



Forum:  
The Obama Administration's  
Management Agenda

# Inherently Governmental Functions: Has the Debate Changed?

How government workers can interpret the latest multisector outsourcing guidelines.

by Allan Burman

There has been a long-standing policy, codified in the U.S. Federal Acquisition Regulations (FAR), that functions intimately related to the public interest should only be performed by federal civil servants. Typically, these types of “inherently governmental” functions require either the use of discretion or the making of value judgments to apply government authority.

A formal governmentwide policy stating this notion has been in place since 1992, reinforced in law by the 1998 Federal Activities Inventory Reform Act (FAIR), and further reinforced in the May 2003 revisions to the U.S. Office of Management and Budget (OMB) Circular No. A-76, *Performance of Commercial Activities*. Although the definitions in these documents are not identical, the idea of governmental activities being “intimately related to public interest” serves as the foundation for each of them.

In translating these definitions into management guidance, there are some obvious examples of functions that only government officials should perform, including awarding contracts, supervising government employees, and engaging in activities related to life and liberty. There are also activities that are clearly commercial in nature, such as performing minor maintenance or repairing machinery. But for every clear-cut example, there are hundreds of others that ultimately must be decided based on the merits of a particular situation.

Some observers have expressed frustration that laws and policies offer agencies no bright-line test. As a result, contractors often perform work that should be carried out by civil servants. The Spring 2008 issue of *The Public Manager* asked the question: Should the government rethink its long-standing policy on contracting out work? The answer: Yes.

Congress, in the FY 2008 Duncan Hunter National Defense Authorization Act (NDAA), tasked the current administration with producing a new “single consistent definition” of inherently governmental functions that can be applied governmentwide. Perhaps, more importantly, it also required the administration to develop criteria for identifying agency positions that, while not considered inherently governmental, should nevertheless only be carried out by agency employees.

The latter requirement reflects a willingness to move away from the legal niceties of a definition that by its very nature proves difficult as a management guide. Rather, the task moves the administration toward an approach that focuses on the much more practical question of what agencies need in terms of staffing and resources to ensure they have the capacity to govern.

In the June 22, 2009, report by the Congressional Research Service, “Inherently Governmental Functions and Department of Defense Operations: Background, Issues and Options for Change,” John R. Luckey, Valerie Bailey Grasso, and Kate M. Manuel argue that what is at stake is much more than a narrow interpretation of law or policy, but rather “a larger debate about the proper role of the federal government vis-à-vis the private sector.”

## Obama’s Outsourcing Concerns

Recent documents put forth by both the president in March 2009 and OMB in July 2009 reinforce the notion that what is at stake here is in fact the broader issue.

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In his March 4, 2009, Memorandum for the Heads of Executive Departments and Agencies on Government Contracting, President Obama states: “Government outsourcing for services raises special concerns.” He goes

on to say, “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.”

In a subsequent July 29, 2009, memorandum, OMB Director Peter Orszag writes, “Agencies must be alert to situations in which excessive reliance on contractors undermines the ability of the federal government to accomplish its missions.” The memo further cautions, “Over-reliance on contractors can lead to the erosion of the in-house capacity that is essential to effective government performance.”

Moreover, the memo describes the problem as real, not hypothetical, and brought about by previous administration management priorities. These priorities, according to the memo, favored identifying functions to outsource while ignoring the costs “stemming from loss of institutional knowledge and capability and from inadequate management of contracted activities.”

Competitive sourcing—that is, opening up government activities to private sector competition—was one of the major themes of President George W. Bush’s President’s Management Agenda. Both President Obama’s and OMB’s memorandums reflect a not-so-subtle change in the nature of the debate. The issue becomes less one of clearly differentiating activities that by law or policy must be performed by government officials to one of promoting a capable and robust federal workforce that can effectively oversee contractor support and react to contractor advice.

When presented in this light, the issue of whether an activity is or is not defined as inherently governmental becomes less important because the decision as to what activities to outsource becomes much more subjective. The decision will be based more on what the agency considers to be its core competency, irrespective of whether such a capability can be widely found in the private sector. For example, if meteorologists are critical

to the National Oceanic and Atmospheric Administration's mission, then it is the responsibility of the agency to see that the ability to carry out these roles is maintained in the agency and not outsourced.

What is at stake is the question of whether government agencies can effectively manage their own operations and successfully accomplish their missions. As a result, depending on agency core missions and interests, similar functions may be outsourced in one agency while determined to be critical and not to be outsourced in another.

## Multisector Sourcing Implications

With respect to operating in a multisector workforce environment—that is, one with both civil servants and contractors working together to meet agency needs—OMB provides a framework for agencies to use in making their sourcing determinations on staffing in its July 29, 2009, memo. That framework offers three categories of functions:

- ◆ inherently governmental (presumably determined by law or regulation or by new OMB guidance)
- ◆ critical, but not inherently governmental (determined by agency officials on an agency specific basis)
- ◆ essential, but not inherently governmental (determined by agency officials using a cost-comparison approach to seek the “most cost-effective source of support for the organization”).

Only federal employees can perform inherently governmental functions, but this set of activities may be relatively small and likely based on those examples already included in FAR. The second or “critical” category, however, could be considerably larger, with the test here being that only federal employees should perform the work “to the extent required by the agency to maintain control of

its mission and operations (or if required by law, executive order, or international agreement).”

The third or “essential” category seems to follow the types of cost comparison approaches facilitated for

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many years under OMB Circular No. A-76, with all its attendant issues of developing a level playing field for government and contractor bidders and arriving at a fair outcome.

With regard to the basic determination regarding outsourcing, however, as opposed to a government-wide test, each agency will be

using its own judgment to decide whether activities are critical to the agency's ability to manage effectively and, therefore, should be performed by civil servants. More important, these decisions will be made irrespective of whether activities are commercial or not. And determinations will be much more difficult to second-guess.

The focus of the debate will then have shifted from the legal or policy question of whether a function is inherently governmental to more practical issues of an agency's capability to acquire the necessary and skilled staff in a reasonable time frame to carry out their core functions.

## Future Impact

What will be the likely impact of this focus shift from policy toward ensuring operational control? Perhaps not much—at least as of yet.

With regard to staffing acquisition positions for the Department of Defense (DOD), Professor Steven Schooner, co-director of the Government Procurement Law Program at George Washington University, in his July 21, 2009, statement to the Defense Acquisition Reform Panel of the House Armed Services Committee states, “For the foreseeable future, government reliance on the private sector for acquisition support is necessary and, arguably, should be increased. Only when DOD shows demonstrable success in rebuilding its acquisition workforce should this issue be revisited.”