

Personal Services Contracts for SAOs

By

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1. Security Assistance Organizations (SAOs), as DOD entities, may not procure personal services by contract except as allowed by the Federal Acquisition Regulation (FAR), part 37.104. This holds true for contracts financed by MAP appropriated funds as well as security assistance (SA) FMS administrative funds. "The FAR and this supplement shall apply to all purchases and contracts made by the Department of Defense in support of Foreign Military Sales" (DOD FAR Supplement part 25.7302).

2. To what extent may DOD entities contract for personal services? Such contracts may be formed where "specifically authorized by statute . . . to do so" (FAR 37.104(b)). The following specific statutory authorizations enable DOD Agencies to contract for personal services.

5 U.S.C. §3109 - expert and consultant services; stenographic reporting services
10 U.S.C. §1091 - health care services

A DOD official who causes the Government to enter into a personal service contract for other than these services violates 31 U.S.C §1342 which provides: "An officer or employee of the United States Government . . . may not . . . employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property."

A *knowing* and *willful* violation of §1342 is criminal (by operation of 31 U.S.C. §1350); the penalties are a fine up to \$5,000 or imprisonment up to two years or both. The penalties for an administrative violation (other than knowing and willful) under 31 U.S.C §1349 are appropriate administrative discipline, including suspension from duty without pay or removal from office.

3. Other specific statutory authorizations may appear to enable DOD to form personal services contracts. However, upon closer examination it is clear that these provisions do not apply to DOD activities. The Foreign Assistance Act, 22 U.S.C. 2396(a)(3) allows contracting for personal services abroad but this permission is not granted for military assistance and sales purposes. Hiring experts and consultants with Foreign Assistance Act funds is permitted by 22 U.S.C. 2386. The State Department has statutory authority (22 U.S.C. 2669) to contract for personal services abroad. The language of the provision clearly limits this to the Department of State. "The Secretary of State may use funds appropriated or otherwise available to the Secretary to . . . employ individuals . . . by contract, for services abroad. . . ." DOD activities may not use these sections as authority for entering into personal services contracts.

4. Where SAOs are supported by the State Department under Foreign Affairs Administrative Support (FAAS) agreements, they may consider requesting functions to be provided under the terms of the agreements. In procuring, the State Department will follow its own rules which may allow a personal services contract between the *embassy* and an individual. This is to be clearly distinguished from a personal services contract between the SAO (a DOD entity) and an individual which, as explained in paragraph 1 above, is allowed only in limited circumstances. The following

guidelines are suggested to ensure that contracting is pursuant to State Department authorization and does not violate legislation applicable to DOD.

- a. If the embassy chooses to provide the function by contracting, then any personal services contract must be between the Embassy or Department of State and the individual concerned.
- b. Avoid mentioning the SAO in the contract (e.g., phrases such as "for the benefit of the SAO" or "on behalf of the SAO").
- c. Do not indicate exclusive performance at the military site.
- d. If supervision is mentioned in the contract, it should be by embassy personnel.
- e. As far as possible, principal tools, equipment, and supplies needed to perform the services should be provided either by the embassy or the individual contractor, not by the SAO.
- f. The contract must contain embassy fund cites rather than SAO fund cites.

It is the opinion of this office that personal services contracts which benefit solely DOD activities would be subject to close scrutiny in an audit. Following the guidelines listed above is no guarantee that such a contract will "pass muster" especially where as a result of the manner of its administration during performance, contractor personnel are subject to relatively continuous supervision and control by a DOD officer or employee. (FAR 37.104(c)).

5. The categorization of personal services contracts into administrative and high risk groups has no basis in statutory or regulatory guidance for personal services contracts. While "cases of emergency involving the safety of human life or protection of property" are excepted from 31 U.S.C. §1342, these do not equate to the "high risk" category identified. Emergency situations are unforeseen and require immediate action. In contrast, known high risk areas, while requiring great protective measures, are not unforeseen situations. The exception contained in 31 U.S.C. §1342 is applicable to any personal services contract. The limitation is "emergency." This exception is not granted for any *situation* involving safety of human life or protection of property, but rather only for emergencies. When an emergency has existed for some period of time it ceases to be unforeseen and thus is no longer an emergency. Then the exception would no longer apply and normal channels must be followed.