



For more information or if you have any questions about this and other government contracts topics, please contact any attorney in Venable's [Government Contracts](#) practice group, or the authors below.

Authors:

Robert A. Burton
rburton@Venable.com
202.344.4776

James Y. Boland
jyboland@Venable.com
202.344.8273

Proposed Policy Will Likely Increase the Number of Contractor Jobs In-Sourced to the Government

Government contractors may soon see fewer business opportunities, as agencies are broadly encouraged under a proposed policy to in-source jobs that serve a "critical function" to the government.

On March 31, 2010, the Office of Federal Procurement Policy issued a proposed policy letter, which provides increased clarification and guidance to all Executive Branch agencies on determining under what circumstances certain work should be reserved for government employees instead of private contractors. See 75 FR 16188, Policy Letter 10-XX. Under existing law and regulations, jobs that have an "inherently governmental function" should only be performed by government employees. The significant expansion of the federal contractor workforce over the last decade, however, has led to some concern that too many contractors are performing jobs that ought to be performed by government employees.

The proposed policy letter is a notable step toward furthering the Obama Administration's goals of in-sourcing work currently performed by contractors, not only because it clarifies when a job has an "inherently governmental function," but because it effectively expands the standard for when work should be performed by government employees to include "critical" functions. Comments on the policy letter are due by May 31, 2010.

Background. Section 321 of the National Defense Authorization Act of 2009 directed the Office of Management and Budget to create a single definition of "inherently governmental function," to establish criteria to be used by agencies to identify critical functions that should only be performed by government employees, and to provide additional guidance to agencies to improve management of jobs that are "inherently governmental." Additionally, a March 4, 2009 policy memorandum from President Obama established as one of the administration's top procurement objectives an effort to ensure that inherently governmental functions are only performed by government employees and not outsourced to the private sector. For more discussion, see Venable's [March 12, 2009 GVC Update](#), "President Obama Issues Memorandum to the Heads of Executive Departments and Agencies Concerning Government Contracting."

OFPP's Proposed Policy on Inherently Governmental Functions. As expected, OFPP's policy letter selects the statutory definition of "inherently governmental function" set forth in the Federal Activities Inventory Reform Act (FAIR Act), Public Law 105-270 (as opposed to the varying definitions under the Federal Acquisition Regulation and OMB Circular A-76). The letter explains that under this definition, inherently governmental functions are those that are "so intimately related to the public interest as to require performance by Federal Government employees." Key characteristics of such functions include:

- Exercise of discretion in applying federal authority or making value judgments (including judgments related to monetary transactions);
- Interpretation and execution of federal law that binds the United States to take action, including by contract; and
- Interpretation and execution of federal law so as to exert ultimate control over the acquisition and use of United States property, including control over the disbursement of appropriations.

The policy letters includes an appendix that identifies twenty examples of inherently governmental functions. The letter directs agencies to determine whether functions are inherently governmental on a case-by-case basis.

Inherently governmental functions **do not include** such things as:

- Gathering information, providing advice, opinions, or recommendations.
- Ministerial and internal agency functions, such as building security, housekeeping, facilities and warehouse operations, or fleet management.

The policy letter establishes an Executive Branch policy that all "government action is taken as a result of informed, independent judgments made by government officials." To carry out this objective, the policy letter directs agencies to "reserve certain work for performance by federal employees and take special care to retain sufficient management oversight" over how contractor employees are utilized. To that end, agencies

are directed to give “special consideration” to government personnel performing jobs that are “closely associated” with an inherently governmental function.

Definition of “Critical Function.” Most importantly, the policy letter defines a “critical” governmental function as one that is necessary for the agency to “effectively perform and maintain control of its mission” and would expose the agency to risk of mission failure if performed entirely by contractors. The policy letter directs agencies to reserve a sufficient number of federal employees to such “critical functions” to ensure adequate control over the agency’s mission and operations. In other words, in addition to reserving work that is inherently governmental to federal employees, the proposed policy letter would require agencies to set-aside positions that are determined to have a “critical function.” Thus, certain jobs that may not be inherently governmental may nevertheless be viewed as “critical” to the agency’s mission or operations.

Significantly, the determination of whether such positions have a critical function is committed to the “informed judgment of agency officials”—an apparent invitation to agencies to broadly in-source work currently performed by contractors on the basis that such work is “critical” to the agency’s mission. In determining whether a function is critical, the proposed policy provides only that agency officials should consider the “importance” that a particular function holds for the agency and its mission and operations and, the more “critical” the function, the more important it will be for the agency to utilize federal employees to ensure adequate control over the agency’s mission.

Additionally, the policy letter permits agencies to utilize federal or private employees when a function is neither critical or inherently governmental. However, the proposed policy emphasizes that, at a minimum, an agency must have “sufficient internal capabilities” to control its mission and operations. When an agency has sufficient internal capabilities, it must determine whether it is “cost effective” to outsource work to contractors.

Moreover, the preamble to the policy letter explains that even when certain functions may not be viewed as critical, “the agency may determine that the function is, nonetheless, *sensitive enough* as to require that many, most, or, in some situations, *all positions* be filled by Federal employees.” (emphasis added). The implication is that agencies will have enormous discretion not only to determine whether certain functions are “critical,” but to in-source “all positions” currently performed by contractors when the function is “sensitive enough.”

Practitioner’s Tips. Government contractors, especially those with employees performing at government sites along with other government employees, should recognize the significance of the administration’s desire to reduce reliance on contractor employees.

- The policy letter emphasizes ongoing, post-award review of contractor performance. If your employees are performing functions that involve a considerable degree of discretion, they may be considered inherently governmental or critical. Under the guidance of this policy letter, agencies may take action to remove these positions from your contract.
- Contractors, especially an incumbent workforce, should anticipate renewed scrutiny over the functions they perform and a likely effort by agencies to in-source some of the work.
- If an agency deletes positions from your contract, document any such action—you may be entitled to an equitable adjustment. The current proposed policy letter does not clarify how such a deletion of work should be accomplished.
- If an agency in-sources positions that you are currently providing, you may have a legal basis to challenge the agency’s conduct. For example, in *Rohmann Services, Inc. v. Department of the Air Force*, No. SA10CA0061 (W.D. Tex.), filed in January 2010, a small business contractor filed an action in U.S. District Court against the Air Force challenging its decision to in-source certain positions covered by its contract. The Justice Department settled the case.

For further information, please contact the authors, [Robert A. Burton](#) or [James Y. Boland](#), or any of the other attorneys in Venable’s [Government Contracts Practice Group](#).

If you have friends or colleagues who would find this alert useful, please invite them to subscribe at www.Venable.com/subscriptioncenter.

CALIFORNIA MARYLAND NEW YORK VIRGINIA WASHINGTON, DC

1.888.VENABLE | www.Venable.com