



Office of Inspector General

MANAGEMENT ADVISORY MEMORANDUM
REGARDING FLRA'S CONTRACT FOR
ADMINISTRATIVE SUPPORT SERVICES

**MANAGEMENT ADVISORY
MEMORANDUM
REGARDING FLRA'S
CONTRACT FOR
ADMINISTRATIVE SUPPORT
SERVICES**

**Report No. MAM-24-01
March 2024**

Federal Labor Relations Authority
1400 K Street, N.W., Washington, D.C. 20424

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Acronyms

ASD	Administrative Services Division (includes contracting)
COR	Contracting Officer’s Representative
FAR	Federal Acquisition Regulation
FLRA	Federal Labor Relations Authority
GSA	General Services Administration
KAPAX	KAPAX Solutions, LLC
OIG	Office of Inspector General
SIGPR	Special Inspector General for Pandemic Recovery
U.S.C.	United States Code



UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY

March 14, 2024

INSPECTOR GENERAL

Memorandum

TO: Susan Tsui Grundmann
Chairman

Colleen Duffy Kiko
Member

FROM: Dana Rooney
Inspector General

SUBJECT: Management Advisory Memorandum Regarding FLRA's Contract for Administrative Support Services

On January 11, 2024, the Special Inspector General for Pandemic Recovery (SIGPR) reported findings to the Federal Labor Relations Authority (FLRA) Office of Inspector General (OIG) related to FLRA's contract with KAPAX Solutions, LLC (KAPAX). SIGPR reported that the KAPAX contract violated the Federal Acquisition Regulation prohibition on awarding personal services contracts. SIGPR was engaged by the FLRA OIG via an Inter-Agency Agreement to conduct investigative work that was not related to the personal services contract issue but related to other issues related to contracting. We immediately transmitted SIGPR's findings to the Chairman and Member. The Chairman requested the Office of the Solicitor to review SIGPR's findings to independently determine if the KAPAX contract is a prohibited personal services contract.

On February 16, 2024, the solicitor transmitted his analysis and conclusions to the OIG. While he expressed concerns with some aspects of the contract, he concluded that it was not a personal services contract. However, because of the concerns raised, he advised that FLRA should revoke the government purchase card from the KAPAX employee and not exercise any additional option years under the contract.

While we stand by SIGPR's analysis and conclusion that the contract is in fact a personal services contract, we agree with the solicitor's recommended course of action. Therefore, we consider this matter closed.



Office of the Special Inspector General for Pandemic Recovery

January 11, 2024

Dana Rooney, Inspector General
Federal Labor Relations Authority
Office of Inspector General
1400 K Street, N.W. Suite 235
Washington, DC 20424

Dear Inspector General Rooney:

This letter reflects a review and legal analysis by the Special Inspector General for Pandemic Recovery of whether Contract Number 54310321C00002/0353/21/3535 awarded to KAPAX Solutions LLC (hereafter, the “KAPAX Contract”) on September 21, 2021, by the Federal Labor Relations Authority (FLRA) is a legally permissible contract. Based upon our review, we believe that the KAPAX Contract constitutes a personal services contract, which is prohibited by Federal Acquisition Regulation (FAR) 37.104.

Management should review whether the services provided under the KAPAX Contract are needed. If so, management should recruit and hire one or more Government employees to provide those services. In either case, management should not exercise further option years under this impermissible agreement.

Government Agencies Are Generally Prohibited from Entering Into Personal Services Contracts

The FAR generally prohibits federal government agencies from awarding personal service contracts. The FAR explains that “[t]he Government is normally required to obtain its employees by direct hire under competitive appointment or other procedures required by the civil service laws,” and that “[o]btaining personal services by contract, rather than by direct hire, circumvents those laws unless Congress has specifically authorized acquisition of the services by contract.” (FAR 37.104(a).) For these reasons, the FAR states unequivocally that “[a]gencies shall not award personal services contracts unless specifically authorized by statute (*e.g.*, 5 U.S.C. 3109) to do so.” (FAR 37.104(b).) There is no statute that specifically authorizes FLRA to award personal services contracts. Like other Federal agencies, FLRA is required to follow appropriations laws and the FAR when acquiring services with appropriated funds.

The KAPAX Contract Constitutes a Personal Services Contract

In determining whether a particular government contract is a personal services contract, the “key question” will always be: “Will the Government exercise relatively continuous supervision and control over the contractor personnel performing the contract”? (FAR 37.104(c)(2).) For the purpose of making that determination, the FAR sets forth a series of “descriptive elements” that “should be used as a guide in assessing whether or not a proposed contract is personal in nature.”

SIGPR Findings

(FAR 37.104(d).) In this instance each of those elements weighs in favor of our finding that the KAPAX Contract is a prohibited personal services contract.

- (1) Performance on site.
- (2) Principal tools and equipment furnished by the Government.
- (3) Services are applied directly to the integral effort of agencies or an organizational subpart in furtherance of 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 services, 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.

Judged according to these criteria, the KAPAX Contract clearly constitutes a prohibited personal services contract. KAPAX’s employee who performs services under the KAPAX Contract has office space at FLRA, and performs those services in that office space with computer and other equipment that FLRA has provided to that individual. The services the KAPAX employee provides directly relate to and are integral to FLRA’s mission and are services that are commonly performed by government employees. These are services that FLRA needs (and will need) for far more than one year (and the fact that the KAPAX Contract has been extended through two additional option years corroborates that assertion). Finally, the services performed by the KAPAX employee are inherently those that must be supervised by Government employees in order to protect the Government’s interest and to retain control of the function involved. By using contractor personnel for personal services, FLRA violated the FAR, which states that obtaining personal services by contract circumvents civil service laws that require Government employees to be hired through competitive appointment or other required procedures unless Congress has authorized an exception.

Additional Concerns Relating to the KAPAX Contract

There are two additional concerns relating to the existence and structure of the KAPAX Contract.

First, the issuance of a GSA charge card to a KAPAX employee violates the laws and regulations applicable to the GSA SmartPay program. That program provides charge cards to federal employees to make official government purchases. These charge cards are centrally billed accounts and obligate the taxpayer for charges made. As such, charge cards are only issued to federal employees and not to contractors. It is unclear the reasoning or what authority that FLRA used to issue a charge card to a KAPAX employee to make purchases for FLRA. FLRA has created a situation whereby a non-federal employee who is not bound by procurement laws and regulations has the ability to obligate the taxpayer to pay for goods and services.

Second, there are numerous ways in which KAPAX appears not to be providing coverage per the terms contained in the contract. For instance, the contract with KAPAX requires coverage at FLRA's headquarters from 8:30am to 5:00pm. However, it appears the coverage starts prior to 8:30am and ends before 5:00pm. This seems to be approved by FLRA officials but no formal change to the contract or the Performance Work Statement (PWS) was made. Also, telework is

SIGPR Findings

allowed by KAPAX employees but there is no allowance for telework in the contract with KAPAX. We acknowledge that a health emergency was declared in March 2020, but the KAPAX contract and PWS was never updated to reflect changes in work location and processes. Also, the health emergency is officially over but telework still continues under the contract. Documentation also showed FLRA officials approved work to be conducted during foreign travel. While it appears this travel was cancelled and never happened, it still demonstrates that FLRA officials were allowing remote work which the contract did not authorize and also demonstrated that FLRA officials were directly supervising the KAPAX employee(s) without going through the contracting officer and the responsible KAPAX officials on the matter.

Conclusion

We advise that the FLRA Inspector General ask management to immediately review the KAPAX contract with attention to whether the services are needed and if so, whether the services fall under the definition of a personal services contract when applying the guidelines in FAR 37. If services are required and it appears to meet the definition of a prohibited personal services contract, then steps should be taken to recruit and hire for the position. Finally, if the contract continues, a full review of the PWS is warranted to ensure it accurately defines the need.

Sincerely,

Geoffrey A.

Digitally signed by
Geoffrey A. Cherrington
Date: 2024.01.11
13:39:12 -05'00'

Cherrington

Geoffrey A. Cherrington
Assistant Inspector General
U.S. Department of the Treasury
Office of the Special Inspector General for Pandemic Recovery

Solicitor's Response and Legal Analysis



UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C. 20424

OFFICE OF THE SOLICITOR

VIA E-MAIL: drooney@flra.gov

February 16, 2024

Confidential:

Dana Rooney, Inspector General
Office of Inspector General
Federal Labor Relations Authority
1400 K Street, N.W., Suite 235
Washington, D.C. 20424

Re: KAPAX Solutions LLC
Contract Number 54310321C00002/0353/21/3535

Dear Inspector General Rooney,

On January 11, 2024, the FLRA management received a transmittal letter from the Office of the Inspector General (“OIG”) regarding a FLRA contract with KAPAX (the “KAPAX Contract”). The OIG attached a letter with findings from the U.S. Department of Treasury, Office of the Special Inspector General for Pandemic Recovery (“SIGPR”). The OIG concluded that “SIGPR issued this letter which contains findings that need to be presented to management for immediate administrative review and disposition *as deemed appropriate.*” (emphasis added). The SIGPR letter asks management: “*whether* the services [under the KAPAX Contract] fall under the definition of a personal services contract when applying the guidelines in FAR 37?” (emphasis added).

Chairman Grundmann asked the Office of the Solicitor (“Solicitor”) to undertake an independent and objective review of the KAPAX Contract to determine: 1) whether it falls under the FAR’s definition of a personal services contract, 2) whether a contractor should have use of a Government Purchase Card, and 3) whether a contract employee can telework or work outside the work hours outlined in the Contract. Lastly, the Solicitor was asked to recommend a disposition regarding these aforementioned questions.

As part of the review, the Solicitor conducted interviews and collected related records. Additionally, the Solicitor researched analogous GAO and Federal Circuit cases and similar contracts at other federal agencies. Please find attached with our full analysis with citations and other relevant information.

I. The KAPAX Contract is Not an Illegal Personal Services Contract

Solicitor's Response and Legal Analysis

Based on the available facts and legal authorities, the Solicitor has made the following determinations. Prevailing guidelines and case law do not compel a finding that the KAPAX Contract is a personal services contract. As the SIGPR has stated, Federal Acquisition Regulations (FAR) list six descriptive elements which should be considered in assessing whether a contract constitutes a personal services contract.¹ Yet, the analysis of whether a subject contract is a personal services contract is based on a case-by-case analysis, especially where Government employees are working alongside contract employees. The distinction between a contract that is a personal services contract versus non-personal services contract may be difficult to determine, and depends on the interpretation of tasks and the nature of the supervision of contract employees. The dispositive feature of the analysis is the level of supervision by Government employees over the contractor's employees.

Here, the Contractor Officer's Representative (COR) is not supervising the Contract Employee, but expecting the Contract Employee to perform Specific Tasks listed in the Contract. When direction is indicated, the COR, by contract, is limited to technical assistance, which consists of discussions or questions to clarify the deliverables under the Specific Task. Such discussions do not convert a contract into an illegal personal services contract. Therefore, the KAPAX Contract in the aggregate, under prevailing guidelines and case law, is not an illegal personal services contract. Moreover, we adopt recommendations to improve the implementation of the KAPAX Contract, including additional training and guidelines; these recommendations are consistent with the resolutions of similar OIG and GAO investigations involving more serious allegations. We requested a pause on new activity on this Contract pending issuance of guidelines.

II. Government Purchase Card, Teleworking and Scheduled Hours of Work

There is no *per se* bar for a contractor employee to use a Government Purchase Card in GSA's SmartPay program, but only cost-reimbursement contractors are eligible to use a Government Purchase Card in the SmartPay program. The KAPAX Contract, however, is a firm fixed price contract. Additionally, the FLRA's internal policy provides that only a Government employee is allowed to have a Government Purchase Card.

Although the Contract does not provide for teleworking, there is no written justification for a prohibition against telework² and the Contract language regarding hours of work provides that the agency *expects* coverage five days a week from 8:30 a.m. to 5:00 p.m., which is not mandatory.

Based on the above, the Solicitor has already issued guidance to leadership to cancel the contractor employee's use of the Government Purchase Card. Second, the Solicitor recommends modifying the language in the Contract to establish the guidelines on telework and hours. Third, the Solicitor's office has issued guidelines consistent with the guidelines in other agencies to identify potential personal services contracts in contract formation and administration, and to manage and train personnel to prevent the blurring of lines between contractor and employer-employee relationships. Lastly, given the legal risks in these types of contracts, the size of our agency, and, especially, the length of time FLRA has had a contract involving the same on-site personnel, the Solicitor recommends not renewing this Contract in the future.

¹ FAR § 37.104(c)(1).

² See FAR § 7.108 (stating that "[i]n accordance with 41 U.S.C. 3306(f), an agency shall generally *not discourage* a contractor from allowing its employees to telecommute in the performance of Government contracts[']").

Solicitor's Response and Legal Analysis

After you have had an opportunity to examine and consider our analysis, we are open to discussing and considering any factual information you may have uncovered that compels a different conclusion. We understand the seriousness of these issues. We will review our other contracts to determine whether these contracts constitute personal services contracts. Please feel free to contact me if you have any questions or you would like to discuss the findings.

Sincerely

By



Thomas Tso
Solicitor

Enclosures

Solicitor's Response and Legal Analysis



UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C. 20424

OFFICE OF THE SOLICITOR

MEMORANDUM

TO: Dana Rooney, Inspector General

FROM: Thomas Tso, Solicitor
Scott Weiss, Deputy Solicitor
Nariea Nelson, Attorney

DATE: February 16, 2024

SUBJECT: Memorandum in support of Response to January 11, 2024 letter

I. Introduction

On January 11, 2024, the Inspector General sent a transmittal letter regarding a FLRA contract with KAPAX (the "Contract"). The Inspector General attached a letter with findings from the U.S. Department of Treasury, Office of the Special Inspector General for Pandemic Recovery ("SIGPR"). The Inspector General noted that "[t]he investigation is continuing and an investigative report will be issued to you at the conclusion of the investigation." The Inspector General concluded that "SIGPR issued this letter which contains findings that need to be presented to management for immediate administrative review and disposition *as deemed appropriate*." (emphasis added). Chairman Grundmann requested the Office of the Solicitor conduct an immediate administrative review and recommend a disposition.

In the three-page SIGPR letter, SIGPR examined the Federal Acquisition Regulation ("FAR")'s section 37.104, which discusses its prohibition against "personal services" contracts. Based on a series of "descriptive elements" listed in that FAR provision, SIGPR's Assistant Inspector General concluded that the KAPAX contract constituted a "personal services" contract:

KAPAX's employee who performs services under the KAPAX Contract has office space at FLRA, and performs those services in that office space with computer and other equipment that FLRA has provided to that individual. The services the KAPAX employee provides directly relate to and are integral to FLRA's mission and are services that are commonly performed by government employees. These are services that FLRA needs (and will need) for far more than one year (and the fact that the KAPAX Contract has been extended through two additional option years corroborates that assertion). Finally, the services performed by the KAPAX employee are inherently those that must be supervised by Government employees

Solicitor's Response and Legal Analysis

in order to protect the Government's interest and to retain control of the function involved.

Additionally, SIGPR also identified two additional concerns. First, SIGPR asserts that charge cards issued through the GSA SmartPay program ("Government Purchase Card") are "only issued to federal employees and not to contractors." Thus, according to the SIGPR, issuance of such a card to a KAPAX employee violates that rule. Second, the Contract indicates that FLRA expects coverage at FLRA HQ from 8:30 am to 5:30 pm. Apparently, coverage occurred before and after those hours and also through telework.

This Memorandum provides a report of findings of our investigation and our analysis. At the conclusion, we will also provide suggested remedies and guidelines related to procurement contracts and personnel management.

II. Questions presented

- A. The SIGPR letter asks management: "*whether* the services [under the KAPAX contract] fall under the definition of a personal services contract when applying the guidelines in FAR 37?" (emphasis added).

Answer: No. FAR section 37 lists six descriptive elements to help determine whether a federal procurement contract like the KAPAX contract under review is an improper personal services contract. The dispositive feature is the level of supervision undertaken by Government employees over the contractor's employees. Our analysis is based on available facts and circumstances, which in the aggregate, under prevailing guidelines and case law, does not compel a finding that the Contract is a personal services contract. Here, the Contracting Officer's Representative ("COR") is not supervising the contractor employee, but is expecting the contractor employee to perform specific tasks covered in the Contract with minimal direction from the COR. The COR can answer questions, but technical discussions or questions are not sufficient supervision by the COR to convert this Contract into a personal services contract. The COR's actions here predominately constitute "technical direction" permitted under the FAR. Nevertheless, due to some actions that blur the lines between contractor and employee and the ongoing legal risks associated with the Contract, we recommend the establishment of guidelines and declining any future options for this Contract.

- B. Should the KAPAX employee use a Government Purchase Card?

Answer: No. While there is no *per se* bar for a contractor employee to use a Government Purchase Card in GSA's SmartPay program, only contractors under a cost-reimbursement contract are allowed. In a cost-reimbursement contract, the Government awards costs to the contractor, but the contractor may not incur costs over a stated limit. FAR § 16-301. This Contract is a firm fixed price contract. Moreover, FLRA policy specifically restricts the issuance of Government Purchase Cards to Government employees.

Solicitor's Response and Legal Analysis

- C. Can the KAPAX employee telework or work outside 8:30 am to 5:00 pm under the current contract terms?

Answer: Not typically. FAR § 7.108 suggests that the Government should not discourage teleworking by contractors and requires a written justification for prohibiting teleworking. Here, the Contract does not provide for teleworking, but we have not identified any written justification for a prohibition. The Contract also “expects” the Contract employee to provide coverage five days a week from 8:30 a.m. to 5:00 p.m. This expectation is not mandatory. We recommend the parties modify the Contract to clarify actual requirements on coverage and telework.

III. Summary Of Findings

We requested and reviewed documents related to the Contract regarding its terms and implementation. We also interviewed a number of individuals. We did not receive permission from the contractor to interview the contractor employee on site at FLRA.

A. The Contract's History and Contract Administration

The contractor's employee (“Contract Employee”) began working on site for FLRA's Administrative Services Division (“ASD”) through a contract with HRAnew in 2019 as HRAnew's employee. The COR was hired on or about June 18, 2021. The COR previously worked as a Logistics and Facility Director at another federal agency. When the COR arrived at the Authority, the COR reviewed the HRAnew contract and determined that HRAnew was submitting invoices at incorrect intervals, which resulted in the Authority expending additional funds. FLRA decided to replace HRAnew. An Authority employee informed the COR that the Authority had contracted with KAPAX (“Contractor”), a Section 8(a) small business program participant, to provide administrative services to CIP. The former Authority employee received approval to expand the contract to CIP and ASD. The Contract, which is a firm-fixed price contract, was signed September 21, 2021.³ The total contract awarded included five options covering four-and one-half years.

The new Contractor then hired the Contract Employee who was already providing administrative support services to ASD since 2019 (presumably because of a practice of right of first refusal).⁴ Pursuant to the Contract, the Contractor is to perform Specific Tasks in a Performance Work Statement (“PWS”) (see the Contract's Part 5). In the first 30 days after Contract award, the COR reviewed the Specific Tasks list to determine which contracted services to request from the Contractor and Contract Employee. Afterwards, the Contract Manager (“CM”) at KAPAX submitted a Quality Control Program report (QCP) to the COR to show what steps the CM would take as a far as conducting oversight and surveillance of the Contract.

³ Unlike a firm fixed price contract that has a fixed price, a cost-reimbursement contract includes in the contract award an allocation for costs at a set limit that the contractor cannot exceed, FAR § 16-301.

⁴ From interviews, it is apparently a common practice for a new contractor to offer to hire and then hire contract employees who worked for the previous contractor, before hiring from the market.

Solicitor's Response and Legal Analysis

Thereafter, the CM emailed weekly status reports to the COR outlining the tasks that the Contract Employee completed as required by the Contract.

After some time, the Contract Employee completed the specific tasks outlined in the Contract to a satisfactory degree such that the COR no longer needed to consult the Specific Tasks list or communicate with the Contract Employee about those tasks. The Contract Employee would ask for some clarification from the COR; however, that clarification was still related to the Specific Tasks outlined in the Contract. For example, the Contract Employee performed required Specific Tasks like "c) reconciling government purchase cards monthly" independently, but would consult regularly the COR to fill in specific details.

On occasion, when the COR requested that the Contract Employee perform a task, the COR referred to this request as a "tasking," which should fall within the Specific Tasks list.⁵ The COR did not contact the CM to request these taskings because the tasks are within the Specific Tasks outlined in the Contract. Additionally, the COR viewed the Contract as not limited to the Specific Tasks, but also administrative support generally.⁶ In addition to weekly status reports, the CM, as a part of the Contractor's oversight and quality control duties, contacted the COR on a quarterly basis to confirm that the COR was satisfied with the Contract Employee's performance.

The Contract Employee would participate in office team meetings on Tuesdays and Thursdays with other ASD employees. At times, the COR rescheduled weekly meetings if the Contract Employee was unable to attend due to the Contract Employee's work schedule. The COR believes the Contract Employee's regular schedule has been 7:00 a.m. to 3:00 p.m. since 2019; however, the COR does not have the Contract Employee's work schedule because, as a contractor, the Contract Employee is not required to complete a work schedule form. The Contract Employee informed the COR about schedules and coordinated teleworking days.

The COR indicated that no training has been conducted on contract implementation or administration. The COR stated that guidance was sought from the Office of the Solicitor about whether the Contract Employee should be included in the agency-wide Privacy Act training. The COR was informed that the Contract Employee was not to attend the Privacy Act training.

B. Government Purchase Card

When the COR arrived in June 2021, the Contract Employee already had use of a Government Purchase Card. In the COR's prior federal job, the COR managed a purchase card program, which included 7 to 10 contract employees who had use of a Government Purchase Card. Based on the COR's prior government role, the COR believed it was not unusual for contract employees to have Government Purchase Cards. The COR sought guidance from the

⁵ For example, the COR requested that the Contract Employee address an issue regarding payment of monthly parking fees for the Building Garage, which the COR considered to be covered by Specific Task, "d) Process invoices and itemizing expenditures[.]" In another example, the COR requested the Contract Employee collect electronic e-waste that the COR believed was a Specific Task: "n) Provide support for the personal property inventory system . . . disposal of property[.]"

⁶ See Contract Part 5: "t) Provide customer service, addressing inquiries and *agency requests pertaining to ASD and CIP.*" (emphasis added).

Solicitor's Response and Legal Analysis

Administrative Resource Center ("ARC") at the Department of Treasury, which approved the issuance of a Government Purchase Card to the Contract Employee. The Contract Employee completed the required GSA Smartpay training for individuals with Government Purchase Cards.

C. Teleworking

The Contract was signed in September 2021 during the pandemic. In or about that time, the CM asked for the Authority's pandemic policy. The COR sent the Contractor the Authority's Teleworking Policy. The CM confirmed the Contractor does not have its own telework policy, but follows the telework policies of the agencies it services. The COR confirmed that the Contract Employee completed the telework training and signed the telework agreement as required by the Authority. As to a specific request for teleworking internationally, the COR did not impose any requirements as the Contract Employee was not an FLRA employee.⁷ The COR considered the Contract Employee's report to the COR for informational purposes only as the COR is not the Contract Employee's supervisor.

IV. Analysis

A. What is a Personal Services Contract?

Under the FAR, "[a] personal services contract is characterized by the employer-employee relationship it creates between the Government and the contractor's personnel."⁸ Pursuant to the FAR, a personal service contract may create a prohibited "employer-employee" relationship as a result of two possibilities: (1) "the contract's terms" or (2) "the manner of its administration during performance."⁹

In assessing the line between a personal versus nonpersonal services contract, FAR provides several "descriptive elements" 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 agencies or an organizational subpart in furtherance of 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 1 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

⁷ The SIGPR letter states that the foreign travel was cancelled.

⁸ FAR § 37.104(a).

⁹ FAR §§ 37.104(c)(1)(i)-(ii).

Solicitor's Response and Legal Analysis

(iii) Retain full personal responsibility for the function supported in a duly authorized Federal officer or employee.¹⁰

The FAR also contains two caveats. First, “giving an order for a specific article or service, with the right to reject the finished product or result, is not the type of supervision or control that converts an individual who is an independent contractor (such as a contractor employee) into a Government employee.”¹¹ Second, “[e]ach contract arrangement must be judged in the light of its own facts and circumstances, the key question always being: Will the Government exercise *relatively continuous* supervision and control over the contractor personnel performing the contract.”¹² (emphasis added).

Other Inspectors General have interpreted these provisions to mean that “[t]he presence of one or more these [descriptive] elements alone does not necessarily establish the existence of a personal services contract.”¹³ Stated differently, “the presence of any or all of these elements does not necessarily establish the existence of a personal services contract. Such a finding can only be established based on a case-by-case analysis of the totality of the circumstances in each case.”¹⁴

The line between a personal services contract and a non-personal services contract “can be murky and requires a case-by-case analysis, especially where contractors are working side-by-side with government counterparts.”¹⁵ Indeed, in one GAO investigation, USAID “Agency officials stated [to the GAO] that the distinction between personal services contracts and nonpersonal services contracts is sometimes difficult to determine, and that making a decision that a particular contract is a personal service contract is subjective and depends on the interpretation of tasks and supervision.”¹⁶

In light of the FAR’s distinction between the “contract’s terms” versus “the manner of its administration,” the following separates the two analyses.

- a. Contractual Terms
 1. *Clauses in the Contract supporting a personal services designation*
 - Section 1.4: “Supportive services include purchasing; contracts; space and facilities management; records management; property inventory; travel; transit subsidy benefits and other administrative support areas, as

¹⁰ FAR § 37.104(c)(1).

¹¹ FAR § 37.104(d).

¹² FAR § 37.104(c)(2).

¹³ *E.g.*, Department of Commerce, Office of the Inspector General, National Weather Service’s Oversight of Service Contracts, Document Retention, and Reporting Needs Improvement, Report No. OIG-17-007-A (Nov. 30, 2016), available at [OIG-17-007-A \(doc.gov\)](#).

¹⁴ Department of Commerce, Procurement Memorandum 2015-05 (May 4, 2015), available at [PM 2015-05 Proper Relationships with Support Services Contractors \(Final\).pdf \(commerce.gov\)](#).

¹⁵ [OIG-17-007-A \(doc.gov\)](#)

¹⁶ GAO, Improvements needed in how some agencies report personal services contracts, GAO-17-610 (July 27, 2017).

Solicitor's Response and Legal Analysis

assigned by the ASD Director, Supervisory Attorney, and/or Contracting Officer Representative (COR)."

- Section 1.6.7.1: "all government equipment, information and property provided for contractor use."
- Section 3.2-3.5: "The Government will provide necessary workspace for the contractor staff to provide support outlined in the PWS. / The Government will provide computers, desk phones, common-area fax machines, and printers. / The Government will provide commonly used office supplies, such as paper, pens, pencils, etc."

Section 1.4 suggests that the ASD Director and the Supervisory Attorney can directly assign tasks to the Contract Employee, and the list of services include "management" and "purchasing," among others, which may constitute binding governmental actions. The last two provisions support a personal services designation, because the Government is providing the tools and space for the Contract Employee's work.

Section 1.4 is, nevertheless, ambiguous as it can also be applied in a way that avoids the prohibition against personal services. The terms permit the COR to be the only person that assigns work ("and/or"). As discussed later in this memo, a COR may assign tasks in line with technical direction and the FAR. The Contract also specifies that the work is generally "supportive" in nature, meaning there is some ambiguity as whether any work is binding in nature.

2. Clauses in the Contract rejecting a personal services designation

- Section 1: "The Government shall not exercise any supervision or control over the contract service providers performing the services herein. Such contract service providers shall be accountable solely to the Contractor who, in turn is responsible to the Government."
- Section 1.6.9: "At these meetings the [Contracting Officer (CO)] will apprise the contractor of how the government views the contractor's performance and the contractor will apprise the Government of problems, if any, being experienced."
- Section 1.6.10: "The COR is authorized to perform the following functions: assure that the Contractor performs technical requirements of the contract; perform inspections necessary in connection with contract performance; maintain written and oral communications with the Contractor concerning technical aspects of the contract . . . monitor Contractor performance . . . coordinate availability of government furnished property; and provide site entry of Contractor personnel."
- Section 1.6.11: "The CM shall work through the COR to resolve issues, receive technical instructions, and ensure adequate performance of services. The CM shall ensure that contractor employees do not perform any services outside the scope of the contract without an official modification issued by the CO. . . ."

Solicitor's Response and Legal Analysis

- Section 1.6.12: "All contract personnel attending meetings, answering Government telephones, and working in other situations where their contractor status is not obvious to third parties are required to identify themselves as such to avoid creating an impression in the minds of members of the public that they are Government officials. They must also ensure that all documents or reports produced by contractors are suitably marked as contractor products or that contractor participation is appropriately disclosed."
- Section 4.1, 4.3-4.4: "The Contractor shall furnish all supplies, equipment, facilities and services required to perform work under this contract that are not listed under Section 3 of this PWS. / Materials: The Contractor shall provide all other required materials and supplies necessary to meet the requirements under this PWS not listed in Section 3. / Equipment: The Contractor shall provide all other required equipment necessary to meet the requirements under this PWS not listed in Section 3."
- Section 5.1: Contractor "a) Furnish all supervision, labor and specific materials necessary to perform all the services under this PWS in an orderly, timely and efficient manner in accordance with (IAW) this PWS."
- Technical Exhibits 1 and 2 (listing deliverables and performance standards).

The thrust of these provisions reserves day-to-day supervision to the Contractor rather than a government employee. *See* Section 1, 5.1, Technical Exhibits. Specifically, sections 1.6.9 and 1.6.11 grant the CM the final authority over performance management and evaluation of the specific contractor personnel. Section 1.6.10 limits the COR's role to monitoring the Contractor's performance of tasks to assure the Contractor's compliance and to determine that the Contractor is meeting and providing the contracted services. Sections 4.1, 4.3-4.4, and 5.1 indicate that the Contractor has a role in supplying materials outside of those provided by the Government for the specific tasks in the PWS. Section 1.6.12 requires contractor personnel to self-identify as contractors, not as employees. Finally, the Contract designates the COR with "authority to provide technical direction to the Contractor as long as that direction is within the scope of the contract[.]" Section 2.1.3.

One may read Section 2.1.3 as clarifying Section 1.4 to mean that the COR is the *only* government employee with authority to issue task orders to the Contract Employee. Moreover, Section 2.1.3 limits the COR's "authority to provide technical direction" that is "*within* the scope of the contract[.]" "does *not* constitute a [contract] change and has *no* funding implications" (emphasis added). Said another way, this language limits the COR's role in providing "technical direction" to answering questions related to specific tasks under the Contract.

b. Comparison to other contracts

1. *Types of services provided*

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GSA has a contract for Federal Supply Service,¹⁷ which lists “executive assistant,” and “administrative assistant” as possible roles fulfilled by contractors. Among the tasks listed: “handles correspondence, prepares reports, arranges meetings and/or travel arrangements” and “[m]aintains logs, records, archives and/or working files[.]” This maps onto several work items in the PWS for this Contract, including Sections 5.1(f), (g), (h), (i), (j), (k), (l), (o), (p), broadly “handl[ing] correspondence” and “arrang[ing] meetings[.]” Sections 5.1(f), (n), (q), (r) and (s) maps broadly onto maintaining “logs, records, archives and/or working files[.]” Under the GSA Contract’s role for an “Acquisition/Contract Specialist IV,” “market research/analysis” is one task, which maps directly onto this Contract’s Section 5.1(e), “Perform market research and cost analysis[.]” “Procurement Analyst III” in the GSA Contract includes “general procurement or purchasing administration” which maps onto Sections 5.1(c) and (d).

A Department of Energy contract also has a similar PWS as the Contract, including “[r]eceiv[ing] telephone calls and visitors,” general document management, travel assistance, and inventory of supplies.¹⁸ For these services, the DOE contract provides for a “work area” during the “on-site activity” and a “[c]omputer system with access to the Site network[.]”¹⁹

The Department of Justice²⁰ and NIH²¹ provide other examples. NIH, for example, has a five-year contract for “long-term” administrative services. NIH’s contract provides support services in the form of “general office, support, travel, meeting, mail, procurement, property management, personnel, and publication.”²²

In short, there are plenty of examples of other Government contracts that provide the same services to agencies across the federal government. Based on the “descriptive factors,” many other agencies have found the same services, factors (3), (4) and (6), to *not* constitute personal services despite performance on-site (factor (1)) using equipment furnished by the Government (factor 2), and even in “long-term” situations, (factor 5).

2. Structure of supervision

In their analogous contracts, other government agencies have a fairly similar broad structure. The COR in other agencies’ contracts provides the “day-to-day” monitoring of the contract and provides technical direction, but not daily tasking. For example, in these other agencies’ contract, “[t]he Task Order CO and Task Order COR provide ‘frontline’ day-to-day

¹⁷ GSA, “Federal Supply Service: Authorized Federal Supply Schedule Price List” (March 29, 2022), available at [Microsoft Word - VMSI - Multiple Award Schedule - GS10F030AA Catalog \(8.3.2022\) \(gsaadvantage.gov\)](#); see also GSA, “Federal Supply Group: Professional Service,” (February 2, 2020), available at [1 \(gsaadvantage.gov\)](#).

¹⁸ Department of Energy, “Administrative Support Services: Performance Work Statement (PWS),” (April 17, 2017), available at [SRS-DE-EM0004555-S&K-Logistics,-LLC-attachment1.pdf \(energy.gov\)](#).

¹⁹ *Id.* (“The Government will furnish all facilities, materials, property, and equipment for on-site use in the performance of this contract as specified.”).

²⁰ Department of Justice, Asset Forfeiture Administrative Support Services, Contract No. 15JPSS20D00000271, available at [Asset Forfeiture Administrative Support Services \(justice.gov\)](#).

²¹ NIH, LTASC III: Long Term Administrative Support Contract, FAQs, available at [FAQs \(nih.gov\)](#).

²² *Id.*; see also NIH, LTASC III: Long Term Administrative Support Contract, FAQs, available at [Services \(nih.gov\)](#) (describing all of the various roles).

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monitoring of the task order during the task order period of performance. Since this is a non-personal services contract, the Task Order CO and Task Order COR shall ensure that direct management of contractor personnel remains the responsibility of the contractor's management staff."²³ Or "[t]he COR will have overall project management and oversight responsibilities, and will coordinate the technical aspects of this contract."²⁴ The other agencies' COR can "[p]rovide specific tasks to the [c]ontractor for assignment to [c]ontractor employees and to receive progress reports on these tasks[.]"²⁵ But, "[a]ll individual employee assignments, and daily work direction, shall be given by the applicable [contractor's] employee supervisor[.]"²⁶ And the other agencies' COR's "technical direction" "[s]hall not be generally used as a means for daily tasking and workload assignment[.]"²⁷

3. Government Purchase Cards

There is no *per se* bar against contractors obtaining purchase cards or using purchase cards under the GSA SmartPay program.²⁸ However, eligibility is limited to cost-reimbursement contractors.²⁹ KAPAX's contract is a fixed-price contract.³⁰ The FLRA's Government Purchase Card Policy is even more narrow: "[t]he APC, in conjunction with the Executive Director and Chairman, shall delegate procurement authority to the *Government employee* requesting use of a purchase card." Government Purchase Card Policy Instruction, FLRA No. 4420.1 (emphasis added);³¹ *see generally* FAR § 1.603-3 ("Individuals delegated [micro-purchase] authority . . . shall be appointed in writing in accordance with agency procedures."). So, while some contractors may use government purchase cards, KAPAX is not one of those eligible contractors, and providing a purchase card to a KAPAX employee will also violate FLRA policy.

For these reasons, separate and apart from the question as to whether the Contract is a personal services contract, no KAPAX employees should be issued a Government Purchase Card and any cards should be canceled immediately.

²³ NIH, LTASC III: Standard Operating Procedures, available at [LTASCIII SOP.pdf \(nih.gov\)](#).

²⁴ [Asset Forfeiture Administrative Support Services \(justice.gov\)](#).

²⁵ [Asset Forfeiture Administrative Support Services \(justice.gov\)](#).

²⁶ NIH, LTASC II: Sample Contract, available at [LTASC II - SAMPLE CONTRACT \(nih.gov\)](#).

²⁷ [Asset Forfeiture Administrative Support Services \(justice.gov\)](#).

²⁸ GSA, SmartPay: Eligibility and Application Process, available at [Eligibility and the Application Process \(gsa.gov\)](#) ("Federal agencies, departments, tribal organizations and approved non-federal entities (including those eligible to use GSA sources of supply and/or *cost-reimbursable contractors*) can apply to obtain GSA SmartPay payment solutions.") (emphasis added). This is consistent with other agencies' policies. *See, e.g.*, Department of Energy, Acquisition Guide: Review of Management Contractors Purchasing Systems: Purchase Card Considerations," (January 2005 and August 2012), available at [AcqGuide70pt44.doc \(energy.gov\)](#); [Acquisition Guide - Chapter 13.1 - Purchase Card Policy and Operating Procedures \(energy.gov\)](#); *see also* Department of Energy, Purchase Card Policy and Operating Procedures (June 2010), available at [June 2010 Update \(energy.gov\)](#) (definition of "Authorized Contractor"). HHS, Purchase Card Program Guide (July 2010), Appendix A, available at [I\(hhs.gov\)](#) ("Only cost reimbursement contractors are eligible to use GSA SmartPay® Program to acquire goods or services to further the objectives of a Government contract.").

²⁹ *Id.*

³⁰ FAR Part 16.

³¹ FLRA Government Purchase Card Policy Instruction FLRA No. 4420.1 (Feb. 25, 2016), at 9-10.

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4. Telework and Hours of Work

Similar contracts have varied policies towards telework. NIH's contract stated that "[r]egular telework is not permitted under [its administrative services contract] except for unusual circumstances such as COVID 19. However, language has been included in the contract to allow for ad-hoc telework."³² DOJ's contract states "[n]o telework or remote work is authorized for the completion of services."³³ The Contract does not include explicit provisions for teleworking, so modification of the contract is necessary to expressly permit or prohibit teleworking. Nevertheless, the intent of the FAR, section 7.108, states that "[i]n accordance with 41 U.S.C. 3306(f), an agency shall generally *not discourage* a contractor from allowing its employees to telecommute in the performance of Government contracts." (emphasis added). A prohibition against teleworking must also be justified during the solicitation, section 7.108, and we have not identified a written justification for such a prohibition.³⁴ So, while permitting teleworking by KAPAX contractors may violate the terms of the contract, the agency cannot prohibit telework by those contractors unless there is a written justification. In light of the FAR's intent not to discourage telecommuting, we recommend a modification of the Contract to specify an allowance for teleworking or a written justification for a prohibition.

Section 1.6.4 of the Contract provides: "FLRA *expects* coverage during the work hours (8:30 a.m.-5:00pm) Monday thru Friday[.]" Although it appears the Contract Employee's schedule is not in compliance with the Contract, the use of the specific language, "expects coverage" may indicate permissive and aspirational language, not necessarily mandatory language.³⁵ Any ambiguity as to FLRA's expectations of coverage needs to be clarified by modification.

B. Implementation

As noted above, the FAR's descriptive elements are present in analogous nonpersonal services contracts. So, the dispositive question is whether, in implementation, "the Government exercise[d] relatively continuous supervision and control over the contractor personnel performing the contract?" A focus on this question is consistent with case-law, which has emphasized the dispositive nature of "continuous supervision and control."³⁶ As the Federal Circuit stated, "the plaintiffs . . . focus on the requirements that they work at government-designated sites and that they use government-supplied equipment. While in some instances those factors can be relevant . . . they are far from definitive." *Seh Ahn Lee v. United States*, 895 F.3d 1363, 1371 (Fed. Cir. 2018) (rejecting a personal services designation). Instead, the factors are

³² [FAQs \(nih.gov\)](https://www.nih.gov/faq).

³³ [Asset Forfeiture Administrative Support Services \(justice.gov\)](https://www.justice.gov/asset-forfeiture-administrative-support-services).

³⁴ We have requested and will check if any justifications are provided in the original RFP.

³⁵ *E.g., W. Bay Builders, Inc. v. United States*, 85 Fed. Cl. 1, 20 (2008) ("Unlike 'shall,' 'should' is used to either express 'probability or *expectation*' or 'conditionality or contingency,' American Heritage College Dictionary, *supra*, at 1284, and is indicative of permissive language . . .") (emphasis added). Or, "expect" just means something that is more likely to happen than not, *State Farm Lloyds v. Jones*, No. 4:05-CV-389, 2008 WL 5424093, at *3 (E.D. Tex. Dec. 30, 2008).

³⁶ *Briggs for use & benefit of United States v. Quantitech, Inc.*, No. 2:19-CV-01690-ACA, 2021 WL 461694, at *6 (N.D. Ala. Feb. 9, 2021) (finding no personal services contract even if the government employee required contractor employees to sign in and out of work).

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"merely 'to be used as indicia of continuous supervision and control of contractor personnel by the government.'"³⁷

In implementation, the primary consumer for KAPAX's services is currently also the COR. Under the Contract, the COR may provide "technical direction" to KAPAX to implement the Contract, but this does not extend to day-to-day supervision or taskings. Various agencies have elaborated on this distinction. The Department of Energy distinguishes "technical direction" in its own regulations as "[p]roviding direction to the Contractor that redirects contract effort, shift work emphasis between work areas or tasks, require pursuit of certain lines of inquiry, fill in details, or otherwise serve to accomplish the contractual Statement of Work."³⁸ EPA, in its regulation, 48 C.F.R. § 1552.237-71, similarly describes it as "[i]nstruction to the contractor that approves approaches, solutions, designs, or refinements; fills in details; completes the general descriptions of work shifts emphasis among work areas or tasks[.]" See also NIH's contract,³⁹ DOJ's contract.⁴⁰ For example, DOJ's contract permits "direction" from the COR for tasks within the confines of the general scope of work but cannot be "generally used a means for daily tasking and workload assignment[.]"⁴¹ DOJ authorizes the COR to "[c]oordinate contractor and government activities related to the performance of services for Contractor employees; [a]rrange for and coordinate the use of government resources (personnel, space, documents, etc.) for Contractor employees; [and] [p]rovide specific tasks to the Contractor for assignment to Contractor employees and to receive progress reports on these tasks[.]"⁴²

As implemented, the relationship under the Contract operated similar to these structures. The COR here issued Specific Tasks within the scope of work to the Contract Employee on-site with weekly reports to the Contractor. The COR has also coordinated the use of government resources for the Contract Employee. In effect, the COR generally "g[ave] an order for a specific article or service, with the right to reject the finished product or result," which "is not the type of supervision or control that converts an individual who is an independent contractor (such as a contractor employee) into a Government employee."⁴³ There is no indication that the COR

³⁷ *John Douglas Burke v. DHS*, CBCA 7492 (Mar. 10, 2023) (quoting *W.B. Jolley*, B-234146 (Mar. 31, 1989)). In *Burke*, for example, "Mr. Burke alleges that his contract work conditions satisfy several of the items listed in FAR 37.104(d), supporting his characterization of his contracts as being for personal services: he was working at the NIH site; although listed as a contractor in NIH directories, his address was identified in research publications as the NHGRI campus in Bethesda, Maryland; his principal tools and equipment were furnished by the Government; his services were integral to NHGRI's effort to develop an HPS1 gene therapy; he had to attend regular meetings with NHGRI employees to report on his work; his work far exceeded the one-year period identified in FAR 37.104(d); and he was fully integrated into and worked with NHGRI staff. None of those allegations, though, indicate direct government control and supervision of the work that he was performing." *Id.* (rejecting personal services designation).

³⁸ Department of Energy Acquisition Regulation, Section 952.242-70, "Technical Direction," available at [952.242-70 Technical direction. | Acquisition.GOV.](#)

³⁹ [LTASC II - SAMPLE CONTRACT \(nih.gov\).](#)

⁴⁰ [Asset Forfeiture Administrative Support Services \(justice.gov\).](#)

⁴¹ *Id.*

⁴² *Id.*; see generally *McGregor FSC, Inc.*, B-224634, 86-2 CPD ¶ 537 (Nov. 7, 1986) ("We do not think that simple monitoring, such as establishing performance evaluations on a periodic basis, or routine approvals, creates a prohibited personal services contract between the Government and the Contractor.").

⁴³ FAR § 37.104(d).

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strayed outside the COR role in providing evaluations or conducting performance management for KAPAX.⁴⁴ Based on our fact-finding, we did not identify evidence of pervasive “continuous supervision and control” beyond technical direction.⁴⁵ The evidence does not suggest the contractor’s employees were “contractually subject to the level of direct government supervision” that authorities found “necessary to create a personal services contract.”⁴⁶

While we have not identified relatively continuous supervision outside the bounds of the Contract’s structure or the limits of “technical direction,” certain aspects of the existing relationship may easily stray into conduct close to an employee-employer relationship. For example, (1) the ultimate consumer of the services and the manager/interpreter of the contractor are the same person, which may create misaligned incentives,⁴⁷ (2) direct and frequent communications from the COR/customer with the Contract Employee; (3) periodic treatment of the contractor like an employee in communications, telework arrangements, performance evaluation, and attendance at staff meetings or events; (4) a history of a lack of distinction of the Contract Employee as a contractor versus an employee on paper and in personal conduct; and (5) the length of time a single Contract Employee has worked on-site through two different contracts.

C. Remedies and Guidelines

In situations where there are questions surrounding the implementation of an otherwise valid contract, the invalidation of the contract under FAR section 37.104 is typically

⁴⁴ GAO, *Defense Contracting: Army Case Study Delineates Concerns with Use of Contractors as Contract Specialists*, GAO-08-360 (March 26, 2008) (“government ‘managers interviewed and selected contractor personnel for assignment to positions, and routinely requested pay increases and promotions for contractor personnel’ to be contributing factors in the existence of a personal services contract”).

⁴⁵ *Lee v. United States*, 130 Fed. Cl. 243, 255–56 (2017), *aff’d sub nom. Seh Ahn Lee v. United States*, 895 F.3d 1363 (Fed. Cir. 2018) (“By reciting only general allegations of direct supervision, plaintiffs have not plausibly alleged that the Board’s supervision of plaintiffs was *so pervasive and extensive* as to constitute direction, supervision, or control regarding plaintiffs’ “manner or method of performance” in breach of the express contract terms, rather than being within the scope of review and compliance commensurate with the government’s right and obligation to inspect and accept or reject contractors’ work in accord with the contractors’ provision of nonpersonal services.”) (emphasis added).

⁴⁶ *Burke*, CBCA 7492; *see also Monarch Enterprises, Inc.*, B-233303 ET AL. (Mar. 2, 1989) (“Further, our review . . . fails to reveal any term in the RFPs or contracts providing for detailed supervision or direction of the contractors’ employees. . . . Thus, we do not find that the mere award to individuals creates personal services contracts.”). Pervasive supervision was found when “[s]uch supervision and control took the form of routine assignment of tasks to individual contractor personnel, often on a daily basis. In some instances, [agency] employees also reviewed and signed contractor personnel timecards and/or evaluated the performance of contractor personnel.” HHS, Office of the Inspector General, *Review of the Centers for Disease Control and Prevention’s Compliance With Appropriations Laws and Acquisition Regulations - Contractor A*, A-04-08-01059 (hhs.gov) (January 2010).

⁴⁷ NIH, LTASC III: Task Order Procedures, available at [LTASCIII_TOPcedures.pdf \(nih.gov\)](#) (describing separate COR and customer functions); HHS, Office of the Inspector General, *CMS Did Not Administer and Manage Strategic Communications Services Contracts in Accordance With Federal Requirements*, A-12-19-20003 (hhs.gov) (July 2020) (OIG faulting CMS for permitting customers to directly assign work to contractors as “[t]he COR was unable to accurately monitor and administer specified aspects of contractor performance, including whether the tasks performed met the standards set forth in the contract and whether the services fell within the scope of performance.”).

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unwarranted.⁴⁸ The proper remedy is typically the issuance of guidelines and increased oversight in the technical direction of CORs and contractor employees.

For example, a DOJ OIG investigation had identified two serious violations in implementing DOJ's nonpersonal services contracts: (1) the contractor's "legal support staff received assignments directly from government employees, such as Assistant U.S. Attorneys, rather than from the [contractor's] Project Manager" and (2) "some contract personnel were embedded on drug investigation teams and performed duties that were deeply integrated into the DEA's mission essential functions [and] were at risk of inappropriately performing inherently governmental functions that should be performed by DEA personnel."⁴⁹ Despite these fairly serious violations, the OIG recommended training and the establishment of guidelines.⁵⁰ The GAO reached a similar conclusion with respect to another contract, recommending careful monitoring: "issue guidance to clarify the circumstances under which contracts risk becoming improper personal services contracts and to provide direction on how the risk should be mitigated."⁵¹ We believe the same recommendation applies here.

We also recommend that FLRA revoke the purchase card issued to the KAPAX employee and the parties modify the contract to establish guidelines on teleworking and hours worked.

Conclusion

The Office of the Solicitor has already issued guidance to leadership to cancel the Contract Employee's use of the Government Purchase Card. We recommend modifying the language in the Contract to establish the guidelines on telework and hours. We will also issue guidelines soon consistent with guidelines in other agencies to prevent the blurring of lines in our agency between COR functions and employer-employee management.⁵²

Finally, given the direct communications between customer and contractor employees and the size of our agency, these contracts can inherently blur the lines between customer, employees, and contractors.⁵³ While directing such contractors may be defensible as a form of "technical direction," the treatment of contractors and the reliance on those contractors will often create the legal risk of obtaining personal services. To avoid this risk, we also recommend not renewing this contract in the future given the length of the time that administrative support services have been provided through the same individual. Future contracts can only be

⁴⁸ See *Burke*, CBCA 7492.

⁴⁹ DOJ, Office of the Inspector General, Management Advisory Memorandum Concerning the Department of Justice's Administration and Oversight of Contracts (July 2020), available at [UNRESTRICTED Cover \(justice.gov\)](#).

⁵⁰ Id. ("[E]nsure all components update their contractor-related monitoring policies and provide regular training to government contracting employees on how to maintain appropriate, FAR-compliant relationships with contractor personnel").

⁵¹ "Because of the type of contract and nature of the contract services provided along with the presence of the FAR's descriptive elements, the CACI contract runs the risk of becoming a personal services contract if the government does not carefully monitor the manner in which services are provided." GAO 08-360.

⁵² E.g., [PM 2015-05 Proper Relationships with Support Services Contractors \(Final\).pdf \(commerce.gov\)](#).

⁵³ Id. ("Be sensitive to appearances created by close relationships between government and contractor personnel.").

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considered if there are clear contract language, training, and guidelines.⁵⁴ We recommend a response to the Inspector General along the lines discussed in this memorandum.

⁵⁴ GAO, *Protest of CNCS Contract Award for Administrative Support Services*, B-278903.2, (Feb. 12, 1999), available at [\[Protest of CNCS Contract Award for Administrative Support Services\] | U.S. GAO.](#)

Distribution

Federal Labor Relations Authority

Thomas Tso, Solicitor

Michael Jeffries, Executive Director

Pershette Wakefield, Director, Administrative Services Division

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Office of Inspector General

MANAGEMENT ADVISORY MEMORANDUM
REGARDING FLRA'S CONTRACT FOR
ADMINISTRATIVE SUPPORT SERVICES