

September 23, 1992

POLICY LETTER 92-1

TO THE HEADS OF EXECUTIVE AGENCIES AND DEPARTMENTS

SUBJECT: Inherently Governmental Functions

1. **Purpose.** This policy letter establishes Executive Branch policy relating to service contracting and inherently governmental functions. Its purpose is to assist Executive Branch officers and employees in avoiding an unacceptable transfer of official responsibility to Government contractors.
2. **Authority.** This policy letter is issued pursuant to section 6(a) of the Office of Federal Procurement Policy (OFPP) Act, as amended, codified at 41 U.S.C. [[section]] 405.
3. **Exclusions.** Services obtained by personnel appointments and advisory committees are not covered by this policy letter.
4. **Background.** Contractors, when properly used, provide a wide variety of useful services that play an important part in helping agencies to accomplish their missions. Agencies use service contracts to acquire special knowledge and skills not available in the Government, obtain cost effective services, or obtain temporary or intermittent services, among other reasons.

Not all functions may be performed by contractors, however. Just as it is clear that certain functions, such as the command of combat troops, may not be contracted, it is also clear that other functions, such as building maintenance and food services, may be contracted. The difficulty is in determining which of these services that fall between these extremes may be acquired by contract. Agencies have occasionally relied on contractors to perform certain functions in such a way as to raise questions about whether Government policy is being created by private persons. Also, from time to time questions have arisen regarding the extent to which de facto control over contract performance has been transferred to contractors. This policy letter provides an illustrative list of functions, that are, as a matter of policy, inherently governmental (see Appendix A)(, and articulates the practical and policy considerations that underlie such determinations (see [[section]] 7).

As stated in [[section]] 9, however, this policy letter does not purport to specify which functions are, as a legal matter, inherently governmental, or to define the factors used in making such legal determination. Thus, the fact that a function is listed in Appendix A, or a factor is set forth in [[section]] 7(b), does not necessarily mean that the function is inherently governmental as a legal matter or that the factor would be relevant in making the legal determination.

5. **Definition.** As a matter of policy, an "inherently governmental function" is a function that is so intimately related to the public interest as to mandate performance by Government employees. These functions include those activities that require either the exercise of discretion in applying Government authority or the making of value judgments in making decisions for the Government. Governmental functions normally fall into two categories: (1) the act of governing, i.e., the discretionary exercise of Government authority, and (2) 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 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.

Inherently governmental functions do not normally include gathering information for or providing advice, opinions, recommendations, or ideas to Government officials. They also do not include functions that are 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 and operations, or other routine electrical or mechanical services.

The detailed list of examples of commercial activities found as an attachment to Office of Management and Budget (OMB) Cir. No. A-76 is an authoritative, nonexclusive list of functions that are not inherently governmental functions. These functions therefore may be contracted.

6. Policy.

(a) **Accountability.** 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 who are ultimate accountable to the President. When the Government uses service contracts, such informed, independent judgment is ensured by:

(1) prohibiting the use of service contracts for the performance of inherently governmental functions (See Appendix A);

(2) providing greater scrutiny and an appropriate enhanced degree of management oversight (see subsection 7(f)) when contracting for functions that are not inherently governmental but closely support the performance of inherently governmental functions (see Appendix B);

(3) ensuring, in using the products of those contracts, 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 who may have interests that are not in concert with the public interest, and who may be beyond the reach of management controls otherwise applicable to public employees; and

(4) ensuring that reasonable identification of contractors and contractor work products is made whenever there is a risk that the public, Congress, or other persons outside of the Government might confuse them with Government officials or with Government work products, respectively.

(b) **OMB Circular No. A-76.** This policy letter does not purport to supersede or otherwise effect any change in OMB Circular No. A-76, Performance of Commercial Activities.

(c) **Drafting of Congressional testimony, responses to Congressional correspondence, and agency responses to audit reports from an Inspector General, the General Accounting Office, or other Federal audit entity.** While the approval of a Government document is an inherently governmental function, its drafting is not necessarily such a function. Accordingly, in most situations the drafting of a document, or portions thereof, may be contracted, and the agency should review and revise the draft document, to the extent necessary, to ensure that the final document expresses the agency's views and advances the public interest. However, even though the drafting function is not necessarily an inherently government function, it may be inappropriate, for various reasons, for a private party to draft a document in particular circumstances. Because of the appearance of private influence with respect to documents that are prepared for Congress or for law enforcement or oversight agencies and that may be particularly sensitive, contractors are not to be used for the drafting of Congressional testimony; responses to

Congressional correspondence; or agency responses to audit reports from an Inspector General, the General Accounting Office, or other Federal audit entity.

7. **Guidelines.** If a function proposed for contract performance is not found in Appendix A, the following guidelines will assist agencies in understanding the application of this policy letter, determining whether the function is, as a matter of policy, inherently governmental and forestalling potential problems.

(a) **The exercise of discretion.** While inherently governmental functions necessarily involve the exercise of substantial discretion, not every exercise of discretion is evidence that such a function is involved. Rather, the use of discretion must have the effect of committing the Federal Government to a course of action when two or more alternative courses of action exist (e.g., purchasing a minicomputer than a mainframe computer, hiring a statistician rather than an economist, supporting proposed legislation rather than opposing economist, supporting proposed legislation rather than opposing it, devoting more resources to prosecuting one type of criminal case than another, awarding a contract to one firm rather than another, adopting one policy rather than another, and so forth).

A contract may thus properly be awarded where the contractor does not have the authority to decide on the course of action to be pursued but is rather tasked to develop options to inform an agency decision maker, or to develop or expand decisions already made by Federal officials. Moreover, the mere fact that decisions are made by the contractors in performing his or her duties (e.g., how to allocate the contractor's own or subcontract resources, what techniques and procedures to employ, whether and whom to consult, what research alternatives to explore given the scope of the contract, what conclusions to emphasize, how frequently to test) is not determinative of whether he or she is performing an inherently government function.

(b) **Totality of the circumstances.** Determining whether a function is an inherently governmental function often is difficult and depends upon an analysis of the factors of the case. Such analysis involves consideration of a number of factors, and the presence or absence of any one is not in itself determinative of the issue. Nor will the same emphasis necessarily be placed on any one factor at different times, due to the changing nature of the Government's requirements.

The following factors should be considered when deciding whether award of a contract might effect, or the performance of a contract has effected, a transfer of official responsibility:

- (1) Congressional legislative restrictions or authorizations.
- (2) The degree to which official discretion is or would be limited, i.e., whether the contractor's involvement in agency functions is or would be so extensive or his or her work product is so far advanced toward completion that the agency's ability to develop and consider options other than those provided by the contractor is restricted.
- (3) In claims adjudication and related services,
 - (i) the finality of any contractor's action affecting individual claimants or applicants, and whether or not review of the contractor's action is **de novo** (i.e., to be effected without the appellate body's being bound by prior legal rulings or factual determinations) on appeal of his or her decision to an agency official;
 - (ii) the degree to which contractor activities may involve wide-ranging interpretations of complex, ambiguous case law and other legal authorities, as opposed to being circumscribed by detailed laws, regulations, and procedures.
 - (iii) the degree to which matters for decision by the contractor involve recurring fact patterns or unique fact patterns; and
 - (iv) The contractor's discretion to determine an appropriate award or penalty.

(4) 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.)

(5) The availability of special agency authorities and the appropriateness of their application to the situation at hand, such as the power to deputize private persons.

(6) Whether the function in question is already being performed by private persons, and the circumstances under which it is being performed by them.

(c) **Finality of agency determinations.** Whether or not a function is an inherently governmental function, for purposes of this policy letter, is a matter for agency determination. However, agency decisions that a function is or is not an inherently governmental function may be reviewed, and, if necessary, modified by appropriate OMB officials.

(d) **Preaward responsibilities.** Whether a function being considered for performance by contract is an inherently governmental function is an issue to be addressed prior to issuance of the solicitation.

(e) **Post-award responsibilities.** After award, even when a contract does not involve performance of an inherently governmental function, agencies must take steps to protect the public interest by playing an active, informed role in contract administration. This ensures that contractors comply with the terms of the contract and that Government policies, rather than private ones, are implemented. Such participation should be appropriate to the nature of the contract, and should leave no doubt that the contract is under the control of Government officials. This does not relieve contractors of their performance responsibilities under the contract. Nor does this responsibility to administer the contract require Government officials to exercise such control over contractor activities to convert the contract, or portion thereof, to a personal service contract.

In deciding whether Government officials have lost or might lose control of the administration of a contract, the following are relevant considerations: the degree to which agencies have effective management procedures and policies that enable meaningful oversight of contractor performance, the resources available for such oversight, the actual practice of the agency regarding oversight, the duration of the contract, and the complexity of the tasks to be performed.

(f) **Management controls.** When functions described in Appendix B are involved, additional management attention to the terms of the contract and the manner of performance is necessary. How close the scrutiny or how extensive or stringent the management controls need to be is for agencies to determine. Examples of additional control measures that might be employed are:

(1) developing carefully crafted statements of work and quality assurance plans, as described in OFPP Policy Letter 91-2 **Service Contracting**, that focus on the issue of Government oversight and measurement of contractor performance;

(2) establishing audit plans for periodic review of contracts by Government auditors;

(3) conducting preaward conflict of interest reviews to ensure contract performance in accordance with objective standards and contract specifications;

(4) physically separating contractor personnel from Government personnel at the worksite; and

(5) requiring contractors to (a) submit reports that contain recommendations and that explain and rank policy or action alternatives, if any, (b) describe what procedures they used to arrive at their recommendations, (c) summarize the substance of their deliberations, (d) report any dissenting

views, (e) list sources relied upon, and/or (f) otherwise make clear the methods and considerations upon which their recommendations are based.

(g) Identification of contractor personnel and acknowledgment of contractor participation.

Contractor personnel attending meetings, answering Government telephones, and working in other situations where their contractor status is not obvious to third parties must be required to identify themselves as such to avoid creating an impression in the minds of members of the public or the Congress that they are Government officials, unless, in the judgment of the agency, no harm can come from failing to identify themselves. All documents or reports produced by contractors are to be suitably marked as contractor products.

(h) Degree of reliance The extent of reliance on service contractors is not by itself a cause for concern. 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. What number of Government officials is needed to oversee a particular contract is a management decision to be made after analysis of a number of factors. These include, among others, the scope of the activity in question; the technical complexity of the project or its components; the technical capability, numbers, and workload of Federal oversight officials; the inspection techniques available; and the importance of the activity. Current contract administration resources shall not be determinative. The most efficient and cost effective approach shall be utilized.

(i) Exercise of approving or signature authority. 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 of documents submitted by contractors and a recognition of the need to apply independent judgment in the use of these work products.

8. Responsibilities.

(a) Heads of agencies. Heads of departments and agencies are responsible for implementing this policy letter. While these policies must be implemented in the Federal Acquisition Regulation (FAR), it is expected that agencies will take all appropriate actions in the interim to develop implementation strategies and initiate staff training to ensure effective implementation of these policies.

(b) Federal Acquisition Regulatory Council. Pursuant to subsections 6(a) and 25(f) of the OFPP Act, as amended, 41 U.S.C. [[section]][[section]] 405(a) and 421(f), the Federal Acquisition Regulatory Council shall ensure that the policies established herein are incorporated in the FAR within 210 days from the date this policy letter is published in the **Federal Register**. Issuance of final regulations within this 210-day period shall be considered issuance "in a timely manner" as prescribed in 41 U.S.C. [[section]] 405(b).

(c) Contracting officers. When requirements are developed, when solicitations are drafted, and when contracts are being performed, contracting officers are to ensure:

(1) that functions to be contracted are not among those listed in Appendix A of this letter and do not closely resemble any functions listed here;

(2) that functions to be contracted that are not listed in Appendix A, and that do not closely resemble them, are not inherently governmental functions according to the totality of the circumstances test in subsection 7(b), above;

(3) that the terms and the manner of performance of any contract involving functions listed in Appendix B of this letter are subject to adequate scrutiny and oversight in accordance with subsection 7(f), above; and

(4) that all other contractible functions are properly managed in accordance with subsection 7(e), above.

(d) **All officials.** When they are aware that contractor advice, opinions, recommendations, ideas, reports, analyses, and other work products are to be considered in the course of their official duties, all Federal Government officials are to ensure that they exercise independent judgment and critically examine these products.

9. **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.

10. **Information contact.** For information regarding this policy letter contact Richard A. Ong, Deputy Associate Administrator, the Office of Federal Procurement Policy, 725 17th Street, N.W., Washington, DC 20503. Telephone (202) 395-7209.

11. **Effective date.** This policy letter is effective 30 days after the date of publication.

Allan V. Burman
Administrator

APPENDIX A

The following is an illustrative list of functions considered to be inherently governmental functions: (footnote: With respect to the actual drafting of Congressional testimony, of responses to Congressional correspondence, and of agency responses to audit reports from the Inspector General, the General Accounting Office, or other Federal audit entity, see special provisions in subsection 6(c) of the text of the policy letter)

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 members of the combat, combat support or combat service support role.

4. The conduct of foreign relations and the determination of foreign policy.
5. The determination of agency policy, such as determining the content and application of regulations, among other things.
6. The determination of Federal program priorities or budget requests.
7. The direction and control of Federal employees.
8. The direction and control of intelligence and counter-intelligence operations.
9. The selection or nonselection of individuals for Federal Government employment.
10. The approval of position descriptions and performance standards for Federal employees.
11. 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).
12. 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 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) approval of any contractual documents, to include documents defining requirements, incentive plans, and evaluation criteria;
 - (d) awarding contracts;
 - (e) administering contracts (including ordering changes in contract performance or contract quantities, taking action based on evaluations of contractor performance, and accepting or rejecting contractor products or services);
 - (f) terminating contracts; and

- (g) determining whether contract costs are reasonable, allocable, and allowable.

 - 13. 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.

 - 14. 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.

 - 15. The approval of Federal licensing actions and inspections.

 - 16. The determination of budget policy, guidance, and strategy.

 - 17. 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. [[section]] 952 (relating to private collection contractors) and title 31 U.S.C. [[section]] 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 easily calculated or predetermined and the funds collected can be easily controlled using standard cash management techniques, and
 - (b) routine voucher and invoice examination.

 - 18. The control of the treasury accounts.

 - 19. The administration of public trusts
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APPENDIX B

The following list is of services and actions that are not considered to be inherently governmental functions. However, they may approach being in that category because of the way in which the contractor performs the contract or the manner in which the government administers contractor performance. When contracting for such services and actions, agencies should be fully aware of the terms of the contract, contractor performance, and contract administration to ensure that appropriate agency control is preserved.

This is an illustrative listing, and is not intended to promote or discourage the use of the following types of contractor services:

1. Services that involve or relate to budget preparation, including workload modeling, fact finding, efficiency studies, and should-cost analyses, etc.
2. Services that involve or relate to reorganization and planning activities.
3. Services that involve or relate to analyses, feasibility studies, and strategy options to be used by agency personnel in developing policy.
4. Services that involve or relate to the development of regulations.
5. Services that involve or relate to the evaluation of another contractor's performance.
6. Services in support of acquisition planning.
7. Contractors' providing assistance in contract management (such as where the contractor might influence official evaluations of other contractors).
8. Contractors' providing technical evaluation of contract proposals.
9. Contractors' providing assistance in the development of statements of work.
10. Contractors' providing support in preparing responses to Freedom of Information Act requests.
11. Contractors' working in any situation that permits or might permit them to gain access to confidential business information and/or any other sensitive information (other than situations covered by the Defense Industrial Security Program described in FAR 4.402(b)).
12. Contractors' providing information regarding agency policies or regulations, such as attending conferences on behalf of an agency, conducting community relations campaigns, or conducting agency training courses.

13. Contractors' participating in any situation where it might be assumed that they are agency employees or representatives.

14. Contractors' participating as technical advisors to a source selection board or participating as voting or nonvoting members of a source evaluation board.

15. Contractors' serving as arbitrators or providing alternative methods of dispute resolution.

16. Contractors' constructing buildings or structures intended to be secure from electronic eavesdropping or other penetration by foreign governments.

17. Contractors' providing inspection services.

18. Contractors' providing legal advice and interpretations of regulations and statutes to Government officials.

19. Contractors' providing special non-law enforcement, security activities that do not directly involve criminal investigations, such as prisoner detention or transport and non-military national security details.

20.

OFFICE OF MANAGEMENT AND BUDGET

Office Of Federal Procurement Policy

AGENCY:

Office of Management and Budget, Executive Office of the President, Office of Federal Procurement Policy.

ACTION:

Policy Letter on Inherently Governmental Functions.

SUMMARY:

The Office of Federal Procurement Policy (OFPP) publishes today the final version of a policy letter providing guidance to Executive Departments and agencies on (1) what functions are inherently governmental functions that must only be performed by Government officers and employees and (2) what contractible functions so closely support Government officers and employees in their performance of inherently governmental functions that the terms and performance of those contracts require closer scrutiny from Federal officials. This policy letter has been developed because executive agencies, members of Congress, the General Accounting Office, and the public have from time to

time either requested guidance regarding, or inquired about, the propriety of awarding contracts for certain types of functions or administering contracts in certain ways. Previous guidance on this issue has also not been as detailed as that which we now provide.

FOR FURTHER INFORMATION CONTACT:

Richard A. Ong, Deputy Association Administrator, Office of Federal Procurement Policy, 725 17th Street, NW---Suite 9001, Washington, DC 20503 (202) 395-7209. To obtain a copy of this policy letter, please call OMB's Publication Office at (202) 395-7332.

SUPPLEMENTARY INFORMATION

Comments received. We received 34 comments in response to our proposed policy letter published in the **Federal Register** on December 16, 1991 (56 Fed. Reg. 65279): eight from industry or trade groups, four from private individuals, two from employee organizations, one from a Federally funded research and development center, and 19 from Government agencies.

1. **Purpose of the policy letter.** This policy letter on inherently governmental functions is being published to provide guidance on what kinds of functions, as a matter of policy, must be performed by officials of the Executive Branch of the United States and what kinds of functions may be performed by private persons under contract with the Federal Government.

Previous guidance on these matters that has been available to the Executive Branch has not been detailed and sometimes Federal agencies have permitted contractors to perform functions that should be performed by Government personnel. We now provide more detailed guidance.

2. **Relationships of policy letter to other OFPP publications on service contracting.** This policy letter is also one of several that the Office of Federal Procurement Policy (OFPP) has published recently that have focused on some aspect of service contracting in the Federal Government. At this time, OFPP has determined it is best to deal with individual aspects of service contracting rather than trying to publish comprehensive guidance in one document. We will consider collecting all of the guidance on service contracts in one document in the future.

Thus, we do not cover in detail in this policy letter such matters as cost effectiveness of contracting for services, conflicts of interest of service contractors, and management of service contracts. These issues are dealt with in OMB Circular No. A-76, Performance of Commercial Activities, August 4, 1983 (under revision); OFPP Policy Letter 89-1, Conflict of interest Policies Applicable to Consultants, 54 Fed. Reg. 51,805 (December 18, 1989); OFPP Memorandum for Agency Senior Procurement Executives, Government-Wide Guidance on Contract Administration (March 15, 1991); OFPP Policy Letter 91-2, Service Contracting, 56 Fed. Reg. 15110 (April 15, 1991); proposed OFPP Policy Letter 91-____, Past Performance Information, 56 Fed. Reg. 63988 (December 6, 1991); and proposed OFPP Policy Letter 92-____, Management of Service Contracting, 56 Fed. Reg. 66091 (December 20, 1991).

3. **Relationship to OMB Circular No. A-76.** One commenter asked that we make clear our apparent intent to clarify rather than alter the guidance originally found in OMB Circular No. A-76 on inherently government functions. This is our intent. No fundamental change is intended.

We have altered the form of the original Circular A-76 definition of an inherently governmental function in the interest of clarity. Specific examples cited in the original A-76 definition have been incorporated into Appendix A and a list of the general principles underlying the selection of the functions listed in that appendix has been added in their stead.

The terms "function" and "activity" as used in this policy letter and Circular A-76, respectively, are interchangeable.

The same commenter above suggested that we add a new Appendix C, containing a nonexclusive list of functions that are commercial activities that should be contracted. We have not adopted this suggestion because the scheme proposed is the same one we have implicitly adopted. The proposed Appendix C is nothing more than the list of examples of commercial activities found as an Attachment to Circular A-76. We do not believe it is necessary to incorporate that A-76 attachment in this policy letter. The fact that we have not provided this Appendix C thus should not be construed as narrowing the scope of functions that have been contracted in the past. Nonetheless, we have added language to [[section]] 5 to clarify the relationship between Circular A-76 and this policy letter on this point.

Another commenter stated that the relationship between this policy letter and Circular A-76 is unclear. This policy letter is to be the exclusive source of guidance on what constitutes, as a matter of policy, an inherently governmental function.

4. **Libraries.** Several persons questioned the inclusion of library operations as a ministerial function that should be contracted out in subsection 7(a) of the December version of the policy letter. The fact that employees render professional services in performing a function does not mean that the function in question is necessarily inherently governmental. In fact, the Government frequently seeks out contract services precisely because of the level of sophistication required to perform a particular function. On the other hand, agencies may determine that aspects of their library operations, such as handling certain types of information in certain circumstances, involve performance of an inherently governmental function. Therefore, we have removed the reference to libraries.
5. **Contract audits for inspectors general.** One commenter suggested that Federal inspector general (IG) work should be done by using Government resources, with exceptions justified on a case-by-case basis, unless specific technical expertise is needed temporarily and is not available within the Government. This suggestion was not adopted because (1) Congress has specifically authorized the use of contract auditors in [[paragraph]] 6(a) (9) of the Inspector General Act codified at 5 U.S.C. App. 3, and (2) financial and compliance audit activities are not considered inherently governmental functions.

Another commenter questioned whether subsection 12(g) of Appendix A pertaining to the determination of whether contract costs are reasonable, allocable, and allowable proscribes the use of contract audit services. It does not. The decision on what costs are reasonable, allocable, and allowable is ultimately a Government decision, but that decision may be based on recommendations made by contract auditors. Certified public accountants, for example, only render "opinions" and contracts sometimes provide that audit reports are advisory only. Moreover, the use of contract auditors has been authorized by Congress, as noted above.

6. **Agency determinations.** One commenter interpreted the policy letter as authorizing Federal managers to make a final determination on whether a function is an inherently governmental function, under this policy letter, without such determination's being subject to being overturned by the Office of Management and Budget (OMB) or being subject to a cost comparison study under Circular A-76. In general, agencies are expected to make their own determinations, subject to oversight by OMB. Language has been added to subsection 7(c) to clarify this point.
7. **Agency discretion.** One commenter questioned the need for the language in former subsection 7(e) regarding agency discretion to award nonpersonal service contracts. We agree it is unnecessary. It is already clear that awarding a contract is an agency responsibility.

8. **Incorporation in OMB Circular No. A-76, other documents.** Several commenters suggested that the policy letter be incorporated in Circular A-76, "Commercial Activities," currently being revised. We did not incorporate this suggestion because A-76 is already a lengthy document. Also, contracting for inherently government functions is indeed a consideration in contracting out, but it is not unique to the A-76 program. All Federal officials who contract for nonpersonal services must consider the problem of inherently governmental functions, and we thus believe separate guidance applicable to all such contracting, not just to nonpersonal service contracting in the A-76 context, is the better alternative. Other commenters urged that the policy letter be combined with one or more other OFPP policy letters, such as those on conflict of interest, service contracting, and past performance and published in a form other than a policy letter. This suggestion has merit but we believe it best to try to deal with discrete portions of service contracting rather than to try to deal with all facets of a complex problem at once, as discussed in point 2, above.

9. **Agency discretion regarding resource allocation.** One commenter suggested we should address the issues of the future balance between official and contractor workforce in the performance of "basic government work," the specific expertise needed to manage the contractor workforce now or in the future, where this expertise should be located, and the way in which it can be maintained. We believe this is a matter for agencies themselves to determine, given their knowledge of their mission, their resources, the kinds of services they wish to contract, and the size of their service contracting effort. We merely highlight the problem of lack of oversight as a loss of Government control and require agencies to be aware of their existing oversight responsibilities. They are, however, to use their own discretion to figure out how to manage their contracts.

10. **Evaluation of proposals.** One commenter believes there is an apparent conflict between former subsection 14(b) in Appendix and [[section]] 8 of Appendix B. There is no conflict as new subsection 12(b) refers to participation as a voting member on source selection boards only.

11. **Appendix B controls.** The same commenter also suggested that Appendix B should contain a discussion of possible controls that the Government should employ to prevent the functions listed there from being perceived as inherently government function. We do not believe this is necessary, as any function that is in Appendix B is by definition **not** an inherently governmental function.

12. **Applicability to nonpersonal services.** Three commenters questioned why the policy letter applies only to nonpersonal service contracts. Upon consideration, we have accordingly deleted the definition of "service contract" in [[section]] 5. No useful purpose is served by defining "personal services" differently from the FAR and no harm arises from having the policy letter apply to the minimal number of true personal service contracts. Personal service contracts that are really personnel appointments are excluded from the coverage of the policy letter. Thus, FAR 37.102(b) need not be amended as a result of this policy letter.

13. **Subcontractors.** Commenters questioned whether subsection 12(d) of Appendix A should apply to subcontractors. It does not and clarifying language has been added.

14. **Supplies or services purchased by prime contractors.** Some commenters questioned the apparent effect of subsection 12 in Appendix A of preventing contractors from buying supplies and services for their own account. It is not the intent of this policy letter to prevent contractors mess halls from buying food to be prepared for military personnel. Nor does it affect what or how contractors buy to be incorporated into supplies or services to be delivered to the Government. Similarly, contractors may purchase supplies or

services for the Government while acting within reasonable Government guidelines. Section 12 is only meant to address the Government's direct acquisition of supplies or services.

15. **Independent judgment.** The emphasis placed on independent judgment by this policy letter does not preclude the wholesale adoption of contractor advice, opinions, recommendations, ideas, or conclusions. They merely may not be adopted, in whole or in part, without officials' first exercising independent judgment.

16. **Duties of contracting officers.** We have added language to [[section]] 8 to spell out the analytical steps to be following by contracting officers seeking to comply with this policy letter.

17. **Risk of injury to the public.** One commenter stated that the definition of an inherently government function does not clearly address the danger to the public interest when a function is contracted out and the public is at risk if contractors, such as fire fighters or military support contractors, fail or refuse to act in time of crisis. The risk of injury to the public is an important consideration. We believe, however that [[paragraph]] 7(b)(5) appropriately identifies this point as a consideration in determining whether a function is, as a matter of policy, an inherently governmental function. The decision to include several of the functions listed in Appendix A reflects an underlying concern for this risk.

18. **Binding nature of decisions.** This same commenter noted that it is an overstatement to say that the use of discretion (referred to in what is not subsection 7(a) of the policy letter) must have the effect of committing the Government to a course of action. This is because a scientific consulting firm, for example, could submit a study that would have a tremendous impact on regulations or other agency actions but would not necessary lead to a commitment to a course of action.

We have addressed the element of discretion in subsection 7(a) to convey the idea that the mere existence of the element of discretion is not determinative of whether, as a matter of policy, an inherently governmental function is involved. Moreover, it is useful to observe that a study hat has a tremendous impact is not per se a bad thing. A study may have that effect because of its great merit. We should be concerned, however, when a study is allowed to proceed to the point where alternative views, solutions, research, or conclusions, and so forth, cannot realistically be included or taken into account. In this case, the contractor has in effect made all important decisions. Section 7(b)(c) addresses this issue.

19. **Federally funded research and development center (FFRDCs).** One commenter stated that while profit-making contractors can perform functions listed in Appendix B, the policy letter should cross-reference FAR 35.107 pertaining to FFRDCs and "recognize less rigorous oversight." We have not adopted this suggestion. We do not agree that FFRDCs necessarily require less oversight. FAR Part 35 and that its provisions may suffice to enable satisfactory agency oversight of FFRDCs. Whether fewer or additional control measures are necessary to ensure agency control over FFRDCs is a matter for agencies to decide in the circumstances of each case.

20. **Architect-engineer evaluation boards.** This same commenter questioned whether [[section]] 3, which states that services obtained by personnel appointments and advisory committees are not covered by this policy letter, could be construed to prohibit private individuals appointed to architect-engineer source evaluation boards in accordance with FAR 36.602 from voting. To the extent such boards are advisory committees, the policy letter is not applicable to them. If they are not, the commenter makes an excellent

point. FAR 36.602-4 makes clear that the agency is to make the final selection and FAR 36.602-3(d) provides for the evaluation board to set out in its report the considerations upon which its recommendations were based. This is an acceptable mechanism and we have accordingly revised subsection 12(b) of Appendix A and [[section]] 14 of Appendix B to make clear that it is **selection** of sources that is the most sensitive function. Contractor activities that result in recommendations and that explain how those recommendations were arrived at adequately preserve agency options. A related change has been made in subsection 7(f) stating that requiring contractors to explain how they arrived at their recommendations is another available control measure.

21. Factors to consider in totality of the circumstances.

(a) **Complexity and oversight.** One commenter questioned the inclusion of [[paragraph]] 7(d)(2) of the proposed policy letter relating to the complexity of the task to be performed. Upon consideration, we conclude that complexity is better considered in conjunction with the provision that was at 7(d)(12) relating to oversight procedures, resources, and practices. We have amended paragraph 12 accordingly and moved it, as well as the provision in former [[paragraph]] 7(d)(4) relating to the duration of the contract, to new subsection 7(e), Post-award responsibilities. This was done to remove questions relating to contract oversight from the "totality of the circumstances" test. It is important to understand that, if an agency has inadequate oversight procedures or poor oversight practices, the **underlying** function of any agency contract affected by these deficiencies is not thereby transformed into an inherently governmental function. As the totality test focuses on the nature of the function in question and as there can be a transfer of oversight responsibility even if the underlying function is contractible, the issue of de facto transfer of control should therefore be dealt with elsewhere. (Note that a transfer of contract management responsibility to the contractor is explicitly not permitted by Appendix A, subsection 12(e).)

(b) **Ultimate user of contractor work product.** Several commenters questioned the inclusion of this factor at [[paragraph]] 7(d)(3) of the proposed policy letter. We agree it should be taken out. Who will use the contractor's work product is important and this has bearing on how much management attention to give to the contract, but it doesn't say anything about the nature of the underlying function or the adequacy of agency contract administration.

(c) **Review of contractor action.** The same commenter questions the advisability of including a factor (new [[paragraph]] 7(b)(5)) that relates to the finality of any contractor's adjudication of any claim and the type of agency review of contractor adjudications. We see no problem with agencies' providing for contractor adjudication of claims so long as citizens know that they have a right of recourse to agency decisionmakers if they are dissatisfied with the decisions of the contractor. (Note, however, that certain kinds of hearings may still not be eligible of any person for a security clearance, or hearings involving actions that affect matters of personal reputation or eligibility to participate in Government programs. See Appendix A, [[section]] 14.)

Thus, we distinguish between on the one hand, holding hearings and making recommendations and, on the other, retaining the authority to issue the final adjudicatory decision. Contractors may perform the former functions so long as there is adequate oversight, agencies retain the authority to issue the final decision, and the public has a right to insist that the agency make the final decision, if it so desires. This is easier to understand if one views the contractor's action as more of an advisory action than one that binds the claimant with only limited opportunities to change the result before the agency. Note that in the absence of an appeal by a claimant, the agency need not rule on each contractor decision or ruling. It should of course, inspect or sample contractor decisions or rulings from time to time to ensure that contractors comply with agency guidelines and procedures.

(d) **Limited or extinguishing discretion.** The same commenter noted that our speaking in terms of contractor limiting or extinguishing discretion in former [[paragraph]] 7(d)(5) could mistakenly create the impression that some of the Government's authority can be exercised by a contractor. The policy letter attempts to clarify this issue at subsection 7(a).

(e) **Public perception.** Several commenters questioned the inclusion of this factor at [[paragraph]] 7(d)(11) of the proposed policy letter, believing that public perception is too ambiguous a concept. We agree. A

function can probably be analyzed in the light of other factors listed without the need to resort to the concept of perceptions. Appendix A of the policy letter is itself an up-to-date listing that already takes into account the factor of public perceptions. The paragraph has been deleted.

(f) **Laws applicable to the Civil Service.** Several commenters questioned the inclusion of this factor at [[paragraph]] 7(d)(123) of the proposed policy letter. We agree and have deleted this factor. The consideration listed may be relevant to what good contract management should require by way of contract conditions, but they don't say anything about the nature of the function or the adequacy of agency contract administration practices.

(g) **Record keeping requirements.** One commenter found the meaning of paragraph 8(d)(15) of the proposed policy letter unclear. This factor was included to cover situations such as a contractor's providing a aircraft-related training. If the contractor proves to be incompetent or negligent, the fact that the contractor did maintain or was required to maintain records of who was trained permits corrective action to be taken, such as locating improperly trained students and requiring retraining. If records are not maintained, the Government cannot exercise ultimate control because it cannot correct any errors. Nonetheless, the provision appears to have only limited application and has been deleted.

22. **Collection of fees.** Two commenters questioned the provision of [[paragraph]] 20 of Appendix A of the proposed policy letter prohibiting collection of fees or other public moneys, pointing out that contractors in mess halls for military personnel currently collect charges for meals and Department of Housing and Urban Development (HUD) contractors collect fees from purchasers of HUD properties. We have modified the policy letter to enable routine collection of fees where good cash management practices and other controls are in effect, where there is little danger of miscalculating the amount of money ultimately due the Government, and where there is little difficulty in obtaining payment. For example, a contractor could have discretion to determine that a family seeking entrance to a part consists of four people rather than three, and that one of the four is a child under 12, but the contractor would not have the discretion to determine the amount of the fee to be paid by each person in a particular category. HUD contractors may also collect fees from purchasers of HUD properties in accordance with subsection 17(a) of Appendix A. We also make clear that routine voucher and invoice examination by contractors is an acceptable practice.

23. **Contract for one function or several.** One commenter questioned whether the policy letter reflects our belief that only contracts with multiple functions are susceptible to confusion with respect to inherently governmental functions. This is not our belief. The policy letter is intended to provide guidance with respect to discrete functions regardless of whether there is a mixture of several functions in a contract or there is only one function that is being contracted.

24. **Post-aware responsibilities.** Section 7(e) has been amended to make clear that agency contract oversight is to ensure contractor performance in accordance with the terms of the contract, but that oversight must not be exercised so as to create a personal service contract. Language from subsection 7(d) of the proposed policy letter has been moved to subsection 7(e), as explained in [[section]] 21, above.

25. **Drafting of Congressional testimony, responses to Congressional correspondence, and agency responses to audit reports from an Inspector General, the General Accounting Office or other Federal audit entity.** Two commenters questioned whether contractors should be able to draft Congressional testimony, subject to ultimate agency approval. Approval is a key power reserved to any official and we by no means agree that officials do or will approve contractor work in a perfunctory manner. We have nonetheless reexamined this issue and, because of the importance of Congressional testimony and correspondence of agency responses to audit reports, we are not deciding, as a matter of policy, that these documents should not be drafted by contractors. We have thus added a new subsection (c) to the body of the policy letter to this effect. We deleted the relative portions of Appendix A because we do not

believe that drafting documents per se is an inherently governmental function and failing to exercise sufficient oversight with respect to drafting of such documents does not transform the underlying function into an inherently governmental function, as noted in subsection [[paragraph]] 21(a), above. Contractor reports, conclusions, summaries, analyses, and other work products may, of course, still be quoted correspondence, and responses to audit reports, or set out in such things as attachments, appendices, or enclosures thereto.

26. **Reliance on contractor support.** One commenter called attention to our statement in [[paragraph]] 4 of the policy letter that agencies "award service contracts for various reasons, such as to acquire special skills not available in the Government or to meet the need for intermittent services." The commenter pointed out that "'support service' contractors have come to serve as the permanent workforce for many programs" seemingly implying that our statement does not take this into account. In fact, our statement is an accurate one, citing only two of the reasons why agencies award service contracts as examples. Contracting actions under Circular A-76 are also a reason why agencies award service contracts.

Whatever the reason for using service contracts to accomplish agency missions, it is important to understand that agency use of the function must not be an inherently government function, and if it is not, the agency must be able to exercise effective oversight of any contract awarded. We make clear that management of a contract is just as important as deciding whether the contract may properly be awarded in the first place.

Our policy letter is limited in scope and does not focus on why agencies use service contracts. Rather we are concerned that service contracts, when used, are used only when contractors may perform the functions in question and when agencies have the resources to manage the contracts. It is true that agencies have sometimes contracted functions that we have listed in the policy letter as inherently governmental functions, and it is true that they have sometimes failed to recognize that they were not exercising effective oversight over nongovernmental functions that had been contracted. Nonetheless, effective corrective action has been taken by the agencies in the past when oversight problems were identified.

Additional problems in this area will probably arise in the future. Even the General Accounting Office recognized the difficulty in defining inherently government functions and providing guidance to agencies on the subject. **Are Service Contractors Performing Inherently Governmental Functions?**, GAO/GGD-92-11, November 1991, p. 3. We have every reason to expect, however, that because our guidance is much more detailed than anything that was available to agencies in the past there will be fewer instances of problems in this area. We thus disagree strongly with the commenter that the policy letter is a mere exhortation to better management.

27. **Other issues.** One commenter also suggested that we should address whether "contractors who perform work historically performed by civil servants should be subjected to comparable limitations on pay and rules of conduct;" measurement of the short-term and long-term costs of reliance on contractors versus officials; whether Superfund and the savings and loan bailout programs "provide models for public management of the next bailout or cleanup program;" and the "practical meaning that we will give to the concept of 'public service' as the Federal Government heads into the 21st century."

The concept of work "historically performed" by civil servants is not useful because a function may have been performed by civil servants in the past for reasons other than the belief that the function was inherently governmental. In fact, the premise of Circular No. A-76 is that many functions historically performed by Government employees can more appropriately be performed by the private sector.

We believe that competition is the most powerful force available to keep costs down, even though there may be instances where this will not be so. In such instances, determinations shall be made in accordance with Circular No. A-76.

Measurement of the short-term and long-term costs of reliance on contractors versus officials is an aspect of cost effectiveness of service contracts and need not be dealt with here. Similarly, the efficacy of the Superfund and savings and loan programs is a matter beyond the scope of this policy letter.

So far as the practical meaning of the concept of public service is concerned, this policy letter attempts to identify those functions that, as a matter of policy, should only be performed by Government officials and those that may be performed by service contractors. If our taxonomy and analytical methods are sound, our policy letter should define what public service entails in terms of the functions that officials must perform for the foreseeable future.

28. **Acknowledgment.** Finally, we wish to acknowledge our reliance on the excellent work of the Environmental Protection Agency in our drafting of the appendices to this policy letter. Also, the comments we received were all exceptionally well thought out. We are most grateful for the time, effort and imagination that went into the preparation of those comments.

Allan V. Burman
Administrator

Date: September 23, 1992