

Chapter 3 : PERSONAL SERVICES

Introduction

This section is your guide if you are considering using an independent contractor instead of a classified employee to perform personal services for the State. With very few exceptions, the Personnel Director is legally required by the Privatization Program to review and approve your use of a contractor for these services. The State Personnel Director has assigned staff to perform this review that is distinct and separate from other reviews conducted by the State Purchasing Division and the Office of the State Controller. Some of the Privatization Program's unique characteristics are that the State Personnel Director must review and approve the contract no matter what type of encumbrance document is used or the source or amount of the funds being spent. The State Personnel Director's responsibility to review and approve the contract cannot be delegated.

Work which benefits the State is generally performed by State classified staff. These State employees perform "personal services". Privatization is the use of independent contractors rather than State classified staff to perform work that has been needed or will be needed by the State. The Personnel Director's review and approval of personal services agreements is to assure the constitutional and statutory protection of classified system employees. The main consideration being that State work cannot be performed by independent contractors if it causes the separation of State classified staff.

Background

The guidelines for allowing privatization of State services are more fully set out in statute and interpretive administrative rules. Chapter 13 of the Personnel Director's Administrative Procedures contains the rules governing privatization. These rules provide the criteria by which the acquisition of personal services by independent contractors is justified and define the relationship between the State and the persons providing the services.

As mentioned previously, certain agreements are not subject to review by the Department of Personnel staff assigned to perform the duties required by the Privatization Program. They are as follows: transactions to acquire goods and commodities having no service component other than delivery and/or installation; intergovernmental agreements; agreements for the lease and/or purchase of real property; agreements involving personal services exempt from the classified system; and services of a non recurring nature that are able to be performed within six months.

If your agreement is not exempt from review, begin considering whether the services you intend to acquire will be approved. You will need to make some preliminary determinations such as:

- Will the services directly or indirectly result in the separation of State classified staff?
- Are the services available within the State classified system?

- Are the services provided substantially different from those of classified staff?
- Is the contracting for services authorized by statute (post April 7, 1993)?
- Will contracting for the services result in cost savings?
- Will the level of quality be maintained?
- Will the public interest outweigh the economic advantages of contracting?

Recommended Approach

First obtain an information packet from the Department of Personnel staff to perform the duties required by the Privatization Program. The packet contains copies of the pertinent statutes, administrative procedures and forms as well as background information. Next, determine if your acquisition is exempt from review by the program. If not, then determine if the acquisition "implicates" or does "not implicate" the State classified system. The term "implicate" as used by the program means that if the services being acquired are available within the classified system, the acquisition "implicates" the system. The converse is true of the term does "not implicate". Either way, the statute and administrative procedures specify the exact circumstances that provide grounds for the acquisition.

Program forms are used to demonstrate and present the agency's determinations and factual assertions about the necessity of acquiring the services outside the classified system. The Certification for Personnel Service Agreements Form is required with all submittals for review and is used to certify the need to go outside the system as well as establishing the independent status of the contractor. For certain submittals, a **"Cost Analysis Form"** along with a **"Certification Form"** must be submitted. The cost analysis form compares the cost of acquiring services from a contractor versus using State classified staff. The certification form is the Department of Personnel's permanent document and will not be returned to your department.

A distinct program service is the "pre-approval process". Prior to issuing a formal bid proposal [(i.e. - Request for Proposal (RFP) or Invitation for Bid (IFB)], the agency seeking bids should work closely with the Department of Personnel staff assigned to perform the duties required by the Privatization Program. The staff reviews the scope of work as outlined in the bid to make sure a basis exists to approve the services obtained from independent contractors. Staff then issues a pre-approval letter which allows the agency to bypass a second review after a vendor is selected and an encumbrance document is executed. Failure to submit to this pre-review could jeopardize the successful outcome of the entire formal bid process.

The following is an outline intended to guide the novice through the important points of the Privatization Program procedures. The reader is expected to refer to the actual State Statute and procedure language for interpretation and guidance when it is cited in the outline.

Please note: The word contract refers to any type of State agreement regardless of what it may be called (i.e. - contract, purchase order, etc.).

I. Personnel Director's Administrative Procedures

(Rules P13-1-1 through P13-1-13; Sections 24-50-501, *et seq.*, CRS)

A. Agreements for personal services are governed by these rules and subject to review and approval by the Personnel Director.

B. Knowing the meaning of the following key terms is essential:

- Contract
- Services
- Personal Services
- Purchased Services
- Independent Contractor

These definitions are contained in the Personnel Procedures (P13-1-1). One must be familiar with the requirements of the Personnel Rules, as a whole, when executing personal services agreements.

II. Key Exceptions To Privatization Review Requirements

A. The Privatization Program procedures and review requirements apply to almost all personal services acquisitions with very few exceptions; the main exceptions are as follows:

1. Agreements to acquire goods and commodities: If the transaction is for the purchase of goods or commodities and does not have an ongoing and significant service component other than delivery and/or installation, it is exempt from program review.
2. Agreements for the lease and purchase of real property.
3. Intergovernmental agreements - - contracts between State agencies, the State and its political subdivisions, other states, the federal government, or any combination of these. (Section 24-50-508, CRS; Rule P13-1-2)
4. Limited term agreements:
 - a. The service is not expected to recur on a regular basis (Section 24-50-513, CRS Rule P13-1-2). Foreseeable need is the key here. Reviewer looks for patterns, even irregular patterns of need. For example, vacations and illness requiring fill-in temporary staff can be expected (based on past patterns). Because these situations can be expected to recur, the agreements for these services may be reviewed. Accidents causing need for temporary staff are considered as not recurring and fit the limited term exception as well as the “emergency” and are approved on that basis.

- b. The services to be acquired can be performed in 6 months or less and are non-recurring (Section 24-50-513, CRS Rule P13-1-2.). **In addition**, the contracting agency must place written certification (self certification) of this exception in the contract file at the agency. You may use the Certification form, see sec. VI(A) below, or place a signed note in the contract file certifying that the contract is exempted from program review.
5. Contracts involving personal services exempt from the Civil Service (Personnel) System (Rule P13-1-4), e.g.,
 - a. An employee of the legislative/judicial branches of government.
 - b. Attorneys
 - c. Educators in higher education institutions.
 6. Program waiver of successive review of individual agreements for services may be obtained from the Personnel Director upon written request (Rule P13-1-6).
 - a. The contracting agency submits written request for waiver of successive approval. The waiver request is not a form -- contact the Personnel Director's office for a sample of a written request to follow as a model.
 - b. You must review agreements waived for several years to assure that facts supporting the original approval have not materially changed. The program reserves the right to audit you for compliance with the terms of the waiver.
 - c. This waiver excuses you from having to submit each personal services agreement for individual program review but does not excuse you from listing the transaction on the annual report **unless** the transaction is considered intergovernmental.

B . An agreement for personal services must clearly fit one of these exceptions or it shall be subject to Privatization Program review.

III. Grounds For Approval

Personal services agreements **must** create an independent contractor relationship. Privatization Program procedures recognize two types of personal services agreements:

- Those that implicate the State Personnel System, and
- Those not implicating the State Personnel System.

A. **PERSONAL SERVICES AGREEMENTS IMPLICATING THE STATE PERSONNEL SYSTEM**

- **Section 24-50-503 CRS; Procedure P13-1-3. These are agreements with independent contractors for services normally provided, or presently performed, within the State Personnel system, except:**
 1. The agreement **will not** be approved if it would result directly, or indirectly, in the separation of certified employees from State service [Section 24-50-503(2) CRS; Rule P13-1-3].
 - It is critical that the acquiring agency be able to attest that no FTE will be affected.
 2. The contract must meet **all** of the conditions set out in Section 24-50-503 CRS; Rule P13-1-3) to be approved:
 - a. **The proposed contract meets a cost savings test.** One critical requirement in the comparison of contractor costs to State employee costs, is that the contractor's Cost of Benefits must equal (cannot be less than) State employee Cost of Benefits. If the contractor has no Cost of Benefits (does not pay benefits), or the Cost of Benefits is less than the State's, you must factor in the necessary dollar amount to bring the contractor's benefits cost in line with the State's Cost of Benefits. [The program requires mandatory use of its Cost Analysis form, see sec. VI(B) below]; and,
 - b. The proposed agreement contains the specific provisions set out in Rule P13-1-3.
 3. **Submit required forms** with agreements for review: **Certification and Cost Analysis** [see VI(A) and VI(B) below].

B. **PERSONAL SERVICES AGREEMENTS NOT IMPLICATING THE STATE PERSONNEL SYSTEM: Section 24-50-504 CRS; Procedure P13-1-4. These are contracts with independent contractors for services sufficiently different from, or not normally provided by, those available within the Personnel system.**

1. Personal services agreements creating an independent contractor relationship must be reviewed and are permissible. These agreements must conform to **any one or more** of the conditions detailed in Rule P13-1-4; some limited examples include:

- a. New State programs (coming into being after April 7, 1993) with specific statutory authority to contract, certain existing State programs and services not available within the Personnel system, etc., as detailed in Rule P13-1-4. Note that a footnote in the Long Bill does not constitute “statutory authority”.
 - b. Service agreements as components of acquisitions of real or personal property must be reviewed and approved.
2. Purchased services agreements that create independent contractor relationships are must be reviewed and approved (Rule P13-1-5).
 - These are agreements with public or private entities authorized to provide services benefiting specific groups or individuals in the public **at large**, not individuals in the legal or physical custody of the State[see Rule P13-1-1(C)].
 3. **Submit Required Certification form** with all agreements for review, see VI(A) below.

C. PRE-APPROVAL PROCESS

1. Agreements for services requiring review and approval may be sent to the Personnel Director prior to award and execution of the agreement only when a formal solicitation process is to be undertaken (Rule P13-1-7). This advance approval avoids problems that may arise on review of final executed agreements which do not comply with Privatization Program requirements.

D. PROCUREMENTS THROUGH PRICE AGREEMENTS, Rule P13-1-8.

These are acquisitions of personal services under official price agreements.

1. See Rule P13-1-1(F) for definition of Official Price Agreements.
2. All procurements for personal services under official price agreements by a State agency or institution are still subject to the review and approval process provided within 24-50-501 CRS, *et seq.* and these rules.

IV. Limitation On Use Of State Temporary Employees

Both types of personal services agreements, III(A) and III(B) above, are subject to Rule P13-1-13.

- A. The State constitution restricts the time a person may work in the same occupation for the State as a State temporary employee up to six months in a 12 month period.

- B. However, a person may work as a State temporary employee for six months, then be hired as an independent contractor performing functions **completely unrelated** to the temporary work originally performed as a State temporary employee.

V. Other Policies

- A. Annual reporting. Rule P13-1-9; (Section 24-50-510 CRS) requires that all agencies report all information about agreements for personal services by September 30 annually. The reports must be submitted in the format requested by the program.
- Each summer the Department of Personnel provides a reminder and written instruction on the preparation of the annual report.
- B. **Mandatory clause**. Rule P13-1-11 requires that all personal services contracts contain a clause that defines the independent contractor relationship created by the contract. Clause A16 in Appendix A to Chapter 6 sets out the prescribed language.
- C. Veterans preference. Section 24-50-511 CRS; Rule P13-1-10 sets out requirements for utilizing contractors who give preference to hiring veterans of military service.

VI. Forms Instructions

Personnel provides forms to accompany the agreement. They are enclosed at Appendix A. The individual preparing the contract must use these forms to demonstrate compliance with each requirement (Rule P13-1-12):

A. CERTIFICATION FOR PERSONAL SERVICES AGREEMENTS/ INDEPENDENT CONTRACTOR CERTIFICATION (Rule P13-1-12)

This two page form must accompany all agreements submitted for program review approval and is a permanent document retained by Personnel. The Certification form is used to demonstrate need and provide justification to meet the Personnel Director's conditions, as outlined above, as well as to certify that the contractor is an independent contractor.

B . COST ANALYSIS FORM (RULE P13-1-3)

This form submitted along with the certification form is required with all agreements that “implicate” the Personnel System, i.e., the services are available within the Personnel System. It contains all of the elements required for a cost analysis; your own form may never be used, however, if you wish to attach an additional page with information in narrative form you may. See part III(A)(2)(a) for directions on how to fill out Cost of Benefits section of this form.

PRIVATIZATION PROGRAM SUMMARY

I. The rules require review and approval of all personal services agreements by the Personnel Director prior to work being performed.

II. The exceptions to review are:

- Goods and commodity transactions
 - Agreements to acquire goods and commodities
- Non-recurring service contracts less than/equal to six months in length, Rule P13-1-2
- Intergovernmental agreements, Rule P13-1-2.
- Services exempt from Civil Service (Personnel) System, Rule P13-1-4.
- Approval waiver for same type agreements for a program, Rule P13-1-6.

III. The two main categories of personal services agreements subject to review and approval are:

Contracts implicating the Personnel System, Rule P13-1-3

- Services that may be performed within the System, however, there is need (meeting the criteria) to contract outside of the system.
- Must meet cost savings test.
- Certification **AND** Cost Analysis forms required.

Contracts not implicating the Personnel System, Rule P13-1-4

- Services are for new programs, or not available within the System, etc.
- Certification form required.

IV. Six month limitation for contract/temporary employment combination, Rule P13-1-13.

V. Mandatory clause required, Rule P13-1-11.

Annual reporting required. Rule P13-1-9.

Veterans Preference, Rule P13-1-10.

VI. Forms required:

- Certification form required with all contracts, Rule P13-1-12.
- Cost Analysis form required with all contracts implicating Personnel System, Rule P13-1-3. Cost savings to the State may not be attributed to contractor's lower Cost of Benefits.

Appendix A: Personnel Review Forms

Certification for Personal Services Agreements (2 pages)

Personal Services Contracts—Cost Analysis Form (2 pages)

CERTIFICATION FOR PERSONAL SERVICES AGREEMENTS

(Please fill out this form accurately and completely and provide all information requested including explanations.)

Your Department/Institution Name: _____

Contract Routing #: _____ P.O.# _____

Amount: _____ Contractor: _____

Term of Agreement: From _____ To _____

1. Briefly describe: a. the type of services and skills to be purchased; b. whether and why it is a specialized skill; and c. identify who is the direct beneficiary.

a.

b.

c.

2. Post April 7, 1993, are there any specific statutory citations (not footnotes to the Long Bill) which require an outside contractor to provide this service? _____ If yes, cite statute **and attach a copy** to this form.

3. Have these services presently or previously been performed by classified staff? _____ If yes, please provide an explanation of a) When; b) What job class was utilized; and, c) Why did the agency decide to contract out these services?

4. How long have you been purchasing these services through agreements? _____ years. Are these services on-going and for an indefinite period of time? ____ Yes ____ No

5. If the contractor is an individual, has he/she previously been an employee of the state either as a state temporary employee or as a permanent employee? ____ Yes ____ No If yes, give last date of employment _____.

6. We attest that the acquisition of services from the independent contractor will not result in the separation or displacement of classified staff. Yes No

7. **Review/Approval Criteria:** The following are statutory and/or procedural citations by which all personal services agreements will be evaluated by the State Personnel Director. Please identify those criteria that would make this request an approvable agreement.

The contract meets all of the relevant cost savings test. A "Cost Analysis" form must be completed and attached to this form. (Refer to CRS 24-50-503; Director's Procedure P13-1-3)

The contract is for an existing state program never performed by state employees. Or, the contract is for an existing state program which is different in scope or policy from the programs carried out by state employees. (CRS 24-50-504 (2)(a); P13-1-4 (C)).

The contract is for a new state program (created after 4/7/93) which statutorily authorizes the performance of the program by independent contractors. (CRS 24-50-504 (2) (b); P13-1-4 (D)).

The contracted services are not available within the state personnel system, or cannot be performed satisfactorily by state employees, or are of a highly specialized or technical nature. (CRS 24-50-504 (2) (c); P13-1-4 (E)).

The services are incidental to a contract for the purchase or lease of real or personal property. (CRS 24-50-504 (2) (d); P13-1-4 (F)).

The contract is needed to protect against a conflict of interest, or to ensure independent and unbiased findings in cases where there is a clear need for a different, outside perspective. (CRS 24-50-504 (2) (e); P13-1-4 (G)).

The contractor will provide equipment, materials, facilities or support services that could not feasibly be provided by the state in the location where the services are to be performed. (CRS 24-50-504 (2) (f); P13-1-4 (H)).

The contractor will conduct training courses for which appropriately qualified state personnel system instructors are not available. (CRS 24-50-504 (2) (g); P13-1-4 (I)).

The services are of an urgent, temporary or occasional nature. (CRS 24-50-504 (2) (h); P13-1-4 (J)).

This is an intergovernmental agreement. (CRS 24-50-508; P13-1-2)

The services provided are for a term of six months or less and are not expected to recur on a regular basis. (CRS 24-50-513; P13-1-1 (B))

The contract is for purchased services. (The acquisition of services which directly benefit specific groups or individuals in the public at large.) (CRS 24-50-504 (3); P13-1-1 (C))

Explain your selection of any items checked above (the area below is to be used for your explanation).

Personal Services Certification:

Independent Contractor Certification: We certify that the contract or commitment voucher is indeed an independent contract that does not create an employee relationship and that these documents contain the required independent contractor language as part of the Director's Procedures (P13-1-11).

If "No" is marked, don't submit your agreement for review because it cannot be approved.

Yes No

Department/agency certification: We hereby certify that the attached agreement for personal services meets every criterion stated above and that all responses on this certification are true and accurate, to the best of our knowledge.

Dated this _____ day of _____, 19_____.

By:

Agency Representative

Title/Work Phone Number

PERSONAL SERVICES CONTRACTS

Cost Analysis Form

This two sided cost analysis form must be completed for any personal services agreements which are to be approved pursuant to Section 24-50-503, C.R.S. (1995 supp.). Submit this form in addition to a certification form.

- Department or Institution: _____

- Division or Agency: _____

- Contract Services Provided: _____

- Term of Contract: _____

- Titles of Affected
Classified Employees: _____

- Number of Classified FTE Affected: _____

- Name & Phone # of Person
Completing Cost Analysis: _____

CONTRACTOR COSTS (a):				STATE EMPLOYEE COSTS (a):				PROJECTED SAVINGS: (Identify Fund Source)	
Direct Labor (Specify Titles)	Est. Hours	Hourly Rate	Est. Cost	Direct Labor (Specify Titles)	Est. Hours	Hourly Rate	Est. Cost	Present 199 - 199	Succeeding Years 199 - 199 199 - 199
Direct Labor Total			\$	Direct Labor Total			\$		
Cost of Benefits (b) (_____% of pay):			\$	Cost of Benefits (30% of Pay):			\$		
Indirect Overhead Costs:			\$	Indirect Overhead Costs (c):			\$		
Continuing State Oversight Costs:			\$						
Other Direct Costs:				Other Direct Costs:					
Travel:			\$	Travel:			\$		
Per Diem:			\$	Per Diem:			\$		
Equipment:			\$	Equipment:			\$		
Materials:			\$	Materials:			\$		
Other:			\$	Other:			\$		
Total Contractor Costs:			\$	Total State Costs:			\$		
				GF:			\$		
				CF:			\$		
				CFE:			\$		
				FF:			\$		

(a) Identify assumptions used in calculating costs. Indicate any rate increase the contractor proposes to impose during the term of the contract.
 (b) There shall not be included any savings to the state attributable to lower health insurance benefits provided by the contractor, (CRS 24-50-503 (1)(a)(IV)). Thus, if the contractor's lower health insurance benefits equal \$50 per month, this total amount must be added to the contractor's total costs before savings to the state can be evaluated.
 (c) Those costs shall be included only if the costs can be attributed only to the function in question and would not exist if that function were not performed in state service. For such purposes, "Indirect Overhead Cost", means existing administrative salaries and benefits, rent, equipment costs, utilities and materials. (CRS 24-50-503 (1)(a)(II)).

②

2/94

PERSONNEL RULES (AGENCY INSERT)

THIS SECTION IS RESERVED FOR THE STATE PERSONNEL RULES GOVERNING PRIVATIZATION REVIEW (IF DESIRED) OR OTHER AGENCY POLICIES/PROCEDURES RELATED TO THIS CHAPTER.