



FEMA

SEP 9 2008

MEMORANDUM FOR: All FEMA Employees

FROM: David A. Trissell
Chief Counsel 

SUBJECT: Limitation on the Use of Contractors to Perform
Government Functions

Please take heed of the attached memorandum regarding the prohibition on employing contractors to perform certain tasks, including drafting written testimony or correspondence for submission to the Congress or its members.

As FEMA's mission has expanded so have the demands upon our relatively small and fully engaged staff. The resulting demands sometimes necessitate that we rely on contractors to accomplish all that is expected. Even so, we must recognize that contractors are not federal employees and there are limits as to the tasks that they may perform.

Specifically, federal regulations prohibit the use of contractors for the performance of "inherently governmental functions." 48 C.F.R. § 7.503(a). These include, among other activities, "[t]he drafting of Congressional testimony, responses to Congressional correspondence, or agency responses to audit reports from the Inspector General, the Government Accountability Office, or other Federal audit entity." 48 C.F.R. § 7.503(c)(20).

Below is a link to a *Washington Post* article that highlights the problems that can arise when appropriate limits to the use of contractors are not followed. See, http://www.washingtonpost.com/wp-dyn/content/article/2008/08/17/AR2008081702013_pf.html. This article illustrates the constraints that may apply to a contractor's eligibility for future contracts when the contractor works within the federal workplace and has access to non-public information.

If you have any questions or concerns about the appropriate use of contractors, please contact the Office of Chief Counsel at (202) 646-4105.

Attachment



Homeland Security

AUG - 7 2008

MEMORANDUM FOR ALL COMPONENT HEADS

FROM: Gus P. Coldebell 
Acting General Counsel

SUBJECT: Prohibition on the Use of Contractors to Draft Congressional
Testimony and Responses

Purpose

This memorandum advises you of the law regarding the prohibition on employing contractors to draft written testimony or correspondence for submission to the Congress or its members.

Discussion

Congressional committees and subcommittees request that the department's leadership testify frequently. This takes a toll on the management of the department in many ways. We have learned that the extraordinary burden of testifying may be leading some offices to consider using contractors to draft written testimony. Although the motivation is understandable given the state of congressional oversight of the department, this course is prohibited by current law.

Current federal regulations prohibit the use of contractors for the drafting of congressional testimony or responses to congressional correspondence. As a general rule, federal agencies cannot use contractors for the performance of "inherently governmental functions." 48 C.F.R. § 7.503(a). Notwithstanding the agency's broad authority to contract for private sector services to support its business operations and mission, governing regulations identify certain services and activities as reserved for performance by government employees. These include, among others, "[t]he drafting of [c]ongressional testimony, responses to [c]ongressional correspondence, or agency responses to audit reports from the Inspector General, the Government Accountability Office, or other Federal audit entity." 48 C.F.R. § 7.503(c)(20).

The prohibition on using contractors for inherently governmental functions also means that contractors may not represent the department in communications or meetings with congressional officials. In the unusual circumstance in which department employees must have contractors accompany them to a meeting with congressional members or staff to explain technical matters, contractors' status as contractors should be made known, and all presentation materials or reports relied upon at the meeting produced by contractors should be suitably marked as contractor products (or otherwise have the contractors' participation appropriately disclosed). See 48 C.F.R. § 37.114(c).

We recognize that the repeated and frequent requests to appear before committees of Congress undoubtedly put a strain on not only the leaders testifying, but also the departmental officials whose time is consumed in preparing the department witnesses' written testimony. In lieu of hiring contractors to shoulder this burden, however, department officials should explore other alternatives. This might include, for example: submitting substantially shorter written statements; resubmitting previously-written statements when congressional committees request participation in hearings on the same topic; or (when a committee gives short notice of a witness's invitation to a hearing) deciding that time simply does not allow for preparation of a written statement for a particular hearing. The Office of Legislative Affairs will provide strategic advice on these or other options.

Although this memorandum principally has concerned the drafting of congressional testimony and responses, agency officials and employees should guard against all instances in which contractors may be hired to perform, or may slip into the performance of, inherently governmental functions. Even where performance of inherently governmental functions is not implicated by contractor activity per se, agency officials and employees should be alert to circumstances and work conditions that may restrict the exercise of their discretionary authority, limit or dilute their decision-making responsibility, or render them less able to make accounting of their official actions and decisions, including the alternatives they considered and choices they made. When this occurs, the department has crossed the line between using contractors for appropriate support and using them for inherently governmental activities.

Should you have any questions about the propriety of contractor support in connection with these matters, please contact your servicing procurement law office.

cc: Paul A. Schneider, Deputy Secretary
Donald H. Kent, Jr., Assistant Secretary for Legislative Affairs