

DEPARTMENT OF ADMINISTRATIVE SERVICES

RTP TRACKING#: 2012-294
01T-2192

REQUEST FOR SUPPLIES/SERVICES/EQUIPMENT \$1,000.00 or more

DIVISION: OAKS
DATE: 7/22/2011
VENDOR NAME: Logic Soft (MBE)
DOCUMENT TOTAL: \$49,400.00

DESCRIPTION OF REQUEST FOR GOODS/SERVICES/EQUIPMENT:

myOhio.gov Portal Project; Resource Name: Kevin Armstrong
Provide project management support for myOHIO.gov initiative.
Responsible for the OAKS Directory Services and Portal project management including all milestones and work products as defined in the Integrated Project Workplan and SOW.
Assists with managing the scope of the milestones and deliverables
A new vendor is being used because ETCI, Kevin Armstrong's prior vendor, did not renew their STS.

FUNDING SOURCE (S):

FUND 5EB0
ALI 100635
DEPARTMENT DAS510120
PROGRAM 3870D

Please explain in detail below why this purchase is critical in nature and how it is in compliance with Executive Order 2009-07S issued on April 22, 2009.

Critical resource to complete the myOhio.gov initiative which is under way.

Continuation of existing contractor.

Request approved by: Douglas W. [Signature] 7-28-11
DAS Division Deputy Date

*DM
07/22/2011*

Office of Finance Review:

Approved
The request has been reviewed and is determined to be:
critical ongoing project, existing contractor
Ann Eftimiou 8/5/2011
Date

*S PD
8/2/11*

8/2/11

Ohio Department of Administrative Services
Ted Strickland, *Governor*
Hugh Quill, *Director*

DAS Directive

Directive No. **HR-D-13**
Effective Date: **09-01-2009**



To: All Appointing Authorities and Personnel Officers
From: Hugh Quill, *Director of Administrative Services*
Re: Independent Contractor Guidelines

PURPOSE

To establish uniform guidelines and policies for contracting with independent contractors. These guidelines apply to appointing authorities with job classifications established under section 124.14(A) of the Ohio Revised Code.

GENERAL

Pursuant to section 124.14(A) of the Revised Code, the director of the Department of Administrative Services is to establish a job classification plan for all employments, the salaries of which are paid in whole or in part by the state. Appointing authorities with service needs that cannot be fulfilled with traditional employee appointments may enter into a personal services contract for the purpose of contracting for the performance of those services. Prior to contracting, careful consideration should be taken to determine whether the respective job responsibilities are that of a state civil service employee as defined in Revised Code section 124.01, or that of an independent contractor. This careful examination of the job responsibilities is necessary in order to prevent potential conflict with current state employees as well as subsequent determinations that the independent contractor is acting as an employee. Black's Law dictionary defines an independent contractor as, "One who is hired to undertake a specific project but who is left free to do the assigned work and to choose the method for accomplishing it. (Black's Law Dictionary, 7th Ed. 1999).

While there are numerous things to consider in determining whether or not the use of the independent contractor is appropriate, some of the important issues to be considered by the appointing authority include:

- (1) An independent contractor is paid a fee or other payment by contractual arrangement for particular services.
- (2) Personnel of the appointing authority usually do not control or supervise the manner of an independent contractor's work. Independent contractors are not eligible for employee fringe benefits such as vacation or sick leave, and do not appear on a public payroll.
- (3) Independent contractors are generally required to provide their own supplies and equipment and to provide and pay assistants if necessary.
- (4) Independent contractors receive a Form 1099 for income tax reporting purposes and are not eligible for workers compensation coverage.

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- (5) The work to be performed by the independent contractor is seen as temporary as opposed to permanent.
- (6) The independent contractor is still subject to certain guidelines established by the appointing authority including providing the hours in which the independent contractor can perform work at the appointing authority's work site.
- (7) The independent contractor is not supervised and does not perform a supervisory function over any civil service employees.

Established Criteria of an Independent Contractor

Level of Control is a common criterion established in common law and by the Internal Revenue Service ("IRS"), Department of Labor and Public Employee Retirement System ("PERS") in determining whether a particular individual is a state civil service employee or independent contractor as used by the employer.

Guidelines have been established which provide the general characteristics possessed by a civil service employee and contrast those characteristics with those generally possessed by an independent contractor. Some examples of independent contractors currently being used in the state system include medical personnel at the state's penal institutions as well as consultants used for information technology projects.

Factors to weigh in determining whether a worker is a state civil service employee or an independent contractor include, but are not limited to:

- a. A worker who is required to comply with instructions about when, where and how the worker is to work beyond the general instructions set forth in the personal services contract is ordinarily a state civil service employee. The employer's right to instruct, not the actual exercise of that right, is a key factor. Instructions may be oral or written (e.g., procedures and manuals).
- b. Beyond general orientation training, specific training of an independent contractor by an experienced employee who works with the independent contractor is a factor indicating control because the specific training indicates that the employer wants the services performed in a certain manner. Independent contractors ordinarily use their own methods and receive limited training from the state agency that purchases the independent contracting services.
- c. If services must be rendered personally and the employer is more interested in who does the job and the particular methods used rather than getting the job done and the result of the services rendered, the worker may be considered an employee.
- d. Hiring other than in a personal services contract or other contractual relationship, supervision beyond general contract requirements and payment by an employer are some of the factors that generally reveal control over persons on the job.

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- e. If a worker, as part of his performance, hires supervises and pays assistants under a written contract to provide materials and labor, the worker may be an independent contractor.
- f. The existence of a continuing relationship between the worker and the employer may indicate an employer-employee relationship. A continuing relationship may exist when work is frequently performed, or when the contract is long term or regularly renewed.
- g. If the employer sets the hours of work, that may be indicative of control. However, if the independent contractor is required by the nature of the work to perform the work at a certain location, the independent contractor may be limited to the operating hours of that agency or institution. In addition, the personal services contract executed by the parties may indicate a certain number of hours estimated to be worked each week in order to meet a deadline.
- h. An independent contractor is free to work for as many employers as he or she chooses as long as the other work does not create a conflict of interest. An employee generally works full or part time for one employer.
- i. The location where the work is performed might indicate an element of control. If the work is performed on the employer's premises, an element of control is implied, only if the work could be conducted elsewhere. Likewise, if the worker uses the employer's tools, materials, etc., that is indicative of control unless this usage was determined to be a consideration as part of the compensation package in the personal service contract. In contrast, if the worker makes a significant investment in the facilities he or she uses (e.g., rents an office from an unrelated party), the worker would tend to be an independent contractor.
- j. If the employer directs how the work must be performed (e.g., the sequence of tasks, regular reports, the manner in which something is to be accomplished), the worker is likely an employee beyond the guidelines or request for deliverables set forth in the personal services contract.
- k. Employees are typically compensated for work done by the hour, week or month. Independent contractors are typically paid by the job, by the deliverable or on a commission basis.
- l. If a worker can make his or her services available to the general public, he or she would tend to be an independent contractor.
- m. A state employer has the right to discharge a civil service employee. The services of an independent contractor are terminated for breach of contract, or with the expiration of the personal services contract.
- n. If there is an opportunity for profit and loss, the worker is likely to be an independent contractor.

Assessment of Agency Needs

A multi-step analysis is required to assess agency needs. First, an agency must determine whether the worker's function is that of an independent contractor. Then, the agency must

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apply the guidelines set forth below to determine whether the worker's function is inherently governmental. This determination involves an assessment as to whether the worker's function is so intimately related to the public interest that the work is more properly performed by a governmental employee. As a guide, ask the following questions:

1. Does the work involve policy making or is it managerial in nature? Final determinations as to administrative actions or the establishment of policy should be made by a governmental employee.
2. Is the work to be performed within the scope of a project, initiative or study which has specified time parameters that establish a date of commencement and a date of completion or is the work within the scope of a new or established program or service provided by a state entity?
3. Is the independent contractor justification being used to circumvent personnel ceilings, pay limitations or employment procedures?
4. Is the contract to be awarded to a former agency employee?
5. Will the contractor aid in influencing or enacting legislation?
6. Is the independent contractor's particular expertise available within the agency or from another agency?

If the answer is "yes" to questions 2, 3, 4, 5 or 6 it may be that the worker's function is inherently governmental and should be performed by a governmental employee.

If the function is not inherently governmental, involves independent judgment, extended analysis and advanced training, an agency should determine whether the service is personal in nature, involves a temporary task and/or requires expertise beyond the resources currently available to the state employer and, therefore, appropriate for a personal services contract. The agency should also determine whether the service is a regulated profession under Title 47 of the Ohio Revised Code. Many of these professions have state job classifications.

Each appointing authority is to evaluate the functions of its workers to determine whether the individual worker is an independent contractor or a state civil service employee. If the individual worker functions as a civil service employee, every effort should be made to place the individual into an appropriate civil service job classification so that appropriate IRS, PERS and other employee withholdings may be made. Temporary employees hired through an employment agency or temporary service should have employee withholdings made through that service.

Selecting an Independent Contractor

Typically, the duration of service of an independent contractor should not be long term, and contractors should not be hired to perform work that could be performed by civil service employees. Long-term services may be acquired through seasonal, intermittent, part-time

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or permanent state employees. Contracts may not cross over the biennium, but may be renewed when necessary.

- Check contractor's references to ensure that the contractor can perform the work.
- In preparing the personal services contract, ensure that the statement of work or scope of services defines as precisely as possible the product of the contractor's work including any deliverables and payments associated with the referenced deliverables.
- Include a quality assurance plan or invoke a project management process to evaluate the contractor's work, in order to ensure that quality and value are received by the agency.
- Eliminate conflicts of interest through competition where possible. Some contracts require a competitive selection process. Avoid allowing the contractor to steer the agency toward follow-on contracts, or contracts that provide for extending the relationship between the employer and the independent contractor or other actions that may create the existence of an employee relationship for the contractor. Avoid career contractors.
- Include a contract provision requiring the contractor to acknowledge the intent of the parties that the contract establishes an independent contractor relationship and the independent contractor is not to be considered a state employee for any purposes, including but not limited to the application of the Fair Labor Standards Act, Social Security Act, Federal Unemployment Tax Act, Federal Insurance Contribution Act, the provisions of the Internal Revenue Code, Ohio tax law, workers' compensation law and unemployment insurance law.
- Use the following, or include a contract provision that states in essence:

The contractor agrees that it is a separate and independent enterprise from the state and from your agency and that it has a full opportunity to find other business and has made an investment in its business. Moreover, the contractor will retain sole and absolute discretion in the judgment of the manner and means of carrying out the contractor's activities and responsibilities under the contract. The contract is not to be construed as creating any joint employment relationship between the contractor and the public agency or the State of Ohio.
- For complex and/or expert relationships, develop a Competitive Sealed Proposal or Request for Proposal ("RFP"). Much of the RFP's content can be incorporated into

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the contract which will establish the parameters, scope of services, contract scope and renewal options of your selected contractor.

This directive supersedes any previously issued directive or policy and will remain effective until canceled or superseded.

AUTHORITY & REFERENCES

OAC 123:1-45-01

Office of Federal Procurement Policy Letter 92-01. Model Independent Contractor Agreement for Services (available from DAS)

Section 2-302 of the Model Procurement Code for State and Local Governments (ABA/ALI). Available from the Department of Administrative Services.

State of Ohio
Procurement

Ohio Department of Administrative
Services General Services Division
Office of State Procurement
Services 4200 Surface Road
Columbus, Ohio 43228
General Information: 614-466-5090

State of Ohio Procurement Handbook for Supplies and Services

Ohio**DAS**

8.5.1 Motor vehicles purchased from state term contracts.

1. Agency requestor will enter a completed requisition into OAKS attaching all necessary documentation (vehicle lease/purchase justification form(s), written justifications, etc.). The completed requisition will be routed to OFM for approval.
2. If the requested purchase is approved, OFM will enter the information into OAKS.
3. If the requested purchase has been disapproved, OFM will request additional information and return the requisition to the agency through OAKS.

8.5.2 Motor vehicles purchased from non-contract vendors (\$50,000 in aggregate to be competitively bid).

1. Agency requestor will enter a completed requisition into OAKS along with all necessary documentation (vehicle purchase justification form(s), written justifications, etc.)
2. If the requested purchase is approved, OFM will update the information in OAKS and send notification to State Procurement.
3. State Procurement will issue an Invitation to Bid (ITB). After State Procurement awards the ITB, OFM will be notified via OAKS. State Purchasing will enter the ORDER into OAKS with the required codes and approvals.
4. If the requested purchase has been disapproved, OFM will notify the agency and request additional information.

8.5.3 Motor vehicles leased from commercial leasing companies (under \$50,000 in aggregate).

1. Agency requestor enters a completed requisition in OAKS along with all necessary documentation (vehicle lease purchase justification form(s), written justifications, including a copy of the unsigned lease agreement, etc.).
2. If the requested lease is approved, OFM will update information in OAKS and send notification to the agency.
3. If the requested lease has been disapproved, OFM will notify the agency and request additional information.

8.5.4 Motor vehicles leased from commercial leasing companies (\$50,000 in aggregate to be competitively bid).

1. Agency requestor enters completed requisition into OAKS and routes to OFM with all necessary documentation (vehicle lease purchase justification form(s), written justifications, including a copy of the unsigned lease agreement, etc.).
2. If the requested lease is approved, OFM will update in OAKS and route to State Procurement.
3. State Procurement will issue the ITB. After the ITB is awarded, State Procurement will notify OFM and enter the ORDER into OAKS with the required codes and approvals.
4. If the requested lease has been disapproved, OFM will notify the agency and request additional information.

8.6 Release and Permit

Referring to the diagram at the beginning of Chapter 4, when an agency's direct purchase amount exceeds \$50,000, the agency is required to forward their request to DAS to make the purchase under competitive selection. If DAS determines that it is not possible or advantageous for it to make the purchase, permission will be given to the agency to make the purchase under its direct purchase authority.

The waiver that authorizes the agency to seek Controlling Board approval or to make purchases that DAS cannot make is the **Release and Permit**. DAS' authority to grant a Release and Permit is contained in Ohio Revised Code Sections 125.05 & 125.06 and Ohio Administrative Code Section 123:5-1-03. To submit a request for a Release and Permit use the Request to Purchase form at the following web site <http://apps.das.ohio.gov/requesttopurchase/requestform.aspx>

Factors DAS will consider in granting a Release and Permit include:

- The demonstrated ability of the agency in terms of procurement and specialized knowledge pertinent to the procurement.
- The past experience of the agency in exercising similar authority.
- The degree of economy and efficiency to be achieved if authority is delegated.
- The availability of resources in DAS to make the purchase.
- The ability of DAS to complete the purchase under Competitive Selection.
- An emergency condition exists.

The agency should not proceed with the purchase until DAS has granted the Release and Permit. Whenever DAS grants a Release and Permit, the agency must make the purchase pursuant to Competitive Selection requirements or with Controlling Board approval. A copy of the approved Release and Permit, to include supportive documentation, will be retained by DAS.

If the request is approved, a release and permit number will be assigned to the using agency. Using agencies must enter the given release and permit number field when entering their requisition in OAKS.

DAS may also grant special Blanket Release and Permits for certain personal services that cannot be bid by DAS. DAS will issue the Blanket Release and Permit prior to the beginning of the fiscal year(s) to which they apply. See Section 8.8.

Special Note: Agencies are cautioned against investing significant time in obtaining quotes and/or finalizing any contractual agreement with a vendor under the assumption that DAS will automatically grant the release & permit. Agencies should also guard against submitting a request for the release & permit citing an expedited need for DAS to grant the release & permit (i.e. trying to meet a Controlling Board deadline for submission). Law requires that DAS review each request to determine if such can be purchased through competitive selection. If DAS determines that formal bidding is possible, the request will be denied. The agency should contact DAS when the agency first determines that a need exists. If DAS determines, at that time, that it cannot procure the need through competitive selection, the agency will be granted the release & permit and may then proceed with using their direct authority to complete the purchase.

Questions & Answers

Q: When should a Release and Permit be requested?

A: The Agency should submit a request for Release and Permit by using the following web site <http://apps.das.ohio.gov/requesttopurchase/requestform.aspx>. DAS will review the purchase request and make a determination if such can be purchased through competitive selection or if a Release and Permit should be granted to the agency. Agencies should not contact suppliers prior to DAS review. If it is determined that the purchase can be purchased through competitive selection, the request will be denied and the agency will have invested time and effort needlessly.

Q: What if the purchase has been made and we now discover that a Release and Permit is necessary?

A: Law requires DAS to determine that it is not possible or advantageous to make the purchase through Competitive Selection. If determined that DAS could have made the purchase through Competitive Selection, the purchase could be considered invalid. This may require the agency to return the item and/or may leave the person authorizing the purchase personally responsible to pay for the purchase. The only exception would involve an emergency condition.

Q: When would a purchase be considered an emergency purchase?

A: The Revised Code defines that an emergency exists when there is an immediate need for supplies or services that cannot be met through normal procurement methods and lack of which would create a serious threat to the health or safety of a person or to the functioning of state government. The failure to properly plan is not considered to fall within the definition of an emergency situation. With few exceptions, only true emergency requests will be considered for a release and permit.

Q: How long does it take to obtain a Release and Permit?

A: With the exception of an emergency, the process generally takes a minimum of ten (10) business days from the date the request is received. Agencies should be mindful to include all relative information to support the request as failure to do so will result in return of the request and will delay receipt of the Release and Permit. Depending upon the purchase, some requests may require additional time for review.

Q: How do I make a request for a Release and Permit?

A: Complete the web based Request to Purchase form at <http://apps.das.ohio.gov/requesttopurchase/requestform.aspx>. Attach all detailed information and complete all areas of the form, as requested. When the review is completed, you will receive an e-mail noting the final determination of your request.

Q: Why does a Release and Permit have to be obtained for Controlling Board Requests?

A: The Controlling Board requires that all requests to be placed on the agenda requesting a waiver of competitive selection be accompanied by a Release and Permit from DAS, if so required by DAS. If not attached, the request will not be placed on the Controlling Board agenda. It is important to involve DAS early into your purchase as the Controlling Board Request must include the Release and Permit or you will be delayed in obtaining Controlling Board approval.

Q: I need to make a purchase involving a repair to our public building. How do I obtain a Release and Permit?

A: The Office of State Purchasing is not authorized by law to make purchases related to the construction, re-construction, alterations, or similar repairs to a public building (see Chapter 11). Agencies should contact the Ohio Facilities Construction Commission (OFCC) at (614) 466-6290.

8.7 Blanket Release and Permit

Certain types of purchases may exceed the agency direct purchase authority thresholds, but are not required to be purchased through DAS. DAS issues a **blanket release and permit** to cover these types of purchases.

At the beginning of each biennium, DAS determines that it is not possible or advantageous for it to make purchases of certain types of personal services and other specialized items. These items are described in the Expense Account as published by OBM, State Accounting. This blanket release and permit does not waive the necessity for any additional reviews or approvals as required by law or other DAS policies.

The following procedures have been established to enable agencies to process requisition in OAKS.

The blanket release and permit number is comprised of the agency's three digit alphanumeric OAKS code, followed by a hyphen and 08/09. For example:

- DAS-08/09 (Department of Administrative Services)
- OBM-08/09 (Office of Budget and Management)

Agencies may view the actual blanket R&P on the State Procurement website (procure.ohio.gov) ; click on "What's New" and then on "Announcements".

The blanket release and permit should be used on all requisitions utilizing these expense accounts. If Controlling Board approval is required, due to exceeding the annual dollar threshold, the agency must make a written notation on the Controlling Board request of the expense accounts utilized and the Release and Permit number assigned. Controlling Board staff will verify this information prior to scheduling any request. No further release and permits will be required from DAS.

For expense accounts not listed, release and permit approvals are necessary from DAS. Telecommunication charges and utility payments and services are to be acquired in accordance with Section 9.30, Ohio Revised Code. Release and permits are not necessary for these services.

8.8 Controlling Board

The State Controlling Board is a legislative body comprised seven members: the Director of the Office of Budget and Management or an employee of the Office of Budget and Management designated by the Director, the Chairs of the Senate and House Finance Committees, a majority member appointed from both the Senate and the House, and a minority member appointed from both the Senate and the House. The Controlling Board provides oversight to ensure that funds appropriated by the legislature are used appropriately, consistent with the original legislative intent.

The Controlling Board has the authority to waive competitive selection. Agencies must seek Controlling Board approval when the cumulative amount to be spent with a single vendor will exceed \$50,000 per fiscal year and purchase does not follow competitive selection. For these purchases, the agency must obtain a release & permit from DAS.

For more on Controlling Board procedures, please consult the Controlling Board web site, at the following location: <http://obm.ohio.gov/sectionpages/ControllingBoard/default.aspx>