Acquisition Policy
DOT DASH
2012-08

Date: February 26, 2012

To: Chief of the Contracting Office (COCO)
Acquisition Personnel

From: Office of the Senior Procurement Executive

Subj: Service Contract Inventory and Contract Reporting in FPDS

SUMMARY: Section 743 of Division C of the Fiscal Year (FY) 2010 Consolidated Appropriations Act, P.L. 111-117, requires civilian agencies to prepare an annual inventory of their service contracts and to analyze the inventory to determine if the mix of federal employees and contractors is effective or if rebalancing may be required. Office of Management and Budget Memorandum dated December 19, 2011, attached to this DOT DASH, provides specific information collection requirements for FY2012 service contract inventories.

Beginning with the FY 2012 inventory, agencies are required to report on the role contracted services play in achieving agency objectives. Agencies shall immediately start collecting this information for new contracts awarded on or after March 1, 2012. Agencies shall review the OFPP Policy Letter 11-01, *Performance of Inherently Governmental and Critical Functions*, and follow the below procedures to appropriately report service contract information:

When a contract is initially awarded, agencies should report in the Federal Procurement Data System (FPDS) using the phrase describing the predominant type of functions being performed under the contract. Specifically, agencies should input the first letters in the "description of requirement" field: "Closely Associated," "Critical Functions", or "Other Functions". Identifying closely associated and critical functions at the time of award should assist agencies (in the case of closely associated functions) in prioritizing which contracts may require increased management attention and oversight to ensure that mission creep does not result in contractors performing inherently governmental functions and (in case of critical functions) ensure that the agency does not lose control of its mission and operations.

An annual FPDS report for service contract inventories, which is currently being developed, will generate the description of requirement field for the most recently reported modification, so the description field for each modification of the covered contracts should also include this information.

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2012-08

If you have questions or comments regarding the service contract inventory information collection requirements, please contact Ames Owens, (202) 366-6914, ames.owens@dot.gov. Questions regarding FPDS may be directed to Diane Morrison, (202) 366-4960, diane.morrison@dot.gov.

Attached

Jeffrey Thomas,
Associate Director,
Acquisition Policy, Oversight and Business Strategies Division

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

OFFICE OF FEDERAL
PROCUREMENT POLICY

December 19, 2011

MEMORANDUM FOR CHIEF ACQUISITION OFFICERS
SENIOR PROCUREMENT EXECUTIVES

FROM: Daniel I. Gordon
Administrator for Federal Procurement Policy

SUBJECT: Service Contract Inventories

Section 743 of Division C of the Fiscal Year (FY) 2010 Consolidated Appropriations Act, P.L. 111-117, requires civilian agencies to prepare an annual inventory of their service contracts and to analyze the inventory to determine if the mix of Federal employees and contractors is effective or if rebalancing may be required. This memorandum provides guidance regarding: 1) the submission of analyses for the FY 2010 inventories, 2) the preparation of FY 2011 inventories, and 3) the development of analyses of the FY 2011 inventories. A summary checklist of submissions, formats, and deadlines may be found at Attachment 1. This memorandum applies to all agencies covered by the Federal Activities Inventory Reform (FAIR) Act, except the Department of Defense.

A. Analysis of FY 2010 inventories

Each agency shall submit a report suitable for public disclosure that discusses its analysis of the FY 2010 service contract inventory and the use of contractors for the special interest functions that the agency selected to study. At a minimum, each agency's report should identify:

a) The special interest functions studied by the agency, the dollars obligated to those specific product and service codes (PSCs) in FY 2010, and the rationale for focusing on the identified functions;

b) The methodology used by the agency to support its analysis (e.g., sampled contract files, conducted interviews of members of the acquisition workforce working on specific contracts of interest);

c) Agency findings, including a brief discussion of the extent to which the desired outcomes described in section 743(e)(2) are being met (e.g., the agency is not using contractor employees to perform critical functions in such a way that could affect the ability of the agency to maintain control of tis mission and operations); and

d) Actions taken or planned by the agency to address any identified weaknesses or challenges.

In order to meet the statutory deadline for publishing its analysis, the agency should submit its report to the Office of Federal Procurement Policy (OFPP) by no later than December 30, 2011. OFPP will share the draft with other offices within the Office of Management and Budget (OMB). The agency should await confirmation of completion of OMB review before publicly posting the report on the agency website and publishing a *Federal Register* notice of availability.

B. FY 2011 inventories

1. Inventory preparation. Agencies shall prepare FY 2011 inventories in the same manner as they prepared FY 2010 inventories under OFPP's November 5, 2010 guidance, provided at Attachment 2. Similar to the FY 2010 inventory, the FY 2011 inventory shall exclude data on the number of full-time equivalents and the amount invoiced. This information in not currently collected in the Federal Procurement Data System (FPDS). OFPP will continue to defer the collection of this information pending the outcome of further analysis on agency and public comments on a proposed rule to collect this information from contractors and discussion with the Department of Defense on the approaches it has used to comply with similar requirements in 10 U.S.C. § 2462 and 10 U.S.C. § 2330a(c). As explained in Section C, below, collection of information on the role contracted services play in achieving agency objectives will begin with the FY 2012 inventory.

Agencies shall submit their FY 2011 inventories to OFPP by December 30, 2011. By January 30, 2012, the information must be made publicly available on the agency website, and the agency will provide the website address (URL) to OFPP. The agency must also publish a notice in the *Federal Register* by January 30 that the inventory is available to the public along with the name, telephone number, and e-mail address of an agency point of contact.

2. Planned analysis of FY 2011 inventory. Each agency shall also submit to OFPP a planned analysis by December 30, identifying which special interest functions in its FY 2011 inventory will be evaluated for analysis. After OMB completes its review, this analysis should also be publicly posted by each agency before January 30, 2012. The submission should provide the list of PSCs, dollars obligated for those PSCs in FY 2011, and a brief description of the rationale for selection. (The top portion of the summary table (Appendix C of November 2010 guidance) should also identify the specific PSCs that agencies plan for further analysis.) When choosing these functions, each agency is encouraged to reflect insight gained and lessons learned from its multi-sector workforce pilots, analysis of the FY 2010 inventory, the initiative to reduce spending on management support service contracts, and agency analysis of its FAIR Act inventory. Agencies should identify functions that were not previously the subject of a focused analysis unless additional analysis of those functions is necessary.

C. Additional information collection for FY 2012 inventories

Beginning with the FY 2012 inventory, agencies will be required to report on the role contracted services play in achieving agency objectives. Because the information is not currently collected in FPDS, agencies shall immediately instruct their acquisition workforce to start collecting this information for new contracts awarded on or after March 1, 2012. Agencies shall review the OFPP Policy Letter 11-01, *Performance of Inherently Governmental and Critical Functions*, and when a contract is initially awarded, the first letters in the "description of

requirement" field in FPDS should indicate if the services provided under the contract are predominantly for functions closely associated to inherently governmental ones (enter the code "CL" in capital letters), critical functions (enter the code "CT" in capital letters), or other functions (enter the code "OT" in capital letters). Identifying closely associated and critical functions at the time of award should assist agencies (in the case of closely associated functions) in prioritizing which contracts may require increased management attention and oversight to ensure that mission creep does not result in contractors performing inherently governmental functions and (in the case of critical functions) ensure that the agency does not lose control of its mission and operations. Agencies should incorporate the use of these codes in the training programs required in Section 5-4 of Policy Letter 11-01.

Agencies shall submit all required documents to OFPP by December 30, 2011, through the MAX system at htpps://max.omb.gov/community/x/z4OqHQ. Instructions for registering with MAX can be found at htpps://max.omb.gov/maxportal/. Questions regarding this memorandum may be referred to Jennifer Swartz (202-395-6811; e-mail: jswartz@omb.eop.gov) or Mathew Blum (202-395-4953; e-mail: mblum@omb.eop.gov). Thank you for your careful attention to this matter.

Attachments

Attachment 1

Service Contract Inventory
Checklist of Submissions, Formats and Deadlines

Submission	Format	Deadline
Analysis of FY 2010 Inventories	• Ensure that the report includes the following: ○ a list of special interest functions analyzed and dollars obligated in FY 2010; ○ a description of the methodology used to support analysis (e.g. sampling, interviews, review of contract files); ○ a summary of findings, including achievement of outcomes described in section 743(e)(2); and ○ an explanation of actions taken or planned to resolve identified weaknesses.	• Submit draft report to OMB by December 30, 2011. • Await OMB confirmation of completion of review before publicly posting report of analysis on agency website by January 30, 2012.
FY 2011 Inventories	• Follow OFPP's November 5, 2010 guidance for inventory content and structure. *Note*: Number of FTEs, amount invoiced, and role services play in achieving agency mission will not be collected for FY 2011 inventory.	• Submit draft report to OMB by December 30, 2011. • Await OMB confirmation of completion of review before publicly posting by January 30, 2012. • Send OFPP the hyperlink to agency website with the inventory and publish Federal Register Notice of Availability.
Analysis of FY 2011 Inventories	• Identify agency-specific special interest functions for analysis in FY 2012: ○ specify PSCs that will be analyzed and associated agency-funded obligations for those PSCs in FY 2011; and ○ provide brief explanation about why functions were chosen.	• Send OFPP a brief document identifying the special interest functions by December 30, 2011.
	• Follow OFPP's November 5, 2010 guidance.	• Draft Report of analysis submitted to OFPP by December 30, 2012. • Await OMB confirmation of completion of review before publicly posting by January 30, 2013.
Additional Information Collection for FY 2012 Inventories	• Report in FPDS whether each new service contract awarded in FY 2012 is predominantly performing closely associated or critical functions.	• Instruct contracting offices to begin entering this information for all new service contracts awarded after March 1, 2012.

To: CAO-COUNCIL@LISTSERV.GSA.GOV <CAO-COUNCIL@LISTSERV.GSA.GOV>
Subject: [CAO-COUNCIL] Clarification to OFPP's December 19, 2011 Guidance on Service Contract Inventories

The following is sent on behalf of Lesley A. Field, Acting Administrator for Federal Procurement Policy.

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SUBJECT: Clarification to OFPP's December 19, 2011 Guidance on Service Contract Inventories

In order to implement the collection of information about the role services play in achieving agency objectives, as part of the service contract inventories required by Section 743 of Division C of the Fiscal Year (FY) 2010 Consolidated Appropriations Act (P.L. 111-117), OFPP's December 19, 2011 guidance instructed agencies to begin coding functions closely associated to inherently governmental functions, critical functions and other functions in the "description of requirement field" in FPDS for new contracts awarded after March 1, 2012. Several agencies have since provided comments that the codes identified in the OFPP guidance (i.e., two letter codes in the description of the requirement field) will be difficult to search in FPDS. To address this concern, we ask that agencies instead report in FPDS using the phrase describing the predominant type of functions being performed under the contract. Specifically, agencies should input one of the following phrases into the "description of requirement" field: "Closely Associated", "Critical Functions", or "Other Functions".

An annual FPDS report for service contract inventories, which is currently being developed, will generate the description of requirement field for the most recently reported modification, so the description field for each modification of the covered contracts should also include this information.

If your agency has any questions regarding this change, please contact Jen Swartz (jswartz@omb.eop.gov, 202-395-6811). Thank you for your attention to this matter.

nonresponse in key Bureau surveys. Moreover, as the use of Web-based surveys continues to grow, so too will the need for careful tests of instrument design and usability, human-computer interactions, and the impact of multiple modes on data quality. The BSRL is uniquely equipped with both the skills and facilities to accommodate these demands.

The extension of the accompanying clearance package reflects an attempt to accommodate the increasing interest by BLS program offices and other agencies in the methods used, and the results obtained, by the BSRL. This package reflects planned research and development activities for FY2012 through FY2014, and its approval will enable the continued productivity of a state-of-the-art, multi-disciplinary program of behavioral science research to improve BLS survey methodology.

III. Desired Focus of Comments

The Bureau of Labor Statistics is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility.
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submissions of responses.

Type of Review: Extension of a currently approved collection.

Agency: Bureau of Labor Statistics.

Title: Cognitive and Psychological Research.

OMB Number: 1220–0141.

Affected Public: Individuals and Households, Private Sector.

Total Respondents: 1,200.

Frequency: One time.

Total Responses: 1,200.

Average Time per Response: 60 minutes.

Estimated Total Annual Burden Hours: 1,200 hours.

Total Burden Cost (capital/startup): $0.

Total Burden Cost (operating/maintenance): $0.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they also will become a matter of public record.

Signed at Washington, DC this 31st day of August 2011.

Kimberley D. Hill,

Chief, Division of Management Systems, Bureau of Labor Statistics.

[FR Doc. 2011–23209 Filed 9–9–11; 8:45 am]

BILLING CODE 4510–24–P

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

AGENCY: Office of Management and Budget, Office of Federal Procurement Policy.

ACTION: Notice of final policy letter.

SUMMARY: The Office of Federal Procurement Policy (OFPP) in the Office of Management and Budget (OMB) is issuing a policy letter to provide to Executive Departments and agencies guidance on managing the performance of inherently governmental and critical functions. The guidance addresses direction to OMB in the Presidential Memorandum on Government Contracting, issued on March 4, 2009, to clarify when governmental outsourcing of services is, and is not, appropriate, consistent with section 321 of the Duncan Hunter National Defense Authorization Act (NDAA) for Fiscal Year 2009 (Pub. L. 110–417). Section 321 requires OMB to: (i) Create a single definition for the term "inherently governmental function" that addresses any deficiencies in the existing definitions and reasonably applies to all agencies; (ii) establish criteria to be used by agencies to identify "critical" functions and positions that should only be performed by Federal employees; and (iii) provide guidance to improve internal agency management of functions that are inherently governmental or critical. The Presidential Memorandum is available at *http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-Subject-Government/*. Section 321 may be found at *http://www.dod.gov/dodgc/olc/docs/2009NDAA_PL110-417.pdf*.

DATES: The effective date of OFPP Policy 11–01 is October 12, 2011.

FOR FURTHER INFORMATION CONTACT: Mathew Blum, OFPP, (202) 395–4953 or *mblum@omb.eop.gov*, or Jennifer Swartz, OFPP, (202) 395–6811 or *jswartz@omb.eop.gov*.

SUPPLEMENTARY INFORMATION:

A. Overview

OFPP is issuing a policy letter to provide guidance on managing the performance of inherently governmental and critical functions. The policy letter is intended to implement direction in the President's March 4, 2009, Memorandum on Government Contracting that requires OMB to "clarify when governmental outsourcing for services is and is not appropriate, consistent with section 321 of Public Law 110–417 (31 U.S.C. 501 note)." The policy letter:

- *Clarifies what functions are inherently governmental and must always be performed by Federal employees.* The policy letter provides a single definition of "inherently governmental function" built around the well-established statutory definition 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 interest as to mandate performance by Federal employees. The definition provided by this policy letter will replace existing definitions in regulation and policy, including the Federal Acquisition Regulation (FAR). The policy letter provides examples and tests to help agencies identify inherently governmental functions.
- *Explains what agencies must do when work is "closely associated" with inherently governmental functions.* Specifically, when functions that generally are not considered to be inherently governmental approach being in that category because of the nature of the function and the risk that performance may impinge on Federal officials' performance of an inherently governmental function, agencies must give special consideration to using Federal employees to perform these functions. If contractors are used to perform such work, agencies must give special management attention to contractors' activities to guard against their expansion into inherently governmental functions. The policy letter includes examples to help agencies identify closely associated functions and a checklist of responsibilities that must be carried out

when agencies rely on contractors to perform these functions.

• *Requires agencies to identify their "critical functions" in order to ensure they have sufficient internal capability to maintain control over functions that are core to the agency's mission and operations.* The policy letter holds an agency responsible for making sure it has an adequate number of positions filled by Federal employees with appropriate training, experience, and expertise to understand the agency's requirements, formulate alternatives, manage work product, and monitor any contractors used to support the Federal workforce. Federal officials must evaluate, on a case-by-case basis, whether they have sufficient internal capability, taking into account factors such as the agency's mission, the complexity of the function, the need for specialized staff, and the potential impact on mission performance if contractors were to default on their obligations.

• *Outlines a series of agency management responsibilities to strengthen accountability for the effective implementation of these policies.* Agencies must take specific actions, before and after contract award, to prevent contractor performance of inherently governmental functions and overreliance on contractors in "closely associated" and critical functions. Agencies are also required to develop agency-level procedures, provide training, and designate senior officials to be responsible for implementation of these policies.

OFPP will work with the Federal Acquisition Regulatory Council, the Defense Acquisition Regulations Council and the Civilian Agency Acquisition Council to develop and implement appropriate changes to the FAR to implement this policy letter. In addition, OFPP will review other relevant policy documents, such as guidance in OMB Circular A–76 implementing the FAIR Act, and take appropriate action to ensure they conform to the policies in this letter. Finally, OFPP will work with the Federal Acquisition Institute and the Defense Acquisition University on appropriate training materials for the acquisition workforce and other affected stakeholders.

B. Summary of Proposed and Final Policy Letters

The Presidential Memorandum on Government Contracting required the Director of OMB to develop guidance addressing when governmental outsourcing of services is, and is not, appropriate. The Memorandum states that the line between inherently governmental activities that should not be outsourced and commercial activities that may be subject to private-sector performance has become blurred, which may have led to the performance of inherently governmental functions by contractors and, more generally, an overreliance on contractors by the government. It directs OMB to clarify when outsourcing is, and is not, appropriate, consistent with section 321 of the NDAA for Fiscal Year (FY) 2009.

Section 321 directs OMB to: (1) Create a single, consistent definition for the term "inherently governmental function" that addresses any deficiencies in the existing definitions and reasonably applies to all agencies; (2) develop criteria for identifying critical functions with respect to the agency's mission and operations; (3) develop criteria for determining positions dedicated to critical functions which should be reserved for Federal employees to ensure the department or agency maintains control of its mission and operations; (4) provide criteria for identifying agency personnel with responsibility for (a) maintaining sufficient expertise and technical capability within the agency, and (b) issuing guidance for internal activities associated with determining when work is to be reserved for performance by Federal employees; and (5) solicit the views of the public regarding these matters.

1. Proposed Policy Letter

OMB's OFPP issued a proposed policy letter on March 31, 2010, entitled "Work Reserved for Performance by Federal Government Employees," to implement the requirements of the President's Memorandum and section 321 (75 FR 16188–97). The proposed policy letter, which was issued after OFPP reviewed current laws, regulations, policies, and reports addressing the definition of inherently governmental functions, as well as feedback from a public meeting held in the summer of 2009, proposed to consolidate in one document a number of policies, definitions, and procedures associated with identifying when work must be performed by Federal employees that are currently addressed in multiple guidance documents, including the Federal Acquisition Regulation (FAR), OMB Circular A–76, and various OMB memoranda. The document proposed the following policy actions to address inherently governmental functions, functions closely associated with inherently governmental functions, and functions that are critical to the agencies' mission and operations.

a. Proposed Steps To Address Inherently Governmental Functions

• Create a single definition for the term "inherently governmental function" by directing agencies to adhere to the statutory definition for this term set forth in the FAIR Act and eliminate variations of this definition found in other documents, such as the FAR and OMB Circular A–76.

• Preserve a long-standing list of examples set out in the FAR of the most common inherently governmental functions, such as the determination of agency policy, hiring of Federal employees, and awarding of Federal contracts.

• Refine existing criteria (*e.g.*, addressing the exercise of discretion) and provide new ones (*e.g.*, focused on the nature of the function), to help an agency decide if a particular function that is not identified on the list of examples is, nonetheless, inherently governmental.

b. Proposed Steps To Address Functions Closely Associated With Inherently Governmental Functions

• Reiterate requirements in the Omnibus Appropriations Act, 2009 (Pub. L. 111–8) to give special consideration to Federal employee performance of functions closely associated with inherently governmental ones.

• Reinforce and refine guidance in the FAR and Attachment A of OMB Circular A–76 requiring special management attention when contractors perform functions closely associated with inherently governmental functions to guard against their expansion into inherently governmental functions. Steps might entail providing clearer prescriptions in the statement of work of what the contractor may and may not do, and ensuring adequate and adequately trained personnel to oversee the contractor's work.

• Preserve a long-standing list of examples set out in the FAR of the most common functions closely associated with inherently governmental functions, such as support for policy development or support for the selection of contractors.

c. Proposed Steps To Address Critical Functions

• Recognize a new category of work, "critical functions," which must be evaluated to determine the extent to which performance by Federal employees is required. Define the term as a function that is "necessary to the

agency being able to effectively perform and maintain control of its mission and operations."

• Hold an agency responsible for making sure that, for critical functions, it has an adequate number of positions filled by Federal employees with appropriate training, experience, and expertise to understand the agency's requirements, formulate alternatives, manage work product, and monitor any contractors used to support the Federal workforce. To meet this responsibility, require Federal officials to evaluate, on a case-by-case basis, whether they have sufficient internal capability, taking into account factors such as the agency's mission, the complexity of the function, the need for specialized staff, and the potential impact on mission performance if contractors were to default on their obligations.

• Make clear that, so long as agencies have the internal capacity needed to maintain control over their operations, they are permitted to allow contractor performance of positions within critical functions (subject to any other applicable legal or regulatory requirements).

Finally, the proposed policy letter would require agencies to take specific actions, before and after contract award, to prevent contractor performance of inherently governmental functions and overreliance on contractors in the performance of "closely associated" and critical functions. Agencies would also be required to develop agency-level procedures, provide training, and designate senior officials to be responsible for implementation of these policies. The proposed policy letter emphasized the need for a shared responsibility between the acquisition, program and human capital offices within the agency to effectively implement its provisions.

The proposed policy letter was published in the **Federal Register** on March 31, 2010 (75 FR 16188–97) for public comment. OFPP encouraged respondents to offer their views on a series of questions to elicit feedback on some of the more difficult or pressing policy challenges, such as whether and how best to use the "discretion" test to identify inherently governmental functions, how best to explain the difference between critical functions and functions that are closely associated with the performance of inherently governmental functions, and how to properly classify certain functions related to acquisition support and security.

For additional background on the proposed policy letter, see discussion in the preamble at 75 FR16188–94.

2. Final Policy Letter

Based on public comments received in response to the proposed policy letter (which are discussed in greater detail below), and additional deliberations within the Executive Branch, OFPP has refined the proposed policy letter to:

• Rename the policy letter "Performance and Management of Inherently Governmental and Critical Functions" to more accurately capture its scope and purpose;

• Add to the illustrative list of inherently governmental functions the following: (i) All combat, (ii) security operations in certain situations connected with combat or potential combat, (iii) determination of an offer's price reasonableness, (iv) final determinations about a contractor's performance, including approving award fee determinations or past performance evaluations and taking action based on those evaluations, and (v) selection of grant and cooperative agreement recipients;

• Clarify the illustrative list of functions closely associated with the performance of inherently governmental functions to expressly recognize a variety of work to support Federal acquisitions that includes conducting market research, developing inputs for independent government cost estimates, drafting the price negotiations memorandum and collecting information, performing an analysis or making a recommendation for a proposed performance rating to assist the agency in determining its evaluation of a contractor's performance;

• Establish a comprehensive responsibilities checklist for functions closely associated with inherently governmental functions;

• Caution that, in many cases, functions include multiple activities that may be of a different nature—some activities within a function may be inherently governmental, some may be closely associated, and some may be neither—and by evaluating work at the activity level, an agency may be able to more easily differentiate tasks within a function that may be performed only by Federal employees from those tasks that can be performed by either Federal employees or contractors;

• Clarify that determining the criticality of a function depends on the mission and operations, which will differ between agencies and within agencies over time;

• Establish that if an agency makes a decision to insource some portion of a function that is currently being performed for the agency by a combination of small and large businesses, the "rule of two" should be applied to determine who will perform the work that remains in the private sector (the "rule of two" requires that acquisitions be reserved for award to small businesses, or certain subsets of small businesses, if there are two or more responsible small businesses capable of performing the work at fair market prices); and

• Reorganize and consolidate the discussion of management associated with inherently governmental, closely associated, and critical functions to more clearly recognize that oversight responsibilities for these functions are interrelated and should not be stove-piped.

C. Public Comments

OFPP received public comments from more than 30,350 respondents on the proposed policy letter. All but approximately 110 comments were submitted in the format of a form letter. Respondents were divided in their reaction to the proposed guidance. One form letter, submitted by approximately 30,000 respondents, expressed concern about excessive outsourcing and recommended expanding the definition of an inherently governmental function to encompass critical functions and functions closely associated with inherently governmental functions. The letter also proposed augmenting the list of inherently governmental functions to include all security functions and intelligence activities, training for interrogation, military and police, and maintenance and repair of weapons systems. A second form letter, submitted by approximately 240 respondents, raised significantly different concerns, cautioning that the policy letter and the increased attention on having non-inherently governmental functions performed by Federal employees will inappropriately discourage Federal managers and agencies from taking full and effective advantage of the private sector and the benefits of contracting. The roughly 110 responses that were not form letters were generally supportive of OFPP's efforts to clarify policies and management responsibilities, though respondents were divided over whether too much or not enough work would be reserved for Federal employees if policies were implemented as proposed.

Copies of the public comments received are available for review at *http://www.regulations.gov* (Docket ID OFPP–2010–0001). A short summary description of the comments and OFPP's responses and changes adopted in the final policy letter are set forth below.

1. Scope of the Policy Letter

A number of respondents offered views on the general focus of the policy letter. Several respondents stated that the policy letter was too narrowly focused and cautioned that the overall tone of the policy letter, as set by the title and purpose section, could be construed as being concerned only about ensuring that work is properly reserved for Federal employees—as opposed to also needing to strike the right balance between work that may be contracted out and work that must be reserved. Some respondents recommended that the scope of the policy letter be broadened to more expressly address the performance of commercial activities and advisory and assistance services.

Response: OFPP concurs that the overall purpose of the policy letter should be clarified. While a key goal of the policy letter is to ensure that inherently governmental work is reserved for Federal employees, agencies have an equally important responsibility, in cases where work is not inherently governmental, to evaluate how to strike the best balance in the mix of work performed by Federal employees and contractors to both protect the public's interest and serve the American people in a cost-effective manner. The policy letter's title and purpose statement have been revised accordingly. In particular, rather than focusing the title on work reserved for Federal employees, it now focuses on performance of inherently governmental and critical functions, which expressly acknowledges that functions closely associated with inherently governmental functions and critical functions are often performed by both Federal employees and contractors, and states that reliance on contractors is not, by itself, a cause for concern, provided that the work that they perform is not work that should be reserved for Federal employees and that Federal officials are appropriately managing contractor performance.

OFPP does not believe the scope of the policy letter should be broadened to include an extended discussion of contractor performance of commercial activities and instead prefers to keep the main focus on inherently governmental functions, functions closely associated with them, and critical functions. Recent studies of the role of employees and contractors, and the overall increase in reliance on contractors over the past decade, do not suggest a general difficulty or hesitation in taking advantage of contractors to provide expertise, innovation, and cost-effective support to Federal agencies. By contrast, these studies and general contracting trends, as well as the President's Memorandum on Government Contracting in March 2009, point to a need for guidance to clarify when work must be performed by Federal employees and the steps agencies need to take to ensure they maintain control of their mission and operations, when extensive work is performed by contractors. OFPP believes any questions regarding the intended use of contractors will largely be addressed by clarifying the overall scope of the policy letter, as described above, and reinforcing that an agency may frequently be able to address overreliance on contractors by allocating additional resources to contract management while continuing to use contractors for support.

OFPP carefully considered the merits of adding discussion on advisory and assistance services and other professional and technical services. These functions are likely to be commonly found among those considered to be either critical or closely associated with inherently governmental functions and spending in this area has grown disproportionately over the past few years. In November 2010, OFPP identified these functions for special management consideration based on concern of increased risk of losing control of mission and operations as identified through a review of reports issued in recent years, such as by the Government Accountability Office, the Commission on Wartime Contracting, agency Inspectors General, Congressional Committees, and the Acquisition Advisory Panel. Agencies were instructed to consider if contractor support for these "special interest functions" is being used in an appropriate and effective manner and if the mix of Federal employees and contractors in the agency is appropriately balanced. See OFPP Memorandum, *Service Contract Inventories,* Memorandum to Chief Acquisition Officers and Senior Procurement Executives (November 5, 2010), available at *http://www.whitehouse.gov/sites/default/files/omb/procurement/memo/service-contract-inventories-guidance-11052010.pdf.* OFPP will work with agencies as they review their use of support contractors in these areas and consider the need for additional guidance in conjunction with these efforts.

2. Inherently Governmental Functions

Respondents offered a number of comments regarding the scope of the definition of "inherently governmental function," the tests proposed to determine whether or not a function is inherently governmental, and the illustrative list of examples.

a. *Definition.* Many respondents stated that use of the FAIR Act definition of an inherently governmental function is reasonable. Some respondents, including those offered through one of the two form letters, urged that the definition be expanded to include functions closely associated with inherently governmental functions and critical functions, in order to effectively prevent the inappropriate outsourcing of work that should be reserved for performance by Federal employees. A number of respondents inquired as to OMB's plans for ensuring that, going forward, the definition set forth in the policy letter is recognized as the single authorized definition for the term.

Response: Based on its review of public comments, prior feedback (including that provided at a public meeting held in the summer of 2009, in connection with the President's Memorandum on Government Contracting) and its review of relevant reports (such as the report of the Congressionally-chartered Acquisition Advisory Panel), OFPP believes the FAIR Act definition is reasonable. OFPP does not believe it is appropriate to expand the definition to encompass closely associated or critical functions. Agencies must give special attention to functions falling into those categories to ensure that the government does not lose control of either inherently governmental functions (in the case of closely associated functions) or activities that are core to the agency's mission or operations (in the case of critical functions), but such functions can, in appropriate circumstances, be performed by contractors.

To ensure that the definition in the FAIR Act is recognized as the single authorized definition for the term, OFPP intends to work with the Federal Acquisition Regulatory Council, the Defense Acquisition Regulations Council and the Civilian Agency Acquisition Council to develop and implement appropriate changes to the FAR to implement this policy letter. In addition, OFPP will review other relevant policy documents, such as OMB Circular A–76, and take appropriate action to ensure they conform to the policies in this letter.

b. *Tests.* Respondents generally did not raise concerns regarding the continued use of tests to help agencies determine if functions are inherently governmental, but a number cautioned

of potential pitfalls, and others offered suggestions for how application of the tests could be improved. A number of recommendations, mostly clarifications, were offered to help improve the "discretion" test, which asks agencies to evaluate if the discretion associated with the function, when exercised by a contractor, would have the effect of committing the government to a course of action. Recommendations included: (i) Emphasizing that the evaluation should generally focus on how much discretion is left to government employees as opposed to how much discretion has been given to contractors, and (ii) distinguishing between fact-finding and making decisions based on the fact-finding. A number of comments questioned the likely effectiveness of the proposed "nature of the function test," which would ask agencies to consider if the direct exercise of sovereign power is involved. Some respondents suggested that the term "sovereign" be explained while others concluded that the manner in which sovereign authority is exercised is so varied that it is better explained by example than further definition. A few respondents recommended that the final policy letter adopt a new "principal-agent" test that would require agencies to identify functions as inherently governmental where serious risks could be created by the performance of these functions by those outside government, because of the difficulty of ensuring sufficient control over such performance.

Response: OFPP has made refinements to the "discretion" test. First, it has more fully distinguished the type of discretion that may be appropriately exercised by a contractor from that which would not be appropriately exercised by a contractor. Second, it has clarified that inappropriate delegations of discretion can be avoided by: (i) Carefully delineating in the statement of work contractor responsibilities and types of decisions expected to be made in carrying out these responsibilities and effectively overseeing them and (ii) subjecting the contractor's discretionary decisions and conduct to meaningful oversight and, whenever necessary, to final approval by an agency official. OFPP agrees that it is appropriate to consider how much discretion is left to government employees but, at the same time, also believes there is merit in considering the nature of the discretion given to contractors, as well as whether circumstances, such as time constraints, may limit the ability to effectively manage the contractor's actions or inappropriately restrict government employees' final approval authority. It also concluded that the proposed language was sufficiently clear to help agency officials differentiate between fact-finding that could appropriately be performed by contractors from binding decision-making based on fact-finding that needed to be performed by Federal employees.

Only minimal changes were made to the "nature of the function test." OFPP appreciates that the value of this test may be limited, but believes it still can contribute to an agency's overall understanding and analysis in differentiating between functions that are inherently governmental and those that are not. OFPP considered, but did not adopt, the "principal-agent" test. While recognizing that risk is an underlying factor in reserving work for Federal employees and the definition of inherently governmental function, OFPP concluded that the test would not likely lead to identification of significantly different functions as inherently governmental and was concerned that application of the test could lead to greater confusion about what may be performed by contractors and what must be performed by Federal employees.

c. *Examples.* While most respondents did not object to retaining a list with illustrative examples, they offered mixed reactions to the specific examples given. A number of respondents felt the proposed list is too narrow and should be modified to add additional functions while at least one respondent thought the list was too broad. Many of those who believed the list was too narrow suggested the addition of functions involving private security contractors, especially when performed in hostile environments or involving intelligence. Some acquisition functions were also recommended for the list, such as developing independent government cost estimates, and preparing documentation in support of a price negotiation memorandum and price reasonableness determination. One respondent who thought the list was too broad recommended refinements to more precisely identify the inherently governmental characteristic of the action, such as "a judge exercising the authority of the Federal government" rather than "the performance of adjudicatory functions." The respondent explained that deciding a dispute is not, *per se,* inherently governmental since arbitration and alternative dispute resolution processes can be performed by non-Federal employees, even when one of the parties is a Federal agency.

Response: Based on public comment and additional deliberations, OFPP has added to the list of inherently governmental functions: (i) All combat and (ii) security operations in certain situations connected with combat or potential combat. OFPP concluded these were clear examples of functions so intimately related to public interest as to require performance by Federal Government employees; hence, the addition of these activities to the list of inherently governmental functions would contribute to clarifying the line between what work must be reserved for Federal employees and what work may be performed by contractors. OFPP also clarified that making final determinations about a contractor's performance (including approving award fee determinations or past performance evaluations) and taking action based on these assessments are also inherently governmental because such actions involve the exercise of substantial discretion. In addition, OFPP added selection of grant and cooperative agreement recipients to the list of examples of inherently governmental functions because such actions bind the government.

With respect to contract pricing, the list identifies price reasonableness determinations as inherently governmental. This includes approval of any evaluation relied upon to support a price reasonableness determination, such as a price negotiation memorandum or approval of documentation cited as the government's independent cost estimate, which, by definition, must be the government's own final analysis. That said, an agency is not precluded from using the services of a contractor to develop inputs for government cost estimates or to draft a price negotiation memorandum as long as whatever the government relies upon to determine price reasonableness has been reviewed and approved by a government employee. As in other situations where a Federal official must review and approve documents prepared by a contractor, the Federal official's review and approval must be meaningful; that is to say, it cannot be a "rubber stamp" where the government is completely dependent on the contractor's superior knowledge and is unable to independently evaluate the merits of the contractor's draft or to consider alternatives to that draft. For that reason, while an agency may appropriately choose to have Federal employees prepare documentation in support of a price negotiation memorandum and price reasonableness

determination, OFPP does not view this work as inherently governmental, but rather closely associated with an inherently governmental function—and has added this work to the list of closely associated functions. If this work is performed by contractors, the agency must apply special management attention to ensure the work does not expand to include decision-making (which is inherently governmental) or otherwise interfere with the government's ability to exercise independent judgment, in this case, to determine that offered prices are fair and reasonable.

Regarding the performance of adjudicatory functions, OFPP retained the language on the proposed list, without change, and notes that the language currently in the FAR and the proposed policy letter already provides a carve-out for certain types of adjudicatory functions that are not inherently governmental, such as those relating to arbitration or other methods of alternative dispute resolution.

Similar to the list appearing in the FAR today, the list in the final policy letter is illustrative and not exhaustive. In addressing security operations, for example, the list identifies where security operations would be inherently governmental in connection with combat. This should not be read as a determination that all security performed in any hostile situation other than actual combat may be performed by contractors. Rather it means that those situations should be evaluated on a case-by-case basis to determine what security functions and activities are inherently governmental and what can be performed by contractors with appropriate management and oversight.

Finally, OFPP has added a caveat to recognize that many functions include multiple activities, some of which may not be inherently governmental. These other activities performed in conjunction with the function may be closely associated or neither inherently governmental nor closely associated. This caveat helps to clarify that the identification of a function on the list does not mean every action associated with the function is inherently governmental. For additional discussion, see response to comment no. 5, below.

3. Functions Closely Associated With Inherently Governmental Functions

Respondents offered a range of comments. Some call into question the purpose of this category; others raise concerns about the extent to which contractors should perform these functions; still others offer refinements to the proposed list of examples.

a. *Purpose.* A number of respondents recommended that the guidance on closely associated functions be clarified. Many of them pointed out that discussion of this concept appears to overlap with the new concept of critical function in that both appear to address the same risk, namely of the government losing control of its operations. Some thought this confusion might be avoided by defining the term "closely associated" so that its scope as a functional category can be more clearly understood. Others favored adding an explanation of the different purposes served by the two concepts. Some proposed doing away with the category, pointing out that the "closely associated" concept is more appropriately viewed as a management practice rather than as a separate functional category.

Response: OFPP does not agree that the concept of "closely associated" should be eliminated, as it serves an important management purpose in helping agencies guard against losing control of inherently governmental functions. However, OFPP agrees that the concept is more relevant to management practices, or internal control mechanisms, as opposed to serving as a stand-alone functional category. For this reason, the discussion of this concept in the policy letter has been reorganized so that it is now addressed as part of the discussion on identifying inherently governmental functions. This reorganization should also help to clarify the different reasons for tracking contractors who are performing closely associated functions and those who are performing critical functions. In the case of closely associated functions, the agency is trying to prevent contractor performance from interfering with Federal employees' ability to perform inherently governmental functions. In the case of critical functions, the agency is looking to determine if the agency is at risk of losing control of its ability to perform its mission and operations. OFPP does not believe a definition will necessarily provide greater clarity, but has created a new checklist to summarize in one place the various actions that must be taken if the agency determines that contractor performance of a function closely associated with an inherently governmental function is appropriate.

b. *Performance.* A number of respondents (including those using one of the two form letters) stated that *only* Federal employees should be allowed to perform functions closely associated with inherently governmental functions (with contractor performance allowed only in limited or exceptional circumstances). These respondents generally recommended that the concept of "closely associated" be incorporated into the definition of inherently governmental function to effectively protect the government against improper reliance on contractors.

Response: Agencies must carefully guard against contractor performance of inherently governmental functions, but managing this risk does not require that performance of closely associated functions be reserved exclusively for Federal employees. Such a bar would inappropriately limit an agency's ability to take advantage of a contractor's expertise and skills to support the agency in carrying out its mission. For example, limiting performance of functions closely associated with inherently governmental functions could inappropriately limit an agency's ability to take advantage of a Federally Funded Research Development Center (FFRDC) or University Affiliated Research Center that provides essential engineering, research, development, and analysis capabilities to support agencies in the performance of their responsibilities and mission. As explained in FAR 35.017: "An FFRDC meets some special long-term research or development need which cannot be met as effectively by existing in-house or contractor resources. FFRDCs enable agencies to use private sector resources to accomplish tasks that are integral to the mission and operation of the sponsoring agency."

Effective risk management can be achieved if agencies are mindful of their responsibility to give special consideration to Federal employee performance and effectively apply special management attention when contractor performance is determined to be appropriate. With respect to special consideration, the policy letter reminds agencies of their responsibilities under the law and OMB's management guidance on this issue. (These responsibilities are also reiterated in guidance OFPP issued last fall to help agencies in evaluating the activities of their service contractors in accordance with section 743 of Division C of the Consolidated Appropriations Act, 2010 (Pub. L. 111–117). See OFPP Memorandum *Service Contract Inventories* (refer to response to comment no. 1, above, for cite).

With respect to contractor performance of closely associated functions, the final policy letter includes a new checklist that summarizes the various contract

management actions that agencies must take to ensure contractors are not performing, interfering with, or undermining the agency's decision-making responsibilities. The checklist, which is largely taken from existing guidance in the FAR and other documents, identifies steps such as: (i) Establishing specified ranges of acceptable decisions and/or conduct in the contract, (ii) assigning a sufficient number of qualified government employees to perform contract management, (iii) ensuring reasonable identification of contractors and contractor work products if there is a risk that the public will confuse contractor personnel or work products with government officials or work products, and (iv) avoiding or mitigating conflicts of interest.

In the case of an FFRDC, the FAR has long required that such organizations conduct their business in a manner befitting their special relationship with the government—which includes access, beyond that which is common to the normal contractual relationship, to government and supplier data, including sensitive and proprietary data, and to employees and installations equipment and real property. As stated in FAR 35.017, FFRDCs must operate in the public interest with objectivity and independence, be free from organizational conflicts of interest, and have full disclosure of their affairs to the sponsoring agency.

c. *Examples.* Respondents offered varied reactions to maintaining a list of examples of "closely associated" functions. Several felt a list should not be included in the final policy letter because it introduces unnecessary ambiguity and allows for unnecessarily broad interpretation that could include either an inappropriate presumption in favor of insourcing or an inappropriate presumption that the work is appropriately performed by a contractor. Of those who favored (or did not oppose) the continued use of a list, some felt the list was too broad, either because it included functions where the potential for encroaching on inherently governmental responsibilities should not be viewed as a significant concern in need of heightened scrutiny or because the function as described was indistinguishable from those identified as inherently governmental.

Response: OFPP believes the list, which is currently set forth in the FAR, continues to serve as a useful tool to assist agencies in identifying functions where they must give special consideration to performance by Federal employees or special contract management attention if performed by contractors. The reorganized discussion of this issue (as described above) in combination with the checklist should help to avoid inappropriate presumptions regarding the performance of these functions.

With respect to the substance of the list, OFPP has made three types of modifications. First, as was done with the list of inherently governmental functions, OFPP has added a caveat that many functions include multiple activities, only some of which are closely associated with inherently governmental. Other activities performed in conjunction may be inherently governmental or not closely associated. This caveat helps to clarify that the identification of a function on the list does not mean every action associated with the function is closely associated with an inherently governmental function. (See comment no. 5, below for additional discussion.) Second, the list more carefully delineates activities that are performed in direct support of inherently governmental functions (*e.g.*, analyses and feasibility studies to support the development of policy), which are closely associated activities, from those that involve making binding decisions (*e.g.*, the final shape of a policy), which are inherently governmental. Third, OFPP has added additional examples to further describe the types of acquisition support that are closely associated functions. These added functions include: Conducting market research, developing inputs for independent government cost estimates, assisting in the development of a price negotiation memorandum, and supporting agency personnel in evaluating a contractor's performance, such as by collecting information or conducting an analysis that can be used by a Federal employee to make a determination about the quality of the contractor's performance.

4. Critical Functions

A number of respondents recognized that the creation of "critical function" as a new category helps to fill a void in current policy, but sought clarification and recommended refinements to ensure agencies properly identify and address functions that are at the core of an agency's mission and operations. Some confusion was voiced, as noted above, regarding the difference between critical functions and closely associated with inherently governmental functions. Some respondents suggested that a list providing examples of critical functions be developed, similar to that developed for inherently governmental and closely associated functions, but others advised against developing a list, noting that the criticality of a function depends on an agency's mission and current capabilities. A number of respondents addressed how an agency might go about differentiating between a critical and a non-critical function. Some suggested that agencies be authorized, if not encouraged, to identify categories of service contracts that may be presumed to be non-critical in order to avoid unnecessary analyses. Others expressed concern that a list will lead to inappropriate generalizations that will hinder, rather than facilitate, meaningful rebalancing.

Response: OFPP intends to work with FAI and DAU to develop appropriate training to support the successful implementation of the policy letter. However, OFPP does not support the creation of a list of critical functions. A function's criticality is dependent on an agency's mission and operations. The policy letter has been clarified to emphasize that the criticality of a function depends on 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. Similarly, OFPP does not support the creation of a government-wide list of non-critical functions, as this may also differ between agencies based on their mission and operations.

5. Terminology

Several respondents raised concerns regarding how the policy letter uses the terms "function," "activity," and "position." These respondents state that the terms are used interchangeably to cover different concepts, namely: (1) A process, (2) tasks undertaken in conjunction with the process, and (3) billets filled by individuals to perform tasks. They recommend that clarification be provided, perhaps with the addition of definitions.

Response: OFPP recognizes that the terms have different meanings and agrees that more careful use of these terms may help to avoid inappropriately broad generalizations regarding the characterization of work. A function, for example, often includes multiple activities, or tasks, some of which may be inherently governmental, some of which may be closely associated with inherently governmental work, and some may be neither. By identifying work at the activity level, an agency can more easily differentiate tasks within a function that may be performed only by

Federal employees from those tasks that can be performed by either Federal employees or contractors without blurring the line between the role of Federal employees and contractors. The chart below provides several examples. For instance, within the function of source selection, the tasks of determining price reasonableness and awarding a contract are inherently governmental, the task of preparing a technical evaluation and price negotiation memorandum are closely associated (provided the government has sufficient time and knowledge to independently evaluate alternative recommendations and decide which is in the government's best interest) and (although not shown on the table), the task of ensuring the documents are in the contract file is neither inherently governmental nor closely associated.

Function	Work that is inherently governmental and therefore must be performed by Federal employees	Work that is closely associated with inherently governmental functions and that may be performed by either Federal employees or contractors
Budget development	The determination of budget policy, guidance, and strategy, and the determination of Federal program priorities or budget requests.	Support for budget preparation, such as workforce modeling, fact finding, efficiency studies, and should-cost analyses.
Policy and regulatory development.	The determination of the content and application of policies and regulations.	Support for policy development, such as drafting policy documents and regulations, performing analyses, feasibility studies, and strategy options.
Human resources management.	The selection of individuals for Federal Government employment, including the interviewing of individuals for employment, and the direction and control of Federal employees.	Support for human resources management, such as screening resumes in accordance with agency guidelines.
Acquisition planning, execution, and management.	*During acquisition planning:* (1) Determination of requirements, (2) approval of a contract strategy, statement of work, incentive plans, and evaluation criteria, (3) independent determination of estimated cost based on input from either in-house or contractor sources or both. *During source selection:* (1) Determination of price reasonableness of offers, (2) participation as a voting member on a source selection board, and (3) awarding of contracts. *During contract management:* (1) Ordering of any changes required in contract performance or contract qualities, (2) determination of whether costs are reasonable, allocable, and allowable, (3) participation as a voting member on performance evaluation boards, (4) approval of award fee determinations or past performance evaluations, and (5) termination of contracts.	*Support acquisition planning by:* (1) Conducting market research, (2) developing inputs for government cost estimates, and (3) drafting statements of work and other pre-award documents. *Support source selection by:* (1) Preparing a technical evaluation and associated documentation; (2) participating as a technical advisor to a source selection board or as a nonvoting member of a source evaluation board; and (3) drafting the price negotiation memorandum. *Support contract management by:* (1) Assisting in the evaluation of a contractor's performance (*e.g.*, by collecting information, performing an analysis, or making a recommendation for a proposed performance rating); and (2) providing support for assessing contract claims and preparing termination settlement documents.

Further 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. The fact that contractors are performing some portion of a particular activity is not an automatic signal that rebalancing is required, except where work is inherently governmental. In other cases, the number of positions, or slots, that should be held by government employees versus contractor personnel to perform a particular activity will depend on a number of considerations, such as whether the work is critical or closely associated with inherently governmental functions, the particular mission of the agency, the current capability of government employees to understand the mission and manage contractors, and how the function will be delivered to the agency by the contractor.

A number of clarifications have been made throughout the document to capture these differences, such as in connection with the lists of inherently governmental and closely associated functions in Appendix A and Appendix B. OFPP does not believe definitions need to be added to the policy letter at this time, but will review with the FAR Council if further clarification is required as regulatory changes are develop to implement the policy letter.

6. Small Business Contracting

Many respondents expressed concern that the rebalancing called for in the policy letter could harm small businesses. These respondents offered a number of recommendations to mitigate this impact, such as excluding all contracts that were awarded under set-asides from insourcing without a formal justification and approval, and having the Small Business Administration review proposed insourcing actions.

Response: OFPP does not anticipate a widespread shift away from contractors as a result of the requirements in the policy letter. As the policy letter explains, insourcing is intended to be a management tool—not an end in itself—to address certain types of overreliance on contractors. In many cases, overreliance may be corrected by allocating additional resources to contract management—*i.e.*, an agency does not necessarily need to take work away from contractors and have it performed by Federal employees. However, some insourcing is taking place and will be undertaken in the future in some situations, such as where an agency determines that outsourced work is inherently governmental or

where the agency is at risk of losing control of its operations regarding work of a critical nature. To minimize the negative impact of these actions on small businesses, the final policy letter requires agencies to take two actions. First, when prioritizing what contracted work should be reviewed for potential insourcing, agencies are instructed to generally place a lower priority on reviewing work performed by small businesses where the work is not inherently governmental and where continued contractor performance does not put the agency at risk of losing control of its mission and operations. Second, agencies are instructed to apply the "rule of two" to work that will continue to be performed by contractors following the insourcing of part of the work (the rule of two calls for a contract to be set aside for small businesses when at least two small businesses can do the work for a fair market price). Application of this rule should increase the amount of residual work remaining in the hands of small businesses that can perform the work cost effectively.

7. Human Capital Planning

A number of respondents acknowledged the connection that exists between human capital planning, clear guidance on the performance of inherently governmental, closely associated, and critical functions, and the ability to effectively evaluate the need for rebalancing. However, reactions were mixed regarding the value of addressing hiring ceilings and funding constraints. Some thought these were appropriate considerations for assessing the current and desired mix of Federal employees and contractors in an organization. Others felt that the assessment should remain focused exclusively on the nature of the function.

Response: Striking the right balance of work performed by Federal employees and contractors is a shared responsibility between human capital, acquisition, program, and financial management offices. Issues such as hiring ceilings and funding constraints were referenced in the guidance document because these issues are part of the challenges that agency officials must address in executing their responsibilities and determining the best mix of labor resources. OFPP and other organizations within OMB are working with the Chief Human Capital Officers (CHCO) Council to ensure agency human capital officers understand their role and responsibilities. OMB will work with the CHCO Council to determine the appropriate type of supplementary materials that might be needed when the policy letter is finalized.

8. Other Issues

a. *The role of cost in rebalancing decisions.* Several respondents raised concern that the policy letter provides insufficient guidance on the parameters for insourcing when based on a determination that public sector performance is more cost effective than private sector performance. They suggested that the policy letter lay out the steps for performing a cost comparison and define key terms such as "cost effective," "fully loaded cost" and "indirect cost."

Response: The proposed policy letter's discussion of insourcing focuses primarily on situations where an agency identifies improper reliance on contractors, namely, where the outsourced work is inherently governmental, or where the agency is at risk of losing control of its mission and operations. These circumstances, in particular, were highlighted in section 321 of the FY 2009 NDAA and the President's Memorandum on Government Contracting and have been the subject of reports issued in recent years addressing the use of contractors. The policy letter acknowledges that cost may also be a basis for insourcing, and requires in such situations that agency officials ensure that the agency's analysis fairly takes into account the full cost of performance by both sectors to support a determination that insourcing will save money. OFPP agrees that additional guidance in this area may be beneficial, and is reviewing the need for such guidance, but believes that additional coverage of the type described by the respondents, if appropriate, is better addressed as a supplement to existing guidance on insourcing, such as that in Appendix 3 of OMB Memorandum M–09–26, *Managing the Multi-Sector Workforce* (July 29, 2009), which implements section 736 of Division D of the Omnibus Appropriations Act, 2009 (Pub. L. 111–8), or Circular A–76, which addresses the use of public-private competition to outsource or insource work that may appropriately be performed by either sector.

b. *Management responsibilities.* Some respondents recommended that the contents of the policy letter be reorganized, such as by consolidating the discussion of management responsibilities, rather than addressing these responsibilities separately for inherently governmental, closely associated and critical functions. A few respondents also recommended listing, either in the text or an additional appendix, all laws that require work to be performed by Federal employees.

Response: OFPP has reorganized the policy letter to create a comprehensive and consolidated discussion of management responsibilities that agencies must undertake before and after awarding a contract to ensure proper and effective implementation of policies associated with the performance of inherently governmental, closely associated, and critical functions. This consolidated discussion of pre-award and post-award responsibilities more clearly recognizes that oversight responsibilities for each of these functional categories are interrelated. The policy letter includes citations to relevant laws with government-wide or broad applicability but does not include a list of all laws requiring reservation, a number of which are agency-specific and best addressed individually by affected agencies.

c. *Tribal organizations.* Representatives of Tribal organizations requested that language be added to the policy letter exempting Federal government agreements with Tribal government organizations under the Indian Self-Determination and Education Assistance Act (ISDEAA), as amended, 25 U.S.C. 450 *et seq.* They provided a number of statutory and policy reasons for differentiating these agreements, which address a government-to-government relationship, from government procurement contracts, the principal purpose of which is to acquire products and services for the direct benefit or use of the United States Government. They stated that the ISDEAA, at 25 U.S.C. 458aaa–9, expressly exempts the former agreements from the application of Federal acquisition regulations.

Response: The policy letter is issued pursuant to section 6(a) of the Office of Federal Procurement Policy Act, which charges the Administrator for Federal Procurement Policy with providing overall policy direction for agencies' acquisition of products and services. In accordance with the OFPP Act, the policy letter focuses on the relationship between the Federal government and its contractors—that is, entities who are providing a product or service for the direct benefit of an agency under a Federal procurement contract. The policy letter is not intended to modify or otherwise affect any rights or limitations set forth under the Act, including either the right of Tribal governments to assume and carry out functions under the ISDEAA or limitations imposed by the ISDEAA on a Tribal government's ability to assume

responsibility for an inherently Federal function as that term is used under the Act.

d. *Foreign indirect hire employees working with U.S. Forces.* During the disposition of comments, a question was raised regarding the applicability of this guidance to foreign indirect hire employees, as that term is defined in Defense Department (DoD) guidance.

Response: DoD guidance defines indirect hire employees as "local national personnel assigned by the host government to work with U.S. Forces." This guidance goes on to state that such personnel are not employees of the United States and cannot perform inherently governmental functions." See DOD Financial Management Regulation, Volume 5, Chapter 33, ¶ 330204 (August 2010). Nothing in this policy letter is intended to modify the Department's guidance. Thus, restrictions on the use of contractors to perform inherently governmental functions would also apply to foreign indirect hire employees working with U.S. Forces.

Daniel I. Gordon,

Administrator.

POLICY LETTER 11–01

TO THE HEADS OF CIVILIAN EXECUTIVE DEPARTMENTS AND AGENCIES

SUBJECT: Performance of Inherently Governmental and Critical Functions

1. Purpose. This guidance establishes Executive Branch policy addressing the performance of inherently governmental functions and critical functions. The policy is intended to assist agency officers and employees in ensuring that only Federal employees perform work that is inherently governmental or otherwise needs to be reserved to the public sector. The policy is further intended to help agencies manage functions that are closely associated with inherently governmental functions and critical functions, which are often performed by both Federal employees and contractors.

Nothing in this guidance is intended to discourage the appropriate use of contractors. Contractors can provide expertise, innovation, and cost-effective support to Federal agencies for a wide range of services. Reliance on contractors is not, by itself, a cause for concern, provided that the work that they perform is not work that should be reserved for Federal employees and that Federal officials are appropriately managing and overseeing contractor performance.

2. Authority. This policy letter is issued pursuant to section 6(a) of the Office of Federal Procurement Policy Act, 41 U.S.C. 405(a), the President's March 4, 2009, Memorandum on Government Contracting, and section 321 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Public Law 110–417.

3. Definitions.

"Inherently governmental function," as defined in section 5 of the Federal Activities Inventory Reform Act, Public Law 105–270, means a function that is so intimately related to the public interest as to require performance by Federal Government employees.

(a) The term includes functions 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. An inherently governmental function involves, among other things, the interpretation and execution of the laws of the United States so as —

(1) to bind the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;

(2) 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;

(3) to significantly affect the life, liberty, or property of private persons;

(4) to commission, appoint, direct, or control officers or employees of the United States; or

(5) 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 appropriations and other Federal funds.

(b) The term does not normally include—

(1) gathering information for or providing advice, opinions, recommendations, or ideas to Federal Government officials; or

(2) any function that is 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).

"*Critical function*" means a function that is necessary to the agency being able to effectively perform and maintain control of its mission and operations. Typically, critical functions are recurring and long-term in duration.

4. Policy. 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. Adherence to this policy will ensure that the act of governance is performed, and decisions of significant public interest are made, by officials who are ultimately accountable to the President and bound by laws controlling the conduct and performance of Federal employees that are intended to protect or benefit the public and ensure the proper use of funds appropriated by Congress. To implement this policy, agencies must reserve certain work for performance by Federal employees and take special care to retain sufficient management oversight over how contractors are used to support government operations and ensure that Federal employees have the technical skills and expertise needed to maintain control of the agency mission and operations.

(a) *Performance of work by Federal employees.* To ensure that work that should be performed by Federal employees is properly reserved for government performance, agencies shall:

(1) ensure that contractors do not perform inherently governmental functions (see section 5–1);

(2) give special consideration to Federal employee performance of functions closely associated with inherently governmental functions and, when such work is performed by contractors, provide greater attention and an enhanced degree of management oversight of the contractors' activities to ensure that contractors' duties do not expand to include performance of inherently governmental functions (see sections 5–1(a) and 5–2(a) and Appendices B and C); and

(3) ensure that 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 (see sections 5–1(b) and 5–2b).

(b) *Management and oversight of Federal contractors.* When work need not be reserved for Federal performance and contractor performance is appropriate, agencies shall take steps to employ and train an adequate number of government personnel to administer contracts and protect the public interest through the active and informed management and oversight of contractor performance, especially where contracts have been awarded for the performance of critical functions, functions closely

associated with the performance of inherently governmental functions, or where, due to the nature of the contract services provided, there is a potential for confusion as to whether work is being performed by government employees or contractors. Contract management should be appropriate to the nature of the contract, ensure that government officials are performing oversight at all times, and make clear to other government organizations or to the public when citizens are receiving service from contractors.

(c) *Strategic human capital planning.*

(1) As part of strategic human capital planning, agencies shall—

(i) dedicate a sufficient amount of work to performance by Federal employees in order to build competencies (both knowledge and skills), provide for continuity of operations, and retain institutional knowledge of operations;

(ii) ensure that sufficient personnel with appropriate training, experience, and expertise are available, and will remain available for the duration of the contract, to manage and oversee every contractor's performance and evaluate and approve or disapprove the contractor's work products and services, recruiting and retaining the necessary Federal talent where it is lacking; and

(iii) consider the impact of decisions to establish a specified level of government employee authorizations (or military end strength) or available funding on the 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.

(2) Agencies' annual Human Capital Plan for Acquisition shall identify specific strategies and goals for addressing both the size and capability of the acquisition workforce, including program managers and contracting officer's representatives. The number of personnel required to administer a particular contract is a management decision to be made after analysis of a number of factors. These include, among others:

(i) scope of the activity in question;

(ii) technical complexity of the project or its components;

(iii) technical capability, numbers, and workload of Federal management officials;

(iv) inspection techniques available;

(v) proven adequacy and reliability of contractor project management;

(vi) sophistication and track record of contract administration organizations within the agency;

(vii) importance and criticality of the function; and

(viii) the level of risk associated with performance of the function and its performance by a contractor.

5. Implementation guidelines and responsibilities. Agencies shall use the guidelines below to determine: (1) whether their requirements involve the performance of inherently governmental functions, functions closely associated with inherently governmental functions, or critical functions; and (2) the type and level of management attention necessary to ensure that functions that should be reserved for Federal performance are not materially limited by or effectively transferred to contractors and that functions that are suitable for contractor performance are properly managed. Determining the type and level of management required typically requires agencies to consider the totality of circumstances surrounding how, where, and when work is to be performed. Special exceptions to these guidelines may exist, such as for statutorily authorized personal services contracting.

5–1. Guidelines for identifying inherently governmental functions and critical functions. Agencies must ensure that inherently governmental functions are reserved exclusively for performance by Federal employees. Agencies must further ensure that a sufficient number of Federal employees are dedicated to the performance and/or management of critical functions so that Federal employees can provide for the accomplishment of, and maintain control over, their mission and operations. Proper identification of inherently governmental and critical functions is the first step for meeting these requirements.

(a) *Determining whether a function is inherently governmental.* Every Federal Government organization performs some work that is so intimately related to the public interest as to require performance by Federal Government employees. Agencies should review the definition of inherently governmental functions in section 3, any other statutory provisions that identify a function as inherently governmental, and the illustrative list of inherently governmental functions in Appendix A. In no case should any function described in the definition, identified in statute as inherently governmental, or appearing on the list be considered for contract performance. If a function is not listed in Appendix A or identified in a statutory provision as inherently governmental, agencies should determine whether the function otherwise falls within the definition in section 3 by evaluating, on a case-by-case basis, the nature of the work and the level of discretion associated with performance of the work using the tests below.

(1) *Tests for identifying inherently governmental functions.* A function meeting either of the following tests should be considered inherently governmental.

(i) *The nature of the function.* Functions which involve the exercise of sovereign powers of the United States are governmental by their very nature. Examples of functions that, by their nature, are inherently governmental are officially representing the United States in an inter-governmental forum or body, arresting a person, and sentencing a person convicted of a crime to prison. A function may be classified as inherently governmental based strictly on its uniquely governmental nature and without regard to the type or level of discretion associated with the function.

(ii) *The exercise of discretion.*

(A) A function requiring the exercise of discretion shall be deemed inherently governmental if the exercise of that discretion commits 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 decisions or conduct to meaningful oversight and, whenever necessary, final approval by agency officials.

(B) A function may be appropriately performed by a contractor consistent with the restrictions in this section—including those involving the exercise of discretion that has the potential for influencing the authority, accountability, and responsibilities of government officials—where the contractor does not have the authority to decide on the overall course of action, but is tasked to develop options or implement a course of action, and the agency official has the ability to override the contractor's action. The fact that decisions are made, and discretion exercised, by a contractor in performing its duties under the contract is not, by itself, determinative of whether the contractor is performing an inherently governmental function. For instance, contractors routinely, and properly, exercise discretion in performing functions for the Federal Government when, providing advice, opinions, or recommended actions, emphasizing certain conclusions, and, unless

specified in the contract, deciding what techniques and procedures to employ, whether and whom to consult, what research alternatives to explore given the scope of the contract, or how frequently to test.

(C) A function is not appropriately performed by a contractor where the contractor's involvement is or would be so extensive, or the contractor's work product so close to a final agency product, as to effectively preempt the Federal officials' decision-making process, discretion or authority. Such circumstances may be avoided by: (i) carefully delineating in the statement of work the contractor's responsibilities and types of decisions expected to be made in carrying out these responsibilities and (ii) having Federal employees oversee and, as necessary, give final approval of contractor conduct and decisions. This requires that a sufficient number of in-house personnel with the appropriate training and expertise be available and remain available through the course of the contract to make independent and informed evaluations of the contractor's work, approve or disapprove that work, perform all inherently governmental functions, and preclude the transfer of inherently governmental responsibilities to the contractor. Agencies should consider whether time constraints, the operational environment, or other conditions may limit their ability to effectively manage the contractor's actions or inappropriately restrict their final approval authority. If this is the case, government performance may be the only way that Federal officials can retain control of their inherently governmental responsibilities. For example, providing security in a volatile, high-risk environment may be inherently governmental if the responsible Federal official cannot anticipate the circumstances and challenges that may arise, and cannot specify the range of acceptable conduct (as required by paragraph 5–1(a)(1)(ii)). Agencies should also consider if the level of management and oversight that would be needed to retain government control of the operation and preclude the transfer of inherently governmental responsibilities to the contractor would result in unauthorized personal services. In such cases, the function should not be contracted out.

(2) *Functions closely associated with inherently governmental functions.* As agencies identify inherently governmental functions, they should bear in mind that certain services and actions that generally are not considered to be inherently governmental functions may approach being in that category because of the nature of the function and the risk that performance may impinge on Federal officials' performance of an inherently governmental function. See Appendix B for list of examples. Although closely associated functions are not reserved exclusively for performance by Federal employees, section 736 of Division D of the Omnibus Appropriations Act, 2009, Public Law 111–8, requires civilian agencies subject to the FAIR Act to give special consideration to using Federal employees to perform these functions. Similarly, the Department of Defense is required to ensure special consideration is given to Federal employee performance consistent with the requirements of 10 U.S.C. 2463. The Department is further required, to the maximum extent practicable, to minimize reliance on contractors performing functions closely associated with inherently governmental functions consistent with 10 U.S.C. 2330a. Civilian agencies shall refer to OMB Memorandum M–09–26, *Managing the Multi-Sector Workforce* (July 29, 2009), Attachment 3 for criteria addressing the in-sourcing of work under Public Law 111–8. The OMB Memorandum is available at http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_fy2009/m-09-26.pdf.

(b) *Determining whether a function is critical.* Determining the criticality of a function requires the exercise of informed judgment by agency officials. The criticality of the function depends on the mission and operations, which will differ between agencies and within agencies over time. In making that determination, the officials shall consider the importance that a function holds for the agency and its mission and operations. The more important the function, the more important that the agency have internal capability to maintain control of its mission and operations. Examples of critical functions might include: analyzing areas of tax law that impose significant compliance burdens on taxpayers for the Internal Revenue Service's Office of the Taxpayer Advocate and performing mediation services for the Federal Mediation and Conciliation Service. Where a critical function is not inherently governmental, the agency may appropriately consider filling positions dedicated to the function with both Federal employees and contractors. However, to meet its fiduciary responsibility to the taxpayers, the agency must have sufficient internal capability to control its mission and operations and must ensure it is cost effective to contract for the services.

(1) Sufficient internal capability—

(i) generally requires that an agency have an adequate number of positions filled by Federal employees with appropriate training, experience, and expertise to understand the agency's requirements, formulate alternatives, take other appropriate actions to properly manage and be accountable for the work product, and continue critical operations with in-house resources, another contractor, or a combination of the two, in the event of contractor default; and

(ii) further requires that an agency have the ability and internal expertise to oversee and manage any contractors used to support the Federal workforce.

(2) Determinations concerning what constitutes sufficient internal capability must be made on a case-by-case basis taking into account, among other things the:

(i) agency's mission;

(ii) complexity of the function and the need for specialized skill;

(iii) current strength of the agency's in-house expertise;

(iv) current size and capability of the agency's acquisition workforce; and

(v) effect of contractor default on mission performance.

(c) *Handling of work performed by Federally Funded Research and Development Centers (FFRDCs) and University Affiliated Research Centers (UARCs).* In some circumstances, work that is closely associated with the performance of inherently governmental functions, or work that is critical to maintaining control of an agency's mission and operations, may be performed by FFRDCs or UARCs (with appropriate oversight by Federal officials and pursuant to properly executed contracts). These contractors provide essential engineering, research, development, and analysis capabilities to support agencies in the performance of their responsibilities and mission. FFRDCs and UARCs and their employees are not allowed to perform inherently governmental functions. Agencies shall also refer to the requirements in FAR Part 37 regarding requirements pertaining to the conduct of FFRDCs.

5–2. Management responsibilities in connection with the planning and awarding of contracts.

(a) *Pre-award.* As part of acquisition planning, agencies shall confirm that the services to be procured do not include work that must be reserved for performance by Federal employees and that the agency will be able to manage the contractor consistent with its

responsibility to perform all inherently governmental functions and maintain control of its mission and operations. For the procurement of services above the simplified acquisition threshold, the contract file shall include documentation of this confirmation from the agency head or designated requirements official to the contracting officer. The contract file should include analysis that establishes, at a minimum, that:

(1) the function to be contracted does not appear on the list of inherently governmental functions in Appendix A and does not otherwise qualify as an inherently governmental function, taking into consideration, as necessary, the tests in subsection 5–1(a);

(2) a statute, such as an annual appropriations act, does not identify the function as inherently governmental or otherwise require it to be performed by Federal employees;

(3) the proposed role for the contractor is not so extensive that the ability of senior agency management to develop and consider options or take an alternative course of action is or would be preempted or inappropriately restricted;

(4) if the function is closely associated with an inherently governmental one—

(i) special consideration has been given to using Federal employees to perform the function in accordance with applicable law and implementing guidance;

(ii) the agency has sufficient capacity and capability to give special management attention to contractor performance, limit or guide the contractor's exercise of discretion, ensure reasonable identification of contractors and contractor work products, avoid or mitigate conflicts of interest, and preclude unauthorized personal services;

(iii) the agency will comply with the checklist of responsibilities in Appendix C; and

(5) if the function is a critical function, the agency has sufficient internal capability to control its mission and operations as provided at subsection 5–1(b).

(b) *Post-award.* Agencies should review, on an ongoing basis, the functions being performed by their contractors, paying particular attention to the way in which contractors are performing, and agency personnel are managing, contracts involving functions that are closely associated with inherently governmental functions (see subsection 5–1(a) and Appendix B) and contracts involving critical functions (see subsection 5–1(b)). These reviews should be conducted in connection with the development and analysis of inventories of service contracts. Through the use of an inventory, an agency manager can gain insight into where, and the extent to which, contractors are being used to perform activities by analyzing how contracted resources are distributed by function and location across the agency and within its components. Civilian agencies should refer to section 743 of Division C of the Consolidated Appropriations Act, 2010 (Public Law 111–117) and OFPP Memorandum to Chief Acquisition Officers and Senior Procurement Executives, *Service Contract Inventories*, November 5, 2010. Department of Defense services and agencies should refer to section 2330a of Title 10 of the United States Code.

(1) Contractor performance of inherently governmental functions. If a determination is made that a contractor is performing work that is inherently governmental (or involves unauthorized personal services), but the contract, properly defined, does not entail performance of inherently governmental functions or unauthorized personal services, the agency shall take prompt corrective actions. 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 (see also Appendix C). However, agencies must ensure that increasing the level of government oversight and control does not result in unauthorized personal services as provided by FAR 37.104 If government control of inherently governmental functions cannot be reestablished, agencies will need to in-source work on an accelerated basis through the timely development and execution of a hiring plan timed, if possible, to permit the non-exercise of an option or the termination of that portion of the contract being used to fulfill inherently governmental responsibilities.

(2) Overreliance on contractors to perform critical functions. While contractor performance of critical functions is common, if the agency determines that internal control of its mission and operations is at risk due to overreliance on contractors to perform critical functions, requiring activities should work with their human capital office to develop and execute a hiring and/or development plan. Requiring activities should also work with the acquisition office to address the handling of ongoing contracts and the budget and finance offices to secure the necessary funding to support the needed in-house capacity. Agencies should also consider application of the responsibilities outlined in Appendix C, as appropriate.

If an agency has sufficient internal capability to control its mission and operations, the extent to which additional work is performed by Federal employees should be based on cost considerations. Supporting cost analysis should address the full costs of government and private sector performance and provide like comparisons of costs that are of a sufficient magnitude to influence the final decision on the most cost effective source of support for the organization.

(c) *Analyzing functions.* A function often includes multiple activities, or tasks, some of which may be inherently governmental, some of which may be closely associated with inherently governmental work, and some may be neither. By evaluating work at the activity level, an agency may be able to more easily differentiate tasks within a function that may be performed only by Federal employees from those tasks that can be performed by either Federal employees or contractors without blurring the line between the role of Federal employees and contractors.

5–3. Management responsibilities in connection with small business contracting.

(a) *Lower prioritization for review.* When prioritizing what outsourced work should be reviewed for potential insourcing, agencies generally should 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 recently met, or currently is having difficulty meeting, its small business goals, including any of its socioeconomic goals. The agency should involve its small business advocate if considering the insourcing of work currently being performed by small businesses.

(b) *Considerations when contracted work is identified for insourcing.* If part of a contracted function to be insourced is currently being performed by both small and large businesses, the "rule of two" should be applied in deciding between small and large businesses that will perform the contracted work that remains in the private sector. The "rule of two" set out in FAR subpart 19.5 requires that acquisitions be reserved for award to small businesses, or certain subsets of small businesses, if there are

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.

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.

Appendix B. Examples Of Functions Closely Associated With The Performance Of Inherently Governmental Functions

The following is an illustrative list of functions that are generally not considered to be inherently governmental but are closely associated with the performance of inherently governmental functions. This list should be reviewed in conjunction with the list of inherently governmental functions in Appendix A to better understand the differences between the actions identified on each list.

Note: For most functions, the list also identifies activities performed in connection with the stated function. In many cases, a function will include multiple activities, some of which may not be closely associated with performance of inherently governmental functions.

1. Services in support of inherently governmental functions, including, but not limited to the following:

(a) performing budget preparation activities, such as workload modeling, fact finding, efficiency studies, and should-cost analyses.

(b) undertaking activities to support agency planning and reorganization.

(c) providing support for developing policies, including drafting documents, and conducting analyses, feasibility studies, and strategy options.

(d) providing services to support the development of regulations and legislative proposals pursuant to specific policy direction.

(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 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.

(f) Preparation of responses to Freedom of Information Act requests.

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)).

3. Dissemination of information regarding agency policies or regulations, such as conducting community relations campaigns, or conducting agency training courses.

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.

5. Service as arbitrators or provision of alternative dispute resolution (ADR) services.

6. Construction of buildings or structures intended to be secure from electronic eavesdropping or other penetration by foreign governments.

7. Provision of inspection services.

8. Provision of legal advice and interpretations of regulations and statutes to government officials.

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.

Appendix C. Responsibilities Checklist For Functions Closely Associated With Inherently Governmental Functions

If the agency determines that contractor performance of a function closely associated with an inherently governmental function is appropriate, the agency shall—

two or more responsible small businesses capable of performing the work at fair market prices. The agency should involve its small business representative in the same manner as it would in working with the acquisition and program office in evaluating opportunities for small businesses for new work. In addition, if contracted work not currently being performed by small businesses is reduced as part of an insourcing, the agency should carefully consider during recompetition whether it can be totally or partially set-aside for small businesses.

5–4. Additional agency management responsibilities.

(a) *Duty of Federal employees.* Every Federal manager and their employees have an obligation to help avoid performance by contractors of responsibilities that should be reserved for Federal employees. Although contractors provide important support to the agency, they may not be motivated solely by the public interest, and may be beyond the reach of management controls applicable to Federal employees. As part of this obligation, Federal managers and employees who rely on contractors or their work product must take appropriate steps, in accordance with agency procedures, to ensure that any final agency action complies with the laws and policies of the United States and reflects the independent conclusions of agency officials and not those of contractors. These steps shall include increased attention and examination where contractor work product involves advice, opinions, recommendations, reports, analyses, and similar deliverables that are to be considered in the course of a Federal employee's official duties and may have the potential to influence the authority, accountability, and responsibilities of the employee.

(b) *Development of agency procedures.* Agencies shall develop and maintain internal procedures to address the requirements of this guidance. Those procedures shall be reviewed by agency management no less than every two years.

(c) *Training.* Agencies shall take appropriate steps to help their employees understand and meet their responsibilities under this guidance. Steps should include training, no less than every two years, to improve employee awareness of their responsibilities.

(d) *Review of internal management controls.* Agencies should periodically evaluate the effectiveness of their internal management controls for reserving work for Federal employees and identify any material weaknesses in accordance with OMB Circular A–123, *Management's Responsibility for Internal Control,* and OFPP's *Guidelines for Assessing the Acquisition Function,* available at http://www.whitehouse.gov/omb/circulars_a123/.

(e) *Designation of responsible management official(s).* Each Federal agency with 100 or more full-time employees in the prior fiscal year shall identify one or more senior officials to be accountable for the development and implementation of agency policies, procedures, and training to ensure the appropriate reservation of work for Federal employees in accordance with this guidance. Each such agency shall submit the names and titles of the designated officials, along with contact information, by June 30 annually to OMB on the following MAX Web site: https://max.omb.gov/community/x/VwkQIg.

6. Judicial review. This policy letter is not intended to provide a constitutional or statutory interpretation of any kind and it is not intended, and should not be construed, to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person. It is intended only to provide policy guidance to agencies in the exercise of their discretion concerning Federal contracting. Thus, this policy letter is not intended, and should not be construed, to create any substantive or procedural basis on which to challenge any agency action or inaction on the ground that such action or inaction was not in accordance with this policy letter.

7. Effective date. This policy letter is effective October 12, 2011.

Daniel I. Gordon,

Administrator.

Appendix A. Examples of inherently governmental functions

The following is an illustrative list of functions considered to be inherently governmental. This list should be reviewed in conjunction with the list of functions closely associated with inherently governmental functions found in Appendix B to better understand the differences between the actions identified on each list.

Note: For most functions, the list also identifies activities performed in connection with the stated function. In many cases, a function will include multiple activities, some of which may not be inherently governmental.

1. The direct conduct of criminal investigation.

2. The control of prosecutions and performance of adjudicatory functions (other than those relating to arbitration or other methods of alternative dispute resolution).

3. The command of military forces, especially the leadership of military personnel who are performing a combat, combat support or combat service support role.

4. Combat.

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.

6. The conduct of foreign relations and the determination of foreign policy.

7. The determination of agency policy, such as determining the content and application of regulations.

8. The determination of budget policy, guidance, and strategy.

9. The determination of Federal program priorities or budget requests.

10. The selection or non-selection of individuals for Federal Government employment, including the interviewing of individuals for employment.

11. The direction and control of Federal employees.

12. The direction and control of intelligence and counter-intelligence operations.

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

(1) limit or guide a contractor's exercise of discretion and retain control of government operations by both—

(i) establishing in the contract specified ranges of acceptable decisions and/or conduct; and

(ii) establishing in advance a process for subjecting the contractor's discretionary decisions and conduct to meaningful oversight and, whenever necessary, final approval by an agency official;

(2) assign a sufficient number of qualified government employees, with expertise to administer or perform the work, to give special management attention to the contractor's activities, in particular, to ensure that they do not expand to include inherently governmental functions, are not performed in ways not contemplated by the contract so as to become inherently governmental, do not undermine the integrity of the government's decision-making process as provided by subsections 5–1(a)(1)(ii)(b) and (c), and do not interfere with Federal employees' performance of the closely-associated inherently governmental functions (see subsection 5–2(b)(2) for guidance on steps to take where a determination is made that the contract is being used to fulfill responsibilities that are inherently governmental);

(3) ensure that the level of oversight and management that would be needed to retain government control of contractor performance and preclude the transfer of inherently governmental responsibilities to the contractor would not result in unauthorized personal services as provided by FAR 37.104;

(4) ensure that a reasonable identification of contractors and contractor work products is made whenever there is a risk that Congress, the public, or other persons outside of the government might confuse contractor personnel or work products with government officials or work products, respectively; and

(5) take appropriate steps to avoid or mitigate conflicts of interest, such as by conducting pre-award conflict of interest reviews, to ensure contract performance is in accordance with objective standards and contract specifications, and developing a conflict of interest mitigation plan, if needed, that identifies the conflict and specific actions that will be taken to lessen the potential for conflict of interest or reduce the risk involved with a potential conflict of interest.

[FR Doc. 2011–23165 Filed 9–9–11; 8:45 am]

BILLING CODE P

THE NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Meetings of Humanities Panel

AGENCY: The National Endowment for the Humanities, The National Foundation on the Arts and the Humanities.

ACTION: Cancellation of panel meeting.

Notice is hereby given of the cancellation of the following meeting of the Humanities Panel at the Old Post Office, 1100 Pennsylvania Avenue, NW., Washington, DC 20506 which was published in the **Federal Register** on August 23, 2011, 76 FR 52698.

Dates: September 27, 2011.

Time: 9 a.m. to 5 p.m.

Room: 315.

Program: This meeting will review applications for Request for Proposals for A Cooperative Agreement with NEH to Support Bridging Cultures at Community Colleges, submitted to the Division Education Programs at the August 23, 2011 deadline.

Michael P. McDonald,

Advisory Committee, Management Officer.

[FR Doc. 2011–23264 Filed 9–9–11; 8:45 am]

BILLING CODE 7536–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–397–LR; ASLBP No. 11–912–03–LR–BD01]

Energy Northwest; Establishment of Atomic Safety and Licensing Board

Pursuant to delegation by the Commission dated December 29, 1972, published in the **Federal Register**, 37 FR 28,710 (1972), and the Commission's regulations, *see, e.g.*, 10 CFR 2.104, 2.105, 2.300, 2.309, 2.313, 2.318, and 2.321, notice is hereby given that an Atomic Safety and Licensing Board (Board) is being established to preside over the following proceeding:

Energy Northwest (Columbia Generating Station)

This proceeding involves an application by Energy Northwest to renew for twenty years its operating license for Columbia Generating Station, which is located near Richland, Washington. The current operating license expires on December 20, 2023. In response to a Notice of Opportunity for Hearing, published in the **Federal Register** on March 11, 2010 (75 FR 11,572), a request for hearing was submitted by Nina Bell, Executive Director, Northwest Environmental Advocates. The request, entitled "Petition for Hearing and Leave to Intervene in Operating License Renewal for Energy Northwest's Columbia Generating Station," was received via E-Filing on August 22, 2011.[1]

The Board is comprised of the following administrative judges:

Alan S. Rosenthal, Chair, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

Dr. Gary S. Arnold, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

Dr. William H. Reed, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

All correspondence, documents, and other materials shall be filed in accordance with the NRC E-Filing rule, which the NRC promulgated in August 2007 (72 FR 49,139).

Issued at Rockville, Maryland this 6th day of September 2011.

E. Roy Hawkens,

Chief Administrative Judge, Atomic Safety and Licensing Board Panel.

[FR Doc. 2011–23199 Filed 9–9–11; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 52–018–COL, 52–019–COL, 52–025–COL, 52–026–COL; ASLBP No. 11–913–01–COL–BD01]

Duke Energy Carolinas, LLC; Southern Nuclear Operating Company; Establishment of Atomic Safety and Licensing Board

Pursuant to delegation by the Commission dated December 29, 1972, published in the **Federal Register**, 37 FR 28,710 (1972), and the Commission's regulations, *see, e.g.*, 10 CFR 2.104, 2.105, 2.300, 2.309, 2.313, 2.318, and 2.321, notice is hereby given that an Atomic Safety and Licensing Board (Board) is being established to preside over this proceeding, which involves the following captioned cases:

Duke Energy Carolinas, LLC, (William States Lee III Nuclear Station, Units 1 and 2), Docket Nos. 52–018–COL & 52–019–COL;

Southern Nuclear Operating Company, (Vogtle Electric Generating Plant,

[1] On August 22, 2011, petitioner, Ms. Bell, also filed a petition for rulemaking, coupled with a request to suspend licensing decision. Those requests are under review by Commission advisers as a separate action.