

More Jobs Shift to Feds Under Proposed Guidance

BY GREGG CARLSTROM | APRIL 4, 2010

The White House has finally settled on a single definition for inherently governmental work, ending what the Office of Federal Procurement Policy calls years of ambiguity — and likely accelerating the Obama administration's push to insource government work.

A letter containing draft guidance, issued last week by OFPP administrator Dan Gordon, directs agencies to use only the definition outlined in the Federal Activities Inventory Reform (FAIR) Act. Gordon said the single standard will replace a complicated patchwork of definitions, in which some agencies used FAIR, others used the Office of Management and Budget's Circular A-76, and still others used the Federal Acquisition Regulation.

"The FAIR Act defines an activity as inherently governmental when it is so intimately related to the public interest as to mandate performance by federal government employees," the letter says.

OFPP's guidance also directs agencies to avoid over-reliance on contractors for another category of work — "critical functions," or those functions "closely associated with inherently governmental" work.

Jeffrey Zients, the federal chief performance officer, told reporters that the guidance is intended to clarify the roles of contractors and federal employees. "This policy is about striking the right balance to protect the public interest," Zients said.

The memo received wide praise from labor unions and good-government groups, who say it will probably lead to federal employees taking over work that's now contracted out. It was also well-received within the contracting industry — traditionally on the other side of the insourcing issue; industry groups say they welcome the clarity on inherently governmental work.

But experts warn that the guidance will be difficult to enforce, and that the definition of "closely associated" functions remains blurry.

'A slight insourcing tilt'

OMB Director Peter Orszag issued a memo last summer ordering agencies to insource their inherently governmental work. Experts say last week's guidance will probably accelerate that initiative — and that its attempt to define "closely associated" positions could expand the number of jobs being insourced.

OFPP's guidance would require agencies to review their ongoing contracts "to ensure the scope of the work ... [has] not changed to the point that inherently governmental authority has been transferred to the contractor." Agencies are encouraged to re-establish control over their contracts, either through increased oversight or by insourcing work "on an accelerated basis."

OFPP's letter explicitly identifies 20 positions as inherently governmental; the list includes criminal investigators and budget analysts. Many of these jobs are already performed by federal employees, experts say, and the guidance is unlikely to change that segment of the workforce. The letter says OMB, OFPP's parent agency, will develop a test to analyze whether other functions fit the definition.

Another 19 positions are identified as "closely associated with inherently governmental" work; agencies that want to use contractors for those functions must establish guidelines limiting the decisions those contractors can make, and appoint "an adequate number" of federal employees to oversee and administer the work. Experts say those functions are currently performed by a mix of contractors and federal employees — and that the guidance could push agencies to replace the former with the latter.

"It reads to people over here as having an insourcing tilt," said Scott Amey, general counsel at the nonprofit Project on Government Oversight. Neither Amey nor others would estimate how many new federal jobs or lost contractor jobs this might mean.

Many of the "closely associated" functions deal with acquisition — "services in support of acquisition planning," for example, and services that involve "the evaluation of another contractor's performance." OMB says that's intended to reduce the likelihood of one contractor overseeing another — a not-uncommon occurrence. The guidance also identifies certain types of legal, regulatory and public relations work as "closely associated."

Experts say the guidance — which will undergo further revisions before it's issued in final form — still needs to provide more detail about which jobs are "closely associated," and when contractors are permitted to perform those tasks. That's particularly true at the Defense Department, which has hundreds of pages of internal guidance on the subject. OFPP's memo specifically orders Defense to reduce the number of contractors performing "closely associated" work.

"To the maximum extent practicable, [Defense must] minimize reliance on contractors performing functions closely associated with inherently governmental functions," the guidance states.

The letter also excludes a number of positions, including building security, janitorial services and facilities maintenance, all of which are deemed not inherently governmental. Many of these jobs are already performed by contractors.

Stan Soloway, president of the Arlington, Va.-based Professional Services Council, praised the memo for its specificity.

Praise for standard

Unions have long called for a tougher definition for inherently governmental work, largely because of the Bush administration's push to outsource; Circular A-76, in particular, encouraged agencies to compete their work between federal employees and private companies. The 2009 Defense Authorization Act required OMB to review federal policy; President Obama also pledged to study the issue in a procurement memo released in March 2009. Labor leaders say they're generally happy with last week's announcement.

"The bottom line is ensuring that federal employees perform the essential work of government, and that agencies have control over their missions and operations," said Colleen Kelley, president of the National Treasury Employees Union. "This proposal makes great strides in that direction."

Contracting groups, too, praised the announcement. The Professional Services Council said it treats the inherently governmental issue "as a strategic human capital issue."

"It's nonideological. This policy paper is about management and strategic human capital, not about ideology," Soloway said. "It's very good, very consistent with what we expected. OMB deserves a lot of credit."

But the guidance also leaves a number of questions unanswered, like the degree to which contractors should be barred from performing "closely associated" functions. OMB officials say they're looking for public comment on that and dozens of other questions; comments must be submitted by June 1.

Some labor unions say they're upset that the guidance doesn't further expand the definition of inherently governmental beyond what's specific in the FAIR Act.

"It does not correct long-standing flaws in the current definition, [and] the proposal is also too acquisition-oriented,"

said John Gage, the president of the American Federation of Government Employees. "Finally, the proposal is in some cases more academic than practical."

Gage said the current definition of inherently governmental is hard to enforce, and lacks transparency; in a statement, AFGE said it's difficult for outside groups to determine which jobs should and should not be performed by contractors.

Good government groups also echoed Gage's "more academic than practical" criticism. Amey, at the Project on Government Oversight, said the guidance would be difficult to enforce — though he said that would be true of any inherently governmental standard.

"A lot of the time, contractors are so deeply embedded in the daily workings of the federal government that it's difficult to police whether they're inherently governmental or not," Amey said.

Gordon said a final rule will be adopted sometime in late summer or early autumn.

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