



## OFPP Defines 'Inherently Governmental'

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The Office of Federal Procurement Policy is recommending all agencies use only the definition of inherently governmental as defined in the Federal Activities Inventory Reform Act, and create a test to determine whether other jobs should be done only by federal employees.

OFPP will issue a draft policy letter Wednesday in the Federal Register detailing the new definition, a list of inherently governmental and closely associated inherently governmental functions and a host of new responsibilities for agencies to determine and oversee work that should only be done by the government. FederalNewsRadio obtained a copy of the draft policy letter.

"The policy letter is designed to address a number of weaknesses with existing rules that are affecting the efficiency and effectiveness of government performance," the letter states.

OFPP administrator Dan Gordon promised the new draft definition, required by Congress in the 2009 Defense Authorization Act, would be issued by March 31.

OFPP says agencies should use the FAIR Act definition from 1998 in all current regulations and policies. OFPP says agencies were using multiple definitions, including one in Circular A-76 and one from the Federal Acquisition Regulations.

"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 employees," the letter states.

OFPP also provides 20 examples of inherently government positions, such as conducting criminal investigations, determining agency policy including content and application of regulations, participating on acquisition source selection teams and determining budget, policy and strategy.

For those functions that are not listed among the 20, OFPP says it will develop a test to analyze "whether a function is inherently governmental based on the nature of the function and the level of discretion to be exercised in performing the function."

OFPP says agencies on a case-by-case basis should look at the nature of the function if it's uniquely governmental function and whether the job commits the government to decisions that deal with overall policy discretion or approval, or oversight by federal officials.

The policy also defines closely associated with inherently governmental functions and provides 19 examples. These include functions that involve or relate to budget preparation, including workforce modeling, fact finding, efficiency studies and cost analyses, involve or relate to development of regulations, in support of acquisition functions, such as assistance in contract management, technical evaluations and development of statements of work.

"Closely associated functions approach the status of inherently governmental work because of the nature of these functions and the risk that their performance, if not appropriately managed, may materially limit federal officials' performance of inherently governmental functions," the letter states.

Agencies must give special consideration to reserving these functions for federal employees, and determine if contractors already are performing these functions and/or is appropriate.

"These responsibilities include pre-establishing in the contract specified ranges of acceptable decisions, subjecting the contractor's discretionary decision to final approval by an agency official, assigning a sufficient number of qualified federal employees with appropriate expertise to administer the work, and taking steps to avoid or mitigate conflicts of interest," the letter states. "Each of these actions is designed to help ensure that the contractor's activities do not expand to include inherently governmental responsibilities. Although these actions should currently be taken, they are not enumerated in one guidance document and often are given insufficient management attention."

Finally OFPP defines critical functions that are considered core capabilities of agency employees.

"The proposed policy letter would define critical function to mean a function whose importance to the agency's mission and operation requires that at least a portion of the function must be reserved to federal employees in order to ensure the agency has sufficient internal capability to effectively perform and maintain control of its mission and operations," the letter states. "Agencies would be held responsible for ensuring a sufficient number of positions performing critical work are filled by federal employees with appropriate training, experience, and expertise to understand the agency's

requirements, formulate alternatives, manage the work product, and manage any contractors used to support the federal workforce."

OFPP also says agencies must evaluate whether they have enough skills and capabilities already on staff to perform these critical functions and take into account their mission, the complexity of the function, the need for specialized skills and the effect of contractors on mission performance.

"The proposed guidance is built around the general principle that the more critical a function is, the greater the need for internal capability to maintain control of the agency's mission and operations," the letter states. "This is most obviously the case where the function is critical to achievement of the agency's core mission, but even for functions that may not be viewed as critical, such as functions that are not directly involved in performing the core mission, the agency may determine that the function is, nonetheless, sensitive enough as to require that many, most, or, in some situations, all positions be filled by federal employees."

Agencies and vendors can comment on 11 specific areas with several questions under each area and must submit them by May 31.

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