



Outsourcing: The 'Critical Function' Controversy

By Matthew Weigelt

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“Critical function” is now the controversial term as agency officials interpret new regulations on what work only federal employees should be doing and could be used to increase the insourcing of contractor jobs.

“Inherently governmental function isn’t the big problem,” said Robert Burton, former deputy administrator of the Office of Federal Procurement Policy (OFPP). “It’s the broad category called ‘critical function.’”

A new policy letter from OFPP defines critical function as work that is “necessary to the agency being able to effectively perform and maintain control of its mission and operations.” Beyond that, the letter tells agency officials to decide case-by-case if work should be done by their own employees or by contractors.

If a contractor is doing the work, agencies must have employees who know the job and who would be able to manage the contractor who is doing the work, according to the policy letter, which was released officially Sept. 12.

The policy holds an agency responsible for making sure it has an adequate number of positions filled by federal employees with appropriate expertise and experience. Those employees need to understand the agency’s requirements and be able to formulate alternative options, if needed, while also monitoring any contractors supporting the federal workforce, the letter said.

“The more important the function, the more important that the agency have internal capability to maintain control of its mission and operations,” the letter stated.

However, Burton said officials can argue that any job is critical to meeting their agency’s mission and also decide the adequate number of federal employees they need to do it, under this policy.

“We’re missing the elephant in the room,” said Burton, now a partner at the Venable law firm. “What this policy letter does is institutionalize insourcing in the federal government.”

He said these critical functions are the jobs agencies are already insourcing, often to the detriment of small businesses.

The policy letter goes into effect Oct. 12, and, because it came from the OFPP, it is more than guidance. It will be added to the Federal Acquisition Regulation. These will be rules to live by.

The term "critical function" came from the fiscal 2009 National Defense Authorization Act, which told the administration to draw up a single definition of "inherently governmental function" and also lay out criteria for a critical function. OFPP drafted the definition in 75 pages.

As deputy administrator from 2001 to 2008, Burton said the issue isn't necessarily with writing the policy. It's how the agency officials apply it.

"The challenge of so much of this is the interpretation," he said.

Stan Soloway, president of the Professional Services Council, said the policy must have clear guidance for interpreting the intent correctly. He has raised concerns in the past about making agencies prove that their choice to insource work is a good deal.

"As such, it is vital that clear guidance be given to the agencies on how to conduct their cost comparisons to ensure the right outcomes for the American taxpayer," he said Sept. 9 in a statement.

Burton also said the OFPP missed two important points in the policy. It should have required agency officials to talk with small businesses about the effects that insourcing would have. And it should have required agencies to share their cost comparison data with, at least, the company who faces the loss of its work.

It's often too late to use the Freedom of Information Act to get the data, he said. By then, the insourcing is completed.

