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June 4, 2010

Office of Federal Procurement Policy
ATTN: Mathew Blum
9013 New Executive Office Building
724 17th Street, NW
Washington, DC 20503

Re: Proposed OFPP Policy Letter—Work Reserved for Performance by Federal
Government Employees
CODSIA Case No. 06-10

Dear Mr. Blum:

The Office of Federal Procurement Policy (OFPP) has requested comments on its proposed policy letter “on circumstances when work must be reserved for performance by federal government employees” that appeared in the March 31, 2010 ***Federal Register***. The undersigned members of the Council of Defense and Space Industry Associations¹ are pleased to provide comments to be considered in the formulation of the final policy letter on this important topic.

In general, we support OFPP’s efforts to clarify the definition of what constitutes “inherently governmental” work that must be performed by federal government employees. We understand the need to clarify definitions for work that, while not “inherently governmental,” nevertheless also must be performed by federal government employees for reasons specific to the mission of the particular agency or department or because of the nature of the function. On the other hand, we have a continuing concern that agencies will interpret this policy as a mandate to in-source. We do not believe this is the intent of the proposed policy letter and needs to be actively guarded against.

Because determination of ‘inherently governmental’ or other functions reserved for performance by government employees confers immunity from examination of best value, we assert the interests of both the American taxpayer and industry are best served by defining concepts narrowly to ensure that appropriate functions are properly examined. We further assert that the complement of ‘inherently governmental’ is not

¹ CODSIA was formed in 1964 by industry associations with common interests in federal procurement policy issues at the suggestion of the Department of Defense. CODSIA consists of eight associations – the Aerospace Industries Association (AIA), the American Council of Engineering Companies (ACEC), the Association of General Contractors (AGC), the American Shipbuilding Association (ASA), the Chamber of Commerce of the United States of America, the National Defense Industrial Association (NDIA), the Professional Services Council (PSC), and TechAmerica (formerly AeA and ITAA). CODSIA’s member associations represent thousands of government contractors nationwide. The Council acts as an institutional focal point for coordination of its members’ positions regarding policies, regulations, directives, and procedures that affect them. A decision by any member association to abstain from participation in a particular case is not necessarily an indication of dissent.

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automatic outsourcing but due diligence in search of the most effective result for the American taxpayer.

We are particularly concerned that the underlying adversarial tone of the proposed policy is one which calls for the government to be vigilant in order to guard against contractor attempts to overtake portions of the government's mission. We find this language to be counter-productive and would suggest that this proposed policy contain explicit language emphasizing the government/industry partnership, particularly for functions that are not inherently governmental, and our mutual interest in conducting the public's business in as cost effective a manner as possible.

We recommend the following changes in the final policy letter in order to improve understanding and compliance:

- Change the title of the policy letter to "Management of Inherently Governmental and Critical Functions."
- Make definitions and examples of what constitutes "inherently governmental" work as clear as possible.
- Combine the category "functions closely associated with inherently governmental functions" with the category "critical functions."
- Prohibit the use of any definitions, categories of functions, or criteria used by agencies to determine work to be performed by government employees in policy or guidance that does not conform to the OMB policy letter.
- Use the term "critical position" for individual billets that, while not inherently governmental, must be occupied by government employees in order for the agency to maintain control of its mission and operations. Clearly articulate the criteria to be used by agencies in making critical position determinations.
- Require agencies to submit their list of inherently governmental and critical functions and list of critical positions, with the rationale for the determination, to OFPP. To ensure consistent application of this policy, develop and maintain a public database of functions and positions. Periodically audit agencies to verify that each is applying the criteria appropriately.
- Comprehensive manpower and human capital planning and cost considerations must be fully integrated into agency determinations about these "critical functions."

There are clear distinctions between this policy, and other regulatory and programmatic efforts, such as those addressing conflicts of interest. Care should be taken to avoid having those related but separate matters confuse agencies responsible for implementing the policy contained in your proposed policy letter.

Change the Policy Letter Title to "Management of Inherently Governmental and Critical Functions"

The current policy letter title, "Work Reserved for Performance by Government Employees," suggests the purpose of the proposed policy is only focused on government employees. The revised title better reflects the proposed policies intent to define the proper criteria to determine what government functions are appropriately done by government employees and what functions are to be examined for the greatest effectiveness for the American taxpayer.

Make the Definition of Inherently Governmental Functions Clearer

The proposed policy letter adopts the definition for “inherently governmental function” contained in section 5 of the Federal Activities Inventory Reform Act (FAIR Act), Public Law 105-270. As this proposed definition makes clear, the determination of whether something is an “inherently governmental function” depends on whether the person performing the function is standing in the shoes of the sovereign and making a decision that binds the sovereign to a particular course of action. The person who has the discretion to make that binding decision must be a government employee. We support this definition. We also agree that the illustrative list of functions in Appendix A are appropriately considered “inherently governmental.”

The proposed definition goes on to state what is not “normally” inherently governmental. While this description is somewhat helpful, it fails to fully articulate the scope of activities that fall outside of an “inherently governmental function.” Moreover, by providing a lengthy list of “ministerial and internal” functions, it leaves the impression that this is a representative list of appropriate contractor functions and even these could become inherently governmental in other than “normal” circumstances. We are concerned that, without further guidance, agency officials may well regard this as a compulsory listing and “in-source” work that is currently being performed by contractors, inappropriately, to government workers. To alleviate any possible misperception and help agencies better understand what functions are not to be considered inherently governmental, we recommend that additional language be added to the effect that:

“Project specific services that do not materially affect the exercise of decision-making authority by the government. Services such as technical planning, or analysis and development of strategies and documentation to be used by government officials to facilitate government decision-making, or product support services are not inherently governmental provided that any employees performing these functions do not impinge on government officials’ discretion essential to performing their inherently governmental function.”

Adding language such as this reinforces the principle that while the ultimate decision to bind the government must rest in the hands of a government employee, a contractor may, subject to considerations in the next section, perform a wide array of functions that assist government officials in making those decisions and in providing other services. The flexibility of contractor services allows the government to meet non-recurring and widely varying needs. The policy should state that periodic competitions involving contractors can produce innovation and the infusion of private expertise to improve government effectiveness. As long as government employees are overseeing and controlling the contractor in its activities to the extent needed to control agency missions and operations, and a government employee retains the discretion to direct governmental actions or bind the government, the contractor is not performing an inherently governmental function.

Combine “Functions Closely Associated with Inherently Governmental Functions” and “Critical Functions”

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The proposed policy letter includes two concepts for identifying functions that, while not “inherently governmental,” nevertheless must be controlled by government employees to ensure that contractors do not essentially impinge on the ability of government employees to perform inherently governmental functions (i.e., functions closely associated with inherently governmental functions) and functions that materially affect missions or operations (i.e., critical functions).

We suggest that these two sections be merged in the final policy. The intent of the merged section should be to describe functions which, while not inherently governmental, are critical to the agency. The overall title could be “Critical Functions.”

There is significant overlap between these two sections in terms of the process and factors to be considered in making such a determination. The key to both the closely associated and critical criteria is the agency’s ability to ensure the agency retains not only ultimate decision making authority, but has sufficient expertise and input to effectively control the process (i.e., not act as a “rubber stamp) so that the agency at all times maintains control of its mission and operations. By separating these criteria into two sections with similar but different policies and processes, there is significant risk that the policy will unnecessarily complicate agency decision making and confuse agency decision makers. By retaining the category of “closely associated with inherently governmental functions,” OFPP also signals to agencies that they need not change their thought processes about how to control missions and operations. These complications and confusions will be compounded with the passage of time, as the two branches of regulation evolve and are interpreted. Instead, the policy letter should consider adopting a unified approach for addressing functions that are not inherently governmental, but that require enhanced scrutiny.

Additionally, agency officials have the responsibility to make the determination of the criticality of a function based on the policy letter criteria. There will need to be flexibility afforded agencies in making these determinations based on the particular mission, organizational structure, and other circumstances applicable to each agency. Specifically, we believe the agency must develop a list of “critical functions” based on the following considerations:

- The agency’s mission.
- The agency’s need to develop or maintain organic expertise and technical capability in order to control its mission and operations.
- The risk to the agency’s ability to perform its mission in the event an employee – whether a contractor or a government employee -- were unable or unwilling to continue performing the function.
- The nature of the function, with particular reference to the list contained in Appendix B and FAR 7.503(d), provided these lists are amended as we recommend in Attachment 2.

Of course, there are a large number of functions that agencies perform that are neither critical nor inherently governmental, and so require no additional scrutiny under the terms described in this policy letter. As to all these functions, there should be no presumption that the work be performed by government employees. Rather, the decision to source the function from government employees or private contractors should be based upon an analysis of the agency’s ability to maintain control of its mission and operations by limiting or guiding the contractor’s exercise of its discretion,

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and by other relevant factors such as cost, performance, and workforce planning and human capital considerations. Although “closely associated” functions have a statutory basis in appropriations law, the policy can be drafted in a manner to conform to this law’s requirement and adopt such a unified approach. Moreover, section 321 specifically asks OMB to recommend legislative changes. We urge OMB to do so in an effort to bring more consistency to applicable legislation.

Finally, we would urge OMB to suggest amendment of 10 USC §2383² to conform to the final policy letter.

Prohibit the Use of any Definitions, Categories of Functions, or Criteria that do not Conform to the OMB Policy Letter

The policy should explicitly supersede existing policies, definitions, categories and published guidance by all government agencies. Existing documents frequently employ expanded definitions such as “mission essential”, “core competency”, “commercial critical”, and “exempt from private sector performance,” and other definitions for work to be reserved for government performance to support in-sourcing, in-sourcing quotas, or “balancing the workforce” goals. The preamble of the proposed policy and a March 18 Senate letter to OMB director Peter Orszag even suggest all functions merely deemed ‘sensitive’ should be reserved for government employees. The policy procedure for defining ‘inherently governmental’ functions and select positions for critical functions, plus due diligence examination of remaining functions must be the single, consistent policy.

Adopt Specific Criteria for Determining the Positions that Must Be Filled by Government Employees to Control Agency Missions and Operations

If it is determined that the function in question is a “critical function,” then the agency must make a determination regarding the positions that government employees must occupy to allow the agency to “maintain control of its mission and operations” (i.e., identify “critical positions” to be filled only by government employees).

Among the factors to consider in making the determination that a position is a critical position are:

- The sufficiency of means available for the agency to control a function.
- The complexity of the function and the need for specialized skills.
- The risk that a contractor would be unwilling or unable to perform work or to extend performance under a contract.
- The internal capability of the agency to properly manage and be accountable for contractor work products. In this regard, the agency must identify those “critical positions” that must be performed by government employees in order for the agency to provide proper oversight of contractors performing critical functions.
- The agency’s ability to pre-establish ranges of acceptable decisions or conduct for the contractor or other aspects of the contractor’s work (such as work

² Other laws and statutes that would need amendment include: 10 U.S.C. §2330a; 10 U.S.C.A. § 2463; 41 U.S.C.A. § 405c; Pub’s. 110-181, Div. A, Title VIII, § 802(d)(1); Pub.L. 110-181, Div. A, Title VIII, § 808(b)(1)

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location) to ensure the integrity of the agency's decision making process is not circumscribed, and all final decisions are made by an agency official.

- The ranges established for the contractor must ensure government input is provided at key points particularly when the exercise of an inherently governmental function may be affected.
- The focus in this part of the analysis should be on the nature of the discretion left to the government employee, as well as how much discretion the contractor may have.

If the agency determines that a critical function does not require the establishment of a critical position, then the policy letter should make it clear that the agency has the authority to contract it out. In this regard, the examples provided in section 5-2b of the policy letter for "critical functions" are not particularly persuasive. So long as ultimate decisions are made by agency officials, we believe that contractors are capable of performing functions related to the design and construction of satellites, assessing and providing advice regarding compliance burdens on taxpayers from tax law provisions, and performing mediation services without risk to an agency's ability to maintain control of its mission and operations. Although the draft policy letter discusses the role of "contractor default," the problem is usually specific to the company in default and does not arise because the work should have been done by government employees.

Develop and Manage a Public Website of Critical Functions and Positions

Without clear guidance about the process and factors agencies are required to consider and a clear tie to the overriding principles involved in the decision, there is significant risk that agencies will interpret the rather vague list of functions described in Appendix B very differently in applying this policy. There also is a significant risk that agency leaders will interpret the policy as an instruction to in-source functions arguably covered by Appendix B. They may do so because they interpret the policy as creating a presumption that this list of functions *should be* in-sourced. They may do so because this is a "safer" alternative with lower risk for them. Regardless of the motives behind such decisions, the result would be disparate treatment across agencies, significant disruption of the workforce as agencies seek to transition work previously performed by contractors to government employees, potentially increased costs to the federal government from inappropriate and inefficient decisions, and, potentially, risk to the agencies' ability to execute their missions.

Therefore, we recommend that OFPP develop and maintain a public data base website that would identify, by agency, which functions have been designated as inherently governmental and why; and which functions and/or positions have been designated as critical, and why. OFPP should periodically review the agency determinations to ensure that the criteria in the final policy letter are being appropriately and consistently applied. Making the website publicly-available will ensure transparency and assist OFPP in this auditing function.

Address Manpower, Human Capital, Cost, and Other Important Issues

Workforce Planning and Human Capital Management

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Another critical issue is workforce planning and human capital considerations. Some skills are highly sought after and have limited availability in the government or the private sector. Some skills are kept more current in the private sector. The nature of the work may change over time, with attendant changes in the kind of skilled workers needed to perform functions. Hiring contractors to perform the work may give the government greater flexibility to adjust to new workforce requirements over time.

Consideration must also be given to those “national emergency” scenarios which may require an immediate surge response by the government. While certainly critical in nature, the needed flexibility to hire private sector employees must be addressed and built into the agencies response plans.

The policy also should provide a mechanism for an agency to continue to employ contractors as it works on an accelerated basis to develop and execute a hiring plan to replace any contractors performing either “inherently governmental functions” or filling “critical positions” that it determines must be performed by government employees. The policy should require agencies to consider the implications of agency decisions on workforce planning in technical fields.

Staffing and recruiting strategies and tactics for deep scientific, engineering, and technical expertise in multiple fields require the ability to meet “ebb and surge” requirements. The ability to recruit, retain, and develop unique, high-demand skill sets requires the ability to match employees with particular skills to shifting labor markets. These are not characteristic of traditional federal hiring practices, nor are they easily replicable in the federal civil service.

In addition, the workforce that is used for industry’s independent research and development (IR&D) efforts is seldom a static workforce solely devoted to IR&D. Those employees’ knowledge base and industry’s ability to innovate are both fostered by the rotation of employees in and out of IR&D positions and those positions that involve direct charging to operational programs. If a material portion of these workers is shifted into civil service jobs without the IR&D emphasis, their technical growth will be stunted, and correspondingly, their ability to contribute to leading edge fields in technology will be diminished.

Like IR&D and infrastructure and facilities design and construction activities, there are functions that are specific to a particular outcome or unique project, with specified start and completion targets. The optimum workforce for that outcome or project may not be needed after the activity is complete or may not be optimum for other projects that arise. Hiring and developing government employees to perform such activities is inefficient and disruptive to workforce planning and development and could be wasteful and even harmful to the public. Contracting for private sector performance of such work should be required, with contract management and administration performed by government employees whose skills are applicable to the work type and not the technical performance requirements.

Cost Considerations

Another important issue for consideration is the role cost considerations should play at this stage of the agency’s decision making process. The proposed policy letter suggests, in connection with functions closely associated with inherently governmental

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functions, that cost effectiveness should be considered at the same time as an agency's determination regarding its ability to maintain control of its mission and operations. We recommend that cost considerations be incorporated in the analysis done to determine if a position should be a critical position.

In calculating the cost effectiveness of using government employees, versus hiring contractors to perform a critical function, agencies must be required to include all material costs. We also urge that the policy include consideration of the benefits one work force may have over another (i.e., not merely a low cost but a best value analysis).

- Cost estimates for government employee support. As OMB knows from experience with A-76, estimating the costs of government workers is difficult and controversial. Because of this and because we believe current in-sourcing initiatives are likely driven by underestimates of the costs of a government worker, we ask that the policy require agencies to disclose estimates of the costs of government workers and provide a reasonable period for public comment on these estimates before they are used. We also believe the estimates should be "fully burdened" cost assessments.
- Administrative support. In-sourcing practices typically ignore the additional requirements for support personnel and infrastructure required to manage, administer and support significant numbers of employees in-sourced to government jobs. In-sourcing results in incremental increases in support requirements such as recruiting, training, employee relations, health and benefits processing, administrative support, employment records, financial/accounting support, security support, etc. These increases can add significantly to non-critical functions of civil service employment and, therefore, must be included in the agency's overall, "fully burdened" cost assessment.
- Facilities/ technology support. Another aspect of the "fully burdened" analysis is that facilities considerations for preparing for an influx of government workers could outstrip budgetary requirements for government workspace. This is particularly true in areas where there exists a concentration of highly skilled workers since there is an accompanying higher cost of living, and affordable real estate is at a premium in these areas. Additional costs would be incurred for provisioning information technology and office supplies/furniture requirements for in-sourced functions.

Conflicts of Interest

Section 5 (c)(4) of the policy letter lists several steps to avoid or mitigate conflicts of interest. It omits many elements and includes several elements that are not addressed in the Organizational Conflict of Interest (OCI) proposed DFARS rule published on 22 April 2010, such as physically separating contractor personnel from government personnel at the worksite and/or having contractor personnel work off-site. We recognize that contractors who are performing acquisition-related work, in particular, will be subject to special scrutiny and separate rules that apply solely to them in order to prevent personal conflicts of interest. However, inclusion of this section in this policy letter adds an extraneous and potentially confusing element and muddies the water on both personal and organizational conflict of interest rules. We suggest this portion of the policy be deleted, that any issues associated with this topic be included in the portion of

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the policy addressing how agency officials must address concerns surrounding hiring contractors to perform “critical functions,” and that agency determinations on these issues be guided by executive branch policy that fully address such issues.

Inclusion of “enforceability of criminal sanctions” as a criterion for internal capability

It is not clear how inclusion of this criterion would assist an agency in determining whether it has the internal capability to manage a contractor potentially performing a “critical function.” Absent some further justification for this criterion tied to the agency’s ability to “maintain control of its mission and operations,” we would suggest that this provision be deleted.

We appreciate your consideration of these comments. If you have questions or need additional information, please do not hesitate to contact Bettie McCarthy, CODSIA’s Administrative Officer, at 703-895-8059 or Mr. Richard Sylvester, CODSIA project officer for this case, at 703-358-1045.

Sincerely,




Richard Sylvester
Vice President – Acquisition Policy
Aerospace Industries Association
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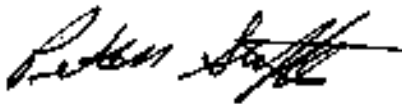
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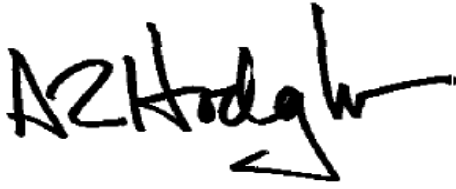


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ATTACHMENT 1

Responses to OFPP Questions

1. Definitions

a. If the FAIR Act definition of “inherently governmental” is adopted, what additional definitional clarification is needed, if any?

ANSWER:

We recommend that there be a more complete explanation of what is not “inherently governmental” as part of the definition that is ultimately adopted. In addition, if a function is to be considered inherently governmental, then it should be tested by analyzing whether it must be performed by a government employee all the time in all circumstances. If not, it may well be critical, but it is not inherently governmental. Finally, OFPP should include recommendations regarding amendments to existing legislation that are required in order to solidify a single definition for the term. This may include recommended amendments to the statutory provisions in Public Law 111-8 as referenced in section 5-2a.

b. What additional guidance should be provided to make clear that identifying “critical” work is driven by mission and circumstance, which will differ between agencies and within agencies over time? Is there a term other than “critical” that might be used to more clearly convey this principle?

ANSWER:

The policy letter should explain the criteria agency officials must use in identifying their “critical functions,” explain the process for creating an inventory of these functions, and provide the criteria agencies will be expected to use in determining critical positions for their particular agency. Some critical functions may be performed by contractors with proper oversight by government employees who must make all final decisions.

c. What, if any, additional guidance should be provided to address what is meant by the term “public interest”?

ANSWER:

No additional guidance is required. The term is adequately explained in Section 3(a).

2. Inherently Governmental Functions

a. Does the “discretion” test (which is derived from OMB Circular A-76, Attachment A and, before that, OFPP Policy Letter 92-1) help or hinder identification of inherently governmental functions? How might the language in the proposed policy letter be improved to make it more useful?

ANSWER:

The discretion test helps to identify what is an “inherently governmental function” in the following sense: “Discretion” implies the power to choose. “Discretion” conveys that the individual has the authority to choose among various courses of action in the application of federal government authority. An individual whose function includes this ability to make choices in exercising sovereign authority of the United States performs an “inherently governmental” function thus we suggest that the policy letter make clear that linkage to some exercise of sovereign authority is necessary to make a discretionary decision inherently governmental

b. Does the proposed “nature of the function” test help in the identification of inherently governmental functions? How might the coverage of this test in the proposed policy letter be improved to make it more useful?

ANSWER:

The “nature of the function test” helps somewhat in the identification of “inherently governmental functions.” The concept is that regardless of whether there is any exercise of discretion, activity of this nature is “inherently governmental” activity. There are a relatively few functions that, by their very nature, are “inherently governmental.” It is difficult to pinpoint the outer reaches of this set of functions using an objective test. However, the draft policy, included in Appendix A, provides a good illustrative list.

c. Should consideration be given to establishing a “principal-agent” test that would require agencies to identify functions as inherently governmental where serious risks could be created by the performance of these functions by those outside government, because of the difficulty of ensuring sufficient control over such performance?

ANSWER:

We are not convinced that this would be a good idea. The risk does not derive from whether the contractor is acting as an “agent” of their agency “principal.” Rather, the risk derives from the nature of the discretion being exercised by the contractor and the nature of the discretion retained by the agency official/principal. This issue can be appropriately handled within the context of the agency’s determination of what are “critical functions.” If the agency determines that the function is “critical,” then it must further determine whether it can “maintain control over its mission and operations” if that function is contracted out. The focus, thus, is not only on what the contractor is doing, but also on how much discretion the agency official retains.

We also note that contractors seldom, if ever, act as legally recognized agents of the government so that it is not clear if such a test would ever apply to government contractors.

d. What, if any, additional guidance might help agencies differentiate between circumstances where contractors are being used appropriately to inform government officials and those where contractors are limiting or constraining government exercise of inherently governmental responsibilities?

ANSWER:

This question raises a very important point. Agency officials bear an appropriate burden to provide contractors with clear guidance regarding the amount of discretion the contractors have in performing their services and the discretion required to be retained by the agency official. With careful adherence to this requirement, a wide range of functions, including critical functions, can appropriately be performed by contractors. The key to addressing this issue lies in requiring the agency managing the contractors to establish ranges of acceptable decisions and/or conduct for the contractor. This principle must be incorporated into each phase of the contracting process. This will ensure that the agency's decision making process is not circumscribed and that all final decisions are made by an agency official.

e. What, if any, changes should be made to existing laws that currently deem specific functions or the work performed by specific organizations to be inherently governmental?

ANSWER:

Since the proposed policy is intended to provide the single, government wide definition of 'inherently governmental' functions and related concepts, existing laws, policies and guidance should be superseded, repealed, canceled, or amended as appropriate consistent with the final policy.

3. *Closely Associated and Critical Functions*

a. Should the policy letter set out a presumption, or a requirement, in favor of performance of "closely associated" and/or critical functions by federal employees?

ANSWER:

No. There should be no presumption or requirement in favor of performance by government employees of "closely associated" and/or critical functions. Rather, each agency should be required to evaluate the functions it performs, and identify those functions that pose a heightened risk that performance by a contractor may essentially impinge on government officials' performance of an inherently governmental function. Some closely associated or critical functions relate to the nature of the function regardless of the agency mission, for example, support for agency procurement activities. Other areas are tied to the nature of the agency's mission and must be left to the responsibility of agency officials to identify using clear criteria.

Once the agency identifies "critical" or "closely associated" functions, the agency must determine, using appropriate criteria and processes, what positions must be filled by government employees to control "critical" and "closely associated" functions. This decision should focus on retaining sufficient expertise and decision making discretion by government employees occupying critical positions to maintain control of its mission and operations. If the agency ensures it can maintain control, then it should analyze a variety of factors, including cost, performance, manpower planning and human capital considerations, and the risk of default, in deciding whether the remaining work should be

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contracted out or performed by government employees. A presumption would be inappropriate because only inherently governmental functions always need to be performed by government employees. Moreover, a presumption would likely lead some agencies to in-source as many positions as possible without analyzing what are the key control positions. No matter the caveats, we would be concerned a presumption would lead agencies to ignore considerations of cost, performance, and manpower planning. Therefore, the government would be at significant risk that it would increase unnecessarily the cost of performing these services; it would unnecessarily subject itself to poor performance by government employees when contractors could do the job more effectively; and it potentially would set itself up for failure because the presumption might be untethered to whether the government was achieving control of the function or could even hire government employees with the skills necessary to perform the work. There should not, therefore, be any presumption with regard to any function except positions exercising inherently governmental functions.

b. What, if any, additional guidance may help agencies differentiate between critical functions and functions that are closely associated with the performance of inherently governmental functions?

ANSWER:

For reasons already discussed, we recommend that there be a unified approach to agency decision making with regard to both these types of non-inherently governmental functions. In the event this is not pursued, we recommend that the guidance for each be clarified. As currently drafted, a “critical function” is one so essential to an agency’s ability to perform its mission and conduct operations that the agency must have sufficient internal capability to control and manage contractors performing work associated with this function. As currently drafted, a “function closely associated with” an inherently governmental function is one that, because of the nature of its function, poses a risk that performance by a contractor will essentially impinge on government officials’ performance of an inherently governmental function. The former is more tied to the mission of the agency and the risk that failure of that mission could pose to the nation and its citizens. The latter is more tied to the integrity of the agency’s decision making process and the risk that some compromise of that integrity could pose to the agency’s effectiveness and the public’s perception of the integrity of the agency and its leadership, and of the government more broadly. Although they may be envisioned as tied to slightly different risks and outcomes, they are similar in many respects and a definition and accompanying guidance can be adopted to encompass all important elements of each.

c. Should these categories be merged and treated in identical fashion? Why or why not?

ANSWER:

Yes. We recommend that the concepts of “functions that are closely associated with the performance of inherently governmental functions” and “critical functions” be merged and treated as one category with one set of processes and standards agencies should apply in evaluating whether and under what circumstances they may be performed by contractors. There is significant overlap between these two categories. Retaining two

similar, overlapping, categories would increase unnecessarily the burden imposed on agencies and contractors in administering any rules related to this policy.

d. What, if any, additional guidance might be provided to help agencies identify the extent to which a critical function may be performed by a contractor?

ANSWER:

The question of what positions a contractor may fill that perform a “critical function” is tied to a number of factors, depends primarily on whether the agency can “maintain control over its mission and operations”. The second question is what factors the agency should consider in deciding whether to use contractors or government employees to fill positions that are not needed to control the function. We recommend that OFPP provide much more guidance about both the factors to be considered on this second point, and how agencies should weigh those factors than just referring to cost considerations. Among the factors we recommend be included are cost considerations, performance considerations, workplace planning and human capital considerations, and risks associated the failure of individuals to perform the required work.

e. Should the policy clarify whether determinations regarding criticality are to be made at the departmental or component level?

ANSWER:

Criticality determinations should be made, approved, and published at the department or agency level.

4. Non-critical Functions

a. What, if any, additional guidance may help agencies differentiate between functions that are critical and those that are not?

ANSWER:

We recommend that OFPP provide guidance to the effect that:

Some critical functions, while sufficiently sensitive that they should be subject to the oversight and control of government employees, may nevertheless be performed by either private contractors or government employees, provided the agency has sufficient internal capability to control its mission and operations. Such critical functions would include:

- (1) Functions that are not inherently governmental functions but are so important to ensuring an agency achieves its missions or operates in accordance with its policy.
- (2) Functions that could influence the discretion of those performing an inherently governmental function. For example, a private contractor may perform a critical function by providing advice or studies that the agency may rely upon in performing its mission or operations, formulating

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regulations, or providing agency positions to other agencies or other branches of government.

- (3) A function that involves more than ministerial services or more than the compilation of objective facts or data, where the work product could also significantly influence:
 - (a) agency budget decisions;
 - (b) agency missions, operations, or potential reorganization; or
 - (c) requirements definition, planning, evaluation, award or management of agency contracts.
- (4) A function requiring access to health information, personally identifying information, confidential business information, competitively sensitive information, or to other sensitive information submitted to the government.

In addition, we recommend that no position should be outsourced if that position involves making critical management decisions for the agency, or retaining that position is necessary for developing or maintaining organic expertise and technical capability required in the future to fill positions exercising inherently governmental functions or positions required to control its mission and operations.

b. Should guidance allow agency heads to identify categories of service contracts that may be presumed to be non-critical? Why or why not?

ANSWER:

Yes, this would help streamline the process, and eliminate the need to repeat the criticality analysis. Once an appropriate analysis has been performed and a determination made with regard to a particular function that there is no likelihood the function is critical to the agency, there is no reason to repeat it for each instance. Agencies should be able to identify classes of functions to be performed in services contracts as non-critical based on a one-time review.

5. Specific Functions

a. What functions, in particular, are the most difficult to properly classify as inherently governmental, closely associated with inherently governmental, critical, or non-critical— and why? What specific steps should be taken to address this challenge?

ANSWER:

The list of functions that are inherently governmental is not difficult to describe both based on the nature of the function and on the level of discretion involved in making the decision. Classification of critical functions is more difficult and depends on the agency and its mission, among other factors. Some of the functions that are difficult to classify are those supporting senior level policy making and strategic decision making, and procurement decision making. For these categories, agencies can benefit from the advice of outside experts who can provide technical and other expertise the agency can use to improve the quality of its decisions on these issues. However, care must be

taken to protect the integrity of agency decision making processes. The best approach to addressing this challenge is for the agency to provide clear direction to the contractor to guide their activities by defining the range of acceptable decisions and/or conduct for the contractor and the nature of the discretion retained by the government employee.

b. What should guidance say—in place of, or in addition to, the draft guidance or currently existing federal regulations or policies—to address the use (if any) of contractors performing any of the following functions?

- i. Pre-award acquisition support, such as acquisition planning, market research, development of independent government cost estimates, and preparation of documentation in support of contract award, including preparation of: price negotiation memoranda and price reasonableness determinations, technical evaluations, determinations of responsibility, determinations and findings, and justifications;**
- ii. Post-award acquisition support, such as functions involving the use of contractors to manage other contractors, the development of contractor performance assessments, review of contract claims, and the preparation of termination settlement proposals;**
- iii. Procurement management reviews;**
- iv. Management of federal grantees;**
- v. Strategic planning;**
- vi. Lead systems integration;**
- vii. Physical security involving:**
 - A. Guard services, convoy security services, pass and identification services, plant protection services, the operation of prison or detention facilities;**
 - B. Security services other than those described in A; or**
 - C. The use of deadly force, including combat, security operations performed in direct support of combat, and security that could evolve into combat;**
- viii. Cyber security, including IT network security;**
- ix. Support for intelligence activities, such as covert operations;**
- x. The assistance, reinforcement or rescue of individuals who become engaged in hostilities or offensive responses to hostile acts or demonstrated hostile intentions; and**
- xi. Intelligence interrogation of detainees, including interrogations in connection with hostilities.**

ANSWER:

Certain of these functions, such as the use of deadly force, rescue of individuals in hostilities, and interrogation of detainees could, based on agency analysis, be identified as either “inherently governmental functions” or as “critical functions” that must be performed by government employees. A number of the remaining items on the list could be classified by the agency as a “critical function” depending on the agency’s mission, the precise nature of the function that is sought to be performed, and the risk of mission failure if the function were to not be performed. How these items are categorized should depend on how agencies apply the guidance provided in this policy letter. In terms of what guidance should be provided, the best approach is for the agency to provide clear

direction to the contractor to guide their activities and define the range of acceptable decisions and/or conduct.

c. Should the guidance provide an illustrative list of functions that are presumed to be critical? Why or why not? If so, what functions should be included on the list?

ANSWER:

There needs to be clear guidance about how agencies should identify their “critical functions.” This could include requiring that agencies consult an illustrative list such as the one in Appendix B, although we have concerns that this list could be interpreted in an overly broad manner. This decision should not be left to each contracting officer who may lack the knowledge and insight needed to determine how a particular contract action may affect control of agency missions and operations. Rather, it should be an agency-level responsibility to determine which functions of the agency are critical. Adequate human capital planning covering both the agency and contractor workforce would assist in making these determinations.

6. Human Capital Planning

a. How, if at all, should this guidance address the problem of limitations on the number of authorized federal positions and the impact of such limitations on decisions about reserving work for federal employees?

ANSWER:

It is essential that this guidance address this issue. As discussed above, we recommend that there be an explicit requirement that agency officials conduct workforce planning and human capital management considering whether work will be sourced to contractors or performed by government employees so that enough government employees with the right skills will be available.

If authorized full-time equivalents (FTEs) are too few, then the agency should provide its analysis to OMB and, unless it determines the agency estimates are in material error, OMB should ensure the executive branch asks for any needed legislation.

b. How, if at all, should this guidance address the potential nexus between decisions regarding reserving work for federal employees and the unavailability of certain capabilities and expertise among federal employees (e.g., “hard to fill” labor categories), and the impact of federal salary limits on hiring people with those capabilities and expertise?

ANSWER:

This guidance should address this nexus by requiring that consideration of these issues be a factor in determining whether a “critical function” may be performed by a contractor.

c. Should the guidance address when it is appropriate to temporarily contract for performance of work that is generally reserved for federal employees?

ANSWER:

Yes. If an agency determines that it is currently contracting out work that should be performed by government employees because it is either inherently governmental or is a critical function that must be performed by a government employee, then the policy should identify the mechanism the agency should use to address that issue. That guidance should include a requirement that the agency preserve contract rights and privileges, and abide by government hiring practices, and permit the ability to temporarily contract for performance work, as necessary.

Properly defined 'Inherently governmental' functions should not be performed by the private sector except in extraordinary circumstances. Other functions normally reserved for government performance should be temporarily permitted in time of war, national emergency, temporary need, or other unusual circumstances. Government procedures, extended training, experience requirements, and often the national talent pool may not permit agile hiring in response to rapidly changing conditions. The proposed policy should permit performance by the private sector in such cases. When the unusual situation has passed or government capabilities have matured, functions should be returned to government performance as appropriate.

We also believe the policy should re-emphasize the guidance provided in Attachment 3 to OMB's Memorandum on Managing the Multi-Sector Workforce (July 29, 2009):

In cases in which ... analysis indicates government performance, but the agency is having difficulty recruiting federal employees or developing federal employees would take too long, the acquisition office should proceed with a temporary contract that provides service to the agency until federal employees can be hired.

d. How, if at all, should this guidance address situations where there is no basis to reserve work for federal employees, but the government is not in a position to provide adequate oversight of a contractor, whether due to the unavailability of federal employees with the skills needed for contract management or for other reasons?

ANSWER:

The policy should address this as a workforce planning issue, and provide some mechanism for a continued role for contractors, or an effective transition, as appropriate. Agencies should not, as a matter of course, recruit contractor employees to become government employees and perform the same function.

See also OMB Memorandum, M-09-26, Managing the Multi-Sector Workforce, July 29, 2009.

e. What, if any, additional guidance might be provided to help an agency analyze whether it has the best mix of private and public sector labor? Are there benchmarks that exist to help agencies make this determination? Can the concept of "overreliance" be effectively understood without also providing guidance on "underreliance"? Why or why not?

ANSWER:

We do not believe it is productive to seek to define “overreliance or underreliance.” Rather, once the proper determination inherently governmental functions have been made, the interests of the American public are best served by subsequent application of the criteria in the policy letter.

7. Scope of Coverage

a. How, if at all, should the draft guidance address advisory and assistance services? What, if any, changes should be considered to FAR Subpart 37.2 to improve how agencies draw upon the skills of the public and private sectors?

ANSWER:

We do not recommend that the guidance address advisory and assistance services as a separate matter. We do not recommend changes to FAR Subpart 37.2 at this time.

b. How, if at all, should the draft guidance address personal services contracting? What, if any, changes should be considered to FAR Subpart 37.104 to improve how agencies draw upon the skills of the public and private sectors?

ANSWER:

We do not recommend that the guidance address personal services contracting as a separate matter. We do not recommend changes to FAR Subpart 37.104 at this time.

c. What additional guidance, if any, would be beneficial to improve understanding and implementation of policies addressing functions that must be reserved for performance by federal employees?

ANSWER:

We suggest the title of this policy letter be changed. The use of the word “reserved” does not suggest that there will be an analysis and balancing of factors which, in fact, will be the case for most functions being evaluated by agencies under this policy. In order to preserve the sovereign authority of the United States, the integrity of government decision making, and the ability of agencies to perform their missions and control their operations, functions that are inherently governmental must be performed by government employees and critical positions necessary to control missions and operations should be filled by government employees. However, many functions will remain eligible for performance by contractors. The title of the final policy letter should better convey the balance of interests and principles involved. A title such as “Management of Inherently Governmental and Critical Functions” would be more neutral.

d. What additional guidance, if any, would be beneficial to improve understanding and implementation of policies addressing functions that may be performed by contractors?

ANSWER:

As recommended above, the policy should provide more explanation of what functions are not inherently governmental so that agencies do not interpret this letter as a direction to in-source without proper planning or justification functions currently being performed by contractors.

8. Form of Coverage

Is an OFPP policy letter an effective vehicle to serve as the main document for consolidated policy guidance on the subject of work reserved for federal employees and maintaining certain critical capability levels in-house? Does it effectively address the affected stakeholder communities? If not, which communities are not properly addressed and what form should the guidance take and why?

ANSWER:

Because of the importance of this topic and because it encompasses much more than acquisition, it may make sense to have the main document issued at the Office of Management and Budget level. This would also be more consistent with the Congressional direction in Section 326.

9. Implementation

a. What best practices (e.g., flowcharts, decision trees, checklists, handbooks) exist to help agencies identify which functions should be reserved for performance by federal employees? Note: Respondents are encouraged to submit copies of, or provide citations to, relevant documents with their responses.

ANSWER:

We do not have any best practices to share beyond those already discussed.

b. What questions arise most frequently that might be suitably addressed in a question and answer format? Examples of questions might include the following:

- **What steps should contractor employees be required to take when**
- **Working on a government site to ensure their status is clearly understood?**
- **Under what, if any, circumstances may a contractor attend a policy-making meeting?**
- **Under what, if any, circumstances may a contractor represent an agency at a policy-making meeting?**

ANSWER:

All these examples focus on the contractor. Significant attention should be paid to providing clear guidance to the agency officials who will be obligated to implement this policy. They will need clear guidance regarding the steps they should follow in

implementing this policy, and the policies, processes, and factors they will be required to employ at each stage of that analysis.

10. Management Responsibilities

What, if any, additional guidance should be provided to ensure the policies and practices discussed in the draft guidance are given appropriate management attention?

ANSWER:

The most effective method to command management attention is to make adherence to this policy a performance objective and to require that the agency establish metrics that can be used to measure management officials' accomplishments in implementing this policy in order to rate their overall job performance. But, quite clearly, such metrics should not include a goal for in-sourcing or out-sourcing any number of positions. Instead, as DoD's acquisition office did recently to identify gaps in its employee workforce, each agency needs to determine if there are areas where it is at risk of losing control of its mission or operations and develop a plan to reduce that risk. This effort is not limited to in-sourcing positions but could include restructuring contracts, changing agency oversight to become more effective, restructuring how the agency uses contractor advice or assuring a single contractor is not providing advice without others with knowledge of the area also have a fair chance to present their views.

11. Inventories of Federal and Contractor Employees

a. What is the best way to optimize the value of federal employee inventories that agencies prepare under the FAIR Act and OMB Circular A-76 to support policies for identifying work to be reserved for performance by federal employees?

ANSWER:

Adopt a similar approach to identifying "critical functions."

b. What is the best way to optimize the value of the contractor employee inventory required by section 743 of Division C of the FY 2010 Consolidated Appropriations Act, Public Law 111- 117 (for civilian agencies) and section 807 of the National Defense Authorization Act for FY 2008, Public Law 110-181 (for defense agencies), to support policies for identifying work to be reserved for performance by government employees and those that may continue to be performed by contractors?

ANSWER:

Adopt a similar approach to identifying "critical functions."

ATTACHMENT 2

CHANGES TO APPENDIX B IN THE PROPOSED POLICY LETTER

As discussed above, there is a strong rationale for establishing a unified approach to “closely associated functions” and “critical functions.” Whether or not they are merged, however, we are concerned about the definition of “closely associated functions” in the current draft. The current draft references Appendix B as examples of functions “that are closely associated with the performance of inherently governmental functions.” Although this list is identical to the list in FAR 7.503(d), its importation into this policy without amendment and further careful policy guidance poses significant risks.

The language of the list in Appendix B is quite vague in parts, so its application could be extremely broad. For example, in the second item, “Services that involve or relate to reorganization and planning activities,” the words “planning activities” can be broadly construed to cover many activities that do not implicate the exercise of sovereign authority on behalf of the United States, pose any risk to an agency’s ability to maintain control of its missions and operations, or essentially impinge on government officials’ ability to exercise their discretion necessary to their performance of an inherently governmental function. The same is true for item three (“Services that involve or relate to analyses, feasibility studies, and strategy options to be used by agency personnel in developing policy”), item six (“Services in support of acquisition planning”), item nine (“Assistance in the development of statements of work”), and item 12 (“Dissemination of information regarding agency policy or regulations”), among others.

Reprinted below is Appendix B showing our recommended changes (strikeout for deleted language, red italics for inserted language). Our suggestions support elimination of “closely associated with the performance of inherently governmental functions” test. These changes are recommended even if the closely associated test is retained.

The following is an illustrative list of ~~functions~~ *services* that are *critical* ~~closely associated with the performance of inherently governmental functions~~ *so that if contractor employees are performing them the agency must retain sufficient positions to control contractor performance so that performance of inherently governmental functions is not impaired; the agency maintains control of its mission and operations; and it is developing any organic expertise needed to manage such functions.*

1. Services *upon which* ~~that involve or relate to~~ budget preparation *depends,* including workforce modeling, fact finding, efficiency studies, and should-cost analyses, *and*
- ~~2. Services that involve or relate to reorganization and planning activities.~~
- ~~3.~~ *23.* Services that involve or relate to analyses, feasibility studies, and strategy options to be used by agency personnel in developing policy *or-*
- ~~4. Services that involve or relate to the development of regulations.~~
- ~~310. Support~~ *Services requiring the exercise of material judgment in interpreting the Freedom of Information Act (FOIA) or exercising discretion available under that Act to respond* in preparing responses to FOIA requests.
- ~~412. Dissemination of information regarding agency policies or regulations, such as Attending conferences on behalf of an agency, conducting community~~

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relations campaigns, or conducting agency training courses *on behalf of an agency*.

548. Drafting of legal advice and interpretations of regulations and statutes to government officials.

The following functions from Appendix B only indirectly have the potential to affect the contracting function of an agency but often seem more directed at protecting contractor information or the integrity of the acquisition process as ends in themselves, not really involving impinging on inherently governmental functions. Thus while being careful when a contract involves such activities is good practice and should be retained, these functions should not appear in Appendix B of this Proposed Policy.

5. Services that involve or relate to the evaluation of another contractor's performance.
6. Services in support of acquisition planning.
7. Assistance in contract management (particularly where a contractor might influence official evaluations of other contractors' offers).
8. Technical evaluation of contract proposals.
9. Assistance in the development of statements of work.
11. Work in any situation that permits or might permit access to confidential business information and/or any other sensitive information (other than situations covered by the National Industrial Security Program described in FAR 4.402(b)).
13. Participation in any situation where it might be assumed that participants are agency employees or representatives.
14. Participation as technical advisors to a source selection board or as nonvoting members of a source evaluation board.
15. Service as arbitrators or provision of alternative dispute resolution (ADR) services.
16. Construction of buildings or structures intended to be secure from electronic eavesdropping or other penetration by foreign governments.
17. Provision of inspection services.
19. Provision of special non-law-enforcement security activities that do not directly involve criminal investigations, such as prisoner detention or transport and nonmilitary national security details.