



Performance of Inherently Governmental and Critical Functions: The Obama Administration's Final Policy Letter

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Summary

On September 12, 2011, the Office of Federal Procurement Policy (OFPP) within the Office of Management and Budget (OMB) issued its final policy letter on Performance of Inherently Governmental and Critical Functions. The policy letter is to guide executive branch agencies in (1) identifying inherently governmental and critical functions; (2) ensuring that only federal employees perform inherently governmental functions or work that “otherwise needs to be reserved to the public sector;” and (3) managing functions that are closely associated with inherently governmental functions and critical functions. The policy letter defines an “inherently governmental function,” in accordance with the Federal Activities Inventory Reform (FAIR) Act (P.L. 105-270), as “one that is so intimately related to the public interest as to require performance by Federal Government employees.” It also 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.” The policy letter does not define functions closely associated with inherently governmental functions, but lists examples of such functions in an **Appendix**.

The policy letter was issued, in part, in response to Section 321 of the Duncan Hunter National Defense Authorization Act for FY2009 (P.L. 110-417), which tasked OMB with reviewing existing definitions of “inherently governmental function” and developing a “single consistent definition” of this term which would address any deficiencies in existing definitions. President Obama’s memorandum of March 4, 2009, on government contracting similarly charged OMB with clarifying when it is “appropriate” to contract out work. OFPP issued a proposed policy letter in response to these requirements on March 31, 2010. However, the proposed policy letter differed from the final one in focusing on “work reserved for performance by federal government employees” and in other ways.

Beyond defining “inherently governmental function” and “critical function,” the final policy letter articulates that 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.” In support of this policy, the letter directs agencies to (1) ensure that work which should be performed by federal employees is properly reserved for government performance; (2) take steps to employ and train an adequate number of government personnel to administer contracts when work is contracted out; and (3) as part of strategic human capital planning, dedicate a sufficient amount of work to performance by federal employees in order to build competencies, provide for continuity of operations, and retain institutional knowledge of operations. The policy letter establishes two tests for identifying inherently governmental functions, the “nature of the function” test and the “exercise of discretion” test, as well as lists examples of inherently governmental functions. These include certain security functions, but not routine building security. The policy letter also directs that, when agencies review outsourced work for potential insourcing, they should place a lower priority on reviewing certain work performed by small businesses, as well as give small businesses preference when determining who performs work that will remain in the private sector after related functions are insourced.

Congressional interest in inherently governmental functions may persist notwithstanding the issuance of the final policy letter. The Commission on Wartime Contracting included recommendations based on perceived deficiencies in existing guidance on inherently governmental functions in its final report to Congress, and several Members of the 112th Congress have introduced legislation regarding inherently governmental functions (e.g., H.R. 1474; H.R. 1540; H.R. 1949; H.R. 2017; S. 709; S. 785; S. 991; S. 1253; S. 1254; S. 1546; S. 1573).

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Introduction

On September 12, 2011, the Office of Federal Procurement Policy (OFPP) within the Office of Management and Budget (OMB) issued its final policy letter on the Performance of Inherently Governmental and Critical Functions (“Policy Letter 11-01” or “final policy letter”).¹ Scheduled to take effect on October 12, 2011, the policy letter represents the Obama Administration’s guidance for executive branch agencies on (1) identifying inherently governmental and critical functions; (2) ensuring that only federal employees perform inherently governmental functions or work that “otherwise needs to be reserved to the public sector;” and (3) managing functions that are closely associated with inherently governmental functions and critical functions. The policy letter was issued, in part, 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

OFPP issued a proposed policy letter in response to these requirements on March 31, 2010.⁵ However, the proposed policy letter differed from the final one in focusing on “work reserved for performance by federal government employees” and in other ways discussed below. This report supersedes an earlier report analyzing the proposed policy letter, CRS Report R41209, *Inherently*

¹ Office of Management and Budget, Office of Federal Procurement Policy, Publication of the Office of Federal Procurement Policy (OFPP) Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions, 76 Fed. Reg. 56227 (Sept. 12, 2011).

² *Id.* at 56236. The policy letter also cites as authority for its issuance Section 6(a) of the Office of Federal Procurement Policy Act, which authorizes the Administrator of OFPP to “provide overall direction of procurement policy and leadership in the development of procurement systems of the executive agencies.” See 41 U.S.C. §1121(a).

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

⁴ The White House, Office of the Press Secretary, Government Contracting, Mar. 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 Office of Management and Budget, Office of Federal Procurement Policy, Work Reserved for Performance by Federal Government Employees, 75 Fed. Reg. 16188 (Mar. 31, 2010). OFPP published a correction to the proposed policy letter on April 19, 2010. See 75 Fed. Reg. 20397. However, the correction pertained only to the methods for submitting comments on the proposed policy letter.

Governmental Functions and Other Work Reserved for Performance by Federal Government Employees: The Obama Administration's Proposed Policy Letter, by (name redacted) et al.

Congressional interest in inherently governmental functions may persist notwithstanding the issuance of the final policy letter. The Commission on Wartime Contracting included recommendations based on perceived deficiencies in existing guidance on inherently governmental functions in its final report to Congress,⁶ and several Members of the 112th Congress have introduced legislation regarding inherently governmental functions (e.g., H.R. 1474; H.R. 1540; H.R. 1949; H.R. 2017; S. 709; S. 785; S. 991; S. 1253; S. 1254; S. 1546; S. 1573).

Final Policy Letter

The final policy letter articulates that 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.”⁷ In support of this policy, the letter directs agencies to do three things. First, they must ensure that work that should be performed by federal employees is properly reserved for government performance. As discussed below, agency responsibilities under this requirement depend on whether the work involves an inherently governmental function, a function closely associated with an inherently governmental function, or a critical function. Second, agencies are directed to take steps to employ and train an adequate number of government personnel to administer contracts when work is contracted out, particularly when contractors engage in functions that are critical or closely associated with an inherently governmental function. Third, agencies are required, as part of strategic human capital planning, to dedicate a sufficient amount of work to performance by federal employees in order to build competencies, provide for continuity of operations, and retain institutional knowledge of operations.

The policy letter also directs agencies, when reviewing outsourced work for potential insourcing, to place a lower priority on reviewing work performed by small businesses that is not inherently governmental, particularly if the agency has not met its small business goals.⁸ Agencies are also directed to give small businesses preference when determining who performs the private-sector work that remains after related activities are insourced. Specifically, the letter tells agencies to use the “rule of two”—which generally requires that a contract be “set aside” for small businesses if at least two small businesses are capable of performing it at a fair market price⁹—when deciding whether small or “large” businesses should perform the remaining private-sector work.¹⁰

⁶ See Commission on Wartime Contracting in Iraq and Afghanistan, *Transforming Wartime Contracting: Controlling Costs, Reducing Risks*, Aug. 2011, at 38-63, available at http://www.wartimecontracting.gov/docs/CWC_FinalReport-lowres.pdf. Among other things, the Commission found that the existing “inherently governmental standard is insufficient, offering little or no guidance for deciding whether contracting for non-governmental functions is appropriate or prudent in contingency operations.” *Id.* at 39. While the final policy letter apparently addresses the Commission’s concern that agencies not deem all functions that are not inherently governmental suitable for contracting out, it arguably does not address other concerns of the Commission, such as “ad hoc legislated interventions,” decreeing particular functions to be inherently governmental, or inconsistent determinations by individual agencies as to whether particular functions are inherently governmental. *See id.* at 41-42, 46.

⁷ 76 Fed. Reg. at 56236.

⁸ *See id.* at 56239.

⁹ *See* 48 C.F.R. Subpart 9.5.

¹⁰ 76 Fed. Reg. at 56239-40.

The policy letter also imposes other requirements on federal agencies, including (1) implementing procedures to comply with the letter's requirements and reviewing those procedures at least once every two years; (2) ensuring employees have regular training to understand their responsibilities; (3) conducting periodic reviews of internal management controls; and (4) designating at least one senior official as accountable for agency compliance with the letter.¹¹

Inherently Governmental Functions

As part of the requirement that certain work be reserved for federal employees, the policy letter directs agencies to ensure that contractors do not perform inherently governmental functions.¹² The letter defines an "inherently governmental function," in accordance with the Federal Activities Inventory Reform (FAIR) Act (P.L. 105-270),¹³ as "one that is so intimately related to the public interest as to require performance by Federal Government employees."¹⁴ It goes on to explain that the term includes those functions requiring "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."¹⁵

The policy letter establishes two tests for identifying inherently governmental functions.¹⁶ Under the "nature of the function" test, functions involving the exercise of U.S. sovereign power are inherently governmental due to their "uniquely governmental nature" and regardless of any "type or level of discretion associated with them."¹⁷ Under the "exercise of discretion" test, agencies may not contract out functions involving an exercise of discretion that would

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: (I) identify specified ranges of acceptable decisions or conduct concerning the overall policy or direction of the action; and (II) subject the discretionary authority to final approval or regular oversight by agency officials.¹⁸

The policy letter also provides broad examples of the types of functions included in the definition of inherently governmental function, such as the interpretation and execution of federal law so as to bind the government to take or not take action; advancing U.S. interests through various means; and controlling federal employees or the acquisition and use of U.S. property.¹⁹

¹¹ *See id.* at 56240.

¹² *Id.* at 56236.

¹³ 31 U.S.C. §501 note, at §5(2)(A).

¹⁴ 76 Fed. Reg. at 56236. Using the FAIR Act definition is arguably in keeping with 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." *See supra* note 3 and accompanying text.

¹⁵ 76 Fed. Reg. at 56236.

¹⁶ The proposed policy letter solicited comments on a potential third test, the "principal-agent test," which would have required 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." 75 Fed. Reg. at 16192. However, OFPP ultimately decided not to include this test in the final policy letter. *See* 76 Fed. Reg. at 56231 (noting that OFPP instead "made refinements" to the other tests).

¹⁷ 76 Fed. Reg. at 56237.

¹⁸ *Id.*

¹⁹ *See id.*

Additionally, the letter's Appendix A lists specific examples of inherently governmental functions (see **Table A-1**).²⁰ The letter also explains that the definition would not typically include gathering information for or providing advice to government officials, or "ministerial functions" (e.g., building security, operation of cafeterias, housekeeping).

The policy letter requires that agencies take certain steps to ensure they do not contract out inherently governmental functions.²¹ Before issuing a solicitation, agencies are 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, or (3) qualify as such under either of the two tests described above. Agencies also must establish that the contractor's role would not unduly limit the agency's ability to consider options or alternative courses of action.

Ongoing agency responsibilities include reviewing contractor performance and agency contract management.²² If agencies find that contractors are performing inherently governmental functions, they 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,²³ or terminating all or part of the contract.²⁴

Functions Closely Associated with the Performance of Inherently Governmental Functions

As part of the directive that certain work be reserved for federal employees, the policy letter 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.²⁵ The letter also directs agencies to take care that contractors engaging in such functions do not cross the line into performing inherently governmental functions.²⁶ The policy letter does not define functions closely associated with inherently governmental functions, but lists examples in its Appendix B (see **Table A-2**).²⁷

Under the policy letter, any agency contracting out a function closely associated with the performance of an inherently governmental function must determine in writing before issuing a solicitation that it (1) has given special consideration to having federal employees perform the work; (2) has the resources to give "special management attention" to the contractor's performance and related issues; and (3) will comply with the agency responsibilities laid out in

²⁰ See *id.* at 56240-41.

²¹ See *id.* at 56238-39.

²² *Id.* at 56239.

²³ 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.

²⁴ See 76 Fed. Reg. at 56239. 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.

²⁵ 76 Fed. Reg. at 56236, 56238.

²⁶ See *id.*

²⁷ See *id.* at 56241.

the policy letter's Appendix C.²⁸ Appendix C requires agencies do such things as (1) take steps to "limit or guide" contractors' exercise of discretion; (2) assign a sufficient number of qualified government personnel to monitor contractors' activities; (3) ensure contractors and their work product are reasonably identified when there is a risk that their personnel or work might be confused with those of the government; and (4) take steps to avoid or mitigate contractor conflicts of interest.²⁹

Critical Functions

The policy letter requires that agencies ensure "federal employees perform and/or manage critical functions to the extent necessary for the agency to operate effectively and maintain control of its mission and operations."³⁰ The policy letter defines a critical function as one "necessary to the agency being able to effectively perform and maintain control of its mission and operations."³¹ As noted in the letter, the functions deemed to be critical will differ among agencies, as well as within each agency over time.³²

Critical functions that are not inherently governmental may be performed by contractors provided the agency determines in writing, prior to issuing a solicitation, that it has "sufficient internal capability" (e.g., adequate number of trained employees) so that federal employees maintain control of missions and operations.³³ The agency must also ensure it is cost effective to use private-sector contractors.³⁴ Additionally, the letter requires that agencies monitor post-award performance of contracts involving critical functions and take steps to insource these functions (e.g., developing hiring plans, securing funding for in-house capacity) when internal control of mission and operations is at risk due to overreliance on contractors.³⁵

Notable Differences Between the Proposed and Final Policy Letters

The final policy letter differs from the proposed one in several notable ways. Key among these is its title. While the proposed policy letter was titled "Work Reserved for Performance by Federal Government Employees,"³⁶ the title of the final letter has been changed to "Performance of Inherently Governmental and Critical Functions" in order to "more accurately capture its scope and purpose."³⁷ OMB made this change, in part, because some commentators asserted that the proposed policy letter could be construed as concerned "only about ensuring that work is properly reserved for Federal employees," as opposed to striking "the right balance between work that may

²⁸ *See id.* at 56239, 56241-42.

²⁹ *See id.* at 56241-42.

³⁰ *Id.* at 56236.

³¹ *Id.*

³² *See id.* at 56238.

³³ *Id.* at 56238-39.

³⁴ *See id.*

³⁵ *See id.* at 56239.

³⁶ 75 Fed. Reg. at 16188.

³⁷ 76 Fed. Reg. at 56229.

be contracted out and work that must be reserved.”³⁸ As amended, the title of the policy letter would appear to signal more clearly that its guidance is intended to assist agencies in better managing their workforce mix in all phases of the contracting process, from requirements definition through contract administration, not just in determining whether particular functions must or should be performed in-house.³⁹ In fact, the policy letter arguably can be seen as supplementing earlier guidance from the Administration about “Managing the Multi-Sector Workforce,” which is cited in both the preface to and the text of the policy letter.⁴⁰ Like the policy letter, this earlier guidance recognized the “vital expertise” that contractors can provide to the government, while also noting that “overreliance on contractors can lead to erosion of the in-house capacity that is essential to effective government performance.”⁴¹ The earlier guidance also directed agencies to consider whether particular functions are inherently governmental, critical, or “essential” in determining whether contractors may or should perform them.⁴² While this guidance is arguably broadly consistent with that of the proposed and final policy letters, OMB did not include the category of “essential” functions in either the proposed or final policy letters.⁴³

The final policy letter also includes in its illustrative list of inherently governmental functions (1) all combat; (2) security operations in certain situations connected with combat or potential combat; (3) determinations of the reasonableness of an offeror’s price; (4) final determinations about a contractor’s performance (including approving award fee determinations and past performance evaluations);⁴⁴ and (5) selection of grant and cooperative agreement recipients.⁴⁵ The proposed policy letter did not list these specific functions, although it did list functions that could have been construed as encompassing the additional functions listed in the final policy letter.⁴⁶ (See **Table A-1**.) The inclusion of certain security functions, in particular, is arguably significant because it could limit agencies’ existing discretion to contract out these functions,⁴⁷ which has

³⁸ *Id.* at 56230.

³⁹ For example, as discussed above, the final policy letter identifies specific management responsibilities that agencies should undertake pre- and post-award to ensure that contractors do not perform functions that may not or should not be contracted out. *Id.* at 56238-39. In addition, as is also discussed above, it expressly addresses the role that strategic human capital planning should play in determining whether government employees perform particular functions. *Id.* at 56237.

⁴⁰ *See id.* at 56235, 56238.

⁴¹ Executive Office of the President, Office of Management and Budget, Managing the Multi-Sector Workforce: Memorandum for the Heads of Departments and Agencies, July 29, 2009, at 1, *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_fy2009/m-09-26.pdf.

⁴² *Id.*, at Attachment 1, pg. 2.

⁴³ Certain proposed legislation introduced in the 112th Congress would, however, retain a category of “mission essential functions.” *See* Correction of Long-Standing Errors in Agencies’ Unsustainable Procurements (CLEAN-UP) Act, H.R. 1949, §2(3) (“The term ‘mission-essential functions’ refers to 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.”); S. 991, §2(3) (same).

⁴⁴ Agencies are generally required to evaluate and document contractors’ performance on all contracts whose value exceeds \$150,000. *See generally* CRS Report R41562, *Evaluating the “Past Performance” of Federal Contractors: Legal Requirements and Issues*, by (name redacted).

⁴⁵ 76 Fed. Reg. at 56229.

⁴⁶ For example, the proposed policy letter’s categories of “awarding contracts” and “administering contracts” could have been broadly construed to include determining the reasonableness of an offeror’s price and making final determinations about a contractor’s performance.

⁴⁷ *See infra* note 87 and accompanying text. The proposed policy letter had noted that 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” are difficult to “properly classify,” and it invited 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 (continued...)”

been of significant concern to some Members of Congress and commentators.⁴⁸ The final policy letter similarly includes in its illustrative list of functions closely associated with inherently governmental functions certain acquisition-related functions that were not explicitly addressed in the proposed policy letter (e.g., conducting market research, developing inputs for independent government cost estimates), although such functions were arguably encompassed within other functions listed by the proposed policy letter (e.g., services in support of acquisition planning, assistance in contract management).⁴⁹ (See **Table A-2.**) Relatedly, the final policy letter would establish a comprehensive checklist of activities that agencies should undertake whenever they determine that contractor performance of a function closely associated with an inherently governmental function is appropriate.⁵⁰ The proposed policy letter did not include such a checklist, although actions included in the final policy letter's checklist generally were also included in the proposed policy letter's discussion of contracting out functions closely associated with inherently governmental functions.⁵¹

In addition, the final policy letter differs from the proposed policy letter in that it distinguishes between "functions" and "activities" and cautions that, "in many cases, functions include multiple activities that may be of a different nature."⁵² Some commentators had criticized the proposed policy letter on the grounds that it used the terms "function," "position," and "activity" inconsistently and without defining them.⁵³ In responding to this concern, when drafting the final policy letter, OFPP arguably made clear that agencies' primary focus in determining whether particular work must or should be performed by government personnel is at the activity level.⁵⁴ Such a focus could result in agencies' disaggregating current functions and/or positions to ensure that the specific activities comprising them are performed by the appropriate persons.⁵⁵ Similarly, the final policy letter also departs from the proposed policy letter by explicitly noting that

(...continued)

draft guidance or currently existing federal regulations and policies—to address the use (if any) of contractors performing any [such] functions." 75 Fed. Reg. at 16192.

⁴⁸ See, e.g., P.L. 110-417, §831, 122 Stat. 4534 (expressing 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 requiring 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).

⁴⁹ 75 Fed. Reg. at 16197.

⁵⁰ 76 Fed. Reg. at 56241-42.

⁵¹ See 75 Fed. Reg. at 16195.

⁵² 76 Fed. Reg. at 56229.

⁵³ See, e.g., Task Force of the American Bar Association Public Contract Law Section, Privatization, Outsourcing and Financing Transactions and Battlespace Committees, Work Reserved for Performance by Federal Government Employees: OFPP Policy Letter Dated March 31, 2010: Issues and Challenges, June 16, 2010, at 4-5, available at <http://www.americanbar.org/content/dam/aba/migrated/contract/wp061610.authcheckdam.pdf>.

⁵⁴ 76 Fed. Reg. at 56229.

⁵⁵ The preface to the final policy letter includes a chart which shows how four functions—budget development, policy and regulatory development, human resources management, and acquisition planning, execution and management—could be broken down into activities that must be performed by federal employees because they are inherently governmental and other functions. *Id.* at 56234. It also notes that "analyzing work from the perspective of the number of positions required to perform an activity enables an agency to differentiate those tasks that may require rebalancing from those that do not." *Id.*

agencies' focus in determining whether particular functions are "critical" is upon their mission and operations, which means that the functions identified as critical could differ between agencies and over time.⁵⁶ Some commentators had previously noted that this could be the result of agency determinations as to critical or "mission essential functions,"⁵⁷ but the proposed policy letter did not directly address the issue. In addition, the final policy letter reorganizes and consolidates certain guidance as to the management of inherently governmental and other functions that was included in the proposed policy letter, but presented more diffusely.⁵⁸ OMB's reported goal here is to "more clearly recognize that oversight of these functions [is] interrelated and should not be stovepiped."⁵⁹

Finally, Policy Letter 11-01 directs agencies to give certain preferences to small businesses when insourcing particular functions.⁶⁰ Small businesses were reportedly significantly affected by the Department of Defense's insourcing initiatives in 2009-2010,⁶¹ and the Obama Administration's Interagency Taskforce on Federal Contracting Opportunities for Small Business recommended that the "relationship between policies that address the rebalancing of agencies' relationship with contractors and small business contracting policies" be clarified.⁶² The final policy letter responds to this concern, which was not addressed in the proposed policy letter, by directing agencies, when prioritizing what outsourced work should be reviewed for potential insourcing, to

place a lower priority on reviewing work performed by small businesses when the work is not inherently governmental and where continued contractor performance does not put the agency at risk of losing control of its mission or operations, especially if the agency has not

⁵⁶ *Id.* at 56229.

⁵⁷ See, e.g., 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) at 29-30 ("[T]ying functions more closely to agency operations than to the public interest could result in situations where a function is categorized differently by different agencies. For example, translators would not necessarily be mission essential for the Interior Department, although they might be for the State Department. Similarly, translators could be essential for some DOD missions, but not for others."). See also *Conner Bros. Constr. Co. v. Geren*, 550 F.3d 1368, 1377 (Fed. Cir. 2008) (noting that military officials characterized operation of the dining facilities and custodial services—functions typically performed by contractors—as "mission essential" when troops were restricted to base while preparing to deploy). The category of "mission essential functions" is not included in the policy letter, but appears in certain legislation proposed in the 112th Congress. See *infra* note 127 and accompanying text.

⁵⁸ 76 Fed. Reg. at 56229.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ See, e.g., Matthew Weigelt, Defense Officials Hone Their Insourcing Strategy, *Wash. Tech.*, Feb. 3, 2010, available at <http://washingtontechnology.com/blogs/acquisitive-mind/2010/02/dod-insourcing-initiative.aspx> (describing one small business that lost 20% of its workforce to the government as a result of insourcing); U.S. Chamber of Commerce et al., Letter to the President, Aug. 19, 2010, available at http://www.techamerica.org/content/wp-content/uploads/2010/08/Coalition_Letter_President_Obama-Insourcing_Moratorium_8-19-2010.pdf (urging the Administration to "issue a revision to [its] insourcing agenda calling for an immediate moratorium on all insourcing efforts throughout the Federal government" due to the effects of insourcing on small businesses). For more on DOD's insourcing initiatives, see Matthew Weigelt, Army Vows to Cut 7,000 Contractor Jobs This Year, *Wash. Tech.*, Feb. 23, 2010, available at <http://washingtontechnology.com/articles/2010/02/23/army-insourcing-core-governmental-functions.aspx> (reporting that the Secretary of the Army testified in February 2010 that the Army intended to insource 7,162 positions in FY2010 and 11,084 positions in FY2011 through FY2015).

⁶² Report of the Interagency Task Force on Federal Contracting Opportunities for Small Business, at 7 (Sept. 23, 2010), available at http://www.sba.gov/idc/groups/public/documents/sba_homepage/contracting_task_force_report.pdf.

recently met, or currently is having difficulty meeting, its small business goals, including any of its socioeconomic goals.⁶³

In addition, the final policy letter directs agencies that are insourcing part of a contracted function that is currently being performed by small and “large” businesses to apply the “rule of two” in determining whether small or other businesses perform the contracted work that remains in the private sector.⁶⁴ The “rule of two” generally requires that acquisitions be set aside for competitions in which only small businesses may compete when two or more responsible small businesses are capable of performing the work at fair market price.⁶⁵ The letter also instructs agencies to consider whether work that is currently not being performed by small businesses and is reduced as part of insourcing should be totally or partially set aside for small businesses.⁶⁶ Use of the rule of two in the latter context (i.e., in determining who should perform particular work) is standard practice for executive branch agencies.⁶⁷ However, it is less clear whether and how agencies might apply the rule of two in determining whether to terminate existing contracts or deciding which of several incumbent contractors should continue performing any work that continues to be outsourced when certain functions are insourced.

Proposed Changes to Existing Law and Policy on Inherently Governmental and Critical Functions

The preface to Policy Letter 11-01 proposes—but does not itself make—certain changes to regulations and other policy documents that could bring greater uniformity to existing guidance on inherently governmental and related functions.⁶⁸ In the preface, OMB indicates that it is adopting the definition of “inherently governmental function” given in the Federal Activities Inventory Reform (FAIR) Act for purposes of the policy letter, and that the “definition provided by th[e] policy letter will replace existing definitions in regulation and policy, including the

⁶³ 76 Fed. Reg. at 56239.

⁶⁴ *Id.*

⁶⁵ See 48 C.F.R. §19.502-2(b)(1)-(2).

⁶⁶ 76 Fed. Reg. at 56240. An acquisition is totally set aside for small businesses when only they are eligible to compete. When a total set-aside is not appropriate, a procurement generally can be partially set aside for small businesses if (1) the requirement is severable into two or more economic production runs or reasonable lots; (2) the contracting officer reasonably expects one or more small businesses have the technical competence and productive capacity to satisfy the set-aside portion of the requirement at a fair market price; and (3) the acquisition is not subject to simplified acquisition procedures. 48 C.F.R. §19.502-3(a)(1)-(4).

⁶⁷ See generally CRS Report R41945, *Small Business Set-Aside Programs: An Overview and Recent Developments in the Law*, by (name redacted) and (name redacted).

⁶⁸ Policy Letter 11-01 itself does not purport to have the force and effect of law, although it could potentially be found to do so if OFPP intended to be bound or has employed the guidelines in a manner such that they are binding as a practical matter. See, e.g., *United States v. Alameda Gateway Ltd.*, 213 F.3d 1161, 1168 (9th Cir. 2000); *Chiron Corp. v. Nat’l Transp. Safety Bd.*, 198 F.3d 935, 943-44 (D.C. Cir. 1999); *Troy Corp. v. Browner*, 120 F.3d 277, 287 (D.C. Cir. 1997); *Am. Portland Cement Alliance v. Env’t Prot. Agency*, 101 F.3d 772, 776 (D.C. Cir. 1996). OMB Circular A-76, discussed below, has also generally been found to lack the force and effect of law. See, e.g., *U.S. Dep’t of Health & Human Servs. v. Fed. Labor Relations Auth. (FLRA)*, 844 F.2d 1087 (4th Cir. 1988); *Defense Language Inst. v. FRLA*, 767 F.2d 1398 (9th Cir. 1985). However, some federal courts of appeals have found that particular versions of OMB Circular A-76 have met certain conditions necessary for the Circular to have the force and effect of law. See *Labat-Anderson, Inc. v. United States*, 65 Fed. Cl. 570, 578 (2005) (finding that the 2003 version of OMB Circular A-76 was issued pursuant to a grant of statutory authority); *Diebold v. United States*, 947 F.2d 787, 800 (6th Cir. 1991) (reaching the same conclusion about the 1983 version of OMB Circular A-76).

Federal Acquisition Regulation (FAR)).⁶⁹ The reference to “existing definitions in . . . policy” would appear to be a reference to OMB Circular A-76, which articulates the “longstanding policy of the federal government . . . to rely on the private sector for needed commercial services” and establishes procedures for agencies to use in determining whether their commercial activities should be performed under contracts with the private sector or in-house by agency personnel.⁷⁰

By adopting the FAIR Act’s definition of “inherently governmental functions” and then modifying the FAR and/or OMB Circular A-76 to incorporate this definition, Policy Letter 11-01 arguably would help standardize the various definitions and descriptions of inherently governmental functions currently given in federal law and policy. While the differences between the FAIR Act, the FAR, and OMB Circular A-76 at present are arguably slight, as **Table 1** illustrates, some have suggested that these differences nonetheless make it more difficult for agencies to make appropriate decisions about whether federal employees or contractors may or should perform particular functions.⁷¹ However, the final policy letter does not directly address other provisions of law giving alternate definitions of “inherently governmental function” or designating particular functions as inherently governmental or commercial. There are several such provisions, including two statutory definitions of “inherently governmental function” outside the FAIR Act⁷² and numerous statutory declarations that specific functions are inherently governmental or commercial.⁷³ Some commentators, including the Commission on Wartime Contracting in its final report, have identified the existence of the latter type of provisions as an impediment to “produc[ing] predictable and consistent results on the legal baseline of permissibility” of contracting out particular functions,⁷⁴ but because these designations are based

⁶⁹ 76 Fed. Reg. at 56227.

⁷⁰ See OMB, Circular No. A-76 Revised, May 29, 2003, at §4, *available at* http://www.whitehouse.gov/omb/circulars/a076/a76_incl_tech_correction.html. This is the current version of OMB Circular A-76. There are several prior versions of the Circular, under this and other names, dating back to the 1950s. See 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).

⁷¹ 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.’”).

⁷² See National and Community Service Trust Act of 1993, P.L. 103-82, §196, 107 Stat. 785 (Sept. 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 (Aug. 9, 2004) (codified at 33 U.S.C. §1223(e)) (same). 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) of Title 10 does not itself define “inherently governmental function.” Rather, it incorporates by reference the definition of “inherently governmental function” provided in the FAR. See 48 C.F.R. §2.101.

⁷³ See, e.g., Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, P.L. 110-329, §521, 122 Stat. 3574 (Sept. 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 (Aug. 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); *National Air Traffic Controllers Ass’n v. Sec’y of the Dep’t of Trans.*, 2011 U.S. App. LEXIS 16852, at *10 (6th Cir., Aug. 16, 2011) (finding that amendments made to 49 U.S.C. §47124(b)(2) in 2003 demonstrate Congress’s intent that certain air traffic control activities are commercial functions that may be contracted to private entities).

⁷⁴ *Transforming Wartime Contracting*, *supra* note 6, at 47.

in statute, the executive branch cannot remove or modify them in the same way that it can amend the FAR and/or OMB Circular A-76.⁷⁵

Table 1. Primary Definitions and Discussions of Inherently Governmental Functions in Federal Law and Policy Prior to OFPP Policy Letter 11-01

A comparison of the FAIR Act, the FAR, and OMB Circular A-76

FAIR Act	FAR ^a	OMB Circular A-76
<p>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....</p> <p>Functions included.—The term includes activities 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.</p> <p>An inherently governmental function involves, among other things, the interpretation and execution of the laws of the United States so as—</p> <p>(i) to bind the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;</p> <p>(ii) 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;</p> <p>(iii) to significantly affect the life, liberty, or property of private persons;</p> <p>(iv) to commission, appoint, direct, or control officers or employees of the United States;^b</p>	<p>“Inherently 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. This definition is a policy determination, not a legal determination.</p> <p>An inherently governmental function includes activities that require either the exercise of discretion in applying Government authority, or the making of value judgments in making decisions for the Government. Governmental functions normally fall into two categories: the act of governing, i.e., the discretionary exercise of Government authority, and monetary transactions and entitlements.</p> <p>(1) An inherently governmental function involves, among other things, the interpretation and execution of the laws of the United States so as to—</p> <p>(i) Bind the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;</p> <p>(ii) 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;</p> <p>(iii) Significantly affect the life, liberty, or property of private persons;</p> <p>(iv) Commission, appoint, direct, or control officers or employees of the</p>	<p>An inherently governmental activity is an activity that is so intimately related to the public interest as to mandate performance by government personnel. These activities require the exercise of substantial discretion^e in applying government authority and/or in making decisions for the government.</p> <p>Inherently governmental activities normally fall into two categories: the exercise of sovereign government authority or the establishment of procedures and processes related to the oversight of monetary transactions or entitlements.</p> <p>An inherently governmental activity involves:</p> <p>(1) Binding the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;</p> <p>(2) Determining, protecting, and advancing economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise;</p> <p>(3) Significantly affecting the life, liberty, or property of private persons; or</p> <p>(4) Exerting ultimate control over the acquisition, use, or disposition of United States property (real or personal, tangible or intangible), including establishing policies or procedures for the collection, control, or disbursement of appropriated and</p>

⁷⁵ 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 Fed. Reg. 77493 (Dec. 11, 2000) (designating the “provision of air traffic services” as an inherently governmental function) with Executive Order 13264, 67 Fed. Reg. 39243 (June 7, 2002) (removing this designation). However, there do not appear to be any such executive orders currently in effect.

FAIR Act	FAR ^a	OMB Circular A-76
or	United States; ^b or	other federal funds. ^f
(v) 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 appropriated and other Federal funds. ^c	(v) 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 Federal funds. ^d	

Source: Congressional Research Service, based on 31 U.S.C. §501 note, at §5; 48 C.F.R. §2.101; and OMB Circular A-76, *supra* note 70, at Appendix A, §B.1.a.

- a. This is the definition given in Subpart 7.5 of the FAR, which addresses “Inherently Governmental Functions.” Subpart 7.3 of the FAR, which addresses “Contractor Versus Government Performance,” incorporates the definition of OMB Circular A-76 by reference. See 48 C.F.R. §7.301 (“Definitions of ‘inherently governmental activity’ and other terms applicable to this subpart are set forth at Attachment D of the Office of Management and Budget Circular No. A-76 (Revised), Performance of Commercial Activities, dated May 29, 2003 (the Circular).”).
- b. This function is not included on the list of inherently governmental functions given in OMB Circular A-76.
- c. The FAIR Act then gives a similar listing of “functions excluded” from the definition of inherently governmental functions. This listing includes gathering information or providing advice, opinions, recommendations, or ideas to federal government officials, as well as any function that is primarily ministerial and internal in nature, such as building security, mail operations, and warehouse operations.
- d. The FAR also notes that “[i]nherently governmental functions do not normally include gathering information for or providing advice, opinions, recommendations, or ideas to Government officials. They also do not include functions that are 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.” 48 C.F.R. §2.101.
- e. Some commentators have suggested that the addition of “substantial” to OMB Circular A-76 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*, Feb. 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 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. See OMB, Policy Letter 92-1, Sept. 23, 1992, available at http://www.whitehouse.gov/omb/procurement_policy_letter_92-01.
- f. OMB Circular A-76 further notes that “[w]hile inherently governmental activities require the exercise of substantial discretion, not every exercise of discretion is evidence that an activity is inherently governmental.” It also provides a definition of “commercial activities,” which is lacking in the other sources discussed here. See OMB Circular A-76, *supra* note 70, at Appendix A, §B.2.

The final policy letter would also establish a definition of “critical function,”⁷⁶ which is currently lacking in federal law, although it is unclear whether this definition would be given solely in the policy letter, or whether the FAR and/or OMB Circular A-76 would also be amended to incorporate it. Legislation has been introduced in the 112th Congress that would create and define

⁷⁶ 76 Fed. Reg. at 56236.

a category of “mission essential functions” that must be performed by government employees,⁷⁷ and some commentators consider mission-essential functions to be critical ones.⁷⁸

The policy letter does not define functions closely associated with inherently governmental functions, which are elsewhere defined as “services and actions” that, while not themselves inherently governmental, “approach being in that category because of the nature of the function, the manner in which the contractor performs the contract, or the manner in which the Government administers contract performance.”⁷⁹ Currently, agencies are required by statute to give “special consideration” to using federal employees to perform functions closely associated with the performance of inherently governmental functions,⁸⁰ and the final policy letter explicitly notes this requirement.⁸¹ The final policy letter also lists nine examples of functions closely associated with inherently governmental functions.⁸² While this listing is not identical to the listing of 19 examples of functions closely associated with inherently governmental functions currently given in the FAR, it is substantially similar to it, as **Table A-2** illustrates,⁸³ and OMB’s proposed amendments to the FAR could replace the FAR’s current listing with the final policy letter. However, like existing law, the final policy letter would not prohibit agencies from contracting out such functions,⁸⁴ as certain legislation introduced in the 112th Congress would do.⁸⁵

Issues for Congress

Implementation of Policy Letter 11-01 could raise a number of issues of interest to Congress, including whether the policy letter’s guidance results in different determinations by agencies

⁷⁷ See *infra* note 127 and accompanying text.

⁷⁸ See, e.g., Roger D. Carstens, Michael A. Cohen & Maria Figueroa Küpçü, *Changing the Culture of Pentagon Contracting* 12-13 (2008); 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).

⁷⁹ 48 C.F.R. §7.503(d). Several statutes, particularly ones relating to Department of Defense procurements, incorporate by reference the FAR’s definition of functions closely associated with inherently governmental functions. See, e.g., 10 U.S.C. §2330a(g)(3) (defining functions closely associated with inherently governmental functions by reference to 10 U.S.C. §2383(b)(3)); 10 U.S.C. §2463(e) (same). Section 2383(b)(3) of Title 10 of the United States Code does not itself define functions closely associated with inherently governmental functions. Rather, it incorporates by reference the definition of 48 C.F.R. §7.503(d).

⁸⁰ Omnibus Appropriations Act, 2009, P.L. 111-8, div. D, §736(b)(2)(A)(ii), 123 Stat. 690 (Mar. 11, 2009) (civilian agencies); National Defense Authorization Act for FY2008, P.L. 110-181, div. A, §324(a)(1), 122 Stat. 60 (Jan. 28, 2008) (codified at 10 U.S.C. §2463(b)(1)(B)) (defense agencies).

⁸¹ The policy letter explicitly incorporates this requirement in its text, as well as directs that, when contractors perform functions closely associated with inherently governmental functions, agencies are to “provide greater attention and an advanced degree of management oversight of the contractors’ activities to ensure that contractors’ duties do not expand to include performance of inherently governmental functions.” 76 Fed. Reg. at 56236.

⁸² 76 Fed. Reg. at 56241.

⁸³ However, the final policy letter does include a number of functions supporting acquisition that are not explicitly addressed in the FAR, such as conducting market research, developing inputs for government cost estimates, drafting statements of work and other pre-award documents, drafting price negotiations memoranda, and contract management. Compare 76 Fed. Reg. at 56241 with 48 C.F.R. §7.503(d). As is noted in **Table A-2**, the proposed policy letter’s listing of functions closely associated with inherently governmental functions reproduced almost verbatim that in the FAR.

⁸⁴ 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).

⁸⁵ See *infra* note 127 and accompanying text.

about whether to perform in-house particular functions whose performance by contractors has been of concern to some Members of recent Congresses.⁸⁶ Certain security functions performed by contractors are likely to be of particular interest here because the final policy letter arguably limits agencies' discretion to contract out some security functions by designating them as inherently governmental.⁸⁷ However, it remains to be seen whether listing these functions as inherently governmental precludes certain uses of private security contractors, or whether the debate merely shifts from one over whether security functions are inherently governmental to one over whether particular activities constitute "combat," which is a term that factors heavily in the descriptions of all the security functions designated as inherently governmental. Moreover, some Members of the 112th Congress have introduced legislation that is arguably inconsistent with the final policy letter. The enactment of any such legislation would obviously affect agency implementation of the final policy letter. However, even if not enacted, proposed legislation may signal potential differences of opinion between some Members of Congress and the Administration regarding sourcing policy that could prompt additional congressional oversight of agency actions.

⁸⁶ See, e.g., Concurrent Resolution on the Budget for FY2010, S. Con. Res. 13-42, 111th Cong. (requiring the Department of Defense (DOD) to "review the role that contractors play in operations, including the degree to which they are performing inherently governmental functions"); Department of Homeland Security Appropriations Act, 2010, P.L. 111-83, §520, 123 Stat. 2171 (Oct. 28, 2009) (classifying the functions of the Federal Law Enforcement Training Center instructor staff as inherently governmental); Duncan Hunter National Defense Authorization Act for FY2009, P.L. 110-417, §831, 122 Stat. 4534 (Oct. 14, 2008) (expressing Congress's sense that 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 and cannot appropriately be transferred to private sector contractors); National Defense Authorization Act for FY2008, P.L. 110-181, §802, 122 Stat. 206-07 (Jan. 28, 2008) (requiring DOD to ensure that DOD's acquisition workforce is of the appropriate size and skill level to accomplish inherently governmental functions related to the acquisition of major systems and defining a "lead system integrator" as "a prime contractor under a contract for the procurement of services the primary purpose of which is to perform acquisition functions closely associated with inherently governmental functions with respect to the development or production of a major system"); P.L. 110-181, §841, 122 Stat. 230-34 (requiring the Commission on Wartime Contracting to make specific recommendations regarding, among other things, the process for determining which functions are inherently governmental in contingency operations, including whether providing security in an area of combat operations is inherently governmental).

⁸⁷ The policy letter designates as inherently governmental functions (1) security operations performed in direct support of combat as part of a larger integrated armed force; (2) security operations performed in environments where, in the judgment of the responsible Federal official, there is significant potential for the security operations to evolve into combat; and (3) security that entails augmenting or reinforcing others (whether private security contractors, civilians, or military units) that have become engaged in combat. 76 Fed. Reg. at 56240. The designation of these functions as inherently governmental is a marked departure from current law, which generally leaves agencies with broad discretion in determining whether particular functions are inherently governmental. 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). Some commentators had previously asserted that security functions were inherently governmental functions under the FAIR Act, the FAR, and/or OMB Circular A-76 because they involve protecting and advancing U.S. interests by "military ... action, or otherwise," as well as significantly affect the life, liberty, or property of private persons. However, such arguments were generally unavailing in changing agency practice, or in disturbing the award or proposed award of agency contracts for security services. See, e.g., Department of Defense, Office of General Counsel, Request to Contract for Private Security Companies in Iraq, Jan. 10, 2006 (copy on file with authors) (permitting the use of contractors to protect persons or property, so long as the services they provide do not involve "uniquely military functions"); Brian X. Scott, Comp. Gen. B-298370 (Aug. 18, 2006) (rejecting the allegation that the proposed award involved "uniquely governmental" functions on the grounds that DOD regulations and the provisions of the Defense Federal Acquisition Regulation Supplement permitted the contracts for armed security services under certain conditions).

Implementation of the Policy Letter

With the publication of Policy Letter 11-01, agencies have much-needed, final guidance regarding how to differentiate among inherently governmental functions, functions closely associated with inherently governmental functions, and critical functions, and how to address possible contractor performance of the latter two types of functions. Yet, compliance with the policy letter could be challenging. Agency personnel are expected to understand and apply an expanded typology of functions, and additional resources may be required to carry out successfully management responsibilities outlined in the letter. Finally, while some observers are concerned that the policy letter might lead to widespread insourcing, it is unclear whether any data will be collected regarding agencies' activities, including the outcomes of their efforts.

Identifying Inherently Governmental and Other Functions

Until the publication of OFPP's policy letter, written sourcing policy had divided agency functions into two categories: commercial and inherently governmental.⁸⁸ This dichotomy has its origins in three Bureau of the Budget bulletins that were issued in the 1950s.⁸⁹ With the publication of Policy Letter 11-01, two new categories have been added: critical functions, and functions closely associated with inherently governmental functions ("closely associated"). Inherently governmental is the only category where federal employee performance is mandated.⁹⁰ Contractor employees, federal employees, or a combination of the two may perform commercial, critical, or "closely associated" functions, though the policy letter provides guidance for each of the latter two categories that addresses the circumstances under which contractor performance may be appropriate.

Proper identification of agency functions may depend, at least in part, on whether agencies have sufficient personnel with the requisite knowledge and expertise to review agency functions, contracts, and work performed by contractors. Agency personnel's determinations might have significant implications for their agency, the federal government generally, and the private sector.

Inherently Governmental and "Closely Associated" Functions

The policy letter's instructions regarding the identification of inherently governmental functions are, in some respects, explicit. The letter directs agency personnel to review the illustrative list of inherently governmental functions found in Appendix A of the policy letter and statutory provisions that designate certain functions as inherently governmental. Accomplishing these steps may reinforce agency personnel's understanding of the term *inherently governmental*, clarify how to use the list in Appendix A, and remind personnel to determine which agency functions, if any, have been designated as inherently governmental by statute. By comparison, Subpart 7.5 of the

⁸⁸ Sourcing policy involves determining which sector, public (government) or private, will perform which functions, including determining when federal employee performance is required.

⁸⁹ The Bureau of the Budget was the precursor to the Office of Management and Budget. The three bulletins are as follows: U.S. Bureau of the Budget, "Commercial-Industrial Activities of the Government Providing Products or Services for Governmental Use," Bulletin No. 55-4, Jan. 15, 1955; U.S. Bureau of the Budget, "Commercial-Industrial Activities of the Government Providing Products or Services for Governmental Use," Bulletin No. 57-7, Feb. 5, 1957; and, U.S. Bureau of the Budget, "Commercial-Industrial Activities of the Government Providing Products or Services for Governmental Use," Bulletin No. 60-2, Sept. 21, 1959.

⁹⁰ 48 C.F.R. §7.503(a).

FAR states that contractors may not perform inherently governmental functions and contains a list of functions to be considered inherently governmental, but does not explicitly instruct agency personnel on how to apply the list.

Pursuant to Policy Letter 11-01, if a function neither appears in the list found at Appendix A nor is designated as inherently governmental in a statute, then agency personnel are to turn to the definition itself, and, in particular, apply the “nature of the function” test and the “level of discretion” test (unless the nature of the function test is sufficient, as noted in the policy letter). Generally, agency personnel may have some experience determining whether a function is inherently governmental. First, Subpart 7.5 of the FAR indicates that agency personnel are to determine whether functions are inherently governmental. Second, under President George W. Bush, OMB required agencies to submit lists of their inherently governmental functions when they submitted their annual inventories of commercial activities⁹¹ to OMB pursuant to the Federal Activities Inventory Reform (FAIR) Act.⁹² Yet, there are some differences between the relevant Bush Administration initiative and the Obama Administration’s initiative. During the former administration, the unit of analysis was agency functions; agencies may have used the definition of *inherently governmental* found in OMB Circular A-76 (which differs somewhat from the definition in the FAIR Act); and the inherently governmental inventory was a component of the administration’s competitive sourcing initiative.⁹³ Under the Obama Administration, the units of analysis are agency functions and contractor performance (and possibly contracts); agencies are to use the FAIR Act definition of *inherently governmental*; and identifying inherently governmental functions implements, in part, the policy of “ensur[ing] that government action is taken as a result of informed, independent judgments made by government officials.”⁹⁴ These differences between the competitive sourcing initiative and the policy letter might necessitate a revised approach, or perspective, on the part of agency personnel, and perhaps some training.

Policy Letter 11-01 also addresses, but does not define, functions “closely associated” with inherently governmental functions, though it does include a list of examples in Appendix B. These are functions that “may approach being [in the category of inherently governmental] because of the nature of the function and the risk that performance may impinge on Federal officials’ performance of an inherently governmental function.”⁹⁵ Although the policy letter does not reserve this category for performance by federal employees, civilian agencies subject to the FAIR Act are required to give special consideration to using agency employees to perform “closely associated” functions.⁹⁶ Since this is a new category, agency personnel may need training

⁹¹ A commercial activity “is a recurring service that could be performed by the private sector and is resourced, performed, and controlled by the agency through performance by government personnel, a contract, or a fee-for-service agreement. A commercial activity is not so intimately related to the public interest as to mandate performance by government personnel. Commercial activities may be found within, or throughout, organizations that perform inherently governmental activities or classified work.” OMB Circular A-76, *supra* note 70, at A-3.

⁹² Sean O’Keefe, Deputy Director, U.S. Office of Management and Budget, “Year 2001 Inventory of Commercial Activities,” at 1 (Apr. 3, 2001), *available at* <http://www.whitehouse.gov/sites/default/files/omb/assets/omb/memoranda/m01-16.pdf>. The FAIR Act requires certain agencies, which are identified in the statute, to submit to OMB an annual inventory of their commercial activities. *See* 31 U.S.C. §501 note.

⁹³ Competitive sourcing is “the process of opening the government’s commercial activities to the discipline of competition [and it was] ... one of the five main initiatives of ... [the President’s] Management Agenda [(PMA)] for improving the performance of government.” Office of Mgmt. & Budget, Performance of Commercial Activities, 67 Fed. Reg. 69772 (Nov. 19, 2002.)

⁹⁴ 76 Fed. Reg. at 56236.

⁹⁵ *Id.* at 56238.

⁹⁶ Omnibus Appropriations Act, FY2009, P.L. 111-8, §736, 123 Stat. 689-90 (Mar. 11, 2009).

to aid them in identifying these functions and determining the appropriate workforce (federal employees, contractor employees, or both) for each function. OFPP provides, at Appendix C of the policy letter, a checklist that describes agencies' responsibilities when contractors perform "closely associated" functions.

Critical Functions

Completing the expansion of the typology of agency functions is the addition of critical functions. Agency personnel may have some familiarity with this category (and the category of "closely associated" functions) given that both were included in the proposed OFPP policy letter that was published in March 2010. On the other hand, agency staff might not be able to rely on competitive sourcing experience in classifying what are, in effect, commercial functions. The focus of competitive sourcing is to identify commercial functions eligible for public-private competition. An agency assigns a reason code to each commercial function appearing on the inventory it submits to OMB, and the purpose of the codes is to indicate whether a function is eligible for competition, and, if not, why.⁹⁷ Not only does implementation of the policy letter present agency personnel with a different perspective—some commercial functions might be critical, and federal employee performance of some portion of critical functions might be necessary—but it also asks agency personnel to determine the level of criticality. Determining whether a function is critical, and, if so, whether the agency has sufficient internal capability, "requires the exercise of informed judgment by agency officials."⁹⁸

As suggested by the preface to the policy letter, identifying critical functions probably will be done on a case-by-case basis:

A function's criticality is dependent on an agency's mission and operations ... which will differ between agencies and potentially within agencies over time. Whether an agency is over reliant on a contractor to perform a critical function also will vary from agency to agency depending on its current internal capabilities compared to those needed to maintain control of its mission and operations.⁹⁹

Although each agency will need to determine how to apply the guidance provided in the policy letter when examining each potentially critical function, interagency discussions and sharing of information might facilitate each agency's efforts to identify critical functions. The Chief Acquisition Officers Council (CAOC) has established a working group on Multi-Sector Workforce Management,¹⁰⁰ which might be an appropriate venue for discussions.¹⁰¹

⁹⁷ Reason code A indicates that a commercial function is not appropriate for private sector performance, while code F indicates that a statutory provision prohibits contractor performance. The remaining four reason codes are used to indicate the function is appropriate for a competition (code B), or to show why a public-private competition is not appropriate at the time the inventory is submitted to OMB. Reason code C indicates that a competition is in progress; code D indicates that federal employees are performing the work as the result of a competition held within the past five years; and code E indicates that an agency-approved restructuring decision (e.g., closure or realignment) is pending. Office of Mgmt. & Budget, "Reason Codes for Commercial Activities," *available at* http://www.whitehouse.gov/omb/procurement_fair_2004_reason_codes.

⁹⁸ 76 Fed. Reg. at 56238.

⁹⁹ *Id.* at 56233.

¹⁰⁰ In July 2009, OMB issued a memorandum on multi-sector workforce management. OMB wrote: "Federal agencies use both federal employees and private sector contractors to deliver important services to citizens. Agency management practices must recognize the proper role of each sector's labor force and draw on their respective skills to help the (continued...)"

Resources

Considering the responsibilities and tasks described in the policy letter, some agencies might discover that they need additional personnel to implement fully the letter's provisions. At a minimum, agency personnel will be needed to perform pre-award and post-award tasks; address small business contracting under certain circumstances as specified in the policy letter; develop agency procedures and training and accomplish other management responsibilities; and, if the agency has contractors performing "closely associated" functions, also perform the tasks found in Appendix C.¹⁰² Furthermore, additional federal employees may be needed to perform an inherently governmental function that is currently performed by a contractor's employees; perform all, or a portion, of a critical function; administer contracts; or oversee and manage contractors and their performance. Options for ensuring sufficient personnel are available to accomplish these tasks and responsibilities include recruiting, hiring, and training new employees, or re-allocating incumbent employees (which also may necessitate implementing training), either temporarily or permanently depending upon the circumstances.

The policy letter addresses personnel issues with its discussion of strategic human capital planning. In brief, this provision directs agencies to ensure they are able to build competencies, retain institutional knowledge, and maintain continuity of operations using federal employees; maintain sufficient personnel to manage every contractor's performance and evaluate every contractor's work products and services; and address the size and quality of their acquisition workforces. Agencies are also to consider how available funding, or decisions involving "a specified level of government employee authorizations (or military end strength)," might affect their ability to use federal employees "to perform work that should be reserved for performance by such employees and take appropriate action if there is a shortfall."¹⁰³

Some of the crucial responsibilities and tasks described in the policy letter, such as managing contractors and paying special attention to contractors who are performing "closely associated" functions, will need to be performed by agencies' acquisition workforces. Although acquisition staff already perform some of these tasks, the expansion of the typology of agency functions and the accompanying guidance and responsibilities might tax a workforce that has been understaffed and undertrained since the 1990s.¹⁰⁴ In 2007, the Acquisition Advisory Panel reported that "a significant mismatch [existed] between the demands placed on the acquisition workforce and the personnel and skills available within that workforce to meet those demands."¹⁰⁵ Testifying in fall 2010, the head of the Office of Federal Procurement Policy summarized the problem as follows:

(...continued)

government operate at its best." Managing the Multi-Sector Workforce, *supra* note 41, at 1.

¹⁰¹ See http://caoc.gov/index.cfm?function=c_source for the CAOC multi-sector workforce management website.

¹⁰² 76 Fed. Reg. at 56238-39, 56241-42.

¹⁰³ *Id.* at 56237.

¹⁰⁴ See Steven L. Schooner & David J. Berteau, "Emerging Policy and Practice Issues (2010)," Legal Studies Research Paper No. 529, George Washington University Law School, at pg. 9-6 (Dec. 1, 2010) ("We agree with those who assert that the government has not hired an appropriate number of new acquisition professionals in any year since the 1980's. Accordingly, a disproportionate share of the existing workforce is aging and, in large part, retirement-eligible; most of that workforce was neither hired nor trained to primarily purchase services using flexible contractual vehicles. In addition ... the volume of purchasing exploded during the last decade. Thus, the government faces a problem of enormous proportions.").

¹⁰⁵ *Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress*, 327 (Jan. 2007), available at <https://www.acquisition.gov/comp/aap/finalaapreport.html>.

As this Commission [Commission on Wartime Contracting] and the Gansler Commission have reported, the federal government has not invested in the acquisition workforce enough to allow it to adequately cope with the growth in contract spending or the increased complexity of agencies' missions. From 2001 to 2008, contract spending more than doubled to over 500 billion dollars, while the size of the acquisition workforce – both civilian and defense – remained relatively flat.¹⁰⁶

If an agency's acquisition workforce is not at full strength in terms of both size and capability, and it is not able to augment this segment of its workforce, then its ability to comply fully with the policy letter might be compromised.

Outcomes and Data

What are the possible outcomes of implementing Policy Letter 11-01 and related documents?¹⁰⁷ The list might include the strengthening of an agency's internal capacity, allocating additional agency personnel to contract management and oversight functions, and insourcing.

Insourcing warrants special mention. Some commentators might focus on this possible outcome while failing to acknowledge the other possibilities, thus conflating the policy letter with insourcing. Similarly, some observers might conflate competitive sourcing with one particular possible outcome of public-private competition—outsourcing.¹⁰⁸ OFPP notes in its policy letter, though, that “insourcing is intended to be a management tool—not an end in itself—to address certain types of overreliance on contractors.”¹⁰⁹ Moreover, determining that a contractor's employees are performing inherently governmental functions might not necessarily lead to insourcing. Addressing this possibility, the policy letter states: “In some cases, government control over, and performance of, inherently governmental 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.”¹¹⁰ Testifying in September 2011, the head of OFPP stated that “the policy letter should not lead to a widespread shift away from contractors.”¹¹¹ His reasoning is as follows:

Most agencies have been informally following many of the overarching principles of the policy letter for more than a year and there has not been a significant shift to date. In addition, ... agencies may, with proper management and oversight tools, rely on contractors to perform functions closely associated with inherently governmental functions. They may

¹⁰⁶ “Statement of the Honorable Daniel I. Gordon, Administrator for Federal Procurement Policy, Office of Management and Budget, Before the Commission on Wartime Contracting,” at 1 (Sept. 16, 2010), *available at* http://www.whitehouse.gov/sites/default/files/omb/legislative/testimony/ofpp/2010-09-16_Gordon-OFPP.pdf.

¹⁰⁷ Related documents include, e.g., OMB's memorandum on managing the multi-sector workforce, *see supra* note 41, and Section 736 (Division D) of P.L. 111-8, Omnibus Appropriations Act, FY2009.

¹⁰⁸ Another possible outcome is retaining the work in-house.

¹⁰⁹ 76 Fed. Reg. at 56234.

¹¹⁰ *Id.* at 56239. Subpart 37.114 of the FAR provides guidance regarding certain types of service contracts that “require special management attention to ensure that they do not result in performance of inherently governmental functions by the contractor and that Government officials properly exercise their authority.”

¹¹¹ “Statement of the Honorable Daniel I. Gordon, Administrator for Federal Procurement Policy, Office of Management and Budget, Before the Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, Committee on Homeland Security and Governmental Affairs, United States Senate” (Sept. 20, 2011) *available at* http://hsgac.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=57f164be-8e05-4fce-ae55-d47b3b1e6f8d.

also permit contractors to perform critical functions that are core to the agency as long as the agency has the in-house capability to maintain control of its mission and operations. Moreover, in many cases, overreliance on contractors may be corrected by allocating additional resources to contract management. In other words, rebalancing does not require an agency to insource.¹¹²

Additionally, in cases where insourcing might be the appropriate response, practical, or other considerations, might mitigate against some possibilities. For example, when considering insourcing a function, agencies are advised to place a lower priority on reviewing certain work performed by small businesses. Additionally, agencies are to apply the “rule of two” for work that remains in the private sector when “part of [the] contracted function to be insourced is currently being performed by small and the large businesses.”¹¹³ Small business goals might reinforce these considerations if agencies are reluctant to take steps that could compromise their ability to achieve those goals.¹¹⁴ OFPP also advises agencies on how to respond when they are unable to reestablish control of inherently governmental functions through other means and thus “need to insource work on an accelerated basis.” While termination of the contract is a possibility, OFPP also indicates it is possible to synchronize the insourcing with the non-exercise of an option period in the contract.¹¹⁵

Regarding contractor performance of critical functions that, the agency has determined, puts its internal control of mission and operations at risk, the policy letter does not mention accelerated insourcing as an option. Moreover, the possibility that insourcing could momentarily disrupt agency operations might, depending upon the nature of the (critical) function or the particular circumstances, mitigate against any effort to insource the function, or a portion of it. Additionally, an agency might need time to “secure the necessary funding” to establish or supplement “the needed in-house capacity” and to recruit, hire, and train new personnel, or retrain incumbent personnel.¹¹⁶

This discussion raises the question of whether OFPP might consider having agencies compile data about their outcomes, and submit the information to a centralized database. Possible options include having agencies expand their multi-sector workforce inventories, or add data about outcomes to their service contracts inventories; modifying the Federal Procurement Data System (FPDS) through the addition of appropriate data elements; or creating a new, stand-alone system. Regarding the three existing data collection systems or initiatives, functionality and accessibility vary.

In its memorandum on managing the multi-sector workforce, OMB required each federal agency subject to the Chief Financial Officers Act (P.L. 101-576) to develop a multi-sector workforce planning pilot. In conducting the pilot, each agency was to “[d]evelop a multi-sector workforce inventory that [would map] out the current workload and how in-house and contracted labor [were] ... used by the organization to meet [the] ... workload.”¹¹⁷ The inventory was to include

¹¹² *Id.*

¹¹³ 76 Fed. Reg. at 56239.

¹¹⁴ See <http://www.sba.gov/content/small-business-goaling> for additional information about small business goals.

¹¹⁵ 76 Fed. Reg. at 56239. A contract may have a base period (e.g., one year) and one or more option periods.

¹¹⁶ *Id.*

¹¹⁷ Managing the Multi-Sector Workforce, *supra* note 41, at 1 (attachment 2).

- [T]he number and location of full-time federal employee equivalents (FTEs)¹¹⁸ and contractor employees (for the latter, counting either full-time employees or hours worked) for each function performed by the organization.
- [H]ow work is classified: (i) inherently governmental, (ii) critical and requiring performance by federal employees, (iii) critical and requiring performance by either federal employees or contractors with appropriate management, or (iv) essential but non-critical;¹¹⁹ and
- [T]he associated funding source.¹²⁰

While OMB stated in its memorandum that agencies “should ... prepare an appropriate summary” of their pilots “to share with the public,” whether some or all agencies included their inventories is unknown.¹²¹

Agencies that complied with this requirement have some experience, then, in assessing a selected portion of their multi-sector workforce. As agency staff gain additional experience in reviewing their agencies’ total (or multi-sector) workforces, categorizing functions, and carrying out the other tasks outlined in OFPP’s policy letter, they might identify information that could be useful to agencies and considered for inclusion in an expanded multi-sector workforce inventory.

With the exception of DOD, all agencies subject to the FAIR Act are required to compile inventories of their service contracts annually and submit the information to OMB.¹²² As summarized by OFPP in November 2010, this inventory must include the following elements:

- a description of the services purchased by the executive agency;
- a description of the role the services played in achieving agency objectives;
- the organizational component of the executive agency administering the contract, and the organizational component of the agency whose requirements are being met through contractor performance of the service;
- the total dollar amount obligated for services under the contract and the funding source for the contract;
- the total dollar amount invoiced for services under the contract;
- the contract type and date of award;
- the name of the contractor and place of performance;
- the number and work location of contractor employees, expressed as full-time equivalent for direct labor, compensated under the contract;

¹¹⁸ A full-time equivalent is the “staffing of Federal civilian employee positions, expressed in terms of annual productive work hours (1,776).” *Performance of Commercial Activities*, *supra* note 93, at D-5.

¹¹⁹ This memorandum was written prior to the publication of OFPP’s proposed and final policy letters, neither of which includes “essential but non-critical” functions. Hence, this category may no longer be applicable.

¹²⁰ *Managing the Multi-Sector Workforce*, *supra* note 41, at 2 (attachment 2).

¹²¹ *Id.*

¹²² Sec. 743 (Division C) of P.L. 111-117, Consolidated Appropriations Act FY2010, as amended. Sec. 807 of P.L. 110-181, National Defense Authorization Act for FY2008, contains the statutory requirement for DOD to compile inventories of its service contracts.

- whether the contract is a personal services contract; and
- whether the contract was awarded on a noncompetitive basis, regardless of date of award.¹²³

Agencies' service contracts inventories are available on their websites.¹²⁴ Some, if not all, of the data included in the service contract inventory might be useful in gaining a better understanding of an agency's multi-sector workforce, particularly if these data were combined with information about the type(s) of function(s) (i.e., critical, "closely associated," or commercial) a contractor is performing.

The Federal Procurement Data System (FPDS) is the federal government's system for agencies to report information about their contract actions.¹²⁵ FPDS is available to the public, and users may retrieve data by conducting searches of the database. FPDS includes some of the same information as the service contract inventory, and also contains a relatively large amount of additional procurement information, such as the solicitation number, effective date of the contract action, and contracting officer's determination of business size.¹²⁶

Developing a data collection system (whether based on an existing system or data collection effort, or a newly established system) that includes information about agencies' efforts to classify properly their functions might yield benefits. Perhaps a system could be developed that would aid an agency's acquisition, human resources, and financial management personnel plan, manage, and evaluate their efforts to comply with the policy letter. Making the system available to the public might facilitate transparency, particularly if it were to include information, or training, that would aid in understanding the information. Finally, collecting data, and making it publicly available, possibly could alleviate some concerns regarding the outcomes of agencies' determinations and decisions. Data might aid in dispelling misperceptions and supporting, or disproving, anecdotal evidence.

Relationship Between the Policy Letter and Proposed Legislation

Members of the 112th Congress have introduced several bills that would address inherently governmental and related functions in ways which are arguably inconsistent with the final policy letter. For example, the Correction of Long-Standing Errors in Agencies' Unsustainable Procurements (CLEAN-UP) Act, which has been introduced in identical versions in the House and Senate, would require that federal employees perform functions closely associated with

¹²³ Daniel I. Gordon, Administrator, OFPP, "Service Contract Inventories," Appendix A (Nov. 5, 2010), *available at* <http://www.whitehouse.gov/sites/default/files/omb/procurement/memo/service-contract-inventories-guidance-11052010.pdf>.

¹²⁴ *Id.* at 2. See, for example, the Department of Homeland Security's FY2010 inventory, at <http://www.dhs.gov/xlibrary/assets/.../service-contract-inventory-dhs-2010.xls>, and the Department of Transportation's FY2010 inventory, at http://www.dot.gov/ost/m60/serv_contract_inv.htm.

¹²⁵ FPDS is available at <https://www.fpds.gov>. A contract action is "any oral or written action that results in the purchase, rent, or lease of supplies or equipment, services, or construction using appropriated dollars over the micro-purchase threshold, or modifications to these actions regardless of dollar value. Contract action does not include grants, cooperative agreements, other transactions, real property leases, requisitions from Federal stock, training authorizations, or other non-FAR based transactions." 48 C.F.R. §4.601.

¹²⁶ Global Computer Enterprises, *GSA Federal Procurement Data System-Next Generation (FPDS-NG) Data Element Dictionary*, (version 1.4.2, Aug. 30, 2011), *available at* https://www.fpds.gov/downloads/Version_1.4.2_specs/FPDSNG_DataDictionary_V1.4.2.pdf. See the table of contents for a complete list of the FPDS data elements.

inherently governmental functions and critical functions, as well as inherently governmental ones (H.R. 1949, S. 991). It would also require agencies to implement certain procedures that would give preference to federal employees' performance of particular functions.¹²⁷ In contrast, the Freedom from Government Competition Act, which has also been introduced in identical versions in the House and Senate, would establish a statutory basis for the government's policy of "not compet[ing] with its citizens" and "rely[ing] on commercial sources to supply the products or services that the government needs" (H.R. 1474, S. 785). It would also require federal agencies to take one or more of the following four steps with respect to goods and services that can be provided by private sources and that are not inherently governmental or necessary for national defense or homeland security: (1) divesting federal involvement in providing the good or service; (2) awarding a contract to a private sector entity using "competitive procedures," as defined by the Competition in Contracting Act (CICA) of 1984;¹²⁸ (3) converting the activity to performance by a qualified Indian tribe or Native Hawaiian Organization;¹²⁹ and/or (4) conducting a public-private competition pursuant to OMB Circular A-76.

Other legislation introduced in the 112th Congress would also address inherently governmental functions, including by designating particular functions as inherently governmental,¹³⁰ mandating specific reductions in the number of contractors performing inherently governmental or closely associated functions for certain agencies;¹³¹ limiting agencies' ability to conduct public-private competitions;¹³² and expressing the sense of Congress that DOD should not convert a function from performance by a contractor to performance by DOD civilian employees unless the function is inherently governmental or the conversion is necessary to comply with DOD's general personnel policy (H.R. 1540, §965).

¹²⁷ For example, Section 6 would require that agencies consider "using, on a regular basis, Federal employees to perform new functions," while Section 7 would require that agencies reduce the total number of contractor employees performing "functions at risk" by specified percentages each year for the next six years.

¹²⁸ For more on CICA, see CRS Report R40516, *Competition in Federal Contracting: An Overview of the Legal Requirements*, by (name redacted).

¹²⁹ Certain provisions of federal law authorize the "direct conversion" of functions to performance by such entities. A "direct conversion" is one made without completing the public-private competition process normally required by OMB Circular A-76. See generally CRS Report R40855, *Contracting Programs for Alaska Native Corporations: Historical Development and Legal Authorities*, by (name redacted), (name redacted), and (name redacted).

¹³⁰ See, e.g., S. 1546, §105 (development of guidance regarding independent verification and validation of the integrity and quality of major acquisitions); H.R. 2017, §520 (functions performed by the instructor staff of the Federal Law Enforcement Training Center); S. 709, §3 (approving certain security vulnerability assessments or site security plans).

¹³¹ S. 1254, §823 (requiring the Secretaries of the military departments and the heads of defense agencies to eliminate any contractor positions identified as performing inherently governmental functions and reduce by 10% in each of fiscal years 2012 and 2013 funding for contracts for the performance of functions closely associated with inherently governmental functions, among other things). Similar provisions are included in S. 1253, §823.

¹³² S. 1573, §741 (prohibiting agencies from beginning, planning for, or announcing studies or public-private competitions regarding the conversion to contractor performance of functions performed by government employees until certain reports regarding inherently governmental, closely associated with inherently governmental, and critical functions are submitted to OMB).

Appendix. Inherently Governmental Functions and Functions Closely Associated with Inherently Governmental Functions

Table A-1. Tabular Comparison of the Lists of Inherently Governmental Functions in the Proposed and Final Policy Letters

Significant differences between the proposed and final policy letters are highlighted in bold, italic font.

Proposed Policy Letter ^a	Final Policy Letter ^b
<p>1. The direct conduct of criminal investigation.</p> <p>2. The control of prosecutions and performance of adjudicatory functions (other than those relating to arbitration or other methods of alternative dispute resolution).</p> <p>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.</p> <p>4. The conduct of foreign relations and the determination of foreign policy.</p> <p>5. The determination of agency policy, such as determining the content and application of regulations, among other things.</p> <p>6. The determination of Federal program priorities or budget requests.</p> <p>7. The direction and control of Federal employees.</p> <p>8. The direction and control of intelligence and counter-intelligence operations.</p> <p>9. The selection or non-selection of individuals for Federal Government employment.</p> <p>10. The approval of position descriptions and performance standards for Federal employees.</p> <p>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).</p> <p>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</p>	<p>1. The direct conduct of criminal investigation.</p> <p>2. The control of prosecutions and performance of adjudicatory functions (other than those relating to arbitration or other methods of alternative dispute resolution).</p> <p>3. The command of military forces, especially the leadership of military personnel who are performing a combat, combat support or combat service support role.</p> <p>4. Combat.</p> <p>5. Security provided under any of the circumstances set out below. This provision should not be interpreted to preclude contractors taking action in self-defense or defense of others against the imminent threat of death or serious injury. (a) Security operations performed in direct support of combat as part of a larger integrated armed force. (b) Security operations performed in environments where, in the judgment of the responsible Federal official, there is significant potential for the security operations to evolve into combat. Where the U.S. military is present, the judgment of the military commander should be sought regarding the potential for the operations to evolve into combat. (c) Security that entails augmenting or reinforcing others (whether private security contractors, civilians, or military units) that have become engaged in combat.</p> <p>6. The conduct of foreign relations and the determination of foreign policy.</p> <p>7. The determination of agency policy, such as determining the content and application of regulations.</p> <p>8. The determination of budget policy, guidance, and strategy.</p> <p>9. The determination of Federal program priorities or budget requests.</p> <p>10. The selection or non-selection of individuals for Federal Government employment, including the interviewing of individuals for employment.</p> <p>11. The direction and control of Federal employees.</p> <p>12. The direction and control of intelligence and counter-intelligence operations.</p>

Proposed Policy Letter^a

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.

Final Policy Letter^b

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

14. 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).

15. 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) approving of any contractual documents, including documents defining requirements, incentive plans, and evaluation criteria; **(d) determining that prices are fair and reasonable**; (e) awarding contracts; (f) administering contracts (including ordering changes in contract performance or contract quantities, making final determinations about a contractor's performance, including approving award fee determinations or past performance evaluations and taking action based on those evaluations, and accepting or rejecting contractor products or services); (g) terminating contracts; (h) determining whether contract costs are reasonable, allocable, and allowable; and (i) participating as a voting member on performance evaluation boards.

16. The selection of grant and cooperative agreement recipients including: (a) approval of agreement activities, (b) negotiating the scope of work to be conducted under grants/cooperative agreements, (c) approval of modifications to grant/cooperative agreement budgets and activities, and (d) performance monitoring.

17. 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.

18. 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.

19. The approval of Federal licensing actions and inspections.

20. 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 predetermined or can be readily calculated and the funds collected can be readily controlled using standard cash management techniques, and (b) routine voucher and invoice examination.

Proposed Policy Letter ^a	Final Policy Letter ^b
	21. The control of the Treasury accounts.
	22. The administration of public trusts.
	23. The drafting of official agency proposals for legislation, Congressional testimony, responses to Congressional correspondence, or responses to audit reports from an inspector general, the Government Accountability Office, or other Federal audit entity.
	24. Representation of the government before administrative and judicial tribunals, unless a statute expressly authorizes the use of attorneys whose services are procured through contract.

Source: Congressional Research Service, based on 76 Fed. Reg. at 56240-41; 75 Fed. Reg. at 16196-97.

- a. The listing of inherently governmental functions given in the proposed policy letter is identical to that given in the FAR. See 48 C.F.R. §7.503(c).
- b. The final policy letter's listing of inherently governmental functions notes that functions may consist of multiple activities, not all of which are inherently governmental.

Table A-2. Tabular Comparison of the Lists of Functions Closely Associated with Inherently Governmental Functions in the Proposed and Final Policy Letters

Significant differences between the proposed and final policy letters are highlighted in bold, italic font.

Proposed Policy Letter ^a	Final Policy Letter ^b
1. Services that involve or relate to budget preparation, including workforce modeling, fact finding, efficiency studies, and should-cost analyses.	1. Services in support of inherently governmental functions, including, but not limited to the following:
2. Services that involve or relate to reorganization and planning activities.	(a) performing budget preparation activities, such as workload modeling, fact finding, efficiency studies, and should-cost analyses.
3. Services that involve or relate to analyses, feasibility studies, and strategy options to be used by agency personnel in developing policy.	(b) undertaking activities to support agency planning and reorganization.
4. Services that involve or relate to the development of regulations.	(c) providing support for developing policies, including drafting documents, and conducting analyses, feasibility studies, and strategy options.
5. Services that involve or relate to the evaluation of another contractor's performance.	(d) providing services to support the development of regulations and legislative proposals pursuant to specific policy direction.
6. Services in support of acquisition planning.	(e) supporting acquisition, including in the areas of: i) acquisition planning, such as by—I) conducting market research, II) developing inputs for government cost estimates, and III) drafting statements of work and other pre-award documents; ii) source selection, such as by—I) preparing a technical evaluation and associated documentation; II) participating as a technical advisor to a source selection board or as a nonvoting member of a source selection evaluation board; and III) drafting the price negotiations memorandum; and iii) contract management, such as by—I) assisting in the evaluation of a contractor's
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	

Proposed Policy Letter ^a	Final Policy Letter ^b
<p>information and/or any other sensitive information (other than situations covered by the National Industrial Security Program described in FAR 4.402(b)).</p> <p>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.</p> <p>13. Participation in any situation where it might be assumed that participants are agency employees or representatives.</p> <p>14. Participation as technical advisors to a source selection board or as nonvoting members of a source evaluation board.</p> <p>15. Service as arbitrators or provision of alternative dispute resolution (ADR) services.</p> <p>16. Construction of buildings or structures intended to be secure from electronic eavesdropping or other penetration by foreign governments.</p> <p>17. Provision of inspection services.</p> <p>18. Drafting of legal advice and interpretations of regulations and statutes to government officials.</p> <p>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.</p>	<p><i>performance (e.g., by collecting information performing an analysis, or making a recommendation for a proposed performance rating), and II) providing support for assessing contract claims and preparing termination settlement documents.</i></p> <p>(f) Preparation of responses to Freedom of Information Act requests.</p> <p>2. Work in a situation that permits or might permit access to confidential business information or other sensitive information (other than situations covered by the National Industrial Security Program described in FAR 4.402(b)).</p> <p>3. Dissemination of information regarding agency policies or regulations, such as conducting community relations campaigns, or conducting agency training courses.</p> <p>4. Participation in a situation where it might be assumed that participants are agency employees or representatives, such as attending conferences on behalf of an agency.</p> <p>5. Service as arbitrators or provision of alternative dispute resolution (ADR) services.</p> <p>6. Construction of buildings or structures intended to be secure from electronic eavesdropping or other penetration by foreign governments.</p> <p>7. Provision of inspection services.</p> <p>8. Provision of legal advice and interpretations of regulations and statutes to government officials.</p> <p>9. Provision of non-law-enforcement security activities that do not directly involve criminal investigations, such as prisoner detention or transport and non-military national security details.</p>

Source: Congressional Research Service, based on 76 Fed. Reg. at 56241; 75 Fed. Reg. at 16197.

- a. The listing of functions closely associated with inherently governmental functions given in the proposed policy letter is identical to that given in the FAR. See 48 C.F.R. §7.503(d).
- b. The final policy letter's listing of functions closely associated with inherently governmental functions notes that functions may consist of multiple activities, not all of which are inherently governmental.

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