

“Inherently Governmental”

Written by Administrator
Tuesday, 08 June 2010 08:24

On March 31, 2010, the Office of Federal Procurement Policy (OFPP) [issued](#) a “notice of proposed policy letter ... to provide guidance to Executive Departments and agencies on circumstances when work must be reserved for performance by Federal government employees.”

Comments on the proposed policy letter were due June 1.

The OFPP notice referenced a March 4, 2009

[Presidential Memorandum](#)

that requires the OMB “to clarify when governmental outsourcing of services is, and is not, appropriate” The OFPP notice also referenced

[§ 321](#)

of the FY 2009 National Defense Appropriation Act

(Pub. Law 110-417)

, which required OMB to—

(i) create a single definition for the term “inherently governmental function” that addresses any deficiencies in the existing definitions and reasonably applies to all agencies; (ii) establish criteria to be used by agencies to identify “critical” functions and positions that should only be performed by federal employees; and

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(iii) provide guidance to improve internal agency management of functions that are inherently governmental or critical.

According to [this story](#) (written by Robert Brodsky) at GovExec.com—

The notice also instructs officials to avoid an overreliance on contractors for functions that are ‘closely associated with inherently governmental’ or that are ‘critical’ for the agency’s mission. Agencies with more than 100 employees would be required to develop new procedures and training and to designate a senior official accountable for implementing the changes.

The proposal spells out 20 examples of inherently governmental activities including awarding and administering contracts, determining budget priorities

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and hiring or firing federal employees.

OFPP also would create a test to determine if other functions meet the definition of inherently governmental. Agencies would be asked to evaluate whether the function would commit the government to a course of action or if sovereign power is involved.

The document lists 19 examples of functions closely associated with inherently governmental work that require additional oversight but which are not statutorily prohibited from outsourcing. They include evaluating another contractor's performance, assisting in contract management and any situation that might permit access to confidential business information.

If an agency wants to use a contractor for any of these functions, it must first

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establish guidelines in the contract regarding specified ranges of acceptable decisions; assign an adequate number of qualified federal employees to administer the work and take steps to mitigate conflicts of interest, the policy letter states.

The guidance also requires greater supervision of ‘critical’ functions, which are defined as jobs in which at least a portion of the work

must be reserved to federal employees in order to ensure the agency has sufficient internal capability to effectively perform and maintain control of its mission and operations.

Finally, we should note that [FAR 7.5](#) addresses this topic by providing “policies and procedures to ensure that inherently governmental functions are not performed by contractors.”

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So now that we have some background, let’s look at some of the comments OFPP received. As Mr. Brodsky noted in his [recent article](#) at GovExec.com, “more than 100 individuals and organizations ... offered [public comments](#)” on the proposed rule changes. As the article reported, “little consensus” was evidenced by the comments.

We’re not going to recap the comments; they can be found at the link above. But here are a few choice ones to give you some of the flavor—

- [OMB Watch](#), a “nonprofit research and advocacy organization,” teamed with [CRE DO Action](#) to turn in a petition with more than 29,000 signatures. According to [this article](#), “Commenters urged the government not to allow security contractors to perform functions like guard services, convoy security services, pass and identification services, plant protection services, the operation of prison or detention facilities, and any security operations that might reasonably require the use of deadly force.”

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They also asked OFPP to prevent contractors from performing support of intelligence activities (including covert operations), interrogation, military and police training, and the repair and maintenance of weapon systems.

- The Small Business Administration (SBA) [wrote](#) that it was concerned about the impact of the proposed rule(s) on small businesses. The SBA stated, “The net result of this policy should not be a reduction in the percentage of contracts awarded to small businesses.”

- The Council of Defense and Space Industry Associations (CODSIA) stated that it was generally supportive of the rule. However, CODSIA stated, “We are particularly concerned that the underlying adversarial tone of the proposed policy is one which calls for the government to be vigilant in order to guard against contractor attempts to overtake portions of the government’s mission. We find this language to be counter-productive and would suggest that this proposed policy contain explicit language emphasizing the government/industry partnership, particularly for functions that are not inherently governmental, and our mutual interest in conducting the public’s business in as cost effective a manner as possible.

”

This is kind of a big deal, because many contractors generate a large portion of their sales from providing services to the Federal government. For the past 15 years or so, policy in this area has been based on the notion that “privatizing” government operations will lead to operational efficiencies and commensurate cost reductions. Some critics have charged that the trend toward privatization went too far, such that the government lost critical skills and knowhow. The Obama Administration has expressed its interest in reversing that trend, and has introduced the concept of “[insourcing](#).”

We don’t necessarily have a dog in this hunt, but we do note two interesting studies that would seem to bear on the situation. First, in this [previous article](#) we discussed a recent GAO study that compared use by the State Department of private contractors versus government employees to provide security services. The GAO study concluded that using government employees was *more than 10 times more expensive* than using contractor personnel on three of four contract scenarios it evaluated. (In the fourth scenario, the savings was much less, but it was still there.) In the upcoming era of tight Federal budgets, one ignores that kind of math at one’s own peril.

Second, we also [reported](#) on a recent blog post by Dr. Loren Thompson of the Lexington Institute, in which he expressed a “contrarian” viewpoint regarding commonly held acquisition reform myths. We wrote—

Adding more acquisition, audit, and program management professionals to DoD’s

ranks won’t solve the myriad problems with the Pentagon’s acquisition process, but it will compound the problem.

We are all familiar with the lack of Government resources in this area, and the current reliance on contractors to augment short-staffed contracting offices. But Dr. Thompson notes that those new heads will take additional funds—not just to cover the costs of salary and benefits, but also to cover the costs of training, equipping, housing and supporting them.

As Dr. Thompson notes, ‘When you add up all these costs, the long-term burden of taking on 20,000 new acquisition professionals will be over \$80 billion -- which just happens to be the projected cost of buying a replacement for the Trident ballistic-missile sub.’

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In other words, “insourcing” might make for great press and keep certain interests happy, but it also carries with it tremendous budgetary impact, as well as a potential impact to many current Federal contractors.