

Guide to Judiciary Policy

Vol 14: Procurement

Ch 5: Special Categories of Procurements

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§ 510 Personal Services Contracts

§ 510.10 Definition

A personal services contract is one in which the personnel performing the services are subject, either by the terms of the contract or by the manner of its administration, to supervision and/or direction by a judiciary employee that creates an employer/employee relationship.

Note: Services furnished by temporary help firms for the brief or intermittent need for the skills of private sector temporaries shall not be regarded or treated as personal services. These services shall not be used in lieu of regular recruitment under civil service laws or to displace a Federal employee. For additional guidance and restrictions on the use of temporary help support services, **see:** Guide, Vol 12, § 560 (Temporary Help Service Firms).

§ 510.20 General Prohibition

Personal service contracts are strictly prohibited in the absence of specific statutory authority. The judiciary is required to obtain employees by direct hire under competitive appointment or other personnel procedures, unless a statutory exception applies.

§ 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 Director of the Administrative Office (AO) to contract for personal services for the effective management, coordination, operation, and use of information technology equipment, purchased by the Judiciary Information Technology (JIT) fund. Contracts issued under this authority are subject to the judiciary competition requirements, although they are 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 Director of the AO has statutory authority to obtain 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 Vol 14. For a discussion of obtaining expert or consultant services through award of a contract, **see:** § 520 (Expert and Consultant Nonpersonal Services Contracts).

§ 510.40 Personal Services Indicators

- (a) The personal services determination is largely based on the degree of supervision by the government 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" for how many indicators must be present to result in a conclusion 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 document the file as to 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 must not necessarily lead the CO to conclude that 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 the manner in which 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 those solicitations and contracts for personal services that are permissible under the exception stated in § 510.30(a) (Exceptions to Prohibition).

§ 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.

§ 520.15 Definitions	
Consultant	Someone who provides views or opinions on problems, but does not supervise or carry out operating functions. The person or business entity serves primarily as an adviser to an officer or instrumentality of the judiciary, as distinguished from an officer or employee who carries out the judiciary's duties and responsibilities. Generally, a consultant has a high degree of broad administrative, professional, or technical knowledge or experience that must make the advice distinctively valuable to the agency.

§ 520.15 Definitions	
Expert	Someone with a high degree of attainment in a professional, scientific, technical, or other field and with excellent qualifications, skills, and knowledge above those of the ordinary person in the field. An expert's knowledge and mastery of the practices, problems, methods, and techniques of a field of activity or of a specialized field, are clearly superior to those usually possessed by ordinarily competent persons in that activity. An expert usually is regarded as an authority or as a practitioner of unusual competence and skill by other persons in the profession, occupation, or activity. An individual or business entity must meet all of the criteria in this definition in order to satisfy the definition of an "expert."

§ 520.20 Competition and Advertising Exceptions

- (a) These services are not required to be competed or advertised. When contracting for the services of a consultant or expert under 5 U.S.C. § 3109, the CO is not required 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 which would otherwise be subject to the judiciary's competition requirements.

§ 520.25 Contract and Procurement File Requirements

A purchase/delivery/task order cannot 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 reasonableness of the price (**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 document this determination in the file.

§ 520.35 [Reserved]

§ 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. The following examples of the purposes for which procuring expert and consulting services is appropriate include, but are not limited to, 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 cannot exceed 130 days of work in a service year, 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 (**see**: § 520.15 (Definitions)).
- (b) A CO cannot 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 must not establish by its terms or by the manner in which 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 must not include an option to extend the period of performance beyond one year and cannot be extended by modification. When additional services are required, a new contract must be awarded subject to the requirements and limitations of this section. **See:** § 520.35 (Limitations).

§ 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 section 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) (Statutory Exceptions to Prohibition).

§ 520.65 Travel Reimbursement

Any travel required for performance of the contract which 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, which limits reimbursement to that allowed under the judiciary staff travel regulations. **See also:** Guide, Vol 19, § 410.20(c) (Applicability), regarding contractor eligibility for government travel discounts.

§ 520.70 Professional Licenses

When obtaining expert or consulting services for which individuals are normally required to be professionally licensed (such as medical, legal, accounting, and architecture), the solicitation must require proof of the license as a prerequisite to award, for example, a copy of the membership card issued by the respective bar association showing that membership is current for an attorney, or similar credentials for other professionals. The solicitation may also specify that the individual must 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, such as awards to law firms, etc. Professional services are those which are provided by an individual whose position requires a license or certification, such as an attorney or a 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: <ul style="list-style-type: none"> • 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: <ul style="list-style-type: none"> • labor-hour, • time and materials, or • cost-reimbursement basis.
(i) Clause 6-70, Work for Hire	Solicitations and contracts for professional services when the CO determines that the contract should be treated as a "work for hire." See: Guide, Vol 14, § 650.55.20 (License Terms).

§ 520.75 Provisions and Clauses	
Clause or Provision	Include in:
(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 stated in Guide, Vol 14, § 410.40.30 (Limitations). For additional information on the use of 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. 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 Guide, Vol 14, § 120.40.55 (GSA Building Delegations).

§ 530.10.20 In General

The following services 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. These services include:
 - 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

Mapping associated with the research, planning, development, design, construction, or alteration of real property is considered to be an architectural and engineering service. However, mapping services that are not connected to traditionally understood or accepted architectural and engineering activities, are not incidental to such architectural and engineering activities or have not in themselves traditionally been considered architectural and engineering services must not be procured under this section.

§ 530.10.30 Source Selection

The award of contracts for architect-engineer services is subject to the requirements of the Brooks Act. **See:** § 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 the SF-330, Architect-Engineer Qualifications. For additional information 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) in the court unit, Federal Public Defender Organization (FPDO), or Federal Judicial Center (FJC), or the Procurement Executive (PE) in the AO, 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, but may be outside consultants. For additional guidance applicable to evaluators who are outside consultants, **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 the evaluation board for that project.

§ 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 prescribed above 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. The selection report must include a description of the discussions and evaluation conducted by the board. 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 cannot 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 short process set forth in this section may be used as an alternative to the processes set forth 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 set forth 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; and,
- (c) upon receipt of a written report, approved and signed by the chairperson of the board, the CO is authorized to commence negotiations.

§ 530.60 Cost Estimate for Architect-Engineer Contracts

Before the CO can negotiate any proposed contract or initiate 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 the 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 initiate negotiations with the next qualified firm rated on the list. This procedure must be continued 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 in accordance with 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).
(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 frequently 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 the 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: § 540.20(a)(8) (Prohibited Terms and Conditions).
(7) Arbitration Clause	Any clause agreeing to arbitration.

§ 540.20(a) Prohibited Terms and Conditions	
Term or Condition	Deletion Mandatory
(8) Indemnification and/or Hold Harmless	<p>Delete any commercial term or provision stating that the judiciary will indemnify the contractor and replace with the following:</p> <p>“Notwithstanding any other term or provision of this agreement, the liability of the judiciary with respect to any claim for personal injury, death, property loss or damage pursuant to this agreement, is limited by and subject to the procedures and terms of the Federal Tort Claims Act, the Anti-deficiency Act and all other applicable federal laws and regulations.”</p>
(9) Clause making State Court Jurisdiction/State Law applicable	Replace with “Federal law applies.”

(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 Anti-Deficiency Act, 31 U.S.C § 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 additional information regarding taxes on telecommunications services, see: Guide, Vol 15, § 555 (Applicability of Taxes on Telecommunications Services).

§ 540.20(b) Terms and Conditions Recommended for Deletion or Modification	
Term or Condition	Recommended Action
(4) Cancellation	<p>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).</p> <p>Regarding cancellation terms in agreements with hotels or other conference/meeting facilities, see: § 540.20(b)(5)(E) (Cancellation).</p>
(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	<p>The judiciary can provide a “reasonable” deposit in exchange for the hotel or facility to reserve or guarantee a space.</p> <p>Note: The deposit amount must be obligated on a purchase order prior to paying any deposit.</p>

§ 540.20(b) Terms and Conditions Recommended for Deletion or Modification	
Term or Condition	Recommended Action
(E) Cancellation	<p>If the contractor insists on damages for cancellation of a hotel booking, replace any schedule of damages with language similar to the following:</p> <p>A. “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 (i.e., airport closure, major snow storm, hurricane, tornado, flood, etc.).</p> <p>In the event of a cancellation or reduction less than 60 days before the date of the event, the contractor agrees to make every effort to resell the cancelled room block. In the event 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.</p> <p>B. If the judiciary agrees to re-schedule the same event within six months from the date of the cancelled event, any cancellation fee will be waived.</p> <p>C. In the event that the booking is cancelled by the hotel, without limiting the judiciary’s rights and remedies under law or in equity, the hotel shall be held responsible for excess costs incurred by the judiciary to arrange equivalent accommodations for the event.</p>

- (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:

- (1) either a new commercial agreement is generated which 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. 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) In the event 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 will be calculated using a “worst case” scenario.

Note: Sufficient funds must be reserved to cover the costs of the worst case scenario at the time the purchase order is awarded.

§ 550 Interagency Agreements and MOUs for Obtaining Products and Services

§ 550.10 In General

Under some circumstances, judiciary units may wish to acquire goods or services from or through other federal entities. The Director has authority to enter into interagency agreements (IAs) and memoranda of understanding (MOUs) for this purpose and has delegated this authority as described at Guide, Vol 14, § 120.20.10(b) (Delegation to Chief Judges and Other Judiciary Officials). **See:** 28 U.S.C. § 604(a)(10)(c) and 31 U.S.C. § 1535 ; Guide, Vol 14, § 140.30.30(h) (Level 3 Delegation) and Guide, Vol 1, § 630(c) (Procurement). This section prescribes procedures applicable to these IAs and MOUs for obtaining products and services from other federal agencies.

Note: This section does **not** apply to:

- the purchase of duplication/printing services (**see:** Guide, Vol 23, Ch 2 (Printing)),

- the placement and administration of Reimbursable Work Authorizations (RWAs) (**see:** Guide, Vol 16 (Space and Facilities)), or
- MOUs with state or local agencies.

§ 550.20 Types of IAs and MOUs

The judiciary may enter into the following types of IA or MOU transactions with other federal agencies:

- (a) IAs or MOUs under which another federal agency (referred to as the providing agency) will perform work for, or provide services to, the judiciary. In this case, the judiciary is the receiving agency and reimburses the other agency for such work. 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. Regardless of how the work is performed, the payment is to the providing agency, not to a contractor.
- (b) IAs or MOUs under which the judiciary is authorized to issue a task or delivery order directly to a providing agency's contractor following the procedures contained in the Guide, Vol 14, § 310.60 (Other Federal Agency Contracts). In this case, the IA or MOU is non-monetary and no funds are transferred between agencies. Instead, the funds are obligated on the 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 a COCP Level 3 delegated procurement authority. **See:** Guide, Vol 14, § 140.30.30(h) (Level 3 Delegation).

§ 550.30 Limitations

§ 550.30.10 Restrictions/Requirements

Interagency Agreements or Memoranda of Understanding with other federal agencies:

- (a) Must comply with the bona fide needs rule;
- (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.

§ 550.30.20 Content

An IA or MOU must be in writing. As in any contract situation, the agreed upon written terms establish the scope of the undertaking and the rights and obligations of the parties. Also, the written IA or MOU can establish a not-to-exceed amount on the judiciary's financial obligation. If the other agency does not provide an agreement, Form AO 368 (Interagency Agreement) may be used. The IA or MOU should specify at least the following:

- (a) a citation of the statute or authority authorizing the IA or MOU;
 - (b) period of duration;
 - (c) responsibilities of the providing agency and the judiciary;
 - (d) description of services to be provided or products to be furnished;
 - (e) the cost of performance, including appropriate ceilings when cost is based on estimates. This estimated cost cannot be obligated beyond the fiscal year;
 - (f) mode of payment – advance or reimbursement (**see:** § 550.50 (Payment of IAs and MOUs));
 - (g) any applicable special requirements or procedures for assuring compliance;
 - (h) mutual termination provisions;
 - (i) procedures for the resolution of disagreements that may arise under an IA or MOU, including resolution by the PE;
 - (j) a requirement for the providing agency to notify the judiciary if it appears that performance will exceed estimated costs and procedures to cease or curtail performance as may be necessary; and
- (Note:** This is an important safeguard to protect the judiciary from a potential Anti-Deficiency Act violation.)
- (k) approvals and signatures by authorized officials (**see:** § 550.30.30 (Approval Requirements)).

§ 550.30.30 Approval Requirements

- (a) IAs or MOUs issued by the AO are subject to PMD's internal approval procedures. The use of IAs or MOUs 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 at Guide, Vol 14, § 120.20.10(b) (Delegation to Chief Judges and Other Judiciary Officials), or the PLO, if delegated, subject to the following limitations:
 - (1) The IA or MOU may not exceed the procurement delegation authority amount. **See:** Guide, Vol 14, § 140.30.30(h) (Level 3 Delegation). **Note:** If it is expected to exceed the delegation authority, **see:** § 550.30.50 (Exceeding Delegation Authority).
 - (2) The IA or MOU is signed by the chief judge or other judiciary official identified at Guide, Vol 14, § 120.20.10(b) (Delegation to Chief Judges and Other Judiciary Officials) or (if delegated) a CO, certified at the appropriate COCP level.
- (b) All judiciary IAs and MOUs must adhere to applicable statutory and/or regulatory requirements, including appropriations law. This means, for example, that the judiciary may not enter into IAs or MOUs that obligate funds from a future or previous fiscal year. However, the IA or MOU 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.

§ 550.30.40 [Reserved]

§ 550.30.50 Exceeding Delegation Authority

Proposed IAs or MOUs that exceed the general delegation authority amount, or for which authority is specifically not delegated under § 550.30.40 (Authority Not Delegated), must be forwarded to the PE for review and coordination with other AO offices, such as OHR and OGC. A one-time delegation of procurement authority will be issued upon concurrence of all coordinating offices.

§ 550.30.60 Non-Procurement IAs and MOUs

The judiciary may enter into IA or MOU transactions with other federal agencies that do not involve obtaining products or services, such as;

- (1) IAs or MOUs under which the judiciary is the provider of products or services to another federal agency; and

- (2) IAs or MOUs for the detail of personnel by the judiciary to another federal agency, whether paid or unpaid; and
- (3) IAs or MOUs establishing agreed procedures between the judiciary and another federal agency that do not involve the expenditure of appropriated funds by either party.

Non-procurement MOUs and IAs are outside the scope of Vol 14.

§ 550.40 Requirements for IAs and MOUs

§ 550.40.10 Statutory Authority

IAs and MOUs are authorized under one of the following categories:

- (a) specific judiciary statutory authority for the purchase; or
- (b) the Economy Act (31 U.S.C. § 1535).

§ 550.40.20 Specific Statutory Authority

For those IAs or MOUs for which there is specific statutory authority applicable to the judiciary, no Determination and Finding (D&F) is required. The applicable statutory authority must be specified in the IA or MOU, and the PE, in coordination with the Office of General Counsel (OGC), must review and validate its applicability to the judiciary.

§ 550.40.30 Economy Act

- (a) The Economy Act (Act) applies when more specific statutory authority does not exist or when the specific authority does not apply to the judiciary. For example, the Clinger-Cohen Act, 40 U.S.C. § 11314, which authorizes government-wide agency contracts (GWACs), does not apply to the judiciary and thus the Economy Act must be relied upon.
- (b) The Act does not provide authority to enter into IAs or MOUs with state or local agencies.
- (c) All IAs and MOUs under the Act must be supported by a D&F (**see:** § 550.40.40 (Economy Act Determination and Finding) and Appx 5A (Economy Act Determination and Finding)), which must be maintained in the procurement 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 or MOU, that supports the D&F.

§ 550.40.40 Economy Act Determination and Finding

- (a) Before entering into an IA or MOU 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, this should be provided with the IA or MOU. The D&F must determine:
 - (1) that use of an IA or MOU for obtaining products or services, under the Economy Act (31 U.S.C. § 1535), is in the best interest of the judiciary; and
 - (2) the products or services cannot be provided by contract as conveniently or cheaply by contracting with a commercial enterprise.
- (b) To support the determinations required in (1) and (2) above, the following must be considered and included in the D&F and file documentation:
 - (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 or MOU 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 or MOU will remain in force and effect; or specified procedures imposed by the providing agency as a condition of the agreement).
- (c) For IAs and MOUs within the court unit's delegated procurement authority (**see:** Guide, Vol 14, § 140.30.30(h) (Level 3 Delegation)), the D&F must be approved by the chief judge or other judiciary official identified at Guide, Vol 14, § 120.20.10(b) (Delegation to Chief Judges and Other Judiciary Officials) (or PLO, if delegated).

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

§ 550.40.50 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 either agency's appropriations. It cannot include "profit" to the providing agency.
- (b) Actual costs include all direct costs attributable to the performance of a service or the furnishing of products. It also includes only those indirect costs that are funded out of the providing agency's currently available appropriations and that bear a significant relationship to the service or work performed or materials furnished.

§ 550.40.60 Transfer of Funds

Other federal agencies may require that payment be made by transferring funds via the Department of Treasury's Intra-Governmental Payment and Collection (IPAC) system. If the providing agency requires that payment be made via the IPAC system, the purchasing CO will provide the agency location code in Form AO 368 (Interagency Agreement) or provide it in the other federal agency's form. These set forth the accounting information for both the providing and purchasing agencies in addition to other relevant details of the agreement. Because IPAC transfers can only be accomplished at the AO, the CO may need to seek assistance from the AO Accounting Division and follow their instructions to accomplish the payment. The chief judge or other judiciary official identified at Guide, Vol 14, § 120.20.10(b) (Delegation to Chief Judges and Other Judiciary Officials) (or PLO, if delegated) must sign the form as the Authorizing Official, indicating concurrence. These discussions should be carried out and all the funding issues resolved before requesting approval of the IA or MOU.

§ 550.50 Payment of IAs and MOUs

§ 550.50.10 Advance Versus Reimbursement

Payments to federal agencies may be made in advance or upon receipt of the products or services.

(a) Advance

The provisions of the written IA or MOU may permit advance payment for all or part of the estimated cost of furnishing the products or services. If payment is made in advance, then any adjustments on the basis of actual costs must be made as agreed to by the providing agency and judiciary. Amounts in excess of 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, payment for actual costs may be made by the judiciary after the products or services have been furnished on a reimbursement basis.

§ 550.50.20 [Reserved]

§ 550.50.30 Recording IA or MOU Obligations

In most instances, an IA, MOU, or an order placed directly with another agency's contractor obligates the judiciary's appropriations and is recorded as an obligation. If this is an Economy Act transaction, then 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 availability of the appropriation, in:

- (a) providing products or services; or
- (b) making an authorized contract with another person to provide the requested products or services.