



Headquarters Policy Flash

FLASH 2001-23

DATE: October 2, 2001
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, MA-51
Office of Procurement and Assistance Management

SUBJECT: Restrictions on Management and Operating and Support Services Contracting

SUMMARY: The Director, Office of Procurement and Assistance Management has issued a Memorandum dated October 1, 2001 to all Program Officials to remind them of the restrictions and sensitivities in contracting for support services. Included in the guidance is a reiteration of the prohibition of using M&O contracts to provide Departmental support services. The memorandum also discusses certain areas of vulnerability when contracting for support services, e.g. inherently governmental functions, inappropriate employer-employee relationships and conflict of interest issues. Attached to the memorandum was the MA-5

FLASH 2001-23
(October 2, 2001)

memorandum to Procurement Directors of February 28, 2001 entitled "Guidance on Management and Operating Contractor Purchasing" and the updated brochure entitled *Contracting for Support Services, What You Need to Know As A Federal Employee*.

Attached is a copy of the above described memorandum. The brochure is available online under procurement, regulations and guidance on the MA-5 Professionals Homepage at <http://professionals.pr.doe.gov>.

For questions related to this Flash contact Michael Raizen at (202)586-8189 or via e-mail at michael.raizen@pr.doe.gov.


Gwendolyn S. Cowan, Director

Attachment

cc: PPAG Members



Department of Energy
Washington, DC 20585

OCT 01 2001

MEMORANDUM FOR DISTRIBUTION

FROM:

RICHARD H. HOPE 
DIRECTOR, OFFICE OF PROCUREMENT
AND ASSISTANCE MANAGEMENT

SUBJECT:

RESTRICTIONS ON M&O AND SUPPORT SERVICES
CONTRACTING

The Department of Energy (DOE), like other Federal agencies, spends a significant amount of its contracting budget on Management and Operating (M&O) activities and support services. While these contracts fulfill continuing and essential requirements of the Department, this type of contracting arrangement can present unique situations that require special diligence on the part of Federal employees to ensure that applicable statutes, regulations and management practices are followed.

The Office of Procurement and Assistance Management has supplemented relevant Government-wide policies with additional guidance for DOE program and procurement personnel. This guidance has been disseminated in various forms over the past few years, and is now located in the DOE Acquisition Guide under regulations and guidance for procurement at <http://professionals.pr.doe.gov>. (See Chapter 37 entitled Support Service Contracting). I do believe, however, it is necessary to periodically reiterate some of those policies, especially in regard to highly vulnerable areas involving the type of work performed by contractors, and the working relationship that exists between the Federal employees and contractor employees.

Use of M&O Contracts to provide Departmental support services: Such contracting is prohibited. The Federal Acquisition Regulation (FAR) recognizes the existence and special nature of the M&O contract. Among other restrictions, the FAR directs that M&O contracts shall not be used for day-to-day staff or management functions of the agency or any elements thereof. In addition, as it relates to M&O purchasing, DOE funds are to be authorized only to make such support services purchases to support contractually defined programs. Attached for your information is a copy of a February 28, 2001 memorandum which I sent to DOE Procurement Directors to reiterate guidance on the appropriate role for M&O contractor purchasing.

Use of Support Service Contracts: When contracting for DOE support services, a special effort must be made to assure that the work does not involve inherently governmental functions, that no employer-employee relationships are established, and there is not an appearance of a conflict of interest. An *inherently governmental function* would consist of activities that require either the exercise of discretion in applying Government authority, or developing value judgments in decision-making for the Government. Determining agency policy, the application of agency regulations, the drafting of Congressional testimony, and the determination of budget guidance and strategy are examples of inherently governmental functions.



Printed with soy ink on recycled paper

Inappropriate employer-employee relationships may lead to situations where contractor employees perform personal services for Federal employees, which is contrary to civil service laws that normally require Federal agencies to obtain its employees by direct hire under competitive appointments. If the Government exercises relatively continuous supervision and control over contractor personnel performing a contract then the services are personal in nature and an improper employee-employer relationship exists.

A *conflict of interest* occurs when a person or organization is unable to render impartial assistance or advice to the Government because of other activities or relationships, or when a person or organization has an unfair competitive advantage. Two prominent examples of where a conflict of interest may exist are 1) if a potential offeror participated in earlier work involving the same program and has access to source selection or proprietary information or 2) if the work under a contract will put a contractor in a position to influence Government decision-making that will affect the contractor's current or future business. In all cases where a conflict of interest may exist, procurement and General Counsel personnel are available to assist you.

Summary: The Department has over the years responded to congressional and other inquiries about the extent and improper nature of using M&O and support service contracts. Good management practice dictates that all Federal employees be cognizant of the vulnerabilities unique to the administration of M&O contracts and the acquisition of support services. To this end, I would appreciate your discussing these matters with your management staff and disseminating the information to both your program employees and field activities under your cognizance.

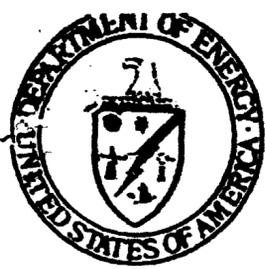
The attached brochure entitled "*Contracting for Support Services, What You Need to Know As A Federal Employee*" has been prepared to assist you. Additional copies of the brochure can be obtained through procurement, regulations and guidance on the Office of Procurement and Assistance Management professionals page at <http://professionals.pr.doe.gov>. If you have any questions regarding this memorandum, please contact Mr. Michael Raizen at (202)586-8189 or via e-mail at michael.raizen@pr.doe.gov.

Attachments

- 1) MA-5 Memorandum for Procurement Directors dated February 28, 2001
- 2) Brochure: *Contracting for Support Services, What You Need to Know As A Federal Employee*

DISTRIBUTION:

Deputy Administrator for Defense Programs
Deputy Administrator for Defense Nuclear Nonproliferation
Deputy Administrator for Naval Reactors
Associate Administrator for Facilities and Operations
Associate Administrator for Management and Administration
Assistant Secretary for Fossil Energy
Assistant Secretary for Energy Efficiency and Renewable Energy
Assistant Secretary for Environmental Management
Assistant Secretary for Environment, Safety and Health
Assistant Secretary for Policy and International Affairs
Assistant Secretary for Congressional and Intergovernmental Affairs
Administrator, Energy Information Administration
Administrator, Bonneville Power Administration
Administrator, Southeastern Power Administration
Administrator, Southwestern Power Administration
Administrator, Western Area Power Administration
Director, Office of Defense Nuclear Counterintelligence
Director, Office of Defense Nuclear Security
Director, Office of Nuclear Energy, Science and Technology
Director, Office of Civilian Radioactive Waste Management
Director, Office of Science
Director, Office of Worker & Community Transition
Director, Office of Emergency Operations
Director, Office of Economic Impact and Diversity
Director, Office of Public Affairs
Director, Office of Hearings and Appeals
Director, Office of the Secretary of Energy Advisory Board
Director, Office of Independent Oversight & Performance Assurance
Director, Defense Nuclear Facilities Safety Board Liaison
Director, Office of Counterintelligence
Director, Office of Intelligence
Director, Office of Security
Chief Information Officer
Chief Financial Officer
Inspector General
General Counsel



Department of Energy
Washington, DC 20585

FEB 28 2001

MEMORANDUM FOR PROCUREMENT DIRECTORS

FROM:

RICHARD H. HOPF 
ACTING DIRECTOR, OFFICE OF
MANAGEMENT AND ADMINISTRATION

SUBJECT:

**GUIDANCE ON MANAGEMENT AND OPERATING
CONTRACTOR PURCHASING**

Over the past 6 years, the Department has successfully re-engineered its approach to management and operating (M&O) contractor purchasing systems, to the point where M&O contractors are now able to use best commercial business purchasing practices to meet the great majority of their subcontracting needs. By my previous memorandum, dated January 30, 1996, I provided you with guidance on the appropriate use of M&O contractors as they implemented the approved changes to their processes. During the course of these process changes, various Headquarters and Field offices appear to have forgotten a basic tenet of DOE policy concerning M&O purchasing practices that remains unchanged.

Department policy has been, and continues to be, that M&O contractors are authorized to use DOE funds to make only such purchases as are necessary to support contractually defined programs. This policy is consistent with the Federal Acquisition Regulation (FAR) limitations on the use of M&O contracts contained in Subpart 17.6. In addition, DOE O 542.1 prohibits Departmental personnel from directing work to a particular source through, or accepting work for, any of the Department's contractors for the purpose of avoiding the Competition in Contracting Act, or as a means of satisfying a requirement for which the Government should contract directly.

The order also requires a justification for other than full and open competition, as if the work were being contracted directly, whenever the Department of Energy assigns work to a laboratory or other contractor, and requires performance by a specific subcontractor(s). The justification must include a determination by the initiating program official that such work is consistent with the contractor's assigned program responsibilities, and that the contractor has the technical capability to perform the work assigned.

In recent months, I have become aware of instances where certain Headquarters and Field offices have been directing work to M&O contractors in a manner inconsistent with the requirements of the Competition in Contracting Act, the FAR, and DOE O 542.1. M&O contractor purchases that are unrelated to their contractually defined scopes of work present a number of potential problems. Such purchases give rise to questions of whether the Department is trying to

circumvent applicable procurement laws and regulations. The M&O contractor also runs the risk of being viewed as a purchasing agent for DOE, thus possibly becoming subject to, among other things, a requirement to conduct its subcontract procurement actions in accordance with the FAR provisions applicable to placement of prime contracts; and, protests at the General Accounting Office. However, what is most important is that inappropriate M&O contract purchasing activities may jeopardize the continued use of the best commercial practices purchasing system. The Department has realized significant benefits from this system, by allowing M&O contractors to make their purchasing more cost-effective. We do not want to risk a return to the inefficient layering of noncommercial, Government-based systems and process-oriented Federal oversight that characterized M&O contractor purchasing systems until the middle of the last decade.

With these thoughts in mind, I would like to restate the following guidance on the appropriate role of M&O contractor purchases:

- M&O contractor purchasing should be limited to acquisitions that are necessary to support contractually assigned mission functions, or permitted work for others activities.
- M&O purchasing for the sole support of DOE Headquarters or field offices is prohibited.
- In certain limited circumstances, M&O contractors may purchase for mixed M&O/DOE site activities, when it is not practicable to segregate DOE requirements from those of the M&O contractor.
- All work assignments to a laboratory or other contractor where the Department of Energy requires performance by a specific subcontractor(s), must satisfy the conditions stated above, and be supported by a written justification for other than full and open competition as if the Department were contracting directly for the work.

As Procurement Directors, you are responsible for ensuring that M&O contractor purchasing capabilities are not used inappropriately to satisfy DOE requirements. Please be aware that it is my intention to ensure that accountability is present throughout our sites and locations. Also, please advise me if you receive pressure from Headquarters elements to circumvent the guidance in this letter, and use your M&O contractors for inappropriate purchases.

If you have any questions on this matter, please contact Mr. John Bashista, Acting Director, Office of Procurement and Assistance Policy, at 202-586-8182.