



TO: Office of Management and Budget, Office of Federal Procurement Policy
ATTN: Mathew Blum (mblum@omb.eop.gov)
FROM: OMB Watch
RE: Comments on Notice of Proposed OFPP Policy Letter, Work Reserved for Performance by Federal Government Employees, 75 FR 61 (Mach 31, 2010)
DATE: June 1, 2010

OMB Watch exists to increase government transparency and accountability; to ensure sound, equitable regulatory and budgetary processes and policies; and to protect and promote active citizen participation in our democracy. While the determination of an inherently governmental function is a difficult task, the criteria upon which the federal government bases its decisions to contract out certain functions matter immensely. OMB Watch strongly supports the drive to clarify the current definition of inherently governmental, but believes that several improvements to the proposed policy letter are necessary to bring about guidelines that allow a federal agency to outsource those functions that provide the taxpayer with the ultimate utility on their dollar while keeping critical skills in-house.

These comments are submitted in response to the proposed Office of Federal Procurement Policy (OFPP) policy letter addressing work reserved for performance by federal government employees.¹ OMB Watch applauds the Obama administration for tackling the larger issue of contracting reform² and welcomes this latest effort to resolve a complicated and politically charged issue. We further believe that the process of clarifying the inherently governmental guidelines creates the opportunity to develop and institute several needed reforms.

OMB Watch supports the proposed policy letter and believes that it represents an important step forward in helping the federal government rationalize the use of contractors to carry out certain tasks of the federal government. However, our recommendations presented below should be

¹ Federal Register 75, no. 61 (2010), 16188-97, <http://edocket.access.gpo.gov/2010/pdf/2010-7329.pdf>.

² Presidential Memorandum, Government Contracting, March 4, 2009.

http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-Subject-Government/.

incorporated into defining “inherently governmental” policies to address the current problems inherent in existing guidelines.

Overall, these recommendations are guided by OMB Watch's belief in the power of transparency and access to government information to transform government processes and produce better outcomes for the public. Without greater transparency, issues of waste, fraud, and abuse, conflicts of interest, and poor performance will continue to beleaguer the federal procurement process.

Conflicts of Interest

The proposed policy letter addresses mitigating potential conflicts of interest. In addition to the listed provisions (5(c)(4)(i-vi)), the letter should also include either methods to identify potential conflicts of interest or instruct the federal agencies to produce such methods. Additionally, the conflict of interest mitigation plans described in 5(c)(4)(i) should be made available to the public on a website designated by the Director of the Office of Management and Budget.

Extent of Contractor Involvement in the Federal Government

Contractor oversight is critical to ensuring that contractor activities do not cross over into inherently governmental functions or that sufficient federal personnel conduct critical functions. Essential to oversight is a simple assessment of the extent to which contractors are carrying out activities for the federal government. The proposed policy letter should require that each federal agency conduct a count of the number of contractors performing work for that agency. This count should be disaggregated into the roles that contractors fulfill and whether these roles are inherently governmental, closely associated with inherently governmental functions, or performing critical functions.

Public Access to Information

Another important aspect of contractor oversight is the ability of outside stakeholders, including journalists, government watchdogs, program advocates, and the general public, to make their own assessments of the quality of contractor oversight by federal agencies. To enable this, myriad information about federal contracting procedures and federal contractors should be made available to the public on a website designated by the Director of the Office of Management and Budget. Not only should this include existing federal contractor performance databases, but also the various plans and reports mentioned in the policy letter.

Specifically, the policy letter should be amended to call for the publication on a publicly available website: conflict of interest mitigation plans (5(c)(4)(i)); the Human Capital Plan for Acquisition that identifies specific strategies and goals for addressing both the size and capability of the acquisition workforce (4(c)(2)); and the procedures, training plans, evaluations of the effectiveness of their internal management controls for reserving work for federal employees,

and the senior official(s) to be accountable for the development and implementation of these, as mentioned in 6(b – e).

Incentives for Agency Officials

The proposed policy letter is particularly laudable for its insistence that federal agencies “take steps to employ an adequate number of government personnel to ensure that contract administration protects the public interest.” However, it is possible that program officials would be sanctioned in the case that they cannot meet their performance goals without the engagement of contractors. Yet there may also be instances in which insufficient federal personnel exist to conduct proper oversight of the contractors. In these cases, program officials are caught between the being penalized for inadequate program performance and a failure to protect the public interest. They should not be put in this position. The proposed policy letter should require that agencies create employee evaluation mechanisms whereby agency staff are provided with incentives to ensure that proper contractor oversight is conducted and simultaneously be protected from penalties for poor program performance due to lack of necessary contractor involvement.

Responses to Questions from Solicitation of Public Comment

2.c. The Establishment of a “Principal-Agent” Test

It is crucial that the government have a set of guidelines for federal agencies to look to when deciding which functions they can and cannot outsource that incorporates the possible risks of not being able to adequately oversee a contractor perform certain functions. Therefore, OMB Watch believes that OFPP should seriously consider establishing a "principal-agent" test to help agencies identify functions as inherently governmental.

The current tests used by agencies to determine if functions are inherently governmental, the "nature of the function" test and the "discretion" test, do not adequately require agencies to examine if the lack of ensuring sufficient control over the performance of a function by those outside government would create serious risks. These tests exclude assessing the degree to which federal agencies can conduct proper contractor oversight. It would be possible that the nature of the work performed by a contractor could not be adequately overseen or that there would be an inability to hold a contractor accountable for actions that are contrary to the public interest. The principal-agent test would allow agencies to consider these potential pitfalls and exclude the performance of certain functions by contractors that might have otherwise been deemed appropriate to outsource.

Additionally, a “principal-agent” test would aid the ability of a federal agency to define its core competencies, thereby determining the activities that help the agency meet its statutory and performance obligations, which help to provide further outliers for what functions should and should not be outsourced.

3.a. A Presumption of Federal Employees Performing “Closely Associated” and Critical Tasks

OMB Watch strongly urges OFPP to set out a requirement, or at the very least set out a presumption, in favor of performance of "closely associated" and critical functions by federal employees in the policy letter.

Many “closely associated” or critical tasks are fraught with the possibilities of conflicts of interest or serious damage to the image of the government if a contractor mishandles the function. An example of this is the outsourcing of any function that allows a contractor to come into possession of citizens’ personal information.

When the Internal Revenue Service (IRS) contracted out to companies to collect the debt of private citizens, not only did these private companies provide less value than government employees collecting the debt, but personal information was continually compromised by the contractors.

To prevent the exposure of the personal information of citizens, the federal government should minimize, or eliminate if possible, contractors from dealing with or handling sensitive personal information. The federal government should not allow contracts to handle, analyze, store, or manipulate such information. One of the ways to accomplish this is for the government to shift the default to in sourcing of such activities.

5.b. Prohibiting Contractors from Performing Certain Functions

OMB Watch believes that the policy letter guidance should prohibit contractors from performing the following functions:

- i) Pre-award acquisition support, including, but not limited to, functions involving the preparation of price negotiation memoranda; price reasonableness determinations; technical evaluations; determinations of responsibility; determinations and findings; and justifications.
- ii) Post-award acquisition support, including, but not limited to, functions involving the use of contractors to manage other contractors; the development of contractor performance assessments; review of contract claims; and the preparation of termination settlement proposals.
- vii) Physical security, including but not limited to, functions involving guard services; convoy security services; pass and identification services; plant protection services; the operation of prison or detention facilities; and the use of deadly force, including combat, security operations performed in direct support of combat, and security that could evolve into combat.
- ix) Support for intelligence activities, such as covert operations.

x) The assistance, reinforcement or rescue of individuals who become engaged in hostilities or offensive responses to hostile acts or demonstrated hostile intentions.

xi) Intelligence interrogation of detainees, including interrogations in connection with hostilities.

OMB Watch is very concerned about the outsourcing of the above functions to private contractors. The performance of mission critical security functions by profit-driven contractors is problematic, as contractors operating in foreign countries are bound to lower levels of accountability than federal personnel. Moreover, given the general resistance of contractors operating inside or outside of U.S. borders to effective oversight and the costs and controversies associated with the contracting out of the above functions, the government would be better served by requiring a higher threshold of necessity before contracting out these services.

Thank you for your consideration of these comments.