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New OMB Policy on Critical Functions Opens the Door to More Insourcing

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The sad truth is that even when the 600 pound gorilla in the room tries to behave properly it is just so big and takes up so much space that the practical consequences of its actions often limit the freedom of those around it. So it is when the Office of Federal Procurement, a part of the Office of Management and Budget (OMB), this week published Policy Letter 11-01, "Performance of Inherently Governmental and Critical Functions." Long awaited by the private sector, the policy was supposed to ensure that, to paraphrase the biblical passage, only those activities that were properly the purview of government would be rendered to the government work force and that all other things were "rendered unto Caesar," meaning to the private sector.

Unfortunately, in its attempt to be Solomonic and divide the infant in half, OMB has actually created a situation open to extraordinary overreach and even abuse by the federal government with respect to the insourcing of activities performed by the private sector under contract to the government.

The first problem is that while the policy does a reasonably good job defining those functions that are inherently governmental in nature it expands the potential scope of government by adding two new categories of functions that either must or may be insourced. The first is "critical functions" for which the definition is so broad and vague as to be highly suspect: "a function that is necessary to the agency being able to effectively perform and maintain control of its mission and operations." The second is "closely associated" to inherently governmental functions for which what passes for a definition is any activity where there is a "risk that performance may impinge on Federal officials' performance of an inherently governmental function." Any bureaucrat worthy of the name could make an argument that they only let contracts with the private sector for work that is related to their performance of inherently governmental functions, otherwise why would they be contracting at all. Hence, if there is a contract activity it must be closely related to an inherently governmental activity and subject to potential insourcing.

The second problem is that the policy renders unto the government many more activities than were previously considered to be in its rightful domain. The reason is that the policy not only defines functions that are inherently governmental and must be performed by government personnel but also a wide range of so-called “closely associated” functions. No, the policy letter does not explicitly direct that these functions be insourced but it does direct agencies to “give special consideration to Federal employee performance of functions closely associated with inherently governmental functions . . .” What government bureaucrat could go wrong by choosing to insource an activity that he or she believes to be closely associated with an inherently governmental function?

The risk of rampant insourcing might not be so bad except for the fact that the OMB letter includes an appendix with examples of closely associated functions. Such functions include “conducting market research, work in a situation that permits or might permit access to confidential business information or other sensitive information, provision of non-law-enforcement security activities that do not directly involve criminal investigations, provision of legal advice” and my personal favorite, “construction of buildings or structures intended to be secure from electronic eavesdropping or other penetration by foreign governments.” The fact that the private sector has built or is now building literally hundreds of secure buildings and structures including U.S. embassies overseas seems somehow to have slipped OMB’s notice. These examples are meant to be illustrative; the bureaucrats can always expand the list.

By way of contrast, OMB’s examples of functions that should not be considered inherently governmental is limited to the following: “building security, mail operations, operation of cafeterias, housekeeping, facilities operations and maintenance, warehouse operations, motor vehicle fleet management operations, or other routine electrical or mechanical services.” OMB provides no examples of closely associated functions that are not potential candidates for insourcing.

Although the OMB policy correctly leaves the identification of critical and closely associated functions up to the agencies, it does nothing to place restraints on the natural tendency of bureaucrats to a) build their own empires through insourcing or b) just cover their behinds when in doubt. A better policy letter would have limited the scope of insourcing to only those functions deemed inherently governmental.