

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

### Problem

The current regulatory and statutory distinction between personal and nonpersonal services is outdated and inconsistent with the multisector workforce management approaches used by the DoD and other federal agencies.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

### Background

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<sup>6</sup> *Ibid.*

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

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

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

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

### ***Critical Functions***

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

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

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

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

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

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

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

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

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

### **Personal Services Contracts**

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

### **Congressional Acts**

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

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

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

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

<sup>16</sup> Ibid.

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

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

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

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

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

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

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

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

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

### Comptroller General Decisions

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

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

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

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

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

### The Pellerzi Standards

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

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<sup>25</sup> Ibid.

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

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

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

<sup>29</sup> Ibid.

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

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

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

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

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

### Regulations on PSCs

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<sup>43</sup> Ibid.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid.

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

<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

### **Employer – Employee Relationship**

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<sup>63</sup> Ibid.

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

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

## Discussion

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

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

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

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

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

<sup>65</sup> Ibid.

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

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

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

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

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

## Conclusions

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

The distinction between PSCs and NPS contracts by:

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

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

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

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

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

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

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

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

## Implementation

### **Legislative Branch**

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

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

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

### ***Executive Branch***

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

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

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

## RECOMMENDED REPORT LANGUAGE

### SEC. XXX. Elimination of Distinction between Personal Services Contracts and Other Types of Services Contracts.

This section would eliminate the statutory distinction between personal services contracts and other types of contracts for services to remove confusion between such contracts and simplify bureaucracy.

Currently section 3109 of title 5, United States Code, authorizes an agency to “procure by contract” temporary or intermittent services of experts and consultants authorized by appropriation or other statute. The committee is aware that “procure by contract” has caused confusion in the potential creation of employer-employee relationships. However, the committee notes that removing the distinction will reinforce the supervisory relationship between the contractor and its employees, and that contractual terms and conditions will define the legal relationship between the government and its contractors. The committee notes that prohibitions on contractor performance of inherently governmental functions will remain in place as well as requirements on organizational conflicts of interest and personal conflicts of interest, and the need for agencies to identify and fully resource the performance of critical functions by government employees.

This section also would add a corresponding new section 3907 to title 41, United States Code, to state expressly that contracts for services similar to those covered by section 3109 or other contracts previously known as personal services contracts may be made on the same basis as other contracts for services.

This section would make several conforming amendments to titles 10 and 41, United States Code, including repeal of section 129b, title 10, United States Code, and revisions to section 1091, title 10, United States Code, since separate authority to enter into contracts would not be needed.

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**[NOTE: The draft legislative text below is followed by a “Sections Affected” display, showing in “redline” form how the text of current provisions of law would be affected by the draft legislative text.]**

1 **SEC. \_\_\_\_ . ELIMINATION OF DISTINCTION BETWEEN PERSONAL SERVICES**  
2 **CONTRACTS AND OTHER TYPES OF SERVICES CONTRACTS.**

3 **(a) New TITLE 41 SECTION.—**

4 (1) IN GENERAL.—Chapter 39 of **title 41**, United States Code, is amended by  
5 adding at the end the following new section:

6 **“§ 3907. Contracts for services**

7 “(a) GENERAL RULE.—A contract for services of experts or consultants, including  
8 stenographic services, and any other contract for services that is of a type that on the day before  
9 the date of the enactment of this section was considered to be a ‘personal services contract’—

10 “(1) may be entered into on the same basis as any other contract for services; and

11 “(2) is not subject to any requirement for specific authorization in an  
12 appropriation or other statute.

13 “(b) REFERENCES IN OTHER LAWS.—Any provision of law in effect on the date of the  
14 enactment of this section that refers to authority to procure services, or to enter into a contract,  
15 under section 3109 of title 5 is superseded by this section.”.

16 (2) CLERICAL AMENDMENT.—The table of sections at the beginning of such  
17 chapter is amended by adding at the end the following new item:

“3907. Contracts for services.”.

18 **(b) REPEAL OF APPLICABILITY OF SECTION 3109 OF TITLE 5 TO CONTRACTS.—**



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1 (1) APPLICABILITY TO EMPLOYMENT ONLY.—Section **3109(b) of title 5**, United  
2 States Code, is amended—

3 (A) in the first sentence—

4 (i) by striking “may procure by contract the” and inserting “may  
5 employ experts or consultants to provide”; and

6 (ii) by striking “experts or consultants or an organization thereof”;

7 (B) in the second sentence—

8 (i) by striking “Services procured under this section are” and  
9 inserting “Employment under this section is”;

10 (ii) by inserting “and” at the end of paragraph (1);

11 (iii) by striking “; and” at the end of paragraph (2) and inserting a  
12 period; and

13 (iv) by striking paragraph (3); and

14 (C) in the last sentence, by striking “the procurement of the services” and  
15 inserting “such employment”.

16 (2) CONFORMING REPEALS OF TITLE 5 “NOTE” SECTIONS.—The following  
17 provisions of law are **repealed**:

18 (A) Section 401 of the Department of the Interior, Environment, and  
19 Related Agencies Appropriations Act, 2014 (division G of Public Law 113–76; **5**  
20 **U.S.C. 3109 note**).

21 (B) Section 501 of the Departments of Labor, Health and Human Services,  
22 and Education, and Related Agencies Appropriations Act, 1993 (Public Law 102-  
23 **394; 5 U.S.C. 3109 note**).

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1 (C) Section 504 of the Energy and Water Development Appropriations  
2 Act, 1993 (Public Law 102-377; **5 U.S.C. 3109 note**).

3 (c) TITLE 10 GENERALLY. —

4 (1) REPEAL OF GENERAL PERSONAL SERVICES CONTRACT AUTHORITY.—Section  
5 **129b** of title 10, United States Code, is **repealed**.

6 (2) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 3  
7 of such title is amended by striking the item relating to section 129b.

8 (d) TITLE 10 HEALTH SERVICES PROVIDERS. —

9 (1) REPEAL OF SEPARATE CONTRACTING AUTHORITY.—Section **1091** of title 10,  
10 United States Code, is **amended to read as follows**:

11 **“§1091. Services contracts for health care responsibilities**

12 “For purposes of sections 1089 and 1094 of this title (and any other provision of law  
13 referring to a contract under this section), a services contract described in this section is a  
14 services contract entered into by the Secretary of Defense or the Secretary of Homeland Security,  
15 with respect to the Coast Guard when the Coast Guard is not operating as a service in the Navy,  
16 to —

17 “(1) carry out health care responsibilities in medical treatment facilities under the  
18 jurisdiction of that Secretary, as determined to be necessary by the Secretary; or

19 “(2) carry out other health care responsibilities of the Secretary (such as the  
20 provision of medical screening examinations at Military Entrance Processing Stations) at  
21 locations outside medical treatment facilities, as determined necessary pursuant to  
22 regulations prescribed by the Secretary.”.

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### (2) CONFORMING AMENDMENTS RELATING TO TITLE 10 HEALTH CARE

#### AUTHORITIES.—

(A) Section **1072(4)** of title 10, United States Code, is amended by striking “contracts entered into under section 1091 or 1097 of this title” and inserting “contracts described in section 1091 of this title or entered into under section 1097 of this title”.

(B) Section **1089(a)** of such title is amended in the last sentence—

(i) by striking “personal services contract entered into under” and inserting “services contract described in”; and

(ii) by striking “that is authorized in accordance with the requirements of such section 1091”.

(C) Section **1094(d)(2)** of such title is amended by striking “personal services contractor under” and inserting “health-care professional serving under a services contract described in”.

(D) Section 704(c) of the National Defense Authorization Act for Fiscal Year 1995 (Public Law 103-337; **10 U.S.C. 1091 note**) is **repealed**.

(e) Section 1601(e) of the National Defense Authorization Act for Fiscal Year 2004 (Public Law 108-136; **10 U.S.C. 2358 note**) is **repealed**.

(e) OTHER AMENDMENTS TO TITLE 10.—Title 10, United States Code, is amended as follows:

(1) Section **2207(a)** is amended by striking “other than a contract for personal services”.

(2) Section **2209(b)** is amended by striking “, personal services,”.

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1 (3) Section **2324(k)** is amended—

2 (A) by striking “, or personal services contractor” each place it appears;

3 and

4 (B) by striking “, subcontract, or personal services contract” each place it  
5 appears and inserting “or subcontract”.

6 (4) Section **2330a** is amended—

7 (A) in subsection (c)(2), by striking subparagraph (F);

8 (B) in subsection (d)(2)—

9 (i) by striking subparagraph (A); and

10 (ii) by redesignating subparagraphs (B) and (C) as subparagraphs

11 (A) and (B), respectively;

12 (C) by striking subsection (g); and

13 (D) in subsection (h)—

14 (i) by striking paragraph (4); and

15 (ii) in paragraph (6), by striking “, including” and all the follows in  
16 that paragraph and inserting a period.

17 (5) Section **2409(a)(1)** is amended by striking “or personal services contractor”  
18 and inserting “or an individual who is a services contractor”.

19 (6) Sections **9446(a)(1)** and **9448(b)(3)** are amended by striking “personal”.

20 **(f) OTHER AMENDMENTS TO TITLE 41.**—Title 41, United States Code, is amended as  
21 follows:

22 (1) Section **4304(a)(15)** is amended by striking “, or personal service contractor”.

23 (2) Section **4310** is amended—

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- 1 (A) by striking “, subcontractor, or personal services contractor” each  
2 place it appears and inserting “or subcontractor”; and
- 3 (B) by striking “, subcontract, or personal services contract” each place it  
4 appears and inserting “or subcontract”.
- 5 (5) Section **4712(a)(1)** is amended by striking “or personal services contractor”  
6 and inserting “or an individual who is a services contractor”.
- 7 (g) EFFECTIVE DATE.—The amendments made by this section shall apply with respect to  
8 contracts entered into after the date of the enactment of this Act.

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## SECTIONS AFFECTED BY THE PROPOSAL

[Matter proposed to be deleted is shown in ~~stricken through~~ text; matter to be inserted is shown in *bold italic*.]

### Title 5, United States Code

#### §3109. Employment of experts and consultants; temporary or intermittent

(a) For the purpose of this section—

- (1) "agency" has the meaning given it by section 5721 of this title; and
- (2) "appropriation" includes funds made available by statute under section 9104 of title 31.

(b) When authorized by an appropriation or other statute, the head of an agency may ~~procure by contract the~~ ***employ experts or consultants to provide*** temporary (not in excess of 1 year) or intermittent services ~~of experts or consultants or an organization thereof, including stenographic reporting services. Services procured~~ ***Employment*** under this section ~~are~~ ***is*** without regard to—

- (1) the provisions of this title governing appointment in the competitive service; ***and***
- (2) chapter 51 and subchapter III of chapter 53 of this title; ~~and~~ .
- (3) ~~section 6101(b) to (d) of title 41, except in the case of stenographic reporting services by an organization.~~

However, an agency subject to chapter 51 and subchapter III of chapter 53 of this title may pay a rate for services under this section in excess of the daily equivalent of the highest rate payable under section 5332 of this title only when specifically authorized by the appropriation or other statute authorizing ~~the procurement of the services~~ ***such employment***.

(c) Positions in the Senior Executive Service or the Federal Bureau of Investigation and Drug Enforcement Administration Senior Executive Service may not be filled under the authority of subsection (b) of this section.

(d) The Office of Personnel Management shall prescribe regulations necessary for the administration of this section. Such regulations shall include-

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- (1) criteria governing the circumstances in which it is appropriate to employ an expert or consultant under the provisions of this section;
  - (2) criteria for setting the pay of experts and consultants under this section; and
  - (3) provisions to ensure compliance with such regulations.
- (e) Each agency shall report to the Office of Personnel Management on an annual basis with respect to—
- (1) the number of days each expert or consultant employed by the agency during the period was so employed; and
  - (2) the total amount paid by the agency to each expert and consultant for such work during the period.

### Title 10, United States Code

#### ~~§129b. Authority to procure personal services~~

~~(a) AUTHORITY. Subject to subsection (b), the Secretary of Defense and the Secretaries of the military departments may—~~

~~(1) procure the services of experts or consultants (or of organizations of experts or consultants) in accordance with section 3109 of title 5; and~~

~~(2) pay in connection with such services travel expenses of individuals, including transportation and per diem in lieu of subsistence while such individuals are traveling from their homes or places of business to official duty stations and return as may be authorized by law.~~

~~(b) CONDITIONS. The services of experts or consultants (or organizations thereof) may be procured under subsection (a) only if the Secretary of Defense or the Secretary of the military department concerned, as the case may be, determines that—~~

~~(1) the procurement of such services is advantageous to the United States; and~~

~~(2) such services cannot adequately be provided by the Department of Defense.~~

~~(c) REGULATIONS. Procurement of the services of experts and consultants (or organizations thereof) under subsection (a) shall be carried out under regulations prescribed by the Secretary of Defense.~~

~~(d) ADDITIONAL AUTHORITY FOR PERSONAL SERVICES CONTRACTS. (1) In addition to the authority provided under subsection (a), the Secretary of Defense may enter into personal services contracts if the personal services—~~

~~(A) are to be provided by individuals outside the United States, regardless of their nationality, and are determined by the Secretary to be necessary and appropriate for supporting the activities and programs of the Department of Defense outside the United States;~~

~~(B) directly support the mission of a defense intelligence component or counter-intelligence organization of the Department of Defense; or~~

~~(C) directly support the mission of the special operations command of the Department of Defense.~~

~~(2) The contracting officer for a personal services contract under this subsection shall be responsible for ensuring that—~~

~~(A) the services to be procured are urgent or unique; and~~

~~(B) it would not be practicable for the Department to obtain such services by other means.~~

~~(3) The requirements of section 3109 of title 5 shall not apply to a contract entered into under this subsection.~~

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### §1072. Definitions

In this chapter:

(1) \*\*\*

\*\*\*\*\*

(4) The term “Civilian Health and Medical Program of the Uniformed Services” means the program authorized under sections 1079 and 1086 of this title and includes contracts ~~entered into under~~ *described in* section 1091 *of this title* or *entered into under section 1097* of this title and demonstration projects under section 1092 of this title.

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### §1089. Defense of certain suits arising out of medical malpractice

(a) The remedy against the United States provided by sections 1346(b) and 2672 of title 28 for damages for personal injury, including death, caused by the negligent or wrongful act or omission of any physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (including medical and dental technicians, nursing assistants, and therapists) of the armed forces, the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32, the Department of Defense, the Armed Forces Retirement Home, or the Central Intelligence Agency in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of his duties or employment therein or therefor shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against such physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (or the estate of such person) whose act or omission gave rise to such action or proceeding. This subsection shall also apply to such a physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (or the estate of such person) serving under a **personal** services contract ~~entered into under~~ *described in* section 1091 of this title or a subcontract at any tier under such a contract ~~that is authorized in accordance with the requirements of such section 1091.~~

(b) The Attorney General shall defend any civil action or proceeding brought in any court against any person referred to in subsection (a) of this section (or the estate of such person) for any such injury. Any such person against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon such person or an attested true copy thereof to such person's immediate superior or to whomever was designated by the head of the agency concerned to receive such papers and such person shall promptly furnish copies of the pleading and process therein to the United States attorney for the district embracing the place wherein the action or proceeding is brought, to the Attorney General and to the head of the agency concerned.

(c) Upon a certification by the Attorney General that any person described in subsection (a) was acting in the scope of such person's duties or employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States of the district and division embracing the place wherein it is pending and the

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proceeding deemed a tort action brought against the United States under the provisions of title 28 and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (a) of this section is not available against the United States, the case shall be remanded to the State court.

(d) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677 of title 28, and with the same effect.

(e) For purposes of this section, the provisions of section 2680(h) of title 28 shall not apply to any cause of action arising out of a negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations).

(f)(1) The head of the agency concerned may, to the extent that the head of the agency concerned considers appropriate, hold harmless or provide liability insurance for any person described in subsection (a) for damages for personal injury, including death, caused by such person's negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of such person's duties if such person is assigned to a foreign country or detailed for service with other than a Federal department, agency, or instrumentality or if the circumstances are such as are likely to preclude the remedies of third persons against the United States described in section 1346(b) of title 28, for such damage or injury.

(2) With respect to the Secretary of Defense and the Armed Forces Retirement Home Board, the authority provided by paragraph (1) also includes the authority to provide for reasonable attorney's fees for persons described in subsection (a), as determined necessary pursuant to regulations prescribed by the head of the agency concerned.

(g) In this section, the term “head of the agency concerned” means—

(1) the Director of the Central Intelligence Agency, in the case of an employee of the Central Intelligence Agency;

(2) the Secretary of Homeland Security, in the case of a member or employee of the Coast Guard when it is not operating as a service in the Navy;

(3) the Chief Operating Officer of the Armed Forces Retirement Home, in the case of an employee of the Armed Forces Retirement Home; and

(4) the Secretary of Defense, in all other cases.

\*\*\*\*\*

### **~~§1091. Personal services contracts~~ *Services contracts for health care responsibilities***

*For purposes of sections 1089 and 1094 of this title (and any other provision of law referring to a contract under this section), a services contract described in this section is a services contract entered into by the Secretary of Defense or the Secretary of Homeland Security, with respect to the Coast Guard when the Coast Guard is not operating as a service in the Navy, to —*

*(1) carry out health care responsibilities in medical treatment facilities under the jurisdiction of that Secretary, as determined to be necessary by the Secretary; or*

*(2) carry out other health care responsibilities of the Secretary (such as the provision of medical screening examinations at Military Entrance Processing Stations)*



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*at locations outside medical treatment facilities, as determined necessary pursuant to regulations prescribed by the Secretary.*

~~(a) AUTHORITY.—(1) The Secretary of Defense, with respect to medical treatment facilities of the Department of Defense, and the Secretary of Homeland Security, with respect to medical treatment facilities of the Coast Guard when the Coast Guard is not operating as a service in the Navy, may enter into personal services contracts to carry out health care responsibilities in such facilities, as determined to be necessary by the Secretary. The authority provided in this subsection is in addition to any other contract authorities of the Secretary, including authorities relating to the management of such facilities and the administration of this chapter.~~

~~(2) The Secretary of Defense, and the Secretary of Homeland Security with respect to the Coast Guard when it is not operating as a service in the Navy, may also enter into personal services contracts to carry out other health care responsibilities of the Secretary (such as the provision of medical screening examinations at Military Entrance Processing Stations) at locations outside medical treatment facilities, as determined necessary pursuant to regulations prescribed by the Secretary.~~

~~(b) LIMITATION ON AMOUNT OF COMPENSATION.— In no case may the total amount of compensation paid to an individual in any year under a personal services contract entered into under subsection (a) exceed the amount of annual compensation (excluding the allowances for expenses) specified in section 102 of title 3.~~

~~(c) PROCEDURES.—(1) The Secretary shall establish by regulation procedures for entering into personal services contracts with individuals under subsection (a). At a minimum, such procedures shall assure—~~

~~(A) the provision of adequate notice of contract opportunities to individuals residing in the area of the medical treatment facility involved; and~~

~~(B) consideration of interested individuals solely on the basis of the qualifications established for the contract and the proposed contract price.~~

~~(2) Upon the establishment of the procedures under paragraph (1), the Secretary may exempt contracts covered by this section from the competitive contracting requirements specified in section 2304 of this title or any other similar requirements of law.~~

~~(3) The procedures established under paragraph (1) may provide for a contracting officer to authorize a contractor to enter into a subcontract for personal services on behalf of the agency upon a determination that the subcontract is—~~

~~(A) consistent with the requirements of this section and the procedures established under paragraph (1); and~~

~~(B) in the best interests of the agency.~~

~~(d) EXCEPTIONS.— The procedures and exemptions provided under subsection (c) shall not apply to personal services contracts entered into under subsection (a) with entities other than individuals or to any contract that is not an authorized personal services contract under subsection (a).~~

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### §1094. Licensure requirement for health-care professionals

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(a)(1) A person under the jurisdiction of the Secretary of a military department may not provide health care independently as a health-care professional under this chapter unless the person has a current license to provide such care. In the case of a physician, the physician may not provide health care as a physician under this chapter unless the current license is an unrestricted license that is not subject to limitation on the scope of practice ordinarily granted to other physicians for a similar specialty by the jurisdiction that granted the license.

(2) The Secretary of Defense may waive paragraph (1) with respect to any person in unusual circumstances. The Secretary shall prescribe by regulation the circumstances under which such a waiver may be granted.

(b) The commanding officer of each health care facility of the Department of Defense shall ensure that each person who provides health care independently as a health-care professional at the facility meets the requirement of subsection (a).

(c)(1) A person (other than a person subject to chapter 47 of this title) who provides health care in violation of subsection (a) is subject to a civil money penalty of not more than \$5,000.

(2) The provisions of subsections (c) and (e) through (h) of section 1128A of the Social Security Act (42 U.S.C. 1320a–7a) shall apply to the imposition of a civil money penalty under paragraph (1) in the same manner as they apply to the imposition of a civil money penalty under that section, except that for purposes of this subsection—

(A) a reference to the Secretary in that section is deemed a reference to the Secretary of Defense; and

(B) a reference to a claimant in subsection (e) of that section is deemed a reference to the person described in paragraph (1).

(d)(1) Notwithstanding any law regarding the licensure of health care providers, a health-care professional described in paragraph (2) or (3) may practice the health profession or professions of the health-care professional at any location in any State, the District of Columbia, or a Commonwealth, territory, or possession of the United States, regardless of where such health-care professional or the patient are located, so long as the practice is within the scope of the authorized Federal duties.

(2) A health-care professional referred to in paragraph (1) as being described in this paragraph is a member of the armed forces, civilian employee of the Department of Defense, **personal services contractor under health-care professional serving under a services contract described in** section 1091 of this title, or other health-care professional credentialed and privileged at a Federal health care institution or location specially designated by the Secretary for this purpose who—

(A) has a current license to practice medicine, osteopathic medicine, dentistry, or another health profession; and

(B) is performing authorized duties for the Department of Defense.

(3) A health-care professional referred to in paragraph (1) as being described in this paragraph is a member of the National Guard who—

(A) has a current license to practice medicine, osteopathic medicine, dentistry, or another health profession; and

(B) is performing training or duty under section 502(f) of title 32 in response to an actual or potential disaster.

(e) In this section:

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(1) The term “license”—

(A) means a grant of permission by an official agency of a State, the District of Columbia, or a Commonwealth, territory, or possession of the United States to provide health care independently as a health-care professional; and

(B) includes, in the case of such care furnished in a foreign country by any person who is not a national of the United States, a grant of permission by an official agency of that foreign country for that person to provide health care independently as a health-care professional.

(2) The term “health-care professional” means a physician, dentist, clinical psychologist, marriage and family therapist certified as such by a certification recognized by the Secretary of Defense, or nurse and any other person providing direct patient care as may be designated by the Secretary of Defense in regulations.

\* \* \* \* \*

### §2207. Expenditure of appropriations: limitation

(a) Money appropriated to the Department of Defense may not be spent under a contract ~~other than a contract for personal services~~ unless that contract provides that—

(1) the United States may, by written notice to the contractor, terminate the right of the contractor to proceed under the contract if the Secretary concerned or his designee finds, after notice and hearing, that the contractor, or his agent or other representative, offered or gave any gratuity, such as entertainment or a gift, to an officer, official, or employee of the United States to obtain a contract or favorable treatment in the awarding, amending, or making of determinations concerning the performance, of a contract; and

(2) if a contract is terminated under clause (1), the United States has the same remedies against the contractor that it would have had if the contractor had breached the contract and, in addition to other damages, is entitled to exemplary damages in an amount at least three, but not more than 10, as determined by the Secretary or his designee, times the cost incurred by the contractor in giving gratuities to the officer, official, or employee concerned.

The existence of facts upon which the Secretary makes findings under clause (1) may be reviewed by any competent court.

(b) This section does not apply to a contract that is for an amount not greater than the simplified acquisition threshold (as defined in section 134 of title 41).

### §2209. Management funds

(a) To conduct economically and efficiently the operations of the Department of Defense that are financed by at least two appropriations but whose costs cannot be immediately distributed and charged to those appropriations, there is the Army Management Fund, the Navy Management Fund, and the Air Force Management Fund, each within its respective department and under the direction of the Secretary of that department. Each such fund shall consist of a corpus of \$1,000,000 and such amounts as may be appropriated thereto from time to time. An account for an operation that is to be financed by such a fund may be established only with the approval of the Secretary of Defense.

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(b) Under such regulations as the Secretary of Defense may prescribe, expenditures may be made from a management fund for material (other than for stock), ~~personal services,~~ and services under contract. However, obligation may not be incurred against that fund if it is not chargeable to funds available under an appropriation of the department concerned or funds of another department or agency of the Department of Defense. The fund shall be promptly reimbursed from those funds for expenditures made from it.

(c) Notwithstanding any other provision of law, advances, by check or warrant, or reimbursements, may be made from available appropriations to a management fund on the basis of the estimated cost of a project. As adequate data becomes available, the estimated cost shall be revised and necessary adjustments made. Final adjustment shall be made with the appropriate funds for the fiscal year in which the advances or reimbursements are made. Except as otherwise provided by law, amounts advanced to management funds are available for obligation only during the fiscal year in which they are advanced.

\* \* \* \* \*

### §2324. Allowable costs under defense contracts

(a) \*\*\*

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(k) PROCEEDING COSTS NOT ALLOWABLE.—(1) Except as otherwise provided in this subsection, costs incurred by a contractor or subcontractor, ~~or personal services contractor~~ in connection with any criminal, civil, or administrative proceeding commenced by the United States, by a State, or by a contractor or subcontractor, ~~or personal services contractor~~ employee submitting a complaint under section 2409 of this title are not allowable as reimbursable costs under a covered contract, *or* subcontract, ~~or personal services contract~~ if the proceeding (A) relates to a violation of, or failure to comply with, a Federal or State statute or regulation or to any other activity described in subparagraphs (A) through (C) of section 2409(a)(1) of this title, and (B) results in a disposition described in paragraph (2).

(2) A disposition referred to in paragraph (1)(B) is any of the following:

(A) In the case of a criminal proceeding, a conviction (including a conviction pursuant to a plea of nolo contendere) by reason of the violation or failure referred to in paragraph (1).

(B) In the case of a civil or administrative proceeding involving an allegation of fraud or similar misconduct, a determination of contractor or subcontractor, ~~or personal services contractor~~ liability on the basis of the violation or failure referred to in paragraph (1).

(C) In the case of any civil or administrative proceeding, the imposition of a monetary penalty or an order to take corrective action under section 2409 of this title by reason of the violation or failure referred to in paragraph (1).

(D) A final decision-

(i) to debar or suspend the contractor or subcontractor, ~~or personal services contractor~~;

(ii) to rescind or void the contract, ~~subcontract, or personal services contract~~ *or subcontract*; or

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(iii) to terminate the contract, ~~subcontract, or personal services contract~~ **or subcontract** for default;

by reason of the violation or failure referred to in paragraph (1).

(E) A disposition of the proceeding by consent or compromise if such action could have resulted in a disposition described in subparagraph (A), (B), (C), or (D).

(3) In the case of a proceeding referred to in paragraph (1) that is commenced by the United States and is resolved by consent or compromise pursuant to an agreement entered into by a contractor or subcontractor, ~~or personal services contractor~~ and the United States, the costs incurred by the contractor or subcontractor, ~~or personal services contractor~~ in connection with such proceeding that are otherwise not allowable as reimbursable costs under such paragraph may be allowed to the extent specifically provided in such agreement.

(4) In the case of a proceeding referred to in paragraph (1) that is commenced by a State, the head of the agency or Secretary of the military department concerned that awarded the covered contract, ~~subcontract, or personal services contract~~ **or subcontract** involved in the proceeding may allow the costs incurred by the contractor or subcontractor, ~~or personal services contractor~~ in connection with such proceeding as reimbursable costs if the agency head or Secretary determines, in accordance with the Federal Acquisition Regulation, that the costs were incurred as a result of (A) a specific term or condition of the contract, ~~subcontract, or personal services contract~~ **or subcontract**, or (B) specific written instructions of the agency or military department.

(5)(A) Except as provided in subparagraph (C), costs incurred by a contractor or subcontractor, ~~or personal services contractor~~ in connection with a criminal, civil, or administrative proceeding commenced by the United States or a State in connection with a covered contract, ~~subcontract, or personal services contract~~ **or subcontract** may be allowed as reimbursable costs under the contract, ~~subcontract, or personal services contract~~ **or subcontract** if such costs are not disallowable under paragraph (1), but only to the extent provided in subparagraph (B).

(B)(i) The amount of the costs allowable under subparagraph (A) in any case may not exceed the amount equal to 80 percent of the amount of the costs incurred, to the extent that such costs are determined to be otherwise allowable and allocable under the Federal Acquisition Regulation.

(ii) Regulations issued for the purpose of clause (i) shall provide for appropriate consideration of the complexity of procurement litigation, generally accepted principles governing the award of legal fees in civil actions involving the United States as a party, and such other factors as may be appropriate.

(C) In the case of a proceeding referred to in subparagraph (A), contractor or subcontractor, ~~or personal services contractor~~ costs otherwise allowable as reimbursable costs under this paragraph are not allowable if (i) such proceeding involves the same contractor or subcontractor, ~~or personal services contractor~~ misconduct alleged as the basis of another criminal, civil, or administrative proceeding, and (ii) the costs of such other proceeding are not allowable under paragraph (1).

(6) In this subsection:

(A) The term "proceeding" includes an investigation.

(B) The term "costs", with respect to a proceeding-

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(i) means all costs incurred by a contractor or subcontractor, ~~or personal services contractor~~, whether before or after the commencement of any such proceeding; and

(ii) includes-

(I) administrative and clerical expenses;

(II) the cost of legal services, including legal services performed by an employee of the contractor or subcontractor, ~~or personal services contractor~~;

(III) the cost of the services of accountants and consultants retained by the contractor or subcontractor, ~~or personal services contractor~~; and

(IV) the pay of directors, officers, and employees of the contractor or subcontractor, ~~or personal services contractor~~ for time devoted by such directors, officers, and employees to such proceeding.

(C) The term "penalty" does not include restitution, reimbursement, or compensatory damages.

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### **§2330a. Procurement of services: tracking of purchases**

(a) DATA COLLECTION REQUIRED.—The Secretary of Defense shall establish a data collection system to provide management information with regard to each purchase of services by a military department or Defense Agency in excess of \$3,000,000, regardless of whether such a purchase is made in the form of a contract, task order, delivery order, military interdepartmental purchase request, or any other form of interagency agreement, for services in the following service acquisition portfolio groups:

- (1) Logistics management services.
- (2) Equipment related services.
- (3) Knowledge-based services.
- (4) Electronics and communications services.

(b) DATA TO BE COLLECTED.—The data required to be collected under subsection (a) includes the following:

- (1) The services purchased.
- (2) The total dollar amount of the purchase.
- (3) The form of contracting action used to make the purchase.
- (4) Whether the purchase was made through—
  - (A) a performance-based contract, performance-based task order, or other performance-based arrangement that contains firm fixed prices for the specific tasks to be performed;
  - (B) any other performance-based contract, performance-based task order, or performance-based arrangement; or
  - (C) any contract, task order, or other arrangement that is not performance based.
- (5) In the case of a purchase made through an agency other than the Department of Defense, the agency through which the purchase is made.
- (6) The extent of competition provided in making the purchase and whether there was more than one offer.

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- (7) Whether the purchase was made from—
  - (A) a small business concern;
  - (B) a small business concern owned and controlled by socially and economically disadvantaged individuals; or
  - (C) a small business concern owned and controlled by women.

(c) Inventory Summary.—(1) Not later than the end of the third quarter of each fiscal year, the Secretary of Defense shall prepare an annual inventory, and submit to Congress a summary of the inventory, of activities performed during the preceding fiscal year pursuant to staff augmentation contracts on behalf of the Department of Defense. The guidance for compiling the inventory shall be issued by the Under Secretary of Defense for Personnel and Readiness, the Under Secretary of Defense (Comptroller), and the Under Secretary of Defense for Acquisition, Technology, and Logistics, as follows:

(A) The Under Secretary of Defense for Personnel and Readiness, as supported by the Under Secretary of Defense (Comptroller), shall be responsible for developing guidance for—

- (i) the collection of data regarding functions and missions performed by contractors in a manner that is comparable to the manpower data elements used in inventories of functions performed by Department of Defense employees;
- (ii) the calculation of contractor full-time equivalents for direct labor, using direct labor hours in a manner that is comparable to the calculation of Department of Defense civilian full-time employees; and
- (iii) the conduct and completion of the annual review required under subsection (e)(1).

(B) The Under Secretary of Defense for Acquisition, Technology, and Logistics shall be responsible for developing guidance on other data elements and implementing procedures for requirements relating to acquisition.

(2) The entry for an activity on an inventory under this subsection shall include, for the fiscal year covered by such entry, the following:

(A) The functions and missions performed by the contractor.

(B) The contracting organization, the component of the Department of Defense administering the contract, and the organization whose requirements are being met through contractor performance of the function.

(C) The funding source for the contract under which the function is performed by appropriation and operating agency.

(D) The fiscal year for which the activity first appeared on an inventory under this section.

(E) The number of contractor employees, expressed as full-time equivalents for direct labor, using direct labor hours and associated cost data collected from contractors (except that estimates may be used where such data is not available and cannot reasonably be made available in a timely manner for the purpose of the inventory).

~~(F) A determination whether the contract pursuant to which the activity is performed is a personal services contract.~~

(G) A summary of the data required to be collected for the activity under subsection (a).

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(3) The inventory required under this subsection shall be submitted in unclassified form, but may include a classified annex.

(d) Review and Planning Requirements.—Within 90 days after the date on which an inventory is submitted under subsection (c), the Secretary of the military department or head of the Defense Agency responsible for activities in the inventory shall—

(1) review the contracts and activities in the inventory for which such Secretary or agency head is responsible, with particular focus and attention on the following categories of high-risk product service codes (also referred to as Federal supply codes):

(A) Special studies or analysis that is not research and development.

(B) Information technology and telecommunications.

(C) Support, including professional, administrative, and management;

(2) ensure that—

~~(A) each contract on the list that is a personal services contract has been entered into, and is being performed, in accordance with applicable statutory and regulatory requirements;~~

~~(B)~~ (A) the activities on the list do not include any inherently governmental functions; and

~~(C)~~ (B) to the maximum extent practicable, the activities on the list do not include any functions closely associated with inherently governmental functions; and

(3) identify activities that should be considered for conversion—

(A) to performance by civilian employees of the Department of Defense pursuant to section 2463 of this title; or

(B) to an acquisition approach that would be more advantageous to the Department of Defense.

(e) Development of Plan and Enforcement and Approval Mechanisms.—The Secretary of the military department or head of the Defense Agency responsible for activities in the inventory shall develop a plan, including an enforcement mechanism and approval process, to-

(1) provide for the use of the inventory by the military department or Defense Agency to implement the requirements of section 129a of this title;

(2) ensure the inventory is used to inform strategic workforce planning;

(3) facilitate use of the inventory for compliance with section 235 of this title; and

(4) provide for appropriate consideration of the conversion of activities identified under subsection (e)(3) within a reasonable period of time.

(f) Comptroller General Report.—Not later than March 31, 2018, the Comptroller General of the United States shall submit to the congressional defense committees a report on the status of the data collection required in subsection (a) and an assessment of the efforts by the Department of Defense to implement subsection (e).

~~(g) Rule of Construction.—Nothing in this section shall be construed to authorize the performance of personal services by a contractor except where expressly authorized by a provision of law other than this section.~~

(h) Definitions.—In this section:

(1) Performance-based.—The term "performance-based", with respect to a contract, task order, or arrangement, means that the contract, task order, or arrangement,



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respectively, includes the use of performance work statements that set forth contract requirements in clear, specific, and objective terms with measurable outcomes.

(2) Function closely associated with inherently governmental functions.—The term "function closely associated with inherently governmental functions" has the meaning given that term in section 2383(b)(3) of this title.

(3) Inherently governmental functions.—The term "inherently governmental functions" has the meaning given that term in section 2383(b)(2) of this title.

~~(4) Personal services contract.—The term "personal services contract" means a contract under which, as a result of its terms or conditions or the manner of its administration during performance, contractor personnel are subject to the relatively continuous supervision and control of one or more Government officers or employees, except that the giving of 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 makes a contract a personal services contract.~~

(5) Service acquisition portfolio groups.—The term "service acquisition portfolio groups" means the groups identified in Department of Defense Instruction 5000.74, Defense Acquisition of Services (January 5, 2016) or successor guidance.

(6) Staff augmentation contracts.—The term "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 missions, ~~including authorized personal services contracts (as that term is defined in section 2330a(g)(5) of this title).~~

(7) Simplified acquisition threshold.—The term "simplified acquisition threshold" has the meaning given the term in section 134 of title 41.

(8) Small business act definitions.—

(A) The term "small business concern" has the meaning given such term under section 3 of the Small Business Act (15 U.S.C. 632).

(B) The terms "small business concern owned and controlled by socially and economically disadvantaged individuals" and "small business concern owned and controlled by women" have the meanings given such terms, respectively, in section 8(d)(3) of the Small Business Act (15 U.S.C. 637(d)(3)).

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### **§2409. Contractor employees: protection from reprisal for disclosure of certain information**

(a) PROHIBITION OF REPRISALS.—(1) An employee of a contractor, subcontractor, grantee, or subgrantee ~~or personal services contractor~~ **or an individual who is a services contractor** may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to a person or body described in paragraph (2) information that the employee reasonably believes is evidence of the following:

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### **§9446. Miscellaneous personnel authorities**

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(a) USE OF RETIRED AIR FORCE PERSONNEL.—(1) Upon the request of a person retired from service in the Air Force, the Secretary of the Air Force may enter into a ~~personal~~ services contract with that person providing for the person to serve as an administrator or liaison officer for the Civil Air Patrol. The qualifications of a person to provide the services shall be determined and approved in accordance with regulations prescribed under section 9448 of this title.

(2) To the extent provided in a contract under paragraph (1), a person providing services under the contract may accept services on behalf of the Air Force.

(3) A person, while providing services under a contract authorized under paragraph (1), may not be considered to be on active duty or inactive-duty training for any purpose.

(b) USE OF CIVIL AIR PATROL CHAPLAINS.—The Secretary of the Air Force may use the services of Civil Air Patrol chaplains in support of the Air Force active duty and reserve component forces to the extent and under conditions that the Secretary determines appropriate.

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### §9448. Regulations

(a) AUTHORITY.—The Secretary of the Air Force shall prescribe regulations for the administration of this chapter.

(b) REQUIRED REGULATIONS.—The regulations shall include the following:

(1) Regulations governing the conduct of the activities of the Civil Air Patrol when it is performing its duties as a volunteer civilian auxiliary of the Air Force under section 9442 of this title.

(2) Regulations for providing support by the Air Force and for arranging assistance by other agencies under section 9444 of this title.

(3) Regulations governing the qualifications of retired Air Force personnel to serve as an administrator or liaison officer for the Civil Air Patrol under a ~~personal~~ services contract entered into under section 9446(a) of this title.

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## Title 41, United States Code

### § 3907. *Contracts for services*

(a) **GENERAL RULE.**—*A contract for services of experts or consultants, including stenographic services, and any other contract for services that is of a type that on the day before the date of the enactment of this section was considered to be a ‘personal services contract’—*

*(1) may be entered into on the same basis as any other contract for services;*  
*and*

*(2) is not subject to any requirement for specific authorization in an appropriation or other statute.*

(b) **REFERENCES IN OTHER LAWS.**—*Any provision of law in effect on the date of the enactment of this section that refers to authority to procure services, or to enter into a contract, under section 3109 of title 5 is superseded by this section.*

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### §4304. Specific costs not allowable

(a) SPECIFIC COSTS.—The following costs are not allowable under a covered contract:

(1) \*\*\*

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(15) Costs incurred by a contractor or subcontractor, ~~or personal services contractor~~ in connection with any criminal, civil, or administrative proceeding commenced by the Federal Government or a State, to the extent provided in section 4310 of this title.

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### §4310. Proceeding costs not allowable

(a) Definitions.—In this section:

(1) Costs.—The term "costs", with respect to a proceeding, means all costs incurred by a contractor, ~~subcontractor, or personal services contractor~~ **or subcontractor**, whether before or after the commencement of the proceeding, including-

(A) administrative and clerical expenses;

(B) the cost of legal services, including legal services performed by an employee of the contractor, ~~subcontractor, or personal services contractor~~ **or subcontractor**;

(C) the cost of the services of accountants and consultants retained by the contractor, ~~subcontractor, or personal services contractor~~ **or subcontractor**; and

(D) the pay of directors, officers, and employees of the contractor, ~~subcontractor, or personal services contractor~~ **or subcontractor** for time devoted by those directors, officers, and employees to the proceeding.

(2) Penalty.—The term "penalty" does not include restitution, reimbursement, or compensatory damages.

(3) Proceeding.—The term "proceeding" includes an investigation.

(b) In General.—Except as otherwise provided in this section, costs incurred by a contractor, ~~subcontractor, or personal services contractor~~ **or subcontractor** in connection with a criminal, civil, or administrative proceeding commenced by the Federal Government, by a State, or by a contractor, ~~subcontractor, or personal services contractor~~ **or subcontractor** or grantee employee submitting a complaint under section 4712 of this title are not allowable as reimbursable costs under a covered contract, ~~subcontract, or personal services contract~~ **or subcontract** if the proceeding—

(1) relates to a violation of, or failure to comply with, a Federal or State statute or regulation or to any other activity described in section 4712(a)(1) of this title; and

(2) results in a disposition described in subsection (c).

(c) Covered Dispositions.—A disposition referred to in subsection (b)(2) is any of the following:

(1) In a criminal proceeding, a conviction (including a conviction pursuant to a plea of nolo contendere) by reason of the violation or failure referred to in subsection (b).

(2) In a civil or administrative proceeding involving an allegation of fraud or similar misconduct, a determination of contractor, ~~subcontractor, or personal services~~

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~~contractor~~ **or subcontractor** liability on the basis of the violation or failure referred to in subsection (b).

(3) In any civil or administrative proceeding, the imposition of a monetary penalty or an order to take corrective action under section 4712 of this title by reason of the violation or failure referred to in subsection (b).

(4) A final decision to do any of the following, by reason of the violation or failure referred to in subsection (b):

(A) Debar or suspend the contractor, ~~subcontractor, or personal services contractor~~ **or subcontractor**.

(B) Rescind or void the contract, ~~subcontract, or personal services contract~~ **or subcontract**.

(C) Terminate the contract, ~~subcontract, or personal services contract~~ **or subcontract** for default.

(5) A disposition of the proceeding by consent or compromise if the disposition could have resulted in a disposition described in paragraph (1), (2), (3), or (4).

(d) Costs Allowed by Settlement Agreement in Proceeding Commenced by Federal Government.—In the case of a proceeding referred to in subsection (b) that is commenced by the Federal Government and is resolved by consent or compromise pursuant to an agreement entered into by a contractor, ~~subcontractor, or personal services contractor~~ **or subcontractor** and the Federal Government, the costs incurred by the contractor, ~~subcontractor, or personal services contractor~~ **or subcontractor** in connection with the proceeding that are otherwise not allowable as reimbursable costs under subsection (b) may be allowed to the extent specifically provided in that agreement.

(e) Costs Specifically Authorized by Executive Agency in Proceeding Commenced by State.—In the case of a proceeding referred to in subsection (b) that is commenced by a State, the executive agency that awarded the covered contract, ~~subcontract, or personal services contract~~ **or subcontract** involved in the proceeding may allow the costs incurred by the contractor, ~~subcontractor, or personal services contractor~~ **or subcontractor** in connection with the proceeding as reimbursable costs if the executive agency determines, in accordance with the Federal Acquisition Regulation, that the costs were incurred as a result of—

(1) a specific term or condition of the contract, ~~subcontract, or personal services contract~~ **or subcontract**; or

(2) specific written instructions of the executive agency.

(f) Other Allowable Costs.—

(1) In general.—Except as provided in paragraph (3), costs incurred by a contractor, ~~subcontractor, or personal services contractor~~ **or subcontractor** in connection with a criminal, civil, or administrative proceeding commenced by the Federal Government or a State in connection with a covered contract, ~~subcontract, or personal services contract~~ **or subcontract** may be allowed as reimbursable costs under the contract, ~~subcontract, or personal services contract~~ **or subcontract** if the costs are not disallowable under subsection (b), but only to the extent provided in paragraph (2).

(2) Amount of allowable costs.—

(A) Maximum amount allowed.—The amount of the costs allowable under paragraph (1) in any case may not exceed the amount equal to 80 percent of the

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amount of the costs incurred, to the extent that the costs are determined to be otherwise allowable and allocable under the Federal Acquisition Regulation.

(B) Content of regulations.—Regulations issued for the purpose of subparagraph (A) shall provide for appropriate consideration of the complexity of procurement litigation, generally accepted principles governing the award of legal fees in civil actions involving the Federal Government as a party, and other factors as may be appropriate.

(3) When otherwise allowable costs are not allowable.—In the case of a proceeding referred to in paragraph (1), ~~contractor, subcontractor, or personal services contractor~~ **or subcontractor** costs otherwise allowable as reimbursable costs under this subsection are not allowable if—

(A) the proceeding involves the same ~~contractor, subcontractor, or personal services contractor~~ **or subcontractor** misconduct alleged as the basis of another criminal, civil, or administrative proceeding; and

(B) the costs of the other proceeding are not allowable under subsection (b).

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### §4712. Enhancement of contractor protection from reprisal for disclosure of certain information

(a) PROHIBITION OF REPRISALS.—

(1) IN GENERAL.—An employee of a contractor, subcontractor, grantee, or subgrantee ~~or personal services contractor~~ **or an individual who is a services contractor** may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to a person or body described in paragraph (2) information that the employee reasonably believes is evidence of gross mismanagement of a Federal contract or grant, a gross waste of Federal funds, an abuse of authority relating to a Federal contract or grant, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a Federal contract (including the competition for or negotiation of a contract) or grant.

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## Other Provisions of Law

### National Defense Authorization Act for Fiscal Year 1995 (Pub. L. 103–337; **10 U.S.C. 1091 note**)

SEC. 704. \*\*\*

(a) \*\*\*

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~~(c) PERSONAL SERVICE CONTRACTS TO PROVIDE CARE.—(1) The Secretary of Defense may enter into personal service contracts under the authority of section 1091 of title 10, United States Code, with persons described in paragraph (2) to provide the services of clinical counselors, family advocacy program staff, and victim's services representatives to members of the Armed Forces and covered beneficiaries who require such services. Notwithstanding subsection (a) of such section, such services may be provided in medical treatment facilities of the Department of Defense or elsewhere as determined appropriate by the Secretary.~~

~~(2) The persons with whom the Secretary may enter into a personal services contract under this subsection shall include clinical social workers, psychologists, marriage and family therapists certified as such by a certification recognized by the Secretary of Defense, psychiatrists, and other comparable professionals who have advanced degrees in counseling or related academic disciplines and who meet all requirements for State licensure and board certification requirements, if any, within their fields of specialization.~~

### National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136; 10 U.S.C. 2358 note)

#### SEC. 1601. RESEARCH AND DEVELOPMENT OF DEFENSE BIOMEDICAL COUNTERMEASURES.

(a) IN GENERAL.—The Secretary of Defense (in this section referred to as the “Secretary”) shall carry out a program to accelerate the research, development and procurement of biomedical countermeasures, including but not limited to therapeutics and vaccines, for the protection of the Armed Forces from attack by one or more biological, chemical, radiological, or nuclear agents.

(b) INTERAGENCY COOPERATION.—\*\*\*

(c) EXPEDITED PROCUREMENT AUTHORITY.—(1) For any procurement of property or services for use (as determined by the Secretary) in performing, administering, or supporting biomedical countermeasures research and development, the Secretary may, when appropriate, use streamlined acquisition procedures and other expedited procurement procedures authorized in—

(A) section 1903 of title 41, United States Code; and

(B) sections 2371 and 2371b of title 10, United States Code.

(2) Notwithstanding paragraph (1) and the provisions of law referred to in such paragraph, each of the following provisions shall apply to the procurements described in this subsection to the same extent that such provisions would apply to such procurements in the absence of paragraph (1):

(A) Chapter 37 of title 40, United States Code (relating to contract work hours and safety standards).

(B) Section 8703(a) of title 41, United States Code.

(C) Section 2313 of title 10, United States Code (relating to the examination of contractor records).

(3) The Secretary shall institute appropriate internal controls for use of the authority under paragraph (1), including requirements for documenting the justification for each use of such authority.

(d) DEPARTMENT OF DEFENSE FACILITIES AUTHORITY.—\*\*\*

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~~(e) AUTHORITY FOR PERSONAL SERVICES CONTRACTS.—(1) Subject to paragraph (2), the authority provided by section 1091 of title 10, United States Code, for personal services contracts to carry out health care responsibilities in medical treatment facilities of the Department of Defense shall~~

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~~also be available, subject to the same terms and conditions, for personal services contracts to carry out research and development activities under this section. The number of individuals whose personal services are obtained under this subsection may not exceed 30 at any time.~~

~~(2) The authority provided by such section 1091 may not be used for a personal services contract unless the contracting officer for the contract ensures that —~~

~~(A) the services to be procured are urgent or unique; and~~

~~(B) it would not be practicable for the Department of Defense to obtain such services by other measures.~~

(f) STREAMLINED PERSONNEL AUTHORITY.—(1) The Secretary may appoint highly qualified experts, including scientific and technical personnel, to carry out research and development under this section in accordance with the authorities provided in section 342 of the National Defense Authorization Act for Fiscal Year 1995 (Public Law 103–337; 108 Stat. 2721), [former] section 1101 of the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999 (Public Law 105–261 [5 U.S.C. 3104 note]), and section 1101 of this Act [enacting chapter 99 of Title 5, Government Organization and Employees, and provisions set out as a note under section 9901 of Title 5].

(2) The Secretary may use the authority under paragraph (1) only upon a determination by the Secretary that use of such authority is necessary to accelerate the research and development under the program.

(3) The Secretary shall institute appropriate internal controls for each use of the authority under paragraph (1).

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### **Section 401 of the Department of the Interior, Environment, and Related Agencies Appropriations Act, 2014 (division G of Public Law 113–76; 5 U.S.C. 3109 note)**

~~SEC. 401. In fiscal year 2014 and thereafter, the expenditure of any appropriation under this Act [div. G of Pub. L. 113–76] or any subsequent Act appropriating funds for departments and agencies funded in this Act, for any consulting service through procurement contract, pursuant to 5 U.S.C. 3109, shall be limited to those contracts where such expenditures are a matter of public record and available for public inspection, except where otherwise provided under existing law, or under existing Executive order issued pursuant to existing law.~~

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### **Section 501 of the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 1993 (Public Law 102-394; 5 U.S.C. 3109 note)**

~~SEC. 501. The expenditure of any appropriation under this Act or subsequent Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Acts for any consulting service through procurement contract, pursuant to 5 U.S.C. 3109, shall be limited to those contracts where such expenditures are a matter of public record and available for public inspection, except where otherwise provided under existing law, or under existing Executive order issued pursuant to existing law.~~

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### **Section 504 of the Energy and Water Development Appropriations Act, 1993 (Public Law 102-377; 5 U.S.C. 3109 note)**

~~SEC. 504. The expenditure of any appropriation under this Act or subsequent Energy and Water Development Appropriations Acts for any consulting service through procurement contract, pursuant to section 3109 of title 5, United States Code, hereafter shall be limited to those contracts where such expenditures are a matter of public record and available for public inspection, except where otherwise provided under existing law, or under existing Executive Order issued pursuant to existing law.~~

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