

ALERT

OFPP Issues Final Guidance on the Performance of Inherently Governmental Functions

September 12, 2011

The Office of Federal Procurement Policy (OFPP) issued its long-awaited final policy letter on managing the performance of inherently governmental functions. The guidance retains, without broadening, the definition of "inherently governmental function" established in the 1998 Federal Activities Inventory Reform (FAIR) Act, Pub. L. No. 105-270, and provides guidance to agencies regarding the circumstances under which it is appropriate to use contractors to perform so-called "closely associated" and "critical" functions.

The OFPP policy letter, issued on September 9, 2011, addresses direction to the Office of Management and Budget (OMB) in President Obama's March 4, 2009 Memorandum on Government Contracting to clarify when governmental outsourcing of services is appropriate, consistent with section 321 of the Duncan Hunter National Defense Authorization Act (NDAA) for Fiscal Year 2009, Pub. L. No. 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 definition and reasonably applies to all agencies, (ii) establish criteria to be used by agencies to identify "critical" functions and positions that should be performed only by federal employees and (iii) provide guidance to improve internal agency management of functions that are inherently governmental or critical.

As noted above, the policy letter adopts the definition of "inherently governmental function" included in the 1998 FAIR Act, which defines an activity as inherently governmental when it "is so intimately related to the public interest as to mandate performance by Federal

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Government employees." OFPP declined to expand the definition to include critical functions and functions closely associated with inherently governmental 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 most appropriate circumstances, be performed by contractors." The policy letter includes an illustrative list of 24 examples of inherently governmental functions, which includes, among other things, combat and the provision of security under certain circumstances, determining what supplies or services are to be acquired by the Government, and the approval of agency responses to Freedom of Information Act (FOIA) requests.

In addition to inherently governmental functions, the policy letter provides guidance regarding the management and performance of work that is closely associated with inherently governmental functions. When functions that generally are not considered to be inherently governmental approach being in the inherently governmental 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 those 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 of "closely associated" functions, such as supporting budget preparation activities; providing support for development of policies, regulations or legislative proposals; and conducting market research or drafting statements of work in support of an acquisition. In addition, it includes a checklist of responsibilities that must be carried out when agencies rely on contractors to perform such functions.

The policy letter also requires agencies to identify their "critical functions" in order to ensure that they have sufficient internal capability to maintain control over functions that are core to the agency's mission and operations. Critical functions are those functions that are "necessary to the agency being able to effectively perform and maintain control of its mission and operations." Examples include analyzing areas of tax law that impose significant compliance burdens on taxpayers for the Internal Revenue Service and performing mediation services for the Federal Mediation and Conciliation Service.

OFPP made it a point to note in the policy letter that nothing in its guidance is intended to discourage the appropriate use of contractors: "Contractors can provide expertise, innovation, and cost-effective support to Federal agencies for a wide range of services. 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 and overseeing contractor performance."

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 Federal Acquisition Regulation (FAR) to implement the policy letter.