



2120 L Street, NW, Suite 700  
Washington, DC 20037

T 202.822.8282  
F 202.296.8834

HOBBSSTRAUS.COM

April 2, 2010

## GENERAL MEMORANDUM 10-044

### OMB Proposes Guidelines Defining "Inherent Federal Functions"

On March 31, 2010, the Office of Management and Budget (OMB) published the attached proposed guidelines, which appear to define for all purposes "inherent governmental functions" which cannot be delegated to contractors because they must be performed by federal employees. The proposed definition tracks the statutory definition in the Federal Activities Inventory Reform Act, 10 U.S.C. § 2883, which applies to more limited purposes. The Supplementary Information makes clear that the purpose of the new definition is to distinguish between governmental activities and commercial procurements. On their face, the guidelines and the proposed policy letter included in them make no mention of the Indian Self-Determination and Education Assistance Act (ISDEAA) or Indian tribes operating programs under that Act.

However, tribes may wish the guidelines to make special mention of tribal ISDEAA rights to avoid agencies or OMB staff who may not be aware of the unusual right of tribes to administer certain federally-funded programs (especially, but not only, Bureau of Indian Affairs (BIA) and Indian Health Service (IHS) programs) attempting to decline tribal contract proposals. According to OMB, the guidelines are not final and comments are requested from the general public prior to June 1, 2010. While the guidelines state that previous consultations have taken place and that comments have been incorporated in the proposed guidelines, there is no mention of any consultation specifically with Indian tribes or, indeed, any mention of Indian tribes in the published guidelines.

We note a number of specific activities listed in the publication which might be considered to bar tribal contracts under the ISDEAA to administer programs which tribes have historically administered under self-determination or self-governance, including the conduct of criminal investigation, the direction and control of federal employees (see, for example, 25 C.F.R. sections 900.192(e) and 900.198), and determinations on disposal of federal property (see 25 U.S.C. § 450j(f) and 25 U.S.C. § 108(c)(b)(8)).

The federal laws and regulations also make clear that the ISDEAA rights of tribes must be considered when a decision is made that an activity may not be included in an ISDEAA agreement because it must be performed by a federal employee. For example, section 4(j) of the ISDEAA provides that, with one exception, no tribal contract under the ISDEAA "shall be construed as a procurement contract," and section 105(a) provides that no tribal contract under the ISDEAA shall be subject to federal contracting or cooperative agreements laws (including any regulations) except to the

extent that such laws expressly apply to Indian tribes." (See 25 U.S.C. §§ 450b(j) and 450j(a)(1). See also 25 U.S.C. §§ 458aaa-8(h), 458aaa-9, and 458aaa-16(e).)

While section 403(k), enacted in 1996, made clear that agreements with the Interior Department may not expand the authority of the Department to contract for the delegation of "functions that are inherently federal," the ISDEAA does not otherwise address this issue. It is discussed at length with respect to contracting with non-BIA agencies and any constitutional restriction on such delegation in the principal previous authority on this matter, an opinion of the Interior Solicitor, dated May 17, 1996. We do not dispute that there are circumstances in which an ISDEAA contract may not delegate a federal function, but you may wish to make the point to OMB that to avoid misunderstanding their guidelines they should recognize the special rights of tribes under the ISDEAA and the limitations and restrictions on federal agency rejection of a tribal self-determination or self-governance proposal. (See 25 U.S.C. §§ 450f, 458ee, 458-3, and 458-4.)

If you wish our assistance in drafting comments, please let us know as soon as possible in view of the June 1 deadline.

###

Inquiries may be directed to:  
S. Bobo Dean ([sdean@hobbsstrauss.com](mailto:sdean@hobbsstrauss.com)) or  
Geoff Strommer ([gstrommer@hobbsstrauss.com](mailto:gstrommer@hobbsstrauss.com))

to the risk of a slip/fall type accident. The petitioner asserts that this petition upon approval will be mandated throughout the Carlisle Mine and will provide no less than the same measure of protection afforded by the standard.

*Docket Number:* M-2010-015-C.

*Petitioner:* Sunrise Coal, LLC, 1183 East Canvasback Drive, Terre Haute, Indiana 47802.

*Mine:* Carlisle Mine, MSHA I.D. No. 12-02349, located in Sullivan County, Indiana.

*Regulation Affected:* 30 CFR 75.1700 (Oil and gas wells).

*Modification Request:* The petitioner requests a modification of the existing standard to permit mine through or near (whenever the safety barrier diameter is reduced to a distance less than the District Manager would approve pursuant to 75.1700) plugged oil and gas wells penetrating the Indian V coal seam. The petitioner has listed in this petition a complete list of procedures to be utilized when plugging oil and gas wells. Persons may review these procedures at the MSHA address listed in this notice. The petitioner asserts that the proposed alternative method will at all times guarantee no less than the same measure of protection afforded to the miners under 30 CFR 75.1700.

*Docket Number:* M-2010-016-C.

*Petitioner:* Lone Mountain Processing, Inc., Drawer C, St. Charles, Virginia 24282.

*Mine:* Huff Creek No. 1 Mine, MSHA I.D. No. 15-17234, Darby Fork No. 1 Mine, MSHA I.D. No. 15-02263, Clover Fork No. 1 Mine, MSHA I.D. No. 15-18647, all located in Harlan County, Kentucky.

*Regulation Affected:* 30 CFR 75.208 (Warning devices).

*Modification:* The petitioner requests a modification of the existing standard to permit a readily visible warning to be posted, or a physical barrier to be installed on the second row of permanent roof support outby unsupported roof to impede travel beyond permanent support, except during the installation of roof supports. The petitioner asserts that the proposed alternative method will at all times guarantee no less than the same measure of protection afforded by the appropriate portion of 30 CFR 75.208.

Dated: March 26, 2010.

**Patricia W. Silvey,**  
*Director.*

[FR Doc. 2010-7197 Filed 3-30-10; 8:45 am]

**BILLING CODE 4510-43-P**

## LEGAL SERVICES CORPORATION

### Sunshine Act Meetings of the Board of Directors and Five Committees of the Board

#### Notice

**DATE AND TIME:** The Legal Services Corporation Board of Directors will meet on April 7, 2010 at 12 p.m., Eastern Time.

**LOCATION:** Legal Services Corporation, 3333 K Street, NW., Washington, DC 20007, 3rd Floor Conference Center.

**PUBLIC OBSERVATION:** For all meetings and portions thereof open to public observation, members of the public who are unable to attend but wish to listen to the proceedings may do so by following the telephone call-in directions given below. You are asked to keep your telephone muted to eliminate background noises. From time to time the Chairman may solicit comments from the public.

#### Call-in Directions for Open Session(s)

- Call toll-free number: 1-(866) 451-4981;
- When prompted, enter the following numeric pass code: 5907707348;
- When connected to the call, please "MUTE" your telephone immediately.

**STATUS OF MEETING:** Open.

**MATTERS TO BE CONSIDERED:**

#### Board of Directors

##### Agenda

##### Open Session

1. Approval of agenda;
2. Consider and act on nominations for the Chairman of the Board of Directors;
3. Consider and act on nominations for the Vice Chairman of the Board of Directors;
4. Consider and act on delegation to Chairman of authority to make Committee assignments;
5. Public comment;
6. Consider and act on other business;
7. Consider and act on motion to adjourn meeting.

#### CONTACT PERSON FOR INFORMATION:

Katherine Ward, Executive Assistant to the Vice President & General Counsel, at (202) 295-1500. Questions may be sent by electronic mail to [FR\\_NOTICE\\_QUESTIONS@lsc.gov](mailto:FR_NOTICE_QUESTIONS@lsc.gov).

**SPECIAL NEEDS:** Upon request, meeting notices will be made available in alternate formats to accommodate visual and hearing impairments. Individuals who have a disability and need an accommodation to attend the meeting may notify Katherine Ward, at (202)

295-1500 or  
[FR\\_NOTICE\\_QUESTIONS@lsc.gov](mailto:FR_NOTICE_QUESTIONS@lsc.gov).

Dated: March 29, 2010.

**Patricia D. Batie,**  
*Corporate Secretary.*

[FR Doc. 2010-7388 Filed 3-29-10; 4:15 pm]

**BILLING CODE 7050-01-P**

## OFFICE OF MANAGEMENT AND BUDGET

### Office of Federal Procurement Policy

#### Work Reserved for Performance by Federal Government Employees

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

**ACTION:** Notice of proposed policy letter.

**SUMMARY:** The Office of Federal Procurement Policy (OFPP) in the Office of Management and Budget (OMB) is issuing a proposed policy letter to provide guidance to Executive Departments and agencies on circumstances when work must be reserved for performance by Federal government employees. The Presidential Memorandum on Government Contracting, issued on March 4, 2009, directs OMB to clarify when governmental outsourcing of services is, and is not, appropriate, consistent with section 321 of the National Defense Authorization Act (NDAA) for FY 2009. 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/](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://thomas.loc.gov/cgi-bin/query/F?c110:5:./temp/~c110wWVqGQ:e178256>.

*Comment Date:* OFPP invites interested parties from both the public and private sectors to provide comments to be considered in the formulation of the final policy letter. Interested parties should submit comments in writing to

the address below on or before June 1, 2010.

**ADDRESSES:** Comments may be submitted by any of the following methods:

- *E-mail:*

*OFPPWorkReserved@omb.eop.gov.*

- *Facsimile:* 202-395-5105.

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

*Instructions:* Please submit comments only and cite “Proposed OFPP Policy Letter” in all correspondence. All comments received will be posted, without change, to [http://www.whitehouse.gov/omb/procurement/workreserved/work\\_comments.html](http://www.whitehouse.gov/omb/procurement/workreserved/work_comments.html), without redaction, so commenters should not include information that they do not wish to be posted (for example because they consider it personal or business-confidential).

**FOR FURTHER INFORMATION CONTACT:** Mathew Blum, OFPP, (202) 395-4953 or [mblum@omb.eop.gov](mailto:mblum@omb.eop.gov).

**SUPPLEMENTARY INFORMATION:**

**A. Overview**

OFPP is issuing a proposed policy letter to provide guidance addressing when work must be reserved for performance by federal employees. 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 proposed policy letter would:

- *Clarify what functions are inherently governmental and must always be performed by federal employees.* 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, would replace existing definitions in regulation and policy. 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. Examples and tests would be provided to help agencies identify inherently governmental functions.

- *Help agencies identify when other functions (or portions of functions) need to be performed by Federal employees.* Existing guidance addressing functions closely associated with inherently

governmental functions would be strengthened to ensure that performance of such functions does not expand to include performance of inherently governmental functions or otherwise interfere with federal employees’ ability to carry out their inherently governmental responsibilities. In addition, consistent with section 321, a new category, “critical function,” would be defined to help agencies identify and build sufficient internal capacity to effectively perform and maintain control over functions that are core to the agency’s mission and operations.

- *Outline a series of agency management responsibilities to strengthen accountability for the effective implementation of these policies.* Agencies would be required to 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 would also be required to develop agency-level procedures, provide training, and designate senior officials to be responsible for implementation of these policies.

After public comment is considered and the policy letter is finalized, appropriate changes will be made to the Federal Acquisition Regulation (FAR).

**B. Background**

The Presidential Memorandum on Government Contracting requires 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 FY 2009.

Section 321 directed 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 missions and structure; (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 organic 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.

OMB’s OFPP reviewed current laws, regulations, policies, and reports addressing the definition of inherently governmental functions and the reservation of work for government employees. The review was conducted with the assistance of an interagency team that included representatives from the Chief Acquisition Officers Council and the Chief Human Capital Officers Council. As part of this effort, OFPP reviewed the definition of inherently governmental functions in the Federal Activities Inventory Reform Act (FAIR Act), Public Law 105-270, section 2383 of title 10 (which cites to definitions in the Federal Acquisition Regulation (FAR)), the FAR, OMB Circular A-76, OFPP Policy Letter 92-1, *Inherently Governmental Functions* (which was rescinded and superseded by OMB Circular A-76 in 2003) and reports by the Government Accountability Office (GAO). OFPP also reviewed the analyses in a recent report by the Congressional Research Service, *Inherently Governmental Functions and Department of Defense Operations: Background, Issues, and Options for Congress* (June 2009) and relevant findings and recommendations set forth in the *Report of the Acquisition Advisory Panel* (January 2007), available at <https://www.acquisition.gov/comp/aap/documents/Chapter6.pdf>. The Panel concluded, among other things, that “[t]here is a need to assure that the increase in contractor involvement in agency activities does not undermine the integrity of the government’s decision-making processes.” See the Panel’s Report at 392.

To supplement this review, OMB held a public meeting and solicited comments from the public last spring and summer to inform the development of guidance. Comments were specifically sought regarding the definition of inherently governmental functions and criteria for identifying critical functions. See 74 FR 25775 (May 29, 2009) for a copy of the notice. OMB received 11 comments addressing these issues. For a copy of public comments, go to [http://www.whitehouse.gov/omb/assets/procurement\\_govcontracting/public\\_comments.pdf](http://www.whitehouse.gov/omb/assets/procurement_govcontracting/public_comments.pdf). For a transcript

of the public meeting, go to [http://www.whitehouse.gov/omb/assets/procurement\\_gov\\_contracting/transcript\\_public\\_meeting.pdf](http://www.whitehouse.gov/omb/assets/procurement_gov_contracting/transcript_public_meeting.pdf).

Respondents generally favored the definition of “inherently governmental function” found in the FAIR Act. Some concern was raised regarding changes made to the definition by OMB Circular A-76 when the Circular was revised in 2003.

Some respondents recommended that the criteria OMB develops to identify critical functions and positions reserved for federal employees be tied to mission performance. Some cautioned that these criteria should also guard against the contracting out of a function if such action poses too great a risk of creating a single point of mission failure.

However, at least one commenter expressed the view that, as long as the overall function is managed by a federal employee, not every position performing a critical function needs to be performed by federal employees in order to protect the government’s interest and prevent mission failure. Another commenter stated that tasks closely associated with governmental decision-making should not be contracted out unless the government can effectively guard against or otherwise mitigate conflicts of interest.

Based on this review and consideration of the public comments, OFPP has: (1) Developed a proposed policy letter and (2) formulated a list of tailored questions to elicit feedback on specific issues that will help inform its deliberations in shaping final guidance.

### C. Proposed Policy Letter

#### 1. Summary

OFPP has developed a proposed policy letter to improve the rules addressing the proper roles of the public and private sectors in performing work for the government. The policy letter is designed to address a number of weaknesses with existing rules that are affecting the efficiency and effectiveness of government performance. These weaknesses are summarized below along with a brief description of how they would be addressed.

**Concern:** The line has been blurred between functions that are inherently governmental and those that are not, potentially leading to confusion and to inappropriate judgments about when contractors may perform work that should be reserved for performance by Federal employees.

**Proposed actions:** Adopt the FAIR Act definition of “inherently governmental function” as the single government-wide definition of this term. (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.) Develop guidance to help agencies identify whether a given function falls within the definition of “inherently governmental function” or is otherwise closely associated with the performance of inherently governmental functions. Provide tests for analyzing whether a function is inherently governmental based on the nature of the function and the level of discretion to be exercised in performing the function. Reinforce management responsibilities—both before and after contract award—to guard against contractor performance of inherently governmental functions.

**Concern:** Some government organizations may be overly reliant on contractors to perform critical functions that, while not inherently governmental, still need to be performed by Federal employees.

**Proposed actions:** Provide guidance for determining the criticality of functions. Identify criteria for determining when positions dedicated to performing critical functions must or should be reserved for Federal employee performance. Hold appropriate officials accountable for ensuring adequate analysis has been performed to establish the sufficiency of internal capability in the event that contractors are to perform part of the function.

**Concern:** There is insufficient management attention focused on ensuring work is properly reserved for federal employees and maintaining certain critical capability levels in-house. An appropriate governance and review structure must be established to support the successful performance of these duties.

**Proposed actions:** Require agencies to develop agency-level procedures, conduct training, periodically review internal controls used to monitor implementation of this authority, and designate one or more senior officials to be responsible for implementation and maintenance of the policy.

#### 2. Inherently Governmental Functions

There are three main sources for definitions and guidance addressing inherently governmental function: (1) The FAIR Act, (2) the FAR, and (3) OMB Circular A-76.

a. **Definition.** The FAIR Act, FAR, and Circular A-76 each make clear that the term “inherently governmental function” addresses functions that are so intimately related to the public interest as to require performance by federal government employees. There are some

variations in the language used by the three sources to describe the types of functions included in the definition. In particular, the FAIR Act states that the term includes activities that require the “exercise of discretion” in applying “Federal Government authority,” whereas the Circular speaks in terms of the exercise of “substantial discretion” in applying “sovereign” Federal government authority. It is unclear what the impact of this type of variation has been. This notwithstanding, these variations can create confusion and uncertainty.

The proposed policy letter adopts the FAIR Act definition as the single, government-wide definition. This definition reflects longstanding OFPP guidance that had been set out in OFPP Policy Letter 92-1. 57 FR 45096 (September 30, 1992). Most public commenters expressed general satisfaction with the statutory definition in the FAIR Act, while also acknowledging uncertainties as to its construction and application in particular circumstances.

b. **Guidance.** The proposed policy letter provides guidance to help agencies determine whether a given function meets the definition of an “inherently governmental function.” The proposed policy letter retains a list of examples of inherently governmental functions, currently found in FAR Subpart 7.5. OFPP would also create tests for agencies to use in determining whether functions not appearing on the list otherwise fall within the definition of inherently governmental. The “nature of the function” test would ask agencies to consider whether the direct exercise of sovereign power is involved. Such functions are uniquely governmental and, therefore, inherently governmental. The “discretion” test would ask agencies to evaluate whether the discretion associated with the function, when exercised by a contractor, would have the effect of committing the government to a course of action. This test was included in OFPP Policy Letter 92-1, *Inherently Governmental Functions*, and currently may be found in OMB Circular A-76 (see Attachment A, para. B(1)(b)), which rescinded Policy Letter 92-1.

OFPP seeks to clarify and reinforce that agencies have both pre-award and post-award responsibilities for evaluating whether a function is inherently governmental and taking steps to avoid transferring inherently governmental authority to a contractor, such as through inadequate attention to contract administration. For proposed work, a determination that the work is not inherently governmental should be made prior to issuance of the

solicitation, preferably during acquisition planning. For ongoing contracts, agencies should review how work is performed, focusing, in particular, on functions that are closely associated with inherently governmental activities and professional and technical services, to ensure the scope of the work or the circumstances have not changed to the point that inherently governmental authority has been transferred to the contractor.

### *3. Functions That Are Closely Associated With Inherently Governmental Functions*

Policy guidance addressing inherently governmental functions must also address functions closely associated with inherently governmental functions to properly ensure that work that is intimately related to the public interest is performed by Federal employees. Closely associated functions approach the status of inherently governmental work because of the nature of these functions and the risk that their performance, if not appropriately managed, may materially limit Federal officials' performance of inherently governmental functions.

The proposed policy letter retains an illustrative list of functions closely associated with inherently governmental functions from current FAR coverage. The guidance requires agencies to take a number of steps related to these functions. First, the proposed policy letter reiterates the requirement set forth in section 736 of Division D of the Omnibus Appropriations Act, 2009, Public Law 111-8, to give special consideration to reserving these functions to performance by federal employees. Second, the proposed policy letter lays out the responsibilities agencies must perform if they determine that contractor performance of a function closely associated with an inherently governmental function is appropriate. These responsibilities include pre-establishing in the contract specified ranges of acceptable decisions, subjecting the contractor's discretionary decision to final approval by an agency official, assigning a sufficient number of qualified federal employees with appropriate expertise to administer the work, and taking steps to avoid or mitigate conflicts of interest. Each of these actions is designed to help ensure that the contractor's activities do not expand to include inherently governmental responsibilities. Although these actions should currently be taken, they are not enumerated in one guidance document and often are given insufficient management attention (see

paragraph 5, below, for additional discussion on new agency responsibilities for management and monitoring).

### *4. Critical functions*

Since at least the early 1990s, government-wide policy addressing when work must be reserved for Federal employees has focused almost exclusively on the definition of "inherently governmental" functions and functions closely associated with inherently governmental functions. This narrow focus has been cited as a cause of inadequate attention to maintaining a residual Federal core capability when considering contractor performance of critical functions that are tied to an agency's mission. The Acquisition Advisory Panel, established by Congress in 2003 to review the federal acquisition system, concluded in its 2007 report that the consequences of this inattention to contractor performance of critical functions include "the loss of institutional memory, the inability to be certain whether the contractor is properly performing the specified work at a proper price and the inability to be sure that decisions are being made in the public interest rather than in the interest of the contractors performing the work." Following the issuance of the Panel's report, Congress, in the FY 2009 NDAA, directed OMB to develop criteria for agencies to use in identifying "critical" functions and in determining when such functions, or parts thereof, must be retained for performance by federal employees.

Consistent with section 321 of the FY 2009 NDAA, the proposed policy letter provides guidance to address the handling of critical functions and the maintenance of a core capability by Federal employees. The proposed policy letter would define critical function to mean a function whose importance to the agency's mission and operation requires that at least a portion of the function must be reserved to federal employees in order to ensure the agency has sufficient internal capability to effectively perform and maintain control of its mission and operations. Agencies would be held responsible for ensuring a sufficient number of positions performing critical work are filled by federal employees with appropriate training, experience, and expertise to understand the agency's requirements, formulate alternatives, manage the work product, and manage any contractors used to support the Federal workforce. The proposed guidance would also require agencies to evaluate whether they have sufficient internal capability on a case-by-case basis, taking into

account factors such as the agency's mission, the complexity of the function and need for specialized skill, and the effect of contractor default on mission performance. The proposed guidance is built around the general principle that the more critical a function is, the greater the need for internal capability to maintain control of the agency's mission and operations. This is most obviously the case where the function is critical to achievement of the agency's core mission, but even for functions that may not be viewed as critical, such as functions that are not directly involved in performing the core mission, the agency may determine that the function is, nonetheless, sensitive enough as to require that many, most, or, in some situations, all positions be filled by Federal employees.

Finally, if an agency determines that it has sufficient internal capability to control its mission and operations, the proposed policy would require the consideration of cost to establish the extent to which additional critical work is performed by Federal employees, unless performance and risk considerations in favor of Federal employee performance would clearly outweigh cost considerations.

### *5. Management Attention*

A clear understanding of responsibilities and heightened management attention will be required to ensure that work that should be performed by Federal employees is reserved for performance by them.

The proposed policy letter lays out the determinations that must be documented by the agency head or designated requirements official before a contract solicitation is issued to show that functions to be acquired by contract are not inherently governmental. It would also require agencies to determine (also before issuing a solicitation) that they have sufficient internal capability to control their mission and operations. During contract performance, agencies would be required to (1) monitor how contractors are performing contracts, especially those involving work closely associated with inherently governmental functions or professional and technical services, and (2) take appropriate action where internal control of mission and operations is at risk due to inappropriate or excessive reliance on contractors to perform critical functions.

Finally, the proposed policy letter would require agencies to strengthen internal agency management. Each agency with 100 or more full-time federal employees in the prior fiscal year would be required to identify one

or more senior officials to be accountable for the development and implementation of agency policies, procedures, and training to ensure the appropriate reservation of work for federal employees. The selected officials would be expected to facilitate the meaningful involvement of all relevant offices. In addition, agencies would be expected to develop and maintain (1) internal procedures, to be reviewed by agency management every two years, and (2) training plans to help their employees understand and meet their responsibilities.

#### D. Solicitation of Public Comment

OFPP welcomes comments on the proposed policy letter. Respondents are also encouraged to offer their views on the following questions, many of which are designed to help elicit feedback on specific aspects of the draft guidance.

##### 1. Definitions

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

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?

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

##### 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?

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?

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?

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?

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?

##### 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?

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?

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

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?

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

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

##### 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?

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.

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?

##### 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?

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?

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

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?

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?

#### 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?

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?

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?

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

#### 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.

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?

#### 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?

#### 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?

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 Federal employees and those that may continue to be performed by contractors?

#### Daniel I. Gordon,

Administrator, Office of Federal Procurement Policy.

Policy Letter No. 10-XX

To the Heads of Executive Departments And Establishments

Subject: Work Reserved for Performance by Federal Government Employees

1. Purpose. This guidance establishes Executive Branch policy addressing when work must be reserved for performance by federal employees. The policy is intended to assist agency officers and employees in ensuring that only federal employees perform work that is inherently governmental or otherwise needs to be reserved to the public sector.

Nothing in this 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 contractor performance.

2. Authority. This policy letter is issued pursuant to section 6(a) of the Office of Federal Procurement Policy Act, 41 U.S.C. 405(a), the President's March 4, 2009, *Memorandum on Government Contracting*, and section 321 of the FY 2009 National Defense Authorization Act, Public Law 110-417.

#### 3. Definitions.

"*Inherently governmental function*," as defined in section 5 of the Federal Activities Inventory Reform Act, Public Law 105-270, means a function that is so intimately related to the public interest as to require performance by Federal Government employees.

(a) The term includes functions that require either the exercise of discretion in applying Federal Government authority or the making of value judgments in making decisions for the Federal Government, including judgments relating to monetary transactions and entitlements. An inherently governmental function involves, among other things, the interpretation and execution of the laws of the United States so as—

(1) To bind the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;

(2) To determine, protect, and advance United States economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise;

(3) To significantly affect the life, liberty, or property of private persons;

(4) To commission, appoint, direct, or control officers or employees of the United States; or

(5) To exert ultimate control over the acquisition, use, or disposition of the property, real or personal, tangible or intangible, of the United States, including the collection, control, or disbursement of appropriations and other Federal funds.

(b) The term does not normally include—

(1) Gathering information for or providing advice, opinions, recommendations, or ideas to Federal Government officials; or

(2) Any function that is primarily ministerial and internal in nature (such as building security, mail operations, operation of cafeterias, housekeeping, facilities operations and maintenance, warehouse operations, motor vehicle fleet management operations, or other routine electrical or mechanical services).

"*Critical function*" means a function that is necessary to the agency being able to effectively perform and maintain control of its mission and operations. A function that would not expose the agency to risk of mission failure if performed entirely by contractors is not a critical function.

4. Policy. It is the policy of the Executive Branch to ensure that government action is taken as a result of informed, independent judgments made by government officials. Adherence to this policy will ensure that the act of governance is performed, and decisions of significant public interest are made, by officials who are ultimately accountable to the President and bound by laws controlling the conduct and performance of Federal employees that are intended to protect or

benefit the public and ensure the proper use of funds appropriated by Congress. To implement this policy, agencies must reserve certain work for performance by federal employees and take special care to retain sufficient management oversight over how contractors are used to support government operations and ensure that Federal employees have the technical skills and expertise needed to maintain control of the agency mission and operations.

(a) *Performance of work by federal employees.* To ensure that work that should be performed by federal employees is properly reserved for government performance, agencies shall:

(1) Ensure that service contractors do not perform inherently governmental functions (see section 5-1);

(2) Give special consideration to federal employee performance of functions closely associated with inherently governmental functions and, when such work is performed by contractors, provide greater attention and an enhanced degree of management oversight of the contractors' activities to ensure that contractors' duties do not expand to include performance of inherently governmental functions (see section 5-2a); and

(3) Ensure that federal employees perform critical functions to the extent necessary for the agency to operate effectively and maintain control of its mission and operations (see section 5-2b).

(b) *Management of federal contractors.* When work need not be reserved for Federal performance and contractor performance is appropriate, agencies shall take steps to employ an adequate number of government personnel to ensure that contract administration protects the public interest through the active and informed management and oversight of contractor performance, especially where contracts have been awarded for the performance of critical functions, functions closely associated with the performance of inherently governmental functions, or where, due to the nature of the contract services provided, there is a potential for confusion as to whether an activity is being performed by government employees or contractors. Contract management should be appropriate to the nature of the contract, ensure that the contract is under the control of government officials at all times, and make clear to the public when citizens are receiving service from contractors.

(c) *Strategic human capital planning.* (1) As part of strategic human capital planning, agencies shall—

(i) Dedicate a sufficient amount of work on critical functions to performance by federal employees in order to build competencies (both knowledge and skills), provide for continuity of operations, and retain institutional knowledge of government operations, including those unique to the agency's mission;

(ii) Ensure that sufficient personnel is available to manage and oversee the contractor's performance and evaluate and approve or disapprove the contractor's work products and services, recruiting and retaining the necessary federal talent where it is lacking; and

(iii) Consider the impact of decisions to establish a specified level of government employee authorizations (or military end strength) or available funding on the ability to use Federal employees for work that should be reserved for performance by such employees.

(2) Agencies' annual Human Capital Plan for Acquisition shall identify specific strategies and goals for addressing both the size and capability of the acquisition workforce, including program managers and contracting officer technical representatives. The number of personnel required to administer a particular contract is a management decision to be made after analysis of a number of factors. These include, among others:

- (i) The scope of the activity in question;
- (ii) The technical complexity of the project or its components;
- (iii) The technical capability, numbers, and workload of federal management officials;
- (iv) The inspection techniques available;
- (v) The proven adequacy and reliability of contractor project management;
- (vi) The sophistication and track record of contract administration organizations within the agency; and
- (vii) The importance and criticality of the function.

5. Implementation guidelines and responsibilities. Agencies shall use the guidelines below to determine (1) whether their requirements involve the performance of inherently government functions, functions closely associated with inherently governmental functions, or critical functions; and (2) the type and level of management attention necessary to ensure that functions that should be reserved for federal performance are not materially limited by or effectively transferred to contractors. The latter determination typically requires agencies to consider the totality of circumstances surrounding how, where, and when work is to be performed.

5-1. Inherently governmental functions. Agencies shall ensure that inherently governmental functions are reserved exclusively for performance by federal employees.

(a) *Determining whether a function is inherently governmental.* Every federal government organization performs some work that is so intimately related to the public interest as to require performance by federal government employees. Agencies should review the definition of inherently governmental function in section 3, any other statutory provisions that identify a function as inherently governmental, and the illustrative list of inherently governmental functions in Appendix A. In no case should any function described in the definition, identified in statute as inherently governmental, or appearing on the list be considered for contract performance. If a function is not listed in Appendix A or identified in a statutory provision as inherently governmental, agencies should determine whether the function otherwise falls within the definition in section 3 by evaluating, on a case-by-case basis, the nature of the work and the level of discretion associated with performance of the work

using the tests below. A function meeting either of these tests would be inherently governmental.

(1) The nature of the function. Functions which involve the exercise of sovereign powers—that is, powers that are uniquely governmental—are inherently governmental by their very nature. Examples of functions that, by their nature, are inherently governmental are an ambassador representing the United States, a police officer arresting a person, and a judge sentencing a person convicted of a crime to prison. A function may be classified as inherently governmental based strictly on its uniquely governmental nature and without regard to the type or level of discretion associated with the function.

(2) The exercise of discretion. (i) A function requiring the exercise of discretion shall be deemed inherently governmental if the exercise of such discretion commits the government to a course of action where two or more alternative courses of action exist and decision making is not already limited or guided by existing policies, procedures, directions, orders, and other guidance that:

(A) Identify specified ranges of acceptable decisions or conduct concerning the overall policy or direction of the action; and

(B) Subject the discretionary authority to final approval or regular oversight by agency officials.

(ii) The fact that decisions are made, and discretion exercised, by a contractor in performing its duties under the contract—such as how to allocate the contractor's own or subcontract resources, what conclusions to emphasize and, unless specified in the contract, what techniques and procedures to employ, whether and whom to consult, what research alternatives to explore given the scope of the contract, or how frequently to test—is not determinative of whether the contractor is performing an inherently government function. A function involving the exercise of discretion may be appropriately performed consistent with the restrictions in this section where the contractor does not have the authority to decide on the overall course of action, but is tasked to develop options or implement a course of action, and the agency official has the ability to countervail the contractor's action. By contrast, contractor performance would be inappropriate where the contractor's involvement is or would be so extensive, or the contractor's work product so close to a final agency product, as to effectively preempt the federal officials' decision-making process, discretion or authority.

(b) *Responsibilities—(1) Pre-award.* Agencies shall determine prior to issuance of a solicitation that none of the functions to be contracted are inherently governmental. The agency head or designated requirements official shall provide the contracting officer, concurrent with transmittal of the statement of work (or any modification thereof), a written determination that none of the functions to be performed are inherently governmental. If a function is not listed in Appendix A, it still may be inherently governmental. Accordingly, the determination should take into consideration, as necessary, the tests in

paragraph (a). The file should include the analysis that supports the determination and this analysis should establish, at a minimum, that:

(i) The function to be contracted does not appear on the list in Appendix A;

(ii) A statute, such as an annual appropriations act, does not identify the function as inherently governmental or otherwise require it to be performed by Federal employees; and

(iii) The proposed role for the contractor is not so extensive that the ability of senior agency management to develop and consider options is or would be preempted or inappropriately restricted.

(2) *Post-award.* Agencies should review, on an ongoing basis, the functions being performed by their contractors, paying particular attention to the way in which contractors are performing, and agency personnel are managing, contracts involving functions that are closely associated with inherently governmental functions (see subsections 5-2a and Appendix B) or contracts for professional and technical services. If a determination is made that the contractor is performing work that is inherently governmental (or involves unauthorized personal services), but the contract, properly defined, does not entail performance of inherently governmental functions, the agency shall take prompt action to ensure performance by government employees of the inherently governmental responsibilities. In some cases, government control over, and performance of, these responsibilities can be reestablished by strengthening contract oversight using government employees with appropriate subject matter expertise and following the protocols identified in FAR 37.114 (see also section 5.2a, below). In other cases, agencies may need to in-source work on an accelerated basis through the timely development and execution of a hiring plan timed, if possible, to permit the non-exercise of an option or the termination of that portion of the contract being used to fulfill inherently governmental responsibilities.

5-2. Other work that must be reserved for federal employees. In some cases, work that is not inherently governmental must also be reserved for performance by federal employees. Such reservation will be required under certain circumstances for functions that are closely associated with the performance of inherently governmental functions and critical functions.

5-2a. Functions closely associated with the performance of inherently governmental functions. Agencies shall give special consideration to federal employee performance of functions closely associated with inherently governmental functions.

(a) *Determining whether a function is closely associated with the performance of an inherently governmental function.* Certain services and actions that generally are not considered to be inherently governmental functions may 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. Appendix B provides a list of examples of functions

that are closely associated with the performance of inherently governmental functions.

(b) *Special consideration for federal employee performance.*

(1) If the agency determines the function is closely associated with the performance of an inherently governmental function, section 736 of Division D of the Omnibus Appropriations Act, 2009, Public Law 111-8, requires civilian agencies subject to the FAIR Act to give special consideration to using federal employees to perform the function. Civilian agencies shall refer to OMB Memorandum M-09-26, Managing the Multi-Sector Workforce (July 29, 2009), Attachment 3 for criteria addressing the in-sourcing of work under Public Law 111-8. Memorandum M-09-26 explains that federal employee performance would be expected if either contractor performance causes the agency to lack sufficient internal expertise to maintain control of its mission and operations or analysis suggests that public sector performance is more cost effective and it is feasible to hire federal employees to perform the function. The OMB Memorandum is available at [http://www.whitehouse.gov/omb/assets/memoranda\\_fy2009/m-09-26.pdf](http://www.whitehouse.gov/omb/assets/memoranda_fy2009/m-09-26.pdf).

(2) The Department of Defense shall—

(i) Ensure special consideration is given to federal employee performance consistent with the requirements of 10 U.S.C. 2463; and

(ii) To the maximum extent practicable, minimize reliance on contractors performing functions closely associated with inherently governmental functions consistent with 10 U.S.C. 2330a.

(c) *Responsibilities.* If the agency determines that contractor performance of a function closely associated with an inherently governmental function is appropriate and cost-effective, the agency shall—

(1) Limit or guide a contractor's exercise of discretion and retain control of government operations by both—

(i) Pre-establishing in the contract specified ranges of acceptable decisions and/or conduct; and

(ii) Pre-establishing a process for subjecting the contractor's discretionary decisions and/or conduct to final approval by the agency official;

(2) Assign a sufficient number of qualified government employees, with expertise to administer or perform the work, to give heightened management attention to the contractor's activities, in particular, to ensure that they do not expand to include inherently governmental functions, are not performed in ways not contemplated by the contract so as to become inherently governmental, do not undermine the integrity of the government's decision-making process, and do not interfere with federal employees' performance of the closely-associated inherently governmental functions (see section 5-1(b)(2) for guidance on steps to take where a determination is made that the contract is being used to fulfill responsibilities that are inherently governmental);

(3) Ensure that a reasonable identification of contractors and contractor work products is made whenever there is a risk that Congress, the public, or other persons outside

of the government might confuse contractor personnel or work products with government officials or work products, respectively; and

(4) Take appropriate steps to avoid or mitigate conflicts of interest, such as by:

(i) Conducting pre-award conflict of interest reviews, to ensure contract performance is in accordance with objective standards and contract specifications, and developing a conflict of interest mitigation plan, if needed, that identifies the conflict and specific actions that will be taken to lessen the potential for conflict of interest or reduce the risk involved with a potential conflict of interest;

(ii) Physically separating contractor personnel from government personnel at the worksite;

(iii) Ensuring contractors are clearly identified as such in work product and on work support systems, such as in electronic mail systems and phone messaging systems, and on signature blocks, security and other identification badges, and office name plates;

(iv) Having contractor personnel work off-site, if cost-effective and without derogation to the work to be performed;

(v) Excluding contractors from subsequent competitions if conflicts cannot be avoided; or

(vi) Performing work with federal employees if (A) contractor conflicts cannot be satisfactorily resolved or (B) decision-making would be at risk of being transferred to the private sector because contractors have such influence and insight into government decision making or government officials would rely too heavily on contractor inputs (or rely almost exclusively on contractor fact-finding or memory).

(5) Make a written determination concurrent with transmittal of the statement of work (or any modification thereof) to the contracting officer that

(i) The function is closely associated with an inherently governmental function;

(ii) Private sector performance of the function is appropriate and the most cost effective source of support for the agency; and

(iii) The agency has sufficient internal capability to control its missions and operations, oversee the contractor's performance of the contract, limit or guide the contractor's exercise of discretion, ensure reasonable identification of contractors and contractor work products, and avoid or mitigate conflicts of interest and unauthorized personal services.

5-2b. Critical functions. Agencies shall dedicate a sufficient number of federal employees to the performance of critical functions so that federal employees may maintain control of agencies' mission and operations.

(a) *Criteria for determining when critical positions must be reserved for federal employee performance.* Determining the criticality of a function requires the exercise of informed judgment by agency officials. In making that determination, the officials shall consider the importance that a function holds for the agency and its mission and operations. The more critical the function, the more important that the agency have internal capability to maintain control of its

mission and operations. Examples of highly critical functions might include: designing and constructing the next generation of satellites at the National Aeronautics and Space Administration, analyzing areas of tax law that impose significant compliance burdens on taxpayers for the Internal Revenue Service's Office of the Taxpayer Advocate, and performing mediation services for the Federal Mediation and Conciliation Service. Where a critical function is not inherently governmental, the agency may appropriately consider filling positions dedicated to the function with both federal employees and contractors. However, to meet its fiduciary responsibility to the taxpayers, the agency must have a sufficient internal capability to control its mission and operations and must ensure it is cost effective to contract for the services.

(1) Sufficient internal capability—

(i) Generally requires that an agency have an adequate number of positions filled by federal employees with appropriate training, experience, and expertise (organic and technical) to understand the agency's requirements, formulate alternatives, take other appropriate actions to properly manage and be accountable for the work product, and continue critical operations in the event of contractor default; and

(ii) Further requires that an agency have the ability and internal expertise to manage any contractors used to support the federal workforce and evaluate their work product.

(2) Determinations concerning what constitutes sufficient internal capability must be made on a case-by-case basis taking into account, among other things:

(i) The agency's mission;

(ii) The complexity of the function and the need for specialized skill;

(iii) The current strength of the agency's in-house organic and technical expertise;

(iv) The current strength (capability and capacity) of the agency's acquisition workforce;

(v) The effect of contractor default on mission performance; and

(vi) The enforceability of criminal sanctions for crimes performed by contractors as compared to those applicable to federal employees.

(b) *Responsibilities*—(1) *Pre-award*. (i) Agencies shall determine prior to issuance of a solicitation for private-sector performance of any aspect of a critical function that the agency has sufficient internal capability to control its mission and operations. The agency head or designated requirements or human capital official shall provide the contracting officer, concurrent with transmittal of the statement of work (or any modification thereof) a written determination and analysis.

(ii) If an agency has sufficient internal capability to control its mission and operations, the extent to which additional work is performed by federal employees should be determined consistent with the parameters set forth in subsection (2)(ii) below.

(2) *Post-award*. (i) Agencies should be alert for situations where internal control of mission and operations is at risk due to overreliance on contractors to perform

critical functions. In these situations, requiring activities should work with their human capital office to develop and execute a hiring and/or development plan. Requiring activities should also work with the acquisition office to address the handling of ongoing contracts and the budget and finance offices to secure the necessary funding to support the needed in-house capacity. Agencies should also consider application of the responsibilities outlined in 5–2a(c), as appropriate.

(ii) If an agency has sufficient internal capability to control its mission and operations, the extent to which additional work is performed by federal employees should be based on cost considerations unless performance and risk considerations in favor of federal employee performance will clearly outweigh cost considerations. Supporting cost analysis should address the full costs of government and private sector performance and provide like comparisons of costs that are of a sufficient magnitude to influence the final decision on the most cost effective source of support for the organization.

6. Additional agency responsibilities. (a) *Duty of federal employees*. Every federal employee has an obligation to help avoid the performance by contractors of responsibilities that should be reserved to federal employees. As part of this obligation, federal employees who rely on contracts or their work product must take appropriate steps, in accordance with agency procedures, to ensure that any final agency action complies with the laws and policies of the United States and reflects the independent conclusions of agency officials and not those of contractors, who may not be motivated solely by the public interest, and who may be beyond the reach of management controls applicable to federal employees. These steps shall include increased attention and examination where contractor work product involves advice, opinions, recommendations, reports, analyses, and similar deliverables that are to be considered in the course of a federal employee's official duties and may have the potential to influence the authority, accountability, and responsibilities of the employee.

(b) *Development of agency procedures*. Agencies shall develop and maintain internal procedures to address the requirements of this guidance. Such procedures shall be reviewed by agency management no less than every two years.

(c) *Training*. Agencies shall develop training plans to help their employees understand and meet their responsibilities under this guidance. The plan should include training, no less than every two years, to improve employee awareness of their responsibilities.

(d) *Review of internal management controls*. Agencies should periodically evaluate the effectiveness of their internal management controls for reserving work for federal employees and identify any material weaknesses in accordance with OMB Circular A–123, Management's Responsibility for Internal Control, and OFPP's Guidelines for Assessing the Acquisition Function, available at [http://](http://www.whitehouse.gov/omb/assets/omb/procurement/memo/a123_guidelines.pdf)

[www.whitehouse.gov/omb/assets/omb/procurement/memo/a123\\_guidelines.pdf](http://www.whitehouse.gov/omb/assets/omb/procurement/memo/a123_guidelines.pdf)

(e) *Designation of responsible management official(s)*. Each federal agency with 100 or more full-time employees in the prior fiscal year shall identify one or more senior officials to be accountable for the development and implementation of agency policies, procedures, and training to ensure the appropriate reservation of work for federal employees in accordance with this guidance. Each such agency shall submit the names and titles of the designated officials, along with contact information, to OMB by June 30 of each year. This information may be provided with the agency's submission of commercial and inherently governmental activities submitted pursuant to the FAIR Act and OMB Circular A–76.

7. Federal Acquisition Regulatory Council. Pursuant to subsections 6(a) and 25(f) of the Office of Federal Procurement Policy Act, 41 U.S.C. 405(a) and 421(f), the Federal Acquisition Regulatory Council shall ensure that the policies established herein that pertain to the acquisition of services are incorporated in the FAR in a timely manner.

8. Judicial review. This policy letter is not intended to provide a constitutional or statutory interpretation of any kind and it is not intended, and should not be construed, to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person. It is intended only to provide policy guidance to agencies in the exercise of their discretion concerning federal contracting. Thus, this policy letter is not intended, and should not be construed, to create any substantive or procedural basis on which to challenge any agency action or inaction on the ground that such action or inaction was not in accordance with this policy letter.

9. Effective date. This policy letter is effective [insert date 30 days after issuance of final policy letter]

## Appendix A. Examples of inherently governmental functions

The following is an illustrative list of functions considered to be inherently governmental.

1. The direct conduct of criminal investigation.

2. The control of prosecutions and performance of adjudicatory functions (other than those relating to arbitration or other methods of alternative dispute resolution).

3. The command of military forces, especially the leadership of military personnel who are members of the combat, combat support or combat service support role.

4. The conduct of foreign relations and the determination of foreign policy.

5. The determination of agency policy, such as determining the content and application of regulations, among other things.

6. The determination of Federal program priorities or budget requests.

7. The direction and control of Federal employees.

8. The direction and control of intelligence and counter-intelligence operations.

9. The selection or non-selection of individuals for Federal Government employment.

10. The approval of position descriptions and performance standards for Federal employees.

11. The determination of what Government property is to be disposed of and on what terms (although an agency may give contractors authority to dispose of property at prices with specified ranges and subject to other reasonable conditions deemed appropriate by the agency).

12. In Federal procurement activities with respect to prime contracts:

(a) determining what supplies or services are to be acquired by the Government (although an agency may give contractors authority to acquire supplies at prices within specified ranges and subject to other reasonable conditions deemed appropriate by the agency);

(b) participating as a voting member on any source selection boards;

(c) approval of any contractual documents, to include documents defining requirements, incentive plans, and evaluation criteria;

(d) awarding contracts;

(e) administering contracts (including ordering changes in contract performance or contract quantities, taking action based on evaluations of contractor performance, and accepting or rejecting contractor products or services);

(f) terminating contracts;

(g) determining whether contract costs are reasonable, allocable, and allowable; and

(h) participating as a voting member on performance evaluation boards.

13. The approval of agency responses to Freedom of Information Act requests (other than routine responses that, because of statute, regulation, or agency policy, do not require the exercise of judgment in determining whether documents are to be released or withheld), and the approval of agency responses to the administrative appeals of denials of Freedom of Information Act requests.

14. The conduct of administrative hearings to determine the eligibility of any person for a security clearance, or involving actions that affect matters of personal reputation or eligibility to participate in government programs.

15. The approval of federal licensing actions and inspections.

16. The determination of budget policy, guidance, and strategy.

17. The collection, control, and disbursement of fees, royalties, duties, fines, taxes and other public funds, unless authorized by statute, such as title 31 U.S.C. 952 (relating to private collection contractors) and title 31 U.S.C. 3718 (relating to private attorney collection services), but not including:

(a) collection of fees, fines, penalties, costs or other charges from visitors to or patrons of mess halls, post or base exchange concessions, national parks, and similar entities or activities, or from other persons, where the amount to be collected is easily calculated or predetermined and the funds collected can be easily controlled using standard cash management techniques, and

(b) routine voucher and invoice examination.

18. The control of the Treasury accounts.

19. The administration of public trusts.

20. The drafting of Congressional testimony, responses to Congressional correspondence, or agency responses to audit reports from the Inspector General, the Government Accountability Office, or other federal audit entity.

#### **Appendix B. Examples of functions closely associated with the performance of inherently governmental functions**

The following is an illustrative list of functions that are closely associated with the performance of inherently governmental functions.

1. Services that involve or relate to budget preparation, including workforce modeling, fact finding, efficiency studies, and should-cost analyses.

2. Services that involve or relate to reorganization and planning activities.

3. Services that involve or relate to analyses, feasibility studies, and strategy options to be used by agency personnel in developing policy.

4. Services that involve or relate to the development of regulations.

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 (particular 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.

10. Support in preparing responses to Freedom of Information Act requests.

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)).

12. Dissemination of information regarding agency policies or regulations, such as attending conferences on behalf of an agency, conducting community relations campaigns, or conducting agency training courses.

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.

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

19. Provision of special non-law-enforcement security activities that do not directly involve criminal investigations, such

as prisoner detention or transport and non-military national security details.

[FR Doc. 2010-7329 Filed 3-30-10; 8:45 am]

**BILLING CODE P**

---

#### **MORRIS K. UDALL AND STEWART L. UDALL FOUNDATION**

##### **Sunshine Act Meetings**

*Time and Date:* 9 a.m. to 12 p.m., Friday, April 16, 2010.

*Place:* The offices of the Morris K. Udall and Stewart L. Udall Foundation, 130 South Scott Avenue, Tucson, AZ 85701.

*Status:* This meeting will be open to the public, unless it is necessary for the Board to consider items in executive session.

*Matters To Be Considered:* (1) A report on the U.S. Institute for Environmental Conflict Resolution; (2) A report from the Udall Center for Studies in Public Policy; (3) A report on the Native Nations Institute; (4) Program Reports; and (5) A Report from the Management Committee.

*Portions Open to the Public:* All sessions with the exception of the session listed below.

*Portions Closed to the Public:* Executive session.

*Contact Person for More Information:* Ellen K. Wheeler, Executive Director, 130 South Scott Avenue, Tucson, AZ 85701, (520) 901-8500.

Dated: March 24, 2010.

**Ellen K. Wheeler,**

*Executive Director, Morris K. Udall and Stewart L. Udall Foundation, and Federal Register Liaison Officer.*

[FR Doc. 2010-7012 Filed 3-30-10; 8:45 am]

**BILLING CODE 6820-FN-M**

---

#### **NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**[Notice (10-036)]**

##### **NASA Advisory Council; Space Operations Committee; Meeting**

**AGENCY:** National Aeronautics and Space Administration.

**ACTION:** Notice of meeting.

**SUMMARY:** In accordance with the Federal Advisory Committee Act, Public Law 92-463, as amended, the National Aeronautics and Space Administration announces a meeting of the NASA Advisory Council Space Operations Committee.

**DATES:** Tuesday, April 13, 2010, 3-5 p.m. CDT.

**ADDRESSES:** NASA Johnson Space Center's Gilruth Center, Lone Star