

Inherently Governmental Functions and Other Work Reserved for Performance by Federal Government Employees: The Obama Administration's Proposed Policy Letter

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January 3, 2011

Congressional Research Service

7-....

www.crs.gov

R41209

Summary

On March 31, 2010, the Office of Federal Procurement Policy (OFPP) in the Office of Management and Budget (OMB) issued a proposed policy letter on inherently governmental functions and other “work reserved for performance by federal government employees.” While not final, the policy letter represents the Obama Administration’s proposed guidance for agencies determining (1) whether particular functions are inherently governmental and (2) when functions closely associated with the performance of inherently governmental functions and critical functions should be performed by government personnel. Under existing law, agencies cannot contract out inherently governmental functions, and they must give “special consideration” to using government personnel in performing functions closely associated with the performance of inherently governmental functions. No limitations upon contracting out critical functions currently exist.

In keeping with the requirements of Section 321 of the Duncan Hunter National Defense Authorization Act for FY2009 (P.L. 110-417), which tasked OMB with developing a “single consistent definition” of “inherently governmental function,” the proposed policy letter adopts the definition of the Federal Activities Inventory Reform (FAIR) Act. The FAIR Act defines an “inherently governmental function” as one that is “so intimately related to the public interest as to require performance by Federal Government employees.” However, neither the proposed policy letter nor the notice from OFPP introducing it indicates whether or how the Obama Administration would amend the definitions of “inherently governmental function” in the Federal Acquisition Regulation, OMB Circular A-76, or other executive branch regulations and policy documents.

The proposed policy letter defines a “critical function” as one that is “necessary to the agency being able to effectively perform and maintain control of its mission and operations.” This definition, and the accompanying guidance on when critical functions and functions associated with the performance of inherently governmental functions should be performed in-house, also respond to the requirements of Section 321 of the Duncan Hunter National Defense Authorization Act. Among other things, Section 321 tasked OMB with developing criteria that agencies could use in identifying critical functions and positions that should be performed by government personnel to ensure that agencies develop and maintain “sufficient organic expertise and technical capacity.” President Obama’s March 4, 2009, memorandum on government contracting similarly charged OMB with clarifying when outsourcing is “appropriate.”

The proposed policy letter raises several legal and policy issues of potential interest to Congress, given recently enacted and proposed legislation regarding inherently governmental functions and other limitations upon contracting out (e.g., P.L. 111-8, P.L. 111-84, P.L. 111-117). Key among these issues are (1) the relationship between the proposed policy letter and other executive branch authorities on inherently governmental and related functions; (2) whether the proposed policy letter would necessarily result in changes in agencies’ use of contractors to perform certain functions that some Members of Congress and commentators claim are inherently governmental (e.g., security services during contingency operations); and (3) the potential demands of any new requirements upon the acquisition workforce.

The Office of Federal Procurement Policy has reportedly indicated that a final policy letter will be released “in early 2011.”

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Introduction

On March 31, 2010, the Office of Federal Procurement Policy (OFPP) in the Office of Management and Budget (OMB) issued a proposed policy letter on inherently governmental functions and other “work reserved for performance by federal government employees.”¹ While not final, the policy letter represents the Obama Administration’s proposed guidance for agencies determining (1) whether particular functions are inherently governmental and (2) when functions closely associated with the performance of inherently governmental functions and critical functions should be performed by government personnel. The proposed policy letter was, in part, issued under the authority of the Duncan Hunter National Defense Authorization Act for FY2009 (NDAA’09) and President Obama’s memorandum of March 4, 2009, on government contracting.² Section 321 of NDAA’09 tasked OMB with (1) reviewing existing definitions of “inherently governmental function” to determine whether such definitions are “sufficiently focused” to ensure that only government personnel perform inherently governmental functions or “other critical functions necessary for the mission of a Federal department or agency;” (2) developing a “single consistent definition” of “inherently governmental function” that would address any deficiencies in the existing definitions, reasonably apply to all agencies, and ensure that agency personnel can identify positions that perform inherently governmental functions; (3) developing criteria for identifying “critical functions” that should be performed by government personnel; and (4) developing criteria for identifying positions that government personnel should perform in order to ensure that agencies develop and maintain “sufficient organic expertise and technical capacity” to perform their missions and oversee contractors’ work.³ President Obama’s March 4, 2009, memorandum similarly charged OMB with clarifying when outsourcing is “appropriate.”⁴

The Office of Federal Procurement Policy has reportedly indicated that a final policy letter will be released “in early 2011.”⁵ Depending upon their views regarding the desirability and potential efficacy of the provisions of the final policy letter,⁶ Members of the 112th Congress could hold

¹ Office of Management and Budget, Office of Federal Procurement Policy, Work Reserved for Performance by Federal Government Employees, 75 *Federal Register* 16188 (March 31, 2010). OFPP published a correction to the proposed policy letter on April 19, 2010. See 75 *Federal Register* 20397. However, the correction pertains only to the methods for submitting comments on the proposed policy letter.

² 75 *Federal Register* at 16193.

³ P.L. 110-417, § 321(a)(1)-(4), 122 Stat. 4411 (October 14, 2008).

⁴ The White House, Office of the Press Secretary, Government Contracting, March 4, 2009, *available at* http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-Subject-Government. This memorandum specifically noted that “the line between inherently governmental activities that should not be outsourced and commercial activities that may be subject to private sector competition has been blurred and inadequately defined. As a result, contractors may be performing inherently governmental functions. Agencies and departments must operate under clear rules prescribing when outsourcing is and is not appropriate.” *Id.*

⁵ See FY 2010 Procurement Spending Expected to Level Off for First Time in Recent Years, 94 *Fed. Cont. Rep.* 558 (December 14, 2010) (quoting Daniel I. Gordon, Administrator of the Office of Federal Procurement Policy).

⁶ Because allegedly inherently governmental functions have been a particular focus of the Obama Administration’s insourcing initiatives, debates over the desirability of these initiatives could color discussions of the desirability of particular provisions in the final policy letter. See, e.g., U.S. Chamber of Commerce et al., Letter to the President, August 19, 2010, *available at* http://governmentcompetition.org/uploads/Coalition_Letter_President_Obama-Insourcing_Moratorium_8-19-2010.pdf (calling for the Administration to halt its insourcing initiatives). Similarly, findings from a recent survey of senior federal acquisition officials could raise questions regarding the efficacy of the final policy letter if it closely resembles the proposed policy letter, which 70% of respondents said would not change the way that agencies contracted for services. See Professional Services Council, The Great Divide: Acquisition Policy Survey, October 2010, at 19, *available at* <http://www.pscouncil.org/Content/NavigationMenu/Publications/> (continued...)

hearings or introduce legislation like that enacted or introduced in the 111th Congress (e.g., P.L. 111-8, P.L. 111-84, P.L. 111-117).

Existing Law

Under existing law, inherently governmental functions cannot be contracted out.⁷ However, agencies generally have considerable discretion in determining whether particular functions are inherently governmental,⁸ and some Members of Congress and commentators have alleged that certain functions that have been contracted out should have been classified as inherently governmental (e.g., provision of personal security).⁹ There has been particular concern that the existence of multiple or inconsistent definitions of “inherently governmental function” may have facilitated improper contracting out,¹⁰ prompting the 110th Congress to task OMB with reviewing the existing definitions of “inherently governmental function” and developing a single consistent one.¹¹ Four definitions of “inherently governmental function” currently exist in law,¹² with one

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ProcurementPolicySurvey/2010_Acquisition_Policy_Survey.pdf.

⁷ 48 C.F.R. § 7.503(a) (“Contracts shall not be used for the performance of inherently governmental functions.”). See also *Marsh v. Alabama*, 326 U.S. 501 (1946) (requiring that private-sector entities that perform “public functions” provide due process and similar protections); *Smith v. Allwright*, 321 U.S. 649 (1944) (same); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (striking down as an unconstitutional private delegation legislation that would have subjected industry to maximum hours agreed to by a supermajority of workers and producers in the industry); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (striking down as an unconstitutional private delegation legislation that would have allowed industrial organizations or trade associations to establish “codes of fair competition”).

⁸ See, e.g., *Arrowhead Metals, Ltd. v. United States*, 8 Cl. Ct. 703, 717 (1985) (finding that coinage of money is inherently governmental, but that the U.S. Mint has discretion to determine whether the stamping of blanks constitutes coinage). In reaching this conclusion, the court noted its “desire to avoid a legislative-executive controversy” regarding whether the striking of blanks in the production of coins constitutes an inherently governmental function. *Id.* The U.S. Constitution specifies that Congress shall have the power to “coin Money.” U.S. Const. art. 1, § 8, cl. 5.

⁹ See, e.g., P.L. 110-417, § 1057, 122 Stat. 4611 (expressing the sense of Congress that interrogation of enemy prisoners of war, civilian internees, retained persons, other detainees, terrorists, or criminals captured, confined, or detained during or in the aftermath of hostilities is an inherently governmental function); Correction of Long-Standing Errors in Agencies’ Unsustainable Procurements (CLEAN-UP) Act of 2009, S. 924, 111th Cong., § 3 (congressional finding that inherently governmental functions “have been wrongly outsourced”).

¹⁰ See, e.g., *Duncan Hunter National Defense Authorization Act for Fiscal Year 2009: Report of the Committee on Armed Services of the House of Representatives on H.R. 5658 Together with Additional Views*, 110th Cong., 2d Sess., at 333-34 (2008) (noting that the task of determining which functions are inherently governmental “is made even more difficult by the lack of a single definition and accompanying guidance on what constitutes an ‘inherently governmental function.’” Currently, the Federal Acquisition Regulation defines that term in multiple places, the Office of Management and Budget Circular A-76 also defines the term, and there is yet another definition in the Federal Activities Inventory Reform Act (P.L. 105-270). There is also the additional DOD-specific definition of [functions] ‘closely associated with inherently governmental functions.’”); Roger D. Carstens, Michael A. Cohen & Maria Figueroa Küpçü, *Changing the Culture of Pentagon Contracting* 12 (2008) (noting that the phrase “inherently governmental function” appears 15 times in the United States Code “without a clear or consistent definition”).

¹¹ See P.L. 110-417, § 321(a)(1)-(2).

¹² See FAIR Act, P.L. 105-270, § 5(2) 112 Stat. 2382 (October 19, 1998) (codified at 31 U.S.C. § 501 note, at § 5(2)(A)) (“The term ‘inherently governmental function’ means a function that is so intimately related to the public interest as to require performance by Federal Government employees.”); National and Community Service Trust Act of 1993, P.L. 103-82, § 196, 107 Stat. 785 (September 21, 1993) (codified at 42 U.S.C. § 12651g(a)(1)(C)(iii)) (“As used in this subparagraph, the term ‘inherently governmental function’ means any activity that is so intimately related to the public interest as to mandate performance by an officer or employee of the Federal Government.”); A Bill to Authorize Appropriations for Fiscal Years 2004 and 2005 for the United States Coast Guard, and for Other Purposes, P.L. 108-293, § 302, 118 Stat. 1028 (August 9, 2004) (codified at 33 U.S.C. § 1223(e)) (same); 48 C.F.R. § 2.101 (“Inherently (continued...)”).

additional definition in a government-wide policy document that lacks the force of law.¹³ These definitions arguably do not differ significantly in themselves.¹⁴ However, they are often accompanied by additional guidance, such as descriptions or listings of the types of functions included in or excluded from the category of inherently governmental functions, which differ in ways that some commentators view as significant.¹⁵ There are also numerous statutes classifying specific functions, or work performed by specific entities, as inherently governmental.¹⁶

Agencies are also required by law to give “special consideration” to using federal employees to perform functions closely associated with the performance of inherently governmental functions.¹⁷ However, they are not prohibited from contracting out such functions.¹⁸ According to the Federal Acquisition Regulation (FAR), functions that are not themselves inherently governmental nonetheless can “approach being [inherently governmental] because of the nature of the function, the manner in which the contractor performs the contract, or the manner in which

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governmental function’ means, as a matter of policy, a function that is so intimately related to the public interest as to mandate performance by Government employees.”). Other statutes incorporate by reference a definition of “inherently governmental function” provided by another statute or policy document. *See, e.g.*, 10 U.S.C. § 2330a(g)(4) (“The term ‘inherently governmental functions’ has the meaning given that term in section 2383(b)(2) of this title.”). Section 2382(b)(2) does not itself define “inherently governmental function.” Rather, it incorporates by reference the definition of “inherently governmental function” provided in the Federal Acquisition Regulation. *See* 48 C.F.R. § 2.101.

¹³ *See* OMB, Circular No. A-76 Revised, May 29, 2003, Attachment A, at § (B)(1)(a), *available at* http://www.whitehouse.gov/omb/circulars/a076/a76_incl_tech_correction.html (“An inherently governmental activity is an activity that is so intimately related to the public interest as to mandate performance by government personnel.”). *See also* U.S. Dep’t of Health & Human Servs. v. Fed. Labor Relations Auth., 844 F.2d 1087 (4th Cir. 1988) (holding that OMB Circular A-76 does not have the force of law because it (1) was not the product of a congressional grant of legislative authority promulgated in accordance with procedural requirements imposed by Congress and (2) is not a substantive- or legislative-type rule affecting individual rights or obligations); *Def. Lang. Inst. v. Fed. Labor Relations Auth.*, 767 F.2d 1398 (9th Cir. 1985) (same).

¹⁴ *See generally* CRS Report R40641, *Inherently Governmental Functions and Department of Defense Operations: Background, Issues, and Options for Congress*, by (name redacted), (name redacted), and (name redacted).

¹⁵ In particular, the description of inherently governmental functions provided in OMB Circular A-76 notes that “[inherently governmental] activities require the exercise of substantial discretion in applying government authority and/or in making decisions for the government.” OMB Circular A-76 Revised, May 29, 2003, Attachment A, at § (B)(1)(a). Some commentators have suggested that the addition of “substantial” in 2003 represented a significant change in the definition of inherently governmental functions and facilitated the contracting out of allegedly inherently governmental functions by the Bush Administration. *See, e.g.*, Am. Fed’n of Gov’t Employees, *Privatization: Cleaning Up the Mess*, February 9, 2009, *available at* <http://www.afge.org/index.cfm?page=2005LegislativeConferenceIssuePapers&fuse=Content&ContentID=1745> (“OMB officials illegally watered down the statutory definition when they overhauled the A-76 Circular” in 2003). However, OFPP Policy Letter 92-1, discussed below, also referred to the exercise of “substantial discretion” as characterizing inherently governmental functions, and the Bush Administration’s revision of OMB Circular A-76 incorporated and superseded Policy Letter 92-1.

¹⁶ *See, e.g.*, Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, P.L. 110-329, § 521, 122 Stat. 3574 (September 30, 2008) (noting that the instructor staff at the Federal Law Enforcement Training Center perform inherently governmental functions); Government Performance and Results Act of 1993, P.L. 103-62, 107 Stat. 285 (August 3, 1993) (codified at 5 U.S.C. § 306; 31 U.S.C. §§ 1115-1116; & 39 U.S.C. § 2805) (classifying the preparation of agency strategic plans and program performance reports as an inherently governmental function).

¹⁷ Omnibus Appropriations Act, 2009, P.L. 111-8, Div. D, § 736(b)(2)(A)(ii), 123 Stat. 690 (March 11, 2009) (civilian agencies); National Defense Authorization Act for FY2008, P.L. 110-181, Div. A, § 324(a)(1), 122 Stat. 60 (January 28, 2008) (codified at 10 U.S.C. § 2463(b)(1)(B)) (defense agencies).

¹⁸ *See, e.g.*, *Gulf Group, Inc. v. United States*, 61 Fed. Cl. 338, 341, n.7 (2004) (treating items on the FAR’s list of “functions approaching inherently governmental” as capable of being contracted out by agencies).

the Government administers contract performance.”¹⁹ The FAR lists 19 functions that “approach being” inherently governmental, but this list is not all-inclusive.²⁰

Critical functions are not presently defined for purposes of federal law, and there are no limitations upon contracting them out. Legislation was introduced in the 111th Congress that would have created a category of “mission essential functions” that must be performed by government employees,²¹ and some commentators consider mission-essential functions to be critical ones.²² However, this legislation was not enacted.

Agencies are also not currently prohibited from contracting out functions when doing so could potentially lead to a loss of “organic expertise and technical capacity.”

Proposed Policy Letter

While not final, the policy letter represents the Obama Administration’s proposed guidance for agencies determining (1) whether particular functions are inherently governmental and (2) when functions closely associated with the performance of inherently governmental functions and critical functions should be performed by government personnel. It articulates that “[i]t 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.”²³ However, it also states the following:

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 they perform is not work that should be reserved for federal employees and that federal officials are appropriately managing contractor performance.²⁴

In its guidance on inherently governmental functions, the proposed policy letter can be seen as a successor to OFPP Policy Letter 92-1, which established executive branch policy regarding “service contracting and inherently governmental functions” and was designed to assist agencies in “avoiding an unacceptable transfer of official responsibility to Government contractors.”²⁵ Policy Letter 92-1 expressly prohibited contracting out inherently governmental functions,²⁶ which it defined as “[functions] that [are] so intimately related to the public interest as to mandate

¹⁹ 48 C.F.R. § 7.503(d).

²⁰ 48 C.F.R. § 7.503(d)(1)-(19).

²¹ See Correction of Long-Standing Errors in Agencies’ Unsustainable Procurements (CLEAN-UP) Act of 2009, S. 924, 111th Cong., § 2(3) & (5)(a) (defining “mission essential functions” as including functions that, “although neither necessarily inherently governmental nor necessarily closely related to an inherently governmental function, are nevertheless considered by executive agency officials to be more appropriate for performance by Federal employees.”).

²² See, e.g., Carstens et al., *supra* note 10, at 12-13; Geoffrey Emeigh, Law Professor Suggests Focus on “Core,” Not “Inherently Governmental,” Functions, 89 *Fed. Cont. Rep.* 649 (June 17, 2008); Orszag Stresses Importance of Procurement Reform for Effective, Efficient Government, 91 *Fed. Cont. Rep.* 173 (March 10, 2009).

²³ 75 *Federal Register* at 16193.

²⁴ *Id.*

²⁵ OMB, Policy Letter 92-1, September 23, 1992, available at http://www.whitehouse.gov/omb/procurement_policy_letter_92-01/.

²⁶ *Id.*, at § 6(a)(1).

performance by Government employees.”²⁷ Although Policy Letter 92-1 is still occasionally cited as an authority on the definition of inherently governmental functions,²⁸ the 2003 revision of OMB Circular A-76 incorporated some of its contents and superseded it.²⁹

In contrast, the proposed policy letter’s guidance on when functions closely associated with the performance of inherently governmental functions and critical functions should be performed by government personnel would arguably be unprecedented. There is nothing like it in Policy Letter 92-1 or OMB Circular A-76. OMB Circular A-76 provides guidance for agencies in determining whether government personnel or private contractors can more efficiently perform commercial activities on behalf of the government.³⁰ It notes the existence of—but does not define or otherwise address—a category of activities that are commercial but “not appropriate for private sector performance.”³¹

Inherently Governmental Functions

In keeping with Section 321 of the Duncan Hunter National Defense Authorization Act for FY2009, which tasked OMB with developing a “single consistent definition” of “inherently governmental function,” the proposed policy letter adopts the definition of “inherently governmental function” in the Federal Activities Inventory Reform (FAIR) Act.³² The FAIR Act defines an “inherently governmental function” as one that is “so intimately related to the public interest as to require performance by Federal Government employees.”³³ However, neither the proposed policy letter nor the introductory comments on it indicates what, if any, changes the Obama Administration would make to other regulations or policy documents that also define “inherently governmental function” (e.g., the FAR, OMB Circular A-76).

In addition to defining “inherently governmental function,” the policy letter requires that agencies take certain steps to ensure that they do not contract out such functions. Before issuing a solicitation, agencies would be required to determine that none of the requirements are (1) designated as inherently governmental in statute, (2) listed among the functions included in Appendix A of the proposed letter, which corresponds to Subpart 7.5 of the FAR, or (3) qualify as such under one of several tests proposed in the letter.³⁴ The first of these tests focuses on the nature of the function and requires that functions involving the exercise of sovereign powers, or “powers that are uniquely governmental,” be classified as inherently governmental regardless of the “type or level of discretion associated with the function.”³⁵ The second test focuses on the exercise of discretion and prohibits agencies from contracting out functions involving an exercise of discretion that would

²⁷ *Id.*, at § 5.

²⁸ See, e.g., Statement of P. Jackson Bell, Deputy Under Secretary, Logistics & Materiel Readiness, Department of Defense, to the House Armed Services Subcommittee on Readiness, *CQ Cong. Testimony*, March 11, 2008.

²⁹ OMB Circular A-76 Revised, May 29, 2003, at § 2, *available at* http://www.whitehouse.gov/omb/circulars_default.

³⁰ See *id.*, at § 1.

³¹ *Id.*, Attachment A, at § (C)(1).

³² 75 *Federal Register* at 16193.

³³ 31 U.S.C. § 501 note, at § 5(2)(A).

³⁴ 75 *Federal Register* at 16194-95.

³⁵ *Id.* at 16194.

commit[] 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) [i]dentify specified ranges of acceptable decisions or conduct concerning the overall policy or direction of the action; and (B) [s]ubject the discretionary authority to final approval or regular oversight by agency officials.³⁶

The notice of the proposed policy letter also requests comments on a third possible test, the 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 the government, because of the difficulty of ensuring sufficient control over such performance.”³⁷ Written determinations that functions to be contracted out are not inherently governmental would have to be included in the contract file, along with the analysis that supports this determination.³⁸

Agencies would also be required to monitor the functions currently being performed by contractors to ensure that contractor performance of functions closely associated with the performance of inherently governmental functions, in particular, “does not expand to include performance of inherently governmental functions or otherwise interfere with federal employees’ ability to carry out their inherently governmental responsibilities.”³⁹ If they find that contractors are performing inherently governmental functions, agencies are instructed to reestablish control over these responsibilities by strengthening oversight, insourcing the work through the timely development and execution of hiring plans, refraining from exercising options under the contract,⁴⁰ or terminating all or part of the contract.⁴¹

Functions Closely Associated with the Performance of Inherently Governmental Functions

The proposed policy letter does not address the definition of “functions closely associated with the performance of an inherently governmental function.”⁴² However, given that its Appendix B lists the same functions that the FAR lists as “approaching being” inherently governmental, the proposed policy letter appears to rely on the FAR’s definition of such functions. The proposed policy letter also reiterates existing statutory requirements that agencies give “special consideration” to using government personnel to perform functions closely associated with the performance of inherently governmental functions.⁴³

³⁶ *Id.*

³⁷ *Id.* at 16192.

³⁸ *Id.* at 16195.

³⁹ *Id.* at 16189.

⁴⁰ An option is a unilateral right in a contract under which the government may, for a specific period, purchase additional supplies or services or otherwise extend the contract. Federal contracts are generally for one year but can potentially be extended to five years through agencies’ use of options. 48 C.F.R. § 17.204(e). It is always within the government’s power to decline to exercise an option.

⁴¹ 75 *Federal Register* at 16195. Such a termination would generally be a termination for convenience, requiring the government to pay the contractor an agreed-upon amount or, in the absence of such an agreement, (1) the costs incurred in performing the terminated work, (2) the costs of settling and paying settlement proposals under terminated subcontracts, and (3) a fair and reasonable profit on work performed. *See* 48 C.F.R. § 49.103.

⁴² *See* 75 *Federal Register* at 16195-96.

⁴³ *Id.*

While the proposed policy letter would not prohibit agencies from contracting out functions that are closely associated with the performance of inherently governmental functions, it would require them to determine in writing before issuing a solicitation 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.⁴⁴

When functions closely associated with the performance of inherently governmental functions are contracted out, agencies would be expected to “[l]imit or guide” contractors’ exercise of discretion by incorporating in the contract a specified range of acceptable decisions or conduct or establishing a process for subjecting contractors’ discretionary decisions or conduct to final agency approval.⁴⁵ They would also be expected to (1) assign a sufficient number of qualified government personnel to monitor contractors’ activities; (2) ensure that contractors and contractor work product are “reasonably identified” when “there is a risk that Congress, the public or other persons outside the government might confuse contractor personnel or work products with government officials or work products”; and (3) take certain steps to avoid or mitigate contractor conflicts of interest, including by physically separating contractor and government personnel on any shared worksites.⁴⁶

Critical Functions

Because “critical function” is presently not defined for purposes of federal law, the proposed policy letter defines a “critical function” as one that is “necessary to the agency being able to effectively perform and maintain control of its mission and operations.”⁴⁷ The proposed policy letter requires that agencies (1) dedicate a “sufficient number of employees to the performance of critical functions so that federal employees may maintain control of agencies’ missions and operations”⁴⁸ and (2) retain control of “highly critical functions,” which could vary by agency.⁴⁹ However, the proposed policy letter otherwise allows agencies to contract out critical functions provided that the agency determines in writing, prior to issuing a solicitation, that it (1) has sufficient internal capability to control its missions and operations and (2) the cost-savings of private-sector performance “clearly outweigh” any considerations relating to performance or risk that favor federal employee performance of the functions.⁵⁰ Agencies would also have to monitor post-award performance of any contracts that involve critical functions and take the necessary steps to insource these functions (e.g., developing hiring plans, securing funding for in-house

⁴⁴ *Id.* at 16195-96.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 16193.

⁴⁸ *Id.*

⁴⁹ *Id.* at 16192.

⁵⁰ *Id.*

capacity) when internal control of mission and operations is at risk due to overreliance on contractors.⁵¹

Issues for Congress

Although it is not final,⁵² the policy letter raises several legal and policy issues of potential interest to Congress, given recently enacted and proposed legislation regarding inherently governmental functions and other limitations upon contracting out (e.g., P.L. 111-8, P.L. 111-84, P.L. 111-117). Key among these issues are (1) the relationship between the proposed policy letter and other executive branch authorities on inherently governmental and related functions; (2) whether the proposed policy letter would necessarily result in changes in agencies' use of contractors to perform certain functions that some Members of Congress and commentators claim are inherently governmental (e.g., security services during contingency operations); and (3) the potential demands of any new requirements upon the acquisition workforce. Certain reforms contemplated by the proposed policy letter could require congressional action (e.g., its call for comments on whether changes should be made to existing laws that deem specific functions or the work of specific organizations to be inherently governmental), and some proposals may suggest opportunities for additional reforms (e.g., interagency contracting, the definition of commercial items, the policies underlying OMB Circular A-76).

Consistency with and Relationship to Other Executive Branch Authorities on Inherently Governmental and Related Functions

The proposed policy letter and other executive branch authorities on inherently governmental and related functions arguably diverge somewhat in their terminology, definitions, and explanations. Among other things, the proposed policy letter uses the term "functions closely associated with the performance of inherently governmental functions," while the FAR speaks of functions that "approach being" inherently governmental⁵³ and several statutes refer to "functions closely associated with inherently governmental functions."⁵⁴ Such differences might be merely semantic. However, they could potentially form the basis for more substantive distinctions because the category of functions that are themselves nearly inherently governmental is arguably narrower than the category of functions associated with the performance of inherently governmental functions. For example, serving as an interpreter during an interrogation of an enemy prisoner of war could potentially constitute a function approaching inherently governmental.⁵⁵ It is less clear that transcribing a recording of that interrogation approaches being inherently governmental. However, transcription could potentially be a function closely associated with the performance of an inherently governmental function. Given that the notice accompanying the proposed policy

⁵¹ *Id.*

⁵² *Id.* at 16189 (inviting interested parties to submit comments in writing on or before June 1, 2010).

⁵³ See 48 C.F.R. § 7.503(d).

⁵⁴ See, e.g., 10 U.S.C. § 2330 note; 10 U.S.C. § 2463(e).

⁵⁵ The National Defense Authorization Act for FY2009 expressed Congress's sense that interrogation of enemy prisoners of war is an inherently governmental function. See *supra* note 9.

letter itself suggests that even minor “variations can create confusion and uncertainty,” additional precision in the use of terms might be desirable.⁵⁶

Similarly, while the proposed policy letter adopts the definition of “inherently governmental function” used in the FAIR Act, neither it nor the notice accompanying it addresses whether or how the Obama Administration would change the definitions in the FAR, OMB Circular A-76, and other executive branch regulations and policy documents to ensure that there is a “single consistent definition” of inherently governmental functions.⁵⁷ The actual definitions contained in these sources arguably differ only slightly (e.g., the FAIR Act speaks of “functions” whose relationship to the public interest is such as to “require performance by Federal Government employees,” while OMB Circular A-76 speaks of “activities” whose relationship to the public interest is such as to “mandate performance by government personnel”). However, the explication accompanying these definitions diverges to a greater degree, with OMB Circular A-76 speaking of activities that involve the exercise of “substantial discretion,” while other sources speak only of the exercise of discretion.⁵⁸ Additionally, one of the two tests for identifying inherently governmental functions in the proposed policy letter introduces a new term, “sovereign,” that does not appear in the FAIR Act’s definition or discussion of inherently governmental functions.⁵⁹ While the concept of sovereignty is arguably implicit in the FAIR Act’s listing of the types of functions included within the definition of “inherently governmental function,”⁶⁰ and in the case law regarding inherently governmental functions,⁶¹ the FAIR Act’s discussion of inherently governmental functions arguably focuses more upon the exercise of discretion, which is the focus of the second of the proposed policy letter’s tests for identifying inherently governmental functions.⁶²

⁵⁶ 75 *Federal Register* at 16190.

⁵⁷ Statements in the notice accompanying the proposed policy letter could be read as suggesting that the Obama Administration would make such changes. *See id.* at 16189 (“A single definition of ‘inherently governmental function’ built around the well-established statutory definition in the Federal Activities Inventory Reform Act (FAIR Act), P.L. 105-207, would replace existing definitions in regulation and policy.”) However, no proposed changes to the FAR or OMB Circular A-76 are discussed in the notice or proposed policy letter.

⁵⁸ *See supra* note 14 and accompanying text.

⁵⁹ The proposed “nature of the function” test specifies that “[f]unctions which involve the exercise of *sovereign* powers—that is, powers that are uniquely governmental—are inherently governmental by their very nature.” 75 *Federal Register* at 16194 (emphasis added).

⁶⁰ *See, e.g.*, 31 U.S.C. § 501 note, at § 5(2)(B)(iii) (functions that “significantly affect[] the life, liberty, or property interests of private persons” among the types of functions included within the definition of “inherently governmental function”).

⁶¹ *See, e.g.*, *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978) (conducting elections); *Contributors to Pa. Hospital v. Philadelphia*, 245 U.S. 20 (1917) (exercising the power of eminent domain); *Takle v. Univ. of Wisc. Hosp. & Clinics Auth.*, 402 F.3d 768 (7th Cir. 2005) (providing police services); *Kauch v. Dep’t for Children, Youth & Their Families*, 321 F.3d 1 (1st Cir. 2003) (investigating allegations of child abuse); *Sigman v. United States*, 208 F.3d 760 (9th Cir. 2000) (exercising prosecutorial discretion); *Week v. Cayman Islands*, 1992 U.S. App. LEXIS 32985 (7th Cir. 1992) (chartering, oversight, and regulation of companies); *Republic of the Philippines v. Marcos*, 818 F.2d 1473 (9th Cir. 1987) (creation of public monopolies); *Kimbrough v. O’Neil*, 545 F.2d 1059 (7th Cir. 1976) (holding the personal property of prisoners); *Bonner v. Coughlin*, 545 F.2d 565 (7th Cir. 1976) (limiting the First Amendment rights of prisoners); *S.J. Constr., Inc. v. Lewis & Clark Reg’l Water Sys.*, 2008 U.S. Dist. LEXIS 62192 (D.S.D. 2008) (taxing and paying governmental indebtedness or obligations); *Royal Thai Gov’t v. United States*, 441 F. Supp. 2d 1350 (Ct. Int’l Trade 2006) (devising tariff regimes); *Elliott v. British Tourist Auth.*, 986 F. Supp. 189 (S.D.N.Y. 1997) (hiring diplomatic staff or civil servants).

⁶² 75 *Federal Register* at 16194. *See generally* 31 U.S.C. § 501 note, at § 5(2)(b) (stating that inherently governmental functions are ones 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 (continued...)”).

Additionally, the proposed policy letter does not explain how its requirements would relate to existing requirements under OMB Circular A-76. Assuming the proposed policy letter is implemented and OMB Circular A-76 is not amended, agency personnel would apparently be required to determine which agency functions are inherently governmental for purposes of two different processes. Under the policy letter, agency personnel would be required to ensure, on a contract-by-contract basis, that inherently governmental functions are not performed by contractors. That is, agency personnel would have to make a determination prior to issuing a solicitation for a particular procurement.⁶³ Separately, and in accordance with Circular A-76, each agency would continue to compile, and submit to OMB by June 30 each year, a list of its inherently governmental functions.⁶⁴ Potentially significant differences between the proposed policy letter and Circular A-76 involve, at a minimum, the level of detail (i.e., a solicitation or contract versus an agency function or work center) and the definition of “inherently governmental,” including related guidance. The existence of two related, yet somewhat disparate, procedures (and guidance) for identifying inherently governmental work raises several questions. Could the two processes result in different outcomes, or designations, for the same function? If so, might this undermine the government’s effort to adopt a single, consistent definition of “inherently governmental”? Setting aside these issues, might the implementation of OFPP’s proposed policy letter render the Circular A-76 requirement for the submission of inventories of inherently governmental activities moot?

Potential Treatment of Specific Functions Under the Proposed Letter

The proposed policy letter acknowledges that certain functions are particularly difficult to “properly classify” and invites comments on “[w]hat specific steps should be taken to address this challenge” and “[w]hat should guidance say—in place of, or in addition to, the draft guidance or currently existing federal regulations and policies—to address the use (if any) of contractors performing any [such] functions.”⁶⁵ These functions include physical security involving guard services and “the use of deadly force, including combat, security operations performed in direct support of combat, and security that could evolve into combat.”⁶⁶ Some Members of Congress have had their own concerns about the contracting out of such functions,⁶⁷ which might still be possible, albeit more difficult, under the proposed policy letter.⁶⁸ The Obama Administration

(...continued)

transactions and entitlements.”).

⁶³ 75 *Federal Register* at 16194.

⁶⁴ OMB Circular A-76 Revised, May 29, 2003, at A-1.

⁶⁵ 75 *Federal Register* at 16192.

⁶⁶ *Id.*

⁶⁷ See, e.g., P.L. 110-417, § 831, 122 Stat. 4534 (expresses the sense of Congress that “security operations for the protection of resources (including people, information, equipment, and supplies) in uncontrolled or unpredictable high-threat environments should ordinarily be performed by members of the Armed Forces if they will be performed in highly hazardous public areas where the risks are uncertain and could reasonably be expected to require deadly force” and requires that regulations to be issued under Section 862(a) of the National Defense Authorization Act for FY2008 ensure that private security contractors are not authorized to perform inherently governmental functions in areas of combat operations); Laura D. Francis, Speakers, Members Debate Whether Federalizing FPS Workforce Will Solve Persistent Problems, 93 *Fed. Cont. Rep.* 302 (April 20, 2010).

⁶⁸ Cf. The Great Divide, *supra* note 6, at 19 (noting that 70% of survey respondents said the proposed policy letter would not change the way that agencies contract for services).

separately ended contractor performance of another function—collection of taxpayer debts—whose performance by contractors had also been of concern to some Members.⁶⁹

Federal Building Security

The FAIR Act defines federal building security as not being an inherently governmental function.⁷⁰ The proposed policy letter asks, among other things, what federal government guidance should say regarding the use of contractors to perform physical security, including guard services at buildings.⁷¹ One might conclude that this would include the Federal Protective Service's (FPS's) use of contract security guards.

Because the federal government's real property portfolio comprises approximately 446,000 buildings, FPS relies on the majority of on-site security to be provided by contract security guards. FPS's contract security guard responsibilities include federal building access control, employee and visitor identification checks, security equipment monitoring, and roving patrols of the interior and exterior of federal property.⁷² Within the National Capital Region, FPS contracts with 54 private security guard companies to provide approximately 5,700 guards to protect 125 federal facilities. FPS issues task orders to contract security guard services that detail the terms and conditions under which the contract security guard services are to be provided. Some of these task orders include the identification of buildings requiring protection, specific guard post locations, and the hours and days of the week each post is to be staffed; whether security guards are to be armed; and the number of guards at each post. FPS currently employs approximately 15,000 contract security guards across the nation, and, according to the Department of Homeland Security inspector general, contract guard services "represent the single largest item in the FPS operating budget, with an estimated FY2006 budget of \$487 million."⁷³

Some Members of Congress have shown recent interest in the FPS's use of contract security guards, including a House Homeland Security Committee hearing on April 14, 2010, on the "Federal Protective Service: Would Federalization of Guards Improve Security at Critical Facilities?" Specifically, the Committee discussed the possibility of federalizing portions of the FPS's contract security guard force to ensure federal building security. A congressionally mandated federalization of a portion of FPS's contract security guard force or an increase to FPS's law enforcement officer full-time equivalents—to provide some federal buildings with a federal law enforcement presence—may result in some federal agencies, specifically the Department of Homeland Security, commenting on the proposed policy letter and its effects on their use of contract security guards.

⁶⁹ See, e.g., Diane Freda, Shulman Formally Announces End of Private Debt Collection Program, 91 *Fed. Cont. Rep.* 191 (March 17, 2009) (referencing Representative John Lewis's "often repeated view" that tax collection is an inherently governmental function). For more on this program, see generally CRS Report RL33231, *The Internal Revenue Service's Private Tax Debt Collection Initiative: Current Status and Issues for Congress*, by (name redacted).

⁷⁰ 31 U.S.C. § 501 note, at § 5(2)(C)(ii) (excluding building security from the functions included within the definition of inherently governmental functions).

⁷¹ See *id.*

⁷² U.S. Department of Homeland Security, Office of Inspector General, Federal Protective Service Needs to Improve Its Oversight of the Contract Guard Program, OIG-07-05, October 2006, at 2, available at http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG_07-05_Oct06.pdf.

⁷³ *Id.*

OFPP's proposed policy letter and recent congressional action could affect federal agencies' continued use of contract security guards and the role FPS has in administering contract security guards. Additionally, Congress could amend the FAIR Act and its list of functions excluded from the definition of inherently governmental functions, which could result in reduced use of contract security guards.

Private Security Contractors

The proposed policy letter does not list armed security as an inherently governmental, closely associated with inherently governmental, or critical function. OFPP is soliciting public comment on how to categorize contractors engaging in "[t]he use of deadly force, including combat, security operations performed in direct support of combat, and security that could evolve into combat."⁷⁴ However, the proposed policy letter is relevant to the use of private security contractors (PSCs) to the extent that it would impose on agencies pre- and post-award responsibilities for evaluating whether a function is inherently governmental.⁷⁵ Generally, analysts, industry officials, and Department of Defense (DOD) and Department of State officials agree that the current draft of the policy letter probably would not substantially alter the DOD's use of private security contractors during contingency operations, including current operations in Iraq and Afghanistan.⁷⁶

DOD has already performed an initial agency analysis to determine whether the use of PSCs in Iraq and Afghanistan should be considered inherently governmental, much as it would be required to do under the proposed policy letter. On January 10, 2006, DOD's Office of General Counsel issued an opinion permitting the use of contractors to protect U.S. personnel and property.⁷⁷ The opinion does not directly address whether PSCs perform inherently governmental functions, but does state that "when using contractors for security services, the purpose must be to provide such services other than uniquely military functions."⁷⁸ The opinion goes on to state that it would be inappropriate to use armed security contractors in "situations where the likelihood of direct participation in hostilities is high. For example, they should not be employed in quick-reaction force missions, local patrolling, or military convoy security operations where the likelihood of hostile contact is high."⁷⁹ In a DOD instruction issued in July 2009, DOD addressed the issue more directly, stating that "[c]ontractors performing private security functions are not authorized to perform inherently governmental functions. In this regard, they are limited to a defensive response to hostile acts or demonstrated hostile intent."⁸⁰

⁷⁴ 75 *Federal Register* at 16192.

⁷⁵ *Id.* at 16190.

⁷⁶ Based on conversations with industry and government officials, April 20, 2010. This report does not address the merits of DOD and the Department of State's internal analysis of whether the use of PSCs is inherently governmental or closely associated to inherently governmental. The report focuses only on the potential impact of the draft policy letter on the government's use of PSCs in contingency operations.

⁷⁷ Department of Defense, Office of General Counsel Memorandum, Request to Contract for Private Security Companies in Iraq, January 10, 2006.

⁷⁸ *Id.* at 2.

⁷⁹ *Id.* at 4. The Department of State does use contractors to perform quick reaction force type missions in Iraq.

⁸⁰ Department of Defense Instruction 3020.50, Private Security Contractors Operating in Contingency Operations, July 22, 2009, at 12.

The post-award requirements under the proposed policy letter would include the responsibility of “review[ing], on an ongoing basis, the functions being performed by ... 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 or contractors for professional and technical services.”⁸¹ As discussed earlier in this report, the notice for the proposed policy letter requests public comment on a possible test that would require agencies to consider functions inherently governmental “where serious risks could be created by the performance of these functions by those outside the government, because of the difficulty of ensuring sufficient control over such performance.”⁸² Many analysts and government agencies—including the Government Accountability Office, the Special Inspector General for Iraq Reconstruction, and the Commission on Wartime Contracting—have raised questions about DOD and the Department of State’s ability to manage armed security contractors effectively.⁸³ Depending upon the final draft of the letter, some analysts could argue that the use of PSCs has undermined the U.S. mission in Iraq and Afghanistan and that the inability to effectively manage PSCs makes armed security an inherently governmental function.⁸⁴ Other analysts could argue that both departments are in line with the draft policy letter; both departments have periodically reviewed their contractor management, have evaluated the performance of their contractors, and have taken steps to improve oversight.⁸⁵ For example, the Department of State reportedly did not renew certain armed security contracts with Blackwater and ArmourGroup because of poor performance and the contractors’ conduct.⁸⁶ Further, on April 12, 2010, DOD issued an instruction that includes a detailed discussion of what is and is not an appropriate use of armed contractors in contingency operations.⁸⁷ Analysts could also argue that not using PSCs in Iraq and Afghanistan would deprive DOD and the Department of State of the manpower necessary to successfully perform their mission in Iraq, thereby posing a much greater risk to the overall mission than the risk posed by imperfect contract management.

Congress has addressed the issue of what functions should not be performed by PSCs, stating that it is the sense of Congress that security should ordinarily be provided by the Armed Forces in high-threat environments where it could reasonably be expected that deadly force will be initiated by security personnel.⁸⁸ In an area of combat operation, Section 832 of the Duncan Hunter National Defense Authorization Act for FY2009 vests sole discretion for determining the appropriateness of using armed contractors with the combatant commander.⁸⁹ DOD instructions

⁸¹ 75 *Federal Register* at 16192.

⁸² *Id.*

⁸³ See generally CRS Report R40835, *The Department of Defense’s Use of Private Security Contractors in Iraq and Afghanistan: Background, Analysis, and Options for Congress*, by (name redacted).

⁸⁴ See CRS Report R40835, *The Department of Defense’s Use of Private Security Contractors in Iraq and Afghanistan: Background, Analysis, and Options for Congress*, by (name redacted).

⁸⁵ See CRS Report R40835, *The Department of Defense’s Use of Private Security Contractors in Iraq and Afghanistan: Background, Analysis, and Options for Congress* for a discussion on steps DOD has taken to try to improve the management and oversight of PSCs.

⁸⁶ See, e.g., U.S. Will Not Renew Blackwater Contract in Iraq, January 31, 2009, available at http://www.rferl.org/content/US_Will_Not_Renew_Blackwater_Contract_In_Iraq/1377275.html; ArmourGroup Loses Kabul Embassy Contract, December 8, 2009, available at http://www.politico.com/blogs/laurarozon/1209/POGO_ArmourGroup_loses_Kabul_embassy_contract.html.

⁸⁷ Department of Defense Instruction 1100.22, Policy and Procedures for Determining Workforce Mix, April 12, 2010.

⁸⁸ Duncan Hunter National Defense Authorization Act for FY2009, P.L. 110-417, § 832, 122 Stat. 4535.

⁸⁹ According to the statute, such determination should not be delegated to any person not in the military chain of command.

generally conform with the sense of Congress, including vesting the discretion for determining the appropriateness of using armed contractors with the combatant commander.⁹⁰

Demands of the Proposed Workload on the Acquisition Workforce

Considering the responsibilities and tasks that an agency would be expected to fulfill and accomplish, successful implementation of OFPP's proposed policy letter would depend, in large part, on the capability of each agency's acquisition workforce. Agency personnel would be required to, for example, carry out a host of pre-award and post-award tasks regarding inherently governmental functions and critical functions, develop and implement a plan for managing each contractor who performs one or more functions closely associated with the performance of inherently governmental functions, and develop and review internal management controls.⁹¹ Throughout the proposed policy letter, OFPP acknowledges the importance of the acquisition workforce, stating that agencies are to "employ an adequate number of government personnel," "[e]nsure that sufficient personnel are available," and "identify specific strategies and goals for addressing both the size and capability of the acquisition workforce."⁹²

It is probably unlikely that, for at least the foreseeable future, the government's acquisition workforce—particularly the civilian agencies' acquisition workforce—will have sufficient capability to accomplish the tasks required by the proposed policy letter while fulfilling all of their other responsibilities.⁹³ The following excerpt from a fall 2009 OFPP memorandum summarizes the problem:

The inflation-adjusted dollar value of civilian agency contracting increased by 56 percent between FY 2000 and FY 2008, but the capability and capacity of the federal acquisition workforce has not kept pace with the increase in spending, the number of [contract] actions, or the complexity of federal purchases. As a result of this, FAI's [Federal Acquisition Institute's] 2008 Acquisition Workforce Competencies Survey found that the acquisition workforce spends less time on critical steps in the acquisition process—such as planning, requirements development, market research, competition, and contract administration. This lack of capacity requires the workforce to make tradeoffs during the acquisition lifecycle that may reduce the chance of successful acquisition outcomes.⁹⁴

Although efforts are under way to bolster the acquisition workforce,⁹⁵ the extent of the problem suggests that it is not realistic to expect that the situation will be remedied easily, or in the short term. Thus, as OFPP notes in the excerpt above, members of the acquisition workforce most

⁹⁰ See CRS Report R40764, *Department of Defense Contractors in Iraq and Afghanistan: Background and Analysis*, by (name redacted).

⁹¹ See 75 *Federal Register* at 16193-96.

⁹² *Id.* at 16194.

⁹³ For a thorough discussion of the challenges involving the government's acquisition workforce, see Acquisition Advisory Panel, *Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress* 361 (January 2007), available at https://www.acquisition.gov/comp/aap/24102_GSA.pdf.

⁹⁴ Lesley A. Field, Deputy Administrator, OFPP, Acquisition Workforce Development Strategic Plan for Civilian Agencies—FY 2010-2014, October 27, 2009, at 1, available at http://www.whitehouse.gov/omb/assets/procurement_workforce/AWF_Plan_10272009.pdf.

⁹⁵ See, e.g., National Defense Authorization Act for FY2008, P.L. 110-181, § 802, 122 Stat. 206-07 (January 28, 2008) (requiring the Department of Defense (DOD) to ensure that DOD's acquisition workforce is of the appropriate size and skill level to accomplish certain functions).

likely will have to continue to make trade-offs among the many acquisition-related tasks that they are required to accomplish, including those described in the proposed policy letter.

Possible Legislation

Certain actions apparently contemplated by the proposed policy letter, such as “changes ... to existing laws that currently deem specific functions or the work performed by specific organizations to be inherently governmental,”⁹⁶ would require congressional action. Because these designations are based in statute, the executive branch cannot remove or modify them in the same way that it can amend the FAR or OMB Circular A-76.⁹⁷

Congress could also take legislative action to establish a statutory basis for any desirable features of the proposed policy letter that would otherwise lack such a basis. For example, assuming that no further legislation is enacted on this issue, the definition of “critical functions” would exist only in a policy document, which could be changed by the executive branch at any time. It would not have a statutory or other legal basis.

Conversely, Congress could legislate to modify any aspects of the proposed policy letter that might not comport with its intent. Given that the proposed policy letter would allow agencies to contract out functions closely associated with the performance of inherently governmental functions and critical functions provided that certain conditions are met, its restrictions on contracting out functions that are not themselves inherently governmental might not be as stringent as some Members of Congress would wish.⁹⁸ Relatedly, it is unclear whether the proposed policy letter’s inclusion within its definition of “critical functions” of functions that should be performed by government personnel to ensure that agencies develop and maintain “sufficient internal capacity to effectively perform and maintain control over functions that are core to the agency’s mission and operations”⁹⁹ comports with Congress’s intent in Section 321 of the Duncan Hunter National Defense Authorization Act. Section 321 appears to group critical functions in a separate category from those that should be performed by the government to maintain in-house expertise.¹⁰⁰

⁹⁶ 75 *Federal Register* at 16192.

⁹⁷ Executive Orders have, at times, classified particular functions as inherently governmental, and these designations could be removed without congressional action. Compare Executive Order 13180, 65 *Federal Register* 77493 (December 11, 2000) (designating the “provision of air traffic services” as an inherently governmental function) with Executive Order 13264, 67 *Federal Register* 39243 (June 7, 2002) (removing this designation). There do not appear to be any such executive orders currently in effect.

⁹⁸ For example, the Correction of Long-Standing Errors in Agencies’ Unsustainable Procurements (CLEAN-UP) Act of 2009 (S. 924, 111th Cong.) would have removed agency discretion to contract out “functions closely related to inherently governmental functions” and “mission essential functions” by requiring that “[t]he head of each executive agency shall ensure that inherently governmental functions, functions closely related to inherently governmental functions, and mission-essential functions are performed by Federal employees.” See also Barbara A. Mikulski et al., Letter to Peter Orszag, March 18, 2010, available at http://mikulski.senate.gov/_pdfs/Press/MikulskiLetterToOrszag.pdf (“Specifically, we suggest that the new ‘inherently governmental’ definition include ... [a]n expansion of the definition to cover all sensitive functions so that managers won’t need designations like ‘core,’ ‘critical,’ and ‘mission-essential’ to shield jobs they know are best performed by federal workers.”).

⁹⁹ 75 *Federal Register* at 16189. The proposed policy letter also invites comments on whether the category of functions closely associated with the performance of inherently governmental functions should be “merged and treated in an identical fashion” with critical functions. *Id.* at 16192.

¹⁰⁰ See P.L. 110-417, § 321(a)(3)-(4).

Opportunities for Further Reforms?

While commentators generally suggest that OFPP has undertaken a systematic, thoughtful approach to “work reserved for performance by federal government employees,”¹⁰¹ certain aspects of the proposed policy letter may raise related questions that Congress might wish to explore, or instruct the executive branch to explore. For example, a principal-agent test, which is not among the two tests for identifying inherently governmental functions included in the proposed policy letter but which OFPP has requested comments on, 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.”¹⁰² Interagency contracting, in particular, might be subject to this particular type of problem and also might be more susceptible to attenuated accountability, or limited transparency, than intra-agency contracting.¹⁰³ For these reasons, a review of interagency contracting (or particular forms of interagency contracting) might be warranted in light of the proposed policy letter.

A review of the definition of “commercial activity” might also be warranted in light of the proposed changes. OMB Circular A-76 defines a “commercial activity” as “[a] recurring service that could be performed by the private sector. This recurring service is an agency requirement that is funded and controlled through a contract, fee-for-service agreement, or performance by government personnel.”¹⁰⁴ A narrowing of this definition might be in keeping with the proposed policy letter.

Alternatively, some observers might suggest that a broad review of the appropriate role of the private sector in performing work for the federal government could be helpful in determining how to balance government performance and contractor performance of agency functions.¹⁰⁵ A rigorous examination of the private sector’s role also might aid in addressing the following questions posed by OFPP:

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

¹⁰¹ Cf. Proposed OFPP Policy Letter Would Define “Inherently Governmental,” Provide Guidance, 93 *Fed. Cont. Rep.* 270 (April 6, 2010) (reporting that both industry groups and unions representing government employees had positive reactions to the proposed policy letter).

¹⁰² 75 *Federal Register* at 16192. “An *agency* relationship exists whenever there is an arrangement in which one person’s welfare depends on what another person does. The **agent** is the person who acts, and the **principal** is the party whom the action affects.” Restated, a principal (e.g., a government agency) employs an agent (e.g., a contractor) “to achieve the principal’s objective.” Robert S. Pindyck & Daniel L. Rubinfeld, *Microeconomics* 609 (5th ed. 2001) (emphasis in original). The principal-agent problem arises when the agent pursues its own goals. *Id.*

¹⁰³ See CRS Report R40814, *Interagency Contracting: An Overview of Federal Procurement and Appropriations Law*, by (name redacted) and (name redacted).

¹⁰⁴ OMB Circular A-76 Revised, May 29, 2003, at D-2. The FAR includes a definition of “commercial item,” but this definition is not related to the subject of this report. See 48 C.F.R. 2.101 (defining, in part, a commercial item as “[a]ny item, other than real property, that is of a type customarily used by the general public or by non-governmental entities for purposes other than governmental purposes, and ... (i) [h]as been sold, leased, or licensed to the general public; or (ii) [h]as been offered for sale, lease, or license to the general public.”).

¹⁰⁵ See, e.g., Freedom from Government Competition Act of 2009, H.R. 2682, 111th Cong., § 2(4), 111th Cong. (“Unfair government competition with the private sector of the economy is at an unacceptably high level, both in scope and in dollar volume.”).

agencies make this determination? Can the concept of ‘overreliance’ be effectively understood without also providing guidance on ‘underreliance’?¹⁰⁶

Some might equate, or attempt to equate, the concepts of “overreliance” and “underreliance” with the number, extent, and type of contract opportunities publicized by the federal government; the value, or number, of contracts awarded by the federal government; or the number of companies that have been awarded government contracts. For others, the standard by which to judge the government’s appropriate degree of reliance on the private sector might be found in an excerpt from the Circular A-76 policy statement, which reads as follows: “The longstanding policy of the federal government has been to rely on the private sector for needed commercial services.”¹⁰⁷

However, others might respond that this and similar policy statements are no longer valid, or useful, as the scope and complexity of government activities and procurement have grown. Additionally, they might note that other objectives, policies, or principles have become as important (if not more so) than reliance on contractors. Examples of this type of change may be found in OFPP’s proposed policy letter. Yet another approach might be to consider why, or under what circumstances, it could be preferable to use contractors. For example, OFPP notes that “[c]ontractors can provide expertise, innovation, and cost-effective support to federal agencies for a wide range of services.”¹⁰⁸

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¹⁰⁶ 75 *Federal Register* at 16193.

¹⁰⁷ OMB Circular A-76 Revised, May 29, 2003, at 1. This position arguably overlooks the qualifications, or caveats, included in three Bureau of the Budget bulletins which were precursors to the original Circular A-76, which was issued in 1966. For example, Bulletin 60-2 excluded “a service or product primarily for the public or agency employees” and “functions which are a part of the normal management responsibilities of a Government agency or a private firm of a comparable size (such as accounting, personnel work, and the like)” from consideration for private sector performance. See Bureau of the Budget, Commercial-Industrial Activities of the Government Providing Products or Services for Governmental Use, Bulletin No. 60-2, September 21, 1959, at 1. The other two Bureau of the Budget bulletins are Bulletin No. 55-4 (January 15, 1955) and Bulletin No. 57-7 (February 5, 1957). They have the same subject line as Bulletin No. 60-2. The Bureau of the Budget was OMB’s predecessor.

¹⁰⁸ 75 *Federal Register* at 16193.

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