

CONTRACTORS

Legality of Permitting Contractor Employees to Perform Functional Account Manager Duties

This responds to a MAJCOM request for an exception to policy/waiver to AFI 36-2619, *Military Personnel Appropriation Man-Day Program*. If granted, this waiver would permit contractor employees to perform as Functional Military Personnel Appropriation (MPA) (Man-Day Program)/Functional Account Manager (FAM)/Validating Authorities.

AFI 36-2619, Attachment 1, requires the FAM to be “a [Regular Air Force] RegAF member or DoD Civilian.” This requirement, when read in conjunction with the definition of inherently governmental and closely-related functions, indicates FAM duties are inherently governmental functions. The requirement that these functions be performed by federal employees and not contractors cannot be waived.

The MAJCOM requested this exception “to permit . . . contractor personnel continued access to M4S in order to perform as [FAMs],” and explains that the contractor personnel assist with cradle-to-grave exercise planning, including “exercise requirements determination and execution, to include processing M4S tasks.”

FAM duties are listed in AFI 36-2619, paragraphs 1.2.3.3.1 through 1.2.3.3.8 and Attachment 1. Some of the articulated duties include: administering the MPA Man-Day Program between Commands, Staffs, and Agencies and associated RegAF and supporting Air National Guard (ANG)/Air Force Reserve (AFR) units; ensuring prioritized requirements are identified and submitted annually to commands, staffs, or agencies’ MPA Man-Day program managers for review and consolidation; and advising the RegAF hiring authority to coordinate with the appropriate MAJCOM Functional Manager (MFM) before selecting volunteers outside their primary Air Force Specialty Code (AFSC) prior to starting the tour.

The Performance Work Statement (PWS) at issue in this matter states the following with respect to MPA Man-Days: “The [contractor] is responsible for tracking the individual exercise funding Man-Day budgets utilizing the appropriate USAF systems. . . . This includes processing Man-Day Requests/Authorizations for both the ANG and the AFR personnel.” PWS, paragraph 1.3.3.1.1.

The Federal Acquisition Regulation (FAR) Subpart 7.503, holds that contracts cannot be used for the performance of inherently governmental functions. An inherently governmental function is one “so intimately related to the public interest as to require performance by Federal Government Employees.” P.L. 105-270, 112 Stat. 2382 (1998). This includes functions that require either exercise of discretion in applying Federal Government authority or the making of value judgments in making decisions for the Federal Government, including judgments relating to monetary transactions and entitlements. Office of Federal Procurement Policy Letter. Other functions which are not, per se, inherently governmental, but which are closely related to inherently governmental functions, may approach being inherently governmental because of the nature of the function, the manner in which the contractor performs a contract, or the manner in which the Government administers contractor performance.

The FAR lists examples of inherently governmental functions, including: determination of agency policy; determination of Federal program priorities for budget requests; direction and control of Federal employees; approval of position descriptions and performance standards for Federal employees; and determination of budget policy, guidance, and strategy. Contractors may not perform inherently governmental functions; however, they may be able to perform closely-related functions, so long as there is enhanced management and oversight of contractor activities to ensure that contractors do not perform inherently governmental functions.

AFI 36-2619 requires that FAM duties be performed by RegAF or DoD civilian personnel. While not stated in the broad terms of the FAR, many of the responsibilities listed in AFI 36-2619 require the exercise of discretion in applying Federal Government authority or the making of value judgments in making decisions for the Federal Government, including judgments relating to monetary entitlements. Therefore FAM duties rise to the level of inherently governmental functions listed by the FAR. The FAR and OPM policies against appointing contractors to perform these functions cannot be waived. Even if these duties were deemed to not be inherently governmental, FAM duties as described have characteristics of “closely-related” functions, including but not limited to participating in any situation where it might be assumed that contractors are agency employees or representatives.

The PWS requires contractors to “[track] the individual exercise funding Man-Day budgets utilizing the appropriate USAF systems. . . . [t]his includes processing Man-Day Requests/Authorizations.” This requires contractors to utilize Man-Day management systems, but does not require that contractors act as FAMs. The request does not state what FAM duties the contractors perform, but none of the duties listed in AFI 36-2619 appear to be anticipated by the contract. FAM duties appear to be inherently governmental and require performance by RegAF or civilian DoD personnel; this requirement cannot be waived. Therefore, by the wording of the exception to policy request, the MAJCOM’s needs may be met by allowing contractors to have access to M4S, rather than appointing contractors as FAMs.

In our review of the PWS, we noted several functions which could approach being in the category of inherently governmental functions without proper oversight of contractor performance. The MAJCOM should ensure contractors are working in a support capacity and that there are a sufficient number of Government employees with expertise who will administer the contract, provide oversight, retain decision-making authority, retain control of government operations, and assign and manage government personnel.

The Administrative Law Directorate (AF/JAA) and Acquisition Law and Litigation Directorate (AF/JAQ) join in this opinion.

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