

## White House Clarification of 'Inherently Governmental Functions' Draws Criticism

By Charles S. Clark

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The Office of Management and Budget's final letter on "inherently governmental functions" released on Monday was bound to draw some criticisms, and it did.

The document, intended to help agencies achieve a better balance between work performed in-house and contracted out, includes lists of functions that are clearly inherently governmental and separate lists of "functions closely associated with the performance of inherently governmental functions."

But the letter's provisions for set-asides for small businesses were a "missed opportunity" to protect small business and the language on critical functions will continue to cause "confusion and risk," said Rob Burton, a former administrator of OMB's Office of Federal Procurement Policy now advocating for small business clients as a partner at Venable LLP.

The applications of "critical functions" vary by agency, and decisions are determined on a case-by-case basis, he said. "Small business will be impacted most."

Burton applauded the letter's move toward greater discussion of critical functions, a concept introduced in the 2009 Defense Authorization bill, but stressed that many critical functions are not inherently governmental -- information technology training, for example, he said. "Some small businesses that perform a commercial function would go out of business if those functions are insourced," he said.

The letter should have legally required agencies to talk to businesses in advance about the coming impact, Burton said. As it stands, businesses get a call or a letter in the mail from an agency after the decision is already made. He also faulted the procurement policy office's guidance for a "lack of transparency," saying the data agencies use to make decisions on what to contract is not available to the public, except after a time-consuming Freedom of Information Act request.

The letter also disappointed the International Federation of Professional and Technical Engineers. The group's legislative and political director, Matthew Biggs, had hoped for clarification on whether federal employees deemed "essential" during shutdowns and emergencies are also performing functions that are inherently governmental.

"When the government deems federal personnel as essential or excepted functions, this act literally speaks for itself -- as an inherently governmental function is a federal function that is ordered so [the employee] must remain on the job because those functions are considered essential to the well-being of the federal government," Biggs said on Monday. "Agencies cannot have it both ways, 'essential' to the government one day but not 'inherently governmental' the next day after a national event occurrence."

The union in August made similar arguments in a comment letter to OMB Director Jack Lew and Office of Federal Procurement Policy Administrator Dan Gordon. The letter cited

the recent work stoppage at the Federal Aviation Administration, during which air traffic controllers were deemed essential and stayed on the job.

Asked to respond, an OMB spokeswoman said in an email to *Government Executive* that the "excepted, or 'essential,' classification is associated with deciding who keeps working during a funding gap (a government 'shutdown'). Some contractors' work is excepted (companies doing work key to health and safety, such as paramedics), and may need to keep working during a funding gap -- even though the contractors' work is, of course, not inherently governmental," she said. "On the other hand, some federal workers whose work is inherently governmental ... are not excepted and therefore would not work during a funding gap."