



## OFPP Keeps Classic Definition of Fed-Only Work

By Matthew Weigelt      Sep 09, 2011

The Obama administration chose to follow the definition of an inherently governmental function as described already in the law without broadening it.

An inherently governmental function is “a function that is so intimately related to the public interest as to require performance by federal government employees,” according to a final rule from the Office of Federal Procurement Policy (OFPP). The final rule is expected to be in the Sept. 12 issue of the Federal Register.

The OFPP is using a definition from the 1998 Federal Activities Inventory Reform Act.

The OFPP has ruled that the term includes duties that require either exercising discretion in applying the government’s authority or making value judgments in decisions for the government, including monetary transactions, such as acquisitions and entitlements. An inherently governmental function also involves interpreting laws

The new policy letter lists 24 examples of inherently governmental functions. For example, a contractor should not have direct conduct of criminal investigation or of control of prosecutions. A contractor can’t conduct foreign relations or determine agency policy or budgets and strategies. Also, it can’t be in command of the military.

In its final policy letter, the OFPP added to the list of functions that all combat is inherently governmental and security operations in certain situations connected with combat or even potential combat.

Officials said the list is illustrative and not exhaustive.

Beyond those examples, the clear-cut definition blurs. Dan Gordon, administrator of OFPP, devised a way for agency officials to test cases where the line is blurred. He said officials should look at the nature of the function and whether the duty would essentially control the government.

Along with inherently governmental functions, officials need to consider jobs that are very closely associated with those jobs only federal employees should be doing. The letter cited preparing budgets and undertaking duties in support of agency reorganizations, planning, and developing policies. Many jobs before and after awarding a contract may fall into a function closely associated with inherently governmental work.

The list identifies price reasonableness determinations, or making a final decision on whether a price is reasonable, as inherently governmental. An agency is not precluded from using a contractor to help officials with cost estimates or to draft a price negotiation memorandum. But a federal employee must approve it.

If an agency finds a contractor too close, they need to limit that contractor and regain management control of the duties, the letter stated.

The OFPP added a caveat. It said many functions include multiple duties, some of which may not be inherently governmental.

Agency officials should consider work at the activity level, the OFPP said. They then 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.

Officials said this caveat will help to clarify that a function on the list of inherently governmental work does not mean all the work along with it should be done by government employees, the letter stated.

The OFPP also created a new term, called the “critical function,” which confused many in the community.

That is defined as a function that is necessary to the agency to perform well and maintain control of its mission and operations. Typically, critical functions are recurring and long term duties.

The OFPP is requiring agencies to identify their critical functions to ensure they have enough employees with enough training to manage work that is core to their mission and operations.

“So long as agencies have the internal capacity needed to maintain control over their operations, they are permitted to allow contractor performance of positions within critical functions,” the letter states.

The OFPP chose not to list examples of critical functions because they are often unique to each agency since they have different missions.

In all, Gordon said that this policy letter isn’t intended to urge agencies away contractors.

“Reliance on contractors is not, by itself, a cause for concern, provided that the work that they perform is not work that should be reserved for federal employees and that federal officials are appropriately managing and overseeing contractor performance,” he wrote.

In response to the first proposed policy letter in 2010, some experts questioned whether this definition will be accepted government-wide as the single, standard definition.

OFPP officials said they intend to work with the various federal acquisition regulation councils make appropriate changes to the Federal Acquisition Regulation.

In addition, officials plan to review other relevant policy documents, such as OMB Circular A-76, to ensure they conform. The circular allows for private sector companies to compete against federal employees for work, a controversial policy that has been banned in recent years.