

# DEPARTMENT OF ADMINISTRATIVE SERVICES

## FREQUENTLY ASKED QUESTIONS (FAQS)

### EXECUTIVE ORDER 2010-09S

#### Banning the Expenditure of Public Funds on Offshore Services

Updated on September 3, 2010

State officials and employees must at all times remain passionately focused on initiatives that will create and retain jobs in the United States in general and in Ohio, in particular. To ensure that the intent behind Executive Order 2010-09S (banning the expenditure of public funds for offshore services) is fully carried out, careful attention must be paid to when public funds are used to pay for services.

This Frequently Asked Questions (FAQs) document is an update to the original FAQs document released on August 20, 2010. The Department of Administrative Services (DAS) will continue to update these FAQs and will post the current copy at [www.procure.ohio.gov](http://www.procure.ohio.gov).

A state employee with questions regarding procurement and the application of this Executive Order should consult his or her agency procurement officer (APO). If an APO needs assistance, she or he should contact the DAS Office of Procurement via e-mail at [terry.tyler@das.state.oh.us](mailto:terry.tyler@das.state.oh.us) or by phone at (614) 644-8497. For any other questions regarding the Executive Order, state employees should contact their agency's legal counsel.

1. Does Executive Order 2010-09S ban the use of any funds (within the control of the executive agency) to purchase services which will be provided in Mexico? in Canada?

**Answer: Executive Order 2010-09S bans the use of public funds to purchase services that will be provided "outside the United States". Mexico and Canada are outside of the United States and therefore included in the prohibition.**

2. Does the prohibition "attach" only to state funds?

**Answer: No. Executive Order 2010-09S applies to all funds in the custody of an executive agency, whether they are from state, federal, philanthropic or private sources. This includes fees paid to the agency. Throughout the FAQs, the term "funds" means all funds within the control or custody of the executive agency.**

3. Does Executive Order 2010-09S ban the use of any funds to purchase goods?

**Answer: Executive Order 2010-09S only bans the purchase of services provided outside the United States. Other state and federal laws and directives, including those pertaining to "Buy Ohio" and "Buy American", cover the purchase of goods.**

4. Our agency wants to purchase a good, but the good also has a service component, such as a helpline phone number for technical or warranty questions. This service may be provided outside the United States. Does Executive Order 2010-09S ban the use of any funds to make this purchase?

**Answer:** Careful attention must be paid to each purchase the agency makes, especially where there is a contract for a good and a service. The purchase is not banned under Executive Order 2010-09S where the purchase is predominately for a good and no integral part of the purchase is for the rendition of a service.

Examples of permissible purchases include “off the shelf” software or an office computer. These types of purchases are predominately for the purchase of a good. While the purchase may include the ability to use a helpline phone number, this service is not an integral part of the purchase.

If the purchase of a good includes a requirement for the performance of a service and the service is an integral part of the purchase, the purchase is prohibited if the service will be provided outside of the United States. Agencies are cautioned to pay careful attention to purchased services which may carry substantial risk, which often come in the form of maintenance agreements and contracts for professional services (e.g., performance of engineering or architectural services).

5. Is Executive Order 2010-09S retroactive for previously made purchases?

**Answer:** Executive Order 2010-09S strengthens existing procurement procedures that were put in place to restrict the purchase of services provided outside the United States. Previously made purchases should have been entered into in accordance with those procurement procedures.

Executive Order 2010-09S became effective on August 6, 2010. The additional requirements found in Executive Order 2010-09S are in place for all purchases made on or after that date.

6. Our agency has a contract where all services are performed in Ohio by Ohio workers, but the company is owned by a foreign company. Is our agency allowed to pay for these services?

**Answer:** Yes. The agency is permitted to use public funds to pay for these services performed by American workers.

7. Does Executive Order 2010-09S ban the purchase of services provided by a foreign company that is using foreign workers who work onshore, inside the United States?

**Answer:** The expenditure of public funds for services provided by foreign companies should not be used in a way to defeat the intent behind Executive Order 2010-09S. Executive Order 2010-09S bans the use of any funds to purchase services which will be provided outside the United States. The primary reason for this ban is that the expenditure of public funds for services provided offshore deprives Ohioans and other Americans critical employment opportunities.

The purchase of services provided by offshore workers who travel to the United States undercuts this economic consideration. Further, purchasing these types of services puts the state at risk of additional costs (e.g., for travel and accommodations). The state, however, may benefit from training and other educational engagements that only offshore workers who travel

to the United States can provide. As such, where public funds are being used for the purpose of creating and retaining jobs in the United States and in Ohio, in particular, public funds are permitted to be used for this purpose.

8. Does the prohibition apply to services provided by subcontractors?

**Answer: Executive Order 2010-09S applies to all prime service providers and prospective service providers (i.e., contractors, vendors, etc.) and their direct subcontractors (or prospective subcontractors). The Executive Order does not ban prime service providers or their subcontractors from contracting with an individual or entity to provide services which are (or will be) a negligible part of the project.**

**In addition, the Executive Order does not apply to ancillary services used by contractor(s) or subcontractor(s) to conduct its business affairs.**

9. What if a service provider fails to properly disclose a change of performance location, but they have not yet provided any services? What are the contractual remedies?

**Answer: Please see the Standard Terms and Conditions provisions provided by the Department of Administrative Services. Each agency must include the standard contract provisions that provide a cure period before the contractor is considered to be in default. Executive agencies must include the standard contract provisions that provide a remedy for any negative consequence suffered due to loss of time. Also, APOs must insert the appropriate information in the cure period and liquidated damages provisions.**

10. What if the contractor assigns the contract to another provider?

**Answer: Please see the Standard Terms and Conditions provisions provided by the Department of Administrative Services. Each agency must include prior written consent within the contract's standard terms and conditions. As one of the conditions of consent, the new contractor must affirm that they understand Executive Order 2010-09S, provide the same disclosure information required by the original contractor and agree to the same restrictions. These provisions must not be modified unless prior approval is given by DAS.**

11. What if a prospective service provider says that it is only able to provide services offshore, but it says that it will provide those services free of charge to the state? Can the agency enter into an agreement with the provider?

**Free services provided to the state are not prohibited under the Executive Order 2010-09S. However, agencies must be aware that such services may not be truly free. Rather, the cost of "free" (or reduced) services may be concealed in other parts of the purchase in the form of higher cost for other services. As such, agencies must thoroughly scrutinize these types of offers, looking to factors (e.g., market indicators for the value of the service, the prospective service provider's past contractual history, etc.) to uncover any hidden costs or risks to the state. If the "free" services are, in fact, being paid for through other portions of the contract, the purchase is prohibited.**

12. Are utilities a product or a service under the Executive Order?

**Answer: Electricity, gas or water passing through utility-owned conduits are considered goods and as such, are not covered under the Executive Order.**

13. Does Executive Order 2010-09S apply to grants?

**Answer: Grant making agencies must follow all of the requirements under the Executive Order. Executive Order 2010-09S bans the use of public funds to purchase services that will be provided outside the United States. The purchase of services includes the use of any public funds to buy, acquire, invest in or fund services, whether those services are provided to the state to fulfill a contractual obligation or those services are being performed to implement a project or program.**

**An agency is prohibited from purchasing, reimbursing the grantee for, or counting as match or cost share which is specifically required as a condition to the disbursement of grant funds any service that will be provided outside of the United States. FAQ #8 makes clear that the Executive Order does not apply to ancillary services, and the same considerations apply to grantees. Modifications of the specific language in the Standard Affirmation and Disclosure Form and Standard Terms and Conditions document should be directed to DAS.**

14. A grantee receives public funds but also has other sources of non-public funding. The grantee uses those non-public sources of funding to pay for offshore services. Is the grantee permitted to use their non-public funds in this way? Does Executive Order 2010-09S prevent me from providing funds to this grantee?

**Answer: Executive Order 2010-09S applies to funds within the custody of an executive agency. An agency is prohibited from purchasing, reimbursing the grantee for, or counting as match or cost share specifically required as a condition to disbursement of the grant funds any service that will be provided outside of the United States. The Executive Order does not cover investments made by the grantee who uses other sources of funding beyond what the state provides or reimburses with grant funds. However, agencies should encourage the grantee to purchase all services needed to implement its project or program from contractors that will provide the services in the United States and in Ohio, in particular.**

15. Does Executive Order 2010-09S apply to amendments to grants, “open grants” in particular?

**Answer: Yes. Executive Order 2010-09S applies to any amendment that authorizes the purchase of any new or additional service that will be provided. The amendment is prohibited if it will authorize a new or additional service that will be provided outside the United States.**

16. Our agency provides grants to other independent state agencies. Should our agency require the grantee-state agency to provide all affirmation and disclosure information as well as include the Standard Terms and Conditions in the grantee documents?

**Answer:** All agencies are expected to comply with the Executive Order. The grant making agency must ensure that no funds are used in violation of the Executive Order. However, the grant making agency is not required to impose the technical requirements for disclosure and affirmation or to use the standard terms and conditions when making a grant to another state agency.

Grants should be distinguished from instances where the agency apportions funds to political subdivisions, such as local school districts, etc. The Executive Order does not cover the apportionment of funding from executive agencies to local political subdivisions.

17. Does Executive Order 2010-09S apply to “smaller, direct purchases,” such as purchases made using a procurement card (“p-card”)?

**Answer:** Agencies are prohibited from using any public funds to purchase, using the procurement card or other means, any service that will be provided outside of the United States. Agencies are not required to add the technical requirements for affirmation and disclosure or to use the Standard Terms and Conditions if the agency makes small purchases that do not require an execution of a contract. However, agencies must ensure that no public funds are being used in violation of the Executive Order. Please note that for purchases from DAS contracts, DAS will handle any required provisions.

18. Our agency hires a local company for lawn mowing service. Does Executive Order 2010-09S apply to this purchase?

**Answer:** The Executive Order bans the purchase of services that will be provided outside the United States. However, an agency is not required to obtain the Affirmation and Disclosure Form or to use the Standard Terms and Conditions where all of the components of that service are clearly provided solely at the agency’s facilities (e.g. cleaning, plumbing, window washing, or other assistance service). However, agencies must ensure that no public funds are being used in violation of the Executive Order.

19. Does Executive Order 2010-09S apply to software development?

**Answer:** Yes. Executive Order 2010-09S bans the use of public funds to purchase services that will be provided outside of the United States.

20. Does Executive Order 2010-09S apply to “media buys”?

**Answer:** Agencies must purchase services connected with the “buy” of advertising time or space from contractors who can provide services in the United States. Agencies may “buy” the advertising time or space in an offshore market if the purpose is to promote Ohio and/or generate business activity that will benefit Ohio.

21. Who is required to attend the training sessions?

**Answer: Executive Order 2010-09S requires DAS, through Ohio's Chief Procurement Officer, to have procedures in place to ensure that the requirements of the Executive Order are met. On August 20, 2010, DAS released a memorandum that described the procedures that agencies must follow to comply with the Executive Order. Specifically, agency procurement officers (APOs) or any other person with equivalent duties must attend one of the four training sessions provided by DAS. Agencies must require their APOs to attend a training session. Agencies should use their judgment as to what other staff members should attend.**

22. What if my agency has a situation that is not covered under the FAQs?

**Answer: DAS has the authority to resolve all questions and will do so in accordance with the Executive Order. If an agency has an unusual circumstance that is not covered under the FAQs, the agency should refer the question to DAS. Where the question is fact-specific, DAS will analyze and resolve the question on a case by case basis.**