Inherently Governmental Functions: At a Tipping Point?

by Allan V. Burman

More than 15 years ago, the U.S. Office of Management and Budget (OMB) Office of Federal Procurement Policy issued Policy Letter 92-1, Subject: Inherently Governmental Functions. This 1992 document offered the first government-wide guidance to help executive branch officers and employees avoid making “an unacceptable transfer of official responsibility to government contractors.” Implemented in Subpart 7.5 of the Federal Acquisition Regulation, the policy has remained relatively unchanged since its issuance. Even the comptroller general’s 2003 Commercial Activities Panel proposed no significant adjustments to this guidance as the panel addressed the merits and procedures for contracting out government work.

However, as more and more reports question the government’s reliance on contractors for activities ranging from providing security services in Iraq to overseeing another contractor’s performance, is it time for another look? Does the policy still hold up? Has the government reached a “tipping point” regarding an overreliance on contractors, as suggested by Charles Tiefer in Government Executive magazine? What was the reason for putting it in place back then? Do changed circumstances today require the government to rethink the policy, pulling back from the level of discretion afforded by this earlier document? And if so, how should that be done?

Inherently Governmental Functions

Letter 92-1 states that an inherently governmental function is a function that is “so intimately related to the public interest as to mandate performance by government employees.” It goes on to explain that these types of functions involve exercising discretion in the use of government authority or making
value judgments in government decision making. The specific definition is as follows:

"An inherently governmental function involves, among other things, the interpretation and execution of the laws of the United States so as to:

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

(b) determine, protect, and advance its economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise;

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

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

(e) 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 appropriated and other Federal funds."

These broad prescriptions are bolstered by a set of examples that offer more detailed guidance on what should or should not be undertaken by contractors. The policy relies on OMB Circular No. A-76, “Performance of Commercial Activities,” to identify the activities that could be contracted out, but presents its own list of activities that require special attention because they so closely affect the public interest.

The list of inherently governmental activities includes—among other things—such specific actions as the “direction and control of federal employees, the determination of federal program priorities and budget requests, and determining what supplies or services are to be acquired by the government.” All nineteen items listed can still be found in Appendix A of 92-1. The document also includes an Appendix B that identifies nineteen activities that are not inherently governmental but may approach being so because of the way the government administers the contractor’s performance or because of the way the contractor performs. The latter nineteen items include services that involve or relate to the development of regulations, preparing budgets, or support of acquisition planning.

Non-Inherently Governmental Functions

The basic distinction between the two lists is the question of who decides the course of action. The Appendix A activities require governmental decision making because they are so intimately related to the public interest that no question of ulterior motivation can be allowed to arise concerning those choices. Accountability remains squarely with the public servant. Appendix B, however, identifies a significant opportunity for contractors to contribute to the decision-making process, but limits their roles to providing support or information that will allow an informed choice. As stated in the policy letter, “Inherently governmental actions do not normally include gathering information for or providing advice, opinions, recommendations, or ideas to government officials.”

That distinction was made as a means to allow the government to take advantage of significant expertise in the private sector on a host of topics. However, the intention is clear to ensure that the government remains fully in charge and in command of the actions it is taking. This question of accountability is central to the issue of what should or should not be contracted out. In many ways, this may be the rub today. Is the government staffed and equipped to make independent judgments on the advice it is receiving from contractors? In many respects, this becomes a human capital and resource constraint issue, touching all aspects of the government-employee-contractor equation, from staff size to expertise and training, and even to the basic questions of pay comparability and hiring efficiencies.

Policy Letter Justification

Various agency policies regarding these types of activities had been around for years, but the 1992 document was the first attempt at a consistent government-wide approach to the issue. As part of the justification for its issuance, the document states: “Agencies have occasionally relied on contractors to perform certain functions in such a way as to raise questions about whether public policy is being created by private persons.” A clear case in point is the proscription in the document on drafting congressional testimony, preparing responses to congressional correspondence, and preparing responses.

Allan V. Burman, PhD, is president of Jefferson Solutions, the government division of the Jefferson Consulting Group. He is also an adjunct professor at George Mason University, a former administrator for federal procurement policy in the U.S. Office of Management and Budget, and the author of Policy Letter 92-1. He can be reached at aburman@jeffersonconsulting.com.
to audit reports to the inspectors general, U.S. Government Accountability Office, or other federal audit entity. Although approval of a document is normally considered an inherently governmental activity, drafting some portions of it is not. However, in light of the sensitivity of these specific activities and the questions that might be raised about “who is in charge,” the document clearly prohibits using contractors to perform these roles.

Similarly, the document cites instances where “de facto control over contract performance has been transferred to contractors” as another reason to establish a clear policy that ensures solid federal oversight to remove any ambiguity about who is the decision maker. In this case, the document identifies the following as a major factor to consider in deciding “whether the award of a contract might affect, or the performance of a contract has affected, a transfer of official responsibility”:

“The greater the degree of reliance on contractors the greater the need for oversight by agencies.”

The contractor’s ability to take action that will significantly and directly affect the life, liberty or property of individual members of the public, including the likelihood of the contractor’s need to resort to force in support of a police or judicial function; whether force, especially deadly force is more likely to be initiated by the contractor or by some other person; and the degree to which force may have to be exercised in public or relatively uncontrolled areas. (Note that contracting for guard, convoy security, and plant protection services, armed or unarmed, is not proscribed by these policies.)

The above section reads like something developed to address the Blackwater debate today. In many ways, it also shows the limitation of the policy in that it states these issues as important to consider but provides no bright-line test of allowability. In other words, as the document states, a decision needs to be made on the basis of the “totality of the circumstances” to determine the appropriateness of contracting something out to the private sector. Although some activities, such as providing maintenance support on a military base, are easy to address, others, such as the kinds of politically sensitive actions many are concerned about today (intelligence gathering or security services in Iraq, for example) are not. The policy demands a case-by-case determination. Moreover, this middle area is broad, decidedly gray, and subject to considerable debate.

The Qualified Staff

A factor noted in the policy letter that perhaps requires further review and reflection today is the point, “Agencies must, however, have a sufficient number of trained and experienced staff to manage Government programs properly. The greater the degree of reliance on contractors the greater the need for oversight by agencies.” It further addresses this concern, noting, “Official responsibility to approve the work of contractors is a power reserved to government officials. It should be exercised with a thorough knowledge and understanding of the contents submitted by contractors and a recognition of the need to apply independent judgment in the use of these work products.”

Formulating an inherently governmental policy that includes a bright-line test for every activity for which the government may want to consider using contractors would be difficult. Moreover, government officials should have discretion on these types of decisions on the basis of the circumstances. However, ensuring that the government has the staff and expertise to make these informed and independent decisions seems much less of an issue. Here, the answer is ensuring that the agency has the core competency to adequately carry out its oversight and decision-making responsibilities. If the activity is central to the agency’s core mission, perhaps further review should be required to see that resources—trained staff members with appropriate expertise and in sufficient numbers—are available to ensure the public interest is served.

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