



Inherently Governmental Functions Policy and Guidance Issued

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Two years ago, contractors shuddered when the Obama Administration proposed to shift work from contractors to government employees. That objective was to be accomplished, in part, by more clearly defining what contractors could and could not do. The wait is over. And the answer so far is a big "Never mind". The long awaited guidance on the type of work that is considered "inherently governmental" and thus, cannot be performed by contractors, was issued by the Office of Federal Procurement Policy ("OFPP") on September 12, 2011. *See* 76 Fed. Reg. 56227. The definition of what constitutes an "inherently governmental function" was not re-written. Instead, the OFPP maintained the definition from the Federal Activities Inventory Reform Act, Public Law 105-270, which defines an inherently governmental function as "a function that is so intimately related to the public interest as to require performance by Federal Government employees." The OFPP explains that these are functions that require the exercise of discretion in applying Federal Government authority including judgment related to monetary transactions and entitlements. The types of things that are inherently governmental would be those that bind the United States, determine and advance United States interests by military or diplomatic action, significantly affect the life of private persons, appoint or control employees of the United States or exert control over acquisitions. Some examples given include: combat, security operations performed in support of combat, determining what supplies or services are to be acquired by the government, participation as a voting member on a source selection board, determining whether prices are fair and reasonable, and awarding and administering contracts.

The OFPP policy letter also explains the types of things that are not considered inherently governmental such as gathering information or providing advice or opinions to Federal Government officials and functions that are ministerial in nature such as building security, mail operations, and cafeteria operations. Other categories of functions broken out include "critical functions" and functions "closely associated with inherently governmental functions." Functions that fall into these categories can be performed by contractors with proper oversight by federal employees. Guidance is also provided on how to determine whether a function is "inherently governmental", "critical" or "closely associated with inherently governmental functions" in the letter.

While many in the private sector feared strict new guidelines would limit the work available, the final guidelines in large part remain somewhat vague and allow room for agency level discretion. In fact, there is not an announced intent to move away from using contractors. In the policy letter, OFPP states that "[n]othing in this guidance is intended to discourage the appropriate use of contractors. Contractors can provide expertise, innovation, and cost-effective support to Federal agencies for a wide range of services." 76 Fed. Reg. at 56236. The OFPP further explains that it "does not anticipate a widespread shift away from contractors as a result of the requirements in the policy letter. As the policy letter explains, insourcing is intended to be a management tool - not an end in itself - to address certain types of over reliance on contractors." *See* 76 Fed. Reg. at 56234. Nevertheless, the definition of "inherently governmental functions" remains somewhat vague which means that to a certain extent the true impact is yet to be seen as various agencies take the guidance and implement

their own internal practices and policies.

Kick the contractor is good sport and, at times, the temptation to play is too much to avoid. For now, there are higher priorities.

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