

## Recommendation 20: Clarify the definitions of personal and nonpersonal services and incorporate in the DFARS a description of supervisory responsibilities for services contracts.

### Problem

The FAR, DFARS, and other DoD issuances provide policies for contracted services for mission support. Confusion exists as to when these commercial and noncommercial services should be contracted either as a personal or nonpersonal service, and what supervisory responsibilities contractors must exercise when providing contracted services.

### Background

In recent decades, federal agencies adopted a multisector workforce approach to gain access to the evolving and necessary skills, technologies, and expertise required to accomplish their missions in the 21st century. DoD policy for total force management, found at 10 U.S.C. § 129a, General Policy for Total Force Management, stipulates “the Secretary of Defense 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>1</sup>

The National Academy of Public Administration, in a November 16, 2005 paper titled *Managing Federal Missions with a Multisector Workforce: Leadership for the 21st Century*, cites a variety of reasons for workforce restructuring. Reasons include the following: “to utilize existing service delivery mechanisms, to acquire hard to find skills, to save money, to have the private sector do work that is not inherently governmental, to augment capacity on an emergency basis, and to reduce the size of government.”<sup>2</sup> Within the workforce structure, DoD predominately acquires contractor personnel by nonpersonal service contracts.

A stringent requirements-determination process in DoD ensures that the agency does not award a contract for services unless the following apply:

- The workload for the requirement has been validated.
- Government personnel with the required training and capabilities are not available within the agency.
- For a personal services contract, the requirement must be specifically authorized by statute.

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<sup>1</sup> General Policy for Total Force Management, 10 U.S.C. § 129a.

<sup>2</sup> The National Academy of Public Administration, *Managing Federal Missions with a Multisector Workforce: Leadership for the 21st Century*, Academy Initiative, November 16, 2005, accessed December 8, 2017, <http://www.distributedworkplace.com/DW/governmentgovernment/National%20Academy%20of%20Public%20Administration%202005.pdf>.

A formal review and approval process exists within the DoD Components.<sup>3</sup> The following DoDIs address these requirements:

- DoDI 5000.74, Defense Acquisition of Services, defines the service acquisition category (S-CAT) levels, policies, responsibilities, and procedures for acquiring services.<sup>4</sup>
- DoDI 5000.02, Operation of the Defense Acquisition System, requires the program manager, in conjunction with the designated DoD Component human systems integration staff, to determine the most efficient and cost-effective mix of DoD workforce and contract support.<sup>5</sup> The mix of military, DoD civilian, and contract support necessary to operate, maintain, and support the system is determined based on the manpower mix criteria in DoDI 1100.22, Policy and Procedures for Determining Workforce Mix.<sup>6</sup>

KBS (often referred to as A&AS<sup>7</sup>) contracted commercial and noncommercial services are by far the largest category of services supporting the multisector workforce, now accounting for \$37.7 billion in annual DoD expenditures.<sup>8</sup> DoD acquires the contractor portion of the multisector workforce through either a personal or nonpersonal services contract; 99.1 percent are awarded as nonpersonal services.

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<sup>3</sup> General Policy for Total Force Management, 10 U.S.C. § 129a. Policy and Procedures for Determining Workforce Mix, DoDI 1100.22 (2010).

<sup>4</sup> Acquisition of Services, DoDI 5000.74 (2016). Procurement of Contract Services: Management Structure, 10 U.S.C. § 2330.

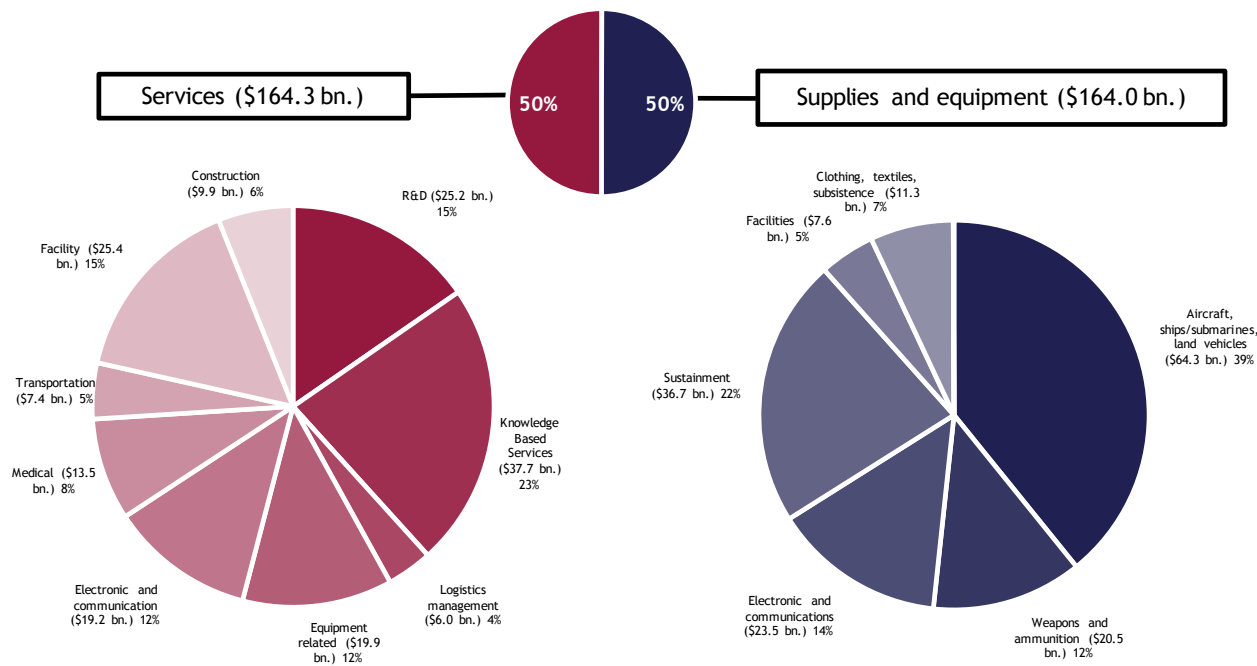
<sup>5</sup> Operation of the Defense Acquisition System, DoDI 5000.02 (2015).

<sup>6</sup> Policy and Procedures for Determining Workforce Mix, DoDI 1100.22 (2010).

<sup>7</sup> "Knowledge Based Services (A&AS)," DAU Service Acquisition Mall (SAM), accessed December 8, 2017, [http://sam.dau.mil/Content.aspx?currentContentID=knowledge\\_based\\_services](http://sam.dau.mil/Content.aspx?currentContentID=knowledge_based_services).

<sup>8</sup> "Services Spend Charts," Services Acquisition (SA), Defense Procurement and Acquisition Policy, accessed December 8, 2017, <https://www.acq.osd.mil/dpap/sa/Learn-More/ServiceSpendCharts.html>.

Figure 5-1. FY 2017 Spend—DoD as Funding Department<sup>9</sup>



A lack of clarity regarding the differences between personal and nonpersonal services contracts raises concern among government personnel who may incorrectly conclude that contractor employees performing alongside government employees are (or should be) under a contract for personal services.

Congress, federal agencies, and DoD have enacted a number of statutes and policies outlining the requirements for appropriate use of contracts for A&AS and KBS.

- In 1992, OMB issued Circular A-120, Guidelines for the Use of Advisory and Assistance Services. DoD implemented OMB Circular A-120 as well as DoDD 4205.2, DoD Contracted Advisory and Assistance Services (CAAS) outlining policy, responsibilities, and procedures for the management, acquisition, and use of CAAS for requirements within DoD.<sup>10</sup> OMB Circular A-120 was rescinded in 1994 and DoD rescinded DoDD 4205.2 in 2004, citing redundancy with its other service contracting policies.<sup>11</sup>
- OMB issued Policy Letter 93-1, Management Oversight of Services, on May 18, 1994, following a review of service contracting practices and capabilities across the Executive Branch as part of the National Performance Review. It established responsibilities and “guiding principles through the ‘best practices’ concept to help agencies develop, analyze, and perfect requirements

<sup>9</sup> Data from Federal Procurement Data System, extracted January 2, 2018. Categories based on DPAP *Crosswalks* services and supplies and equipment taxonomy at <https://www.acq.osd.mil/dpap/sa/Tools/crosswalks.html>, accessed January 2, 2018.

<sup>10</sup> DoD Contracted Advisory and Assistance Services (CAAS), DoDD 4205.2 (1992).

<sup>11</sup> GAO, *Federal Contracting: Congressional Action Needed to Address Long-standing Problems with Reporting of Advisory and Assistance Services*, GAO-08-319, accessed December 8, 2017, <http://www.gao.gov/assets/280/274250.pdf>.

for service contracts which, in turn, should help improve contract management and administration.”<sup>12</sup>

- The 1994 FASA provided a definition for A&AS and authorized both civilian agencies and DoD to use task order contracts with limits on the ordering period to procure A&AS.<sup>13</sup> A&AS was defined as those services provided by nongovernmental sources for management and professional support services; studies, analyses, and evaluations; and engineering and technical services.<sup>14</sup> FASA also directed OMB to collect and report, annually, obligations for A&AS in the President’s budget.<sup>15</sup> The FAR Subpart 37.2 was amended in 1995 to include the definition for A&AS. The FAR was later amended in April 2000 to move the definition for A&AS from FAR Subpart 37.2 to FAR Subpart 2.101, Definitions.<sup>16</sup>

*‘Advisory and assistance services’ as defined in FAR Subpart 2.101 are ‘those services provided under contract by nongovernmental sources to support or improve: organizational policy development; decision-making; management and administration; program and/or project management and administration; or R&D activities. It can also mean the furnishing of professional advice or assistance rendered to improve the effectiveness of Federal management processes or procedures (including those of an engineering and technical nature). In rendering the foregoing services, outputs may take the form of information, advice, opinions, alternatives, analyses, evaluations recommendations, training and the day-to-day aid of support personnel needed for the successful performance of ongoing Federal operations.’ They are classified into three major categories: (1) management and professional support services; (2) studies, analyses and evaluations; and (3) engineering and technical services.<sup>17</sup>*

- OFPP issued Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions, dated September 12, 2011, pursuant to section 6(a) of the Office of Federal Procurement Policy Act, 41 U.S.C. 405(a), the President’s March 4, 2009, Memorandum on Government Contracting, and section 321 of the FY 2009 NDAA, Pub. L. No. 110-417. The intent of the policy is to provide guidance to help agencies manage functions that are closely associated with inherently governmental and critical functions performed by both Federal and contractor employees.<sup>18</sup>

Neither the FAR nor the DFARS defines KBS. DoD designated KBS as a portfolio group in the DoD taxonomy of services on November 23, 2010,<sup>19</sup> subsequently updated on August 12, 2012.<sup>20</sup> The taxonomy now reflects how “DoD organizes its spend for services and supplies, and equipment using a

<sup>12</sup> Management Oversight of Service Contracting, OMB Policy Letter 93-1, May 18, 1994.

<sup>13</sup> Budget Contents and Submission to Congress, 31 U.S.C. § 1105(g). Advisory and Assistance Services, 41 U.S.C. § 4105.

<sup>14</sup> Budget Contents and Submission to Congress, 31 U.S.C. § 1105(g).

<sup>15</sup> Ibid.

<sup>16</sup> Federal Acquisition Circular 97-17, FAR Case 1999-014 (2000).

<sup>17</sup> FAR Subpart 2.101 Definitions, Current to: FAC 2005-96 (2017).

<sup>18</sup> Performance of Inherently Governmental and Critical Functions, OFPP Policy Letter 11-01 (2011).

<sup>19</sup> OSD(AT&L), Defense Procurement Acquisition Policy (DPAP) Memo, *Taxonomy for the Acquisition of Services*, November 23, 2010, accessed December 8, 2017, <http://bbp.dau.mil/docs/Taxonomy%20for%20the%20Acquisition%20of%20Services.pdf>.

<sup>20</sup> OSD(AT&L), Defense Procurement Acquisition Policy (DPAP) Memo, *Taxonomy for the Acquisition of Services and Supplies & Equipment*, August 27, 2012, accessed December 8, 2017, <https://www.acq.osd.mil/dpap/policy/policyvault/USA004219-12-DPAP.pdf>.

taxonomy that maps Product Service Codes (PSCs), as set forth in the Federal Procurement Data System Product and Service Codes” (shown below).<sup>21</sup>

**Table 5-1. Services Portfolio Group: PSC Definitions; Knowledge-Based Services**

Portfolio Category	PSC	Title
Engineering and Technical Services	R412	Simulation
	R413	Specifications Development Services
	R415	Professional Services/Tech Sharing–Utilization
	R425	Engineering and Technical Services (Includes R414 and R421 merging in FY 2012)
Program Management Services	Axx6	RDT&E Management Support
	B	Special Studies and Analyses—Not R&D
	R405	Operations Research & Quantitative
	R406	Policy Review/Development Services
	R408	Program Management/Support Services
	R410	Program Evaluation/Review Development (Includes R407 and R409 merging in FY 2012)
	R499	Other Professional Services
	R707	Contract & Procurement Support
	R799	Other Management Support Services
Management Support Services	R7xx	Management Support Services Less R706, R707, and R799
Administrative & Other Services	R6xx	Administrative Support Services
	T	Photographic, Mapping, Printing, and Publications Services
Professional Services	R4xx	Professional Services Less R405-R410, R412-R415, R421, R425, R426 and R499
Education and Training	U	Education and Training Services

DoD uses the taxonomy to facilitate strategic sourcing.<sup>22</sup> The taxonomy identifies a KBS Portfolio Group that includes engineering and technical services, program management services, management support services, administrative and other services, professional services, and education and training.<sup>23</sup>

DoD separated the Logistics Management Services Portfolio Group from the KBS Portfolio Group and established it as its own portfolio group. A&AS is neither discussed nor identified as a separate portfolio group within the taxonomy.

The following is a description of KBS found in the Defense Acquisition University (DAU) Service Acquisition Mall (SAM):

*KBS, commonly referred to as Advisory and Assistance Services (A&AS), relates to tasks that require the application of detailed processes or technical knowledge. A&AS pertains to the details provided under contract by nongovernmental sources to support or improve organizational policy development, decision-making, management and administration, program and/or project management and administration, or research and development (R&D) activities. It can also involve the furnishing of professional advice or*

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

*assistance rendered to improve the effectiveness of Federal management processes or procedures, including those of an engineering and technical nature. The result of these services may take the form of information, advice, opinions, alternatives, analysis, evaluations, recommendations, training, and the day-to-day aid of support personnel needed for the successful performance of ongoing Federal operations.*<sup>24</sup>

Section 812 of the FY 2017 NDAA (Pub. L. No. 114-328 § 812) amended 10 U.S.C. § 2330a to add KBS, logistics management services, equipment related services, and electronics and communications services as separate service acquisition portfolio groups for the budgetary data collection requirement. Additionally, this legislation requires an “annual inventory, of activities performed during the preceding fiscal year pursuant to staff augmentation contracts for the DoD.”<sup>25</sup> The term *staff augmentation contracts* is defined in this statute and is stated as,

*means services contracts for personnel who are physically present in a government work space on a full-time or permanent part-time basis, for the purpose of advising on, providing support to, or assisting a government agency in the performance of the agency’s missions, including authorized personal services contracts.*<sup>26</sup>

Agencies acquire A&AS, KBS, and other staff augmentation requirements by either a personal or nonpersonal services contract. The primary difference between award of a contract for a personal service and award of a nonpersonal service is that a statutory authority must exist for the award of certain requirements for a personal service contracts.<sup>27</sup> Another difference involves the supervisory responsibilities of the contractor. In the case of a nonpersonal services contract, the contractor is solely responsible for the supervision of its employees.

*A nonpersonal services contract, as defined in FAR Subpart 37.101, “means a contract under which the personnel rendering the services are not subject, either by the contract’s terms or by the manner of its administration, to the supervision and control usually prevailing in relationships between the Government and its employees.”*<sup>28</sup>

*A personal services contract, as defined in FAR Subpart 2.101, “means a contract that, by its express terms or as administered, make the contractor personnel appear to be, in effect, government employees (see 37.104).”*<sup>29</sup> FAR Subpart 37.104(a) further states, “a personal services contract is characterized by the employer-employee relationship it creates between the government and the contractor’s personnel.”<sup>30</sup>

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<sup>24</sup> “Knowledge Based Services (A&AS),” DAU Service Acquisition Mall (SAM), accessed December 8, 2017, [http://sam.dau.mil/Content.aspx?currentContentID=knowledge\\_based\\_services](http://sam.dau.mil/Content.aspx?currentContentID=knowledge_based_services).

<sup>25</sup> Procurement of Services: Tracking of Purchases, 10 U.S.C. § 2330a.

<sup>26</sup> Ibid.

<sup>27</sup> Employment of Experts and Consultants; Temporary or Intermittent, 5 U.S.C. § 3109. Personal Services Contracts, 10 U.S.C. § 1091. Authority to Procure Personal Services, 10 U.S.C. § 129b. Employment Experts and Consultants; Temporary or Intermittent, 5 U.S.C. § 3109.

<sup>28</sup> FAR Subpart 37.101 Definitions, Current to: FAC 2005-96, November 6, 2017.

<sup>29</sup> FAR Subpart 2.101 Definitions, Current to: FAC 2005-96, November 6, 2017.

<sup>30</sup> FAR Subpart 37.104(a), Current to: FAC 2005-96, November 6, 2017.



Within a multisector workforce structure, contractor personnel perform alongside government personnel. A clear understanding of the supervision of contractor employees in this environment is necessary to ensure that a nonpersonal services contract does not inadvertently function as a personal services contract. Under nonpersonal services contracts, contractors are solely responsible for supervision of their employees. This arrangement necessitates a detailed definition of the supervisory functions provided by the contractor in contrast to the role of the government in providing direction and oversight to contractor employees. In general, government personnel may provide guidance and direction to contractor employees and approve work product (see 37 U.S.C. § 104c 1 ii); however, direction must not include functions such as recruitment, hiring, termination, compensation, and other functions.

## Findings

Numerous audits issued by GAO and the Inspector General (IG) address long-standing congressional concerns with federal agency processes for requirements determination, reporting mechanisms, and management of A&AS contracts.<sup>31</sup> These reports highlight challenges that federal agencies and DoD encounter with how they manage and track contracts for A&AS, KBS, and staff augmentation services within their organizations.<sup>32</sup>

Current acquisition policies are vague on the supervisory responsibilities of contractors providing contracted services support. Policies are also vague on the appropriate direction that government employees can provide to contractors performing under these contracts. This ambiguity has created confusion about the appropriate use of personal and nonpersonal service contracts. Providing clear and definitive guidance will streamline the requirements definition process and improve communication between the requiring activities, contracting organizations, and contractors performing these types of services.

The DFARS should include definitions for both KBS and staff augmentation services. Adopting these recommended regulatory changes would produce a clearer understanding of what is and is not a personal service or a nonpersonal service, what statutory authorities are necessary for the award of a personal services contract, and what type of direction government employees can provide contractor employees on nonpersonal services contracts.

## Conclusions

DoD acquires the contractor element of Total Force Management using contracted services, whether personal or nonpersonal.<sup>33</sup> In an effort to resolve confusion concerning the acquisition of personal or nonpersonal services, federal agencies and DoD continue to develop and implement a variety of policies and instructions aimed at improving vague definitions and existing guidance on data collection requirements for congressional reporting and internal spend analysis. These efforts have not fully addressed the challenges and confusion on this topic continues within the acquisition workforce. There is a need for updated and definitive guidance and policy on when contract services should be

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<sup>31</sup> GAO, *DoD Consulting Services: Erroneous Accounting and Reporting of Cost*, GAO/NSIAD-98-136, Appendix I: Selected Reports About A&AS Management and Reporting Problems, 12-14, accessed December 8, 2017, <http://www.gao.gov/assets/230/225673.pdf>.

<sup>32</sup> GAO, *Federal Contracting: Congressional Action Needed to Address Long-standing Problems with Reporting of Advisory and Assistance Services*, GAO-08-319, accessed December 8, 2017, <http://www.gao.gov/assets/280/274250.pdf>.

<sup>33</sup> Acquisition of Services, DoDI 5000.74 (2016). Policy and Procedures for Determining Workforce Mix, DoDI 1100.22 (2010).

acquired as either a personal or nonpersonal service. Furthermore, there is a need to clarify the supervisory responsibilities of contractors and the types of direction government employees may provide to contractors.

## **Implementation**

### ***Legislative Branch***

- No statutory changes are required.

### ***Executive Branch***

- Supplement FAR 37.102 Policy (under FAR 37.1 Service Contracts – General) by adding DFARS 237.201(j).
- Modify DFARS Subpart 237.5, Management Oversight of Service Contracts, to provide clarity on supervisory responsibilities of contractors performing contracted services. The modification includes deleting language in DFARS 237.503 and adding DFARS 237.504.
- Supplement FAR 37.203 Policy for A&AS by adding DFARS 237.203(e) to provide guidance that it is appropriate to use a personal services contract to acquire A&AS and KBS if the requirement is authorized by statute.
- Add a definition for Knowledge-Based Services (KBS) and Logistic Management Services at DFARS 237.101 Definitions.
- Update the DoD COR Handbook to incorporate these recommendations.
- Update DAU training to reflect these recommendations.

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

- The recommendations, as stated here, would have no implications for other agencies; however, civilian agencies would benefit from adopting these recommendations; thus, the Defense Acquisition Regulation Council should discuss implementation of these recommendations at the FAR level with the Civilian Agency Acquisition Council.



Supplement FAR 37.102 Policy (under FAR 37.1 Service Contracts – General) by adding DFARS 237.102 as proposed below:

## **SUBPART 237.1--SERVICE CONTRACTS--GENERAL**

### **237.102 Policy.**

(j) Supervision of employees in a nonpersonal services contract is the sole responsibility of the contractor and establishes the employer-employee relationship it has with its employees.

(1) Supervision includes the continuous employee management of recruitment, hiring, termination, compensation, benefits, career development, human resources management infrastructure, security clearance management, work location, contract assignment and evaluations of contractor employee.

(2) Government personnel are authorized, dependent on contract terms and conditions,

(i) to regularly assign work tasks and provide guidance on the completion of work products or services,

(ii) give an order for a specific article or service,

(iii) with the right to reject the finished product or results (See FAR 37.104(c)(1)(ii)).

Modify DFARS Subpart 237.5, Management Oversight of Service Contracts, to delete language in DFARS 237.503 and add DFARS 203.504.

## **SUBPART 237.5--MANAGEMENT OVERSIGHT OF SERVICE CONTRACTS**

### **237.503 Agency-head responsibilities.**

(c) The agency head or designee shall employ procedures to ensure that requirements for service contracts are vetted and approved as a safeguard to prevent contracts from being awarded or administered in a manner that constitutes an unauthorized personal services contract. Contracting officers shall follow the procedures at PGI [237.503](#), include substantially similar certifications in conjunction with service contract requirements, and place the certification in the contract file. The program manager or other official responsible for the requirement, at a level specified by the agency, should execute the certification. In addition, contracting officers and program managers should ~~remain aware of the descriptive elements at FAR 37.104(d)~~ be aware of the supervisory responsibilities of contractors described in DFARS 237.102(j) to ensure that a service contract does not inadvertently become administered as a personal-services contract. However, so long as the government is not performing supervisory functions (see DFARS 237.504) the descriptive elements in FAR 37.104(d) are not applicable to DoD.

### **237.504 Policy Related to Supervisory Responsibilities on Nonpersonal Services.**

Supervision of employees in a nonpersonal services contract is the sole responsibility of the contractor and establishes the employer-employee relationship it has with its employees. Government personnel shall refrain from exercising supervisory responsibilities for contractor personnel as delineated in DFARS 237.102(j) which are inconsistent with the employer-employee relationship the contractor has with its employees. Government personnel are authorized to regularly assign work tasks and provide guidance on the completion of work products or services, give an order for a specific article or service, with the right to reject the finished product or results (See FAR 37.104(c)(1)(ii)).

Add a definition for “Staff Augmentation” as established in 10 U.S.C. 2330a at DFARS 237.101, Definitions, and provide guidance on how staff augmentation requirements should be acquired at DFARS 237.2XX.

A definition, policy and procedures for the acquisition of A&AS are included in the FAR and DFARS. However, KBS is only described in the taxonomy DoD uses for the acquisition for services, supplies, and equipment to support strategic sourcing and is not included in FAR Subpart 37.2. Because the terms A&AS and KBS are used interchangeably, any differences between the two terms should be clarified that the policy for A&AS also applies to KBS.

Supplement FAR 37.203 Policy for A&AS by adding DFARS 237.203(e) as proposed below:

#### **DFARS SUBPART 237.2 – Advisory and Assistance Services**

237.203(e) Contracts for advisory and assistance services, knowledge-based services, and logistics management services, may be appropriate for personal services, but only if the requirement for the personal service is specifically authorized by statute. See DFARS 237.104 for the statutory authorities to acquire personal services.

Add a definition for Knowledge Based Services and Logistics Management Services at Subpart 237.101 Definitions as proposed below:

#### **SUBPART 237.1--SERVICE CONTRACTS--GENERAL**

##### **237.101 Definitions.**

“Knowledge Based Services (KBS) and Logistics Management Services are elements of Advisory and Assistance Services (A&AS) defined in FAR 2.101 Definitions and DFARS 237.102-74 Taxonomy for the acquisition of services, and supplies and equipment.”

Recommend guidance on how A&AS and KBS requirements should be acquired by adding the following for the acquisition of knowledge-based services and logistics management services in DFARS Subpart 237.2, Advisory and Assistance Services.

## **SUBPART 237.2--ADVISORY AND ASSISTANCE SERVICES**

### **237.2XX Acquisition of Knowledge-Based Services and Logistics Management Services**

As Knowledge-Based Services and Logistics Management Services are elements of Advisory and Assistance Services, follow the policies and procedures for advisory and assistance services as prescribed at FAR 37.2 and DFARS 237.2.

Add a definition for “Staff Augmentation” as established in 10 U.S.C. 2330a at DFARS 237.101 Definitions and provide guidance on how “staff augmentation” requirements should be acquired at DFARS 237.2XX.

## **SUBPART 237.1--SERVICE CONTRACTS--GENERAL**

### **237.101 Definitions.**

As used in this subpart—

“Staff Augmentation” contracts means services contracts for personnel who are physically present in a government work space on a full-time or permanent part-time basis, for the purpose of advising on, providing support to, or assisting a government agency in the performance of the agency’s mission, including authorized personal services contracts.”

## **SUBPART 237.2--ADVISORY AND ASSISTANCE SERVICES**

### **237.2XX Staff Augmentation Services**

Contracts for staff augmentation requirements can be either personal or nonpersonal services. Contracts for staff augmentation requirements shall follow the policies and procedures for Advisory and Assistance Services (A&AS) as prescribed at FAR 37.2 and DFARS 237.2.