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New Definition of ‘Inherently Governmental Function’ Affects Government Insourcing Decisions

On September 9, 2011, the Office of Management and Budget’s Office of Federal Procurement Policy (OFPP) issued final guidance on what constitutes an “inherently governmental function.” The new definition, which will eventually replace existing definitions in the Federal Acquisition Regulation (FAR) and elsewhere, has immediate implications for federal agencies deciding whether to insource work. The OFPP also provides guidance to agencies in deciding when to use contractors to perform “critical functions” and functions “closely associated” with inherently government functions.

This new definition is important because federal law prohibits contractors from performing “inherently governmental functions.” Furthermore, federal agencies deciding whether or not to insource work are required to take specific actions before and after contract award to prevent contractor performance of inherently governmental functions and overreliance on contractors in “closely associated” and “critical functions.”

The OFPP’s definition of an “inherently governmental function” is built around the statutory definition in the Federal Activities Inventory Reform Act (FAIR Act) as one “so intimately related to the public interest as to require performance by federal government employees.” The OFPP policy letter lists 24 examples of functions considered to be inherently governmental.

In connection with procurement activities, the OFPP defines inherently governmental to include:

- (1) determining when supplies or services are to be acquired by the government (noting that agencies may give contractors the authority to acquire supplies at prices within specified ranges and subject to other reasonable conditions deemed appropriate by the agency)
- (2) participating as a voting member on any source selection boards
- (3) approving any contractual documents
- (4) determining that prices are fair and reasonable
- (5) awarding contracts
- (6) administering contracts
- (7) terminating contracts
- (8) determining whether contract costs are reasonable, allocable, and allowable
- (9) participating as a voting member on performance evaluation boards

Functions “closely associated” with inherently governmental functions are not considered to be inherently governmental, but approach being in that category because of the nature of the function and risk that performing such functions may impinge on the government’s performance of inherently government functions. Examples of “closely associated” functions include “supporting acquisition” in the areas of (1) acquisition planning (market research, developing inputs for government cost estimates, drafting statements of work), (2) source selection (preparing a technical evaluation, participating as a technical adviser, drafting price negotiations memoranda), and (3) contracting management (assisting in the evaluation of a contractor’s performance, providing support for assessing contract claims).

Agencies are required to guard against any expansion of “closely associated” work becoming an inherently government functions by following a checklist of responsibilities, including limiting or guiding the contractor’s discretion, assigning government employees to give special management attention to the contractor’s activities, and taking steps to avoid or mitigate conflicts of interest.

The OFPP also defined a “critical function” as one that is “necessary to the agency being able to effectively perform and maintain control of its mission and operations.” In its guidance, the OFPP requires agencies to arrive at their own determinations of what constitutes a “critical function,” which may create inconsistencies across different agencies. Many respondents also have expressed concerns that what constitutes a “critical function” is not entirely clear, and that there are few restrictions on an agency’s ability to decide that a given function is “critical.”

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