



PROJECT ON GOVERNMENT OVERSIGHT

## OMB Issues New Policy on Inherently Governmental Functions

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This week, the Office of Management and Budget's Office of Federal Procurement Policy (OFPP) issued new guidance on inherently governmental functions, or activities that must be performed by federal government employees, not contractors. The new policy, which will go into effect next month, largely mirrors a draft policy issued last year.

The policy provides a standardized definition of "inherently governmental function" based on the definition in the Federal Activities Inventory Reform Act of 1998 (FAIR Act), which is that an activity is inherently governmental when it is so intimately related to the public interest as to require performance by government employees.

In addition, the policy explains how agencies must manage two other types of functions that can be performed by contractors. In the case of functions "closely associated" with inherently governmental functions, agencies must give special consideration to using government employees. In the case of "critical functions," or functions considered necessary to the agency being able to effectively perform and maintain control of its mission and operations, agencies must ensure they have sufficient internal capability to oversee contractors. Agencies must take specific actions both before and after a contract is awarded to prevent contractor performance of inherently governmental functions and over-reliance on contractors performing closely associated and critical functions.

The policy also added several new examples to the list of inherently governmental functions provided in Subpart 7.5 of the Federal Acquisition Regulation (FAR):

- combat
- security operations in direct support of combat or when there is a significant potential for combat (This is an area of special concern to POGO, which documented the problems of using security contractors in war zones, such as the U.S. Embassy in Kabul.)
- in procurement activities, determining that prices are fair and reasonable or making final determinations about a contractor's performance, including approving award fee determinations or past performance evaluations
- selecting grant and cooperative agreement recipients
- drafting official agency proposals for legislation
- representing the government before administrative and judicial tribunals

While POGO's just-released "Bad Business" report looked at the excessive cost of contractors, a forthcoming follow-up will document the extent to which contractors have performed inherently governmental functions (which the FAR expressly prohibits) and closely associated functions (which often come dangerously close to being inherently governmental functions).

The White House has high hopes for the new policy. The goal, as OMB Deputy Director Jeffrey Zients told *Government Executive*, is to help federal agencies do a better job of balancing the mix of contractor and government employees in the federal workforce.

“The mix was out of balance and we think this protects the public interest,” Zients told *GovExec*. “Given our fiscal situation today, it is important more than ever that taxpayer money be well spent.”

POGO is pleased with the new policy. It comes clean about the government’s over-reliance on contractors and further clarifies which functions should/should not be performed by contractors. Whether it leads the agencies to launch a full-scale effort to insource work that should be performed by public servants, however, remains to be seen.