

OFFICE OF MANAGEMENT AND BUDGET

Office of Federal Procurement Policy

Publication of the Office of the Office of Federal Procurement Policy (OFPP) Policy

Letter 11-01, Performance of Inherently Governmental and Critical Functions

AGENCY: Office of Management and Budget, Office of Federal Procurement Policy

ACTION: Notice of Final Policy Letter

SUMMARY: The Office of Federal Procurement Policy (OFPP) in the Office of Management and Budget (OMB) is issuing a policy letter to provide to Executive Departments and agencies guidance on managing the performance of inherently governmental and critical functions. The guidance addresses direction to OMB in the Presidential Memorandum on Government Contracting, issued on March 4, 2009, to clarify when governmental outsourcing of services is, and is not, appropriate, consistent with section 321 of the Duncan Hunter National Defense Authorization Act (NDAA) for Fiscal Year 2009 (Public Law 110-417). Section 321 requires OMB to: (i) create a single definition for the term “inherently governmental function” that addresses any deficiencies in the existing definitions and reasonably applies to all agencies; (ii) establish criteria to be used by agencies to identify “critical” functions and positions that should only be performed by Federal employees; and (iii) provide guidance to improve internal agency management of functions that are inherently governmental or critical. The Presidential Memorandum is available at http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-Subject-Government/. Section 321 may be found at http://www.dod.gov/dodgc/olc/docs/2009NDAA_PL110-417.pdf.

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DATES: The effective date of OFPP Policy 11-01 is October 12, 2011.

FOR FURTHER INFORMATION CONTACT: Mathew Blum, OFPP, (202) 395-4953 or mblum@omb.eop.gov, or Jennifer Swartz, OFPP, (202) 395-6811 or jswartz@omb.eop.gov.

SUPPLEMENTARY INFORMATION:

A. Overview

OFPP is issuing a policy letter to provide guidance on managing the performance of inherently governmental and critical functions. The policy letter is intended to implement direction in the President's March 4, 2009, Memorandum on Government Contracting that requires OMB to "clarify when governmental outsourcing for services is and is not appropriate, consistent with section 321 of Public Law 110-417 (31 U.S.C. 501 note)." The policy letter:

- Clarifies what functions are inherently governmental and must always be performed by Federal employees. The policy letter provides a single definition of "inherently governmental function" built around the well-established statutory definition in the Federal Activities Inventory Reform Act (FAIR Act), Public Law 105-270. The FAIR Act defines an activity as inherently governmental when it is so intimately

related to the public interest as to mandate performance by Federal employees. The definition provided by this policy letter will replace existing definitions in regulation and policy, including the Federal Acquisition Regulation (FAR). The policy letter provides examples and tests to help agencies identify inherently governmental functions.

- Explains what agencies must do when work is “closely associated” with inherently governmental functions. Specifically, when functions that generally are not considered to be inherently governmental approach being in that category because of the nature of the function and the risk that performance may impinge on Federal officials’ performance of an inherently governmental function, agencies must give special consideration to using Federal employees to perform these functions. If contractors are used to perform such work, agencies must give special management attention to contractors’ activities to guard against their expansion into inherently governmental functions. The policy letter includes examples to help agencies identify closely associated functions and a checklist of responsibilities that must be carried out when agencies rely on contractors to perform these functions.
- Requires agencies to identify their “critical functions” in order to ensure they have sufficient internal capability to maintain control over functions that are core to the agency’s mission and operations. The policy letter holds an agency responsible for making sure it has an adequate number of positions filled by Federal employees with appropriate training, experience, and expertise to understand the agency’s

requirements, formulate alternatives, manage work product, and monitor any contractors used to support the Federal workforce. Federal officials must evaluate, on a case-by-case basis, whether they have sufficient internal capability, taking into account factors such as the agency's mission, the complexity of the function, the need for specialized staff, and the potential impact on mission performance if contractors were to default on their obligations.

- Outlines a series of agency management responsibilities to strengthen accountability for the effective implementation of these policies. Agencies must take specific actions, before and after contract award, to prevent contractor performance of inherently governmental functions and overreliance on contractors in “closely associated” and critical functions. Agencies are also required to develop agency-level procedures, provide training, and designate senior officials to be responsible for implementation of these policies.

OFPP will work with the Federal Acquisition Regulatory Council, the Defense Acquisition Regulations Council and the Civilian Agency Acquisition Council to develop and implement appropriate changes to the FAR to implement this policy letter. In addition, OFPP will review other relevant policy documents, such as guidance in OMB Circular A-76 implementing the FAIR Act, and take appropriate action to ensure they conform to the policies in this letter. Finally, OFPP will work with the Federal Acquisition Institute and the Defense Acquisition University on appropriate training materials for the acquisition workforce and other affected stakeholders.

B. Summary of proposed and final policy letters

The Presidential Memorandum on Government Contracting required the Director of OMB to develop guidance addressing when governmental outsourcing of services is, and is not, appropriate. The Memorandum states that the line between inherently governmental activities that should not be outsourced and commercial activities that may be subject to private-sector performance has become blurred, which may have led to the performance of inherently governmental functions by contractors and, more generally, an overreliance on contractors by the government. It directs OMB to clarify when outsourcing is, and is not, appropriate, consistent with section 321 of the NDAA for Fiscal Year (FY) 2009.

Section 321 directs OMB to: (1) create a single, consistent definition for the term “inherently governmental function” that addresses any deficiencies in the existing definitions and reasonably applies to all agencies; (2) develop criteria for identifying critical functions with respect to the agency’s mission and operations; (3) develop criteria for determining positions dedicated to critical functions which should be reserved for Federal employees to ensure the department or agency maintains control of its mission and operations; (4) provide criteria for identifying agency personnel with responsibility for (a) maintaining sufficient expertise and technical capability within the agency, and (b) issuing guidance for internal activities associated with determining when work is to be

reserved for performance by Federal employees; and (5) solicit the views of the public regarding these matters.

1. Proposed policy letter

OMB's OFPP issued a proposed policy letter on March 31, 2010, entitled "Work Reserved for Performance by Federal Government Employees," to implement the requirements of the President's Memorandum and section 321 (75 Fed. Reg. 16188-97). The proposed policy letter, which was issued after OFPP reviewed current laws, regulations, policies, and reports addressing the definition of inherently governmental functions, as well as feedback from a public meeting held in the summer of 2009, proposed to consolidate in one document a number of policies, definitions, and procedures associated with identifying when work must be performed by Federal employees that are currently addressed in multiple guidance documents, including the Federal Acquisition Regulation (FAR), OMB Circular A-76, and various OMB memoranda. The document proposed the following policy actions to address inherently governmental functions, functions closely associated with inherently governmental functions, and functions that are critical to the agencies' mission and operations.

a. Proposed steps to address inherently governmental functions:

- Create a single definition for the term "inherently governmental function" by directing agencies to adhere to the statutory definition for this term set forth in the

FAIR Act and eliminate variations of this definition found in other documents, such as the FAR and OMB Circular A-76.

- Preserve a long-standing list of examples set out in the FAR of the most common inherently governmental functions, such as the determination of agency policy, hiring of Federal employees, and awarding of Federal contracts.
 - Refine existing criteria (e.g., addressing the exercise of discretion) and provide new ones (e.g., focused on the nature of the function), to help an agency decide if a particular function that is not identified on the list of examples is, nonetheless, inherently governmental.
- b. Proposed steps to address functions closely associated with inherently governmental functions:
- Reiterate requirements in the Omnibus Appropriations Act, 2009 (Public Law 111-8) to give special consideration to Federal employee performance of functions closely associated with inherently governmental ones.
 - Reinforce and refine guidance in the FAR and Attachment A of OMB Circular A-76 requiring special management attention when contractors perform functions closely associated with inherently governmental functions to guard against their expansion into inherently governmental functions. Steps might entail providing clearer

prescriptions in the statement of work of what the contractor may and may not do, and ensuring adequate and adequately trained personnel to oversee the contractor's work.

- Preserve a long-standing list of examples set out in the FAR of the most common functions closely associated with inherently governmental functions, such as support for policy development or support for the selection of contractors.
- c. Proposed steps to address critical functions:
- Recognize a new category of work, "critical functions," which must be evaluated to determine the extent to which performance by Federal employees is required. Define the term as a function that is "necessary to the agency being able to effectively perform and maintain control of its mission and operations."
 - Hold an agency responsible for making sure that, for critical functions, it has an adequate number of positions filled by Federal employees with appropriate training, experience, and expertise to understand the agency's requirements, formulate alternatives, manage work product, and monitor any contractors used to support the Federal workforce. To meet this responsibility, require Federal officials to evaluate, on a case-by-case basis, whether they have sufficient internal capability, taking into account factors such as the agency's mission, the complexity of the function, the need

for specialized staff, and the potential impact on mission performance if contractors were to default on their obligations.

- Make clear that, so long as agencies have the internal capacity needed to maintain control over their operations, they are permitted to allow contractor performance of positions within critical functions (subject to any other applicable legal or regulatory requirements).

Finally, the proposed policy letter would require agencies to take specific actions, before and after contract award, to prevent contractor performance of inherently governmental functions and overreliance on contractors in the performance of “closely associated” and critical functions. Agencies would also be required to develop agency-level procedures, provide training, and designate senior officials to be responsible for implementation of these policies. The proposed policy letter emphasized the need for a shared responsibility between the acquisition, program and human capital offices within the agency to effectively implement its provisions.

The proposed policy letter was published in the Federal Register on March 31, 2010 (75 Fed. Reg. 16188-97) for public comment. OFPP encouraged respondents to offer their views on a series of questions to elicit feedback on some of the more difficult or pressing policy challenges, such as whether and how best to use the “discretion” test to identify inherently governmental functions, how best to explain the difference between critical functions and functions that are closely associated with the performance of inherently

governmental functions, and how to properly classify certain functions related to acquisition support and security.

For additional background on the proposed policy letter, see discussion in the preamble at 75 Fed. Reg.16188-94.

2. Final policy letter

Based on public comments received in response to the proposed policy letter (which are discussed in greater detail below), and additional deliberations within the Executive Branch, OFPP has refined the proposed policy letter to:

- Rename the policy letter “Performance and Management of Inherently Governmental and Critical Functions” to more accurately capture its scope and purpose;
- Add to the illustrative list of inherently governmental functions the following: (i) all combat, (ii) security operations in certain situations connected with combat or potential combat, (iii) determination of an offer’s price reasonableness, (iv) final determinations about a contractor’s performance, including approving award fee determinations or past performance evaluations and taking action based on those evaluations, and (v) selection of grant and cooperative agreement recipients;

- Clarify the illustrative list of functions closely associated with the performance of inherently governmental functions to expressly recognize a variety of work to support Federal acquisitions that includes conducting market research, developing inputs for independent government cost estimates, drafting the price negotiations memorandum and collecting information, performing an analysis or making a recommendation for a proposed performance rating to assist the agency in determining its evaluation of a contractor's performance;
- Establish a comprehensive responsibilities checklist for functions closely associated with inherently governmental functions;
- Caution that, in many cases, functions include multiple activities that may be of a different nature – some activities within a function may be inherently governmental, some may be closely associated, and some may be neither – and by evaluating work at the activity level, an agency may be able to more easily differentiate tasks within a function that may be performed only by Federal employees from those tasks that can be performed by either Federal employees or contractors;
- Clarify that determining the criticality of a function depends on the mission and operations, which will differ between agencies and within agencies over time;
- Establish that if an agency makes a decision to insource some portion of a function that is currently being performed for the agency by a combination of small and large

businesses, the “rule of two” should be applied to determine who will perform the work that remains in the private sector (the “rule of two” requires that acquisitions be reserved for award to small businesses, or certain subsets of small businesses, if there are two or more responsible small businesses capable of performing the work at fair market prices); and

- Reorganize and consolidate the discussion of management associated with inherently governmental, closely associated, and critical functions to more clearly recognize that oversight responsibilities for these functions are interrelated and should not be stove-piped.

C. Public comments

OFPP received public comments from more than 30,350 respondents on the proposed policy letter. All but approximately 110 comments were submitted in the format of a form letter. Respondents were divided in their reaction to the proposed guidance. One form letter, submitted by approximately 30,000 respondents, expressed concern about excessive outsourcing and recommended expanding the definition of an inherently governmental function to encompass critical functions and functions closely associated with inherently governmental functions. The letter also proposed augmenting the list of inherently governmental functions to include all security functions and intelligence activities, training for interrogation, military and police, and maintenance and repair of weapons systems. A second form letter, submitted by approximately 240 respondents,

raised significantly different concerns, cautioning that the policy letter and the increased attention on having non-inherently governmental functions performed by Federal employees will inappropriately discourage Federal managers and agencies from taking full and effective advantage of the private sector and the benefits of contracting. The roughly 110 responses that were not form letters were generally supportive of OFPP's efforts to clarify policies and management responsibilities, though respondents were divided over whether too much or not enough work would be reserved for Federal employees if policies were implemented as proposed.

Copies of the public comments received are available for review at <http://www.regulations.gov> (Docket ID OFPP-2010-0001). A short summary description of the comments and OFPP's responses and changes adopted in the final policy letter are set forth below.

1. Scope of the policy letter

A number of respondents offered views on the general focus of the policy letter. Several respondents stated that the policy letter was too narrowly focused and cautioned that the overall tone of the policy letter, as set by the title and purpose section, could be construed as being concerned only about ensuring that work is properly reserved for Federal employees – as opposed to also needing to strike the right balance between work that may be contracted out and work that must be reserved. Some respondents recommended

that the scope of the policy letter be broadened to more expressly address the performance of commercial activities and advisory and assistance services.

Response: OFPP concurs that the overall purpose of the policy letter should be clarified.

While a key goal of the policy letter is to ensure that inherently governmental work is reserved for Federal employees, agencies have an equally important responsibility, in cases where work is not inherently governmental, to evaluate how to strike the best balance in the mix of work performed by Federal employees and contractors to both protect the public's interest and serve the American people in a cost-effective manner.

The policy letter's title and purpose statement have been revised accordingly. In particular, rather than focusing the title on work reserved for Federal employees, it now focuses on performance of inherently governmental and critical functions, which expressly acknowledges that functions closely associated with inherently governmental functions and critical functions are often performed by both Federal employees and contractors, and states that reliance on contractors is not, by itself, a cause for concern, provided that the work that they perform is not work that should be reserved for Federal employees and that Federal officials are appropriately managing contractor performance.

OFPP does not believe the scope of the policy letter should be broadened to include an extended discussion of contractor performance of commercial activities and instead prefers to keep the main focus on inherently governmental functions, functions closely associated with them, and critical functions. Recent studies of the role of employees and contractors, and the overall increase in reliance on contractors over the past decade, do

not suggest a general difficulty or hesitation in taking advantage of contractors to provide expertise, innovation, and cost-effective support to Federal agencies. By contrast, these studies and general contracting trends, as well as the President's Memorandum on Government Contracting in March 2009, point to a need for guidance to clarify when work must be performed by Federal employees and the steps agencies need to take to ensure they maintain control of their mission and operations, when extensive work is performed by contractors. OFPP believes any questions regarding the intended use of contractors will largely be addressed by clarifying the overall scope of the policy letter, as described above, and reinforcing that an agency may frequently be able to address overreliance on contractors by allocating additional resources to contract management while continuing to use contractors for support.

OFPP carefully considered the merits of adding discussion on advisory and assistance services and other professional and technical services. These functions are likely to be commonly found among those considered to be either critical or closely associated with inherently governmental functions and spending in this area has grown disproportionately over the past few years. In November 2010, OFPP identified these functions for special management consideration based on concern of increased risk of losing control of mission and operations as identified through a review of reports issued in recent years, such as by the Government Accountability Office, the Commission on Wartime Contracting, agency Inspectors General, Congressional Committees, and the Acquisition Advisory Panel. Agencies were instructed to consider if contractor support for these "special interest functions" is being used in an appropriate and effective manner and if

the mix of Federal employees and contractors in the agency is appropriately balanced. See OFPP Memorandum, *Service Contract Inventories*, Memorandum to Chief Acquisition Officers and Senior Procurement Executives (November 5, 2010), available at <http://www.whitehouse.gov/sites/default/files/omb/procurement/memo/service-contract-inventories-guidance-11052010.pdf>. OFPP will work with agencies as they review their use of support contractors in these areas and consider the need for additional guidance in conjunction with these efforts.

2. Inherently governmental functions

Respondents offered a number of comments regarding the scope of the definition of “inherently governmental function,” the tests proposed to determine whether or not a function is inherently governmental, and the illustrative list of examples.

a. *Definition.* Many respondents stated that use of the FAIR Act definition of an inherently governmental function is reasonable. Some respondents, including those offered through one of the two form letters, urged that the definition be expanded to include functions closely associated with inherently governmental functions and critical functions, in order to effectively prevent the inappropriate outsourcing of work that should be reserved for performance by Federal employees. A number of respondents inquired as to OMB’s plans for ensuring that, going forward, the definition set forth in the policy letter is recognized as the single authorized definition for the term.

Response: Based on its review of public comments, prior feedback (including that provided at a public meeting held in the summer of 2009, in connection with the President's Memorandum on Government Contracting) and its review of relevant reports (such as the report of the Congressionally-chartered Acquisition Advisory Panel), OFPP believes the FAIR Act definition is reasonable. OFPP does not believe it is appropriate to expand the definition to encompass closely associated or critical functions. Agencies must give special attention to functions falling into those categories to ensure that the government does not lose control of either inherently governmental functions (in the case of closely associated functions) or activities that are core to the agency's mission or operations (in the case of critical functions), but such functions can, in appropriate circumstances, be performed by contractors.

To ensure that the definition in the FAIR Act is recognized as the single authorized definition for the term, OFPP intends to work with the Federal Acquisition Regulatory Council, the Defense Acquisition Regulations Council and the Civilian Agency Acquisition Council to develop and implement appropriate changes to the FAR to implement this policy letter. In addition, OFPP will review other relevant policy documents, such as OMB Circular A-76, and take appropriate action to ensure they conform to the policies in this letter.

b. *Tests.* Respondents generally did not raise concerns regarding the continued use of tests to help agencies determine if functions are inherently governmental, but a number

cautioned of potential pitfalls, and others offered suggestions for how application of the tests could be improved. A number of recommendations, mostly clarifications, were offered to help improve the “discretion” test, which asks agencies to evaluate if the discretion associated with the function, when exercised by a contractor, would have the effect of committing the government to a course of action. Recommendations included: (i) emphasizing that the evaluation should generally focus on how much discretion is left to government employees as opposed to how much discretion has been given to contractors, and (ii) distinguishing between fact-finding and making decisions based on the fact-finding. A number of comments questioned the likely effectiveness of the proposed “nature of the function test,” which would ask agencies to consider if the direct exercise of sovereign power is involved. Some respondents suggested that the term “sovereign” be explained while others concluded that the manner in which sovereign authority is exercised is so varied that it is better explained by example than further definition. A few respondents recommended that the final policy letter adopt a new “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.

Response: OFPP has made refinements to the “discretion” test. First, it has more fully distinguished the type of discretion that may be appropriately exercised by a contractor from that which would not be appropriately exercised by a contractor. Second, it has clarified that inappropriate delegations of discretion can be avoided by: (i) carefully

delineating in the statement of work contractor responsibilities and types of decisions expected to be made in carrying out these responsibilities and effectively overseeing them and (ii) subjecting the contractor's discretionary decisions and conduct to meaningful oversight and, whenever necessary, to final approval by an agency official. OFPP agrees that it is appropriate to consider how much discretion is left to government employees but, at the same time, also believes there is merit in considering the nature of the discretion given to contractors, as well as whether circumstances, such as time constraints, may limit the ability to effectively manage the contractor's actions or inappropriately restrict government employees' final approval authority. It also concluded that the proposed language was sufficiently clear to help agency officials differentiate between fact-finding that could appropriately be performed by contractors from binding decision-making based on fact-finding that needed to be performed by Federal employees.

Only minimal changes were made to the "nature of the function test." OFPP appreciates that the value of this test may be limited, but believes it still can contribute to an agency's overall understanding and analysis in differentiating between functions that are inherently governmental and those that are not. OFPP considered, but did not adopt, the "principal-agent" test. While recognizing that risk is an underlying factor in reserving work for Federal employees and the definition of inherently governmental function, OFPP concluded that the test would not likely lead to identification of significantly different functions as inherently governmental and was concerned that application of the test could

lead to greater confusion about what may be performed by contractors and what must be performed by Federal employees.

c. *Examples.* While most respondents did not object to retaining a list with illustrative examples, they offered mixed reactions to the specific examples given. A number of respondents felt the proposed list is too narrow and should be modified to add additional functions while at least one respondent thought the list was too broad. Many of those who believed the list was too narrow suggested the addition of functions involving private security contractors, especially when performed in hostile environments or involving intelligence. Some acquisition functions were also recommended for the list, such as developing independent government cost estimates, and preparing documentation in support of a price negotiation memorandum and price reasonableness determination. One respondent who thought the list was too broad recommended refinements to more precisely identify the inherently governmental characteristic of the action, such as “a judge exercising the authority of the Federal government” rather than “the performance of adjudicatory functions.” The respondent explained that deciding a dispute is not, *per se*, inherently governmental since arbitration and alternative dispute resolution processes can be performed by non-Federal employees, even when one of the parties is a Federal agency.

Response: Based on public comment and additional deliberations, OFPP has added to the list of inherently governmental functions: (i) all combat and (ii) security operations in certain situations connected with combat or potential combat. OFPP concluded these

were clear examples of functions so intimately related to public interest as to require performance by Federal Government employees; hence, the addition of these activities to the list of inherently governmental functions would contribute to clarifying the line between what work must be reserved for Federal employees and what work may be performed by contractors. OFPP also clarified that making final determinations about a contractor's performance (including approving award fee determinations or past performance evaluations) and taking action based on these assessments are also inherently governmental because such actions involve the exercise of substantial discretion. In addition, OFPP added selection of grant and cooperative agreement recipients to the list of examples of inherently governmental functions because such actions bind the government.

With respect to contract pricing, the list identifies price reasonableness determinations as inherently governmental. This includes approval of any evaluation relied upon to support a price reasonableness determination, such as a price negotiation memorandum or approval of documentation cited as the government's independent cost estimate, which, by definition, must be the government's own final analysis. That said, an agency is not precluded from using the services of a contractor to develop inputs for government cost estimates or to draft a price negotiation memorandum as long as whatever the government relies upon to determine price reasonableness has been reviewed and approved by a government employee. As in other situations where a Federal official must review and approve documents prepared by a contractor, the Federal official's review and approval must be meaningful; that is to say, it cannot be a "rubber stamp"

where the government is completely dependent on the contractor's superior knowledge and is unable to independently evaluate the merits of the contractor's draft or to consider alternatives to that draft. For that reason, while an agency may appropriately choose to have Federal employees prepare documentation in support of a price negotiation memorandum and price reasonableness determination, OFPP does not view this work as inherently governmental, but rather closely associated with an inherently governmental function – and has added this work to the list of closely associated functions. If this work is performed by contractors, the agency must apply special management attention to ensure the work does not expand to include decision-making (which is inherently governmental) or otherwise interfere with the government's ability to exercise independent judgment, in this case, to determine that offered prices are fair and reasonable.

Regarding the performance of adjudicatory functions, OFPP retained the language on the proposed list, without change, and notes that the language currently in the FAR and the proposed policy letter already provides a carve-out for certain types of adjudicatory functions that are not inherently governmental, such as those relating to arbitration or other methods of alternative dispute resolution.

Similar to the list appearing in the FAR today, the list in the final policy letter is illustrative and not exhaustive. In addressing security operations, for example, the list identifies where security operations would be inherently governmental in connection with combat. This should not be read as a determination that all security performed in any

hostile situation other than actual combat may be performed by contractors. Rather it means that those situations should be evaluated on a case-by-case basis to determine what security functions and activities are inherently governmental and what can be performed by contractors with appropriate management and oversight.

Finally, OFPP has added a caveat to recognize that many functions include multiple activities, some of which may not be inherently governmental. These other activities performed in conjunction with the function may be closely associated or neither inherently governmental nor closely associated. This caveat helps to clarify that the identification of a function on the list does not mean every action associated with the function is inherently governmental. For additional discussion, see response to comment no. 5, below.

3. Functions closely associated with inherently governmental functions

Respondents offered a range of comments. Some call into question the purpose of this category; others raise concerns about the extent to which contractors should perform these functions; still others offer refinements to the proposed list of examples.

a. *Purpose.* A number of respondents recommended that the guidance on closely associated functions be clarified. Many of them pointed out that discussion of this concept appears to overlap with the new concept of critical function in that both appear to address the same risk, namely of the government losing control of its operations. Some

thought this confusion might be avoided by defining the term “closely associated” so that its scope as a functional category can be more clearly understood. Others favored adding an explanation of the different purposes served by the two concepts. Some proposed doing away with the category, pointing out that the “closely associated” concept is more appropriately viewed as a management practice rather than as a separate functional category.

Response: OFPP does not agree that the concept of “closely associated” should be eliminated, as it serves an important management purpose in helping agencies guard against losing control of inherently governmental functions. However, OFPP agrees that the concept is more relevant to management practices, or internal control mechanisms, as opposed to serving as a stand-alone functional category. For this reason, the discussion of this concept in the policy letter has been reorganized so that it is now addressed as part of the discussion on identifying inherently governmental functions. This reorganization should also help to clarify the different reasons for tracking contractors who are performing closely associated functions and those who are performing critical functions. In the case of closely associated functions, the agency is trying to prevent contractor performance from interfering with Federal employees’ ability to perform inherently governmental functions. In the case of critical functions, the agency is looking to determine if the agency is at risk of losing control of its ability to perform its mission and operations. OFPP does not believe a definition will necessarily provide greater clarity, but has created a new checklist to summarize in one place the various actions that must

be taken if the agency determines that contractor performance of a function closely associated with an inherently governmental function is appropriate.

b. *Performance.* A number of respondents (including those using one of the two form letters) stated that *only* Federal employees should be allowed to perform functions closely associated with inherently governmental functions (with contractor performance allowed only in limited or exceptional circumstances). These respondents generally recommended that the concept of “closely associated” be incorporated into the definition of inherently governmental function to effectively protect the government against improper reliance on contractors.

Response: Agencies must carefully guard against contractor performance of inherently governmental functions, but managing this risk does not require that performance of closely associated functions be reserved exclusively for Federal employees. Such a bar would inappropriately limit an agency’s ability to take advantage of a contractor’s expertise and skills to support the agency in carrying out its mission. For example, limiting performance of functions closely associated with inherently governmental functions could inappropriately limit an agency’s ability to take advantage of a Federally Funded Research Development Center (FFRDC) or University Affiliated Research Center that provides essential engineering, research, development, and analysis capabilities to support agencies in the performance of their responsibilities and mission. As explained in FAR 35.017: “An FFRDC meets some special long-term research or development need which cannot be met as effectively by existing in-house or contractor

resources. FFRDCs enable agencies to use private sector resources to accomplish tasks that are integral to the mission and operation of the sponsoring agency.”

Effective risk management can be achieved if agencies are mindful of their responsibility to give special consideration to Federal employee performance and effectively apply special management attention when contractor performance is determined to be appropriate. With respect to special consideration, the policy letter reminds agencies of their responsibilities under the law and OMB’s management guidance on this issue. (These responsibilities are also reiterated in guidance OFPP issued last fall to help agencies in evaluating the activities of their service contractors in accordance with section 743 of Division C of the Consolidated Appropriations Act, 2010 (Public Law 111-117). See OFPP Memorandum *Service Contract Inventories* (refer to response to comment no. 1, above, for cite).

With respect to contractor performance of closely associated functions, the final policy letter includes a new checklist that summarizes the various contract management actions that agencies must take to ensure contractors are not performing, interfering with, or undermining the agency’s decision-making responsibilities. The checklist, which is largely taken from existing guidance in the FAR and other documents, identifies steps such as: (i) establishing specified ranges of acceptable decisions and/or conduct in the contract, (ii) assigning a sufficient number of qualified government employees to perform contract management, (iii) ensuring reasonable identification of contractors and contractor work products if there is a risk that the public will confuse contractor

personnel or work products with government officials or work products, and (iv) avoiding or mitigating conflicts of interest.

In the case of an FFRDC, the FAR has long required that such organizations conduct their business in a manner befitting their special relationship with the government – which includes access, beyond that which is common to the normal contractual relationship, to government and supplier data, including sensitive and proprietary data, and to employees and installations equipment and real property. As stated in FAR 35.017, FFRDCs must operate in the public interest with objectivity and independence, be free from organizational conflicts of interest, and have full disclosure of their affairs to the sponsoring agency.

c. *Examples.* Respondents offered varied reactions to maintaining a list of examples of “closely associated” functions. Several felt a list should not be included in the final policy letter because it introduces unnecessary ambiguity and allows for unnecessarily broad interpretation that could include either an inappropriate presumption in favor of insourcing or an inappropriate presumption that the work is appropriately performed by a contractor. Of those who favored (or did not oppose) the continued use of a list, some felt the list was too broad, either because it included functions where the potential for encroaching on inherently governmental responsibilities should not be viewed as a significant concern in need of heightened scrutiny or because the function as described was indistinguishable from those identified as inherently governmental.

Response: OFPP believes the list, which is currently set forth in the FAR, continues to serve as a useful tool to assist agencies in identifying functions where they must give special consideration to performance by Federal employees or special contract management attention if performed by contractors. The reorganized discussion of this issue (as described above) in combination with the checklist should help to avoid inappropriate presumptions regarding the performance of these functions.

With respect to the substance of the list, OFPP has made three types of modifications. First, as was done with the list of inherently governmental functions, OFPP has added a caveat that many functions include multiple activities, only some of which are closely associated with inherently governmental. Other activities performed in conjunction may be inherently governmental or not closely associated. This caveat helps to clarify that the identification of a function on the list does not mean every action associated with the function is closely associated with an inherently governmental function. (See comment no. 5, below for additional discussion.) Second, the list more carefully delineates activities that are performed in direct support of inherently governmental functions (e.g., analyses and feasibility studies to support the development of policy), which are closely associated activities, from those that involve making binding decisions (e.g., the final shape of a policy), which are inherently governmental. Third, OFPP has added additional examples to further describe the types of acquisition support that are closely associated functions. These added functions include: conducting market research, developing inputs for independent government cost estimates, assisting in the development of a price negotiation memorandum, and supporting agency personnel in evaluating a contractor's

performance, such as by collecting information or conducting an analysis that can be used by a Federal employee to make a determination about the quality of the contractor's performance.

4. Critical functions

A number of respondents recognized that the creation of "critical function" as a new category helps to fill a void in current policy, but sought clarification and recommended refinements to ensure agencies properly identify and address functions that are at the core of an agency's mission and operations. Some confusion was voiced, as noted above, regarding the difference between critical functions and closely associated with inherently governmental functions. Some respondents suggested that a list providing examples of critical functions be developed, similar to that developed for inherently governmental and closely associated functions, but others advised against developing a list, noting that the criticality of a function depends on an agency's mission and current capabilities. A number of respondents addressed how an agency might go about differentiating between a critical and a non-critical function. Some suggested that agencies be authorized, if not encouraged, to identify categories of service contracts that may be presumed to be non-critical in order to avoid unnecessary analyses. Others expressed concern that a list will lead to inappropriate generalizations that will hinder, rather than facilitate, meaningful rebalancing.

Response: OFPP intends to work with FAI and DAU to develop appropriate training to support the successful implementation of the policy letter. However, OFPP does not support the creation of a list of critical functions. A function's criticality is dependent on an agency's mission and operations. The policy letter has been clarified to emphasize that the criticality of a function depends on mission and operations, which will differ between agencies and potentially within agencies over time. Whether an agency is over-reliant on a contractor to perform a critical function also will vary from agency to agency depending on its current internal capabilities compared to those needed to maintain control of its mission and operations. Similarly, OFPP does not support the creation of a government-wide list of non-critical functions, as this may also differ between agencies based on their mission and operations.

5. Terminology

Several respondents raised concerns regarding how the policy letter uses the terms "function," "activity," and "position." These respondents state that the terms are used interchangeably to cover different concepts, namely: 1) a process, 2) tasks undertaken in conjunction with the process, and 3) billets filled by individuals to perform tasks. They recommend that clarification be provided, perhaps with the addition of definitions.

Response: OFPP recognizes that the terms have different meanings and agrees that more careful use of these terms may help to avoid inappropriately broad generalizations regarding the characterization of work. A function, for example, often includes multiple

activities, or tasks, some of which may be inherently governmental, some of which may be closely associated with inherently governmental work, and some may be neither. By identifying work at the activity level, an agency can more easily differentiate tasks within a function that may be performed only by Federal employees from those tasks that can be performed by either Federal employees or contractors without blurring the line between the role of Federal employees and contractors. The chart below provides several examples. For instance, within the function of source selection, the tasks of determining price reasonableness and awarding a contract are inherently governmental, the task of preparing a technical evaluation and price negotiation memorandum are closely associated (provided the government has sufficient time and knowledge to independently evaluate alternative recommendations and decide which is in the government's best interest) and (although not shown on the table), the task of ensuring the documents are in the contract file is neither inherently governmental nor closely associated.

Function	Work that is inherently governmental and therefore must be performed by Federal employees	Work that is closely associated with inherently governmental functions and that may be performed by either Federal employees or contractors
Budget development	The determination of budget policy, guidance, and strategy, and the determination of Federal program priorities or budget requests.	Support for budget preparation, such as workforce modeling, fact finding, efficiency studies, and should-cost analyses.
Policy and regulatory development	The determination of the content and application of policies and regulations.	Support for policy development, such as drafting policy documents and regulations, performing analyses, feasibility studies, and strategy options.
Human resources management	The selection of individuals for Federal Government employment, including the interviewing of individuals for employment, and the direction and control of Federal employees.	Support for human resources management, such as screening resumes in accordance with agency guidelines.

<p>Acquisition planning, execution, and management</p>	<p><u>During acquisition planning:</u></p> <ol style="list-style-type: none"> 1) determination of requirements 2) approval of a contract strategy, statement of work, incentive plans, and evaluation criteria, 3) independent determination of estimated cost based on input from either in-house or contractor sources or both. <p><u>During source selection:</u></p> <ol style="list-style-type: none"> 1) determination of price reasonableness of offers, 2) participation as a voting member on a source selection board, and 3) awarding of contracts. <p><u>During contract management:</u></p> <ol style="list-style-type: none"> 1) ordering of any changes required in contract performance or contract qualities, 2) determination of whether costs are reasonable, allocable, and allowable, 3) participation as a voting member on performance evaluation boards, 4) approval of award fee determinations or past performance evaluations, and 5) termination of contracts. 	<p><u>Support acquisition planning by:</u></p> <ol style="list-style-type: none"> 1) conducting market research, 2) developing inputs for government cost estimates, and 3) drafting statements of work and other pre-award documents. <p><u>Support source selection by:</u></p> <ol style="list-style-type: none"> 1) preparing a technical evaluation and associated documentation; 2) participating as a technical advisor to a source selection board or as a nonvoting member of a source evaluation board; and 3) drafting the price negotiation memorandum. <p><u>Support contract management by:</u></p> <ol style="list-style-type: none"> 1) assisting in the evaluation of a contractor's performance (e.g., by collecting information, performing an analysis, or making a recommendation for a proposed performance rating); and 2) providing support for assessing contract claims and preparing termination settlement documents.
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Further analyzing work from the perspective of the number of positions required to perform an activity enables an agency to differentiate those tasks that may require rebalancing from those that do not. The fact that contractors are performing some portion of a particular activity is not an automatic signal that rebalancing is required, except where work is inherently governmental. In other cases, the number of positions, or slots, that should be held by government employees versus contractor personnel to perform a particular activity will depend on a number of considerations, such as whether the work is critical or closely associated with inherently governmental functions, the particular mission of the agency, the current capability of government employees to understand the

mission and manage contractors, and how the function will be delivered to the agency by the contractor.

A number of clarifications have been made throughout the document to capture these differences, such as in connection with the lists of inherently governmental and closely associated functions in Appendix A and Appendix B. OFPP does not believe definitions need to be added to the policy letter at this time, but will review with the FAR Council if further clarification is required as regulatory changes are developed to implement the policy letter.

6. Small business contracting

Many respondents expressed concern that the rebalancing called for in the policy letter could harm small businesses. These respondents offered a number of recommendations to mitigate this impact, such as excluding all contracts that were awarded under set-asides from insourcing without a formal justification and approval, and having the Small Business Administration review proposed insourcing actions.

Response: OFPP does not anticipate a widespread shift away from contractors as a result of the requirements in the policy letter. As the policy letter explains, insourcing is intended to be a management tool – not an end in itself – to address certain types of overreliance on contractors. In many cases, overreliance may be corrected by allocating additional resources to contract management – i.e., an agency does not necessarily need

to take work away from contractors and have it performed by Federal employees. However, some insourcing is taking place and will be undertaken in the future in some situations, such as where an agency determines that outsourced work is inherently governmental or where the agency is at risk of losing control of its operations regarding work of a critical nature. To minimize the negative impact of these actions on small businesses, the final policy letter requires agencies to take two actions. First, when prioritizing what contracted work should be reviewed for potential insourcing, agencies are instructed to generally place a lower priority on reviewing work performed by small businesses where the work is not inherently governmental and where continued contractor performance does not put the agency at risk of losing control of its mission and operations. Second, agencies are instructed to apply the “rule of two” to work that will continue to be performed by contractors following the insourcing of part of the work (the rule of two calls for a contract to be set aside for small businesses when at least two small businesses can do the work for a fair market price). Application of this rule should increase the amount of residual work remaining in the hands of small businesses that can perform the work cost effectively.

7. Human capital planning.

A number of respondents acknowledged the connection that exists between human capital planning, clear guidance on the performance of inherently governmental, closely associated, and critical functions, and the ability to effectively evaluate the need for rebalancing. However, reactions were mixed regarding the value of addressing hiring

ceilings and funding constraints. Some thought these were appropriate considerations for assessing the current and desired mix of Federal employees and contractors in an organization. Others felt that the assessment should remain focused exclusively on the nature of the function.

Response: Striking the right balance of work performed by Federal employees and contractors is a shared responsibility between human capital, acquisition, program, and financial management offices. Issues such as hiring ceilings and funding constraints were referenced in the guidance document because these issues are part of the challenges that agency officials must address in executing their responsibilities and determining the best mix of labor resources. OFPP and other organizations within OMB are working with the Chief Human Capital Officers (CHCO) Council to ensure agency human capital officers understand their role and responsibilities. OMB will work with the CHCO Council to determine the appropriate type of supplementary materials that might be needed when the policy letter is finalized.

8. Other issues

a. *The role of cost in rebalancing decisions.* Several respondents raised concern that the policy letter provides insufficient guidance on the parameters for insourcing when based on a determination that public sector performance is more cost effective than private sector performance. They suggested that the policy letter lay out the steps for

performing a cost comparison and define key terms such as “cost effective,” “fully loaded cost” and “indirect cost.”

Response: The proposed policy letter’s discussion of insourcing focuses primarily on situations where an agency identifies improper reliance on contractors, namely, where the outsourced work is inherently governmental, or where the agency is at risk of losing control of its mission and operations. These circumstances, in particular, were highlighted in section 321 of the FY 2009 NDAA and the President’s Memorandum on Government Contracting and have been the subject of reports issued in recent years addressing the use of contractors. The policy letter acknowledges that cost may also be a basis for insourcing, and requires in such situations that agency officials ensure that the agency’s analysis fairly takes into account the full cost of performance by both sectors to support a determination that insourcing will save money. OFPP agrees that additional guidance in this area may be beneficial, and is reviewing the need for such guidance, but believes that additional coverage of the type described by the respondents, if appropriate, is better addressed as a supplement to existing guidance on insourcing, such as that in Appendix 3 of OMB Memorandum M-09-26, *Managing the Multi-Sector Workforce* (July 29, 2009), which implements section 736 of Division D of the Omnibus Appropriations Act, 2009 (Public Law 111-8), or Circular A-76, which addresses the use of public-private competition to outsource or insource work that may appropriately be performed by either sector.

b. *Management responsibilities.* Some respondents recommended that the contents of the policy letter be reorganized, such as by consolidating the discussion of management responsibilities, rather than addressing these responsibilities separately for inherently governmental, closely associated and critical functions. A few respondents also recommended listing, either in the text or an additional appendix, all laws that require work to be performed by Federal employees.

Response: OFPP has reorganized the policy letter to create a comprehensive and consolidated discussion of management responsibilities that agencies must undertake before and after awarding a contract to ensure proper and effective implementation of policies associated with the performance of inherently governmental, closely associated, and critical functions. This consolidated discussion of pre-award and post-award responsibilities more clearly recognizes that oversight responsibilities for each of these functional categories are interrelated. The policy letter includes citations to relevant laws with government-wide or broad applicability but does not include a list of all laws requiring reservation, a number of which are agency-specific and best addressed individually by affected agencies.

c. *Tribal organizations.* Representatives of Tribal organizations requested that language be added to the policy letter exempting federal government agreements with tribal government organizations under the Indian Self-Determination and Education Assistance Act (ISDEAA), as amended, 25 U.S.C. § 450 *et seq.* They provided a number of statutory and policy reasons for differentiating these agreements, which address a

government-to-government relationship, from government procurement contracts, the principal purpose of which is to acquire products and services for the direct benefit or use of the United States Government. They stated that the ISDEAA, at 25 U.S.C. 458aaa-9, expressly exempts the former agreements from the application of federal acquisition regulations.

Response: The policy letter is issued pursuant to section 6(a) of the Office of Federal Procurement Policy Act, which charges the Administrator for Federal Procurement Policy with providing overall policy direction for agencies' acquisition of products and services. In accordance with the OFPP Act, the policy letter focuses on the relationship between the federal government and its contractors - that is, entities who are providing a product or service for the direct benefit of an agency under a federal procurement contract. The policy letter is not intended to modify or otherwise affect any rights or limitations set forth under the Act, including either the right of Tribal governments to assume and carry out functions under the ISDEAA or limitations imposed by the ISDEAA on a Tribal government's ability to assume responsibility for an inherently federal function as that term is used under the Act.

d. *Foreign indirect hire employees working with U.S. Forces.* During the disposition of comments, a question was raised regarding the applicability of this guidance to foreign indirect hire employees, as that term is defined in Defense Department (DoD) guidance.

Response: DoD guidance defines indirect hire employees as “local national personnel assigned by the host government to work with U.S. Forces.” This guidance goes on to state that such personnel are not employees of the United States and cannot perform inherently governmental functions." See DOD Financial Management Regulation, Volume 5, Chapter 33, ¶ 330204 (August 2010). Nothing in this policy letter is intended to modify the Department’s guidance. Thus, restrictions on the use of contractors to perform inherently governmental functions would also apply to foreign indirect hire employees working with U.S. Forces.

Daniel I. Gordon

Administrator