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Outsourcing Changes Are in the Wind: **Obama Administration's Proposed Changes to the Definition of 'Inherently Governmental' Will Impact Government Contractors**



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Comments on Proposed Policy Letter Are Due by June 1

The [Office of Federal Procurement Policy](#) (OFPP), a part of the Executive Branch's Office of Management and Budget (OMB) and the highest level policy making office for federal procurements, is now fully engaged in establishing a means to advise government contracting officials and contractors alike on what is and is not 'inherently governmental' and what work can be outsourced or is required to be done by Government personnel.

On April 6, 2010, OFPP issued a [draft policy letter](#) that would clarify what is 'inherently governmental' and what can and cannot be contracted out. The OFPP is actively and openly asking for assistance from the Government and contractor community to shape the definitions of what is 'inherently governmental' and what are 'critical functions', and the policies needed to implement these definitions across the Government.

Over at least the past fifteen years, the pendulum has been swinging back and forth between (a) outsourcing and (b) making the Federal workforce more efficient to ensure that the business of government is done by the Government. For example, public-private competitions under [OMB Circular A-76](#) have been carried out to determine whether it is more economical to contract out certain work than to perform it in-house. The Government has also sought to bridge the gap in its workforce personnel, knowledge, and skill set needs arising from things like reorganizations, budget cuts, workforce retirements, and attrition by looking to contractors to provide the services needed to perform work here in the United States and abroad.

Faced with reported problems with contractors engaging in these activities as well as concerns about having an appropriately sized and staffed Government workforce to perform critical mission functions, Congress in 2008 mandated that the OMB, in consultation with the Government's chief acquisition and human capital council members, create a single definition of the term 'inherently governmental function' and establish criteria to help agencies identify "critical functions and positions that should only be performed by federal employees". See [Duncan Hunter National Defense Authorization Act for FY 2009, Public Law 110-417, §321](#) (NDAA).

Under the NDAA, Congress required these entities to report one year later on the status of their actions. In his March 4, 2009, [Memorandum on Government Contracting](#), President Obama articulated his concerns that "the line between inherently governmental activities that should not be outsourced and commercial activities that may be subject to private sector competition has been blurred and inadequately defined" and he ordered OMB to "clarify when governmental outsourcing for services is and is not appropriate" consistent with the NDAA and to issue government-wide guidance by September 30, 2009.

In the face of these Congressional and Presidential directives, the OFPP issued a proposed policy letter on April 6, 2010, to:

1. clarify what functions are inherently governmental and must always be performed by federal employees
2. help agencies identify when other functions or portions of functions need to be performed by Federal employees, and
3. outline agency management responsibilities to strengthen accountability for the effective implementation of these policies.

What Is Inherently Governmental?

In the proposed policy letter, OFPP seeks to adopt the Federal Activities Inventory Reform Act definition of 'inherently governmental function' as the single, government-wide definition. Using that definition, OFPP's policy letter provides that an 'inherently governmental function' would include a function "that is so intimately related to the public interest as to require mandate performance by Federal Government employees."

The draft letter identifies specific functions in the definition of 'inherently governmental' and, in its Appendix A, which functions would be considered 'inherently governmental' and which could not be considered for private contractor performance. In addition, it provides that, where Congress legislates that a particular function is 'inherently governmental', it too cannot be contracted out.

For functions not included in these definitions, statutes, or lists, the policy letter proposes to charge the affected agency with analyzing those functions prior to issuing any solicitation for contracting out those functions, using two distinct tests:

- the 'nature of the function test' (Does the function involve the exercise of sovereign powers?) and
- the 'exercise of discretion test' (Will the exercise of discretion commit the Government to a course of action where two or more alternative courses of action exist and decision making is not already limited or guided by existing policies, procedures, directions, orders, etc.?).

Significantly, any functions meeting either of these tests will be deemed 'inherently governmental' and the policy provides that the agency will not be able to contract out that function. Under this proposed evaluation standard, there is a clear risk that different agencies could analyze the same facts and issue divergent determinations as to whether a particular function is 'inherently governmental' and could be contracted out.

The letter does not state whether the evaluation will have precedential effect on other determinations within the agency or across the Government. The question of whether a function that is contracted out will be subject to ongoing review during the life of the contract is also not clearly answered. Notably, the draft letter provides a list of examples of "functions closely associated with the performance of inherently governmental functions" which should be carefully monitored post-award of a contract to determine whether the function has become inherently governmental.

When Do Positions Need to Be Filled by Federal Employees?

In addition to addressing the 'inherently governmental' definition and contract scope issues, above, the OFPP policy letter proposes criteria for determining whether a function that is not 'inherently governmental' still is so critical that it "must be reserved for federal employee performance."

The intent of this portion of the proposed policy is to ensure that sufficient numbers of Federal employees are performing "critical functions so that federal employees may maintain control of agencies' missions and operations."

What Are Agencies' Management Responsibilities?

Under the proposed policy letter, not only are agencies charged with analyzing each function to determine whether it is 'inherently governmental' prior to soliciting to contract out the function, but

they also will be charged with ongoing oversight and review to determine whether the functions, as they are being performed following contracting out, have changed or continue to be other than 'inherently governmental'. Where an agency finds that a function has changed, the agency will be charged with taking corrective action, which can include increased oversight and additional protocols, in-sourcing the work, non-exercise of contract options, or even termination of the portion of the contract at issue.

Agencies also will be charged with determining pre-solicitation, even if a function is not 'inherently governmental', whether the function and position at issue involve any aspect of a critical function. If so, the agency must issue a determination and analysis as to whether the agency has sufficient internal capability to control its mission and operations. If it does not, then the agency will need to secure the needed in-house capacity. If it does, the agency may be permitted to engage in contracting out activities to the extent that cost considerations outweigh performance and risk considerations.

Tasks to be handled by agencies to carry out a policy include developing and implementing the agencies' own procedures to carry out the policy letter and periodically reviewing the agencies' internal management controls. They also will need to designate responsible management officials to be accountable for the development and implementation of agency policies and procedures, and training of personnel, to ensure this guidance is carried out.

One Final Note

In a highly unusual move, OFPP has included an extensive list of questions on its proposed definitions and procedures on which it seeks comments prior to finalizing the policy letter. OFPP will accept comments on the proposed policy letter and the questions posed until June 1, 2010.

We expect that a final policy letter will be issued in some form before the end of the year. We encourage you to review the proposed letter and list of questions posed by OFPP to determine if you have any concerns or basis for commenting.

**For more information, see [75 Federal Register, pp 16188-16197](http://www.federalregister.gov) (March 31, 2010).
<http://edocket.access.gpo.gov/2010/pdf/2010-7329.pdf>**

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