Guide to Judiciary Policy

Vol. 14: Procurement

Ch. 5: Special Categories of Procurements

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§ 510 Personal Services Contracts

§ 510.10 [Reserved]

§ 510.20 General Prohibition

(a) Personal service contracts are strictly prohibited without specific statutory authority. Unless a statutory exception applies, the judiciary is required to obtain employees by direct hire under competitive appointment or other personnel procedures.

(b) Brief or intermittent services furnished by private-sector temporary help firms may not be regarded or treated as personal services. These services may not be used instead of regular recruitment under civil service laws or to displace a federal employee. For further guidance and restrictions on the use of temporary help support services, **see:** Guide, Vol. 12, § 560 (Temporary Help Service Firms).

§ 510.30 Judiciary's Statutory Authority

(a) The judiciary's only statutory authority to contract for personal services is 28 U.S.C. § 612(a), which authorizes the AO Director to contract for personal services for the effective management, coordination, operation, and use of information technology equipment, purchased by the Judiciary Information Technology fund (JITF). Contracts issued under this authority are subject to the judiciary competition requirements but exempt from the advertising requirement of 41 U.S.C. § 6101. **See:** Guide, Vol. 14, § 130.20.15 (Advertising Requirements).

(b) Under 28 U.S.C. § 602(c), the AO Director is statutorily authorized to obtain the personal services of experts or consultants as authorized by 5 U.S.C. § 3109 at rates not to exceed the highest rate of pay established under 5 U.S.C. § 5332. Obtaining personal services of experts or consultants under this authority, however, must be through a personnel appointment rather than through an independent contract and is outside the scope of this volume of the *Guide*. For guidance on obtaining expert

or consultant services through award of a contract, **see:** § 520 (Expert and Consultant Nonpersonal Services Contracts).

(c) Only the Procurement Executive (PE) has been delegated the authority to contract for personal services. **See:** Guide, Vol. 14, § 120.20.10 (Director Delegations).

§ 510.40 Personal Services Indicators

(a) The personal services determination is largely based on the degree of government supervision over the individual's work. The fact that the individual may work independently does not in itself satisfy the independent contractor test. The essence of the test is whether judiciary employees, on a close and continuous basis, control what is done and how the individual performs the work.

(b) There is no "acid test" that determines that personal services exist. Instead, this is necessarily a subjective judgment that the CO makes based on the individual circumstances. If there is a reasonable question as to whether a specific contract involves the performance of personal services, the CO should provide file documentation on the analysis performed to reach a determination.

(c) The following questions are useful indicators in determining whether a service contract is an improper personal services contract, either in how the contract is written or in how it is administered on a day-to-day basis. A "yes" answer to any of the following questions may indicate that the proposed procurement is "personal" in nature. The existence of any of these elements may indicate the likelihood that supervision exists. However, the existence of any one indicator alone does not necessarily require the CO to conclude that the services are "personal."

- Will the individual(s) require frequent direction and supervision?
- Will the services be performed on the judiciary site?
- Will the principal tools and equipment necessary for performance of the services be provided by the judiciary?
- Will the services be applied directly to the integral effort of the judicial organization, and are they in direct furtherance of its assigned function or mission?
- Will comparable services, meeting comparable needs, be performed elsewhere in the judiciary using judiciary employees?

- Will the need for the type of provided services be reasonably expected to last beyond one year?

- Will the inherent nature of the service, or how it is provided, reasonably require direct or indirect judiciary supervision of contractor employees to adequately protect the judiciary's interest, retain control of the function involved, or retain full personal responsibility for the function supported in a duly authorized judiciary officer or employee?

§ 510.50 Clause

Include Clause 5-1, Payments under Personal and Professional Services Contracts in solicitations and contracts for personal services permitted under § 510.30(a) (Judiciary's Statutory Authority).

§ 520 Expert and Consultant Nonpersonal Services Contracts

§ 520.10 Authority

The judiciary is authorized to contract for expert and consultant services on a nonpersonal services basis under 5 U.S.C. § 3109. For the definition of expert or consultant, **see:** Guide, Vol. 14, Glossary of Procurement Terms.

§ 520.15 [Reserved]

§ 520.20 Competition and Advertising Exceptions

(a) These services do not need to be competed or advertised. When contracting for the services of a consultant or expert under 5 U.S.C. § 3109, the CO does not need to prepare a sole source justification, since there is no competition requirement. However, the file documentation must reflect that these services are acquired under the authority of 5 U.S.C. § 3109, so that anyone reviewing the contract file will understand why the requirement was not competed or advertised.

(b) Expert or consultant contracts may not be used as a "pass through" for services of individuals other than the named expert, or to acquire goods or services that would otherwise be subject to the judiciary's competition requirements.

§ 520.25 Contract and Procurement File Requirements

A purchase, delivery, or task order may not be used for expert and consultant services. A formal written contract must be used. The contract must contain all the requisite

terms and conditions of a formal government contract. The procurement file must document the price or cost analysis performed, indicating that the compensation is fair and reasonable. This may require an informal market survey (**see:** Guide, Vol. 14, § 210.60 (Market Research)) or other objective facts, which demonstrate the price's reasonableness (**see:** Guide, Vol. 14, § 470.20 (Determining Reasonableness)).

§ 520.30 Statutory Qualification

Before contracting for the services of an individual or business entity as an expert or consultant, the CO must determine that the individual or business entity qualifies as an "expert" or "consultant" under 5 U.S.C. § 3109, and must document this determination in the file.

§ 520.40 Applicability

Advice to the government from experts or consultants must include the alternatives considered and the rationale for the chosen recommendations. The recommendations may include suggestions for a decision or course of action, but judiciary personnel make the ultimate decision. Procuring expert and consulting services is appropriate for purposes such as obtaining:

(a) specialized opinions, professional or technical advice not available within the judiciary or from another federal agency;

(b) outside viewpoints, to avoid too limited a judgment on critical administrative or technical issues;

(c) advice on developments in industry;

(d) the opinions of experts whose national or international prestige can contribute to the success of an important project; or

(e) specialized skills that are not needed continuously.

§ 520.45 Restrictions

(a) The services of consultants or experts under 5 U.S.C. § 3109 may be obtained by contract only if:

(1) the work is temporary or intermittent, defined as follows:

(A) Temporary

Continuous performance (i.e., full time) over a period not exceeding one year. Because of the period limitation, it is

not appropriate to include options to extend the period of performance beyond one year in contracts for temporary expert or consultant services. This authority may not be used to procure the services of experts or consultants under a succession of short-term contracts where the resulting continuous performance would exceed one year.

(B) Intermittent

Occasional or irregular work on cases, programs, projects, and problems requiring intermittent services as distinguished from continuous. A contract for intermittent services may not exceed 130 days of work within a 12-month period but may be renewed from year to year.

(2) the position does not involve policy, management of judiciary staff or projects, or the operating duties of judiciary employees; and

(3) the individual or business entity possesses the necessary skills and expertise to qualify as an expert or consultant.

(b) A CO may not contract for expert or consulting services to bypass, circumvent, or undermine personnel ceilings, pay limitations, or competitive employment procedures.

(c) A contract for expert or consulting services may not establish by its terms or by how it is administered:

(1) an employer-employee relationship between the judiciary and the contractor, including detailed control or supervision by judiciary personnel of the contractor or its employees with respect to the day-to-day operations of the contractor or the methods of accomplishment of the services; or

(2) supervision of judiciary employees, or of employees of other contractors, by the contractor.

§ 520.50 Award and Administration Requirements

Before processing any award or solicitation for expert or consulting services, the CO must ensure that the applicable provisions of this chapter have been complied with and that the following required documentation is complete and included in the contract file:

(a) each requirement is appropriate and fully justified in writing;

(**Note:** The justification must include a statement of need and the requesting official must certify that the services do not unnecessarily duplicate any previously performed work or services.)

(b) each work statement is specific and complete, and states a fixed period of performance within which the services are to be provided; and

(c) appropriate disclosure is required of, and warning is given to, contractor personnel to avoid conflicts of interest.

After the award of a contract for expert or consultant services, the CO must ensure that the contract is properly administered and monitored to ensure that performance meets the requirements of the contract.

§ 520.55 Services Exceeding One Year

Contracts for intermittent expert or consultant services may include options to extend the period of performance for additional years. **See:** Guide, Vol. 14, § 220.40 (Options). However, since temporary services, by definition, are not to exceed one year, a contract for temporary expert or consulting services may not include an option to extend the period of performance beyond one year and may not be extended by modification. When additional services are required, a new contract must be awarded subject to the requirements and limitations of this section (i.e., § 520 (Expert and Consultant Nonpersonal Services Contracts)).

§ 520.60 Former Government Employees

(a) There is no *per se* prohibition on awarding an expert or consultant contract to a former government employee, and it can, in fact, be appropriate, depending upon the circumstances. The individual must meet the definition of an “expert” or “consultant.” However, the definition prohibits procuring services that are to be performed by full-time government employees. Simply because the individual has expertise in a particular matter, which they obtained because of their work on that matter as a government employee, does not mean that they automatically meet the definition of an “expert” or “consultant” under 5 U.S.C. § 3109.

(b) An abuse of this situation would be procuring the services of former government employees to perform the operating duties of the government workforce or to continue with work the individual was involved in as a regular government employee. Then, the requesting office could consider other alternatives instead of contracting with the individual, such as re-employment on a full-time, temporary, or intermittent basis as appropriate.

(c) Although former government employees may satisfy the 5 U.S.C. § 3109 criteria as an "expert" or "consultant," the CO must guard against contracting with such individuals when it will result in a personal services contract (i.e., an employer-employee relationship). **See:** § 510.30(b) (Judiciary's Statutory Authority).

§ 520.65 Travel Reimbursement

Any travel required for contract performance that cannot be defined at the time of award must be approved in advance by the contracting officer's representative (COR), and the contract must incorporate Clause 7-45, Travel, limiting reimbursement to that allowed under the judiciary staff travel regulations. For guidance on contractor eligibility for government travel discounts, **see:** Guide, Vol. 19, § 410.20(c) (Applicability).

§ 520.70 Professional Licenses

When obtaining expert or consulting services for which individuals are normally required to be professionally licensed (e.g., medical, legal, accounting, architecture), the solicitation must require proof of the license as a prerequisite to award (e.g., copy of the membership card issued by the bar association showing that membership is current for an attorney, or similar credentials for other professionals). The solicitation may also require the individual to be licensed in a particular state or by a particular entity.

§ 520.75 Provisions and Clauses

Include the following clauses, in addition to those listed in Guide, Vol. 14, § 330.10.30 (Provisions and Clauses), unless otherwise indicated:

§ 520.75 Provisions and Clauses	
Clause or Provision	**Include in:**
(a) Clause 1-5, Conflict of Interest	All solicitations and contracts for experts and consultant services.
(b) Clause 2-65, Key Personnel	Solicitations and contracts for professional services when the contractor is a corporate entity rather than an individual (e.g., awards to law firms). Professional services are those provided by an individual whose position requires a license or certification (e.g., attorney, certified public accountant). The clause requires use of the key personnel identified in the contractor's offer, unless the CO approves substitution. It provides for contract termination for failure to comply. The CO will appropriately fill in the clause's blank spaces.

§ 520.75 Provisions and Clauses	
Clause or Provision	**Include in:**
(c) Clause 5-1, Payments under Personal and Professional Services Contract	All solicitations and contracts for personal services as well as expert and consultant services.
(d) Clause 5-5, Nondisclosure (Professional Services)	All solicitations and contracts for experts and consultant services.
(e) Clause 5-10, Inspection of Professional Services	All solicitations and contracts for experts and consultant services. Provides for inspection of the professional's work product and acceptance of only those products that meet reasonable professional standards.
(f) Clause 7-125, Invoices, Alternate I	All non-fixed-price contracts for professional services. The clause requires presentation of invoices showing: • who performed the services; • the hours and partial hours of service provided each day; and • the services provided each hour or partial hour. (**Note:** Contractors may be allowed to set minimum charges for partial hours or days.)
(g) Clause 5-20, Records Ownership	Solicitations and contracts when judiciary ownership of all contractor work papers relating to the services provided is desired.
(h) Provision 5-25, Identification of Uncompensated Overtime	All solicitations valued above the judiciary's small purchase threshold (**see:** Guide, Vol. 14, § 325.10 (Applicability)) for professional or technical services to be acquired on a: • labor-hour, • time and materials, or • cost-reimbursement basis.
(i) Clause 6-65, Rights in Data – Special Works	Solicitations and contracts for professional services when the CO determines that there is a need to limit distribution and use of the data to be produced under the contract. **See also:** Guide, Vol. 14, § 650.55.20 (License Terms).
(j) Clause 6-35, Errors and Omissions	Solicitations and contracts when errors and omissions insurance is required. **See:** Guide, Vol. 14, § 630.40 (Errors and Omissions Insurance).

§ 520.80 Contract Type

Firm-fixed-price contracts are preferred. When a firm-fixed-price contract is not suitable, the CO must first document the reasons. A labor-hour contract may be used, subject to the limitations in Guide, Vol. 14, § 410.40.30 (Limitations). For further guidance on this contract type, **see:** Guide, Vol. 14, § 410.40 (Labor-Hour Contracts).

§ 520.85 Experts or Consultants Supporting Judicial Conference Committees

The use of reporters or consultants to directly support committees of the Judicial Conference of the United States (JCUS) requires prior approval. (**Note:** In this context, a "reporter" is a consultant who provides expert or specialized research, analytical, and drafting support directly for a JCUS committee.)

(a) Any contract for expert or consulting services for a JCUS committee for a discrete, short-term project or activity must have prior approval from the AO Director and be issued by the Procurement Management Division (PMD) of the AO's Finance and Procurement Office. The COR appointed to oversee the work must be a member of the AO staff.

(b) Any contract with a reporter or other consultant who may be expected to support a JCUS committee for a longer term or indefinitely must be approved through the AO Director by the Chief Justice, who makes all appointments to these positions.

§ 530 Architect-Engineer Contracts

§ 530.10 Architect-Engineer Services

§ 530.10.10 Delegation

Authority to award Architect-Engineer contracts under this section is delegated only to COCP Levels 5, 6, and 7. If the CO holds a COCP Level 2 delegation for a specific building location for which there is a GSA Real Property Operations and Maintenance Delegation (GSA Building Delegation), the CO must follow the Federal Acquisition Regulation instead of this volume of the *Guide*. **See:** Guide, Vol. 14, Appx. 1E (Contracting Officers Certification Program (Level 2: Special Delegated Procurement Programs)) and § 120.40.55 (GSA Building Delegations).

§ 530.10.20 In General

The following are considered architect-engineer services for the purpose of this section:

(a) Professional services of an architectural or engineering nature, as defined by applicable state law, which the state law requires to be performed or approved in writing by a registered architect or engineer.

(b) Professional services of an architectural or engineering nature associated with design or construction of real property.

(c) Other professional services of an architectural or engineering nature or services incidental thereto that logically or justifiably require performance by registered architects or engineers or their employees, including:

- studies,
- investigations,
- tests,
- evaluations,
- consultations,
- comprehensive planning,
- program management,
- conceptual designs,
- plans and specifications,
- value engineering,
- construction phase services,
- soils engineering,
- drawing reviews,
- preparation of operating and maintenance manuals, and
- other related services;

(d) Professional surveying and mapping services of an architectural or engineering nature.

(1) Surveying

Must be procured from registered surveyors or architects and engineers.

(2) Mapping

(A) Mapping is considered an architectural and engineering service if it is associated with the research, planning, development, design, construction, or alteration of real property.

(B) Mapping services may not be procured under this section if they:

(i) are not connected to traditionally understood or accepted architectural and engineering activities;

(ii) are not incidental to such architectural and engineering activities, or

(iii) have not themselves traditionally been considered architectural and engineering services.

§ 530.10.30 Source Selection

The award of contracts for architect-engineer services is subject to the requirements of the Brooks Act. **See:** Guide, Vol. 14, § 130.20.50 (Procurement of Certain Professional Services). The procedures in this chapter must be followed when contracting for these services rather than solicitation or source selection procedures prescribed elsewhere in this volume. The selection authority for architect-engineer services must be designated by the PE, and may also be, but is not required to be, the CO.

§ 530.10.40 Publicizing and Response

(a) The judiciary must publicly announce all requirements for contracts of architect-engineer services and negotiate contracts for these services based on the demonstrated competence and qualifications of prospective contractors to perform the services at fair and reasonable prices. The announcement must state that all architect-engineer firms wishing to be considered must submit their qualifications using Form SF 330 (Architect-Engineer Qualifications). For further guidance on methods of publicizing procurements, **see:** Guide, Vol. 14, § 315 (Publicizing Open Market Procurement Actions).

(b) The architect-engineer evaluation board and selection authority must evaluate each potential contractor based on the following criteria:

(1) professional qualifications necessary for satisfactory performance of the required services;

(2) specialized experience and technical competence in the type of work required;

(3) capacity to accomplish the work in the required time;

(4) past performance on contracts with the judiciary, other governmental entities, and/or private industry concerning:

- cost control,
- quality of work, and

- compliance with performance schedules;

(5) acceptability under other appropriate evaluation criteria.

§ 530.20 Architect-Engineer Evaluation Board

§ 530.20.10 Composition of Board

When procuring architect-engineer services, the Procurement Liaison Officer (PLO) or equivalent in the judiciary organization or the PE, must establish an architect-engineer evaluation board, composed of at least three members. One member of the board must be designated as the chairperson. All three members must be individuals who are highly qualified professionals who, collectively, have experience in architecture, engineering, construction, and related matters. Board members are not required to be judiciary employees and may be outside consultants. For further guidance on outside consultants serving as evaluators, **see:** Guide, Vol. 14, § 210.70.40 (Evaluation Panels).

§ 530.20.20 Evaluation Board Exclusions

Neither the CO nor anyone delegated to conduct architect-engineer contract negotiations for a given project may be a member of that project's evaluation board.

§ 530.20.30 Conflict of Interest Exclusion

No firm can be eligible for award of an architect-engineer contract during the period in which any of its principals or associates are participating as members of the awarding evaluation board.

§ 530.30 Architect-Engineer Evaluation Board Functions

The evaluation board must perform the following functions under the general direction of the PE (or delegatee if a one-time delegation has been made):

(a) review the firms' qualification statements furnished in response to any notice publicizing the contemplated project, as well as any information available within the judiciary's current data existing files on eligible firms;

(b) evaluate the firms according to the criteria in § 530.10.40(b) (Publicizing and Response);

(c) hold discussions with at least three of the most highly qualified firms about concepts and the relative utility of alternative methods of furnishing the required services;

(d) prepare for the selection authority a report recommending, in order of preference, at least three firms that are evaluated to be the most highly qualified to perform the required services.

(**Note:** The selection report must include a description of the board's discussions and evaluation. This report will allow the selection authority to review the considerations upon which the recommendations are based.)

§ 530.40 Architect-Engineer Selection

§ 530.40.10 In General

The selection authority must:

(a) review the recommendations of the evaluation board, and

(b) with the advice of appropriate technical and staff representatives, approve the final selection report.

§ 530.40.20 List of Most Highly Qualified Firms

The final selection report must be a listing, in order of preference, of the firms considered most highly qualified to perform the work.

§ 530.40.30 File Documentation

If the firm listed as the most preferred is not recommended as the most highly qualified by the evaluation board, the contract file must include a written explanation of the reason for the preference. All firms on the final selection report list must be considered "selected firms" with which the CO may negotiate.

§ 530.40.40 Revisions to the Report

The selection authority may not add firms to the selection report. If the firms recommended in the report are not deemed to be qualified, or the report is considered inadequate for any reason, the selection authority must record the reasons and return the report to the evaluation board for appropriate revision.

§ 530.50 Short Selection Process for Small Purchases

§ 530.50.10 Conditions to Use the Short Process

When authorized by the delegated CO (**see:** § 530.10.10 (Delegation)), the process below in § 530.50.20 (Short Process) may be used as an alternative to those identified in § 530.30 (Architect-Engineer Evaluation Board Functions) and § 530.40 (Architect-

Engineer Selection) to select firms for contracts not estimated to exceed the judiciary's small purchase threshold (**see:** Guide, Vol. 14, § 325.10 (Applicability)).

§ 530.50.20 Short Process

When the CO decides that formal action by the board is not necessary in connection with a particular selection, the following procedures must be used:

(a) The chairperson of the board must perform the functions of the board provided in § 530.30 (Architect-Engineer Evaluation Board Functions).

(b) The CO must review the report and approve it or return it to the chairperson for appropriate revision.

(c) Upon receipt of a written report approved and signed by the board's chairperson, the CO is authorized to begin negotiations.

§ 530.60 Cost Estimate for Architect-Engineer Contracts

Before the CO can negotiate any proposed contract or begin a contract modification requiring funding, an independent cost estimate for the required Architect-Engineer services must be developed based on a detailed analysis of the costs expected to be generated by the work. The estimate must be prepared by the requiring organization and be sent to the CO with the request for services. Access to information concerning the cost estimate must be limited to judiciary personnel and agents whose official duties require knowledge of the estimate.

§ 530.70 Negotiations of Architect-Engineer Contracts

§ 530.70.10 Initiation of Negotiations

(a) The CO must first attempt to negotiate a contract with the first firm on the selection report list (**see:** § 530.40 (Architect-Engineer Selection)) for the required services at a price that the CO determines in writing to be fair and reasonable. Negotiations must be conducted according to Guide, Vol. 14, § 345 (Price Negotiations).

(b) The CO must request an offer from the firm, ensuring that the solicitation does not inadvertently preclude the firm from proposing the use of modern design methods.

(c) The CO must:

(1) ensure that the firm has a clear understanding of the scope of work, specifically the essential requirements involved in providing the required services, and determine whether the firm will make

available the necessary personnel and facilities to perform the services within the required time; and

(2) limit the firm's subcontracting to firms agreed upon during negotiations or through a formal contract modification.

§ 530.70.20 Termination of Negotiations

If a mutually satisfactory contract cannot be negotiated, the CO must notify the firm that negotiations are terminated. The CO must then begin negotiations with the next qualified firm rated on the list. This procedure must continue until a mutually satisfactory contract has been negotiated.

§ 530.70.30 Requesting Additional Firms

If unable to negotiate a satisfactory contract with any of the selected firms, the CO must request a listing of additional firms from the evaluation board and continue negotiations according to this section until an agreement is reached.

§ 530.70.40 Notification of the Final Selection

The CO must promptly inform the evaluation board of the final selection once a mutually satisfactory contract has been negotiated.

§ 530.70.50 Contract Type

Architect-engineer contracts are normally firm-fixed-price. If an indefinite-delivery contract is used, the task orders are normally firm-fixed-price.

§ 530.70.60 Clauses

The following clauses are inserted in solicitations and contracts for architect/engineer services as indicated:

§ 530.70.60 Clauses	
Clause	**Include in:**
(a) Clause 5-30, Authorization and Consent	All architect-engineer solicitations and contracts.
(b) Clause 5-35, Payments under Fixed-Price Architect-Engineer Contracts	Fixed price architect-engineer solicitations and contracts.
(c) Clause 5-45, Design Within Funding Limitations	Solicitations and contracts when the project must be designed so that construction costs do not exceed a contractually specified dollar limit (funding limitation).

§ 530.70.60 Clauses	
Clause	**Include in:**
(d) Clause 5-50, Responsibility of the Architect-Engineer Contractor	Fixed price architect-engineer solicitations and contracts.
(e) Clause 5-55, Work Oversight in Architect-Engineer Contracts	All architect-engineer solicitations and contracts.
(f) Clause 5-60, Requirements for Registration of Designers	All architect-engineer solicitations and contracts.
(g) Clause 5-65, Subcontractors and Outside Associates and Consultants (Architect-Engineer Services)	All architect-engineer solicitations and contracts.
(h) Clause 5-70, Termination (Fixed-Price Architect-Engineer)	Fixed price architect-engineer solicitations and contracts.
(i) Clause 5-75, Suspensions and Delays	All architect-engineer solicitations and contracts.

§ 540 Commercial Agreements

§ 540.10 In General

Commercial agreements, license agreements (including software licenses), and special use agreements are often requested by contractors as conditions to entering into contracts with the judiciary for the purchase of products, services, and commercial meeting or conference facilities. These agreements are usually written for commercial entities rather than federal agencies and contain terms and conditions that must be modified or removed.

§ 540.20 Negotiating Commercial Agreement Terms and Conditions

In general, COs should not sign commercial agreements. Instead, the CO should issue a judiciary contract containing the appropriate judiciary terms and conditions. If this is not possible, then the following steps must be taken before the CO signs the commercial agreement:

(a) Prohibited Terms and Conditions

The CO will review the commercial agreement and negotiate with a representative from the company to delete any of the following terms and conditions if they are proposed as part of the commercial agreement:

§ 540.20(a) Prohibited Terms and Conditions	
Term or Condition	**Deletion Mandatory**
(1) Credit Application/Master Account	Credit provisions are not applicable to the judiciary.
(2) Attorney Fees	Any clause regarding payment of attorney fees.
(3) Automatic Renewals of Agreements	Provisions that automatically renew the commercial agreement from year-to-year.
(4) Payments in Advance	Unless the agreement is authorized for advance payment under Guide, Vol. 14, § 220.55 (Contract Financing).
(5) Insurance	The judiciary is self-insured.
(6) Damage Deposits	Any damage deposit. For Indemnification and/or Hold Harmless terms, **see:** paragraph (8) below.
(7) Arbitration Clause	Any clause agreeing to arbitration.
(8) Indemnification or Hold Harmless	Delete any commercial term or provision stating that the judiciary will indemnify the contractor, and replace with the following: "Notwithstanding any other term or provision of this agreement, the judiciary's liability related to any claim for personal injury, death, property loss, or damage under this agreement, is limited by and subject to the procedures and terms of the Federal Tort Claims Act, the Antideficiency Act, and all other applicable federal laws and regulations."
(9) Clause making State Court Jurisdiction or State Law applicable	Replace with "Federal law applies." **See:** Boyle v. United Technologies Corp., 487 U.S. 500, 504 (1988) (noting "obligations to and rights of the United States under its contracts are governed exclusively by federal law.")

(b) Terms or Conditions Recommended for Deletion or Modification

In addition, it is strongly recommended as being in the best interests of the judiciary that the CO attempt to delete or modify the following commonly used commercial agreement terms or conditions:

§ 540.20(b) Terms and Conditions Recommended for Deletion or Modification	
Term or Condition	**Recommended Action**
(1) Interest	Any interest charges should be negotiated out because the government is not liable for interest in the absence of express provisions in statutes or a lawful contract. If the requirement to pay interest remains in the agreement, then sufficient funds must be available to pay any such interest charges to avoid violation of the Antideficiency Act, 31 U.S.C

§ 540.20(b) Terms and Conditions Recommended for Deletion or Modification	
Term or Condition	**Recommended Action**
	§ 1341(a)(1), and the agreement should stipulate that the interest rate may not exceed that allowed under the Prompt Payment Act.
(2) Subject to Change Without Notice	Any language that indicates that the terms of the agreement are subject to change by the vendor without notice to the judiciary should be negotiated out.
(3) Taxes	Generally, the judiciary is immune from paying taxes imposed by state and local governments. However, for further guidance on taxes on telecommunications services, **see:** Guide, Vol. 15, § 555 (Taxes and Fees for Communication Services and Computers).
(4) Cancellation	Any schedule or fixed rate of liquidated damages or fees associated with the cancellation or reduction of the service should be negotiated out. Regarding cancellation charges on multi-year contracts, **see:** Guide, Vol. 14, § 410.75 (Multi-Year Contracts). **Note:** For cancellation terms in agreements with hotels or other conference or meeting facilities, **see:** paragraph (5)(E) (Cancellation), below.
(5) Provisions Specific to Commercial Meeting or Conference Facilities:	
(A) Early Departure Fee	Any fees for changing departure dates to an earlier date after check-in should be negotiated out.
(B) Food and Beverage Policy	Restrictions that require all food and beverages consumed at the facility to be purchased at the facility should be negotiated out.
(C) Group Commitment	Charges based upon actual number of attendees rather than an estimated number should be negotiated out.
(D) Deposit	The judiciary can provide a “reasonable” deposit in exchange for the hotel or facility to reserve or guarantee a space. **Note:** The deposit amount must be obligated on a purchase order prior to paying any deposit.
(E) Cancellation	If the contractor insists on damages for cancellation of a hotel booking, replace any schedule of damages with language similar to the following: (i) “Cancellation or reduction” refers to either a complete cancellation of the room block or a reduction of more than 20% of the original room block. No penalty will apply to a cancellation or reduction when the judiciary gives written notice of such cancellation or reduction, via email, facsimile, or hard copy, at least 60 days prior to the date of the event, or if the event is cancelled as a result of catastrophic events (e.g., airport closure, major snow storm, hurricane, tornado, flood).

§ 540.20(b) Terms and Conditions Recommended for Deletion or Modification	
Term or Condition	**Recommended Action**
	If a cancellation or reduction occurs less than 60 days before the date of the event, the contractor agrees to make every effort to resell the cancelled room block. If the contractor is unable to resell all the cancelled or reduced products or services, the judiciary will be responsible for such amounts that reflect the actual losses sustained by the contractor. (ii) If the judiciary agrees to reschedule the same event within six months from the date of the cancelled event, any cancellation fee will be waived. (iii) If the hotel cancels the booking, without limiting the judiciary's rights and remedies under law or in equity, the hotel must be held responsible for excess costs incurred by the judiciary to arrange equivalent accommodations for the event.

(c) In addition to the above mandatory and recommended changes to proposed commercial terms and conditions, when the contract is being awarded in the current fiscal year to be delivered or performed in a future fiscal year, the CO must incorporate a statement that the agreement is subject to the availability of funds and incorporate Clause 7-115, Availability of Funds by reference.

§ 540.30 Procedures

(a) The CO must ensure that either:

(1) a new commercial agreement is generated that incorporates all the negotiated changes; or

(2) both parties have initialed all modifications made to the original commercial agreement.

(b) If the contractor and the CO cannot agree to the terms, the CO must:

(1) identify and recommend options that may be available to the judiciary (**Note:** Options could include a recommendation that the product or service be procured elsewhere.); or

(2) contact PMD for assistance if the provisions at issue are those specified in § 540.20(a) (Prohibited Terms and Conditions).

(c) If the CO is unable to negotiate the provisions in § 540.20(b) (Terms and Conditions Recommended for Deletion or Modification) as recommended and proceeds with the agreement, then the CO must calculate any potential costs that may be incurred to obtain or use the products, services, commercial meeting, or conference facility under such terms that may not be favorable to the judiciary. The cost must be calculated using a "worst-case" scenario.

Note: Sufficient funds must be obligated to cover the costs of the worst-case scenario when the purchase order is awarded.

§ 550 Interagency Agreements, MOAs, and MOUs

§ 550.10 In General

(a) Under some circumstances, judiciary units may wish to acquire goods or services from or through other federal entities. The AO Director has authority to enter into interagency agreements (IAs) for this purpose and has delegated this authority as described at Guide, Vol. 14, § 120.20.10(a) (Delegation to the Procurement Executive) and § 120.20.10(b) (Delegation to Chief Judges and Certain Judiciary Officials). **See:** 28 U.S.C. § 604(a)(10)(C); 31 U.S.C. § 1535; and Guide, Vol. 14, § 140.30.30(h) (Level 3 Delegation).

(b) While MOAs and MOUs are not procurement vehicles (when used by themselves), these types of agreements are covered in this section for informational purposes. **See:** § 550.55 (MOAs and MOUs).

(c) This section does not apply to:

- agreements for personnel detail assignments (**see:** Guide, Vol. 12, § 510.70 (Interagency Agreements and Memoranda of Understanding (MOU)));
- the purchase of duplication or printing services (**see:** Guide, Vol. 23, Ch. 2 (Printing)); or
- the placement and administration of Reimbursable Work Authorizations (RWAs) (**see:** Guide, Vol. 16, Ch. 3 (Tenant Alterations and Cyclical Facilities Maintenance)).

§ 550.20 Types of IAs

The judiciary may enter into the following types of IAs with other federal agencies:

(a) IAs under which another federal agency (referred to as the providing agency) will perform work for, or provide services to, the judiciary. In these IAs, the judiciary is the receiving agency and reimburses the other agency for such work.

(1) Under this type of agreement, the other federal agency may either perform the work itself or award a contract for the work to be performed.

(2) Regardless of how the work is performed, the payment is to the providing agency, not to a contractor.

(b) IAs under which the judiciary is authorized to issue a separate task or delivery order directly to a providing agency's contract following the procedures in Guide, Vol. 14, § 310.60 (Other Federal Agency Contracts). Not all agencies offering direct acquisitions require an IA.

(1) Where IAs are required, funds are obligated on a task or delivery order and payment is made directly to the other agency's contractor. The task or delivery order must be issued by an employee with at least COCP Level 3 delegated procurement authority. **See:** Guide, Vol. 14, § 140.30.30(h) (Level 3 Delegation).

(2) An IA is not required to order from the GSA Federal Supply Schedule (FSS). **See:** Guide, Vol. 14, § 310.50 (GSA Federal Supply Schedules). Orders placed under GSA schedules must be within the CO's delegation authority.

§ 550.20.10 Restrictions and Requirements

IAs with other federal agencies:

(a) Must comply with the bona fide needs rule (unless obligating no-year funds);

(b) May not be used to circumvent conditions or limitations on the use of appropriated funds; and

(c) May not be used to make prohibited purchases, whether prohibited by the judiciary or by the other agency.

§ 550.20.20 IA Content

(a) An IA must be in writing and should be executed before any services are performed or goods are requested. The agreed upon written terms

establish the scope of the undertaking and the rights and obligations of the parties. When developing an IA, if the other agency does not provide an agreement, the CO must ensure proper information is reported on FMS Forms 7600A or 7600B (**Note:** Open in Firefox or IE) or a similar form. **Note:** Form 7600A/B is meant for use only with an IA, not with an MOU or MOA. **See:** § 550.55.30 (MOA or MOU Content).

(b) An IA must specify at least the following:

(1) a citation of the statute or authority authorizing the IA;

(2) period of duration;

(3) responsibilities of the providing agency and the judiciary;

(4) description of services to be provided or products to be furnished;

(5) the cost of performance, including appropriate ceilings when cost is based on estimates;

(6) mode of payment — advance or reimbursement (**see:** § 550.50 (Payment of IAs));

(7) any applicable special requirements or procedures for assuring compliance (e.g., in appropriate circumstances, it may be appropriate to request the providing agency add relevant judiciary clauses into a new solicitation or new task or delivery order, if issued on the judiciary's behalf (**see:** Guide, Vol. 14, Appx. 1C (OFAC column));

(8) mutual termination provisions;

(9) procedures for the resolution of disagreements that may arise under an IA, including resolution by the PE;

(10) approvals and signatures by authorized officials (**see:** § 550.20.30 (Approval Requirements)); and

(11) IA point of contact.

§ 550.20.30 Approval Requirements

(a) AO-issued IAs are subject to AO internal approval procedures. The use of IAs by other judiciary organizations to obtain products or services from another federal agency is subject to approval by the chief judge or other judiciary official identified in Guide, Vol. 14, § 120.20.10(b) (Delegation to

Chief Judges and Certain Judiciary Officials), or the PLO, if appointed as a CO, subject to the following limitations:

(1) A CO must be certified at the appropriate COCP level.

(2) The chief judge or other judiciary official identified in Guide, Vol. 14, § 120.20.10(b) (Delegation to Chief Judges and Certain Judiciary Officials), or the PLO, may not approve an IA that exceeds their delegated procurement authority. **See:** Guide, Vol. 14, § 140.30.30(h) (Level 3 Delegation). If the IA is expected to exceed the delegation, **see:** § 550.20.40 (Exceeding Delegation Authority).

(b) All judiciary IAs must adhere to applicable statutory and/or regulatory requirements, including appropriations law. The IA may include yearly option periods that, if the CO exercises the option, will require the obligation of fiscal year funds available for the option period through the execution of a new order with the providing agency. Similar to Guide, Vol. 14, § 220.55.60 (Procedures), an IA for severable services could cross a fiscal year.

§ 550.20.40 Exceeding Delegation Authority

Proposed IAs that exceed the general delegation authority amount, or for which authority is specifically not delegated, must be forwarded to PMD for review and coordination with other AO offices, such as the AO's Human Resources Office (HRO) or Office of the General Counsel (OGC). As appropriate, PMD will issue a one-time delegation of procurement authority.

§ 550.30 [Reserved]

§ 550.40 IA Requirements

§ 550.40.10 Statutory Authority

IAs are authorized under either the Economy Act (31 U.S.C. § 1535) or specific statutory authority for the purchase.

(a) The Economy Act applies when a more specific statutory authority does not exist.

(1) The Act does not provide authority to enter into IAs with state or local agencies to obtain goods or services.

(2) All IAs under the Act must be supported by a Determination and Finding (D&F) (**see:** § 550.40.20 (Economy Act Determination and

Finding) and Appx. 5A (Economy Act Determination and Finding)), which must be maintained in the IA file.

Note: Appx. 5A (Economy Act Determination and Finding) provides only the initial signature page of the required D&F. It must be accompanied by a statement of facts regarding the specific IA that supports the D&F.

(b) IAs supported by a more specific statutory authority than the Economy Act do not require a D&F. Instead, the proposed IA must cite the specific statutory authority, and the PE, in coordination with OGC, must review and validate the lawful use of the authority other than the Economy Act.

§ 550.40.20 Economy Act Determination and Finding

(a) Before entering into an IA under the Act, the CO must prepare and sign a D&F. If the providing agency requires a copy of the judiciary's D&F, the judiciary organization must provide it with the IA. The D&F must determine that:

(1) amounts are available to meet the proposed cost;

(2) it is in the judiciary's best interest to use an IA to obtain products or services under the Economy Act (31 U.S.C. § 1535);

(3) the products or services cannot be provided by contract as conveniently or cheaply by contracting with a commercial enterprise; and

(4) the agency filling the order is able to provide, or get by contract, the ordered products and services.

(b) To support the determinations required in paragraph (a) above, the judiciary organization must consider the following, and include supporting documentation in the D&F and IA file:

(1) Total cost analysis of obtaining the products or services from the providing agency;

(2) Factual supporting information describing any pricing advantages in using an IA for obtaining products or services;

(3) Consideration of intangibles, such as ease of use, time savings;

(4) Comparison of the expenditure of effort and associated costs with placing an order or contract under other procedures; and

(5) Identification of other restrictions (e.g., length of time during which the IA will remain in force and effect; specified procedures imposed by the providing agency as a condition of the agreement).

(c) For IAs within the judiciary organization's delegated procurement authority (**see:** Guide, Vol. 14, § 140.30.30(h) (Level 3 Delegation)), excluding the AO, the D&F must be approved by the chief judge or other judiciary official identified in Guide, Vol. 14, § 120.20.10(b) (Delegation to Chief Judges and Certain Judiciary Officials) (or PLO, if appointed as a CO).

(d) For IAs above judiciary organization's delegated procurement authority, the D&F must be approved by the PE before a one-time delegation of procurement authority will be issued.

§ 550.40.30 Economy Act Costs

(a) Payment under the Act — whether in advance, with subsequent adjustment, or by reimbursement — must be based on the actual costs of products or services provided (including a minimal administrative fee) to avoid unauthorized augmentation of an agency's appropriations. It may not include "profit" to the providing agency.

(b) The Government Accountability Office (GAO) has indicated that, as a rare exception, agencies may waive the recovery of small amounts of costs incurred where processing reimbursement would be uneconomical. The judiciary CO must document the IA file when making such a determination.

(c) Actual costs include:

(1) all direct costs attributable to:

(A) the performance of a service, or

(B) the furnishing of products; and

(2) only indirect costs that:

(A) are funded out of the providing agency's currently available appropriations, and

(B) bear a significant relationship to the service or work performed or materials furnished.

§ 550.40.40 Transfer of Funds

(a) Federal agencies require that payment be made by transferring funds via the Department of Treasury's Intra-Governmental Payment and Collection (IPAC) system.

(b) The purchasing CO must provide the agency location code and other required information on FMS Forms 7600A or 7600B (**Note:** Open in Firefox or IE) or a similar form provided by the other federal agency. This form will provide the accounting information for both the providing and purchasing agencies in addition to other relevant agreement details.

(c) Because IPAC transfers can only be accomplished at the AO, the CO must seek assistance from the AO's Finance and Accounting Division (FAD) to accomplish the payment. For signature and approval requirements, **see:** § 550.20.30 (Approval Requirements).

§ 550.45 IA Management

IAs require management by the IA point of contact POC and the CO throughout the period of performance. Such management should not, however, include "supervising" the providing agency's contractor personnel. **See:** § 510 (Personal Services Contracts).

(a) The POC must manage the IA by:

(1) Monitoring performance, reimbursements, and funding;

(2) Notifying the judiciary CO overseeing the IA of any performance disputes;

(3) Approving invoices; and

(4) Notifying the judiciary CO in writing when the IA period of performance ends.

(b) The judiciary CO must manage the IA by:

(1) Approving any IA changes that will impact the budget (e.g., modification, deobligating, billing, advance payment before invoicing);

(2) Approving any necessary renewal that is accomplished before the expiration date; and

(3) Resolving any performance disputes that may arise (which may need to be coordinated with the providing agency CO in an assisted acquisition-type IA). **See:** § 550.20.20(b)(9) (IA Content).

§ 550.50 Payment of IAs

§ 550.50.10 Advance Versus Reimbursement

Payments to federal agencies may be made in advance or upon receipt of the products or services. **See:** Guide, Vol. 14, § 220.55.30(d) (Delegation).

(a) Advance

If payment is made in advance, then any adjustments based on actual costs must be made as agreed to by the providing agency and judiciary. Amounts over actual costs must be returned to the judiciary. Bills rendered or requests for payment are not subject to audit or certification in advance of payment.

(b) Reimbursement

If approved by the providing agency, the judiciary may reimburse the providing agency for actual costs after the products or services have been furnished.

§ 550.50.20 Recording IA Obligations

(a) In most instances, an IA obligates the judiciary's appropriations and is recorded as an obligation at the time the IA is executed. **See:** 31 U.S.C. § 1501(a); Guide, Vol. 13, § 280.60.10 (Statutory Authorities Permitting Obligations).

(b) For Economy Act IAs, the statute requires that the original amount obligated must be reduced (i.e., deobligated) at the end of the fiscal year to the extent that the providing agency has not incurred costs or made expenditures, before the end of the period of the appropriation's availability, in:

(1) providing products or services; or

(2) making an authorized contract with another person or entity to provide the requested products or services.

§ 550.55 MOAs and MOUs

§ 550.55.10 In General

Memoranda of Agreement or Understanding (MOAs or MOUs) are not procurement vehicles when used exclusively by themselves. However, guidance on MOAs or MOUs is provided in this subsection to differentiate them from funded procurement vehicles (e.g., IAs, contracts, delivery or task orders used to obtain goods or services), as well as certain other transactions.

§ 550.55.20 Delegation

(a) AO-issued MOAs or MOUs are subject to the AO internal delegation policy.

(b) Other judiciary organizations do not require a delegation of authority from the AO Director to use an MOA or MOU, neither of which may obligate funds.

§ 550.55.30 MOA or MOU Content

(a) All MOAs or MOUs must be consistent with applicable federal laws and regulations, judiciary policies, and are subject to approval by the chief judge or other judiciary official identified at Guide, Vol. 14, § 120.20.10(b) (Delegation to Chief Judges and Certain Judiciary Officials), or the PLO, if delegated, subject to described limitations.

(b) An MOA or MOU must be in writing and must specify the following:

(1) Parties

The parties to the agreement.

(2) Purpose

The purpose or reason for entering into the agreement.

(3) Responsibilities

The duties and responsibilities of the parties subject to the agreement.

(4) Applicable Special Requirements

(**Note:** Similar to contracts, an MOA or MOU may not include any provision stating that the judiciary will indemnify other parties. **See:** § 540.20(a)(8) (Prohibited Terms and Conditions).)

(5) Modification

How the MOA or MOU may or may not be modified, whether formal (written) or informal (oral), along with who can do the modification (i.e., signatories of the original agreement only or points of contact).

(6) Disagreements

Procedures for the resolution of disagreements that may arise under the MOA or MOU.

(7) Severability

That nothing in the agreement is intended to conflict with current law, regulation, or judiciary policy. If a term of the agreement is inconsistent with such authority, then that term will be invalid, but the remaining terms and conditions of this agreement will remain in full force and effect.

(8) Effective Date of the Agreement

The date the agreement begins. For example, this could be a specified date after the MOA or MOU is signed by all parties, or the date the last party signs the agreement.

(9) Mutual Termination Provisions

Provisions that indicate whether:

(A) the MOA or MOU will terminate on a certain date, upon the accomplishment of its purpose, or upon agreement of the parties;

(B) the duration of the agreement may be extended and, if so, the extension mechanism (e.g. by written agreement of the parties); and

(C) a party may terminate the agreement early and if so, how it may be done (e.g., written notice to the other parties).

(10) Points of Contact

Provide the names and contact information (e.g., mailing and email addresses; phone and fax numbers) of the POCs for all parties.

(11) Approval Signature Blocks and Dates

Provide the names and signatures of approving officials for each party, along with the date the officials signed the MOA or MOU.

§ 550.55.40 Approval Requirements

(a) AO-issued MOAs/MOUs are subject to the AO internal approval procedures.

(b) MOAs or MOUs issued by other judiciary organizations must be approved according to local policy, as determined by the organization concerned.

§ 550.55.50 MOAs or MOUs Involving Gifts to the Judiciary

(a) When an MOA or MOU purports to provide a benefit or service to the judiciary by a non-federal entity at no cost, it is presumed to be a gift. **See:** Guide, Vol. 2C, § 620.30 (Solicitation of Gifts by a Judicial Officer or Employee). The limitations on accepting "gifts" to the judiciary include:

(1) Only those officers or employees that have been delegated authority from the AO Director may accept gifts to the judiciary. **See:** Guide, Vol. 16, § 520.10(c) (Donation or Gift).

(2) The AO Director has delegated limited authority to certain judiciary officials who may accept voluntary and uncompensated (gratuitous) services from "volunteer employees." **See:** Guide, Vol. 12, § 550.20(c) (Authority).

(b) When the judiciary needs services or other capabilities to fulfill its missions (that can be contracted for), the judiciary organization should contact the servicing CO for advance procurement planning. **See:** Guide, Vol. 14, Ch. 2 (Procurement Planning and Preparations).

§ 550.55.60 MOAs or MOUs Versus No-Cost Contracts

If an MOA or MOU with a non-federal entity contains mutual promises and benefits to both parties (i.e., consideration, instead of obligating funds), it may constitute a "no-cost" contract, versus a gift, depending on the facts.

(a) A judiciary no-cost contract (instead of an MOA or MOU) might be appropriate in rare instances, but only a CO can bind the judiciary to such contracts. For an example, **see:** Guide, Vol. 14, § 310.80 (Vendors

Offering Services for Public Use); GAO B-410752.3 et seq. (LCPtracker, Inc.; eMars, Inc.).

(b) For any proposed no-cost contract:

(1) AO staff are subject to the applicable AO policies and procedures.

(2) Other judiciary organizations should consult with the AO's PMD, as such contracts may involve other potential issues to consider (e.g., conflicts of interest, augmentation of appropriations). **See:** GAO B-308968 (No-Cost Contracts for Event Planning Services).

§ 550.55.70 MOAs or MOUs Versus Loans of Personal Property (Bailments)

One of the ways the judiciary may temporarily obtain personal property for official use is a loan. **See:** Guide, Vol. 16, § 520.10(d) (Loans from a Public Institution or Private Benefactor). A temporary "loan" of such personal property can also be considered a "bailment contract."

(a) A bailment is not a procurement contract. However, to protect the judiciary's interests and make it contractually enforceable, a "bailment contract" (not an MOA or MOU) should be established in writing and signed by a judiciary CO. **See:** Telenor Satellite Services, Inc. v. United States, 71 Fed. Cl. 114 (2006).

(b) Judiciary organizations should take caution to not improperly solicit non-federal persons or entities to temporarily bail (i.e., loan) their personal property to the judiciary.

(c) Where "bailment contracts" are not expressly delegated and authorized elsewhere in judiciary policy, the judiciary organization should consult with the AO's PMD, as such contracts may involve other potential issues to consider.

§ 550.55.80 MOAs or MOUs Versus Leases of Real Property (Office Space)

(a) As a general rule, only the General Services Administration (GSA) may lease office space necessary for judiciary operations. **See:** Guide, Vol. 14, § 160.40 (Non-Ratifiable Unauthorized Commitments); Vol. 16, §§ 110.20 (Authority) and 110.20.40 (General Services Administration). For the narrow statutory exception involving space for holding sessions of court at no cost, **see:** Guide, Vol. 16, § 110.20.20(a) (Director of the Administrative Office).

(b) Branding a real property “lease” as something other than a lease (e.g., MOA, MOU, License, Facility Use Agreement), in and of itself, will normally not alter the legalities involved.

(c) Questions on the need for office space should be directed to the applicable GSA Regional Office and Assistant Circuit Executive. The AO’s Space and Facilities Division is also available to address questions on space needs.