



Congress Clarifies 'Critical Function' Definition

By Matthew Weigelt

Dec 21, 2011

The fiscal 2012 National Defense Authorization Act may provide a little more clarity to the blurry term "critical function."

Such a function is a duty "necessary to maintain sufficient government expertise and technical capabilities" and a duty that "entails operational risk associated with contractor performance."

The Office of Federal Procurement Policy this year defined a critical function as work that's "necessary to the agency being able to effectively perform and maintain control of its mission and operations."

In the authorization bill, Congress tells Defense Department officials to give special consideration to these critical functions, as well as acquisition workforce functions and even work that DOD employees have done at some during the past decade if they plan to take back work from contractors.

Officials would need to test whether to insource certain functions based on DOD guidance on comparing the estimated costs of who's doing the work. Officials would also have to decide if insourcing a function would be either 10 percent or \$10 million less expensive than the contractor's cost. The choice would not apply to inherently governmental functions, which should only be done by federal employees.

The authorization bill cleared Congress Dec. 15, and now awaits President Barack Obama's signature or his veto.

As defense officials consider insourcing work, Congress wants them to notify contractors of their decision to take back their work. DOD would have to give a "timely notification" to companies before insourcing particular jobs.

One expert said the "timely notification" is a step forward in informing the companies that would be losing their contracts. But the provision's usefulness depends on what DOD considers timely.

"How 'timely' is defined determines whether this is of any value or not," said Robert Burton, former deputy OFPP administrator and now partner at the Venable law firm.

Having worked with small contracting companies that lose their business because of insourcing, he said a useful timely notification may be at least a six-month heads-up.

Still he said small businesses often struggle to stay afloat after insourcing, whether or not they know they're losing their work.

He had been pushing for such a provision, although he was disappointed Congress didn't go further than a "timely notification."

For the best option, he said government officials should talk with companies about the effect of insourcing on their future. Officials should then consider it as a factor in their decision.