

OMB Announces Final Guidance on Inherently Governmental Functions

By Charles S. Clark

September 9, 2011

Long-anticipated final guidance on "inherently governmental functions" is set for publication on Monday and should clarify confusion over blurred lines in agencies' understanding of which types of work should be outsourced, top officials at the Office of Management and Budget told reporters on Friday.

The final policy letter, said Chief Performance Officer Jeffrey Zients, "helps agencies do better at balancing contracting out with management by federal employees. The mix was out of balance and we think this protects the public interest. Given our fiscal situation today, it is important more than ever that taxpayer money be well spent."

With a few exceptions, the guidance, which takes effect Oct. 12, is similar to the draft released in March 2010, said Dan Gordon, administrator of the Office of Federal Procurement Policy. "But it is a milestone" that follows up on a memorandum of understanding about reducing waste in contracting issued by President Obama in March 2009.

The document includes lengthy lists of functions that are clearly inherently governmental and separate lists of "functions closely associated with the performance of inherently governmental functions" -- where agencies can use more discretion.

One difference in the new guidance is a provision intended to "clarify the confusing and controversial" policy on the contracting out of military security operations, Gordon said. If a function is part of combat or could evolve into combat, then contractors can't be used. "We benefited on this issue from public comments from the private sector, agencies, nonprofits and the Hill," he added.

A second departure is a provision intended to help small businesses. "It places a lower priority on in-sourcing if the function is not inherently governmental," Gordon said. "Insourcing is not a goal, but agencies need to understand that if an inherently governmental function is improperly contracted," they can lose control of the work.

The administration "is sensitive" to realities of the current budget crunch, Gordon acknowledged. "We need to demonstrate fiscal responsibility on both sides" of the contracting process, he said. "We don't want to dramatically increase [full-time equivalent] levels on the federal side, but in today's fiscal world, the solution is not massive contracting out," nor is it massive insourcing.

Zients presented the letter in the context of the administration's two-and-a-half-year-old effort to trim waste by curbing contracting "after its uncontrolled growth under the prior administration." One in six federal dollars is contracted out, and the rate, mostly in services, doubled since 2008, he said. But 2010 marked the first time in a decade that the level of contracting decreased, by \$80 billion.

Examples of smarter contracting, Zients said, include "strategic sourcing," such as pooling purchases of office supplies, which can save as much as 40 percent. "Rather than buying like 100 medium-sized businesses, take advantage of the fact that the United States is the world's largest purchaser," he said.

Another means is cutting spending on management support, which quadrupled over the past 10 years, he added. "In information technology and acquisition, management support produces many wasteful and unnecessary consultants' reports that sit on a shelf." That approach will reduce expenses by 15 percent, or \$7 billion in fiscal 2012, he said.

Focusing on interaction with contractors, the administration also has "strengthened suspension and debarment" processes, Zients said, stressing, however, that "contractors do valuable work and will continue to do so."

Over the past year and a half, Gordon said, the outsourcing-insourcing issue has been reviewed most thoroughly by the Defense and Homeland Security departments, a process now largely complete. Most agencies have already been working under the principles of the final guidance, he said, so its release won't prompt major shifts.

Critical functions differ by agency, Gordon said, but the letter provides "clear direction to managers responsible for policy on the closely associated functions to make sure that the agency can control it and that the work doesn't expand."

The problem, he said, though "now largely corrected," has been that some agencies, for example, would have a contractor write a statement of work and then award the contract to that same company. In managing IT functions, he added, he's heard federal managers say that "no one in-house understands the work and that they're completely dependent on the contractor. It's intolerable." The solution, he said, might be limited insourcing, adding two to three people, or simply applying more attention.

The guidance's definition of inherently governmental, as in the draft, is based on the 1998 Federal Activities Inventory Reform Act, and Zients said the letter's other changes, though small, would require adjusting the Federal Acquisition Regulation to conform.

Dozens of interest groups had been following the evolution of final guidance on what is inherently governmental. "We are pleased OFPP has retained flexibilities for agencies to determine what functions are considered closely associated with inherently governmental functions or are critical functions to agency missions and to provide for these functions in a way that best meets their needs and capabilities," said Stan Soloway, president of the industry group the Professional Services Council. "However, we are concerned that the list of closely associated functions could be misconstrued as a 'do not contract' list, even though it is not the case, nor OFPP's intent. The checklist that identifies closely associated functions must not become a barrier to contracting for work where it is appropriate to do so."

Scott Amey, general counsel of the watchdog group the Project on Government Oversight, said he is impressed with the guidance. "The policy comes clean about the government's over-reliance on contractors and improves the categories of activities and functions that shouldn't be performed by contractors," he said. "Private security in combat areas was never a good policy, and OFPP's changes will ensure that properly trained and mission-responsible government personnel

conduct such work." He wonders, however, whether agencies will actually retain or insource work that his group believes should be performed by public servants.

Steve Amitay, federal legislative counsel of the National Association of Security Companies, said on Friday that absence of any mention of "building security" in the guidance "validates the continued successful use of contract security by federal agencies. Furthermore, given the decades of effective and efficient use of contract security by federal agencies, any agency that is considering insourcing security jobs should, as the policy states, be required to conduct an in-depth, comprehensive cost-analysis of such a move."