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## Government Contracts Advisory - OFPP Issues Final Inherently Governmental Functions Policy Letter

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The Office of Federal Procurement Policy's (OFPP's) September 12, 2011 final policy letter regarding "Performance of Inherently Governmental and Critical Functions" (Final Letter) improves on OFPP's March 2010 Proposed Letter on the same subject.[i] OFPP made several revisions and clarifications to its policy letter, some of which we highlight below, including revisions to the two new tests for inherently governmental functions introduced in the Proposed Letter, clarifications of the related categories of "closely associated" and "critical" functions, and additions to the list of functions that should not be considered for contract performance.

### Background

To fulfill the requirements of a March 4, 2009 Presidential Memorandum calling on OMB to clarify when government outsourcing is appropriate pursuant to Section 321 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. 110-417 (Oct. 14, 2008) ("FY2009 NDAA"), OFPP issued its proposed policy letter titled "Work Reserved for Performance by Federal Government Employees" on March 31, 2010. The Proposed Letter incorporated the well-known definition of inherently governmental functions from Section 5 of the Federal Activities Inventory Reform Act, Pub. L. 105-270 (Oct. 19, 1998) ("FAIR Act") and added several new tests to determine whether work was so inherently governmental that it must be performed by Federal Government employees.[ii]

The notice of proposed rule-making accompanying the Proposed Letter specifically asked for public comment regarding a series of questions about "some of the more difficult and pressing policy challenges" in the Proposed Letter.[iii] In particular, the Proposed Letter asked for comment on a proposed new category of government functions "closely associated" with inherently governmental functions, how to distinguish these "closely associated functions" from another category of functions required to be defined by Section 321 (a) and (d) of the FY2009 NDAA ("critical functions"), and how to classify certain functions related to acquisition support and security.

### The Final Letter

The Proposed Letter provoked concern that OFPP's policy guidance would force the in-sourcing of many functions now performed by contractors. OFPP's comments accompanying its Final Letter, however, address these concerns and state that OFPP, "does not anticipate a widespread shift away from contractors as a result of the" Final Letter.[iv] Furthermore, OFPP's comments state that in-sourcing is "not an end in itself," but, rather, is one tool to counter

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overreliance on contractors. The Final Letter also states that “[i]n many cases, overreliance on contractors may be corrected by allocating additional resources to contract management—i.e., an agency does not necessarily need to take work away from contractors.”[v]

### The “Discretion” and “Nature of the Function” Tests

The Final Letter requires agencies to “review the definition[s] of inherently governmental functions” from a variety of sources, including the “illustrative list of inherently governmental functions in Appendix A” of the Final Letter.[vi] The Letter states that “in no case” should an agency consider for contractor performance any function described in the Final Letter or any statute as inherently governmental.[vii] However, agencies must also look to two tests contained in the Final Letter to determine, on a case-by-case basis, if work is inherently governmental and thus must be performed by Federal Government employees.

The Final Letter states that if the function meets either of the so-called “discretion” or “nature of the function” tests, it is inherently governmental and must be performed by Federal Government employees. The nature of the function test states:

[F]unctions which involve the exercise of sovereign powers of the United States are governmental by their very nature. Examples of functions that, by their nature, are inherently governmental are officially representing the United States in an inter-governmental forum or body, arresting a person, and sentencing a person convicted of a crime to prison.[viii]

The discretion test states more broadly:

A function requiring the exercise of discretion shall be deemed inherently governmental if the exercise of that discretion commits the government to a course of action where two or more alternative courses of action exist and decision making is not already limited or guided by existing policies, procedures, directions, orders, and other guidance that:

- (I) identify specified ranges of acceptable decisions or conduct concerning the overall policy or direction of the action; and
- (II) subject the discretionary decisions or conduct to meaningful oversight and, whenever necessary, final approval by agency officials.[ix]

These definitions in the Final Letter are largely unchanged from OFPP’s March 2010 Proposed Letter.

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The Final Letter did, however, refine the “discretion” test to distinguish between appropriate levels of discretion exercised by contractors and inappropriate levels that, for example, limit the government’s ability to manage the contractor or restrict the government’s final approval authority. The Final Letter also provides descriptions of management and oversight actions that can be used to avoid contractor performance of inherently governmental functions when a contractor is exercising discretion and corresponding examples of situations where contractors may appropriately exercise discretion.

### “Closely Associated” and “Critical” Functions

The Final Letter also continues to caution agencies regarding the use of contractors for functions that are “closely associated” with inherently governmental functions; i.e., functions which are not themselves inherently governmental functions but which “may approach being in that category because of the nature of the function and the risk that performance may impinge on Federal officials’ performance of an inherently governmental function.”<sup>[x]</sup> In response to public comments asking for clarification of “closely associated” functions, the Final Letter incorporates the discussion of “closely associated” functions in the overall analysis of inherently governmental functions rather than making it a separate category, as OFPP had done in the Proposed Letter.

To further clarify the policy regarding “closely associated” functions, OFPP revised the “closely associated” functions discussion and Appendix B to make clear that “closely associated” functions “are generally not considered to be inherently governmental,” but, rather, were considered “[s]ervices in support of inherently governmental functions.”<sup>[xi]</sup> OFPP also added Appendix C, which contains actions an agency should take to minimize contractor interference with government employee performance of inherently governmental functions when performing “closely associated” functions. Those actions include, for example, limiting or guiding contractor discretion and ensuring a level of oversight and management needed to retain government control of contractor performance.

OFPP also specifically rejected some commenters’ requests to consider all “closely associated” functions to be inherently governmental functions, stating “[s]uch a bar would inappropriately limit an agency’s ability to take advantage of a contractor’s expertise and skills to support the agency in carrying out its mission.”<sup>[xii]</sup>

As required by Section 321 of the FY2009 NDAA, the Final Letter also describes criteria for evaluating whether performance of “critical functions” by contractor personnel is appropriate. Critical functions are defined as, “a function that is necessary to the agency being able to effectively perform and maintain control of its mission and operations. Typically, critical functions are recurring

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and long-term in duration.”[xiii]

Some public comments expressed confusion regarding the difference between “critical functions” and “closely associated” functions. In response to these comments, OFPP clarified the distinction between “closely associated” functions and “critical functions,” stating that:

In the case of closely associated functions, the agency is trying to prevent contractor performance from interfering with Federal employees’ ability to perform inherently governmental functions. In the case of critical functions, the agency is looking to determine if the agency is at risk of losing control of its ability to perform its mission and operations. [xiv]

Another feature of the definitions of “closely associated” and “critical functions,” that OFPP attempted to address, was potential confusion over the terms “function,” “activity,” and “position.” OFPP’s response to comments includes a chart illustrating its understanding of the terms and the following discussion:

Function, for example, often includes multiple activities, or tasks, some of which may be inherently governmental, some of which may be closely associated with inherently governmental work, and some may be neither. By identifying work at the activity level, an agency can more easily differentiate tasks within a function that may be performed only by Federal employees from those tasks that can be performed by either Federal employees or contractors without blurring the line between the role of Federal employees and contractors.[xv]

The Final Letter also stated that OFPP would review the need for greater clarity regarding these definitions with the FAR Council.

### **The List of Inherently Governmental Functions**

As noted above, OFPP’s Proposed Letter also specifically requested comments regarding whether certain functions should be placed in Appendix A, which lists functions “considered to be inherently governmental” and that must be performed by Federal Government employees. Public comments suggested several additions to Appendix A. OFPP addressed three types of potentially inherently governmental functions in response to comments, but also added a qualifying note at the beginning of the list stating that, “For most functions, the list also identifies activities performed in connection with the stated function. In many cases, a function will include multiple activities, some of which may not be inherently governmental.”[xvi]

First, OFPP added various types of security functions performed in combat environments to Appendix A. OFPP made clear however, that this designation

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applies only to situations involving “combat” and not necessarily other “hostile situation[s].”[xvii] OFPP additionally urged agencies to evaluate each situation on a case-by-case basis to determine if contractors could perform the work with appropriate oversight and management.[xviii]

Second, OFPP added to Appendix A’s list of procurement activities that are inherently governmental an additional category for “determining that prices are fair and reasonable.”[xix] In doing so, OFPP again cautioned agencies that, like other situations involving contractor exercise of discretion and Federal Government employee review and approval of contractor work, when conducting procurement activities, “Federal official’s review and approval must be meaningful; that is to say, it cannot be a ‘rubber stamp’” on the contractor’s draft or chosen alternative.[xx]

Finally, OFPP responded to specific comments calling for a discussion of advisory and assistance and other professional and technical services. Though OFPP decided not to address the issue directly in the Final Letter, it committed to work with agencies to follow up on its earlier guidance calling for “special management consideration” of these functions. OFPP stated that it would “review the use of support contractors in these areas and consider the need for additional guidance.”[xxi]

If you have any questions about the Final Letter or the potential additional regulations discussed in the Final Letter, please contact Tom Barletta at 202.429.8058 or Mike Navarre at 202.429.8081, who are part of Steptoe’s Government Contracts’ Practice Group.

[i] 75 Fed. Reg. 16188 (Mar. 31, 2010) (“Proposed Letter”); 76 Fed. Reg. 56227 (Sep. 12, 2011) (“Final Letter”).

[ii] 75 Fed. Reg. at 16190-91; Proposed Letter ¶¶ 5-1(a), 5-2a(b)(1).

[iii] See 76 Fed. Reg. at 56229.

[iv] 76 Fed. Reg. at 56234.

[v] *Id.*

[vi] Final Letter ¶ 5-1(a).

[vii] *Id.*

[viii] Final Letter ¶ 5-1(a)(1)(i).

[ix] Final Letter ¶ 5-1(a)(1)(ii).

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[x] Final Letter ¶ 5-1(a)(2); 76 Fed. Reg. at 56232-33.

[xi] Final Letter ¶ 5-1(a)(2); App. B Intro. & ¶ 1.

[xii] 76 Fed. Reg. at 56232.

[xiii] Final Letter ¶ 3.

[xiv] 76 Fed. Reg. at 56232; Final Letter ¶¶ 5-1(a)(2), 5-1(b).

[xv] 76 Fed. Reg. at 56233-34.

[xvi] Final Letter App. A.

[xvii] 76 Fed. Reg. at 56232. These changes appear similar to a 2006 memo that permitted contractor performance of certain security functions in Iraq and Afghanistan, except certain types of security that also involved a high likelihood of “hostile contact” or “direct participation in hostilities.” DoD, Deputy General Counsel for International Affairs Memorandum to Staff Judge Advocate, U.S. Central Command, “Request to Contract for Private Security Companies in Iraq,” at 2 (Jan. 1, 2006) (as quoted in Warlord, Inc.: Extortion and Corruption Along the U.S. Supply Chain in Afghanistan, Report of the Majority Staff, Subcommittee on National Security and Foreign Affairs, Committee on Oversight and Government Reform, U.S. House of Representatives, at 16 & n.48 (June 2010)).

[xviii] 76 Fed. Reg. at 56232; *see also* Final Letter App. A ¶ 5(b).

[xix] 76 Fed. Reg. at 56231-32; *see also* Final Letter App. A ¶ 15(d).

[xx] 76 Fed. Reg. at 56231.

[xxi] 76 Fed. Reg. at 56230.