

Administration Puts Its Stamp on 'Inherently Governmental'

By Robert Brodsky
March 31, 2010

After years of ambiguity over which jobs are inappropriate for outsourcing, the Obama administration has settled on a single government-wide definition for inherently governmental functions.

The Office of Federal Procurement Policy issued a proposed policy memo to agencies on Wednesday instructing them to use the definition of "inherently governmental" in the 1998 Federal Activities Inventory Reform Act. The FAIR Act classifies an activity as inherently governmental when it is so intimately related to the public interest that it must be performed by federal employees. The OFPP memo directs agencies to disregard changes to the definition when it was revised in 2003 under OMB Circular A-76.

The notice also instructs officials to avoid an overreliance on contractors for functions that are "closely associated with inherently governmental" or that are "critical" for the agency's mission. Agencies with more than 100 employees would be required to develop new procedures and training and to designate a senior official accountable for implementing the changes.

"The proposed guidance is built around the general principle that the more critical a function is, the greater the need for internal capability to maintain control of the agency's mission and operations," wrote OFPP Administrator Daniel Gordon in the letter. "This is most obviously the case where the function is critical to achievement of the agency's core mission, but even for functions that may not be viewed as critical, such as functions that are not directly involved in performing the core mission, the agency may determine that the function is, nonetheless, sensitive enough as to require that many, most, or, in some situations, all positions be filled by federal employees."

In a conference call on Wednesday morning, Jeff Zients, deputy director of management at the Office of Management and Budget, said the line between contractors and federal employees has blurred in recent years. "This policy is about striking the right balance to protect the public interest," Zients said.

The proposal spells out 20 examples of inherently governmental activities including awarding and administering contracts, determining budget priorities and hiring or firing federal employees.

OFPP also would create a test to determine if other functions meet the definition of inherently governmental. Agencies would be asked to evaluate whether the function would commit the government to a course of action or if sovereign power is involved.

The 2009 Defense Authorization Act mandated the inherently governmental policy review. President Obama's March 2009 memorandum on government contracting also required the Office of Management and Budget to develop guidance on the appropriateness of outsourcing services.

To supplement its review, OMB held a public meeting last year and solicited comments from the public. Respondents generally favored the definition found in the FAIR Act, the memo said.

In particular, the Act states that the term includes activities that require the "exercise of discretion" in applying "federal government authority." Circular A-76 refers to the exercise of "substantial discretion" in applying "sovereign" federal government authority.

"These variations can create confusion and uncertainty," Gordon wrote.

A senior official must submit a written determination for proposed work prior to issuing a solicitation that the work is not inherently governmental, the notice said.

For ongoing contracts, agencies should review how work is being performed "to ensure the scope of the work or the circumstances have not changed to the point that inherently governmental authority has been transferred to the contractor," the guidance said.

Once this threshold is met, the decision about whether to have contractors or federal employees perform will continue to be primarily a cost-based one, made at the agency level, the notice said.

In some cases, government control can be re-established through increased contract oversight, Gordon wrote. "In other cases, agencies may need to in-source work on an accelerated basis through the timely development and execution of a hiring plan timed, if possible, to permit the non-exercise of an option or the termination of that portion of the contract being used to fulfill inherently governmental responsibilities," he said.

The document lists 19 examples of functions closely associated with inherently governmental work that require additional oversight but which are not statutorily prohibited from outsourcing. They include evaluating another contractor's performance, assisting in contract management and any situation that might permit access to confidential business information.

If an agency wants to use a contractor for any of these functions, it must first establish guidelines in the contract regarding specified ranges of acceptable decisions; assign an adequate number of qualified federal employees to administer the work and take steps to mitigate conflicts of interest, the policy letter states.

The guidance also requires greater supervision of "critical" functions, which are defined as jobs in which at least a portion of the work "must be reserved to federal employees in order to ensure the agency has sufficient internal capability to effectively perform and maintain control of its mission and operations."

The policy suggests that agencies conduct pre-award conflict of interest reviews when outsourcing functions that could veer closely into inherently governmental territory. Agencies also would have to ensure that contractors are clearly identified as private sector employees on e-mail and phone systems, office name plates and identification badges.

And, in a significant change for some agencies, OFPP wants contractor personnel physically separated from government personnel at the worksite. When possible, the letter calls for contractors to work off-site.

"The goal is not to make government bigger," Zients said. "It's to make government better."

The Professional Services Council, a contractor trade association, praised the guidance.

"Rather than focus on labels that serve only as code words for desired outcomes, the proposed policy offers a solid foundation on which agencies can make practical and necessary decisions about how best to execute their missions by appropriately capitalizing on the total suite of resources available to them," said PSC President Stan Soloway. "We appreciate that the proposed policy letter does not pick winners or losers and is sector neutral when highlighting agency management's responsibilities."

Scott Amey, general counsel for the Project on Government Oversight, a government watchdog group, said "the proposed rule establishes a targeted approach that will better ensure companies with a financial interest are not driving federal policies and programs. However, enforcement of the rule will be difficult because contractors are often performing work that should be reserved for government employees."

The Business Coalition for Fair Competition, a group of 13 national business, taxpayer and free market organizations, called the policy "a mixed bag."

"It will bring to a halt the unjustified government performance or insourcing of commercial activities that we have seen in recent months," said the group's President John Palatiello. "On the other hand, the proposed policy never uses the term 'commercial activities' and does not strike a balance between inherently government and commercial activities."

The guidance, he said, also fails to address activities that should be reserved for contract employees or when a direct conversion to the private sector is appropriate.

OFPP requested public comment by May 31 on dozens of questions related to the policy in 11 areas of interest. They include possible changes to the use of security contractors in combat situations.

The final rule will be adopted in the Federal Acquisition Regulation by late summer or early fall, Gordon said.