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Chapter: <b>Control of Expenditures</b>			
Directive Title: <b>PERSONAL SERVICE CONTRACTS</b>			

## 1. INTRODUCTION

This directive provides guidance to contracting authorities so that an employer/employee relationship is not inadvertently established when the intention is to have a service contract with a person or other entity.

Failure to follow the correct application of the directives could result in the Government being liable for income tax, payroll tax, source deductions and other statutory liabilities such as Workers' Compensation levies.

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

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

## 2. DEFINITIONS

### 2.1 Contract Authority

A contract authority is a person who has been designated as an expenditure authority under Section 40 of the Financial Administration Act and the Government Contract Regulations. (See Directive 9904 in this manual.)

### 2.2 Employer

In this directive, the employer is the Government of the Northwest Territories and the public agencies listed in Schedules A, B, and C of the Financial Administration Act, excluding the Northwest Territories Power Corporation and the Workers' Compensation Board.



### 2.3 Employment Contract

An employment contract exists where there is an employer/employee relationship between the employer and the worker performing the contract work. Refer to Appendices A and B for assistance in determining whether the relationship is an employer/employee relationship (employment contract) or an independent relationship (service contract).

### 2.4 Service Contract

A service contract exists if the person performing the work of the contract performs it independent of the contract authority and is not an employee for purposes of the contract. The person is held to be an independent contractor. Refer to Appendices A and B for assistance in determining whether the relationship is an independent relationship (service contract) or an employer/employee relationship (employment contract).

## **3. SCOPE**

This directive applies to all departments of the Government of the Northwest Territories and public agencies listed in Schedules A, B, and C of the Financial Administration Act, excluding the Northwest Territories Power Corporation and the Workers' Compensation Board.

## **4. DIRECTIVE**

### 4.1 Review of Potential Service Contracts

The Deputy Head of each department is responsible to ensure that a system is in place to review each potential service contract to ensure that an employer/employee relationship would not be created.

### 4.2 Compliance

All contracts entered into by a contract authority shall be in accordance with the Financial Administration Act, the Government Contract Regulations, and the Financial Administration Manual.

### 4.3 Employment Contracts

All employment contracts must be initiated as directed in the Human Resources Manual unless an exception is approved in advance by the Financial Management Board. Persons working under an employment contract with the government shall be paid through a payroll system approved by the Comptroller General and shall have statutory deductions made at source.

## **5. GUIDELINES**

### **5.1 Review of Potential Service Contracts**

- 5.1.1 Before entering into a service contract with a person or a person operating under a proprietorship name, the contract authority is required to ensure that the potential contract is not an employment contract. The contract authority should conduct the tests in Appendices A and B to determine the type of contract under consideration. Where the contract authority is unable to make a clear determination, the departmental Director of Finance and Administration or the Regional Superintendent, Financial Management Board Secretariat (FMBS), should assist in a review.
  
- 5.1.2 If the above review does not determine whether the proposed contract is a service contract or an employment contract, the determination should be assisted by the Labour Relations Division, FMBS.

## **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 independent contractor or an employee 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 an employee is great, control may be less significant than other factors in determining that 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 the employer. A requirement that the person not work beyond a specified number of hours in a given time period is also a form of control.

##### 1.2 Hours of Service

A person must devote a significant portion of their time to the work. This implicitly restricts the person from doing other work, indicating that the 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 e.g., park ranging, fire control. The employer supplies tools and equipment the person needs for performance of the work. These conditions are forms of control.

#### 1.4 Continuing Services

If the contract implies continuing or recurring work, the relationship is considered permanent even if the work is part-time, seasonal, or temporary. Continuing or permanent service indicates employer's 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.

#### 1.7 Compliance with Instructions

The employer has control over how the work is performed. The 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 should be considered an employee.

### 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.

## **2. ECONOMIC REALITY - THE OPPORTUNITY FOR PROFIT OR RISK OF LOSS**

Several economic reality factors indicate that an employer/employee relationship (employment contract) may exist between the 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, etc.
3. payment to a person based on a rate for time rather than on the completion of a specified project

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 employment contract 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 recently 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 end result.

Examples of specified results within service contracts are:

1. "install software, not to exceed 35 hours by 28th Feb. 19xx;" and,
2. "train five employees in the new software for four hours each day for five days."
3. "train only between 10:00 A.M. and 3:00 P.M."
4. an engineer's construction site inspection on a specified day
5. a truck with driver provided for a specified period, or to carry a specified number of loads, or to move a specified tonnage.

Although these examples might appear to call for the primary test of control (hours of work and service), the specified 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*.



**APPENDIX B**

Before entering into a service contract, complete the following questionnaire in order to ensure that the proposed contract does not constitute an employment contract. Refer to Appendix A for guidance also. If the answer to any of the questions is "yes", the proposed contract may be an employment contract. If there is an implied employer/employee relationship:

1. review the Human Resources Manual requirements for employment contracts; and,
2. ask the departmental Director, Finance and Administration or the Regional Superintendent, Financial Management Board Secretariat to preview the proposed contract.

If it is determined that an employer/employee relationship would exist, the proposed contract is inappropriate. Either revise the contract or initiate proper staffing actions as directed in the Human Resources manual.

Questions	Y / N
Q.1 Is the contract with a person or a person operating under a proprietorship name?	
Q. 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"	
Q. 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"	
Q. 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"	
Q. 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"	
Q. 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"	
Q. 7 Will the person be required to submit an accounting of time spent on the work? see Appendix A, 1.5 "Established Routines and Schedules" and 1.6 "Accounting for Actions"	
Q. 8 Will the contract authority train the person to perform the	



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work? see Appendix A, 1.8 "Training"	
Q. 9 Will the person performing the work lack the power to delegate or sub-contract it? see Appendix A, 1.7 "Compliance with Instructions"	
Q. 10 Will the contract authority directly supervise the work? see Appendix A, 1.7 "Compliance with Instructions"	
Q. 11 Will the contract authority have the right to discharge the person? see Appendix A, 1.10 "Right to Discharge"	
Q. 12 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 Possibility of Profit or Loss"	
Q. 13 Is the work part of the contract authority's regular business routine more than it is the contractor's business? see Appendix A, 3. "Integration"	
Q. 14 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?	
Q. 15 Do the facts indicate that an employer/employee relationship would be created ?	