BULLET BACKGROUND PAPER
ON
INHERENTLY GOVERNMENTAL FUNCTIONS

SUBJECT: An "inherently governmental function (IGF)" is one that is so intimately related to the public interest as to require performance by Federal Government employees. You may not contract for the performance of inherently governmental functions; OMB Circular No. A-76 does not apply to them. But it is "likely a short list getting shorter," considering the new statutory process of Public Law No. 105-270, which will require identifying annually non-inherently governmental functions and subjecting them to the A-76 competitive process.

DISCUSSION:

- Congress is of the sense that OMB Circular No. A-76 has routinely been ignored by executive agencies, which continue to perform for themselves activities that are not inherently governmental. S. Rep. No. 105-269, 105th Cong., 2nd Sess. (1998).

- IGFs include activities requiring:

  -- Exercise of discretion in applying Federal Government authority; or,
  -- Making of value judgment in making decisions for the Federal Government (Judgments relating to monetary transactions and entitlements included).

- Excludes, normally:

  -- Gathering information for or providing advice, opinions, recommendations, or ideas to Federal Government officials; or,
  -- Any function that is primarily ministerial and internal in nature (e.g., building security; mail operations; operation of cafeterias; housekeeping; facilities operations and maintenance; warehouse operations; motor vehicle fleet management operations; or, other routine electrical or mechanical service).

- Involves, inter alia, the interpretation and execution of U.S. law so as to:

  -- Bind U.S. to take/not take some action (by contract, policy, regulation, authorization, order, or otherwise);
  -- Determine/protect/advance U.S. economic/political/territorial/property/other interest by military/diplomatic action; civil/criminal judicial procedures; contract management, or otherwise;
  -- Significantly affect the life/liberty/property of private persons;
  -- Commission/appoint/direct/control U.S. officers/employees; or,
  -- Exert ultimate control over the acquisition/use/disposition of U.S. property (real/personal, tangible/intangible), including collection/control/disbursement of Federal funds (appropriated and other).

- Reference: Federal Activities Inventory Reform Act of 1998, Pub. L. No. 105-270, 112 Stat. 2382 (1998); 48 C.F.R. (FAR) §§ 7.500-7.503, 37.102(b) and (c); Performance of Commercial Activities, OMB Circular No. A-76, Revised (Aug. 4, 1983); Performance of Commercial Activities, OMB Circular No. A-76 Revised Supp. Handbook (Mar., 1996); Inherently Governmental Functions, OFPP Policy Letter 92-1 (Sept. 23, 1992).

  -- Each lists specific examples.

CONCLUSION: The now statutory notion of "inherently governmental functions," is becoming more circumscribed. Indeed, at the macro-level it would appear that only portions of the present ASC military and civil service workforce fit comfortably within this protective stricture. Annual listing of government activities not inherently governmental in nature; OMB review; publication; and, interested party challenge of inclusion/exclusion of functions and subsequent expedited agency appeal, followed by A-76 competition pursuant to Public Law No. 105-270, should result in inertia in favor of evaluating more and more traditionally organic ASC functions for performance under contract by commercial sources.

RECOMMENDATION: None - FYI only.

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- It's a question of evidence; each contract arrangement must be judged in light of its own facts and circumstances.
- Sporatic, unauthorized supervision of only one of a large number of contractor employees might reasonably be considered irrelevant, while relatively continuous Government supervision of a substantial number of contractor employees would have to be taken strongly into account.

- Other earmarks/evidence.
  - Performance on site.
  - Principal tools/equipment furnished by Government.
  - Services applied directly to the integral effort of the agency/organizational subpart in furtherance of assigned function/mission.
  - Comparable services, meeting comparable needs, are performed in the same/similar agencies using civil service personnel.
    - The inherent nature of the service/the manner in which it is provided, reasonably requires directly/indirectly, Government direction/supervision of contractor employees in order to: adequately protect the Government's interest; retain control of the function involved; or, retain full personal responsibility for the function supported in a duly authorized federal officer/employee.

- Reference: 48 CFR (FAR) §§37.101-37.104; 37.200-37.205; and, 37.500-37.504.

CONCLUSION: This is nothing new, but keep it in mind; the Pellerzi Standards and OFPP Policy Letter 93-1, "Management Oversight of Service Contracting" (Nov 19, 1993) are still alive and applicable. Remember the rule of "PUNG" (probably, usually, normally, and generally), as regards the above discussion and associate legal counsel in accordance FAR §37.103 in doubtful cases when drafting your contractual provisions.

RECOMMENDATION: None – FYI only.

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