

Project On Government Oversight

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June 1, 2010

Mr. Mathew Blum
Office of Federal Procurement Policy
Executive Office Building, Room 9013
724 17th Street, NW
Washington, DC 20503

Subject: Proposed OFPP Policy Letter

Dear Mr. Blum:

The Project On Government Oversight (POGO) provides the following public comment to the Office of Federal Procurement Policy's (OFPP) "Proposed Policy Letter" clarifying work reserved for performance by federal government employees. 75 Fed. Reg. 16188 (March 31, 2010).¹ POGO is an independent nonprofit that investigates and exposes corruption and other misconduct in order to achieve a more effective, accountable, open, and ethical federal government. We have a keen interest in government contracting matters, especially matters related to policies regarding the performance of government functions by private contractors.

POGO's concerns pertain to the inconsistent definition of the term "inherently governmental function," which has long been a problem for the federal government. The inconsistent definition of the term is creating an environment in which the government's priorities, spending, and mission accomplishment are being heavily influenced by for-profit companies. As a result, the government's reliance on contractors has become a liability, and ethics concerns are on the rise.

OFPP's proposed policy letter provides guidance addressing when work must be reserved for performance by federal employees. POGO supports the governmentwide use of the FAIR Act definition of an inherently governmental function,² but opposes some of the other policies outlined in the letter. POGO is a strong proponent of a blended workforce where public servants make mission decisions and the potential for private sector conflicts of interest is significantly reduced. Although providing clear guidance to government and contractor employees is essential, OFPP must ensure that inherently governmental functions and those that approach that category are performed by government employees.

¹ Available at <http://edocket.access.gpo.gov/2010/pdf/2010-7329.pdf>

² Section 5 of Pub. L. No. 105-270 (the "Federal Activities Inventory Reform Act" (1998)) defined an inherently governmental function as a "function that is so intimately related to the public interest as to require performance by Federal Government employees."

The proposed policy letter will implement President Obama's March 4, 2009, *Memorandum on Government Contracting*³ that requires OMB to "clarify when governmental outsourcing for services is and is not appropriate, consistent with section 321 of Public Law 110-417." The President's memo states that "the line between inherently governmental activities that should not be outsourced and commercial activities that may be subject to private sector competition has been **blurred** and inadequately defined. As a result, contractors may be performing inherently governmental functions. Agencies and departments must operate under clear rules prescribing when outsourcing is and is not appropriate."⁴ (Emphasis added.)

History of Inherently Governmental Functions

Any discussion of the issue of when work must be reserved for performance by federal government employees should begin with the Constitution. In enumerating the powers of the three branches of government, the Constitution deems certain functions inherently governmental, such as Congress' legislative function and the President's executive powers.

Beginning in the 20th century, the pendulum began to swing back and forth between public versus private entities as the preferred provider of goods and services. Contracting by civilian agencies grew in the 1920s. During the Great Depression, the government became the preferred provider of goods and services. During World War II, the pendulum swung back to relying on private sector technological and scientific expertise to meet defense needs, such as the program to develop the atomic bomb.

This reliance on private sector expertise in national security matters continued into the Cold War. President Eisenhower was the first to formally declare a policy of the federal government not competing with the private sector if the product or service "can be procured from private enterprise through ordinary business channels."⁵ This policy was adopted a decade later by President Johnson in the Office of Management and Budget's (OMB) Circular A-76.

President Kennedy's Bell Report⁶ concluded that contracting out scientific and technical work was in the national interest, but warned about the consequences of heavily relying on contractors to perform government functions. The Bell Report is also believed to be where the term "inherently government function" originated.

³ The White House, Office of the Press Secretary, "Memorandum for the Heads of Executive Departments and Agencies—Government Contracting," March 4, 2009. Available at http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-Subject-Government/

⁴ The White House, Office of the Press Secretary, "Memorandum for the Heads of Executive Departments and Agencies—Government Contracting," March 4, 2009. Available at http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-Subject-Government/

⁵ Executive Office of the President, Bureau of the Budget, Bulletin 55-4, January 15, 1955.

⁶ Executive Office of the President, Bureau of the Budget, "Report to the President on Government Contracting for Research and Development," April 30, 1962.

During the 1980s, President Reagan famously declared, “In this present crisis, government is not the solution to our problem; government is the problem,”⁷ and OMB began pushing agencies to privatize commercial functions. President Clinton continued this pro-outsourcing policy with his “reinventing government” initiative and the Federal Activities Inventory Reform (FAIR) Act,⁸ which was originally called the Freedom from Government Competition Act. The move toward outsourcing intensified under President George W. Bush, who employed contractors to an unprecedented degree in the military and reconstruction operations in Iraq and Afghanistan and in the Gulf region cleanup after Hurricane Katrina. Bush also amended OMB Circular A-76 to narrow the definition of inherently governmental function.

The end result of this dramatic shift toward outsourcing is the rapid growth of the so-called “shadow government.” While the number of federal government employees has decreased over the last two decades, the number of contractor employees working for the federal government has greatly increased.

Inherently Governmental Functions Defined

As the proposed policy letter points out, there are multiple definitions of an inherently governmental function – the FAIR Act, the Federal Acquisition Regulation (FAR),⁹ the 2003 revision to Circular A-76 (providing guidance on the performance of commercial activities),¹⁰ and OFPP Policy Letter 92-1 (clarifying the concept of inherently governmental functions).¹¹ POGO’s concern for many years has been that the various definitions created vast interpretations by agencies. POGO is pleased that the White House has selected the legal definition governed by the FAIR Act rather than the much politicized A-76 definition. That said, OFPP should immediately revise Circular A-76 so that the definition of inherently governmental functions is consistent governmentwide.

POGO is also concerned with the definition of activities categorized as being “closely associated” with inherently governmental functions. In practice, those functions can easily cross the line into the inherently governmental category that must be performed by government employees. The function might be “intimately related” based on the circumstances, the nature of the functions, or the lack oversight by a government official. Increased administration and oversight of contractor employees performing closely associated functions will be required so that the line between it and inherently governmental will not continue to be crossed or blurred.

The use of the “critical functions” designation seems to further confuse matters. By creating three categories, and allowing subjective decisions about what is inherently governmental, closely associated, and/or critical, OFPP is inviting chaos. POGO supports the presumption that

⁷ Ronald Reagan, First Inaugural Address, January 20, 1981. Available at http://www.ronaldreagan.com/sp_27.html

⁸ Public Law 105-270, 31 U.S.C. §501 note.

⁹ 48 C.F.R. § 2.101 (“‘Inherently governmental function’ means, as a matter of policy, a function that is so intimately related to the public interest as to mandate performance by Government employees”). Available at https://www.acquisition.gov/far/current/html/Subpart%207_5.html#wp1078196

¹⁰ OMB Circular A-76. Available at http://www.whitehouse.gov/omb/circulars_a076_a76_incl_tech_correction/

¹¹ Office of Management and Budget, Office of Federal Procurement Policy, *Policy Letter 92-1 to the Heads of Executive Agencies and Departments – Subject: Inherently Governmental Functions*, September 23, 1992, p. 1. Available at http://www.whitehouse.gov/omb/rewrite/procurement/policy_letters/92-1_092392.html

critical functions should be performed by federal employees. Therefore, additional language should be inserted into the proposed policy letter reinforcing the presumption that functions that fall outside the legal definition of inherently governmental—but due to its level of sensitivity, discretion, or intimate relationship to the public interest must only be performed by federal employees.

Identifying Inherently Governmental Functions

The government’s varying definitions and lack of administration over functions that in many cases were outsourced via direct hiring of contractors or a conversion have resulted in an overreliance on contractors. Those contractors are performing agency critical functions, and in some cases, inherently governmental functions.

The Government Accountability Office (GAO) has stated that it is essential to retain government control of certain functions:

It is clear that government workers need to perform certain warfighting, judicial, enforcement, regulatory, and policymaking functions, and the government may need to retain an in-house capability even in functions that are largely outsourced. Certain other capabilities, such as adequate acquisition skills to manage costs, quality, and performance and to be smart buyers of products and services, or other competencies such as those directly linked to national security, also must be retained in-house to help ensure effective mission execution.¹² (Emphasis added).

Allowing contractors to perform such mission critical functions is the equivalent of allowing the fox to guard the hen house.

A study by POGO has led to the opinion that any activity that requires the exercise of creative intelligence as a function should be performed by a government employee. Thus, anyone who drafts a decision memorandum or policy, decides what information has to be collected or how that information is to be analyzed in order for a decision memorandum to be drafted, and designs a system of information gathering (e.g., IT, budget information, investigations, etc.) or organizational structure should be a government employee. We would also like to see acquisition functions, including requirements definitions, market research, source selection, program management, and oversight), performed by government, not contractor, employees.

As a result, POGO thinks that OFPP should reconsider the examples provided in FAR Subpart 7.503(c) and (d). Those lists, which are included in the proposed policy letter, are composed of general activities, occupations, functions, and skills that need clarification and continuity. Moreover, repeating the same activities and functions that are listed as inherently governmental functions and adding the words “assistance,” “participation,” or “support” is a major concern for functions listed as closely associated. Such branding is one of the many reasons there is no bright line in the current system. How does a government official or the public clearly differentiate the level of assistance, participation, or support that was performed by the contractor employee and

¹² GAO Report, Commercial Activities Panel, *Improving the Sourcing Decisions of the Government* at 9, 36, 48 (April 2002).

the amount of oversight exercised by a government employee that ensured that the line into inherently governmental functions wasn't crossed?

A review of government report highlights the need to clarify definitions and expressly reserve work for government employees. For example, the Office of the Director of National Intelligence (ODNI) estimates that roughly one quarter of the country's core intelligence workers are contractor employees. Intelligence contractors perform many roles, from food service to building satellites and analyzing intelligence. They provide flexibility, responsiveness and a unique expertise, but senior officials readily admit they need to improve contractor accountability and oversight. The CIA has even publicly admitted it has become a "farm team for contractors." Intelligence agencies have been accused of improperly expanding the role of contractors in Iraq and Afghanistan to perform such inherently governmental—if not outright illegal—functions as secret commando-style raids and assassination programs.

As happened in the intelligence agencies, defense agencies' in-house workforce underwent rapid downsizing after the end of the Cold War in the early 1990s. Not surprisingly, the Department of Defense (DoD) has become more dependent on contractors to provide many services. A study by the Government Accountability Office (GAO) found that, in certain DoD offices, contractor employees far outnumber government employees. In fact, DoD's management of contractors is an issue that has been on GAO's "high-risk" list since 1992. "We have created in ourselves a dependency on contractors that is greater than it ought to be," U.S. Army General Stanley McChrystal recently admitted.¹³

Contractors are now being hired to provide a growing array of security services, from protecting government officials and buildings to training foreign police and military forces and even engaging in direct military or intelligence operations. So-called private security contractors are a matter of intense controversy, particularly when they are involved in tragic international incidents like the September 2007 shooting in Baghdad, Iraq, in which guards employed by Xe Services (formerly known as Blackwater) killed 17 Iraqi civilians or allegations of brutal treatment by contractors employed as interrogators at Iraq's Abu Ghraib prison. Even the bodies that have been established to properly oversee private security contractors in Iraq and Afghanistan, such as DoD's Armed Contractor Oversight Division (ACOD) and the State Department Bureau of Diplomatic Security's Force Investigation Unit (FIU), are themselves believed to have become too reliant on contractors.

The unique circumstance under which the Department of Homeland Security (DHS) was created in 2002 has caused it to be unduly reliant on contractors to fulfill its mission. The ratio of contractors to government employees at DHS is estimated to be slightly more than 1 to 1. A GAO review of DHS procurement policies and practices found a large percentage of DHS' professional and management support contractors providing services that closely support the performance of inherently governmental functions, such as reorganization and planning services for the Coast Guard's fleet modernization project, the Integrated Deepwater System, acquisition and legislative support for the Transportation Security Administration (TSA) and employee relations, budget preparation, and regulation development services at the Coast Guard, TSA and

¹³ *USA Today*, "McChrystal: Too many contractors in Afghanistan," April 16, 2010. Available at http://www.usatoday.com/news/world/afghanistan/2010-04-16-mcchrystal-afghanistan_N.htm

other DHS offices. The Deepwater program, managed by a contractor “lead systems integrator,” quickly began falling behind schedule and over budget, and resulted in finished products that did not measure up to standards.

GAO has identified significant weakness in the Federal Protective Service’s contractor security guard program, which is responsible for providing security at thousands of federal facilities. GAO has found that the government is not doing enough to ensure the contractor security guards are properly trained and certified, or that the guards are complying with their assigned responsibilities. GAO also identified substantial security vulnerabilities at facilities at which contractor security guards are utilized.

The U.S. Customs and Border Protection’s Secure Border Initiative (SBI) also relies heavily on contract personnel, who now comprise more than 50 percent of SBI’s workforce. The DHS’ Inspector General found that contractors were performing functions that should be performed by government employees, such as drafting a statement for Congressional hearing.

The federal government spends hundreds of billions of dollars each year on goods and services, an amount that increases dramatically every year. Add to that its problems in recruiting and retaining qualified personnel, and the end result is that the federal government has little choice but to depend on contractors to support its acquisition functions. This particular use of contractors increases the risk of conflicts of interest and vulnerability to fraud, waste, and abuse.

The Department of Energy (DOE) employs nearly 100,000 contractor workers to manage a complex of assets and facilities valued at more than \$134 billion. DOE relies almost exclusively on private companies, academic institutions, and non-profit organizations to run its research laboratories, storage facilities and cleanup sites. According to the Department’s Inspector General, DOE is “heavily contractor-dependent,” which explains why, almost every year, contract administration makes the Inspector General’s list of the most significant management challenges.

Enhancing Accountability on inherently Governmental Functions

In addition to the suggestions made above, POGO urges OFPP to recommend that federal agencies perform audits of their service contracts to ensure that contractor employees are not performing inherently governmental functions. The government lacks adequate data on specific functions that are currently being performed by contractor employees, what functions should be converted from contractor employees to government employees, and are there common factors that can be identified and built into a reformulation of the definition of inherently governmental functions that will ensure that definitions are genuinely reflective of practical situations.

Currently, DoD and DHS are reviewing their service contracts and DOD is mandated to produce contractor inventories.¹⁴ All agencies should conduct reviews that integrate an analysis of internal capabilities, the discretion and control necessary to perform agency missions, the nexus between those functions and agency missions, and costs, including all direct and indirect short

¹⁴ DoD service contract inventories are mandated by 10 U.S.C. § 2330a(c) and (d).

and long-term costs associated with converting job from a government to a contractor employee and vice versa. Such efforts should be coordinated with a comprehensive program, budgetary, and human capital plan. Transparency of these decisions will help restore the public's faith in the policy and program goals of federal agencies.

Furthermore, OFPP should coordinate the management of the system with ethics officers who see the system up close on a daily basis. Ethics officers are on the front line advising government and contractor employees on the ethical boundaries of their daily work. Unfortunately, POGO is concerned that there is very little proof that the ethics officers' advice is being followed.

The final policy letter should also include stronger wording and guidance that borderline functions and activities should be presumed to be inherently governmental to protect policy and program decision making and to enhance the government's institutional memory and expertise. When too much control of government decisions is in the hands of contractor employees, the democratic principles of our government are jeopardized.

POGO also urges OFPP to provide guidance to prevent decisions, advice, and recommendations that are formulated by contractor employees and then "rubber stamped" by a government official. Those circumstances essentially place the contractor employee in the improper position of performing an inherently governmental function.

Although contracts are often scrutinized during the pre-award phase, the post-award phase is where the government will most likely unearth examples of contractor employees performing functions that are considered or should be considered inherently governmental. The proposed policy letter states that "nature of the function" and "discretion" tests will be created by OFPP for agencies to use in determining whether functions not appearing in FAR Subpart 7.5 otherwise fall within the definition of inherently governmental. The "nature of the function" test requires agencies to consider whether the direct exercise of sovereign power is involved. The "discretion" test requires agencies to evaluate whether the discretion associated with the function, when exercised by a contractor, would have the effect of committing the government to a course of action. POGO supports these tests, but recommends that they be used in evaluating all service contracts. Additionally, a greater emphasis should be placed on them during the post-award phase of the contract. Realizing that day-to-day operations change for government and contractor personnel, it is vital that the tests be continually applied for the entire life of the contract. Comprehensive training of government program, contract, ethics, and human resource staff must be combined with training of contractors employees so that all personnel involved in a contract know the appropriate way of dealing with potential violations.

The proposed letter appears to ignore the linking of job functions and ethics that is required to protect taxpayers. For example, the GAO has reported that in certain DoD offices, "contractor employees outnumbered DoD employees and comprised as much as 88 percent of the workforce."¹⁵ The report stated that "government officials believed that current requirements are inadequate to prevent conflicts from arising for certain contractor employees influencing DoD

¹⁵ GAO Report, Report to the Committee on Armed Services, U. S. Senate, "Defense Contracting: Additional Personal Conflict of Interest Safeguards Needed for Certain DoD Contractor Employees," GAO-08-169, March 2008, p. 3. Available at <http://www.gao.gov/new.items/d08169.pdf>

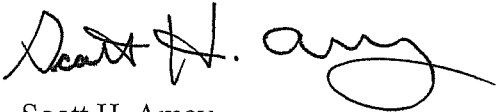
decisions, especially financial conflicts of interest and impaired impartiality.” Very few conflict-of-interest laws and regulations that apply to federal employees apply to contractor employees performing the same jobs. We also recommend that OFPP revisit the lack of governmentwide personal conflict of interest laws and regulations that apply to contractor employees. The dual system for regulating government and contractor employees renders administration and enforcement of conflicts of interest virtually impossible.

Conclusion

Although POGO supports the intent of the proposed rule and many of the proposed solutions, we have concerns requiring additional consideration by OFPP. POGO supports OFPP’s efforts to strategically rebalance the government and contractor workforces, and, as a result, better protect taxpayers. Contractors perform essential functions that permit the federal government to fulfill its duties and obligations to taxpayers. The use of contractors, however, should only occur when agency and government officials retain controls over policies and programs and oversight of contractors. By clarifying the definitions and policies surrounding inherently governmental functions and placing greater emphasis returning internal agency capabilities to the hands of government employees, the public will be reassured that policy and program decisions are being made in their best interest.

If you have any questions, you may contact me at (202) 347-1122.

Sincerely,

A handwritten signature in black ink, appearing to read "Scott H. Amey". The signature is fluid and cursive, with a large loop at the end.

Scott H. Amey
General Counsel