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Chapter: Control of Expenditures			
Directive Title: GOVERNMENT CONTRACTS – PERSONAL SERVICE CONTRACTS			

1. POLICY

The Government uses Personal Service Contracts between the Government and an individual to complete a specific task.

Personal Service Contracts are not contracts of employment and must not inadvertently establish an employer/employee relationship between the Government and the individual.

2. DIRECTIVE

The Deputy Head of each government department or public agency is responsible for implementing a system designed to review each potential Personal Service Contract to ensure that it is used to complete a specific task and does not create an employer/employee relationship.

Appendix A provides details on the four primary common law tests used by the courts to determine if an employer/employee relationship exists.

Appendix B is a questionnaire on the characteristics of a proposed contract, designed to assist the Contract Authority in determining whether the proposed contract should be classified as a service contract or an employment contract.

The definitions of terms used in Financial Administration Manual (FAM) Directives 808 Government Contracts series can be found in [Appendix E](#) of FAM Directive 808 Government Contracts – General.

This directive applies to all government departments and public agencies subject to the *Public Service Act* and [Public Service Regulations](#).

3. PROVISIONS

- 3.1. Personal Service Contracts are contracts between the Government and an individual to complete a specific task. They are not contracts of employment and an individual with a Personal Service Contract is not a person employed to perform work of a temporary or casual nature or in an emergency.
- 3.2. Personal Service Contracts must not directly or inadvertently establish an employer/employee relationship between the Government and the individual, which could result in the Government being liable for income tax, payroll tax, source deductions and other statutory liabilities, as well as related employment benefits.
- 3.3. Personal Service Contracts must not be used to circumvent the regular recruitment and hiring processes as described in the Human Resources Manual. It is an abuse of Contract Authority and a breach of government rules to use this process instead of building a staff by hiring employees through the proper processes.
- 3.4. Honorarium payments must not be used to circumvent the necessity to enter into a personal service contract in order to complete a specific task. Refer to FAM Directive 810 Honoraria that specifies who can be the recipient of an honorarium payment paid by department or public agency.
- 3.5. All Personal Service Contracts entered into by a Contract Authority must be in accordance with the *Financial Administration Act*, the Government Contract Regulations and the FAM.
- 3.6. Employment Contracts
 - 3.6.1. All employment contracts must be initiated as directed in the Human Resources Manual unless an exception is approved in advance by Executive Council.
 - 3.6.2. Persons working under an employment contract with the Government must be paid through a payroll system approved by the Comptroller General and must have statutory deductions made at source.

3.7. Review of Potential Personal Service Contracts

- 3.7.1. Before entering into a Personal Service Contract with a self-employed individual or contractor, the Contract Authority is required to ensure that the potential contract is not an employment contract. The Contract Authority must conduct the tests in Appendices A and B to determine the type of contract under consideration. For greater clarity, the completed Appendix B must be retained for review/audit purposes.
- 3.7.2. Before entering into a standing offer agreement or standing supply arrangement with a corporation under which the corporation will provide individuals to deliver services in departments and public agencies, the Contract Authority must ensure that both the standing offer agreement and the work order, contract, or call-up document do not create an employment relationship or the appearance of an employment relationship between the Government and the contractor's personnel.
- 3.7.3. The Contract Authority must also:
 - a) Review the Human Resources Manual and discuss the requirements with Human Resources; and
 - b) Seek advice and assistance, and a legal review of the requirements and proposed contract with the Department of Justice.
- 3.7.4. If the above review does not determine whether the proposed contract is a service contract or an employment contract, the determination must be assessed by the Employee Relations and Job Evaluation division, Department of Human Resources.
- 3.7.5. Payment terms must comply with FAM Directive 803-3 Account Verification –Timing of Payments.
- 3.7.6. The Contract Authority must ensure that contractors where and when appropriate:
 - a) Have a business number (BN);
 - b) Are registered for and remit payroll taxes and GST;
 - c) Are registered with the Department of Justice to legally carry on business in Nunavut;



- d) Are registered with Workers' Safety and Compensation Commission, where applicable; and
 - e) Have appropriate insurance coverage and indemnify the Government against actions arising from their negligence in the performance of the contract.
- 3.8. The Office of the Comptroller General shall be consulted to resolve any issues with implementation, compliance, and interpretation of this directive.

APPENDIX A

PERSONAL SERVICES CONTRACT OR EMPLOYMENT CONTRACT **THE FOUR PRIMARY TESTS**

The courts have developed the following four categories of tests to help distinguish between an employment contract and a service contract.

1. CONTROL

The foremost indicator of whether a contracted person is an employee, or a service contractor is the degree of control the employer exercises over the person carrying out the work. In an employment contract the employer has the authority to exercise control over what work or service will be done and over the manner of doing it, and this right of control exists whether exercised or not. If the skill required of the person is great, control may be less significant than other factors in determining if the person is an employee.

Control indicators include:

1.1 Hours of Work

The person must work during specified times. Where the nature of the work makes specified times impractical, a requirement that the person work during times determined by the nature of the work is still a form of control by an employer. A requirement that a person not work beyond a specified number of hours in a given time period can also be a form of control.

1.2 Hours of Service

The person must devote a significant portion of their time to the work. This implicitly restricts the person from doing other work, indicating that an employer has control over the work or service.

1.3 Premises and Equipment

The person does the work on the employer's premises or, if the work is done elsewhere, the employer has the right to designate a route or to require work at a specific location. The employer supplies the tools and equipment the person needs for performance of the work. These conditions are forms of control.

1.4 Continuing Services

The contract implies continuing or recurring work. The relationship may be considered permanent even if the work is part-time, seasonal, or temporary. Continuing or permanent service indicates an employer's control. The absence of a defined scope of work with a deadline for completion may be deemed a form of control.

1.5 Established Routines and Schedules

The person is required to follow established routines and schedules.

1.6 Accounting for Actions

The person must account to the employer for time spent on the work (e.g., through time sheets, regular written reports or regular verbal communication).

This test may not be conclusive and should be considered in relation to the other control indicators. An independent contractor may be required to submit reports or account for time spent working. For example, contract conditions for non-continuous professional services may call for progress billings based upon reported progress or time spent. In these cases, time sheets, reports and invoices do not indicate control, but rather substantiate progress on the work of the contract and justify payment for the services rendered.

1.7 Compliance with Instructions

The employer has control over how the work is performed. An employee is required to follow instructions and procedures laid out by the employer and does not have the authority to subcontract the work.

1.8 Training

The employer trains or requires the person to be trained for the work, indicating that the employer exercises control over the manner and means by which the work is performed. This indicator is more significant if the training is periodic or frequent.

1.9 Length of Service

The longer the time spent on the work, the greater the likelihood that the person doing the work could be considered an employee. The absence of a timeline for completion of a defined scope of work may also be deemed a form of control. Therefore, the contractor should have a deadline for completion of the project work.

1.10 Right to Discharge

An employer's right to discharge a worker may indicate control over the person doing the work, although this is not conclusive. A Contract Authority normally has the right to terminate the services of an independent service contractor if the work does not meet contract specifications or the contractor's performance is not satisfactory.

Therefore, it is important that the contract clearly sets out the objectives of the work, the standard of performance, and the material products and deliverables expected to be produced as a result of the contractor's performance of the work.

2. ECONOMIC REALITY – THE OPPORTUNITY FOR PROFIT OR RISK OF LOSS

Several economic reality factors indicate that an employer/employee relationship may exist between an employer and a person.

1. an absence of the person's opportunity for profit or risk of loss;
2. an absence of the person's investment in assets required for the performance of the work (e.g., equipment, furniture); and
3. payment to a person based on an hourly or other rate for time rather than on the completion of a specified project, product or deliverable, and completion by a required deadline.

The status of independent contractor is indicated by a person incurring expenses for the purpose of gaining or producing business income.

3. INTEGRATION

This test considers the employer's corporate organization as a whole and may indicate an employee relationship if the employed person and the work are integral parts of an established organization. For example, the person in question typically relies upon others in the organization for product or service and, in turn, they similarly rely upon the person.

The courts have applied this test by determining whose business it is from the perspective of the person doing the work, not the Contract Authority. If the person performs services for a number of unrelated employers, the work may not be an integral part of a particular employer's business as much as it is the contractor's, indicating a degree of independence by the contractor.

4. SPECIFIED RESULT

This test helps distinguish between an independent person performing specific work as an independent contractor and one in which a person's services as an employee are at the disposal of the employer without reference to a specific result. A main characteristic of an independent service contract is that the person works to a specified plan or intent and the contract ends when this plan or intent is completed or terminated by the contract terms. In an employment contract, the person is engaged and paid continuously and not necessarily toward a specified result. Accordingly, it is important that the contract clearly states the intent of the contract and the expected results, including deliverables to be produced as a result of the contract, as well as a timeline for completion.

Examples of specified results (deliverables) within service contracts are:

1. install software at [specified location], not to exceed 35 days commencing [start date] and completing all aspects of the work by [required deadline];
2. train the following five employees [identify them in the contract] in the new software to an intermediate level of software application including the following abilities [specify software operation capabilities upon completion of the training];
3. train only between 10:00 A.M. and 3:00 P.M. local time in [specify location], and produce and supply a software user manual in the following formats [specify program version soft copy specification and language requirements; and hard copy specifications and quantity] – 1 manual, printed double sided and bound in 3-ring binder for each employee being trained];
4. the minimum number and requirements for professional architect or engineer's site inspections on a specified construction contract;
5. a truck with specified class of driver provided for a specified period, or to carry a specified number of loads, or to move a specified tonnage, between specified locations.



Although these examples might appear to call for the primary test of control (hours of work and service), the specified dates and times express the nature of the service to be rendered, not the employer control typical in an employment contract. The employer has contracted for temporary hours or times as part of a specified end-result. For greater clarity, contracts should be specific about the end-product requirements and provide a deadline for completion. It should be up to the independent contractor to schedule the individual tasks necessary to achieve the contract objectives and deliver the specified results within the stipulated timeframe.

APPENDIX B

PERSONAL SERVICES CONTRACT OR EMPLOYMENT CONTRACT THE QUESTIONNAIRE

Before entering into a service contract, complete the following questionnaire in order to ensure that the proposed contract does not constitute an employment contract. If the answer to any of the questions is "yes", the proposed contract may be an employment contract.

Questions	Y/N
1. Is the contract with a person or a person operating under a proprietorship name?	
2. Will the Contract Authority determine the hours, methods and location of work? See Appendix A, 1.1 "Hours of Work" and 1.3 "Premises and Equipment"	
3. Will the Contract Authority supply the facilities, tools and/or equipment necessary to perform the work? See Appendix A, 1.3 "Premises and Equipment"	
4. Will the person be paid regularly according to a rate for time (hourly, weekly, or similar) and not an amount set by the contract? See Appendix A, 1.4 "Continuing Services"	
5. Do the contract terms imply a continuous relationship between the person and the Contract Authority? See Appendix A, 1.4 "Continuing Services" and 1.9 "Length of Service"	
6. Will the person performing the work be required to follow established routines and schedules? See Appendix A, 1.5 "Established Routines and Schedules" and 1.6 "Accounting for Actions"	
7. Will the Contract Authority train the person to perform the work? See Appendix A, 1.8 "Training"	
8. Will the person performing the work lack the power to delegate or sub-contract it? See Appendix A, 1.7 "Compliance with Instructions"	
9. Will the Contract Authority directly supervise the work? See Appendix A, 1.7 "Compliance with Instructions"	
10. Will the Contract Authority have the right to discharge the person? See Appendix A, 1.10 "Right to Discharge"	
11. Will the contractor be separated from opportunity for profit and risk of loss in the performance of the contract? See Appendix A, 2. "Economic Reality - The Opportunity for Profit or Risk of Loss"	
12. Is the work part of the Contract Authority's regular business routine more than it being the contractor's business? See Appendix A, 3. "Integration"	
13. Is there a reason to believe that the person doing the work is not acting as an independent contractor, given the tests in Appendix A?	
14. Do the facts indicate that an employer/employee relationship would be created?	