

## Recommendation 31: Eliminate the statutory and regulatory distinction between personal services contracts (PSC) and nonpersonal services (NPS) contracts.

### Problem

The current regulatory and statutory distinction between personal and nonpersonal services is outdated and inconsistent with the multisector workforce management approaches used by the DoD and other federal agencies. For DoD, general policy for total force management is found at 10 U.S.C. § 129a, General Policy for Total Force Management and implemented in DoDI 1100.22, Policy and Procedures for Determining Workforce Mix.<sup>1</sup> This distinction between personal service contracts (PSCs) and nonpersonal services (NPS) is derived from concerns about use of contracts and contractors to avoid or work around federal civil service hiring regulations. These concerns are no longer relevant to how the federal government uses and acquires contractor support. The distinction between personal and nonpersonal services should be eliminated and acquisition statutes and regulations should be revised to enable DoD to acquire contracted mission support services in the most efficient and effective manner possible for each unique requirement.

### Background

Federal agencies have adopted a multisector workforce approach to gain access to the evolving necessary skills, technologies, and expertise required to accomplish their mission in the 21st century. Service acquisitions within DoD range from basic services, such as landscaping and janitorial services, to those that are more complex, like systems engineering support, cyber-security and analysis support, acquisition support, and other knowledge-based services (KBS).

The contractor workforce component of the total DoD workforce has increased substantially since the implementation of the personal services statutes and regulations in effect today.<sup>2</sup> This integration of contractor personnel into the total government workforce has largely been for KBS requirements. To facilitate resource allocation decision-making, DoD created a taxonomy for acquisition of services, supplies, and equipment in which KBS—also referred to as advisory and assistance services (A&AS)—is defined.<sup>3</sup> In FY 2017, DoD KBS expenditures were more than \$37 billion, the second largest expenditure element of the DoD taxonomy. That same year, PSCs were less than 1 percent of total DoD KBS contracts. In FY 2017, KBS expenditures for non-DoD government agencies were more than \$37 billion. PSCs were also less than 1 percent of non-DoD government KBS contracts.<sup>4</sup>

Contractor personnel are prohibited from, and do not perform, inherently governmental functions on either personal or nonpersonal services contracts. Contractor personnel provide KBS work alongside their government colleagues in support of organizational missions. PSCs are prohibited, unless the

---

<sup>1</sup> General Policy for Total Force Management, 10 U.S.C. § 129a. Policy and Procedures for Determining Workforce Mix, DoDI 1100.22 (2010).

<sup>2</sup> Personal Services Contracts, FAR Subpart 37.104(b), current to: FAC 2005-97 (2018). Personal services contracts, DFARS Subpart 237.104, current to: DPN 20171228 (2017).

<sup>3</sup> OSD(AT&L), Defense Procurement Acquisition Policy (DPAP) Memo, *Taxonomy for the Acquisition of Services and Supplies and Equipment*, August 27, 2012, accessed April 9, 2018, <https://www.osd.mil/dpap/policy/policyvault/USA004219-12-DPAP.pdf>.

<sup>4</sup> Data from FPDS, extracted April 4, 2018.

acquisition of the specific requirement is authorized by statute. A PSC is defined in the FAR as a contract that, by its express terms or as administered, makes the contractor personnel appear to be, in effect, government employees.<sup>5</sup> FAR Subpart 37.104(d) states,<sup>6</sup>

*The following descriptive elements should be used as a guide in assessing whether or not a proposed contract is personal in nature.*

1. *Performance on site.*
2. *Principal tools and equipment furnished by the government.*
3. *Services are applied directly to the integral effort of the agency or an organizational subpart in the furtherance of its assigned function or mission.*
4. *Comparable services, meeting comparable needs, are performed in the same or similar agencies using civil service personnel.*
5. *The need for the type of service provided can reasonably be expected to last beyond one year.*
6. *The inherent nature of the service, or the manner in which it is provided, reasonably requires, directly or indirectly, government direction or supervision of contractor employees in order to – (i) adequately protect the government’s interest; (ii) retain control of the function involved; or (iii) retain full personal responsibility for the function supported in a duly authorized Federal officer or employee.*

The NPS contracts on which 99 percent of the KBS services are acquired have similar characteristics to the above language found at FAR Subpart 37.104(d). As pointed out in the Section 809 Panel’s January 2018 *Volume I Report*, Chapter 5, this situation has created misunderstandings by government personnel as to whether contractor personnel should be on a PSC or a NPS contract.<sup>7</sup> The distinction between personal and nonpersonal services contracts should be eliminated which will remove the primary source of this misunderstanding.

The critical factor in the award and administration of these NPS contracts is to ensure that an employer-employee relationship between the government and the contractor employee is not created.

Management of the multisector workforce must adequately address the roles, relationships, and responsibilities between federal government employees and contractor employees. This includes:

- ensuring that contractor employees do not perform inherently governmental functions;
- making sure that agencies have sufficient in-house expertise and experience to perform critical functions, make critical decisions and manage the performance of their contractors;

---

<sup>5</sup> Personal Services Contracts, FAR Subpart 37.104(d), current to: FAC 2005-97 (2018).

<sup>6</sup> Ibid.

<sup>7</sup> Section 809 Panel, *Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations, Volume 1 of 3* (2018).

- addressing the potential for personal conflicts of interest (PCI) and organizational conflict of interest (OCI) and ensuring that any OCIs or PCIs are avoided or adequately mitigated; and
- ensuring measures are in place to prevent the creation of an employer-employee relationship between the government and contractor employees as required at 5 CFR subsection 300.504 Subpart E.<sup>8</sup>

### ***Inherently Governmental Functions***

The FAR, DFARS, Office of Federal Procurement Policy (OFPP) Memos, and other DoD issuances provide policies for contracted services for mission support. As noted above, contracting for functions that are defined as inherently governmental are prohibited.<sup>9</sup> The Federal Activities Inventory Reform Act (FAIR Act), Pub. L. No. 105-270, and OFPP Policy Letter 11-01, dated September 12, 2011, define an activity as inherently governmental when “it is so intimately related to the public interest as to require performance by federal government employees.”<sup>10</sup> The rationale for limiting inherently governmental functions to performance by federal employees is that they are held accountable for their actions, bound by oath of office, and subject to an extensive list of limitations to their private conduct as set forth in the federal employee standards of conduct including requirements to be impartial in their public dealings, not misuse their position for private gain, have no personal conflicts of interest between their employment duties and their private financial enrichment, and limits on outside employment and private activities, such as political organizing or campaigning.<sup>11</sup>

### ***Critical Functions***

“Critical function means a function that is necessary to the agency being able to effectively perform and maintain control of its mission and operations.” Agencies are responsible for properly identifying and resourcing functions that are at the core of an agency’s mission and operations with government personnel.<sup>12</sup> It is imperative that agencies have sufficient in-house expertise and experience to perform critical functions, make determinations of critical functions, define requirements for acquisition, and manage the performance of their contractors.<sup>13</sup> Within DoD, policy for total force management, found at 10 U.S.C. § 129a, General Policy for Total Force Management, stipulates “the Secretary of Defense

---

<sup>8</sup> The Acquisition Advisory Panel, *Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress*, January 2007, 392, accessed March 29, 2018, [https://www.acquisition.gov/sites/default/files/page\\_file\\_uploads/ACQUISITION-ADVISORY-PANEL-2007-Report\\_final.pdf](https://www.acquisition.gov/sites/default/files/page_file_uploads/ACQUISITION-ADVISORY-PANEL-2007-Report_final.pdf). Office of Management and Budget, Office of Federal Procurement (OFPP), Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions, Fed. Reg. Vol. 76, No. 176, Notices (Sep. 12, 2011), accessed March 29, 2018, <https://www.gpo.gov/fdsys/pkg/FR-2011-09-12/pdf/2011-23165.pdf>. Prohibition on employer-employee relationship, 5 CFR § 300.504 Subpart E, accessed March 30, 2018, [https://www.ecfr.gov/cgi-bin/text-idx?SID=68e7ff72e2f1b15a8eebf07b534d0053&mc=true&node=pt5.1.300&rgn=div5#se5.1.300\\_1504](https://www.ecfr.gov/cgi-bin/text-idx?SID=68e7ff72e2f1b15a8eebf07b534d0053&mc=true&node=pt5.1.300&rgn=div5#se5.1.300_1504).

<sup>9</sup> Inherently Governmental Functions, FAR Subpart 7.5, current to: FAC 2005-97 (2018). Inherently Governmental Functions, DFARS Subpart 207.5, current to: DPN 20171228 (2017).

<sup>10</sup> Office of Management and Budget, Office of Federal Procurement (OFPP), Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions, Fed. Reg. Vol. 76, No. 176, Notices (Sep. 12, 2011), accessed March 29, 2018, <https://www.gpo.gov/fdsys/pkg/FR-2011-09-12/pdf/2011-23165.pdf>.

<sup>11</sup> Standards of Ethical Conduct for Employees of the Executive Branch, 5 CFR 2635.

<sup>12</sup> Office of Management and Budget, Office of Federal Procurement (OFPP), Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions Fed. Reg. Vol. 76, No. 176, Notices (Sep. 12, 2011), accessed March 29, 2018, <https://www.gpo.gov/fdsys/pkg/FR-2011-09-12/pdf/2011-23165.pdf>.

<sup>13</sup> The Acquisition Advisory Panel, *Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress*, January 2007, accessed March 29, 2018, 392, [https://www.acquisition.gov/sites/default/files/page\\_file\\_uploads/ACQUISITION-ADVISORY-PANEL-2007-Report\\_final.pdf](https://www.acquisition.gov/sites/default/files/page_file_uploads/ACQUISITION-ADVISORY-PANEL-2007-Report_final.pdf).

shall establish policies and procedures for determining the most appropriate and cost efficient mix of military, civilian, and contractor personnel to perform the mission of the Department of Defense.”<sup>14</sup>

A critical function is not inherently governmental, thus the function may be performed by both federal employees and contractors.<sup>15</sup> Even though critical functions may be performed by a contractor, agencies must carefully consider and identify which critical functions must be performed by government employees and “ensure they have appropriate training, experience, and expertise to understand the agency’s requirements, formulate alternatives, manage work product, and monitor any contractors used to support the Federal workforce.”<sup>16</sup>

### **Personal Services Contracts**

PSCs are used to fulfill a specific need or unique requirement that is authorized by statute.<sup>17</sup> For example, 10 U.S.C. § 1091 provides authority for DoD to enter into PSCs to carry out health care responsibilities at medical treatment facilities.<sup>18</sup> A PSC is defined in the FAR as a contract that, by its express terms or as administered, makes the contractor personnel appear to be, in effect, government employees.<sup>19</sup>

### **Congressional Acts**

An early reference to PSCs is found in Section 10 of the Act of March 2, 1861.<sup>20</sup> The act was not an authorization to enter into a PSC; but provided an exemption to the advertising (competition) requirement for personal services and specified that a contract or purchase be authorized by law or be under an appropriation.<sup>21</sup>

The Administrative Expenses Act of 1946, Section 9(a), defined services as “services required to be performed by the contractor in person and are (A) of a technical and professional nature or (B) under Government supervision and paid for on a time basis.”<sup>22</sup> Note that Section 9(a) of the act did not use *personal* as a modifier of *services*.<sup>23</sup> Section 2(c)(4) of the Armed Services Procurement Act of 1956 adapted similar provisions.<sup>24</sup> These three acts demonstrate that Congress, beginning in 1861,

---

<sup>14</sup> General Policy for Total Force Management, 10 U.S.C. § 129a.

<sup>15</sup> Office of Federal Procurement Policy (OFPP) Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions, dated September 12, 2011, accessed April 5, 2018, <https://www.gpo.gov/fdsys/pkg/FR-2011-09-12/pdf/2011-23165.pdf>.

<sup>16</sup> Ibid.

<sup>17</sup> Personal Services Contracts, FAR Subpart 37.104(b), current to: FAC 2005-97 (2018). Personal Services Contracts, DFARS Subpart 237.104, current to: DPN 20171228 (2017).

<sup>18</sup> Personal Services Contracts, 10 U.S.C. § 1091.

<sup>19</sup> Definitions, FAR Subpart 2.101, current to: FAC 2005-97 (2018).

<sup>20</sup> Department of the Army Pamphlet 27-100-6, Military Law Review, October 1959, “Personal Service Contracts,” Lieutenant Colonel Russell N. Fairbanks, 6.

<sup>21</sup> Public Contract Law Journal, Summer 2012, “At the Expense of Governmental Propriety: Personal Service Contractors in the Procurement Office,” William Charles Moorhouse, 6.

<sup>22</sup> Administrative Expenses Act of 1946, ch. 744, 60 Stat. 806, Section 9(a) (1946).

<sup>23</sup> Department of the Army Pamphlet 27-100-6, Military Law Review, October 1959, “Personal Service Contracts,” Lieutenant Colonel Russell N. Fairbanks, 22.

<sup>24</sup> Ibid, 8.

recognized the necessity for contracted services by individuals or contractors that are not employed pursuant to the civil service and classification laws.<sup>25</sup>

### Comptroller General Decisions

A 1926 Comptroller General decision, *Personal Services At Seat of Government – Translators*, ruled that employment of a contractor for a personal service, if not authorized by a specific statutory authority, is not authorized.<sup>26</sup> The basis of this decision stemmed from an 1882 appropriation statute that disallowed the use of federal funds to pay personal services contractors unless the funds were explicitly appropriated for that purpose.<sup>27</sup> That is, if a civil service government employee could do the work, then the work could not be obtained by contract unless specifically authorized by statute.<sup>28</sup>

A Comptroller General decision in 1943, *“Personal Services - Private Contract v. Government Personnel - Janitor Services,”* concluded that allowing a contractor to select persons to render services for the government would be inconsistent with the federal civil service laws, which require that all appointments of officers and employees be and by federal officials.<sup>29</sup>

A Comptroller General decision in 1947, *“Personal Services - Procurement by contract,”* stated that in determining whether certain services are personal

*“there are for consideration such factors as the degree of direct government supervision over the services performed, the furnishing of equipment and supplies to perform the services, the furnishing of office or working space, the use of special knowledge or equipment, the temporary character of services which to Government employee is qualified or available to perform, etc., and whether the fee or the amount of the contract price is based upon the results to be accomplished rather than the time actually worked, and whether the amount paid as compensation covers not only the contractor’s time but the use of his facilities, office staff, equipment, etc.”<sup>30</sup>*

In summary, Comptroller General decisions concerning PSCs have generally focused on the need for specific statutory authorization and the degree of government supervision of contractor employees.<sup>31</sup>

### The Pellerzi Standards

FAR Subpart 37.104(a) states “the Government is normally required to obtain its employees by direct hire under competitive appointment or other procedures required by the civil service laws. Obtaining

---

<sup>25</sup> Ibid.

<sup>26</sup> A-16312, November 27, 1926, 6 Comps Gen. 364,” GAO, accessed March 30, 2018, <https://www.gao.gov/products/419562>.

<sup>27</sup> Employment at seat of Government only for services rendered, 5 U.S.C. § 3103. The Acquisition Advisory Panel, *Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress*, January 2007, 400, accessed March 29, 2018, [https://www.acquisition.gov/sites/default/files/page\\_file\\_uploads/ACQUISITION-ADVISORY-PANEL-2007-Report\\_final.pdf](https://www.acquisition.gov/sites/default/files/page_file_uploads/ACQUISITION-ADVISORY-PANEL-2007-Report_final.pdf).

<sup>28</sup> The Acquisition Advisory Panel, *Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress*, January 2007, 401, accessed March 29, 2018, [https://www.acquisition.gov/sites/default/files/page\\_file\\_uploads/ACQUISITION-ADVISORY-PANEL-2007-Report\\_final.pdf](https://www.acquisition.gov/sites/default/files/page_file_uploads/ACQUISITION-ADVISORY-PANEL-2007-Report_final.pdf).

<sup>29</sup> Ibid.

<sup>30</sup> “Bid Protests & Appropriations Law: B-62377, January 9, 1947, 26 Comp. Gen. 468,” GAO, accessed March 30, 2018, <https://www.gao.gov/products/483619>.

<sup>31</sup> Public Contract Law Journal, Summer 2012, “At the Expense of Governmental Propriety: Personal Service Contractors in the Procurement Office,” William Charles Moorhouse, 9.



personal services by contract, rather than by direct hire, circumvents those laws unless Congress has specifically authorized acquisition of the services by contract.”<sup>32</sup> This policy is derived from opinion letters issued in the late 1960s by two General Counsels of the United States Civil Service Commission, Leo Pellerzi and Anthony L. Mondello,<sup>33</sup> concerning the legality of certain contracts for technical support services at the Goddard Space Flight Center.<sup>34</sup> Of note, the Pellerzi opinion prescribed the six elements now found at FAR Subpart 37.104(d) that are used to determine the existence of a PSC.<sup>35</sup> Pellerzi’s opinion was later supplemented by Mondello which states, “the touchstone of legality under the personnel laws is whether the contract create what is tantamount to an employer-employee relationship between the government and the employee of the contractor.”<sup>36</sup> The critical factor being whether the government actually exercises “relatively continuous close supervision” of the manner and performance of the details of the jobs of the individual contractor employees.<sup>37</sup>

The policy that limits use of PSCs seems clear; however, it has proven difficult to apply in practice. A research study, conducted by Russell N. Fairbanks in 1959, working as the Chief of the Procurement Law Division of the U.S. Army’s Judge Advocate Generals’ School, described in detail the origins and current state of the limitations on the use of PSCs.<sup>38</sup> He concluded that it is difficult to make a determination whether “any given contract will violate the Comptroller General’s policy and constitute an unauthorized procurement of personal services, especially because the Comptroller General would frequently authorize personal services contracts in the name of economy, feasibility or necessity.”<sup>39</sup>

This limitation on the use of PSCs, when combined with the language found at FAR Subpart 37.104(d), has created unnecessary confusion for the government acquisition workforce on use of personal and nonpersonal services contracts.

## Regulations on PSCs

In 1966, DoD included in the Armed Services Procurement Regulation (ASPR) policy guidance to assist contracting officers in determining whether the services to be contracted for are either personal or nonpersonal. The purpose of this guidance was to ensure compliance with the civil service laws and the classification act as well as those statutes authorizing the limited use of personal services contracts.<sup>40</sup> The policy specified that unless authorized by “express statutory authority,” contracting

---

<sup>32</sup> Personal Service Contracts, FAR Subpart 37.104(a), current to: FAC 2005-97 (2018).

<sup>33</sup> The Acquisition Advisory Panel, *Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress*, January 2007, 401, accessed March 29, 2018, [https://www.acquisition.gov/sites/default/files/page\\_file\\_uploads/ACQUISITION-ADVISORY-PANEL-2007-Report\\_final.pdf](https://www.acquisition.gov/sites/default/files/page_file_uploads/ACQUISITION-ADVISORY-PANEL-2007-Report_final.pdf).

<sup>34</sup> Lodge 1858, *America Federation of Government Employees, et al. v. James E. Webb, Administrator, National Aeronautics and Space Administration*, U.S. Court of Appeals for the District of Columbia Circuit – 580 F.2d 496 (D.C. Cir. 1978), accessed March 30, 2018, <https://law.justia.com/cases/federal/appellate-courts/F2/580/496/83935/>.

<sup>35</sup> Personal Service Contracts, FAR Subpart 37.104(d), current to: FAC 2005-97 (2018).

<sup>36</sup> Collin D. Swan, “Dead Letter Prohibitions and Policy Failures: Applying Government Ethics Standards to Personal Services Contractors,” *George Washington Law Review*, Vol. 80, No. 2 (2012), 677, accessed March 30, 2018, <https://ssrn.com/abstract=1980795>.

<sup>37</sup> “Bid Protests & Appropriations Law: B-193035 Comp. General Decision, April 12, 1979,” GAO, accessed on March 30, 2018, <https://www.gao.gov/products/451065>.

<sup>38</sup> Collin D. Swan, “Dead Letter Prohibitions and Policy Failures: Applying Government Ethics Standards to Personal Services Contractors,” *George Washington Law Review*, Vol. 80, No. 2 (2012), 678, accessed March 30, 2018, <https://ssrn.com/abstract=1980795>.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Public Contract Law Journal*, Summer 2012, “At the Expense of Governmental Propriety: Personal Service Contractors in the Procurement Office,” William Charles Moorhouse, 7.

officers “shall not” circumvent laws or regulations through a PSC “which is the procuring of services by contract in such a manner that the contractor or his employees are in effect employees of the Government.”<sup>41</sup> Additionally, the policy listed a number of factors the contracting officer must weigh when making a determination whether a contracted service is personal or nonpersonal.<sup>42</sup> Examples of factors to be considered include: (a) “to what extent the Government can obtain civil servants to do the job, or whether the contractor has specialized knowledge of equipment which is unavailable to the Government;”<sup>43</sup> (b) “to what extent the Government reserves the right to assign tasks to and prepare work schedules for contractor employees during performance of the contract;”<sup>44</sup> (c) “to what extent the Government retains the right to supervise the work of the contractor employees, either directly or indirectly;”<sup>45</sup> and (d) “to what extent the Government reserves the right to supervise or control the method in which the contractor performs the service, the number of people he will employ, the specific duties of individual employees, and similar details.”<sup>46</sup>

In 1984, the FAR was issued and replaced the Defense Acquisition Regulation (DAR) which replaced the ASPR in 1978. FAR Part 37, Services Contracting, included an update to the policies and regulations for services contracting. The 1984 version of FAR Subpart 37.104(b)(2)(c), Personal Services, references the Pellerzi–Mondello opinions and Comptroller General decisions discussed above. It reads:

*FAR Subpart 37.104(b)(2)(c) - The policy prohibiting the use of personal services contracts, without specific statutory authority, has evolved from published memoranda of the Civil Service Commission (Office of Personnel Management) and court and Comptroller General decisions over many years.*

In 1989, the Office of Personnel Management (OPM) issued a final rule establishing criteria and conditions under which agencies may consider using temporary help service firms for meeting short terms temporary work needs.<sup>47</sup> Before the rule was finalized, federal employee unions and others raised concerns on matters such as the employer-employee relationship, supervision, costs, and OMB Circular A-76 requirements.<sup>48</sup> OPM stated:

*In our capacity as the Federal agency authorized by statute to administer, execute, and enforce, the laws governing the civil service under 5 U.S.C. § 1103(a)(5), we believe such use is proper. There is no statutory prohibition. The guidance and opinions of the past, best known as the Pellerzi-Mondello opinions which placed the use of temporary help services under the general ban against contracting for personal service, must give way to a new interpretation based on court decisions, the statutory definition of a Federal supervisor, evolving experience, and the now established role which temporary help services perform.*<sup>49</sup>

---

<sup>41</sup> Policy, Armed Services Procurement Regulation (ASPR) Part 22.102.1.

<sup>42</sup> Criteria for Recognizing Personal Services, Armed Services Procurement Regulation (ASPR) Part 22.102.2.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

<sup>47</sup> Fed. Reg., Vol. 54, No. 15 (Jan. 25, 1989), 3762, accessed March 30, 2018, <https://www.gpo.gov/fdsys/pkg/FR-1989-01-25/pdf/FR-1989-01-25.pdf>.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

### **Employer – Employee Relationship**

The rule at 5 CFR § 300.504 Subpart E establishes a prohibition on the creation of an employer–employee relationships between the government and contractor employees and describes requirements to avoid any appearance of creating such a relationship.<sup>50</sup> This prohibition was implemented at FAR Subpart 37.112, Government use of Private Sector Temporaries.<sup>51</sup>

In May 2011, the DFARS was amended to implement Section 831 of the FY 2009 NDAA (Pub. L. No. 110-417). DoD was required to develop guidance on PSCs to mitigate the risks associated with creating an employer–employee relationship between government and contractor personnel. DFARS Subpart 211.106, Purchase Descriptions for Service Contracts, was added to require that statements of work or performance work statements clearly distinguish between government and contractor employees. DFARS Subpart 237.503, Agency-head Responsibilities, was added to ensure that procedures are adopted to prevent contracts from being awarded or administered as unauthorized PSCs.<sup>52</sup>

A critical factor in the award and administration of services contracts is to ensure that an employer-employee relationship between the government and the contractor employee is not created. This requires measures to be in place to prevent the creation of an employer-employee relationship between the government and contractor employees as required at 5 CFR subsection 300.504 Subpart E.<sup>53</sup>

### **Statutory Authorities for the Award of Personal Services Contracts**

FAR Subpart 37.104(b) states that agencies shall not award contracts for personal service requirements “unless specifically authorized by statute to do so.”<sup>54</sup>

The authority at 5 U.S.C. § 3109, Employment of Experts and Consultants; Temporary or Intermittent, originated in Section 15 of the Administrative Expenses Act of 1946. Executive departments are authorized to procure “temporary (not in excess of one year) or intermittent services of experts or consultants or organizations thereof, including stenographic reporting services, by contract, and in such cases such service shall be without regard to the civil-service and classification laws.”<sup>55</sup> Experts

---

<sup>50</sup> Prohibition on employer-employee relationship, 5 CFR § 300.504 Subpart E, accessed March 30, 2018, [https://www.ecfr.gov/cgi-bin/text-idx?SID=68e7ff72e2f1b15a8eebf07b534d0053&mc=true&node=pt5.1.300&rgn=div5#se5.1.300\\_1504](https://www.ecfr.gov/cgi-bin/text-idx?SID=68e7ff72e2f1b15a8eebf07b534d0053&mc=true&node=pt5.1.300&rgn=div5#se5.1.300_1504).

<sup>51</sup> Government Use of Private Sector Temporaries, FAR Subpart 37.112, current to: FAC 2005-97 (2018).

<sup>52</sup> Fed. Reg., Vol. 76, No. 87 (May 5, 2011), 25565, accessed March 30, 2018, <https://www.gpo.gov/fdsys/pkg/FR-2011-05-05/pdf/2011-10878.pdf>.

<sup>53</sup> The Acquisition Advisory Panel, *Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress*, January 2007, accessed March 29, 2018, 392, [https://www.acquisition.gov/sites/default/files/page\\_file\\_uploads/ACQUISITION-ADVISORY-PANEL-2007-Report\\_final.pdf](https://www.acquisition.gov/sites/default/files/page_file_uploads/ACQUISITION-ADVISORY-PANEL-2007-Report_final.pdf). Office of Management and Budget, Office of Federal Procurement (OFPP), Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions, Fed. Reg. Vol. 76, No. 176, Notices (Sep. 12, 2011), accessed March 29, 2018, <https://www.gpo.gov/fdsys/pkg/FR-2011-09-12/pdf/2011-23165.pdf>. Prohibition on employer-employee relationship, 5 CFR § 300.504 Subpart E, accessed March 30, 2018, [https://www.ecfr.gov/cgi-bin/text-idx?SID=68e7ff72e2f1b15a8eebf07b534d0053&mc=true&node=pt5.1.300&rgn=div5#se5.1.300\\_1504](https://www.ecfr.gov/cgi-bin/text-idx?SID=68e7ff72e2f1b15a8eebf07b534d0053&mc=true&node=pt5.1.300&rgn=div5#se5.1.300_1504).

<sup>54</sup> Personal Services Contracts, FAR Subpart 37.104(b), current to: FAC 2005-97 (2018).

<sup>55</sup> Administrative Expenses Act of 1946, ch. 744, 60 Stat. 806, Section 15 (1946).



and consultants can be procured as a personal or nonpersonal service. 5 U.S.C. § 3109(b) requires an appropriation or other statute as an authority to procure by contract for experts and consultants.<sup>56</sup>

DoD is authorized to award contracts for personal service requirements under 10 U.S.C § 129b and 10 U.S.C. § 1091. The authority cited at 10 U.S.C § 129b authorizes the procurement of experts and consultants (or of organizations of experts and consultants) in accordance with 5 U.S.C. § 3109.<sup>57</sup> The authority at 10 U.S.C. § 1091 allows DoD to carry out health care responsibilities at medical treatment facilities within DoD. The contracts for personal services authorized at 10 U.S.C. § 1091 provide government protections under the Federal Tort Claims Act.<sup>58</sup>

### ***Personal and Organizational Conflicts of Interest***

FAR Subpart 3.11, Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions, was added in November 2011 to implement Section 841(a) of the Duncan Hunter FY 2009 NDAA (Pub. L. No. 110-417). The policy requires contractors to identify and prevent personal conflicts of interest of their employees performing acquisition functions closely associated with inherently government functions and prohibits employees with access to nonpublic government information from using it for personal gain.<sup>59</sup> FAR 9.5 prescribes responsibilities, general rules, and procedures for identifying, evaluating, and resolving organizational conflicts of interest.<sup>60</sup>

### ***Analysis of the Distinctions between Personal and Nonpersonal Services Contracts***

Policies, procedures, and applicable clauses that are specific to the acquisition and management of contracted services are prescribed in FAR Part 37, Service Contracting and DFARS Part 237, Service Contracting. The policies, procedures, and prescriptive guidance are applicable to all contracts and orders for services regardless of the contract type or kind of service being acquired.<sup>61</sup> The prescriptive guidance found in FAR Part 37 and DFARS 237 makes no distinction between the prescriptive guidance for solicitations and for the award of nonpersonal and personal service contracts.

The FARSite Clause Logic web application is a tool designed to assist government contracting professionals in preparing solicitations and contracts.<sup>62</sup> Under the selection for *Services*, there is no distinction between nonpersonal and PSCs. For example, the selections for *Service Conditions* include “continuity of services and preventing personal conflicts of interests,” and *Types of Service* include “special studies and analysis; information technology; and advisory and assistance services.”<sup>63</sup>

The policy for PSCs outlined in FAR Subpart 37.104 addresses the unintentional creation of an employee–employer relationship in a PSC. If an employer–employee relationship is created, the major

---

<sup>56</sup> Employment of Experts and Consultants; Temporary or Intermittent, 5 U.S.C. § 3109(b).

<sup>57</sup> Authority to Procure Personal Services, 10 U.S.C. § 129b. Employment of Experts and Consultants; Temporary or Intermittent, 5 U.S.C. § 3109.

<sup>58</sup> Personal Services Contracts, 10 U.S.C. §1091.

<sup>59</sup> Rules and Regulations, Fed. Reg., Vol. 76, No. 212 (Nov. 2, 2011), 68017, accessed April 4, 2018; <https://www.gpo.gov/fdsys/pkg/FR-2011-11-02/pdf/2011-27780.pdf>.

<sup>60</sup> Organizational and Consultant Conflicts of Interest, FAR Subpart 9.5, current to: FAC 2005-97 (2018).

<sup>61</sup> Service Contracting – Scope of Part, FAR Part 37.000, current to: FAC 2005-97 (2018). Service Contracting, DFARS Part 237, current to: DPN 20171228 (2017).

<sup>62</sup> FARSite Clause Logic, accessed April 4, 2018, [http://pkllunx.hill.af.mil/demo\\_clslogic/app/frameset.htm](http://pkllunx.hill.af.mil/demo_clslogic/app/frameset.htm).

<sup>63</sup> Ibid.

concern is that civil service laws may have been circumvented because federal employees must be hired under a competitive appointment. It is clear that one of the central issues to address in services contracts is how to prevent creation of an employer–employee relationship in the award and administration of personal and nonpersonal services contracts.

It is worth noting that PSCs cannot create an actual employer–employee relationship between the government and contractor employees based on the statutory definition for a federal employee.<sup>64</sup> A government employee must be appointed in the civil service; engaged in the performance of a federal function under authority of law or an Executive act; and subject to the supervision of an individual appointed in the civil service while engaged in the performance of the duties of their position.<sup>65</sup> Contractor employees are not appointed in the civil service and are also prohibited from performing inherently governmental functions. As long as the process in which a contract for services is awarded and administered is done in a way that prevents the establishment of an employer–employee relationship, there is no circumvention of any statutory or civil service hiring rules.

## Discussion

The use of contractors in the multi-sector workforce is a growing component of the total DoD workforce and the current governing statutes need to be updated to align with that growth. For example, our review of 5 U.S.C. § 3109 found that authorities for both federal government employment and procurement by contract are comingled. Employing and procuring experts and consultants under the same statute has created confusion within the federal acquisition workforce regarding the proper acquisition and management of contractors performing under contracts for services.

The federal government has in place strong statutory requirements and regulatory processes on inherently governmental functions, OCI and PCI, critical functions and the avoidance of creating an employer–employee relationship in the award and administration of contracts for services. These requirements and processes ensure that contracts for services do not circumvent civil service hiring authorities.

The statutory and regulatory limitations on the use of PSCs are based on numerous Comptroller General decisions and Civil Service Commission legal opinions. The limitation on the award of PSCs is derived from concerns that PSCs may circumvent civil service rules. The focus of the statutory and regulatory requirements are to limit the use of PSCs to specific statutory authorizations.<sup>66</sup>

The statutory limitation on the use of PSCs has created the implementation of unwieldy procedural safeguards and guidelines in the award and administration of services contracts resulting in unnecessarily long acquisition lead times and contract awards.<sup>67</sup> The limitation on the use of PSCs has resulted in agencies prescribing additional policies and guidance designed to help contracting officers avoid creating an employer–employee relationship between the government and contractor

---

<sup>64</sup> Employee, 5 U.S.C. § 2105(a).

<sup>65</sup> *Ibid.*

<sup>66</sup> The Acquisition Advisory Panel, *Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress*, January 2007, 401, accessed March 29, 2018, [https://www.acquisition.gov/sites/default/files/page\\_file\\_uploads/ACQUISITION-ADVISORY-PANEL-2007-Report\\_final.pdf](https://www.acquisition.gov/sites/default/files/page_file_uploads/ACQUISITION-ADVISORY-PANEL-2007-Report_final.pdf).

<sup>67</sup> *Ibid.*, 394.

personnel.<sup>68</sup> Examples include the certification of nonpersonal services required by DoD to prevent contracts from being awarded or administered in a manner that constitutes an unauthorized PSC and the *U.S. Air Force Guide for the Government-Contractor Relationship*.<sup>69</sup>

In 1989, OPM issued guidance that recognized the need to use contractors for temporary functions that could be done by government employees. OPM recognized the need to introduce changes to guidance and opinions of the past regarding personal service. Approximately 30 years have passed since that OPM decision and the use of contractors as a critical component of the total DoD workforce has increased substantially. The necessity to effectively manage the more complex and larger multi-sector workforce requires updating existing statutes and regulations.

The Department of Veterans Affairs (VA) procures health care services as nonpersonal services. The DoD also acquires health care services as nonpersonal services. The Veteran Affairs Acquisition Regulation Subpart 837.403 prescribes the requirements for contracted service health care providers with respect to the employee–employer relationship and indemnification and medical liability insurance.<sup>70</sup> DoD could follow the example of VA and procure health care providers exclusively as nonpersonal services. This approach will require modification of the statutory authority at 10 U.S.C. § 1091 for PSCs for health care providers within DoD.

## Conclusions

The DoD multisector workforce approach is necessary to achieve and maintain national, strategic, and operational objectives. The growing threats to U.S. economic, political, and military power require a streamlined process to obtain (via contract) and retain private sector expertise (via proper contract award and administration). The elimination of the distinction between PSC and NPS contracts will allow better synchronization of work products and properly defined relationships between federal government and contractor employees. The current statutes and policies that characterize the difference between PSC and NPS contractor employees are outdated and inefficient and must be changed.

The distinction between PSCs and NPS contracts by:

- Modify 5 U.S.C. § 3109 which provides the authority to procure services by contract and obtain services by employment. A modification to 5 U.S.C. § 3109 to remove “procure by contract” will result in making it solely an employment authority for experts and consultants, temporary or intermittent.
- Add a new section to Title 41, Public Contracts, which would provide that contracts that were previously considered to be personal services contracts may be entered into on the same basis

---

<sup>68</sup> Ibid, 401.

<sup>69</sup> Agency-head responsibilities, DFARS Subpart 237.503, current on: DPN 20171228 (2017). U.S. Air Force, *Guide for the Government-Contractor Relationship*, October 2006, accessed March 30, 2018, [http://www.acq.osd.mil/dpap/ccap/cc/jcchb/Files/Topical/CCO\\_Predeploy\\_Plan/training/gov\\_ctr.relationshipaf.docx](http://www.acq.osd.mil/dpap/ccap/cc/jcchb/Files/Topical/CCO_Predeploy_Plan/training/gov_ctr.relationshipaf.docx).

<sup>70</sup> Nonpersonal Health Care Services, VAAR Subpart 837.4, current on: VAAR Update 2008-04 (2018).

as other services contracts and remove the compensation cap associated with personal services contracts in 5 U.S.C. § 3109.

- Repeal 10 U.S.C. § 129b which removes the authority to procure personal services and the compensation cap because all contracted services will be procured under general contracting authority.
- Modify 10 U.S.C. § 1091 which will authorize health care responsibilities under general contract authority.
- Modify 10 U.S.C. § 1089 and 10 U.S.C. § 1094 which will extend the authorization to provide contracted health care providers medical malpractice coverage and extend the authorization to provide contracted health care providers medical licensure portability on all contracted services for health care providers.

The statutory authorizations for PSCs served their purpose in the 19th and 20th centuries but is an ineffective and outdated approach to integrating and managing contractor employees within the DoD multisector workforce of the 21st century. To leverage commercial practices and solutions and commercial expertise within the U.S. government, the obsolete distinction and the exhaustive debates surrounding PSC and NPS contracts should end.

Eliminating this distinction would remove the bureaucracy and confusion around the use of PSCs. In their January 2007 report, the Acquisition Advisory Panel recommended “elimination of the prohibition on PSCs.”<sup>71</sup> Their report describes the challenges and inefficiencies the prohibition creates within the multisector workforce when government and contractor employees are co-located and working together on projects.<sup>72</sup>

## Implementation

### ***Legislative Branch***

- Amend 5 U.S.C. § 3109, Employment of Experts and Consultants; Temporary or Intermittent.
- Repeal 10 U.S.C. § 129b, Authority to Procure Personal Services.
- Amend 10 U.S.C. § 1091, Personal Services Contracts.
- Add a new section to Title 41 for contracts for services.
- Amend 10 USC §1089, Defense of Certain Suits arising out of Medical Malpractice.
- Amend 10 USC §1094, Licensure Requirement for Healthcare Professionals.

---

<sup>71</sup> The Acquisition Advisory Panel, *Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress*, January 2007, 421, accessed March 29, 2018, [https://www.acquisition.gov/sites/default/files/page\\_file\\_uploads/ACQUISITION-ADVISORY-PANEL-2007-Report\\_final.pdf](https://www.acquisition.gov/sites/default/files/page_file_uploads/ACQUISITION-ADVISORY-PANEL-2007-Report_final.pdf).

<sup>72</sup> *Ibid*, 421.

### ***Executive Branch***

- Amend DoDI 1100.22, Policy and Procedures for Determining Workforce Mix, to delete references to personal services.
- Cancel DoDI 6025.5, Personal Services Contracts for Health Care Providers.
- Make substantial changes to FAR Part 37 and DFARS Part 237, as required.

### ***Implications for Other Agencies***

- Other federal agencies face the same challenges concerning the management of the multisector workforce.