination. If the place of performance may be anywhere, depending on who is awarded the contract (as, for example, certain laundry contracts), enter "unknown." If necessary for clarity, attach a brief explanation of the entry in Item 5.

Item 6—Describe the services to be performed in such a manner that it will be clear what type or types of services are called for by the contract. In many instances simple entries will suffice: "Janitorial services at Headquarters Building, Fort Sill," "Food service and kitchen police service at Enlisted Mess, Camp A.P. Hill," "Laundry and drycleaning services for Base Hospital, Eglin AFB," "Garbage collection at Ft. Hood." Unusual types of services must be described in more detail.

Item 7—Mark the appropriate box.

Item 8—It is very important under the amended Service Contract Act that appropriate entries be made in Item 8 if Box A of Item 7 has been marked.

- a. Enter the name and address of the incumbent contractor.
- b. Enter the number(s) of any wage determination(s) made part of the incumbent's contract. For example: 71-69 (Rev. 3) and 69-43 (Rev. 4).
- c. Enter the name(s) of union(s) if any of the services are being performed by the incumbent contractor under collective bargaining agreement(s). If an entry is required in c., a copy of all current applicable collective bargaining agreements must be furnished with the notice. The notice will be returned without action by the Department of Labor if this is not done.

Item 9—It is often necessary for the Department of Labor to get in touch with the contracting official who submitted the notice in order to clarify particular points and expedite a response. The name of this official should be printed or typed in the space provided and he should sign his name above. The telephone number, including area code, should be entered. Enter the date the notice is submitted.

Item 10—Print or type this entry in the space provided within the brackets. This is used by the Department of Labor to identify the contracting agency and for mailing purposes.

ENTRIES ON ATTACHMENT A

Item 11—Enter the notice number found in Item 1 of the basic form.

Item 12—Enter the classes of service employees to be employed in performing the contract. A simple entry may suffice: "Janitor," "Window cleaner," "Automotive mechanic," "Guard," "Stenographer," "Typist," "Warehouseman," "File clerk." Where more complex jobs are involved, it will expedite handling to use a few lines below the entry for a class to describe briefly what the employee will do—a sort of capsule job description. The entries in Item 12 are crucial as they enable the Department of Labor to "match" the job to be performed against existing wage determinations or available wage payment data.

Item 13—Enter the number of employees to be employed in each class listed in Item 12. Do not omit this figure even though it may be necessary to use a rough estimate.

Item 14—The amended Service Contract Act (section 2(a)(5)) requires the contracting agency to include in the contract: "A statement of the rates that would be paid by the Federal agency to the various classes of service employees if section 5341 of Title 5, United States Code, were applicable to them." The Secretary of Labor is required to give "due consideration" to such rates in making wage and fringe benefit determinations.

For purposes of the entries in Item 14, assume that each class of employees listed in Item 12 is to be Federally employed: that is, to be employed directly as "wage board" or "blue collar" employees by the contracting agency and who, if so employed, would receive wages as provided in 5 United States Code §341. Enter the hourly wage rate that each such listed class would be paid. The agency's personnel may be of help in determining the appropriate hourly rate entries.

While the "statement" made part of the contract must include both the hourly wage rates and fringe benefits that would be paid to the various classes, it is not necessary to furnish fringe benefit information as part of the notice. In giving "due consideration" to the fringe benefits that would be paid, the Department of Labor will consult the formula previously made available to all contracting agencies for use in preparing the "statement" required to be made part of the contract.

INSTRUCTIONS- RESPONSE PORTION OF NOTICE

(Completed by Department of Labor)

The original copy of the basic form and the original copy of the attachment will be returned to the contracting agency with appropriate entries by the Department of Labor in that portion of the basic form reserved for Response to Notice.

- A. If this box is marked, the wage determination(s) applicable will be listed by number and attached. The wage rates and fringe benefits reflected in the attached wage determination(s) are applicable to the procurement and must be made part of the contract. (If wage rates and fringe benefits are not provided in the wage determination(s) for particular classes of service employees to be employed on the contract, conforming action must be taken as provided in Title 29, Part 4, section 4.6(b)(2), Code of Federal Regulations.)
- B. If this box is marked, no wage determination applicable to the specified locality and classes of employees is in effect. However, successor contractors may not pay less than the collectively bargained wage rates and fringe benefits, including any prospective increases, applicable to employees of the predecessor contractor except where, upon a hearing, it is found that such wage rates and fringe benefits are substantially at variance with those that prevail in the locality. In no case may an employee be paid less than the minimum wage under section 6(a)(1) of the Fair Labor Standards Act.
- C. From time to time the Department of Labor receives a notice with respect to a proposed contract which, on the basis of the information supplied by the contracting agency, is not subject to the Service Contract Act. If box C is marked, an explanation will be attached.
- D. This box will be marked if the notice must be returned for additional information. An explanation will be attached so that the contracting agency will know what action to take.

ADDITIONAL WAGE DATA

The Department of Labor welcomes any wage rate and fringe benefits data the contracting agency may submit in connection with a notice, as well as any explanatory information that will assist in understanding the proposed procurement.

Exhibit 9C(v)
Notice To Employees Working On Government Contracts

EXHIBIT 9C(v)
**Notice To Employees
Working on
Government
Contracts**

This establishment is performing Government contract work subject to the—

**Service Contract Act
or
Public Contracts Act**

During the period of performance on the contract the following requirements must be observed.

Minimum Wages

Your rate must be at least \$2.65 an hour effective January 1, 1978; \$2.90 an hour effective January 1, 1979; \$3.10 an hour effective January 1, 1980; and \$3.35 an hour effective January 1, 1981. A higher rate may be required for both Service and Supply contracts if a wage determination applies. (A higher rate may also be required for Service contracts if a predecessor contractor has paid a higher rate for your classification pursuant to a collective bargaining agreement.) Such higher rates for Service contracts will be posted as an attachment to this Notice.

Fringe Benefits

Service contract wage determinations may require fringe benefit payments (or a cash equivalent). Supply contracts do not require fringe benefits.

Overtime Pay

You must be paid 1½ times your basic rate of pay for all hours worked in excess of 40 in a week. There are some exceptions.

Safety and Health

The work must be performed under conditions that are sanitary, and not hazardous or dangerous to the employees' health and safety. No person under 16 years of age may be employed on a Supply Contract.

Information

Further information on the wage provisions of the Service Contract Act or the Walsh-Healey Public Contracts Act may be obtained from the Wage and Hour Division. Information relating to the safety and health provisions may be obtained from the Occupational Safety and Health Administration. Offices are located in principal cities. Check your telephone directory under U.S. Government, Department of Labor, Wage and Hour Division or the Occupational Safety and Health Administration.



U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

Exhibit 9C(v)
Notice To Employees Working On Government Contracts (Continued)

U.S. Department of Labor

Washington, D.C. 20210

According to information submitted to this office, your firm has been awarded a contract which is subject to the Walsh-Healey Public Contracts Act or the Service Contract Act. The purpose of the discussion below is to advise contractors of the principal provisions of these acts.

Walsh-Healey Public Contracts Act

General Provisions.—This act applies to contracts which exceed or may exceed \$10,000 entered into by any agency or instrumentality of the United States for the manufacture or furnishing of materials, supplies, articles, or equipment. The act requires the contractor to be qualified as a manufacturer or regular dealer, establishes minimum wage, maximum hours, and safety and health standards for work on such contracts, and prohibits the employment on contract work of children under 16 years of age and convict labor. The employment of homeworkers (except handicapped clients of bona fide sheltered workshops) on a covered contract is not permitted. The act also requires the keeping of certain records.

In addition to its coverage of prime contractors, the act under certain circumstances applies to secondary contractors performing work under contracts awarded by the Government prime contractor.

All provisions of the act except the safety and health requirements are administered by the Wage and Hour Division.

Minimum Wage.—A covered employer must pay to all covered employees at least the minimum wages determined by the Secretary of Labor to prevail for similar work or in the pertinent industry or industries. Employees must be paid not less than \$2.65 an hour effective January 1, 1978; \$2.90 an hour effective January 1, 1979; \$3.10 an hour effective January 1, 1980; and \$3.35 an hour effective January 1, 1981, unless a wage determination sets a higher rate. Under existing policy, compliance with wage orders issued under the Fair Labor Standards Act pursuant to industry committee hearings and recommendations is required in Puerto Rico and the Virgin Islands.

Overtime.—Covered workers must be paid at least one and one-half times their basic rate of pay for all hours worked in excess of 40 a week, whichever number of overtime hours is greater. Overtime is due on the basis of the total hours spent in all work, Government and non-Government, performed by the employee in any week in which covered work is performed.

Child Labor.—Employers may protect themselves against unintentional child labor violations by obtaining certificates of age. State employment or age certificates are acceptable.

Safety and Health.—No covered work may be performed in plants, factories, buildings, or surroundings or under work conditions that are unsanitary or hazardous or dangerous to the health and safety of the employees engaged in the performance of the contract. The safety and health provisions of the Walsh-Healey Public Contracts Act are administered by the Occupational Safety and Health Administration.

Posting.—During the period that covered work is being performed on a contract subject to the act, the contractor must post copies of Notice to Employees Working on Government Contracts in a sufficient number of places to permit employees to observe a copy on the way to or from their place of employment.

Responsibility for Secondary Contractors.—Prime contractors are liable for violations of the act committed by their covered secondary contractors.

Service Contract Act

General Provisions.—The Service Contract Act applies to every contract (and any bid specification therefor) entered into by the United States or the District of Columbia, the principal purpose of which is to furnish services in the United States through the use of service employees. Contractors and subcontractors performing on such Federal contracts must observe minimum wage and safety and health standards, and must maintain certain records, unless a specific exemption applies.

Wages and Fringe Benefits.—Every service employee performing any of the Government contract work under a service contract in excess of \$2,500 must be paid not less than the monetary wages, and must be furnished the fringe benefits, which the Secretary of Labor has determined to be prevailing in the locality for the classification in which the employee is working or the wage rates and fringe benefits (including any accrued or prospective wage rates and fringe benefits) contained in a predecessor contractor's collective bargaining agreement. The wage rates and fringe benefits required are usually specified in the contract. If no wage rate determination has been made applicable to the contract, employees performing work under the contract must be paid not less than the minimum wage provided in section 6(a)(1) of the Fair Labor Standards Act (\$2.65 an hour effective January 1, 1978; \$2.90 an hour effective January 1, 1979; \$3.10 an hour effective January 1, 1980; and \$3.35 an hour effective January 1, 1981).

All employees doing work necessary to the performance of the contract must also be paid not less than the minimum wage provided in section 6(a)(1) of the Fair Labor Standards Act.

Service contracts which do not exceed \$2,500 are not subject to prevailing rate determinations or to the safety and health requirements of the act. However, the act does require that employees performing work on such contracts be paid not less than the above minimum wage rate provided by section 6(a)(1) of the Fair Labor Standards Act.

All provisions of the act except the safety and health requirements are administered by the Wage and Hour Division.

Overtime.—Service contracts in excess of \$2,500 which may require or involve the use of laborers or mechanics require the payment of overtime under the Contract Work Hours and Safety Standards Act at time and one-half the basic rate for all hours worked on the contract in excess of 40 a week, whichever is greater.

Safety and Health.—The act provides that no part of the services in contracts in excess of \$2,500 may be performed in buildings or surroundings or under working conditions, provided by or under the control or supervision of the contractor or subcontractor, which are unsanitary or hazardous or dangerous to the health or safety of service employees engaged to furnish the services. The safety and health provisions of the Service Contract Act are administered by the Occupational Safety and Health Administration.

Notice to Employees.—On the date a service employee commences work on a contract in excess of \$2,500, the contractor (or subcontractor) must provide the employee with a notice of the compensation required by the act. The posting of the notice (including any applicable wage determination) contained on the reverse in a location where it may be seen by all employees performing on the contract will satisfy this requirement.

Notice in Subcontracts. The contractor is required to insert in all subcontracts the following standard clauses specified by the regulations in 29 CFR 4 for Federal service contracts exceeding \$2,500.

Other Obligations.—Observance of the labor standards of these acts does not relieve the employer of any obligation he may have under any other laws or agreements providing for higher labor standards.

Additional Information.—Additional information and copies of the acts and applicable regulations and interpretations may be obtained from the nearest office of the Wage and Hour Division or the National Office in Washington, D.C. Information pertaining to safety and health standards may be obtained from the nearest office of the Occupational Safety and Health Administration or the National Office in Washington, D.C.



U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Occupational Safety and Health Administration

9C-16

Exhibit 9C(vi)
Service Contracts Checklist

Submittals and Documents: Pre-Award

1. SF-98
2. SF-98a, including comparable government employee rates
3. Prior collective bargaining agreements
4. Wage rate determination
 - Statement on solicitation
 - Attachment to solicitation
5. Contract clause

Submittals and Documents: Post-Award

1. Adequate work statement
2. Wage Rate Determination as attachment
3. WH 1313 to contractor

Simplified Acquisition Procedure

1. Small Business Set-Asides
2. Competition
3. Evaluation
 - Responsive
 - Responsible
 - Price and Other Factors

SECTION 9D

ACQUIRING ADVISORY AND ASSISTANCE SERVICES

Advisory and assistance services including management studies and services, are broadly defined as services of a purely advisory nature--surveys, studies, examinations, analyses, reviews, consultations, and the like--which are aimed at developing recommendations and techniques for improving the effectiveness, efficiency, and economy of administration and management functions and agency program management functions. The term generally applies to services provided by persons who are considered to have knowledge and special abilities not generally available within the Agency. It applies whether the advisory and assistance services are performed by an individual or firm under contract or by an individual who is appointed as a consultant or expert. Contracting for advisory and assistance services is governed by FAR Subpart 37.2 and AGAR Subpart 437.2.

Authority for acquiring advisory and assistance services by contract is found in 5 U.S.C. 3109, the Administrative Expenses Act of 1946. Persons whose services are acquired under this authority may not enter into an employee status with the government.

Although many of the ARS service contracts effected by simplified acquisition procedure are for nonprofessional services, there occasionally are requirements for services of a professional nature. Issues periodically arise concerning these services. Some of these issues are related to the determination of whether services are personal or nonpersonal. Others concern protection of the compensation paid to professional employees and the contracting methods used to acquire professional services.

DEFINITION OF ADVISORY AND ASSISTANCE SERVICES

The term "Advisory and Assistance Services" refers to those services provided under contract by nongovernmental sources to support or improve: organizational policy development; decision-making; management and administration; program and/or project management and administration; or R&D activities. It can also refer to the furnishing of professional advice or assistance rendered to improve the effectiveness of Federal management processes or procedures (including those of an engineering and technical nature). In rendering the foregoing services, outputs may take the form of information, advice, opinions, alternatives, analyses, evaluations, recommendations, training and the day-to-day aid of support personnel needed for the successful performance of ongoing Federal operations.

Exhibit 9D(i) contains examples of some but not all of the types of services included in and excluded from the definition of advisory and assistance services.

FAR POLICY

FAR 37.203 states that the acquisition of advisory and assistance services is a legitimate way to improve government services and operations. Accordingly, advisory and assistance services may be used at all organizational levels to help managers achieve maximum effectiveness or economy in their operations.

Subject to FAR and USDA policy and procedures, ARS may contract for advisory and assistance services, when essential to--

- Obtain outside points of view to avoid too limited judgment on critical issues;
- Obtain advice regarding developments in industry, university, or foundation research;
- Obtain the opinions, special knowledge, or skills of noted experts;
- Enhance the understanding of, and develop alternative solutions to, complex issues;
- Support and improve the operation of organizations; or
- Ensure the more efficient or effective operation of managerial or hardware systems.

Advisory and assistance services are not permitted to be--

- Used in performing work of a policy, decision-making, or managerial nature which is the direct responsibility of agency officials;
- Used to bypass or undermine personnel ceilings, pay limitations, or competitive employment procedures;
- Contracted for on a preferential basis to former government employees;
- Used under any circumstances specifically to aid in influencing or enacting legislation;
- Used to obtain professional or technical advice which is readily available within the agency or another Federal agency; or
- Acquire services through grants and cooperative agreements.

Types of Advisory and Assistance Services

Advisory and assistance services may take the form of information, advice, opinions, alternatives, conclusions, recommendations, training, or direct assistance. These services consist of --

Studies, analyses, and evaluations. Studies, analyses, and evaluations are organized, analytic assessments needed to provide the insights necessary for understanding complex issues or improving policy development or decision-making. These analytic efforts result in formal, structured documents containing data or leading to conclusions and/or recommendations.

Management and professional support services. Management and professional support services take the form of advice, training, or direct assistance for organizations to ensure more efficient or effective operations of managerial, administrative, or related systems.

Engineering and technical service. Engineering and technical services (technical representatives) take the form of advice, training, or, under unusual circumstances, direct assistance to ensure more efficient or effective operation or maintenance of existing equipment, systems, related systems, and associated software.

Implementation

Subpart 37.2. and USDA and ARS policy make program activities responsible for justifying the need for advisory and assistance services, obtaining approvals as required, and providing specific and complete work statements (see Exhibit 9D(ii)). Note also that purchasing personnel are responsible for determining whether requested acquisition actions, regardless of dollar value, involve advisory and assistance services. In every case, an advisory and assistance services acquisition action must be referred to the appropriate higher level of authority. Requirements valued at \$25,000 or less are to be approved by the ARS Area Director, or for Headquarters, ARS, by the Deputy Administrator. Requirements over \$25,000 are to be approved by the HCAD (Procurement and Property Division (PPD) Director). These requirements are to be submitted on a quarterly basis through the servicing contracting office to PPD.

The Purchasing Agent is responsible for determining whether a requested contractual action, regardless of dollar value, is for advisory and assistance services. Before processing any solicitation or acquisition action for advisory and assistance services, the Purchasing Agent must ensure that the information listed in Exhibit 9D(ii) has been submitted by the fundholder. Upon receipt of this information it must be forwarded to the Director, PPD for action.

SUMMARY

The proper use of advisory and assistance services is a legitimate and economical way to improve government services and operations. Programs can be strengthened by using the highly specialized knowledge and skills of such individuals. Such services may be used to help managers achieve maximum effectiveness and economy in their operations. Such services cannot be used, however, to perform government functions, to fill positions which call for full-time continuing employees, or to circumvent competitive Office of Personnel Management procedures and Classification Act pay limits.

Exhibit 9D(i)

Examples of Services Included In Or Excluded From The Definition of Advisory and Assistance Services

Services Included in the Definition

Advice on discriminatory practices in labor
Advice on organizational structure and management methods
Advice on and analysis of electric power projects
Advice on mail handling procedures
Advice on plans for conducting census enumerations
Advice on problems in patent and trademark examinations
Analysis of the impact of a program
Evaluation of the effectiveness of agency publications
Policy and program analysis evaluation and advice
Training
Consulting Services
Opinion Surveys
Information Technology (IT) services on IT support services (other than routine services)
Facilitator Services
Total Quality Management or Reinvention/reengineering services
Financial Services

Services Excluded from the Definition

Advisory services provided directly to the public or to foreign governments as a part of an agency's programs of assistance
Architect and engineering services and other associated services directly related to a particular structure
Audits made by certified public accountants
Commercial and industrial products and services (see OMB Circular No. A-76)
Conduct of research (see OMB Circular No. A-11)
Consultant-type services provided by one Federal entity for another under a memorandum of understanding or similar arrangement
Court reporting
Direct operation and management of government-owned facilities
Editing and proofreading services
Educational-vocational guidance counseling for veterans
Routine automated and data processing services unless such services are an integral part of CAAS
Geological, archeological, and cadastral surveys
Information system development
Installation or testing of equipment
Legal research services that do not include advice or recommendations
Performance and supervision of operating functions

Exhibit 9D(i) (Continued)

Examples of Services Included In Or Excluded From The Definition of Advisory and

Assistance Services

Physicians, dentists, nurses, and other health care professionals

Purchase of real or personal property

Services performed by technicians or nonprofessional persons to meet unusual or peak work demands

Initial training, training aids, and technical documentation acquired as an integral part of the lease or purchase of equipment.

Routine maintenance of equipment, routine administrative services (e.g., mail, reproduction, telephone), printing services, and direct advertising (media) costs.

Grants and cooperative agreements, as defined by the Federal Grant and Cooperative Agreements Act (31U.S.C. 6304, 6305).

Exhibit 9D(ii)

Information to be Provided by the Fundholder

1. Name, agency, office address, telephone number of person to contact about the proposed procurement, and reference number (e.g. requisition number).
2. Describe the services to be performed, including any deliverables to be provided. Attach a copy of the statement of work, if one has been prepared.
3. What is the total amount of time for completion of the project?
4. What is the total estimated cost of the project (including cost of options or out years)?
5. Is funding available for this requirement? Please provide documentation showing that funds are available for the initial period of the requirement. If funds have not yet been made available for the requirement, explain how the proposed contract will be funded.
6. Why can't the required services be performed by Government personnel?
7. What program objectives will be served by award of the proposed contract? What negative consequences are anticipated if the proposed contract is not awarded?
8. If similar or related work has been performed previously for the same project or program, please describe the services performed and their relationship to the current request.
9. Is it intended that the contract is to be awarded on a sole source basis? If so, please justify why the contract must be awarded sole source.
10. If the answer to question 9 is "No", have you identified a particular company or individual whom you are recommending to provide the services?
11. If the answer to either question 9 or question 10 is "Yes":
 - a. Please provide the name and business address of the individual or company (the vendor).
 - b. Please describe any contacts which have occurred between the vendor and USDA employees concerning the proposed contract. Such contacts include correspondence between the vendor, as well as discussions or correspondence between the vendor and the agency or mission area.
 - c. Has the vendor already done any work on the project, such as drafting a description of the requirement? If so, please describe the vendor's current involvement with project.

Exhibit 9D(ii) (Continued)

12. If subcontracts are anticipated, will the prime contractor be required to direct work to a particular individual or company? Directed subcontracts are not favored because they restrict competition, may interfere with the prime contractor's independent judgement, and may increase the Government's risk from a business standpoint. If you nevertheless intend to direct subcontract work to a particular source or sources, please justify why you intend to do so.

13. Is there any possibility of the appearance of a personal or organizational conflict of interest if award is made to the recommended individual or company? If so, please explain. An organizational conflict of interest "means that because of other activities or relationships with other persons, a person is unable, or potentially unable, to render impartial assistance or advice to the government, or the person's objectivity in performing the contract work is, or might be otherwise impaired, or a person has an unfair competitive advantage," (FAR 9.501).

14. If the proposed contract or requirement was not submitted within the schedule for quarterly review, please also explain why this requirement was not included in the list of advisory and assistance services contracts submitted for the fiscal quarter.

Certification that these services are necessary to meet program objectives:

Program Official

Concurrence:

FD/PPD Branch Chief or PAO

SECTION 9E

ACQUIRING SERVICES OF PRIVATE SECTOR TEMPORARIES (PST)

INTRODUCTION

FAR 37.112 implements the Office of Personnel Management regulating 5 CFR 300, Subpart E which establishes criteria and conditions under which the ARS may consider using temporary help service firms to assist in meeting short-term needs. This regulation was provided in response to agencies' requests for flexibility, to provide public services, and to maintain productivity. The effect of the regulation is to give the ARS an additional tool for meeting short-term needs which has long been available to other public and private organizations.

The private sector temporaries are legally the employees of a temporary help firm, which exercises overall control of their activities from hiring through termination. The ARS may contract with the firm for services, give the private sector temporaries assigned a brief orientation, assign individual work tasks, and review the work product. There is no employer-employee relationship created between the private sector temporary employee and the Federal Government and therefore, there is no violation of the prohibition of personal services contracts (See Section 9B). ARS policies and procedures are as stated in the following paragraphs.

It is ARS' policy to acquire the services of private sector temporaries under the circumstances described below. For definitions, see Exhibit 9E(i).

CONDITIONS FOR USE OF PRIVATE SECTOR TEMPORARIES (PST)

Short-term Situations

Contracts or other procurement arrangements with a temporary help service firm for the brief or intermittent use of PST must meet one of the following short-term situations:

- An employee is absent for a temporary period because of a personal need including emergency, accident, illness, parental or family responsibilities, or mandatory jury service, but not including vacations or other circumstances which are not shown to be compelling in the judgment of ARS; or
- ARS must carry out work for a temporary period which cannot be delayed in its judgment because of a critical need.

Need Cannot Be Satisfied by Government Employees

The need cannot be met with current employees or through the direct appointment of temporary employees within the time available by the date, and for the duration of time, help is needed.

LIMITATIONS/EXCLUSIONS

General Limitations

The services of a PST are not permitted to be used in lieu of the regular recruitment and hiring procedures under the civil service laws for permanent appointment in the competitive civil service; or to displace a Federal employee.

Firms may not be contracted with as a means of supplementing regularly assigned staff levels or exceeding established personnel ceilings.

Further, the use of PST's is not allowed for:

- Senior Executive Service, managerial, and/or supervisory positions (these positions entail control over Federal employees and programs);
- "Schedule C" positions (based on the confidential nature of their positions); or
- Advisory and assistance services (appointments for these services may be made under 5 U.S.C. 3109 or by contract in accordance with FAR 37 (See Section 9D).

Individual Employment Limitations

No one *employee* of a temporary help firm may work at ARS within its local commuting area for more than 120 work days in a 24-month period. An extension of the same individual may be authorized up to a maximum of 240 work days if the agency has determined that the services of the same individual for the same situation will prevent significant delay. If the critical need still exists after 240 work days, the services of another individual may be obtained. If the termination of the original individual would significantly impact the performance of critical work, the Human Resources Division (HRD) may request that OPM authorize the extension of the same individual for a specified period.

Work Day Limitations

Purchases with temporary help service firms shall not exceed 120 work days in response to any one individual situation. In exceptional cases, HRD may extend that time limit for an additional period not to exceed a total of 240 work days for initial requirement and the extension).

PROCEDURES

Requesting Office

The requesting office must determine if the use of a PST is authorized. It must then prepare and submit a statement of work and a written justification supporting the need for the use of a PST to HRD. At a minimum, the justification shall:

- Identify the circumstances that gave rise to the critical need for a PST;
- Specify the labor category and qualifications needed by the PST;

- Document the actions considered to satisfy the critical need through traditional Federal personnel practices (e.g., details; redistribution of work among existing staff; overtime; Federal temporary appointments, etc.);
- Specify a fixed duration of time for which the services will be required; and
- Identify any required security clearance, if applicable.

Upon approval by the HRD, the requesting office must prepare an AD-700 and submit the Statement of Work reviewed by HRD, with a copy of the approval to the appropriate procurement office.

Purchasing Agent

Upon receipt of a signed AD-700 and HRD's written authorization, the Purchasing Agent must determine appropriate simplified acquisition procedures to be followed to place an order for a PST (See Chapters 7 and 8 of this Manual).

Since it takes approximately 90 days to receive a wage determination from the DOL, Purchasing Agents should submit SF-98's to DOL, covering as many categories of labor as may be conceivably needed in advance of the actual request. (The Directory of Service Contract Act Occupations, available from the Government Printing Office, is a useful guide for identifying labor categories).

Once the DOL wage determination is received, the Purchasing Agent should attempt to negotiate Blanket Purchase Agreements or other appropriate simplified acquisition arrangements in advance with temporary service firms. With these arrangements in place, CO's/PA's will be able to order the services of PST with a minimum of procurement leadtime.

Exhibit 9E(i)

Definitions

1. Critical Need. A sudden or unexpected occurrence; an emergency; a pressing necessity; an exigency. Such occasions are characterized by additional work or deadline required by statute. A recurring, cyclical peak workload would not by itself constitute a critical need. Newly assigned work requirements directed by statute or other directive could comprise a critical need when first imposed, however, continuing requirements, i.e., for subsequent years or cycles would not.
2. Federal Supervisor. An individual employed by ARS having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees to adjust their grievances or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment.
3. Local Commuting Area. A geographic area that usually constitutes one area for employment purposes. It includes any population center (or two or more neighboring ones) and the surrounding localities in which people live and can reasonably be expected to travel back and forth daily to their usual employment.
4. Parental and Family Responsibilities. Birth of a child, adoption, foster care, care of elderly parents or other dependents.
5. Private Sector Temporaries (or PST). Employees of a temporary help service firm who are supervised and paid by that firm, and whom that firm assigns temporarily to other organizations who have contracted for the use of their skills.
6. Temporary Help Service Firm. A private sector entity, which quickly provides ARS with specific, brief, and temporary services performed by its qualified employees. The firm is at all times the legally responsible employer of the PST's assigned to ARS. The firm, not the ARS, recruits, tests, hires, trains, assigns, pays, provides benefits and leave to, and as necessary, addresses performance problems, disciplines, and terminates its employees. Among other employer obligations, the firm is responsible for payroll deductions and payment of income taxes, social security (FICA), unemployment insurance, and workers compensation, and must provide required liability insurance and bonding.