

Inherently Governmental Rule Sparks Little Consensus

By Robert Brodsky June 3, 2010

More than 100 individuals and organizations have offered public comments on a proposed rule change that would help clarify the types of government functions that are suitable for outsourcing.

On Tuesday, June 1, the comment period ended for a proposed policy memo by the Office of Federal Procurement Policy that would establish a single definition of inherently governmental functions, or those duties forbidden from outsourcing.

The notice, which was posted in the *Federal Register* in late March, also instructs agencies to avoid an overreliance on contractors for functions that are "closely associated with inherently governmental" or are "critical" for their missions. Contractors can perform work that fits into these two categories if agencies are capable of providing increased oversight and management, the rule said.

In the past three months, trade groups, labor unions, contracting attorneys and citizens with an interest in government contracting have offered 118 suggestions and comments on the proposal.

Not surprisingly, the comments tended to split by ideology and association. The National Association of Government Employees, for example, argued that the policy needed to be strengthened to ensure that fewer tasks are available for outsourcing.

"NAGE is concerned that the 'special consideration' given federal employees performing 'closely associated' functions is not well defined," the labor group wrote. "This policy letter should clearly set forth a presumption that functions 'closely associated with the performance of inherently governmental functions' will be performed by government employees."

Industry groups, meanwhile, recommended greater flexibility for agency officials when deciding whether to hire a contractor.

"For all functions that fall into this much broader category of not inherently governmental, agencies must retain discretion to decide whether to 'make or buy' -- that is, whether to use government employees, contractor employees, or some mix to perform the function," wrote Trey Hodgkins, vice president for federal procurement policy at the trade association TechAmerica.

Hodgkins also said the categories of 'closely associated with inherently governmental' and 'critical' should be merged. "The distinction adds little or no value, and it will only create confusion for agencies attempting to implement OFPP's guidance," he wrote.

The larger policy fight, however, is likely to center on how specific functions, most notably the use of security contractors, are categorized.

One individual, Mark Lopes, called for a host of facility security jobs, including guard services and the operation of prisons or detention facilities, to be banned from outsourcing. "As we have seen with the reliance on private military contractors in

Afghanistan and Iraq, the performance of mission-critical security functions by profit-driven contractors is at a minimum counterproductive and can be immoral and criminal," Lopes wrote.

But the National Association of Security Companies suggested that a careful distinction must be made between guards on the battlefield and those protecting federal facilities. "The job function of a guard who could use deadly force to protect a federal building from a lone gunman attack (such as the attack on the Holocaust Museum) should not be considered the same job function as a security contractor coordinating security with the armed forces in a war zone," the group wrote.

OFPP will review the comments and is expected to develop a final rule that will be included in the Federal Acquisition Regulation by late summer or early fall.