



Personal Services Contracts

Is It Time to Lift the Bom?

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It is no surprise to those of us in the Department of Defense (DoD) acquisition workforce that contractors are well integrated into our daily routine. The integration of contractors into our DoD workforce has blended it dramatically, changing the landscape of how we provide and manage services. Over the many decades during which this workforce blending has occurred, we have needed to tread lightly in our relationship with contractors in our offices. In fact, Presidents Eisenhower and Kennedy warned of possible difficulties that may occur in contractor integrated offices. One issue has remained unchanged: the risk of creating a *de facto* personal services contract due to this relationship.

Personal Services

In order to understand what constitutes a *de facto* personal services contract, you must first generally understand personal services contracts. There is a two-part definition of personal services. First, in a nutshell, a personal services contract is a type of legal agreement involving someone who provides a unique type of service to another person. This unique type of service cannot be substituted with a common replacement. This definition explains why

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personal services contracts are so common in the sports and entertainment industry. For example, if you bought a ticket to see Elvis Presley in Las Vegas in 1971, it would have been unacceptable for the venue to replace him with an impersonator and expect you to be satisfied. Elvis provided a type of personal service that would have been problematic, essentially impossible, to replace. Second, under U. S. Code Title 10, a personal services contract exists when a contractor employee is subject to continuous supervision and control while performing the contractual responsibilities. Therefore, if a contractor is controlled or supervised as government employees are under a nonpersonal services contract, the contractor's performance becomes a *de facto* personal services.

Unenforceable Contracts

Except for a few exceptions, such as specialized medical resources, personal services contracts are banned in the DoD and the rest of the Federal Government. This ban has roots tracing back to the Thirteenth Amendment of the U.S. Constitution enacted in 1865. The law treats services involving personal services contracts differently than its treatment of ordinary services. The courts have ruled that it may be unconstitutional to enforce a personal service contract. The common interpretation is that enforcing specific or continued performance of such a contract falls under the Thirteenth Amendment's prohibition of involuntary servitude. In other words, personal service contracts are banned in the DoD because they are unenforceable since the Constitution trumps the obligations of the contractual parties. In the Elvis example, if the substitute's performances did not fulfill the patrons' expectations, he could not be forced to perform to a certain level of satisfaction. In addition, if Elvis were too ill to perform, he could not be forced to do so. This differs greatly from nonpersonal services since the common solution would be to replace the underperforming or ill employee with another person in order to avoid defaulting on the contract.

Control and Supervision

According to the Government Accountability Office (GAO) 2015 High Risk Report to Congress, the DoD obligates more than \$300 billion annually to contracts for goods and services, including major weapon systems, support for military bases, information technology, consulting services, and commercial items. These contracts include activities in support of contingency operations, such as those in Afghanistan. Except for some specialized health care and contingency services, personal services are unallowable under the vast majority of these contractor-provided services. Naturally, we want to ensure that the services provided under this \$300 billion expenditure are performed to the highest standards and on budget. Therefore, we strive to maintain control and supervision over the services for which we are responsible. In recent years, several GAO reports have indicated there have been such problems as unauthorized, borderline and unreported personal services, conceivably involving more than 100,000 contracts. Obviously, there is a problem. This may indicate several different or combined complications, such as the following:

- We don't know there is a ban.
- We don't understand what constitutes personal services.
- We don't care.
- We have no clue as to the location of the invisible line.
- It is too difficult to contract for services without giving up control and/or continuous supervision.

Whatever the reason, we need to figure it out as long as the ban on personal services contracts remains in place.

Managing a Blended Workforce

One thing is certain: Program managers need to manage their programs; contracting officers need to manage their contracts, and so on. Complications are imminent in a blended workforce, especially for those who manage the workforce day to day. Instead of managing an organization or department as a whole unit, we must treat the two different sectors of the blended workforce separately. At present, we manage ourselves, and contractors manage themselves, although both may perform the same work in the same department. In fact, a contractor employee may sit at the same desk, doing the same job, that a long-time DoD employee performed just a week earlier. As soon as we begin supervising that contractor employee like the previous government employee, we may have crossed the invisible line and created a *de facto* personal services contract.

Contract Requirements

Crossing the invisible line into a *de facto* personal services contract need not result directly from our supervisory actions. The line may be crossed inadvertently because of how our contract requirements are written. As mentioned earlier, we in acquisition desire to control the particular elements for which we are responsible. Therefore, it is natural for us to build control and supervision into our contract requirements. Our responsibility for contractor employees is limited to monitoring their performance. Supervision and control are left to the contractor organization. We must not cross the invisible line when we write the contract requirements. This line is not easily avoided, but we must review our performance work statements (PWS) thoroughly to ensure that we are not requesting personal services. All PWS language must be written to maintain contractor control and supervision of the workers performing under the contract.

Crossing the Invisible Line

I have mentioned several times an invisible line dividing nonpersonal and personal services. As the GAO has observed, many contracts straddle the line and, therefore, are "borderline" contracts. Here is a list of actions that surely cross the invisible line:

- Determining who should perform contract tasks or how they should be done.
- Pressuring and/or influencing the contractor to use "favorite" employees, or insisting on particular personnel actions.



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- Using government and contractor personnel interchangeably.
- Supervising contractor employees.
- Rating individual contractor employee performance.
- Requiring out-of-scope work or the contractor's performance of inherently governmental functions. Required services are specified in the contract; there are no "other duties as assigned."

Even granting "59 minutes" of early departure from work or instructing a contractor employee to attend a mandatory organizational picnic cross the line into personal services. Allowances for these types of activities would need to be written into their contract. In other words, if it's not in the contract, it's not allowed.

Is It Time to Lift the Ban?

The answer depends on whether it is worth the consequences. In 2014, the DoD reported to the GAO that an estimated 629,000 contractor full-time equivalents (FTEs) are working for the DoD under contracts. These FTEs cost a total of \$123 billion, nearly half the \$300 billion that the DoD spends on contracts. This is 629,000 contractor employees working on behalf of the DoD but not under the government's direct supervision or control. Lifting the ban on personal services may allow us to supervise these employees as if they were our own and thereby gain and maintain control. This could reduce government spending dramatically by cutting contractor employee management and oversight costs.

On the other hand, enforceability is an issue. In the event a dispute over contractor performance makes its way into the courts of law, will the courts just turn their heads? This could leave us in an untenable position regarding failed contractor performance, as well as contract termination issues.

Conclusion

Perhaps it's time for a closer look at the areas in which personal services are authorized and investigate the outcomes. This may give us a clearer picture of potential problems and successes. Looking into the handling and disposition of contract disputes within specialized medical resources could provide some insight into other well-integrated personal services operations. The personal services contracts within the DoD's designated operational areas overseas could show us how we can use personal services for Stateside logistical and construction contracts.

Finally, the personal services contracts we use in our intelligence and counterintelligence communities may reveal how other services may fare in sensitive situations. It may be worthwhile to consider whether we should lift the ban on personal services contracts. It may be that the time for such a ban already has passed. On the other hand, perhaps it should stay as it is. &

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