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Could OMB Eliminate Private Sector Support To The Federal Government?

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One of the Obama Administration's most significant policy initiatives has been to reduce the role of private contractors in providing support to the federal government. The administration is concerned that private contractors were performing jobs that should be done only by government employees and that the over reliance on contractors had reduced the ability of government agencies and departments to control their mission and operations. Based on these concerns, the President signed a Memorandum on Government Contracting which directed OMB to clarify when governmental outsourcing of services is, and is not, appropriate.

OMB's primary task is to create a single, consistent definition for the term "inherently governmental function." The current definition of an inherently governmental function is "a function so intimately related to the public interest as to require performance by Federal Government employees." Simply put, if it involves the work of government employees exercising statutory authorities and responsibilities in the interest of the public, then the function or activity is inherently governmental.

Seems simple and reasonable, doesn't it? However, the presidential memorandum expands on this definition by adding two new categories, functions that are "closely associated with inherently governmental" or that are "critical" to an agency's ability to maintain control of its mission and operations. While not inherently governmental in character, jobs that fall under these two categories will also be reserved for government employees. OMB is assigned the task of establishing criteria by which government officials can identify closely associated and critical functions and positions under those two functions that must be reserved for federal employees. An even more expansive requirement imposed on OMB is to identify individuals within agencies responsible for maintaining sufficient organic expertise and technical capability within the agency in order to allow that organization to conduct its business and oversee remaining contractors.

These additional excluded categories are a potential license for an orgy of conversion of private sector jobs into permanent government positions. Once a function or position is defined as inherently governmental, closely associated or critical in nature, that is the final word. The position must be insourced. It will not matter that the job could be better or more cost effectively performed by the private sector. Nor is there a clear avenue for contesting an agency's determination that a position fits one of the three categories.

OMB's Office of Federal Procurement Policy (OFPP) has published a draft policy letter that seeks to set out the required guidance and criteria. This policy letter takes an overly broad approach to defining closely associated and critical functions. The criteria are too broad and subject to misinterpretation. It relies too much on lists of examples to guide agencies in their determination of positions to be protected rather than requiring those agencies to submit their lists of functions and positions and supporting rationales for review by OMB. The permission to insource private sector jobs is extremely broad. For example, the draft letter states that "even for functions that may not be viewed as critical, such as functions that are not directly involved in performing the core mission, the agency may determine that the function is, nonetheless, sensitive enough as to require that many, most, or, in some situations, all positions be filled by Federal employees." So indirectly, OFPP is slipping in yet another category for protection, the "sensitive" position.

The danger is that when all is said and done there will be no function that cannot be rationalized by a federal agency as being inherent, closely associated, critical or sensitive and, thus, fit only for government employees. Even more dangerous is the notion of the need to assure a sufficient internal agency base of expertise and technical capability. It will be easy for an agency so inclined to argue that the only way to maintain such a capability is by insourcing all positions of significance. What agency will not see the need for a full complement of experts regardless of cost or their prospect for utilization? Unless OPFF tightens up its definitions and criteria, the result could well be the end to the public-private partnership that has worked so well for the federal government up to this point, a massive expansion of the governing class and an enormous increase in the cost of government.

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