

“Inherently Governmental Function:” A Definition

The Office of Federal Procurement Policy (OFPP) in the Office of Management and Budget (OMB) is issuing a proposed policy letter to the White House and Federal agencies on circumstances when work must be reserved for performance by federal government employees.

— by **Laurence Socci**

A Presidential Memorandum, issued on March 4, 2009 directed OMB to:

1. Create a single definition for the term “inherently governmental function” which addresses any deficiencies in the existing definition and reasonably applies to all agencies;
2. Establish criteria to be used by agencies to identify “critical” functions and positions that should only be performed by federal employees; and
3. Provide guidance to improve internal agency management of functions that are inherently governmental or critical.

In response to the President’s Memorandum, OFPP will issue a proposed policy letter that would:

1. Clarify what functions are inherently governmental and must always be performed by federal employees;
2. Help agencies identify when their functions (or portions of functions) need to be performed by federal employees; and
3. Outline a series of agency management responsibilities to strengthen accountability for the effective implantation of these policies.

OMB is seeking comments from the public and private sectors on these issues. A Federal Register Notice was issued on March 31 seeking comment by June 1, 2010.

Currently, the definition of “inherently governmental function” can be found in the Federal Activities Inventory Reform Act (FAIR Act), Public Law 105-270. The FAIR Act defines an activity as inherently governmental when “it is so intimately related to the public inter-

est as to mandate performance by Federal employees.” This is a very broad definition and leaves little direction and guidance for agencies when faced with determining whether a function is inherently governmental.

The March 31 Federal Register Notice states the OFPP “seeks to clarify and reinforce that agencies have both pre-award and post-award responsibilities for evaluating whether a function is inherently governmental and taking steps to avoid transferring inherently governmental authority to a contractor, such as through inadequate attention to contract administration.

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

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

OMB emphasized that policy guidance addressing inherently govern-

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

FAR Subpart 7.5 currently contains a list of examples of inherently governmental functions. The functions in the list are pretty straightforward and appear to rightly belong to a government employee. However, the Federal Register Notice states that under the proposed policy letter, OFPP would create tests for agencies to use in determining whether functions not appearing on the list otherwise fall within the definition of inherently governmental.

The “nature of the function” test would ask agencies to consider whether the direct exercise of sovereign power is involved. Such functions are uniquely governmental and, therefore, inherently governmental. The “discretion” test would ask agencies to evaluate whether the discretion associated with the function, when exercised by a contractor, would have the effect of committing the government to a course of action. This test was included in OFPP Policy Letter 92-1, Inherently Governmental Functions, and currently may be found in OMB Circular A-76.

The proposed policy letter lays out the determinations that must be docu-



