

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

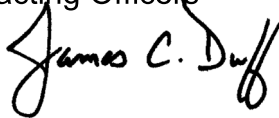
WASHINGTON, D.C. 20544

Date: 12/18/2019

GUIDE TO JUDICIARY POLICY

TRANSMITTAL 14-014 VOLUME/PART 14 CHAPTER(S) 1, 2, 5

TO: Circuit Executives
Federal Public/Community Defenders
District Court Executives
Clerks, United States Courts
Chief Probation Officers
Chief Pretrial Services Officers
Bankruptcy Administrators
Circuit Librarians
Certified Contracting Officers

FROM: James C. Duff 

RE: **PROCUREMENT**

This transmittal provides notice of changes to *Guide to Judiciary Policy*, Volume 14 (Procurement):

[Chapter 1 – Overview](#)
[Chapter 2 – Procurement Planning and Preparations](#)
[Chapter 5 – Special Categories of Procurements](#)
[Glossary of Procurement Terms](#)

Chapter 1 guidance was revised to reflect a statutory change to commercial advance payments that limits advance payment to 15% of the total procurement.

Chapter 2 was revised:

- To explain the difference between prepayments of “software maintenance as a service” and “software maintenance as a product” and to clarify that prepaying for “software maintenance as a product” is not an advance payment;
- To limit advance payments to 15% of the contract price, as required by 28 U.S.C. § 604(g)(4)(C) and 41 U.S.C. § 4505(c); and

Guide Transmittal 14-014 – Procurement

- To outline the steps the contracting officer must take to adequately evaluate the security for advance pay and to remove language that had excluded judiciary and non-judiciary contracts from the requirement to evaluate the adequacy of security for advance payment.

Chapter 5 updates included:

- Reorganizing and clarifying § 550 to clarify the differences between, and the appropriate use of, Interagency Agreements (IAs) or Memoranda of Agreement (MOUs) and Memoranda of Understanding (MOUs);
- Clarifying and adding IA guidance on such topics as approval requirements, Economy Act requirements, payment, and management;
- Removing information on non-procurement IAs and MOUs; and
- Extracting MOU guidance from the sections on IAs and establishing a new section (i.e., § 550.55) for updated and new guidance specific to MOUs and MOAs.

These chapter updates also reflect stylistic changes to improve clarity and readability.

In addition, terms were added and updated in the Glossary of Procurement Terms.

The significant changes are detailed in the Redline Comparison below.

Questions regarding this transmittal may be directed to the Procurement Management Division of the AO's Finance and Procurement Office, at 202-502-1330.

REDLINE COMPARISON REFLECTING CHANGES

[Significant changes in Chapter 1 (Overview) follow:]

§ 120.40 Special Program Delegation

[. . .]

§ 120.40.65 Second Chance Act Products and Services

[. . .]

(b) Delegation of Authority

[. . .]

(3) Commercial advance payment authority for emergency and transitional housing, child care, and job training related to Second Chance Act up to ~~\$25,000~~ 15% of the total contract. **See:** [28 U.S.C. § 604\(g\)\(4\)\(C\)](#).

[. . .]

REDLINE COMPARISON REFLECTING CHANGES

[Significant changes in Chapter 2 (Procurement Planning and Preparations) follow:]

§ 220 Terms and Conditions

[. . .]

§ 220.50 Funding Contract Awards

[. . .]

§ 220.50.90 Clauses for ~~Contracting in Advance of Appropriation~~ Contracts Conditioned Upon Availability of Funds

[. . .]

§ 220.55 Contract Financing

[. . .]

§ 220.55.30 Delegation

- (a) Subject to the following limitations, the Director has delegated to chief judges and other judiciary officials identified at [§ 120.20.10\(b\) \(Delegation to Chief Judges and Other Judiciary Officials\)](#), the authority to use commercial advance payment, subject to the limitations of the bona fide needs rule, in the purchase of services ~~which~~that meet all of the following conditions:

- (1) ~~¶~~The purchase is for:

[. . .]

- ~~extended warranties of commercial items which are ordered at the same time the item is purchased; or~~

(Note: Prepaying “software maintenance as a product” at the time of contract award does not constitute an advance payment under 31 U.S.C. § 3324. In contrast, “software maintenance as a service” is billed in arrears under 31 U.S.C. § 3324 (see: GAO B-256692) or the commercial advance payment authority in this section can be considered for use, but subject to the other limitations noted further below (e.g., the 15% maximum rule in paragraph (a)(2)).)

[. . .]

- (2) Under 28 U.S.C. § 604(g)(4)(C) and 41 U.S.C. § 4505(c), before any performance of work under the contract, the aggregate of commercial advance payments may not exceed 15% of the contract price, the total amount of the commercial advance payment does not exceed \$25,000;

[. . .]

- (1) ~~¶~~The purchase is for:

[. . .]

- ~~extended warranties of commercial items which are ordered at the same time the item is purchased; or~~

(Note: Prepaying “software maintenance as a product” at the time of contract award does not constitute an advance payment under 31 U.S.C. § 3324. In contrast, “software maintenance as a service” is billed in arrears under 31 U.S.C. § 3324 (see: GAO B-256692) or the commercial advance payment authority in this section can be considered for use, but subject to the other limitations noted further below (e.g., the 15% maximum rule in paragraph (a)(2)).)

[. . .]

REDLINE COMPARISON REFLECTING CHANGES

§ 220.55.30 [cont'd]

- (2) ~~Under 28 U.S.C. § 604(g)(4)(C) and 41 U.S.C. § 4505(c), before any performance of work under the contract, the aggregate of commercial advance payments may not exceed 15% of the contract price, the total amount of the commercial advance payment does not exceed \$25,000;~~
- [. . .]
- (b) PMD may approve the inclusion of commercial advance payment terms for transactions outside these limits as one-time delegations of authority for specific purchases, ~~except payments exceeding the statutory 15% rule referenced above in subparagraph (a)(2).~~
- (c) The judiciary may make advance payments to state and local governments where these entities are furnishing non-commercial services under contract which are reasonably available only from the state ~~or~~ local government organization, ~~such as (e.g., state court fees, etc).~~
- [. . .]
- (2) ~~However~~ Conversely, advance payment for purchases of services ~~readily available in the commercial market~~ from state ~~or~~ local governments are subject to the limitations of § 220.55.30(a) (Delegation).
- [. . .]

§ 220.55.60 Procedures

- [. . .]
- (c) [. . .]
- ~~The following requirements do not apply to the award of delivery or task orders against either judiciary or non-judiciary contracts (e.g., GSA schedule contracts, or other Executive branch contracts, such as NASA SEWP, etc.). In these cases, it may be assumed that a review of the contractor's financial condition was made prior to award of such contracts, and that the contracts include appropriate terms authorizing advance payment terms for delivery or task orders issued against them.~~
- [. . .]
- (d) [. . .]
- (4) *[example deleted]*
- [. . .]

[Significant changes in Chapter 5 (Special Categories of Procurements) follow:]

§ 510 Personal Services Contracts

§ 510.10 ~~Definition~~ Reserved

§ 510.20 General Prohibition

~~A personal services contract is one in which the personnel performing the services are subject, either by the terms of the contract or by the manner of its administration, to supervision and/or direction by a judiciary employee that creates an employer/employee relationship.~~

- (a) Personal service contracts are strictly prohibited without specific statutory authority. Unless a statutory exception applies, the judiciary is required to obtain employees by direct hire under competitive appointment or other personnel procedures.

REDLINE COMPARISON REFLECTING CHANGES

§ 510.20 *[cont'd]*

- (b) ~~Brief or intermittent services~~**Note:** ~~Services~~ furnished by private-sector temporary help firms ~~for the brief or intermittent need for the skills of private-sector temporaries shall not~~may not be regarded or treated as personal services. [. . .]

~~§ 510.20 General Prohibition~~

~~Personal service contracts are strictly prohibited in the absence of specific statutory authority. The judiciary is required to obtain employees by direct hire under competitive appointment or other personnel procedures, unless a statutory exception applies.~~

§ 510.30 Judiciary's Statutory Authority

[. . .]

- (c) Only the Procurement Executive (PE) has been delegated the authority to contract for personal services. See: Guide, Vol. 14, § 120.20.10 (Director Delegations).

§ 510.40 Personal Services Indicators

[. . .]

- (b) There is no "acid test" ~~for how many indicators must be present to result in a conclusion that~~ determines that personal services exist. Instead, this is necessarily a subjective judgment that the CO makes, based on the individual circumstances. If there is a reasonable question as to whether a specific contract involves the performance of personal services, the CO should ~~document the~~provide file ~~as to~~documentation on the analysis performed to reach a determination.
- (c) The following questions are useful indicators in determining whether a service contract is an improper personal services contract, either in how the contract is written or in how it is administered on a day-to-day basis. A "yes" answer to any of the following questions may indicate that the proposed procurement is "personal" in nature. The existence of any of these elements may indicate the likelihood that supervision exists. However, the existence of any one indicator alone ~~must~~does not necessarily ~~lead~~require the CO to conclude that ~~the~~ services are "personal."
[. . .]

§ 520 Expert and Consultant Nonpersonal Services Contracts

§ 520.10 Authority

The judiciary is authorized to contract for expert and consultant services on a nonpersonal services basis under 5 U.S.C. § 3109. For the definition of expert or consultant, see: Guide, Vol. 14, Glossary of Procurement Terms.

~~§ 520.15 Definitions~~ *[table deleted]*

§ 520.15 [Reserved]

REDLINE COMPARISON REFLECTING CHANGES

§ 520.45 Restrictions

(a) The services of consultants or experts under [5 U.S.C. § 3109](#) may be obtained by contract only if:

(1) the work is temporary or intermittent, defined as follows:

[. . .]

(B) Intermittent

Occasional or irregular work on cases, programs, projects, and problems requiring intermittent services as distinguished from continuous. A contract for intermittent services ~~cannot~~may not exceed 130 days of work within a service year, 12-month period but may be renewed from year to year.

[. . .]

§ 520.75 Provisions and Clauses

Include the following clauses, in addition to those listed in [Guide, Vol. 14, § 330.10.30 \(Provisions and Clauses\)](#), unless otherwise indicated:

§ 520.75 Provisions and Clauses *[table]*

- | | |
|---|--|
| (i) Clause 6-70, Work for Hire
<u>Clause 6-65, Rights in Data – Special Works</u> | Solicitations and contracts for professional services when the CO determines that <u>there is a need to limit distribution and use of the data to be produced under the contract</u> should be treated as a “work for hire.” See <u>also: Guide, Vol. 14, § 650.55.20 (License Terms)</u> . |
|---|--|

§ 530 Architect-Engineer Contracts

§ 530.10 Architect-Engineer Services

[. . .]

§ 530.10.20 In General

[. . .]

The following ~~services~~ are considered architect-engineer services for the purpose of this section:

[. . .]

(d) ~~p~~PProfessional surveying and mapping services of an architectural or engineering nature.

[. . .]

(2) Mapping

(A) Mapping is considered an architectural and engineering service if it is associated with the research, planning, development, design, construction, or alteration of real property ~~is considered to be an architectural and engineering service. However, mapping services that are not connected to traditionally understood or accepted architectural and engineering activities, are not incidental to such architectural and engineering activities or have not in themselves traditionally been considered architectural and engineering services must not be procured under this section.~~

REDLINE COMPARISON REFLECTING CHANGES

§ 530.10.20 *[cont'd]*

- (B) Mapping services may not be procured under this section if they:
- (i) are not connected to traditionally understood or accepted architectural and engineering activities;
 - (ii) are not incidental to such architectural and engineering activities, or
 - (iii) have not themselves traditionally been considered architectural and engineering services.

§ 540 Commercial Agreements

[. . .]

§ 540.20 Negotiating Commercial Agreement Terms and Conditions

[. . .]

§ 540.20(a) Prohibited Terms and Conditions *[table]*

Term or Condition	Deletion Mandatory
(9) Clause making State Court Jurisdiction / or State Law applicable	Replace with "Federal law applies." <u>See: Boyle v. United Technologies Corp., 487 U.S. 500, 504 (1988) (noting "obligations to and rights of the United States under its contracts are governed exclusively by federal law.")</u>

§ 550 Interagency Agreements, MOAs, and ~~MOUs for Obtaining Products and Services~~

§ 550.10 In General

- (a) Under some circumstances, judiciary units may wish to acquire goods or services from or through other federal entities. The AO Director has authority to enter into interagency agreements (IAs) and memoranda of understanding (MOUs) for this purpose and has delegated this authority as described at Guide, Vol. 14, § 120.20.10(a) (Delegation to the Procurement Executive) and § 120.20.10(b) (Delegation to Chief Judges and Certain Judiciary Officials). See: 28 U.S.C. § 604(a)(10)(C) and; 31 U.S.C. § 1535; and Guide, Vol. 14, § 140.30.30(h) (Level 3 Delegation) and Guide, Vol 1, § 630(c) (Procurement). This section prescribes procedures applicable to these IAs and MOUs for obtaining products and services from other federal agencies.
- (b) While MOAs and MOUs are not procurement vehicles (when used by themselves), these types of agreements are covered in this section for informational purposes. See: § 550.55 (MOAs and MOUs).
- (c) ~~Note:~~ This section does not apply to:
- agreements for personnel detail assignments (see: Guide, Vol. 12, § 510.70 (Interagency Agreements and Memoranda of Understanding (MOU)));
 - the purchase of duplication ~~/ or~~ printing services (see: Guide, Vol. 23, Ch. 2 (Printing)); ~~;~~ or

REDLINE COMPARISON REFLECTING CHANGES

§ 550.10 *[cont'd]*

- the placement and administration of Reimbursable Work Authorizations (RWAs) (~~see: Guide, Vol. 16 (Space and Facilities), or~~ Guide, Vol. 16, Ch. 3 (Tenant Alterations and Cyclical Facilities Maintenance)).
- ~~MOUs with state or local agencies.~~

§ 550.20 Types of IAs ~~and MOUs~~

The judiciary may enter into the following types of ~~IA or MOU transactions~~ IAs with other federal agencies:

[. . .]

- (b) IAs ~~or MOUs~~ under which the judiciary is authorized to issue a separate task or delivery order directly to a providing agency's contractor following the procedures ~~contained in the~~ Guide, Vol. 14, § 310.60 (Other Federal Agency Contracts). ~~In this case, the IA or MOU is non-monetary and no funds are transferred between~~ Not all agencies offering direct acquisitions require an IA.

(1) ~~Where IAs are required, instead, the~~ funds are obligated on ~~the~~ a task or delivery order and payment is made directly to the other agency's contractor. [. . .]

(2) ~~An IA is not required to order from the GSA Federal Supply Schedule (FSS). See: Guide, Vol. 14, § 310.50 (GSA Federal Supply Schedules). Orders placed under GSA schedules must be within the CO's delegation authority.~~

§ 550.30 ~~Limitations~~

§ ~~550.30~~ 20.10 Restrictions ~~and~~ Requirements

~~Interagency Agreements or Memoranda of Understanding~~ IAs with other federal agencies:

- (a) Must comply with the bona fide needs rule; ~~(unless obligating no-year funds);~~
[. . .]

§ 550.30.20.20 IA Content

- (a) ~~An IA or MOU must be in writing. As in and should be executed before any contract situation, the services are performed or goods are requested. The~~ agreed upon written terms establish the scope of the undertaking and the rights and obligations of the parties. ~~Also, the written IA or MOU can establish a not-to-exceed amount on the judiciary's financial obligation. If the other agency does not provide an agreement, Form AO 368 (Interagency Agreement) may be used. The IA or MOU should specify at least the following: When developing an IA, if the other agency does not provide an agreement, the CO must ensure proper information is reported on FMS Forms 7600A or 7600B (Note: Open in Firefox or IE) or a similar form. Note: Form 7600A/B is meant for use only with an IA, not with an MOU or MOA. See: § 550.55.30 (MOA or MOU Content).~~

REDLINE COMPARISON REFLECTING CHANGES

~~(a)(b)~~ An IA must specify at least the following:

[. . .]

~~(e5)~~ the cost of performance, including appropriate ceilings when cost is based on estimates. ~~This estimated cost cannot be obligated beyond the fiscal year;~~

~~(f6)~~ mode of payment ~~—~~ advance or reimbursement (**see:** [§ 550.50 \(Payment of IAs and MOUs\)](#));

~~(g)~~ ~~any applicable special requirements or procedures for assuring compliance;~~

~~(h7)~~ any applicable special requirements or procedures for assuring compliance (e.g., in appropriate circumstances, it may be appropriate to request the providing agency add relevant judiciary clauses into a new solicitation or new task or delivery order, if issued on the judiciary's behalf (**see:** Guide, Vol. 14, Appx. 1C (OFAC column)));

[. . .]

~~(j)~~ ~~a requirement for the providing agency to notify the judiciary if it appears that performance will exceed estimated costs and procedures to cease or curtail performance as may be necessary; and~~

~~(Note: This is an important safeguard to protect the judiciary from a potential Anti-Deficiency Act violation.)~~

~~(k10)~~ approvals and signatures by authorized officials (**see:** [§ 550.20.30 \(Approval Requirements\)](#)); and

(11) IA point of contact.

§ 550.~~30~~20.30 Approval Requirements

(a) ~~IAs or MOUs~~ AO-issued by the AOIAs are subject to ~~PMD's~~AO internal approval procedures. The use of ~~IAs or MOUs~~ by other judiciary organizations to obtain products or services from another federal agency is subject to approval by the chief judge or other judiciary official identified ~~at~~in [Guide, Vol. 14, § 120.20.10\(b\) \(Delegation to Chief Judges and Other Certain Judiciary Officials\)](#), or the PLO, if ~~delegated~~appointed as a CO, subject to the following limitations:

(1) ~~The IA or MOU~~ CO must be certified at the appropriate COCP level.

(2) ~~The chief judge or other judiciary official identified in Guide, Vol. 14, § 120.20.10(b) (Delegation to Chief Judges and Certain Judiciary Officials), or the PLO, may not exceed the~~approve an IA that exceeds their ~~delegated~~procurement-delegation authority amount. **See:** [Guide, Vol. 14, § 140.30.30\(h\) \(Level 3 Delegation\)](#)~~Guide, Vol. 14, § 140.30.30(h) (Level 3 Delegation).~~—**Note:** If ~~it~~the IA is expected to exceed the delegation authority, **see:** [§ 550.30.50 \(Exceeding Delegation Authority\)](#)~~§ 550.20.40 (Exceeding Delegation Authority).~~

~~(2)~~ ~~The IA or MOU is signed by the chief judge or other judiciary official identified at~~ [Guide, Vol. 14, § 120.20.10\(b\) \(Delegation to Chief Judges and Other Judiciary Officials\)](#) or (if delegated) a CO, certified at the appropriate COCP level.

REDLINE COMPARISON REFLECTING CHANGES

§ 550.20.30 [cont'd]

- (b) All judiciary IAs ~~and MOUs~~ must adhere to applicable statutory and/or regulatory requirements, including appropriations law. ~~This means, for example, that the judiciary may not enter into IAs or MOUs that obligate funds from a future or previous fiscal year. However, the IA or MOU~~The IA may include yearly option periods that, if the CO exercises the option, will require the obligation of fiscal year funds available for the option period through the execution of a new order with the providing agency. Similar to Guide, Vol. 14, § 220.55.60 (Procedures), an IA for severable services could cross a fiscal year.

§ 550.~~30~~20.40 [Reserved]

~~§ 550.30.50~~ Exceeding Delegation Authority

[. . .] As appropriate, PMD will issue a one-time delegation of procurement authority ~~upon concurrence of all coordinating offices.~~

§ 550.30.~~60~~ Non-Procurement IAs and MOUs [Reserved] [section deleted]

§ 550.40 IA Requirements ~~for IAs and MOUs~~

§ 550.40.10 Statutory Authority

IAs ~~and MOUs~~ are authorized under ~~one of the following categories:~~

- (a) ~~either the Economy Act (31 U.S.C. § 1535) or specific judiciary~~ statutory authority for the purchase; ~~or,~~
- (b) ~~the Economy Act (31 U.S.C. § 1535).~~

§ 550.40.20 Specific Statutory Authority

~~For those IAs or MOUs for which there is specific statutory authority applicable to the judiciary, no Determination and Finding (D&F) is required. The applicable statutory authority must be specified in the IA or MOU, and the PE, in coordination with OGC, must review and validate its applicability to the judiciary.~~

§ 550.40.30

- (a) The Economy Act ~~(Act)~~ applies when a more specific statutory authority does not exist ~~or when the specific authority does not apply to the judiciary. For example, the Clinger-Cohen Act, 40 U.S.C. § 11314, which authorizes government-wide agency contracts (GWACs), does not apply to the judiciary and thus the Economy Act must be relied upon.~~
- (b1) The Act does not provide authority to enter into IAs ~~or MOUs~~ with state or local agencies to obtain goods or services.

REDLINE COMPARISON REFLECTING CHANGES

§ 550.40.10 [cont'd]

(e2) All IAs ~~and MOUs~~ under the Act must be supported by a Determination and Finding (D&F) (see: ~~§ 550.40.40 (Economy Act Determination and Finding)~~§ 550.40.20 (Economy Act Determination and Finding) and Appx. 5A (Economy Act Determination and Finding)), which must be maintained in the ~~procurement~~IA file.
[. . .]

(b) IAs supported by a more specific statutory authority than the Economy Act do not require a D&F. Instead, the proposed IA must cite the specific statutory authority, and the PE, in coordination with OGC, must review and validate the lawful use of the authority other than the Economy Act.

§ 550.40.4020 Economy Act Determination and Finding

- (a) Before entering into an IA ~~or MOU~~ under the Act, the CO must prepare and sign a D&F. If the providing agency requires a copy of the judiciary's D&F, ~~this should be provided the judiciary organization must provide it~~ with the IA ~~or MOU~~. The D&F must determine ~~that~~:
- (1) ~~that~~amounts are available to meet the proposed cost;
 - (2) it is in the judiciary's best interest to use of an IA or MOU for obtaining to obtain products or services, under the Economy Act (31 U.S.C. § 1535), is in the best interest of the judiciary; and;
 - (23) the products or services cannot be provided by contract as conveniently or cheaply by contracting with a commercial enterprise; ~~and~~
 - (4) the agency filling the order is able to provide, or get by contract, the ordered products and services.
- (b) To support the determinations required in ~~(1) and (2)~~ paragraph (a) above, the judiciary organization must consider the following ~~must be considered, and included~~include supporting documentation in the D&F and IA file ~~documentation~~:
[. . .]
- (c) For IAs ~~and MOUs~~ within the judiciary organization's delegated procurement authority (see: Guide, Vol. 14, § 140.30.30(h) (Level 3 Delegation)), ~~excluding the AO~~, the D&F must be approved by the chief judge or other judiciary official identified ~~at~~ in Guide, Vol. 14, § 120.20.10(b) (Delegation to Chief Judges and Other Certain Judiciary Officials) (or PLO, if ~~delegated~~appointed as a CO).
[. . .]

§ 550.40.5030 Economy Act Costs

- [. . .]
- (b) The Government Accountability Office (GAO) has indicated that, as a rare exception, agencies may waive the recovery of small amounts of costs incurred where processing reimbursement would be uneconomical. The judiciary CO must document the IA file when making such a determination.
- [. . .]

REDLINE COMPARISON REFLECTING CHANGES

§ 550.40.6040 Transfer of Funds

- (a) ~~Other federal~~Federal agencies ~~may~~ require that payment be made by transferring funds via the Department of Treasury's Intra-Governmental Payment and Collection (IPAC) system. ~~If the providing agency requires that payment be made via the IPAC system, the~~
- (b) ~~The purchasing CO will~~must provide the agency location code ~~in Form AO 368 (Interagency Agreement) and other required information on FMS Forms 7600A or provide it in 7600B (Note: Open in Firefox or IE) or a similar form provided by~~ the other federal ~~agency's~~agency. ~~This form. These set forth will provide~~ the accounting information for both the providing and purchasing agencies in addition to other relevant ~~details of the agreement. Because IPAC transfers can only be accomplished at the AO, the CO may need to seek assistance from the AO's Finance and Accounting Division (FAD) and follow their instructions to accomplish the payment. The chief judge or other judiciary official identified at Guide, Vol. 14, § 120.20.10(b) (Delegation to Chief Judges and Other Judiciary Officials) (or PLO, if delegated) must sign the form as the Authorizing Official, indicating concurrence. These discussions should be carried out and all the funding issues resolved before requesting approval of the IA or MOU agreement details.~~
- (c) ~~Because IPAC transfers can only be accomplished at the AO, the CO must seek assistance from the AO's Finance and Accounting Division (FAD) to accomplish the payment. For signature and approval requirements, see: § 550.20.30 (Approval Requirements).~~

§ 550.45 IA Management

IAs require management by the IA point of contact POC and the CO throughout the period of performance. Such management should not, however, include "supervising" the providing agency's contractor personnel. See: § 510 (Personal Services Contracts).

- (a) The POC must manage the IA by:
- (1) Monitoring performance, reimbursements, and funding;
 - (2) Notifying the judiciary CO overseeing the IA of any performance disputes;
 - (3) Approving invoices; and
 - (4) Notifying the judiciary CO in writing when the IA period of performance ends.
- (b) The judiciary CO must manage the IA by:
- (1) Approving any IA changes that will impact the budget (e.g., modification, deobligating, billing, advance payment before invoicing);
 - (2) Approving any necessary renewal that is accomplished before the expiration date; and
 - (3) Resolving any performance disputes that may arise (which may need to be coordinated with the providing agency CO in an assisted acquisition-type IA). See: § 550.20.20(b)(9) (IA Content).

REDLINE COMPARISON REFLECTING CHANGES

§ 550.50 Payment of IAs ~~and MOUs~~

§ 550.50.10 Advance Versus Reimbursement

[. . .]

- (a) Advance

~~The provisions of the written IA or MOU may permit advance payment for all or part of the estimated cost of furnishing the products or services. [. . .]~~

[. . .]

§ 550.50.20 ~~[Reserved]~~

~~§ 550.50.30 Recording IA or MOU Obligations~~

- ~~(a) In most instances, an IA, MOU, or an order placed directly with another agency's contractor obligates the judiciary's appropriations and is recorded as an obligation. If this at the time the IA is executed. See: 31 U.S.C. § 1501(a); Guide, Vol. 13, § 280.60.10 (Statutory Authorities Permitting Obligations).~~

[. . .]

§ 550.55 MOAs and MOUs

§ 550.55.10 In General

Memoranda of Agreement or Understanding (MOAs or MOUs) are not procurement vehicles when used exclusively by themselves. However, guidance on MOAs or MOUs is provided in this subsection to differentiate them from funded procurement vehicles (e.g., IAs, contracts, delivery or task orders used to obtain goods or services), as well as certain other transactions.

§ 550.55.20 Delegation

- ~~(a) AO-issued MOAs or MOUs are subject to the AO internal delegation policy.~~
- ~~(b) Other judiciary organizations do not require a delegation of authority from the AO Director to use an MOA or MOU, neither of which may obligate funds.~~

§ 550.55.30 MOA or MOU Content

- ~~(a) All MOAs or MOUs must be consistent with applicable federal laws and regulations, judiciary policies, and are subject to approval by the chief judge or other judiciary official identified at Guide, Vol. 14, § 120.20.10(b) (Delegation to Chief Judges and Other Judiciary Officials), or the PLO, if delegated, subject to described limitations.~~
- ~~(b) An MOA or MOU must be in writing and must specify the following:~~
- ~~(1) Parties~~

The parties to the agreement.

REDLINE COMPARISON REFLECTING CHANGES

§ 550.55.30 [cont'd]

(2) Purpose

The purpose or reason for entering into the agreement.

(3) Responsibilities

The duties and responsibilities of the parties subject to the agreement.

(4) Applicable Special Requirements

(Note: Similar to contracts, an MOA or MOU may not include any provision stating that the judiciary will indemnify other parties. See: § 540.20(a)(8) (Prohibited Terms and Conditions).)

(5) Modification

How the MOA or MOU may or may not be modified, whether formal (written) or informal (oral), along with who can do the modification (i.e., signatories of the original agreement only or points of contact).

(6) Disagreements

Procedures for the resolution of disagreements that may arise under the MOA or MOU.

(7) Severability

That nothing in the agreement is intended to conflict with current law, regulation, or judiciary policy. If a term of the agreement is inconsistent with such authority, then that term will be invalid, but the remaining terms and conditions of this agreement will remain in full force and effect.

(8) Effective Date of the Agreement

The date the agreement begins. For example, this could be a specified date after the MOA or MOU is signed by all parties, or the date the last party signs the agreement.

(9) Mutual Termination Provisions

Provisions that indicate whether:

(A) the MOA or MOU will terminate on a certain date, upon the accomplishment of its purpose, or upon agreement of the parties;

(B) the duration of the agreement may be extended and, if so, the extension mechanism (e.g. by written agreement of the parties); and

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§ 550.55.30 [cont'd]

(C) a party may terminate the agreement early and if so, how it may be done (e.g., written notice to the other parties).

(10) Points of Contact

Provide the names and contact information (e.g., mailing and email addresses; phone and fax numbers) of the POCs for all parties.

(11) Approval Signature Blocks and Dates

Provide the names and signatures of approving officials for each party, along with the date the officials signed the MOA or MOU.

§ 550.55.40 Approval Requirements

(a) AO-issued MOAs/MOUs are subject to the AO internal approval procedures.

(b) MOAs or MOUs issued by other judiciary organizations must be approved according to local policy, as determined by the organization concerned.

§ 550.55.50 MOAs or MOUs Involving Gifts to the Judiciary

(a) When an MOA or MOU purports to provide a benefit or service to the judiciary by a non-federal entity at no cost, it is presumed to be a gift. **See:** Guide, Vol. 2C, § 620.30 (Solicitation of Gifts by a Judicial Officer or Employee). The limitations on accepting “gifts” to the judiciary include:

(1) Only those officers or employees that have been delegated authority from the AO Director may accept gifts to the judiciary. **See:** Guide, Vol. 16, § 520.10(c) (Donation or Gift).

(2) The AO Director has delegated limited authority to certain judiciary officials who may accept voluntary and uncompensated (gratuitous) services from “volunteer employees.” **See:** Guide, Vol. 12, § 550.20(c) (Authority).

(b) When the judiciary needs services or other capabilities to fulfill its missions (that can be contracted for), the judiciary organization should contact the servicing CO for advance procurement planning. **See:** Guide, Vol. 14, Ch. 2 (Procurement Planning and Preparations).

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§ 550.55.60 MOAs or MOUs Versus No-Cost Contracts

If an MOA or MOU with a non-federal entity contains mutual promises and benefits to both parties (i.e., consideration, in lieu of obligating funds), it may constitute a “no-cost” contract, versus a gift, depending on the facts.

- (a) A judiciary no-cost contract (instead of an MOA or MOU) might be appropriate in rare instances, but only a CO can bind the judiciary to such contracts. For an example, see: Guide, Vol. 14, § 310.80 (Vendors Offering Services for Public Use); GAO B-410752.3 et seq. (LCPtracker, Inc.; eMars, Inc.).
- (b) For any proposed no-cost contract:
 - (1) AO staff are subject to the applicable AO policies and procedures.
 - (2) Other judiciary organizations should consult with the AO’s PMD, as such contracts may involve other potential issues to consider (e.g., conflicts of interest, augmentation of appropriations). See: GAO B-308968 (No-Cost Contracts for Event Planning Services).

§ 550.55.70 MOAs or MOUs Versus Loans of Personal Property (Bailments)

One of the ways the judiciary may temporarily obtain personal property for official use is a loan. See: Guide, Vol. 16, § 520.10(d) (Loans from a Public Institution or Private Benefactor). A temporary “loan” of such personal property can also be considered a “bailment contract.”

- (a) A bailment is not a procurement contract. However, to protect the judiciary’s interests and make it contractually enforceable, a “bailment contract” (not an MOA or MOU) should be established in writing and signed by a judiciary CO. See: Telenor Satellite Services, Inc. v. United States, 71 Fed. Cl. 114 (2006).
- (b) Judiciary organizations should take caution to not improperly solicit non-federal persons or entities to temporarily bail (i.e., loan) their personal property to the judiciary.
- (c) Where “bailment contracts” are not expressly delegated and authorized elsewhere in judiciary policy, the judiciary organization should consult with the AO’s PMD, as such contracts may involve other potential issues to consider.

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§ 550.55.80 MOAs or MOUs Versus Leases of Real Property (Office Space)

- (a) As a general rule, only the General Services Administration (GSA) may lease office space necessary for judiciary operations. See: Guide, Vol. 14, § 160.40 (Non-Ratifiable Unauthorized Commitments); Vol. 16, §§ 110.20 (Authority) and 110.20.40 (General Services Administration). For the narrow statutory exception involving space for holding sessions of court at no cost, see: Guide, Vol. 16, § 110.20.20(a) (Director of the Administrative Office).
- (b) Branding a real property “lease” as something other than a lease (e.g., MOA, MOU, License, Facility Use Agreement), in and of itself, will normally not alter the legalities involved.
- (c) Questions on the need for office space should be directed to the applicable GSA Regional Office and Assistant Circuit Executive. The AO’s Space and Facilities Division is also available to address questions on space needs.

[Significant changes in the Glossary of Procurement Terms follow:]

[. . .]

Assisted Acquisition – A type of interagency procurement where a servicing agency performs procurement activities on a requesting agency’s behalf, such as awarding and administering a contract, task order, or delivery order.

Bailment Contract – A type of interagency procurement where a servicing agency performs procurement activities on a requesting agency’s behalf, such as awarding and administering a contract, task order, or delivery order.

[. . .]

Consultant – A person who provides views or opinions on problems but does not supervise or carry out operating functions. The person or business entity serves primarily as an adviser to an officer or instrumentality of the government, ~~as distinguished from judiciary, rather than~~ an officer or employee who carries out the judiciary’s duties and responsibilities. ~~–A consultant provides views or opinions on problems or questions presented by the judiciary, but neither performs nor supervises performance of operating functions.~~ Generally, a consultant has a high degree of broad administrative, professional, or technical knowledge or experience ~~which that~~ must make the advice distinctively valuable to the judiciary agency.

[. . .]

Direct Acquisitions – A type of interagency acquisition where a requesting agency places an order directly against a servicing agency’s indefinite-delivery contract. The servicing agency manages the indefinite-delivery contract but does not participate in the placement or administration of an order.

[. . .]

Expert – A person with ~~excellent qualifications and~~ a high degree of attainment in a professional, scientific, technical, or other field, ~~and with excellent qualifications, skills, and knowledge above those of the ordinary person in the field.~~ An expert’s knowledge and mastery of the practices, problems, methods and techniques of a field of activity or of a specialized field are clearly superior to those usually possessed by ordinarily competent persons in that activity. An expert usually is regarded as an authority or as a practitioner of unusual competence and skill by other persons in the profession, occupation, or activity. To qualify as an “expert,” an individual or business entity must meet all the criteria in this definition.

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Glossary of Procurement Terms *[cont'd]*

~~**Fair and Reasonable Price** – A price based on reasonable costs under normal competitive conditions and not on lowest possible cost.~~

[. . .]

~~**Interagency Agreement (IA)** – A document authorizing the obligation of appropriated funds to provide goods or services to, or obtain goods or services from, another federal agency. (**Note:** This definition does not include IAs for details of personnel by the judiciary to or from another federal agency. **See:** Guide, Vol. 12, § 510.70 (Interagency Agreements and Memoranda of Understanding (MOU)).)~~

~~**Interagency Agreement (IA) Determination and Finding** – A document for Economy Act IAs, which is prepared by the requesting office and signed by the CO, to explain how:~~

- ~~(a) using an IA to obtain products or services under the Economy Act (31 U.S.C. § 1535) is in the judiciary's best interest; and~~
- ~~(b) the products or services cannot be provided by contract as conveniently or cheaply by a commercial enterprise.~~

~~**See:** Guide, Vol. 14, § 550.40.20 (Economy Act Determination and Finding).~~

[. . .]

~~**Memorandum of Agreement (MOA)** – A document describing the specific responsibilities and actions to be taken by the judiciary and the other federal agency to achieve the agreement's goals. (**Note:** MOAs by themselves may not be used to obligate funds. An accompanying IA, contract, or other lawful instrument is needed to do so.)~~

~~**Memorandum of Understanding (MOU)** – A document describing very broad concepts of mutual understanding, goals, and plans shared by the parties. MOUs establish an understanding between the judiciary and another federal agency. (**Note:** MOUs by themselves may not be used to obligate funds; an accompanying IA, contract, or other lawful instrument is needed to do so. This definition does not include MOUs for details of personnel by the judiciary to or from another federal agency. **See:** Guide, Vol. 12, § 510.70 (Interagency Agreements and Memoranda of Understanding (MOU)).)~~

[. . .]

~~**No-Cost Contract** – A contract between the judiciary and a vendor under which no monetary payment is made by the judiciary for the vendor's performance. Under a typical no-cost contract, instead of receiving compensation from the judiciary, the vendor charges and retains fees (assessed against third parties) for its services or an alternative form of consideration is present.~~

[. . .]

~~**PO** – **See:** Purchasing Office.~~

[. . .]

~~**Procuring IA** – An IA in which the judiciary is obtaining goods or services from another federal agency and is reimbursing it for the costs of those goods or services.~~

[. . .]

~~**Servicing IA** – An IA in which the judiciary is providing goods or services to another federal agency and is being reimbursed by it for the costs of those goods or services.~~

[. . .]