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Sourcing Policy: Selected Developments and Issues

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Sourcing Policy: Selected Developments and Issues

Abstract

[Excerpt] Sourcing policy refers, generally, to determining which sector—public (government) or private—will perform an agency’s function(s). Both federal employees and contractor employees have valid roles to play in performing the work of the federal government. This combined workforce is known as a blended workforce. Determining which sector will perform which functions, including determining when federal employee performance is, or should be, required can be challenging, however. Efforts to address this issue, and related questions, have been the subject of the federal government’s sourcing policy since at least the 1950s.

This report begins with a history of sourcing policy that focuses on the terms *commercial* and *inherently governmental*, and the policy of government reliance on the private sector. The following section examines the two strains of sourcing policy: competitive sourcing and multi-sector workforce management. The juxtaposition of the Bush Administration’s competitive sourcing initiative and the Obama Administration’s multi-sector workforce management effort aids in understanding different, yet potentially complementary, facets of sourcing policy. Policy issues that may be of interest to the 112th Congress are also discussed.

Keywords

sourcing policy, government agency, public sector, private sector, competitive sourcing, multi-sector workforce management

Comments

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Sourcing Policy: Selected Developments and Issues

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Summary

Dating back to the 1950s, federal sourcing policy generally has focused on the premise that the government should rely on the private sector for the provision of certain goods and services. Additionally, it has centered around guidance for conducting public-private competitions to determine whether federal employees, or contractor employees, should be selected to perform certain agency functions. The Administration of President George W. Bush, in particular, emphasized subjecting eligible agency functions to public-private competitions. Branding this policy, and related guidance, as competitive sourcing, the Bush Administration included it as one component of the President's Management Agenda.

During the Administration of President Barack Obama, another strain, or facet, of sourcing policy surfaced. Labeled multi-sector workforce management by the Administration, it posits that federal agencies might be susceptible to overreliance on contractors, which could affect the ability of agencies to maintain control over their missions and operations. OMB's July 2009 memorandum provides guidance to agencies on how to manage their multi-sector workforces. The Office of Federal Procurement Policy's Policy Letter 11-01—by providing a single, consistent definition of *inherently governmental* and guidance for identifying and managing inherently governmental functions, functions closely associated with inherently governmental functions, and critical functions—complements the Administration's multi-sector workforce management policy. This letter was issued in September 2011.

Congressional interest in sourcing policy, generally, has been evident for some time. For example, in 1998, the Federal Activities Inventory Reform (FAIR) Act (P.L. 105-270) was signed into law. It requires certain federal agencies to compile, and submit annually to OMB, inventories of their commercial activities, which are activities that may be performed by federal employees or a government contractor. Recent signs of interest in sourcing policy include two substantively similar but identically titled bills that were introduced during the 112th Congress. H.R. 1474 and S. 785, the Freedom From Government Competition Act, contain provisions that would expand upon existing policies designed to encourage federal government reliance on the private sector for the provision of both goods and services.

This report provides an overview of the evolution of federal sourcing policy to date and identifies the major policy issues before Congress. It is not a legislation tracking report. This report will be updated as events warrant.

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Introduction

Sourcing policy refers, generally, to determining which sector—public (government) or private—will perform an agency’s function(s). Both federal employees and contractor employees have valid roles to play in performing the work of the federal government. This combined workforce is known as a blended workforce.¹ Determining which sector will perform which functions, including determining when federal employee performance is, or should be, required can be challenging, however. Efforts to address this issue, and related questions, have been the subject of the federal government’s sourcing policy since at least the 1950s.

Sourcing policy is not so much a product of coordinated planning and implementation as it is an amalgamation of statutory provisions, policy letters, administrative directives,² and guidance issued by various presidential administrations. Sourcing policy has been at the root of contentious debates, which may complicate the somewhat murky picture. This brief overview of the report is provided to assist in navigating the subject of sourcing policy.

Sourcing policy encompasses two major strains. Delving into the history of sourcing policy is necessary for understanding the strain that emerged in the 1950s, and for providing context for the strain that emerged during President Barack Obama’s Administration. The latter strain has not necessarily displaced, or replaced, the former strain, though it might not always be clear to outside observers what actions agencies are taking, or are expected to take. The complexity might be due, at least in part, to the ad hoc fashion in which sourcing policy has evolved and the mix of government documents involved.

The strain that emerged first, with the issuance of three Bureau of the Budget (BOB) bulletins in the 1950s, emphasizes governmental reliance on the private sector for the provision of goods and services.³ An unwritten corollary of this strain of sourcing policy has been that certain functions performed by federal employees may be subjected to public-private competition. A competition

¹ While acknowledging that there is “no common agreement on a definition of the multisector [or blended] workforce,” a working group of the National Academy of Public Administration (NAPA), provides an expanded description of this term. The multi-sector workforce consists of “federal, state and local civil servants (whether full- or part-time, temporary or permanent); uniformed personnel; and contractor personnel [who] often work on different elements of program implementation, sometimes in the same workplace, but under substantially different governing laws, different systems for compensation, appointment, discipline, and termination; and different ethical standards.” (National Academy of Public Administration, *Managing Federal Missions With a Multisector Workforce: Leadership for the 21st Century*,” November 16, 2005, p. 1, at <https://www.acquisition.gov/comp/aap/documents/National%20Academy%20of%20Public%20Administration%20%2012%2016%2005.pdf>.) Another description says that the “the type of workplace arrangement” where “contractor personnel work alongside federal employees in the federal workspace; often performing identical functions ... has become known as a ‘blended’ or ‘multisector’ workforce.” (Acquisition Advisory Panel, *Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress*, January 2007, p. 392, at <https://www.acquisition.gov/comp/aap/finalaapreport.html>.) The Obama Administration uses the term *multi-sector workforce*. (See “OMB Memorandum on Multi-Sector Workforce Management.”) The Government Accountability Office uses the term *total workforce*. (U.S. Government Accountability Office, *Civilian Agencies’ Development and Implementation of Insourcing Guidelines*, GAO-10-58R, October 6, 2009, p. 7, at <http://www.gao.gov/new.items/d1058r.pdf>.) The Department of Homeland Security uses the term *balanced workforce*. (See “Department of Homeland Security’s Balanced Workforce.”)

² Chief among these is Office of Management and Budget Circular A-76, which is discussed below.

³ The Bureau of the Budget was the precursor to the Office of Management and Budget (OMB). Additional information regarding these bulletins is provided below.

determines whether the incumbent workforce would continue to perform the work, or the agency would award a contract to a private company to perform the work.

Circular A-76, which was issued initially in 1966, continued this policy of governmental reliance on the private sector and provides guidance and procedures for carrying out public-private competitions. The Office of Management and Budget has published five revisions to the circular. The current circular (or revision) was released in May 2003. Generally, the term introduced by the Administration of President George W. Bush—competitive sourcing—is associated with this strain of sourcing policy.⁴

Throughout the history of sourcing policy, only certain functions have been eligible for public-private competitions. Beginning with the Bureau of the Budget bulletins published during the Eisenhower Administration, only agency functions identified as *commercial* may be subjected to public-private competitions. Any agency function designated as *governmental* (or, later, *inherently governmental*) must be performed by federal employees.

With the continued emphasis on governmental reliance on the private sector finding expression in a “[g]overnment policy [that] has favored contracting for goods and services rather than providing them in-house,”⁵ the commercial/inherently governmental dichotomy and the focus on public-private competitions sufficed for a number of years. As the needs of the government expanded over the years, however, contracting for services grew, both in terms of the amount spent on contracts and the types of services provided by contractors. Notably, the federal government’s short-term and long-term responses to the terrorist attacks of September 11, 2001, involved a significant growth in service contracting. The federal government invaded Afghanistan and then Iraq; added a new department tasked with safeguarding the homeland; and embarked upon a raft of new initiatives and programs involving, for example, intelligence, transportation security, and cybersecurity. Determining who should do the work of the federal government became more challenging as, for example, certain practices were called into question (e.g., using companies to conduct passenger screening at airports); controversy swirled around some events that involved private security contractors (e.g., private security guards reportedly shot Iraqi civilians in 2007⁶); and concerns surfaced that, in the rush to expand its capabilities, the federal government was at risk of having contractor employees perform inherently governmental work.

Thus, the second strain of sourcing policy that has emerged focuses on ensuring that the federal government has the best, or most appropriate, mix of federal employees and contractor employees. The Obama Administration, through guidance issued by the Office of Management and Budget, refers to this strain as multi-sector workforce management. Unlike competitive sourcing, the multisector workforce management strain relies chiefly (though not entirely) on an expanded typology of functions and associated guidance to determine who—federal employees or contractor employees—should perform which agency functions. Additions to the existing typology (commercial functions and inherently governmental functions) are *critical functions* and *functions closely associated with inherently governmental functions*. According to the Obama Administration’s guidance, multi-sector workforce management was devised to ensure that

⁴ Any mention of President Bush or the Bush Administration in this report refers to President George W. Bush.

⁵ U.S. Commission on Government Procurement, *Report of the Commission on Government Procurement*, Volume 1, Washington, DC, December 1972, p. 57.

⁶ James Glanz and Alissa J. Rubin, “Blackwater Shootings ‘Murder,’ Iraq Says,” *New York Times*, October 7, 2007, at <http://www.nytimes.com/2007/10/08/world/middleeast/08blackwater.html?pagewanted=all>.

agencies' reliance on contractors is not excessive.⁷ Restated, this strain focuses on ensuring that agencies, not contractors, perform inherently governmental functions, and that agencies retain control over their mission and operations.⁸

This report begins with a history of sourcing policy that focuses on the terms *commercial* and *inherently governmental*, and the policy of government reliance on the private sector. The following section examines the two strains of sourcing policy: competitive sourcing and multi-sector workforce management. The juxtaposition of the Bush Administration's competitive sourcing initiative and the Obama Administration's multi-sector workforce management effort aids in understanding different, yet potentially complementary, facets of sourcing policy. Policy issues that may be of interest to the 112th Congress are also discussed.

Background

Key Terms: *Commercial* and *Inherently Governmental*

Familiarity with the terms *commercial* and *inherently governmental* is integral to understanding the federal government's sourcing policy and related issues.⁹ A commercial activity may be performed by a contractor employee or a federal employee. An inherently governmental function may be performed only by federal employees.¹⁰ Although, at times or under certain circumstances, other terms have been used, such as *core functions*, government-wide sourcing policy, generally, has relied on this dichotomy: a government function (or activity)¹¹ is either commercial or inherently governmental.

⁷ Peter R. Orszag, Director, U.S. Office of Management and Budget, "Managing the Multi-Sector Workforce," July 29, 2009, p. 1, at http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_fy2009/m-09-26.pdf.

⁸ Office of Federal Procurement Policy, "Publication of the Office of Federal Procurement Policy (OFPP) Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions," 76 *Federal Register* 56227-56242, September 12, 2011, at <http://www.gpo.gov/fdsys/pkg/FR-2011-09-12/pdf/2011-23165.pdf>.

⁹ For the purposes of sourcing policy, *commercial* has a different meaning than *commercial item*, which is a term used in government procurement generally. The definition of *commercial item* reads in part: A commercial item is "(1) Any item, other than real property, that is of a type customarily used by the general public or by non-governmental entities for purposes other than governmental purposes, and—(i) Has been sold, leased, or licensed to the general public; or (2) Has been offered for sale, lease, or license to the general public...." (48 CFR § 2.101(a).)

¹⁰ "Contracts shall not be used for the performance of inherently governmental functions." (48 CFR § 7.503(a).)

¹¹ Historically, the words *activities* and *functions* have been treated as synonyms. That is, it has been general practice to use the terms *commercial activities* and *inherently governmental functions*. An American Bar Association white paper attempted to clarify these terms, noting that "people who occupy positions perform functions. Activities are groups of people who perform functions; i.e., assigned duties, to achieve objectives, including supporting others—at least that is the sense in which OMB Circular A-76 uses the term 'activity.'" (Task Force of the American Bar Association Public Contract Law Section, "Work Reserved for Performance by Federal Government Employees, OFPP Draft Policy Letter dated March 31, 2010, Issues and Challenges," white paper, June 16, 2010, p. 4, at <http://www.americanbar.org/content/dam/aba/migrated/contract/wp061610.authcheckdam.pdf>.) The Office of Federal Procurement Policy addressed this issue in the preamble accompanying its policy letter on inherently governmental and critical functions. (See "Office of Federal Procurement Policy's Policy Letter 11-01.") OFPP wrote that it "recognizes that the terms [*function*, *activity*, and *position*] have different meanings and agrees that more careful use of these terms may help to avoid inappropriately broad generalizations regarding the characterization of work. A function, for example, often includes multiple activities, or tasks, some of which may be inherently governmental, some of which may be closely associated with inherently governmental work, and some may be neither." (Office of Federal Procurement Policy, "Publication of the Office of Federal Procurement Policy (OFPP) Policy Letter 11-01, Performance of Inherently Governmental and (continued...)

An agency may choose to subject a commercial activity to a public-private competition. The competition is held to determine who will perform the work in the future: the incumbent workforce (usually federal employees) or the competitor (usually a contractor). Office of Management and Budget (OMB) Circular A-76 provides the policy and guidance governing public-private competitions.¹²

As discussed below, a description of *commercial activity* appeared initially in a 1955 Bureau of the Budget (BOB) bulletin and a definition was published in 1966. A written definition of *inherently governmental* was first published in 1979.¹³

Commercial Activities

Bureau of the Budget Bulletin 55-4 may have been the first policy document that addressed the idea that a government activity may be commercial in nature. The relevant passage is as follows:

In determining whether an activity is “commercial” in nature and “could be procured ... through ordinary business channels,” reference may be made to the Standard Industrial Classification Manual and to ordinary business practice with respect to procurement of services or products. The inclusion of an activity in the manual will be generally considered indicative that it may be procured commercially. There will be excluded from coverage as noncommercial, however, those functions which are a part of the normal management responsibilities of a Government agency or a private business of comparable size (such as accounting, personnel work, and the like).¹⁴

Eleven years later, the Bureau of the Budget provided a definition of *commercial activity*. The definition, which was included in the original Circular A-76, reads as follows:

A Government commercial or industrial activity is one which is operated and managed by an executive agency and which provides for the Government’s own use a product or service that is obtainable from a private source.¹⁵

The word *industrial* was dropped with the publication of the 1983 revision to Circular A-76.

The current definition of *commercial activity*, which features the term *recurring service*, may be found in the 2003 version of Circular A-76.

[A commercial activity is a] recurring service that could be performed by the private sector. This recurring service is an agency requirement that is funded and controlled through a contract, fee-for-service agreement, or performance by government personnel. Commercial

(...continued)

Critical Functions,” p. 56233.) Determining the appropriate circumstances under which to use the term *activity* or *function* is beyond the scope of this report. Hence, this report adheres to longstanding practice and uses the terms *commercial activity* and *inherently governmental function*.

¹² The circular may be found at http://www.whitehouse.gov/sites/default/files/omb/assets/about_omb/a76_incl_tech_correction.pdf.

¹³ The Bureau of the Budget was the predecessor to the Office of Management and Budget.

¹⁴ U.S. Bureau of the Budget, “Commercial-Industrial Activities of the Government Providing Products or Services for Governmental Use,” Bulletin No. 55-4, January 15, 1955, p. 2.

¹⁵ U.S. Bureau of the Budget, “Policies for Acquiring Commercial or Industrial Products and Services for Government Use,” Circular No. A-76, March 3, 1966, p. 1. (Underlining in original.)

activities may be found within, or throughout, organizations that perform inherently governmental activities or classified work.¹⁶

Under the Federal Activities Inventory Reform (FAIR) Act (P.L. 105-270), agencies are required to submit inventories of their commercial activities to OMB by June 30 of each year. An agency's inventory is to include, for each activity listed, the "number of full-time employees [FTEs] (or its equivalent)" needed for government performance.¹⁷

Inherently Governmental Functions

A definition of the term *governmental function* did not appear in a sourcing policy document until 1979, 24 years after the term *commercial* was introduced. The definition of *governmental function*, which was included in the 1979 revision to Circular A-76, was as follows:

A "Governmental function" is a function which must be performed in-house due to a special relationship in executing governmental responsibilities. Such governmental functions can fall into several categories: (1) *Discretionary application of Government authority....* (2) *Monetary transactions and entitlements....* (3) *In-house core capabilities....*¹⁸

The term commonly used today, *inherently governmental function*, appeared initially in the Office of Federal Procurement Policy's (OFPP's) Policy Letter 92-1, which was issued in September 1992. (The letter was superseded by the 2003 revision to Circular A-76.) Policy Letter 92-1 provided the following 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.¹⁹

Currently, there are three primary definitions of *inherently governmental*, which may be found in Circular A-76,²⁰ 48 CFR § 2.101(a),²¹ and Section 5(1)(A) and (B) of the FAIR Act.²² Charged

¹⁶ U.S. Office of Management and Budget, "Performance of Commercial Activities," Circular No. A-76 (Revised), May 29, 2003, p. D-2, at http://www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a076/a76_incl_tech_correction.pdf.

¹⁷ Section 2(a) of P.L. 105-270. A full-time equivalent is the "staffing of Federal civilian employee positions, expressed in terms of annual productive work hours (1,776) rather than annual available hours that includes non-productive hours (2,080 hours)." (U.S. Office of Management and Budget, "Performance of Commercial Activities," Circular No. A-76 (Revised), May 29, 2003, p. D-5.)

¹⁸ U.S. Office of Management and Budget, "Acquiring of Commercial or Industrial Products and Services Needed by the Government; Policy Revision," April 5, 1979. (This is the March 29, 1979 revision of Circular A-76.) (Italics in original.) The full description of the third category is as follows: "(3) *In-house core capabilities* in the area of research, development, and testing, needed for technical analysis and evaluation and technology base management and maintenance. However, requirements for such services beyond the core capability which has been established and justified by the agency are not considered governmental functions." (Ibid.) (Italics in original.)

¹⁹ Office of Federal Procurement Policy, "Inherently Governmental Functions," Policy Letter 92-1, September 23, 1992, p. 2, at http://www.whitehouse.gov/omb/procurement_policy_letter_92-01/.

²⁰ See p. A-2 of Circular A-76, at http://www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a076/a76_incl_tech_correction.pdf.

with developing a single consistent definition of *inherently governmental*,²³ however, OFPP selected the FAIR Act definition, which it included in its 2011 policy letter on inherently governmental functions and critical functions.²⁴ This definition reads as follows:

The term “inherently governmental function” means a function that is so intimately related to the public interest as to require performance by Federal Government employees.... The term includes activities that require either the exercise of discretion in applying Federal Government authority or the making of value judgments in making decisions for the Federal Government, including judgments relating to monetary transactions and entitlements.²⁵

Under the Bush Administration, OMB required agencies to submit inventories of their civilian inherently governmental positions when they submitted their commercial activities inventories to OMB each year.²⁶

Table 1 provides the definitions and descriptions of *commercial* and *inherently governmental* that have been used at various times since 1955. The current definition of *commercial* may be found in Circular A-76 (2003) while the current definition of *inherently governmental* may be found in P.L. 105-270, which is the Federal Activities Inventory Reform (FAIR) Act.

Table 1. Definitions of Commercial and Inherently Governmental
1955-Present

Document (year)	Definition or Description of Commercial Activity	Definition or Description of Inherently Governmental
Bulletin 55-4 (1955)	“In determining whether an activity is ‘commercial’ in nature and ‘could be procured ... through ordinary business channels,’ reference may be made to the Standard Industrial Classification Manual and to ordinary business practice with respect to procurement of services or products. The inclusion of an activity in the manual will be generally considered indicative that it may be procured commercially. There will be excluded from coverage as noncommercial, however, those functions which are a	No entry.

(...continued)

²¹ See also Subpart 7.5 of Title 48 of the Code of Federal Regulations.

²² While certain elements of all three definitions are the same, or similar, such as the phrase *intimately related to the public interest*, there is variation among other terms used in the definitions, including *function* and *activity*, *employees* and *personnel*, and *government* and *Federal Government*. A particularly notable difference, some commentators would suggest, is that the 2003 circular mentions *the exercise of substantial discretion* while neither of the other two definitions includes the modifier *substantial*.

²³ Sec. 321 of P.L. 110-417.

²⁴ See “Office of Federal Procurement Policy’s Policy Letter 11-01.”

²⁵ Sec. 5(2)(A) and (B) of P.L. 105-270.

²⁶ Sean O’Keefe, Deputy Director, U.S. Office of Management and Budget, “Year 2001 Inventory of Commercial Activities,” memorandum M-01-16, April 3, 2001, p. 1, <http://www.whitehouse.gov/sites/default/files/omb/memoranda/m01-16.pdf>.

Document (year)	Definition or Description of Commercial Activity	Definition or Description of Inherently Governmental
Bulletin 57-7 (1957)	<p>part of the normal management responsibilities of a Government agency or a private business of comparable size (such as accounting, personnel work, and the like).”</p> <p>“In determining whether an activity is ‘commercial’ in nature and ‘can be procured ... through ordinary business channels,’ reference may be made to the Standard Industrial Classification Manual, to the availability of the service or product on a competitive basis, and to ordinary business practice with respect to procurement thereof. The inclusion of an activity in the manual will be generally considered indicative that it may be procured through ordinary business channels. There will be excluded as noncommercial, however, those functions which are a part of the normal management responsibilities of a Government agency or a private business of comparable size (such as accounting, personnel work, and the like)...”</p>	No entry.
Bulletin 60-2 (1959)	<p>“Commercial-industrial activity ... for its own use’ includes the provision of services or products primarily for the use of a Government agency (whether the providing agency or other agencies), but excludes, for the purpose of this Bulletin, activities producing a service or product primarily for the public or agency employees. Also excluded are functions which are a part of the normal management responsibilities of a Government agency or a private firm of a comparable size (such as accounting, personnel work, and the like). In determining whether an activity is ‘commercial-industrial’ in nature and ‘can be procured from private enterprise through ordinary business channels,’ reference may be made to the <u>Standard Industrial Classification Manual...</u>”</p>	No entry.
Circular A-76 (1966)	<p>“<u>A Government commercial or industrial activity</u> is one which is operated and managed by an executive agency and which provides for the Government’s own use a product or service that is obtainable from a private source.”</p>	No entry.

Document (year)	Definition or Description of Commercial Activity	Definition or Description of Inherently Governmental
Circular A-76 (1967)	<p>“A <u>Government commercial or industrial activity</u> is one which is operated and managed by an executive agency and which provides for the Government’s own use a product or service that is obtainable from a private source.”</p>	No entry.
Circular A-76 (1979)	<p>“A ‘Government commercial or industrial activity’ is one which is operated and managed by a Federal executive agency and which provides a product or service that could be obtained from a private source. A representative, but not comprehensive, listing of such activities is provided in Attachment A [of this circular]. An activity can be identified with an organization or a type of work, but must be (1) separable from other functions so as to be suitable for performance either in-house or by contract; and (2) a regularly needed activity of an operational nature, not a one-time activity of short duration associated with support of a particular project.”</p>	<p>“A ‘Governmental function’ is a function which must be performed in-house due to a special relationship in executing governmental responsibilities. Such governmental functions can fall into several categories: (1) <i>Discretionary application of Government authority....</i> (2) <i>Monetary transactions and entitlements....</i> (3) <i>In-house core capabilities.</i>”^a</p>
Circular A-76 (1983)	<p>A <i>commercial activity</i> is one which is operated by a Federal executive agency and which provides a product or service which could be obtained from a commercial source. A commercial activity is not a Governmental function. A representative list of such activities is provided in Attachment A [of this circular]. A commercial activity also may be part of an organization or a type of work that is separable from other functions or activities and is suitable for performance by contract.”</p>	<p>“A <i>Governmental function</i> is a function which is so intimately related to the public interest as to mandate performance by Government employees. These functions include those activities which require either the exercise of discretion in applying Government authority or the use of value judgment in making decisions for the Government. Services or products in support of Governmental functions, such as those listed in Attachment A [of this circular] are commercial activities and are normally subject to this Circular. Governmental functions normally fall into two categories: 1) <i>The act of governing....</i> (2) <i>Monetary transactions and entitlements....</i>”</p>

Document (year)	Definition or Description of Commercial Activity	Definition or Description of Inherently Governmental
OFPP Policy Letter 92-I (1992)	No entry.	“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.”
P.L. 105-270 (1998) ^b	No entry.	“The term ‘inherently governmental function’ means a function that is so intimately related to the public interest as to require performance by Federal Government employees.... The term includes activities that require either the exercise of discretion in applying Federal Government authority or the making of value judgments in making decisions for the Federal Government, including judgments relating to monetary transactions and entitlements.”
Circular A-76 (1999)	“A <u>commercial activity</u> is one which is operated by a Federal executive agency and which provides a product or service that could be obtained from a commercial source. Activities that meet the definition of an inherently Governmental function provided below [in this circular] are not commercial activities.... A commercial activity also may be part of an organization or a type of work that is separable from other functions or activities is suitable for performance by contract.”	“An <u>inherently Governmental function</u> is a function which is so intimately related to the public interest as to mandate performance by Government employees. Consistent with the definitions provided in the Federal Activities Inventory Reform Act of 1998 [P.L. 105-270] and OFPP Policy Letter 92-I, these functions include those activities which require either the exercise of discretion in applying Government authority or the use of value judgments in making decisions for the Government. Services or products in support of inherently Governmental functions, such as those listed in Attachment A [of this circular], are commercial activities and are normally subject to this Circular. Inherently Governmental functions normally fall into two categories: (1) The <u>act of governing</u> (2) <u>Monetary transactions and entitlements</u>”
48 CFR § 2.101(b) (2001) ^c	No entry.	“ <i>Inherently governmental function</i> means, as a matter of policy, a function that is so intimately related

Document (year)	Definition or Description of Commercial Activity	Definition or Description of Inherently Governmental
Circular A-76 (2003)	<p>“A commercial activity is a recurring service that could be performed by the private sector and is resourced, performed, and controlled by the agency through performance by government personnel, a contract, or a fee-for-service agreement. A commercial activity is not so intimately related to the public interest as to mandate performance by government personnel. Commercial activities may be found within, or throughout, organizations that perform inherently governmental activities or classified work.”</p>	<p>to the public interest as to mandate performance by Government employees. This definition is a policy determination, not a legal determination. An inherently governmental function includes 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: the act of governing, i.e., the discretionary exercise of Government authority, and monetary transactions and entitlements.”</p> <p>“An inherently governmental activity is an activity that is so intimately related to the public interest as to mandate performance by government personnel. These activities require the exercise of substantial discretion in applying government authority and/or in making decisions for the government. Inherently governmental activities normally fall into two categories: the exercise of sovereign government authority or the establishment of procedures and process related to the oversight to monetary transactions or entitlements.”</p>

Sources: U.S. Bureau of the Budget, “Commercial-Industrial Activities of the Government Providing Products or Services for Governmental Use,” Bulletin No. 55-4, January 15, 1955, p. 2; U.S. Bureau of the Budget, “Commercial-Industrial Activities of the Government Providing Products or Services for Governmental Use,” Bulletin No. 57-7, February 5, 1957, p. 1; U.S. Bureau of the Budget, “Commercial-Industrial Activities of the Government Providing Products or Services for Governmental Use,” Bulletin No. 60-2, September 21, 1959, p. 1 (underlining in original); U.S. Bureau of the Budget, “Policies for Acquiring Commercial or Industrial Products and Services for Government Use,” Circular No. A-76, March 3, 1966, p. 1 (underlining in original); U.S. Bureau of the Budget, “Policies for Acquiring Commercial or Industrial Products and Services for Government Use,” Circular No. A-76 (Revised), August 30, 1967, p. 1 (underlining in original); U.S. Office of Management and Budget, “Acquiring of Commercial or Industrial Products and Services Needed by the Government; Policy Revision,” 44 *Federal Register* 20558, April 5, 1979 (This is the March 29, 1979 revision of Circular A-76.) (italics in original); U.S. Office of Management and Budget, “Issuance of OMB Circular No. A-76 (Revised) ‘Performance of Commercial Activities,’” 48 *Federal Register* 37114, August 16, 1983 (This is the August 4, 1983 revision of Circular A-76.) (italics in original); Office of Federal Procurement Policy, “Inherently Governmental Functions,” Policy Letter 92-1, September 23, 1992, p. 2, at http://www.whitehouse.gov/omb/procurement_policy_letter_92-01/; 48 CFR § 2.101(a) (italics in original); Sec. 5(2)(A) and (B) of P.L. 105-270; U.S. Office of Management and Budget, “Performance of Commercial Activities,” Circular No. A-76, August 4, 1983 (Revised 1999), pp. 2-3 (underlining in original); U.S. Office of Management and Budget, “Performance of Commercial Activities,” Circular No. A-76 (Revised), May 29, 2003, pp. A-2-A-3, at http://www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a076/a76_incl_tech_correction.pdf; 48 CFR § 2.101(b).

Notes:

- a. The full description of the third category is as follows: “(3) *In-house core capabilities* in the area of research, development, and testing, needed for technical analysis and evaluation and technology base management and

maintenance. However, requirements for such services beyond the core capability which has been established and justified by the agency are not considered governmental functions.” (U.S. Office of Management and Budget, “Acquiring of Commercial or Industrial Products and Services Needed by the Government; Policy Revision,” 44 *Federal Register* 20558, April 5, 1979 (This is the March 29, 1979 revision of Circular A-76.) (Italics in original.)

- b. P.L. 105-270 is the Federal Activities Inventory Reform (FAIR) Act.
- c. See also Subpart 7.5, “Inherently Governmental Functions,” of Title 48 of the Code of Federal Regulations for, among other things, “a list of examples of functions considered to be inherently governmental functions or which shall be treated as such.” (48 CFR § 7.503(c).)

The Role of the Private Sector

Governmental reliance on businesses for the provision of goods and services has a long history in the United States and pre-dates the ratification of the Constitution and the establishment of the nation. The colonies relied on merchants, farmers, and craftsmen for supplying their troops during the French and Indian War and the Revolutionary War.²⁷

The federal government’s written policy of relying on the private sector for the provision of goods and services has its origins in three Bureau of the Budget bulletins issued in the 1950s. OMB Circular A-76, first published in 1966 and revised several times over the years, continues this policy.²⁸ Most of these documents also identify, or describe, circumstances under which federal employee performance of commercial functions was, or is, permitted. **Table 2** contains excerpts from the three bulletins, the original Circular A-76, and all of the revised versions of Circular A-76.

Table 2. Policy History of Governmental Reliance on the Private Sector
Bureau of the Budget Bulletins and OMB Circular A-76

Document (date)	Policy Statement ^a	Circumstances Under Which Government Performance of a Commercial Function May Be Permitted ^b
Bureau of the Budget Bulletin No. 55-4 (January 15, 1955)	The “Federal Government will not start or carry on any commercial activity to provide a service or product for its own use if such product or service can be procured from private enterprise through	An agency head may authorize an exception to this policy “only where it is clearly demonstrated in each case that it is not in the public interest to procure such product or service from private enterprise.” ^c

²⁷ James F. Nagle, *History of Government Contracting* (Washington, DC: George Washington University, 1999), pp. 12 and 16.

²⁸ An excerpt from a 1962 report to President John F. Kennedy presents another perspective on the relationship between the federal government and contractors. The Bell Report, which was named for the Director of the Bureau of the Budget, David Bell, “(1) declared that reliance on contractors and grantees ‘blurred the traditional dividing line between the private and public sectors of our Nation’; (2) deemed it ‘axiomatic’ that government officials (i.e., civil and special services and appointees) must do the work and maintain the competence required to account for all government work; and (3) warned that, without corrective action, a brain drain into the contractor workforce would result.” (*Report to the President on Government Contracting for Research and Development* (Bell Report), in *Systems Development and Management: Hearings Before a Subcommittee of the Committee on Government Operations*, House of Representatives, 87th Congress, 191-263 app. I (1962), cited in Dan Guttman, “Governance by Contract: Constitutional Visions; Time for Reflection and Choice,” *Public Contract Law Journal*, vol. 33, no. 2 (Winter 2004), p. 327.

Document (date)	Policy Statement ^a	Circumstances Under Which Government Performance of a Commercial Function May Be Permitted ^b
Bureau of the Budget Bulletin No. 57-7 (February 5, 1957)	ordinary business channels.” Same as BOB No. 55-4.	Same as BOB No. 55-4.
Bureau of the Budget Bulletin No. 60-2 (September 21, 1959)	Same as BOB No. 55-4. “Because the private enterprise system is basic to the American economy, the general policy establishes a presumption in favor of Government procurement from commercial sources.” ^d	“Compelling reasons for exceptions to the general policy include national security; relatively large and disproportionately higher costs; and clear unfeasibility.” ^e
Bureau of the Budget Circular A-76 (March 3, 1966)	“The guidelines in this Circular are in furtherance of the Government’s general policy of relying on the private enterprise system to supply its needs.”	“A Government commercial or industrial activity may be authorized only under one or more of the following conditions: a. Procurement of a product or service from a commercial source would disrupt or materially delay an agency’s program.... b. It is necessary for the Government to conduct a commercial or industrial activity for purposes of combat support or for individual and unit retraining of military personnel or to maintain or strengthen mobilization readiness. c. A satisfactory commercial source is not available and cannot be developed in time to provide a product or service when it is needed.... d. The product or service is available from another Federal agency.... e. Procurement of the product or services from a commercial source will result in higher cost to the Government....” “In some instances, ... it is in the national interest for the Government to provide directly the products and services it uses.”
Bureau of the Budget Circular A-76 (August 30, 1967)	Same as the March 3, 1966, circular.	Same as the March 3, 1966, circular.
Office of Management and Budget Circular A-76 (March 29, 1979)	“In a democratic free enterprise economic system, the Government should not compete with its citizens. The private enterprise system, characterized by individual freedom and initiative, is the primary source of national economic strength. In recognition of this principle, it has been and continues to be the general policy of the Government to rely on competitive private enterprise to	“No Satisfactory Commercial Source Available.... National Defense.... Higher Cost.” ^f

Document (date)	Policy Statement ^a	Circumstances Under Which Government Performance of a Commercial Function May Be Permitted ^b
Office of Management and Budget Circular A-76 (August 4, 1983)	<p>supply the products and services it needs.”</p> <p>“This policy builds on three equally valid policy precepts: a. <i>Rely on the Private Sector</i>. The Government’s business is not to be in business. Where private sources are available, they should be looked to first to provide the commercial or industrial goods and services needed by the Government to act on the public’s behalf. b. <i>Retain Certain Governmental Functions In-House</i>. Certain functions are inherently governmental in nature, being so intimately related to the public interest as to mandate performance by Federal employees. c. <i>Aim for Economy; Cost Comparisons</i>. When private performance is feasible and no overriding factors require in-house performance, the American people deserve and expect the most economical performance and, therefore, rigorous comparison of contract costs versus in-house costs should be used, when appropriate, to decide how the work will be done.”^f</p> <p>“In the process of governing, the Government should not compete with its citizens. The competitive enterprise system, characterized by individual freedom and initiative, is the primary source of national economic strength. In recognition of this principle, it has been and continues to be the general policy of the Government to rely on commercial sources to supply the products and services the Government needs.”</p> <p>“It is the policy of the United States Government to: a. Achieve Economy and Enhance Productivity. Competition enhances quality, economy, and productivity. Whenever commercial sector performance of a Government operated commercial activity is permissible, in accordance with this Circular and its Supplement, comparison of the cost of contracting and the cost of in-house performance shall be performed to determine who will do the work. b. Retain Governmental Functions In-House. Certain functions are inherently</p>	<p>“a. No Satisfactory Commercial Source Available.... b. National Defense.... c. Patient Care.... d. Lower cost.”^g</p>

Document (date)	Policy Statement ^a	Circumstances Under Which Government Performance of a Commercial Function May Be Permitted ^b
Office of Management and Budget Circular A-76 (August 4, 1983 (revised 1999)) ^h	Governmental in nature, being so intimately related to the public interest as to mandate performance only by Federal employees. These functions are not in competition with the commercial sector. Therefore, these functions shall be performed by Government employees. c. Rely on the Commercial Sector. The Federal Government shall rely on commercially available sources to provide commercial products and services. In accordance with the provisions of this Circular, the Government shall not start or carry on any activity to provide a commercial product or service if the product or service can be procured more economically from a commercial source.” ^f	Same as August 4, 1983 circular.
Commercial Activities Panel, ⁱ Improving the Sourcing Decision of the Government, Final Report (April 2002)	Not applicable.	“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.”
Office of Management and Budget Circular A-76 (May 29, 2003)	“The longstanding policy of the federal government has been to rely on the private sector for needed commercial services. To ensure that the American people receive maximum value for their tax dollars, commercial activities should be subject to the forces of competition.”	Although this revision does not identify any circumstances or conditions under which federal employee performance of a commercial function might be permitted, it provides a means for agencies to exempt commercial functions from being subjected to public-private competition. ^k

Sources: U.S. Bureau of the Budget, “Commercial-Industrial Activities of the Government Providing Products or Services for Governmental Use,” Bulletin No. 55-4, January 15, 1955, p. 1; U.S. Bureau of the Budget, “Commercial-Industrial Activities of the Government Providing Products or Services for Governmental Use,” Bulletin No. 57-7, February 5, 1957, p. 1; U.S. Bureau of the Budget, “Commercial-Industrial Activities of the Government Providing Products or Services for Governmental Use,” Bulletin No. 60-2, September 21, 1959, pp.

1-3; U.S. Bureau of the Budget, "Policies for Acquiring Commercial or Industrial Products and Services for Government Use," Circular No. A-76, March 3, 1966, pp. 1-3; U.S. Bureau of the Budget, "Policies for Acquiring Commercial or Industrial Products and Services for Government Use," Circular No. A-76 (Revised), August 30, 1967, pp. 1-3; U.S. Office of Management and Budget, "Acquiring of Commercial or Industrial Products and Services Needed by the Government; Policy Revision," 44 *Federal Register* 20557-20559, April 5, 1979 (This is the March 29, 1979 revision of Circular A-76.); U.S. Office of Management and Budget, "Issuance of OMB Circular No. A-76 (Revised) 'Performance of Commercial Activities,'" 48 *Federal Register* 37114-37115, August 16, 1983 (This is the August 4, 1983 revision of Circular A-76.); U.S. Office of Management and Budget, "Performance of Commercial Activities," Circular No. A-76, August 4, 1983 (Revised 1999), p. 1; U.S. Office of Management and Budget, "Performance of Commercial Activities," Circular No. A-76 (Revised), May 29, 2003, at http://www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a076/a76_incl_tech_correction.pdf; Commercial Activities Panel, *Improving the Sourcing Decisions of the Government, Final Report*, April 2002, p. 46, at <http://archive.gao.gov/f0502/a03209.pdf>.

Notes:

- a. If the document includes, in addition to the policy statement, relevant explanatory material, the additional material is included here.
- b. These are the circumstances identified explicitly in the document. Under the 1966 circular and each revision, federal employees may perform a commercial function if the outcome of the public-private competition indicates that the work should be performed by federal employees.
- c. When reviewing commercial activities, several rules, including the following, applied: "In determining whether an activity is 'commercial' in nature and 'could be procured ... through ordinary business channels,' reference may be made to ordinary business practice with respect to procurement of services or products. The inclusion of an activity in the manual will be generally considered indicative that it may be procured commercially. There will be excluded from coverage as noncommercial, however, those functions which are a part of the normal management responsibilities of a Government agency or a private business of comparable size (such as accounting, personnel work, and the like)." (U.S. Bureau of the Budget, "Commercial-Industrial Activities of the Government Providing Products or Services for Governmental Use," Bulletin No. 55-4, January 15, 1955, p. 2.)
- d. Although this statement does not appear in the paragraph labeled "Policy," it reveals the fundamental reason for the presumption in favor of using the private sector to supply the government.
- e. (1) "There are instances ... when for reasons of national security, an activity cannot be turned over to private industry. These activities may include, but are not necessarily limited to, functions which must be performed by Government personnel in order to provide them with vital training and experience for maintaining combat units in readiness..." (2) "Continuation of Government operation on the ground that procurement through commercial sources would involve higher costs may be justified only if the costs are analyzed on a comparable basis and the differences are found to be substantial and disproportionately large..." (3) "Certain products or services may be found to be clearly unfeasible to procure from private enterprise through ordinary business channels due to the fact that the product or service is: (1) An integral function of the basic mission of the agency, or (2) Not available in the particular instance, nor likely to become available commercially in the foreseeable future because of the Government's unique or highly specialized requirements or geographic isolation of the installation, or (3) Administratively impractical to contract for commercially." (U.S. Bureau of the Budget, "Commercial-Industrial Activities of the Government Providing Products or Services for Governmental Use," Bulletin No. 60-2, September 21, 1959, pp. 2-4.)
- f. Italics in original.
- g. Although the 1979 circular uses the term "higher cost" and the 1983 circular uses the term "lower cost," the meaning, as follows, is the same in both circulars: government performance of a commercial function is authorized if the cost of agency performance is lower than the cost of contractor performance.
- h. OMB has noted that it was the supplement to Circular A-76—not the circular itself—that was revised in 1999. (U.S. Office of Management and Budget, "Performance of Commercial Activities," 67 *Federal Register* 69771, November 19, 2002.)
- i. There are two differences between the policy statements of the 1983 revision and the 1999 revision. Under the heading Achieve Economy and Enhance Productivity, the 1999 revision includes an additional sentence, which reads as follows: "When conducting cost comparisons, agencies must ensure that all costs are considered and that these costs are realistic and fair." Under the heading Rely on the Commercial Sector,

- the 1999 revision includes the following reference to the supplement to Circular A-76: “In accordance with the provisions of this Circular and its Supplement, the Government....” (U.S. Office of Management and Budget, *Circular No. A-76*, August 4, 1983 (Revised 1999), pp. 1-2.) (Underlining included in original.)
- j. See “Commercial Activities Panel’s Sourcing Principles” for additional information about the panel.
 - k. Pursuant to the Federal Activities Inventory Reform (FAIR) Act (P.L. 105-270), each agency subject to the statute is required to submit an inventory of its commercial functions to OMB annually. For each function listed, an agency applies the appropriate reason code, which indicates whether the function is eligible or is not eligible for a Circular A-76 competition. Reason code A is used to identify a commercial function that “is not appropriate for private sector performance pursuant to a written determination by the [agency’s] CSO [competitive sourcing official].” Agencies are required to make the written justifications available to OMB and the public if requested to do so. (U.S. Office of Management and Budget, *Circular No. A-76 (Revised)*, May 29, 2003, p. A-3, at http://www.whitehouse.gov/sites/default/files/omb/assets/about_omb/a76_incl_tech_correction.pdf.)

Although either government employees or contractor employees may perform commercial functions, government reliance on the private sector has been the foundation of written sourcing policy, as shown by the material presented in **Table 2**. Some observers would suggest that contractor performance has been considered the rule while federal employee performance of commercial activities has been treated as an exception. The presumption of, or preference for, contractor performance, they would add, is supported by the following language, which is contained in the policy statement in Circular A-76:

A [public-private] competition is not required for private sector performance of a *new requirement*.... Before government personnel may perform a *new requirement*, a [public-private] competition shall be used to determine whether government personnel should perform the commercial activity.²⁹

In sum, if an agency has a new function (i.e., a new requirement) to perform, it may procure the services of a contractor, in accordance with applicable statutes and the Federal Acquisition Regulation (FAR). If, instead, the agency considers using its employees to perform the work, then it must conduct a public-private competition, which will determine whether federal employees or contractor employees will perform the work.

Several of the documents listed in **Table 2** provide a similar rationale—the importance of the nation’s private enterprise system—for government reliance on the private sector. BOB Bulletin 60-2 states that, “[b]ecause the private enterprise system is basic to the American economy, the general policy establishes a presumption in favor of Government procurement from commercial sources.”³⁰ Circular A-76 (1979 revision) echoed the theme found in Bulletin 60-2, stating that the private sector “is the primary source of national economic strength.”³¹ The same reference to

²⁹ U.S. Office of Management and Budget, “Performance of Commercial Activities,” Circular No. A-76 (*Revised*), May 29, 2003, p. 2. (Italics added to aid in identifying relevant language.) A new requirement is an “agency’s newly established need for a commercial product or service that is not performed by (1) the agency with government personnel; (2) a fee-for-service agreement with a public reimbursable source; or (3) a contract with the private sector. An activity that is performed by the agency and is reengineered, reorganized, modernized, upgraded, expanded, or changed to become more efficient, but still essentially provides the same service, is not considered a new requirement. New ways of performing existing work are not new requirements.” (Ibid., pp. D-6-D-7.)

³⁰ U.S. Bureau of the Budget, “Commercial-Industrial Activities of the Government Providing Products or Services for Governmental Use,” Bulletin No. 60-2, September 21, 1959, p. 1.

³¹ U.S. Office of Management and Budget, “Acquiring of Commercial or Industrial Products and Services Needed by the Government; Policy Revision,” 44 *Federal Register* 20557-20558, April 5, 1979 (This is the March 29, 1979, revision of Circular A-76.)

the importance of the private sector also appeared in the 1983 and 1999³² revisions of Circular A-76.

The 2003 revision to Circular A-76 does not include a rationale for relying on the private sector, but it does acknowledge that reliance on the private sector for commercial services has been the longstanding policy of the federal government. At the time this revision was published, OMB offered the following explanation regarding the absence of a statement about governmental reliance on the private sector:

Deletion of the “reliance” statement from the revised Circular is not intended to denigrate this contribution.³³ Nor does this action signal a retreat from the Administration’s commitment to a market-based government that is unafraid of competition, innovation, and choice. The deletion is simply meant to avoid a presumption that the government should not compete for work to meet its own needs. Such a suggestion conflicts with the Circular’s main function of providing policies and procedures to determine the best service provider—irrespective of the sector the provider represents.³⁴

The justification for competitive sourcing found in the 2003 revision is based partly on market ideology and partly on financial considerations. It states, “To ensure that the American people receive maximum value for their tax dollars, [agencies’] commercial activities should be subject to the forces of competition.”³⁵

Despite this difference from statements in previous versions of Circular A-76, the presumption in favor of private sector performance of commercial activities and a belief in the importance of the private sector as a rationale for competitive sourcing remain, at least for some. Two similar bills introduced during the 112th Congress, H.R. 1474 and S. 785, appear to reflect this perspective. H.R. 1474, Freedom from Government Competition Act of 2011, states, in part, the following:

In the process of governing, the Federal Government should not compete with its citizens. The competitive enterprise system, characterized by individual freedom and initiative, is the primary source of national economic strength. In recognition of this principle, it has been and continues to be the general policy of the Federal Government—(1) to rely on commercial sources to supply the products and services the Government needs; (2) to refrain from providing a product or service if the product or service can be procured more economically from a commercial sources; and (3) to utilize Federal employees to perform inherently governmental functions....³⁶

The material in **Table 2** also shows that, with the exception of the 2003 circular, sourcing policy documents acknowledged the need for, and permitted, exceptions to the policy of governmental reliance on the private sector for the provision of commercial goods and services. Among the reasons cited for permitting exceptions are national security, public interest, cost, disruption to an

³² The 1999 version may not be referred to as such. The title page of the 1999 version includes the following: “(August 4, 1983 (revised 1999)).”

³³ The words “this contribution” refers to the following statement by OMB: “Without the private sector, the government would not be able to meet the many needs of our citizenry.” (U.S. Office of Management and Budget, “Performance of Commercial Activities,” 68 *Federal Register* 32136, May 29, 2003.)

³⁴ *Ibid.*

³⁵ U.S. Office of Management and Budget, “Performance of Commercial Activities,” Circular No. A-76 (Revised), May 29, 2003, p. 1.

³⁶ Sec. 4(a) of H.R. 1474 (112th Congress).

agency's program. Particular functions singled out for federal employee performance were combat support, patient care, and national defense. For its part, the Commercial Activities Panel (CAP) noted that federal employees need to perform "certain warfighting, judicial, enforcement, regulatory, ... policymaking ..." and acquisition functions.³⁷ Thus, while governmental reliance on the private sector has been embedded in written sourcing policy since the 1950s, so, too, has the acknowledgment (and associated exemptions) that, under certain circumstances, federal employee performance of commercial activities may be preferable to contractor performance.

Recent Developments in the History of Sourcing Policy

Competitive Sourcing

The historically predominant strain of sourcing policy—which focuses on governmental reliance on the private sector, Circular A-76, and public-private competitions³⁸—was designated one of the components of President George W. Bush's President's Management Agenda (PMA), and, as such, was named competitive sourcing.³⁹ The Administration viewed competitive sourcing as "the process of opening the government's commercial activities to the discipline of competition"⁴⁰ and envisioned that "[o]pening Government functions to competition to the fullest extent possible is the best way to ensure market-based pricing and encourage innovation...."⁴¹ The Administration's plans for competitive sourcing included "[e]xpanding [the number of] A-76 competitions."⁴² To that end, in early 2001, the Office of Management and Budget directed agencies to conduct public-private competitions, or direct conversions,⁴³ for at least 5% of the full-time equivalents⁴⁴

³⁷ Commercial Activities Panel, *Improving the Sourcing Decisions of the Government, Final Report*, April 2002, p. 46, at <http://archive.gao.gov/f0502/a03209.pdf>. For more information about the panel, see "Commercial Activities Panel's Sourcing Principles."

³⁸ Generally, public-private competitions have involved subjecting an agency's commercial activity to a competition, the outcome of which will determine whether agency employees continue to perform the work, or a contractor will take over the function (for the duration of the contract awarded by the agency).

³⁹ An example of the focus on competing agencies' functions (commercial activities) may be found in a statutory provision that authorized the establishment of the Commercial Activities Panel (CAP). Convened by the Comptroller General pursuant to Section 832 of P.L. 106-398, Floyd D. Spence National Defense Authorization Act of FY2001, the Commercial Activities Panel was directed "to study the policies and procedures governing the transfer of commercial activities for the Federal Government from Government personnel to a Federal contractor...." (Sec. 832(a) of P.L. 106-398.)

⁴⁰ U.S. Office of Management and Budget, "Performance of Commercial Activities," 67 *Federal Register* 69772, November 19, 2002, at <http://www.gpo.gov/fdsys/pkg/FR-2002-11-19/pdf/02-29472.pdf>. OMB's reports on competitive sourcing touted the net savings, cost avoidance, and performance improvements that resulted from public-private competitions. For example, see U.S. Office of Management and Budget, *Report on Competitive Sourcing Results, Fiscal Year 2006*, May 2007, at http://www.whitehouse.gov/sites/default/files/omb/assets/procurement/cs_report_fy2006.pdf.

⁴¹ Executive Office of the President, *A Blueprint for New Beginnings, A Responsible Budget for America's Priorities* (Washington: GPO, 2001), p. 181, at <http://www.gpoaccess.gov/usbudget/fy02/pdf/blueprnt.pdf>.

⁴² Mitchell E. Daniels, Jr., Director, U.S. Office of Management and Budget, "Performance Goals and Management Initiatives for the FY2002 Budget," memorandum M-01-11, February 14, 2001, p. 1 (attachment), at http://www.whitehouse.gov/omb/memoranda_m01-11/.

⁴³ Some Circular A-76 revisions issued prior to 2003 permitted an agency to convert a commercial activity with 10 or fewer full-time equivalents to contract, in-house, or interservice support agreement performance without conducting a (continued...)

[FTEs] listed on their commercial activities inventories in FY2002.⁴⁵ At the same time, OMB noted that the President was committed to subjecting “at least one-half of the Federal positions [FTEs] listed” on FAIR Act inventories to public-private competitions.⁴⁶ A little over two years later, the Administration dropped its government-wide competitive sourcing goals in favor of agency-specific targets, according to the head of the Office of Federal Procurement Policy.⁴⁷

The PMA included a scorecard for tracking each agency’s progress on the PMA initiatives. In December 2003, for example, OMB described the criteria an agency was required to fulfill in order to receive a “green” rating for competitive sourcing.

“An agency will earn a ‘green’ status when it has:

- an OMB approved ‘green’ competition plan to compete commercial activities available for competition
- publicly announced standard competitions in accordance with the schedule outlined in the agency ‘green’ competition plan
- since January 2001, completed at least 10 competitions (no minimum number of positions required per competition)
- in the past year, completed 90% of all standard competitions in a 12-month time frame
- in the past year, completed 95% of all streamlined competitions in a 90-day timeframe
- in the past year, canceled fewer than 10% of publicly announced standard and streamlined competitions
- OMB-approved justifications for all categories of commercial activities exempt from competition.”⁴⁸

(...continued)

public-private competition. (U.S. Office of Management and Budget, *Circular No. A-76 Revised Supplemental Handbook, Performance of Commercial Activities*, March 1996, p. 4, at http://www.whitehouse.gov/sites/default/files/omb/assets/agencyinformation_circulars_procurement_pdf/a076supp.pdf.)

⁴⁴ A full-time equivalent is “[t]he staffing of Federal civilian employee positions, expressed in terms of annual productive work hours (1,776)...” (U.S. Office of Management and Budget, “Performance of Commercial Activities,” Circular No. A-76 (Revised), May 29, 2003, p. D-5.)

⁴⁵ Sean O’Keefe, Deputy Director, U.S. Office of Management and Budget, “Performance Goals and Management Initiatives for the FY2002 Budget,” memorandum M-01-15, March 9, 2001, p. 1, at <http://www.idmanagement.gov/smartcard/information/m01-15.pdf>. The Bush Administration’s competitive sourcing targets may have been only the second time an Administration imposed targets, or goals, for conducting public-private competitions. In Executive Order 12615, President Ronald Reagan required agencies, beginning in FY1989, to “conduct annual studies [competitions] of not less than 3 percent of the department or agency’s total civilian population, until all identified potential commercial activities have been studied.” (Executive Order 12615, “Performance of Commercial Activities,” 52 *Federal Register* 44853, November 23, 1987.)

⁴⁶ O’Keefe, “Performance Goals and Management Initiatives for the FY2002 Budget,” p. 1.

⁴⁷ U.S. Congress, Senate Committee on Governmental Affairs, Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, *Then and Now: An Update on the Bush Administration’s Competitive Sourcing Initiative*, 108th Cong., 1st sess., July 24, 2003, S.Hrg. 108-244 (Washington: GPO, 2004), p. 61.

⁴⁸ Clay Johnson III, Deputy Director for Management, U.S. Office of Management and Budget, “Development of (continued...) ”

As mentioned above, whereas the FAIR Act only required agencies to submit inventories of their commercial activities to OMB, the Bush Administration imposed a similar requirement regarding inherently governmental functions. An OMB memorandum dated April 3, 2001, requested agencies to submit a report that listed their inherently governmental positions when they submitted their FAIR Act commercial activities inventories.⁴⁹ This requirement continued throughout the Bush Administration.⁵⁰

In a major undertaking, OMB completed a revision of Circular A-76 in 2003. The result is a circular that includes, for example, the inventory process for commercial activities and inherently governmental functions; two types of competitions (standard and streamlined);⁵¹ and a provision allowing the use of negotiated contracting, such as a lowest price technically acceptable source selection, or tradeoff source selection process under certain circumstances.⁵² Another change was the exclusion of language that had appeared in the 1999 circular that had explicitly permitted government performance of national defense and patient care commercial activities, and in circumstances where a satisfactory commercial source was not available. A comprehensive summary of changes made to the circular may be found in the *Federal Register* notice that accompanied the publication of the 2003 revision.⁵³

Some commentators might suggest that the Bush Administration did not support the possibility that work performed by a contractor could be subjected to public-private competition. Section 842(b) of H.R. 3058, which was enacted as P.L. 109-115, Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act for FY2006, directed that Circular A-76 contain procedures for subjecting activities performed by contractors to public-private competitions (with the possibility that a competition could result in insourcing).⁵⁴ The text of Section 842(b) is as follows:

(...continued)

‘Green’ Plans for Competitive Sourcing,” memorandum, December 22, 2003, p. 3 (Attachment B), at http://www.whitehouse.gov/sites/default/files/omb/procurement/comp_sourc-green_plans122203.pdf.

⁴⁹ O’Keefe, “Year 2001 Inventory of Commercial Activities,” p.1.

⁵⁰ For example, see Angela B. Styles, Administrator, Office of Federal Procurement Policy, “Year 2002 Inventory of Commercial Activities,” memorandum M-02-04, February 27, 2002, pp. 1-2, at <http://www.whitehouse.gov/sites/default/files/omb/memoranda/m02-04.pdf>; Angela B. Styles, Administrator, Office of Federal Procurement Policy, “Year 2003 Inventories of Commercial and Inherently Governmental Activities,” memorandum M-03-09, March 14, 2003, p. 1, at http://www.whitehouse.gov/omb/memoranda_m03-09/; Clay Johnson III, Deputy Director for Management, U.S. Office of Management and Budget, “2004 Inventories of Commercial and Inherently Governmental Activities,” memorandum M-04-09, April 6, 2004, p. 1, at <http://georgewbush-whitehouse.archives.gov/omb/memoranda/fy04/m04-09.pdf>; Paul A. Denett, Administrator, Office of Federal Procurement Policy, “2007 Inventories of Commercial and Inherently Governmental Activities,” memorandum M-07-14, May 3, 2007, p. 1, at <http://georgewbush-whitehouse.archives.gov/omb/memoranda/fy2007/m07-14.pdf>.

⁵¹ If a commercial activity has 65 or fewer full-time equivalents (FTEs), the agency may use either a streamlined competition, or a standard competition. If a commercial activity has more than 65 FTEs, the agency is required to use a standard competition. (U.S. Office of Management and Budget, “Performance of Commercial Activities,” Circular No. A-76 (revised), May 29, 2003, p. B-1.)

⁵² Generally, prior to the 2003 revision, source selection decisions were made on the basis of cost. The 2003 revision permits, for example, the use of lowest price technically acceptable source selection, which means the “performance decision shall be based on the lowest cost of all offers and [agency] tenders determined to be technically acceptable,” or the tradeoff source selection process (under certain circumstances) when an agency “wishes to consider” non-cost, or non-price, factors, in addition to cost, or price, when making a source selection decision. (Ibid., pp. B-13-B-14.)

⁵³ See U.S. Office of Management and Budget, “Performance of Commercial Activities,” May 29, 2003, pp. 32134-32142.

⁵⁴ Unlike other terms common to sourcing policy, such as *inherently governmental* and *commercial*, it appears that (continued...)

Nothing in Office of Management and Budget Circular A-76 shall prevent the head of an executive agency from conducting a public-private competition to evaluate the benefits of converting work from contract performance to performance by Federal employees in appropriate instances. The Circular shall provide procedures and policies for these competitions that are similar to those applied to competitions that may result in the conversion of work from performance by Federal employees to performance by a contractor.

The Bush Administration's response to this provision provides some insight into its views on the matter. As reported in a 2005 *Federal Times* article, an OMB official at the time offered the following comments: "'We believe the insourcing language [in H.R. 3058, which was enacted as P.L. 109-115] is unnecessary.... We will continue to provide for fair and reasonable processes for agencies to consider insourcing when it can benefit taxpayers.... However we have no plans to alter the focus of the competitive sourcing initiative to emphasize insourcing.'"⁵⁵ No changes were made to Circular A-76 following the enactment of H.R. 3058.

Commercial Activities Panel's Sourcing Principles

In early 2001, during the same period that the Bush Administration launched its competitive sourcing initiative, the Comptroller General, as directed by statute, convened what came to be called the Commercial Activities Panel (CAP). The panel included, among others, the Administrator of OFPP, the Director of the Office of Personnel Management (OPM), the Under Secretary of Defense for Acquisition, Technology and Logistics, and the heads of the American Federation of Government Employees and the National Treasury Employees Union.⁵⁶

Section 832 of P.L. 106-398, Floyd D. Spence National Defense Authorization Act of FY2001, tasked the panel with "study[ing] the policies and procedures governing the transfer of commercial activities for the Federal Government from Government personnel to a Federal contractor" and producing a report on the results of its study. In addition to addressing these policies and procedures, the panel developed "a set of principles that it believes should guide sourcing policy."⁵⁷

The Panel believes that federal sourcing policy should:

1. Support agency missions, goals, and objectives.
2. Be consistent with human capital practices designed to attract, motivate, retain, and reward a high performing federal workforce.
3. Recognize that inherently governmental and certain other functions should be performed by federal workers.

(...continued)

there is no governmentwide definition of *insourcing*. Fundamentally, to insource a function is to shift work that is being performed, or has been performed, by a contractor to a federal agency.

⁵⁵ Tichakorn Hill, "OMB Rebuffs Provision to Bring Contracted Work Back In House," *Federal Times.com*, July 27, 2005. (This article is no longer available from the *Federal Times* website.)

⁵⁶ For a complete list of members of the panel, see the final report, at <http://archive.gao.gov/f0502/a03209.pdf>.

⁵⁷ Commercial Activities Panel, *Improving the Sourcing Decisions of the Government*, p. 33.

4. Create incentives and processes to foster high-performing, efficient, and effective organizations throughout the federal government.
5. Be based on a clear, transparent, and consistently applied process.
6. Avoid arbitrary full-time equivalent (FTE) or other arbitrary numerical goals.
7. Establish a process that, for activities that may be performed by either the public or the private sector, would permit public and private sources to participate in competitions for work currently performed in-house, work currently contracted to the private sector, and new work, consistent with these guiding principles.
8. Ensure that, when competitions are held, they are conducted as fairly, effectively, and efficiently as possible.
9. Ensure that competitions involve a process that considers both quality and cost factors.
10. Provide for accountability in connection with all sourcing decisions.⁵⁸

Statutory Requirement for Agencies to Develop Insourcing Guidelines

Whereas competitive sourcing was a hallmark of the Bush Administration and component of the President's Management Agenda, his successor's first year in office saw the enactment of a provision involving insourcing. This was a significant development since, as indicated above, the Bush Administration did not appear to support the possibility that work performed by a contractor could, or should, be insourced. Pursuant to Section 736 (Division D) of P.L. 111-8, Omnibus Appropriations Act for FY2009, civilian agencies are required to draft and implement their own insourcing guidelines and procedures.

Section 736 (Division D) of P.L. 111-8,⁵⁹ amends Section 739 (Division D) of P.L. 110-161, Consolidated Appropriations Act of FY2008. To aid in tracking the changes effected by Section 736, which struck Section 739(b) and inserted new language, the following convention is used in this report: Section 739(b) of P.L. 110-161, as amended. The following is a summary of Section 739, as amended.

General Consideration of Federal Employee Performance

Each agency's guidelines are to include instructions or procedures that ensure that consideration is given, on a regular basis, to using federal employees to perform new functions and functions being performed by contractor employees that could be performed by agency employees.⁶⁰

⁵⁸ Ibid., pp. 6-9.

⁵⁹ This provision does not apply to the Department of Defense (DOD). (Sec. 739(b)(6) of P.L. 110-161, as amended.) Section 324 of P.L. 110-181, National Defense Authorization Act for FY2008, added Section 2463 to Title 10 of the U.S. Code, which requires the Under Secretary of Defense for Personnel and Readiness to develop and implement insourcing guidelines.

⁶⁰ Sec. 739(b)(1) of P.L. 110-161, as amended.

Special Consideration of Federal Employee Performance

As part of their insourcing guidelines, agencies are required to include guidance and procedures for providing special consideration to using agency employees to perform certain types of functions.⁶¹ This list includes any function that

1. is being performed by a contractor and that has been performed at any time by government employees within the past 10 years;
2. is closely associated with the performance of an inherently governmental function;
3. “has been performed pursuant to a contract awarded on a non-competitive basis”;
or
4. using criteria specified in this provision, has been performed poorly.⁶²

An agency is to give special consideration to using federal employees for any new requirement, and particularly for a new requirement that is closely associated with an inherently governmental function, or is similar to an activity that federal employees performed previously.⁶³

Precluding Public-Private Competition under Certain Circumstances

Although Sec. 739(b)(3) of P.L. 110-161, as amended, does not address insourcing directly or explicitly, it does involve federal employee performance of agency functions. This provision prohibits conducting a public-private competition before the agency (1) “assign[s] the performance of [a new agency] function to Federal employees”; (2) “convert[s] [any agency function where special consideration was given to using federal employees] to performance by Federal employees”; or, (3) “expand[s] the scope of [a] function” performed by federal employees.⁶⁴

Deadline for Agencies

Agencies were required to implement their guidelines and procedures within 120 days after the date of enactment of Section 736 (Division D) of P.L. 111-8.⁶⁵ (The date of enactment was March 11, 2009.) The Government Accountability Office (GAO) reported that, as of July 9, 2009, none of the nine civilian agencies it had visited had finalized their guidelines.⁶⁶ Among the reasons agencies gave for not meeting the deadline were that they had been waiting for OMB to issue

⁶¹ A statutory provision precludes agencies from subjecting agency functions to public-private competition under certain circumstances. An agency “may not conduct a public-private competition under ... Circular A-76 or any other provision of law or regulation before—(A) in the case of a new agency function, assigning the performance of the function to Federal employees; (B) in the case of any agency function described in [Section 739(b)(2)], converting the function to performance by Federal employees; or (C) in the case of an agency function performed by Federal employees, expanding the scope of the function.” (Sec. 739(b)(3) of P.L. 110-161, as amended.)

⁶² Sec. 739(b)(2)(A) of P.L. 110-161, as amended.

⁶³ Sec. 739(b)(2)(B) of P.L. 110-161, as amended.

⁶⁴ Sec. 739(b)(3) of P.L. 110-161, as amended.

⁶⁵ Sec. 739(b)(4) of P.L. 110-161, as amended.

⁶⁶ U.S. Government Accountability Office, *Civilian Agencies’ Development and Implementation of Insourcing Guidelines*, p. 6.

insourcing guidance (which occurred in July 2009), or they did not have sufficient capacity to address “multiple management initiatives” while also performing their regular duties.⁶⁷

OMB Memorandum on Multi-Sector Workforce Management

With the release of an OMB memorandum, in July 2009, regarding the multi-sector workforce, the Obama Administration initiated a systematic effort to develop policy and guidance for managing a workforce that consists of both federal employees and government contractors.⁶⁸ Recognizing that each sector’s workforce contributes to the work of the federal government, OMB advised that “[c]urrent policies and practices must be improved so that agencies consistently identify the proper role of each sector and achieve the best mix of public and private labor resources to serve the American people.”⁶⁹ This approach, which focuses on the appropriate composition of the government’s multi-sector workforce, marks a significant change from an emphasis on competitive sourcing.

Of particular concern to the Administration, and others, was the possibility that contractor employees might be performing inherently governmental work. Inherently governmental functions are reserved for performance by federal employees. President Barack Obama summarized the issue, as follows, in his March 2009 memorandum on government contracting:

Government outsourcing for services also raises special concerns. For decades, the Federal Government has relied on the private sector for necessary commercial services used by the Government, such as transportation, food, and maintenance. Office of Management and Budget Circular A-76, first issued in 1966, was based on the reasonable premise that while inherently governmental activities should be performed by Government employees, taxpayers may receive more value for their dollars if non-inherently governmental activities that can be provided commercially are subject to the forces of competition. However, 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.⁷⁰

Concerns regarding the proper role of contractors, or, alternatively, concerns regarding the ability of agencies to retain control over their operations, including the performance of inherently

⁶⁷ Ibid., pp. 6-7. OMB required each agency subject to its July 29, 2009, memorandum on the multi-sector workforce to “[c]onduct a pilot human capital analysis of at least one program, project, or activity, where the agency has concerns about the extent of reliance on contractors.” (Orszag, “Managing the Multi-Sector Workforce,” p. 2.)

⁶⁸ The memorandum is available at http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_fy2009/m-09-26.pdf.

⁶⁹ Orszag, “Managing the Multi-Sector Workforce,” p. 1.

⁷⁰ President Barack Obama, “Government Contracting,” memorandum, March 4, 2009, p. 2, at http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-Subject-to-Government. In a July 2009 memorandum, the Director of OMB expanded on President Obama’s comments: “In particular, overreliance on contractors can lead to the erosion of the in-house capacity that is essential to effective government performance. Such overreliance has been encouraged by one-sided management priorities that have publicly rewarded agencies for becoming experts in identifying functions to outsource and have ignored the costs stemming from loss of institutional knowledge and capability and from inadequate management of contracted activities.” (Orszag, “Managing the Multi-Sector Workforce,” p. 1.)

governmental functions, were raised previously by the Acquisition Advisory Panel.⁷¹ In its final report, the panel summarized the issue as follows:

... [A]lthough federal law prohibits contracting for activities and functions that are inherently governmental, uncertainty about the proper scope and application of this term has led to confusion, particularly with respect to service contracting outside the ambit of OMB Circular A-76. Moreover, as the federal workforce shrinks, there is a need to assure that agencies have sufficient in-house expertise and experience to perform critical functions, make critical decisions, and manage the performance of their contractors.⁷²

In its memorandum, OMB required agencies (1) to develop a framework for managing the multi-sector workforce; (2) conduct “a pilot human capital analysis”; and (3) comply with OMB guidance in developing their insourcing guidelines and procedures. The following subsections contain summaries of these three requirements.

Later guidance found in OFPP’s Policy Letter 11-01, which was published subsequently in the *Federal Register*, does not appear to be entirely consistent with the guidance in this memorandum. (See below for a brief discussion of the policy letter.) However, it seems likely that agencies are expected to make sourcing determinations based on the policy letter, though whether OMB (or OFPP) has explicitly addressed the existence of two sets of guidance and reconciled the differences is unknown.

Framework for Managing the Multi-Sector Workforce

OMB’s framework comprises workforce planning, sourcing determination, and management. Under workforce planning, an agency reviews its mission, goals, functions, workload, and desired performance standards to determine its workforce needs, specifically the size and skills of its workforce. Next, agency personnel determine which functions must be performed by federal employees, and which ones may be performed by either federal employees or contractor employees. OMB provides a table with three categories of functions—inherently governmental, critical, and essential—and indicates, for each category, which sector may perform the work. If the table indicates that either federal employees or contractors may do the work, then the agency is required to conduct a cost analysis “that addresses the full costs of government and private sector performance and provides ‘like comparisons’ of costs that are of a sufficient magnitude to influence the final decision on the most cost effective” option.⁷³

Management, the third component of OMB’s framework, involves facilitating collaboration across the agency, providing for processes that address and integrate the interests and needs of organizational components involved in managing the multi-sector workforce, and ensuring that the agency’s senior leadership is engaged in multi-sector workforce management.⁷⁴

⁷¹ Section 1423 of the Services Acquisition Reform Act (SARA) of 2003, which was enacted as part of P.L. 108-136, National Defense Authorization Act, FY2004, authorized the establishment of this panel. It is also known as the “SARA panel.”

⁷² Acquisition Advisory Panel, Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress, p. 392.

⁷³ Orszag, “Managing the Multi-Sector Workforce,” pp. 1-2 (attachment 1).

⁷⁴ Ibid., p. 2 (attachment 1).

Multi-Sector Workforce Pilot

Each agency that is subject to the Chief Financial Officers Act was required to conduct a pilot human capital analysis of “at least one organization, program, project or activity ... where there are concerns about the extent of reliance on contractors and take appropriate steps to address any identified weaknesses.”⁷⁵ Conducting the analysis involves reviewing the multi-sector management framework, identifying an agency official “who will be responsible for the pilot,” “select[ing] an organization for study,” developing an inventory of the workforce that currently performs the function to be studied, analyzing the difference between the configuration of the incumbent workforce and the configuration of the desired workforce (“gap analysis”), and documenting the procedures and tools used in carrying out the analysis.⁷⁶ After performing the gap analysis, if an agency had identified a discrepancy between the status quo and the optimal configuration of the workforce, the agency was to develop plans to remedy the situation. OMB noted, by way of example, that a remedy might involve bolstering contract management, recruiting and hiring additional federal employees, or insourcing.⁷⁷ Each agency was to report on its pilot(s) to OMB by April 30, 2010.⁷⁸

OMB reported in December 2009 that 24 agencies had launched pilot projects.⁷⁹ Approximately one-third of the pilots involved acquisition offices or functions, and another third involved information technology functions. The remaining pilots involved a variety of functions, such as federal financial audits, management support, and foreign labor certification processing.⁸⁰ Most of the nine agencies that had IT pilots “reported that they are heavily reliant on contractors and question whether the agency has the ability to maintain control of its mission and operations. Frequent turnover of contractors at some of the agencies has caused further concern that institutional and technical knowledge will be lost.”⁸¹

Insourcing Guidance

As envisioned by the Obama Administration, insourcing is a tool agencies may use to achieve the “best mix” of federal employees and contractor employees.⁸² Although insourcing is not necessarily a new phenomenon,⁸³ it appears that Section 739 (Division D) of P.L. 110-161, as amended, and this OMB memorandum represent an initial effort to develop insourcing policy.

⁷⁵ Ibid., p. 1 (attachment 2)

⁷⁶ Ibid., pp. 1-2 (attachment 2).

⁷⁷ Ibid., p. 2 (attachment 2).

⁷⁸ Ibid., p. 3 (attachment 2).

⁷⁹ U.S. Office of Management and Budget, *Acquisition and Contracting Improvement Plans and Pilots: Saving Money and Improving Government*, December 2009, p. 8, at http://www.whitehouse.gov/sites/default/files/omb/assets/procurement_gov_contracting/Acquisition_Contracting_Improvement_Plans.pdf.

⁸⁰ Ibid., pp. 9-10.

⁸¹ Ibid., p. 9.

⁸² Orszag, “Managing the Multi-Sector Workforce,” p. 1 (attachment 3).

⁸³ A *Federal Times* news article reports that the first insourcing case that involved a public-private competition occurred in the mid-1980s. Officials with the General Services Administration (GSA) believed that a contractor performing building maintenance “was charging too much.” A public-private competition was held, and GSA employees won the competition, “saving GSA millions of dollars.” (Tichakorn Hill, “Competitive Sourcing Manager Also ‘Insourcing’ Advocate,” *Federal Times.com*, January 26, 2006.)

Agency personnel will also need to consult OFPP Policy Letter 11-01, which addresses insourcing and is discussed below.

General Management Responsibilities

The OMB memorandum notes that many agency officials share responsibility for making insourcing decisions; advises agency personnel that they should review contractors' activities on an ongoing basis; and recommends that any inherently governmental work, or unauthorized personal services,⁸⁴ being performed by a contractor be insourced. Additionally, it advises agencies to be ready to develop sufficient in-house capability when "internal control of mission and operations is at risk" because of the use of contractors, and alerts agencies that they must have sufficient resources to manage and oversee contractors.⁸⁵

General Consideration of Federal Employee Performance

Addressing a requirement found in Section 739(b)(2) of P.L. 110-161, as amended, OMB advises agencies that ongoing management reviews that involve the improvement of agency operations should include an evaluation of functions that could be candidates for insourcing.⁸⁶ Notably, OMB states that the evaluation should include "a cost analysis that addresses the full costs of performance and provides 'like comparisons' of relevant costs to determine the most cost effective source of support."⁸⁷ OMB states that a cost analysis is unnecessary in situations where agency managers determine that "performance and risk considerations in favor of federal employee performance will clearly outweigh cost considerations." To assist in determining whether a cost analysis is needed, an agency's insourcing guidelines should include factors to use in evaluating performance and risk considerations and provide examples of factors.⁸⁸

Special Consideration of Federal Employee Performance

The statutory requirement regarding special consideration generally requires an agency to evaluate a specific type of function to determine whether it is a candidate for insourcing.⁸⁹ To aid agencies in determining when a function described in Section 739(b)(2)(A) of P.L. 110-161, as amended, ought to be a candidate for insourcing, OMB provides the following two questions for agencies to use:

⁸⁴ "Personal services contract" means a contract that, by its express terms or as administered, makes the contractor personnel appear to be, in effect, Government employees." (48 C.F.R. § 2.101(a).)

⁸⁵ Orszag, "Managing the Multi-Sector Workforce," pp. 1-2 (attachment 3).

⁸⁶ Another tool that may aid an agency in identifying functions to be considered for insourcing is the agency's own service contract inventory, which is required by Sec. 743 of P.L. 111-117. Sec. 743(e)(4) requires an agency head to use the agency's inventory to "identify contracts that should be considered for conversion to" federal government employee performance or an alternative acquisition approach. Sec. 743(e)(2)(B)-(D) and (E) requires an agency head, upon reviewing the information in the agency's inventory, to ensure that the agency is not using contractor employees to perform inherently governmental functions, or perform critical functions in such a way that the agency's control of its mission and operations could be undermined; is monitoring "functions that are closely associated with inherently governmental functions"; and has established a system for ensuring that activities being performed by contractor employees have not evolved into inherently governmental work.

⁸⁷ Orszag, "Managing the Multi-Sector Workforce," p. 2 (attachment 3).

⁸⁸ *Ibid.*, pp. 2-3 (attachment 3).

⁸⁹ *Ibid.*, p. 3 (attachment 3).

- “Does the fact that the work is performed by contractors cause the agency to lack sufficient internal expertise to maintain control of its mission and operations?” If the agency’s answer is “yes,” then it should begin the insourcing process. If the answer is “no,” then the agency should address the second question.
- “Does preliminary analysis suggest that public sector performance is more cost effective and that it is feasible to hire federal employees to perform the function?” If the agency’s answer is “yes,” then a more detailed analysis of insourcing options should be undertaken. If the agency’s answer is “no,” “the agency should not in-source unless performance and risk considerations in favor of federal employee performance will clearly outweigh cost considerations.”⁹⁰

If an agency’s responses indicate the work should be performed by its employees, but it has encountered difficulties in providing a sufficient in-house workforce, the agency should award a temporary contract and continue its recruiting efforts. The contract continues until federal employees can be hired.⁹¹

Another scenario OMB addressed in its memorandum is when an agency has identified a poorly-performing contractor. The contracting officer must document what the incumbent contractor has done, if anything, to remedy its performance problems. If the contractor has not taken sufficient action to improve performance, the agency has two options: conduct another competition, or consider insourcing. The agency should use the two questions listed above to determine which is the appropriate option.⁹²

Office of Federal Procurement Policy’s Policy Letter 11-01

Another document that may aid agencies in managing their multi-sector workforces is OFPP’s policy letter on inherently governmental and critical functions, which was published in the *Federal Register* on September 12, 2011.⁹³ Written to fulfill a requirement of Section 321 of P.L. 110-417,⁹⁴ Duncan Hunter National Defense Authorization Act of FY2009, and respond to the President’s March 4, 2009, memorandum,⁹⁵ the proposed letter provides definitions of *inherently governmental* and *critical*, and policy and guidance for inherently governmental functions, functions closely associated with inherently governmental functions (“closely associated”), and critical functions. The policy letter

[c]larifies what functions are inherently governmental and must always be performed by Federal employees ... [e]xplains what agencies must do when work is “closely associated” with inherently governmental functions ... [r]equires agencies to identify their ‘critical functions’ in order to ensure they have sufficient internal capability to maintain control over functions that are core to the agency’s mission and operations ... [and] [o]utlines a series of

⁹⁰ Ibid., p. 4 (attachment 3).

⁹¹ Ibid.

⁹² Ibid.

⁹³ The policy letter is available at <http://www.federalregister.gov/articles/2011/09/12/2011-23165/publication-of-the-office-of-federal-procurement-policy-ofpp-policy-letter-11-01-performance-of>.

⁹⁴ 31 U.S.C. § 501 note.

⁹⁵ The March 4, 2009, memorandum on government contracting is available at http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-Subject-Government/.

*agency management responsibilities to strengthen accountability for the effective implementation of these policies.*⁹⁶

An inherently governmental function is “a function that is so intimately related to the public interest as to require performance by Federal Government employees.”⁹⁷ A critical function is “a function that is necessary to the agency being able to effectively perform and maintain control of its mission and operations. Typically, critical functions are recurring and long-term in duration.”⁹⁸

For additional information regarding this policy letter, see CRS Report R42039, *Performance of Inherently Governmental and Critical Functions: The Obama Administration’s Final Policy Letter*, by Kate M. Manuel, L. Elaine Halchin, and Erika K. Lunder.

Policy Issues

Competitive Sourcing, Multi-Sector Workforce Management, and Insourcing

Multi-sector workforce management, as envisioned by the Obama Administration, might be the first systematic effort to address a previously unexamined area, or facet, of sourcing policy. Competitive sourcing, generally, continued the strain of sourcing policy that had been in effect for over 50 years, which promoted reliance on the private sector and public-private competitions for agency work that had been identified as commercial. Sourcing policy history does not indicate, however, that any Administration prior to the Obama Administration had considered whether the policy of reliance on the private sector might have unintended consequences for the federal government, or had facilitated a comprehensive review of agencies’ activities and contractors’ activities with an eye toward mitigating possible adverse consequences. In its final report on federal government acquisition, the Acquisition Advisory Panel stated that “there has been little, if any, attention paid to the ... issue ... [of] whether agencies are inappropriately contracting out functions that, while not necessarily inherently governmental in a strict sense, have traditionally been performed by federal workers and are critical to the performance of the agency’s mission.”⁹⁹

Competitive sourcing and multi-sector workforce management are not necessarily contradictory, or mutually exclusive, policies. Each represents a different, albeit related, facet of sourcing policy. Whereas an emphasis on the importance of the private sector informs competitive sourcing, safeguarding the government’s responsibilities—its missions and operations—underpins multi-sector workforce management. Moreover, the latter approach also (1) expands the circumstances under which federal employees ought to perform, or be permitted to perform, commercial functions (i.e., an agency retains control of its mission and operations); (2) recommends that enhanced government management and oversight of contractors is needed under

⁹⁶ Office of Federal Procurement Policy, “Publication of the Office of Federal Procurement Policy (OFPP) Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions,” pp. 56227-56228. (Italics in original.)

⁹⁷ Ibid., p. 56236.

⁹⁸ Ibid.

⁹⁹ Acquisition Advisory Panel, Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress, p. 399.

certain circumstances; and (3) seeks to ensure that only federal employees perform inherently governmental functions.

Given the longstanding emphasis on governmental reliance on the private sector, the ideas underpinning multi-sector workforce management may be unfamiliar. “Established processes and procedures are geared toward outsourcing,” according to a 2009 GAO publication, and “shifting to insourcing and a ‘total workforce’ approach—that considers both contractors and federal employees—will take time and requires flexibility to meet the needs of any agency within an ever-changing environment.”¹⁰⁰

Although the two approaches to sourcing are not necessarily mutually exclusive, developing a clear, coherent, integrated policy (including implementation guidelines) that strikes a balance between reliance on the private sector and safeguarding the government’s operations and mission might be a challenging undertaking.

Competitive sourcing and multi-sector workforce management share a common problem: the conflation of the name of the policy with a possible outcome of the policy. For example, competitive sourcing is the policy while outsourcing is a specific type of possible outcome. Nevertheless, some might refer to competitive sourcing effort as outsourcing. Similarly, multi-sector workforce management is the policy while insourcing is a specific type of possible outcome. Yet, some observers might conflate the two and refer to the policy as insourcing. The statutory requirement (Section 739(b)(1)(A) of P.L. 110-161, as amended) for agencies to develop insourcing guidelines and OMB’s related guidance (see “Insourcing Guidance”) might contribute to the mislabeling of multi-sector workforce management as *insourcing*. Another possibility is that unfamiliarity with the nuance, details, and complexities of a policy might lead some to adopt an erroneous term. The problem with using *outsourcing* and *insourcing* to refer to competitive sourcing and multi-sector workforce management, respectively, is that they are inaccurate, and thus potentially misrepresent the policy (and associated implementation efforts), which could sow confusion and create misunderstandings. Additionally, depending upon one’s perspective, the misuse of the terms *insourcing* and *outsourcing* could possibly create, or reinforce, negative perceptions of the policies themselves.

To aid in understanding the relationship between policy and outcomes, and several of the key distinctions between competitive sourcing and multi-sector workforce management, **Table 3** displays selected features of these two sourcing policies.

Table 3. Selected Features of Competitive Sourcing and Multi-Sector Workforce Management

Policy	Purpose	Primary Mechanism	Possible Outcomes
Competitive Sourcing - governmental reliance on the private sector	Subject agencies’ commercial activities to competition.	Conduct a public-private competition.	<ul style="list-style-type: none"> - Enter into a fee-for-service agreement.^a - No change in source. - Outsource. - Retain in-house.

¹⁰⁰ U.S. Government Accountability Office, *Civilian Agencies’ Development and Implementation of Insourcing Guidelines*, p. 7.

Policy	Purpose	Primary Mechanism	Possible Outcomes
Multi-Sector Workforce Management – determine the best mix of federal employees and contractors	Determine the appropriate mix, or composition, of agencies’ multi-sector workforces.	Review an agency’s functions and work performed by contractor employees.	- Bolster internal capability. - Establish, or enhance, oversight of contractors. - Insource. - No change in source.

Source: U.S. Office of Management and Budget, “Performance of Commercial Activities,” Circular No. A-76 (Revised), May 29, 2003, at http://www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a076/a76_incl_tech_correction.pdf; President Barack Obama, “Government Contracting,” memorandum, March 4, 2009, at http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-Subject-Government/; Peter R. Orszag, Director, U.S. Office of Management and Budget, “Managing the Multi-Sector Workforce,” July 29, 2009, at http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_fy2009/m-09-26.pdf; Office of Federal Procurement Policy, “Publication of the Office of Federal Procurement Policy (OFPP) Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions,” 76 *Federal Register* 56233, September 12, 2011, at <http://www.gpo.gov/fdsys/pkg/FR-2011-09-12/pdf/2011-23165.pdf>.

Notes:

- a. A fee-for-service agreement is a “formal agreement between agencies, in which one agency provides a service (a commercial activity) for a fee paid by another agency. The agency providing the services is referred to in ... [Circular A-76] as a public reimbursable source.” (U.S. Office of Management and Budget, “Performance of Commercial Activities,” Circular No. A-76 (Revised), May 29, 2003, p. D-5, at http://www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a076/a76_incl_tech_correction.pdf.)

The Federal Government’s Reliance on Contractors

As already discussed, governmental reliance on the private sector has been, and continues to be, a policy of the federal government. Concern has arisen among some observers, though, that reliance on the private sector under certain circumstances might create an unacceptable risk for government agencies.

“Overreliance on contractors” has been identified by the Obama Administration as an issue that warrants attention.¹⁰¹ In his 2009 memorandum on the multi-sector workforce, the Director of OMB advised agencies to “be alert to situations in which excessive reliance on contractors undermines the ability of the federal government to accomplish its missions.”¹⁰² Administration and GAO documents, and academic publications, suggest that each of the following either contribute to excessive reliance on contractors or are consequences of this phenomenon:

¹⁰¹ A GAO report that was published in 2010 catalogued some of the concerns that have arisen regarding reliance on contractors. “Government contracting has more than doubled to reach over \$500 billion annually since [2002]. This increased reliance on contractors to perform agency missions increases the risk that government decisions can be influenced by contractor employees, which can result in a loss of control and accountability. Agencies buy services that range from basic operational support, such as custodial and landscaping, to more complex professional and management support services, which may closely support inherently governmental functions. Such services include acquisition support, budget preparation, and intelligence services. ... The closer contractor services come to supporting inherently governmental functions, the greater this risk of influencing the government’s control over and accountability for decisions that may be based, in part, on contractor work.” (U.S. Government Accountability Office, *Sourcing Policy: Initial Agency Efforts to Balance the Government to Contractor Mix in the Multisector Workforce*, GAO-10-744T, May 20, 2010, p. 3, at <http://www.gao.gov/new.items/d10744t.pdf>.)

¹⁰² Orszag, “Managing the Multi-Sector Workforce,” p. 1.

- Lack of in-house capacity;¹⁰³
- Loss of institutional knowledge;¹⁰⁴
- Inadequate management of contractors and their work;¹⁰⁵
- Contractor performance of inherently governmental functions;¹⁰⁶
- Loss of control over mission and operations, and loss of accountability; or¹⁰⁷
- Restriction on the size of government (“more specifically, [limiting] the number of government employees”).¹⁰⁸

If overreliance exists, it is possible that the Bush Administration’s emphasis on competitive sourcing contributed to this phenomenon. Following the conclusion of President Bush’s tenure, OMB stated that overreliance on contractors was “encouraged by one-sided management priorities that ... publicly rewarded agencies for becoming experts in identifying functions to outsource....”¹⁰⁹ For example, OMB issued memoranda that required agencies to submit

¹⁰³ Ibid. A failure to invest in “human capital planning, recruitment, hiring, and training that are necessary for building strong internal capacity ... [can force agencies] to rely excessively on contractors because internal capacity is lacking.” (Ibid.) GAO echoed this assessment in 2010, writing that “the increased reliance on contractors to perform the work of government is in part attributed to difficulties in hiring for certain hard-to-staff positions, training and retaining government employees.” (U.S. Government Accountability Office, *Sourcing Policy: Initial Agency Efforts to Balance the Government to Contractor Mix in the Multisector Workforce*, p. 8.) The government’s acquisition workforce, which is reportedly understaffed and undertrained, is a notable example of agencies’ reliance on contractors. GAO stated that agencies “have relied increasingly” on contractors for acquisition activities, as “the capacity and capability of the ... acquisition workforce” has failed to keep pace “with increased spending for increasingly complex purchases.” (Ibid.) The lack of sufficient internal capacity has been identified as a chronic problem facing the federal government. In its final report to OFPP and Congress, the Acquisition Advisory Panel “recognized a significant mismatch between the demands placed on the acquisition workforce and the personnel and skills available within that workforce to meet those demands.” (Acquisition Advisory Panel, *Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress*, p. 327.) Steven Schooner and Daniel Greenspahn have noted that “government lacks sufficient qualified acquisition, contract management, and quality control personnel to handle the growth in service contracts, and the existing personnel lack the qualifications and experience necessary for them to perform a complicated, highly discretionary task over extended periods of time.” (Steven L. Schooner and Daniel S. Greenspahn, “Too Dependent on Contractors? Minimum Standards for Responsible Governance,” *Journal of Contract Management*, summer 2008, p. 16.)

¹⁰⁴ Orszag, “Managing the Multi-Sector Workforce,” p. 1.

¹⁰⁵ Ibid. “[T]his problem—pervasive reliance upon contractors without sufficient qualified personnel to properly manage contractual relationships—bedevils the entire federal government.” (Schooner and Greenspahn, “Too Dependent on Contractors? Minimum Standards for Responsible Governance,” p. 17.)

¹⁰⁶ “[T]he 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.” (Obama, “Government Contracting,” p. 1.)

¹⁰⁷ U.S. Government Accountability Office, *Initial Agency Efforts to Balance the Government to Contractor Mix in the Multisector Workforce*, p. 3. The Commission on Wartime Contracting in Iraq and Afghanistan identified a similar list of indicators of overreliance on government contractors. The Commission wrote: “Indicators of over-reliance include contracting that: 1. Extends to functions that law or regulation require government personnel perform, 2. Creates unreasonable risks to mission objectives of other key U.S. interests, 3. Erodes federal agencies’ ability to self-perform core capabilities, or 4. Overwhelms the government’s ability to effectively manage and oversee contractors.” (Commission on Wartime Contracting in Iraq and Afghanistan, *Transforming Wartime Contracting: Controlling Costs, Reducing Risks*, August 2011, p. 19, at http://www.wartimecontracting.gov/docs/CWC_FinalReport-lowres.pdf.)

¹⁰⁸ Schooner and Greenspahn, “Too Dependent on Contractors? Minimum Standards for Responsible Governance,” p. 10.

¹⁰⁹ Orszag, “Managing the Multi-Sector Workforce,” p. 1.

inventories of their inherently governmental activities to OMB; established a governmentwide target for competitive sourcing (which was later revised to agency-specific targets); and assigned color-coded ratings to agencies' competitive sourcing efforts.¹¹⁰

Recognizing some potential pitfalls of relying on government contractors, the Acquisition Advisory Panel observed that “some agencies have contracted out substantive, mission-critical functions, often without considering the potential adverse implications of such a step for the future.”¹¹¹ The panel noted that while there may be advantages to using lead system integrator (LSI) contracts, possible adverse “consequences include the loss of institutional memory, the inability to be certain whether the contractor is properly performing the specified work at a proper price, and the inability to be sure that decisions are being made in the public interest rather than in the interest of the contractors performing the work.”¹¹² GAO has noted that “increased reliance on contractors to perform agency missions increases the risk that government decisions can be influenced by contractor employees, which can result in a loss of control and accountability.... The closer contractor services come to supporting inherently governmental functions, the greater this risk....”¹¹³ Other risks of relying “heavily” on contractors include “[i]nterference with an agency’s ability to accomplish its mission; [h]arm being inflicted upon the public, the government, and others; [l]oss of public confidence in the government; and ... [e]xcessive expenditure of public funds.”¹¹⁴

A Typology of Government Functions

Another development in sourcing policy is the expansion of the typology of government functions. Until the issuance of OFPP’s Policy Letter 11-01 in September 2011, sourcing policy included only a simple dichotomy of functions. An agency function was either inherently governmental or commercial. Policy Letter 11-01 added the categories of critical functions and functions closely associated with inherently governmental functions, thus creating a more nuanced typology that recognizes the complexities of the responsibilities of federal agencies.¹¹⁵

¹¹⁰ Daniels, “Performance Goals and Management Initiatives for the FY2002 Budget”; Sean O’Keefe, Deputy Director, U.S. Office of Management and Budget, “Performance Goals and Management Initiatives for the FY2002 Budget,” memorandum M-01-15, March 9, 2001, at <http://www.whitehouse.gov/sites/default/files/omb/assets/omb/memoranda/m01-15.pdf>; Sean O’Keefe, Deputy Director, U.S. Office of Management and Budget, “Year 2001 Inventory of Commercial Activities,” memorandum M-01-16, April 3, 2001, at <http://www.whitehouse.gov/sites/default/files/omb/assets/omb/memoranda/m01-16.pdf>; Mitchell E. Daniels, Jr., Director, U.S. Office of Management and Budget, “Implementation of the President’s Management Agenda and Presentation of the FY2003 Budget Request,” memorandum M-02-02, October 30, 2001, at http://www.whitehouse.gov/omb/memoranda_m02-02/.

¹¹¹ Acquisition Advisory Panel, Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress, p. 399.

¹¹² Ibid. Lead system integrators, as described by GAO, “are prime contractors with increased program management responsibilities. These responsibilities have included greater involvement in requirements development, design, and source selection of major system and subsystem subcontractors.” (U.S. Government Accountability Office, *Defense Acquisitions: Future Combat Systems Challenges and Prospects for Success*, GAO-05-442T, March 15, 2005, pp. 9-10, at <http://armed-services.senate.gov/statemnt/2005/March/Francis%2003-16-05.pdf>.)

¹¹³ U.S. Government Accountability Office, Initial Agency Efforts to Balance the Government to Contractor Mix in the Multisector Workforce, p. 3.

¹¹⁴ Schooner and Greenspahn, “Too Dependent on Contractors? Minimum Standards for Responsible Governance,” p. 14.

¹¹⁵ The term *functions closely associated with inherently governmental functions* had been used prior to the publication of Policy Letter 11-01. However, the policy letter provides written, government-wide guidance for this category, which did not exist previously.

Going forward, the addition of other categories could further refine sourcing policy. One possibility is a personnel sustainment category. Another, different possibility, is to consider whether institutional characteristics, processes, or values might, when combined, warrant consideration when determining which sector, public or private, ought to perform a particular function.

Personnel Sustainment

A personnel sustainment category might facilitate agencies' efforts to meet their human resources needs and objectives, thus ensuring they are better equipped to perform their missions and conduct operations. Designating certain positions within an agency as personnel sustainment positions, which could be used to ensure that they are filled by federal employees, might further an agency's efforts to recruit, retain, and train agency employees, and provide opportunities for career development and leadership development. For example, to create, or maintain, a sustainable career path, or a leadership development path for would-be senior executives, an agency might determine that it needs to retain certain tasks or functions. Although Policy Letter 11-01 does not suggest the creation of this category, its commentary on strategic human capital planning is consistent with the notion that an agency's personnel needs and objectives warrant consideration in workforce planning. The policy letter requires agencies to "dedicate a sufficient amount of work to performance by Federal employees in order to build competencies (both knowledge and skills)." Continuity of operations and knowledge of operations are two additional reasons identified by OFPP for agencies to have their employees perform the work of the agency.¹¹⁶

An Institutional Perspective

Employing an institutional perspective, one would ask whether the type of sector, or institution (federal agency or private business), might be relevant in determining whether federal employee performance is warranted, or contractor performance is preferred. Government and government agencies are different in a number of ways from the private sector and businesses. "The notion that the qualities of government agencies, nonprofits, and profit-making institutions differ is a commonplace. As a corollary, each attracts a workforce most comfortable with these qualities. Research centers such as the Brookings Institution's Center for Public Service periodically confirm the public's disparate images of the qualities of these institutions and their workforces."¹¹⁷ What, if anything, about federal agencies might suggest that, under certain circumstances, agency performance is preferable to contractor performance of a particular function? Conversely, what, if anything, about private firms might suggest that, under certain circumstances, contractor performance is preferable to federal employee performance of a particular function? Is it possible that certain features of an organization, such as its structure; culture; incentives for employees; applicable statutes and regulations; relationships between management and employees; lines of authority; accountability mechanisms; procedures and policies that promote transparency; and extent, or type, of discretion, or flexibility, enjoyed by personnel, when combined, would suggest that, under certain circumstances or for certain agency functions, contractor performance—or federal employee performance—is preferable?

¹¹⁶ Office of Federal Procurement Policy, "Publication of the Office of Federal Procurement Policy (OFPP) Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions," p. 56237.

¹¹⁷ Dan Guttman, "Governance By Contract: Constitutional Visions; Time for Reflection and Choice," p. 351.

Additionally, depending on the particular function or circumstances, might it be useful to consider citizens' views and expectations of each type of institution, or sector?

Rogene Buchholz's formulation of the conceptual elements of the market system and the public policy process, which are presented in **Table 4**, provide some insight for this discussion. Although her comparison focuses on system and process, it identifies some of the key differences between the government and the private sector.

Table 4. Conceptual Elements of the Market System and the Public Policy Process

Market System	Public Policy Process
Exchange Process	Political Process
Private Goods and Services	Public Goods and Services
Economic Value System	Diverse Value System
Self-interest	Public Interest
The Invisible Hand	The Visible Hand
Economic Roles (Producers-Consumers-Investors-Employees)	Political Roles (Politicians-Citizens-Public Interest Groups)
Consumer Sovereignty	Citizen Sovereignty
Profits as Reward	Power as Reward
Business as the Major Institution	Government as the Major Institution
Operating Principles: Efficiency, Productivity, Growth	Operating Principles: Justice, Equity, Fairness

Source: Rogene A. Buchholz, *Business Environment and Public Policy: Implications for Management and Strategy*, 4th ed. (Englewood Cliffs, NJ: Prentice Hall, 1992), p. 73.

Outcomes and Data¹¹⁸

What are the possible outcomes of implementing multi-sector workforce management and related policies? The list might include the strengthening of an agency's internal capacity, allocating additional agency personnel to contract management and oversight functions, and insourcing.

Insourcing warrants special mention. As discussed above, some commentators might focus on this possible outcome while failing to acknowledge the other possibilities, thus conflating multi-sector workforce management with insourcing. Similarly, some observers might conflate competitive sourcing with one particular possible outcome of public-private competition—outsourcing.¹¹⁹ OFPP notes in its policy letter, though, that “insourcing is intended to be a management tool—not an end in itself—to address certain types of overreliance on contractors.”¹²⁰ Moreover, determining that a contractor's employees are performing inherently governmental functions might not necessarily lead to insourcing. Addressing this possibility, the policy letter states: “In

¹¹⁸ This section is excerpted from CRS Report R42039, *Performance of Inherently Governmental and Critical Functions: The Obama Administration's Final Policy Letter*, by Kate M. Manuel, L. Elaine Halchin, and Erika K. Lunder. A few minor revisions were made to this section so that it would conform to the purpose and text of this report.

¹¹⁹ Another possible outcome is retaining the work in-house.

¹²⁰ Office of Federal Procurement Policy, “Publication of the Office of Federal Procurement Policy (OFPP) Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions,” p. 56234.

some cases, government control over, and performance of, inherently governmental responsibilities can be reestablished by strengthening contract oversight using government employees with appropriate subject matter expertise and following the protocols identified in FAR 37.114.”¹²¹ Testifying in September 2011, the head of OFPP stated that “the policy letter should not lead to a widespread shift away from contractors.”¹²² His reasoning was as follows:

Most agencies have been informally following many of the overarching principles of the policy letter for more than a year and there has not been a significant shift to date. In addition, ... agencies may, with proper management and oversight tools, rely on contractors to perform functions closely associated with inherently governmental functions. They may also permit contractors to perform critical functions that are core to the agency as long as the agency has the in-house capability to maintain control of its mission and operations. Moreover, in many cases, overreliance on contractors may be corrected by allocating additional resources to contract management. In other words, rebalancing does not require an agency to insource.¹²³

Additionally, in cases where insourcing might be the appropriate response, practical, or other considerations, might mitigate against some possibilities. For example, when considering insourcing a function, agencies are advised to place a lower priority on reviewing certain work performed by small businesses. Additionally, agencies are to apply the “rule of two”¹²⁴ for work that remains in the private sector when “part of [the] contracted function to be insourced is currently being performed by small and the large businesses.”¹²⁵ Small business goals might reinforce these considerations if agencies are reluctant to take steps that could compromise their ability to achieve those goals.¹²⁶ OFPP also advises agencies on how to respond when they are unable to reestablish control of inherently governmental functions through other means and thus “need to insource work on an accelerated basis.” While termination of the contract is a possibility, OFPP also indicates it is possible to synchronize the insourcing with the non-exercise of an option period in the contract.¹²⁷

Regarding contractor performance of critical functions that, the agency has determined, puts its internal control of mission and operations at risk, the policy letter does not mention accelerated insourcing as an option. Moreover, the possibility that insourcing could momentarily disrupt

¹²¹ *Ibid.*, p. 56239. FAR 37.114 provides guidance regarding certain types of service contracts that “require special management attention to ensure that they do not result in performance of inherently governmental functions by the contractor and that Government officials properly exercise their authority.”

¹²² Daniel I. Gordon, “Statement of the Honorable Daniel I. Gordon, Administrator for Federal Procurement Policy, Office of Management and Budget, Before the Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, Committee on Homeland Security and Governmental Affairs, United States Senate,” September 20, 2011, p. 5, at http://hsgac.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=57f164be-8e05-4fce-ae55-d47b3b1e6f8d.

¹²³ *Ibid.*

¹²⁴ As described by the Office of Federal Procurement Policy, the “rule of two” requires “that acquisitions be reserved for award to small businesses, or certain subsets of small businesses, if there are two or more responsible small businesses capable of performing the work at fair market prices.” (Office of Federal Procurement Policy, “Publication of the Office of Federal Procurement Policy (OFPP) Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions,” p. 56229.)

¹²⁵ *Ibid.*, p. 56239.

¹²⁶ See <http://www.sba.gov/content/small-business-goaling> for additional information regarding small business goals.

¹²⁷ Office of Federal Procurement Policy, “Publication of the Office of Federal Procurement Policy (OFPP) Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions,” p. 56239. A contract may have a base period (e.g., one year) and one or more option periods.

agency operations might, depending upon the nature of the (critical) function or the particular circumstances, mitigate against any effort to insource the function, or a portion of it. Additionally, an agency might need time to “secure the necessary funding” to establish or supplement “the needed in-house capacity” and to recruit, hire, and train new personnel, or retrain incumbent personnel.¹²⁸

This discussion raises the question of whether OFPP might consider having agencies compile data about their outcomes, and submit the information to a centralized database. Without complete, detailed, accurate information, the outcomes and consequences of the policy might not be known, or understood. Both supporters and critics of the policy might rely on unverifiable, anecdotal, or inaccurate information in supporting, or criticizing, the policy and the implementation thereof.

Possible options include having agencies expand their multi-sector workforce inventories, or add data about outcomes to their service contracts inventories; modifying the Federal Procurement Data System (FPDS) through the addition of appropriate data elements; or creating a new, stand-alone system. Regarding the three existing data collection systems or initiatives, functionality and accessibility vary.

In its memorandum on managing the multi-sector workforce, OMB required each federal agency subject to the Chief Financial Officers Act (P.L. 101-576) to develop a multi-sector workforce planning pilot. In conducting the pilot, each agency was to “[d]evelop a multi-sector workforce inventory that [would map] out the current workload and how in-house and contracted labor [were] ... used by the organization to meet [the] ... workload.”¹²⁹ The inventory was to include

- [T]he number and location of full-time federal employee equivalents (FTEs) and contractor employees (for the latter, counting either full-time employees or hours worked) for each function performed by the organization.
- [H]ow work is classified: (i) inherently governmental, (ii) critical and requiring performance by federal employees, (iii) critical and requiring performance by either federal employees or contractors with appropriate management, or (iv) essential but non-critical,¹³⁰ and
- [T]he associated funding source.¹³¹

While OMB stated in its memorandum that agencies “should ... prepare an appropriate summary” of their pilots “to share with the public,” whether some or all agencies included their inventories is unknown.¹³²

Agencies that complied with this requirement have some experience, then, in assessing a selected portion of their multi-sector workforce. As agency staff gain additional experience in reviewing their agencies’ total (or multi-sector) workforces, categorizing functions, and carrying out the

¹²⁸ Ibid.

¹²⁹ Orszag, “Managing the Multi-Sector Workforce,” p. 1 (attachment 2).

¹³⁰ This memorandum was written prior to the publication of OFPP’s proposed and final policy letters, neither of which includes “essential but non-critical” functions. Hence, this category may no longer apply.

¹³¹ Orszag, “Managing the Multi-Sector Workforce,” p. 2 (attachment 2).

¹³² Ibid.

other tasks outlined in OFPP's policy letter, they might identify information that could be useful to agencies and considered for inclusion in an expanded multi-sector workforce inventory.

With the exception of DOD, all agencies subject to the FAIR Act are required to compile inventories of their service contracts annually and submit the information to OMB.¹³³ As summarized by OFPP in November 2010, this inventory must include the following elements:

- a description of the services purchased by the executive agency;
- a description of the role the services played in achieving agency objectives;
- the organizational component of the executive agency administering the contract, and the organizational component of the agency whose requirements are being met through contractor performance of the service;
- the total dollar amount obligated for services under the contract and the funding source for the contract;
- the total dollar amount invoiced for services under the contract;
- the contract type and date of award;
- the name of the contractor and place of performance;
- the number and work location of contractor employees compensated under the contract, expressed as full-time equivalent for direct labor;
- whether the contract is a personal services contract; and
- whether the contract was awarded on a noncompetitive basis, regardless of date of award.¹³⁴

Agencies' service contracts inventories are available on their websites.¹³⁵ Some, if not all, of the data included in the service contract inventory might be useful in gaining a better understanding of an agency's multi-sector workforce, particularly if these data were combined with information about the type(s) of function(s) (i.e., critical, "closely associated," or commercial) a contractor is performing.

The Federal Procurement Data System (FPDS) is the federal government's system for agencies to report information about their contract actions.¹³⁶ FPDS is available to the public, and users may retrieve data by conducting searches of the database. FPDS includes some of the same

¹³³ Sec. 743 (Division C) of P.L. 111-117, as amended. DOD is subject to a similar statutory requirement, which may be found in Sec. 807 of P.L. 110-181, National Defense Authorization Act for FY2008.

¹³⁴ Daniel I. Gordon, Administrator, Office of Federal Procurement Policy, "Service Contract Inventories," memorandum, November 5, 2010, Appendix A, at <http://www.whitehouse.gov/sites/default/files/omb/procurement/memo/service-contract-inventories-guidance-11052010.pdf>.

¹³⁵ *Ibid.*, p. 2. See, for example, the Department of Homeland Security's FY2010 inventory, at <http://www.dhs.gov/xlibrary/assets/.../service-contract-inventory-dhs-2010.xls>, and the Department of Transportation's FY2010 inventory, at http://www.dot.gov/ost/m60/serv_contract_inv.htm.

¹³⁶ FPDS is available at <https://www.fpds.gov>. A contract action is "any oral or written action that results in the purchase, rent, or lease of supplies or equipment, services, or construction using appropriated dollars over the micro-purchase threshold, or modifications to these actions regardless of dollar value. Contract action does not include grants, cooperative agreements, other transactions, real property leases, requisitions from Federal stock, training authorizations, or other non-FAR based transactions." (48 CFR § 4.601.)

information as the service contract inventory, and also contains a relatively large amount of additional procurement information, such as the solicitation number, effective date of the contract action, and contracting officer's determination of business size.¹³⁷

Developing a data collection system (whether based on an existing system or data collection effort, or a newly established system) that includes information about agencies' efforts to classify properly their functions might yield benefits. Perhaps a system could be developed that would aid agency personnel—particularly those in acquisition, human resources, and financial management—in planning, managing, and evaluating their efforts to comply with the policy letter. Making the system available to the public might facilitate transparency, particularly if it were to include information, or training, that would aid in understanding the information. Finally, collecting data, and making it publicly available, possibly could alleviate some concerns regarding the outcomes of agencies' determinations and decisions. Data might aid in dispelling misperceptions and supporting, or disproving, anecdotal evidence. Additional resources might be needed, however, to develop such a system, and data alone might not be sufficient in addressing some parties' concerns about agencies' decisions.

Cost Considerations

Cost Analysis

Both the July 29, 2009, OMB memorandum and OFPP's Policy Letter 11-01 provide guidance for using cost analysis, under certain, though different, circumstances, to aid in determining which sector, public or private, should perform a particular agency function. If an agency determines that a cost analysis is necessary, it might encounter several challenges, including the lack of a generally accepted definition of *cost of government performance* and *cost of contractor performance*, a standard process for performing cost analysis, resources needed to collect data, and methodological and practical challenges.¹³⁸

In attachment 3 of the multi-sector workforce management memorandum, which provides guidance for implementing Section 736 (Division D) of P.L. 111-8, Omnibus Appropriations Act, FY2009, OMB addresses the subject of cost analysis. Under the heading "General consideration of federal employee performance," OMB writes that, in reviewing the possible use of federal employees for certain functions, agency evaluations should include, among other things, "a cost analysis that addresses the full costs of performance and provides 'like comparisons' of relevant costs to determine the most cost effective source of support."¹³⁹ In Policy Letter 11-01, OFPP uses similar language in describing what an agency should do if it has sufficient resources to control its mission and operations and there is additional critical work to be performed by either federal employees or contractor employees. OFPP's policy letter states that, with regard to critical functions, "[i]f an agency has sufficient internal capability to control its mission and operations,

¹³⁷ Global Computer Enterprises, *GSA Federal Procurement Data System-Next Generation (FPDS-NG) Data Element Dictionary*, August 30, 2011, version 1.4.2, at https://www.fpds.gov/downloads/Version_1.4.2_specs/FPDSNG_DataDictionary_V1.4.2.pdf. See the table of contents for a complete list of FPDS data elements.

¹³⁸ As discussed in "Competitive Sourcing", Sec. 842(b) of P.L. 109-115 stated that Circular A-76 should "provide procedures and policies" for conducting public-private competitions involving work performed by contractors, but the Bush Administration did not revise the circular to reflect this statutory requirement.

¹³⁹ Orszag, "Managing the Multi-Sector Workforce," p. 2 (attachment 3).

the extent to which additional work is performed by Federal employees should be based on cost considerations. Supporting cost analysis should address the full costs of government and private sector performance and provide like comparisons of costs that are of a sufficient magnitude to influence the final decision on the most cost effective source of support for the organization.”¹⁴⁰

Neither document includes a definition of *full costs* or any guidance on how to conduct a cost analysis. GAO reported that, regarding the OMB memorandum, “confusion as to when a cost analysis is needed and the appropriate procedures to conduct one makes it hard to define what procedures are necessary to sufficiently address the cost issue. OMB’s criteria do not specify the procedures for conducting a cost analysis or define what constitutes full cost of performance.”¹⁴¹ A possible consequence is the lack of standardization among agencies’ policies, including determinations regarding which costs to include and which costs to exclude. On the other hand, the decentralized development of guidelines permits agencies to tailor procedures to their particular functions, which might lead to better cost analysis methodologies.

OFPP “agrees that additional guidance” for conducting cost analyses “may be beneficial” and said that it “is reviewing the need for such guidance....”¹⁴² If OFPP, OMB, or another agency develops guidance for use government-wide, perhaps the plan will (1) define the “full costs of government and private sector performance”;¹⁴³ (2) state explicitly what costs are included and what costs are excluded; and (3) explain the reasons for including and excluding certain costs. A well-thought-out definition of *full costs of performance* would likely help to ensure that the results of a cost analysis are valid—i.e., that the cost analysis measures what it purports to measure. The development and consistent use of a rigorous, detailed methodology would likely aid in producing results that are reliable.

Information needed for cost analyses may not be readily available, or an agency may not be able to identify, gather, and maintain data. GAO’s effort to compare the costs of using federal employees and contractor employees for security services in Iraq is an example of this problem. Although it had planned to include both DOD and the State Department in its study, GAO eventually dropped DOD because it was not able to provide needed information. The Defense Department was unable to provide “the number and rank of military personnel that would be needed to meet contract requirements,” or “information on the cost to train personnel to perform the security functions.” Defense Department officials informed GAO that it would have “to form a team from several DOD organizations which would need to analyze each specific contract’s requirements to determine the number and rank of personnel needed to meet the requirements.”¹⁴⁴ Having eliminated DOD from its study, GAO opted for comparing the State Department’s “base

¹⁴⁰ Office of Federal Procurement Policy, “Publication of the Office of Federal Procurement Policy (OFPP) Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions,” p. 56239.

¹⁴¹ U.S. Government Accountability Office, *Civilian Agencies’ Development and Implementation of Insourcing Guidelines*, p. 7.

¹⁴² Office of Federal Procurement Policy, “Publication of the Office of Federal Procurement Policy (OFPP) Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions,” p. 56235. OFPP also stated in the preamble accompanying Policy Letter 11-01 that an appropriate place for additional cost analysis guidance might be a supplement to the insourcing guidance found in attachment 3 to OMB’s memorandum on the managing the multi-sector workforce. (Ibid.)

¹⁴³ Ibid., p. 56239.

¹⁴⁴ U.S. Government Accountability Office, *Warfighter Support: A Cost Comparison of Using State Department Employees versus Contractors for Security Services in Iraq*, March 4, 2010, p. 2, <http://www.gao.gov/new.items/d10266r.pdf>.

year obligated amounts for the four task orders and one security contract to total annual costs that the State Department said it would likely incur if the department were to provide the [security] services—based on the State Department’s assumptions.” The department assumed it would have to recruit, hire, and train new employees; all new hires would be US citizens; the employees would serve in Iraq for one year; and it would use same number of employees as the contractor.¹⁴⁵ In conducting a comparison of agency costs and contractor costs, GAO included “salary, benefits, overseas costs, training, recruitment, background screenings, and support.”¹⁴⁶ Administrative costs—“awarding the task orders and contract and providing oversight”—were omitted because the State Department “was unable to provide an estimate of these costs.”¹⁴⁷ Finally, GAO found that “some costs [related to federal employee performance]... are difficult to quantify[, including the costs of] developing new career fields, providing additional overhead, and building new housing.”¹⁴⁸

The government’s experience with Circular A-76—specifically the development of the overhead rate that is used in public-private competitions—is yet another example of data problems facing government agencies. Since actual overhead costs were not documented, OMB selected 12% as the overhead rate for the government’s in-house cost estimates, which was “near the midpoint of overhead rates” that had been “suggested by government agencies and private sector groups.”¹⁴⁹ In its 1998 report on the 12% overhead rate, GAO noted that “[w]hile the 12-percent rate represents an appropriate move toward including overhead costs in government cost estimates, until actual overhead costs are captured, the magnitude of savings expected will be uncertain and the results of A-76 studies are apt to continue to be controversial.”¹⁵⁰ The overhead rate remains 12%.¹⁵¹

Although the context and circumstances differ, the following five cases illustrate some of the methodological and practical difficulties that might hinder efforts to calculate the cost of government or contractor performance, or, relatedly, capture the amount of savings a sourcing decision is expected to yield. These five cases also illustrate the diversity among methodologies. Generally, the information presented here is an excerpt. See the applicable study or report for a complete description of the methodology that was developed or used.

Government Accountability Office

Under the Bush Administration, OMB required agencies to report the estimated savings they expected from their competitive sourcing efforts. The Government Accountability Office examined the Labor Department’s efforts to calculate its estimated savings for the period FY2004 through FY2007. GAO found that the department had excluded from its calculations “the time in-house staff spent on competition activities, precompetition planning, certain transition costs, and postcompetition review activities.” After noting that OMB had not required agencies to report

¹⁴⁵ Ibid.

¹⁴⁶ Ibid., pp. 2-3.

¹⁴⁷ Ibid., p. 3.

¹⁴⁸ Ibid., p. 4.

¹⁴⁹ U.S. General Accounting Office, *Defense Outsourcing: Better Data Needed to Support Overhead Rates for A-76 Studies*, GAO/NSIAD-98-62, February 27, 1998, p. 3, at <http://www.gao.gov/archive/1998/ns98062.pdf>.

¹⁵⁰ Ibid.

¹⁵¹ U.S. Office of Management and Budget, “Performance of Commercial Activities,” Circular No. A-76 (Revised), May 29, 2003, p. C-4.

these costs, GAO stated that *its* “analysis show[ed] that these costs can be substantial and that excluding them overstates savings achieved by competitive sourcing.”¹⁵² GAO’s reasoning was that, although “these staff are already paid by the government, their time spent away from regular work duties represents a cost that is attributable to the competition process.”¹⁵³

Transportation Security Administration

The Transportation Security Administration (TSA) conducted a comparison of the cost of screening services at Screening Partnership Program (SPP) airports and non-SPP airports.¹⁵⁴ In its examination of the cost comparison, GAO found that TSA failed to include some costs that should be attributed to the government, including “workers’ compensation and general liability insurance, ... [also, the comparison] did not reflect the income received by the government from corporate income taxes paid by SPP contractors.”¹⁵⁵ GAO also noted that “[s]pecific procedures and information used in ... [TSA’s] cost study were not described in sufficient detail to allow a knowledgeable person to carry out the procedures and to replicate the results in their entirety.”¹⁵⁶ In short, the results were not replicable.

Commission on Wartime Contracting

A mandate of the Commission on Wartime Contracting¹⁵⁷ was to “study federal agency contracting for the reconstruction, logistical support of coalition forces, and the performance of security functions ... in Iraq and Afghanistan.”¹⁵⁸ The commission’s August 2011 report includes, in Appendix F, the methodology it used for “[c]omparing costs of contingency-support services performed by military service members, federal civilians, and contractors.”¹⁵⁹ The commission’s “general concept for measuring support costs associated with a contingency [was] to count those incremental costs that would be incurred in supporting a contingency operation—costs that would

¹⁵² U.S. Government Accountability Office, Department of Labor: Better Cost Assessments and Departmentwide Performance Tracking Are Needed to Effectively Manage Competitive Sourcing Program, GAO-09-14, November 21, 2008, p. 5, at <http://www.gao.gov/new.items/d0914.pdf>.

¹⁵³ *Ibid.*, p. 20.

¹⁵⁴ Under the Screening Partnership Program, a commercial airport in the United States may apply to use private-sector screeners, in lieu of federal employees. (Transportation Security Administration, “Program Overview, Screening Partnership Program,” at http://www.tsa.gov/what_we_do/optout/what_is_spp.shtm.)

¹⁵⁵ U.S. Government Accountability Office, *Aviation Security: TSA’s Cost and Performance Study of Private-Sector Airport Screening*, GAO-09-27R, January 9, 2009, p. 24, at <http://www.gao.gov/new.items/d0927r.pdf>. A subsequent GAO report noted that TSA had revised its cost analysis procedure and, among other changes, it now includes “workers’ compensation, general liability insurance, certain retirement costs, and a corporate tax adjustment to reflect revenue received by the government from corporate income taxes paid by SPP contractors...” (U.S. Government Accountability Office, *Aviation Security: TSA’s Revised Cost Comparison Provides a More Reasonable Basis for Comparing the Costs of Private-Sector and TSA Screeners*, GAO-11-375R, March 4, 2011, p. 4, at <http://www.gao.gov/new.items/d11375r.pdf>.)

¹⁵⁶ U.S. Government Accountability Office, *Aviation Security: TSA’s Cost and Performance Study of Private-Sector Airport Screening*, p. 2.

¹⁵⁷ This body was an independent, bipartisan commission established by Section 841 of P.L. 110-181, National Defense Authorization Act, FY2008.

¹⁵⁸ Commission on Wartime Contracting, “Commission on Wartime Contracting,” at <http://www.wartimecontracting.gov/>.

¹⁵⁹ Commission on Wartime Contracting in Iraq and Afghanistan, *Transforming Wartime Contracting: Controlling Costs, Reducing Risks*, August 2011, p. 224, at http://www.wartimecontracting.gov/docs/CWC_FinalReport-lowres.pdf.

otherwise be absent. Costs included in this concept depend on the nature of the contingency, particularly its intensity and duration.”¹⁶⁰ The calculation for estimating the cost of one military FTE included the following:

- Annual Defense Composite Rate, which includes basic pay, basic allowance for housing (BAH), basic allowance for subsistence (BAS), retired-pay accrual, Medicare-Eligible Retiree Health Care (MERHC) accrual, incentive and special pay, permanent change-of-station expenses, and miscellaneous pay.
- Adjustments from Directive-Type Memorandum (DTM) 09-007 for Defense costs, including “costs for health care, education assistance, discount groceries, child development, training, recruitment and advertising, defense education activity and family assistance, manpower management, and other personnel support.”
- Additional adjustments from DTM 09-007 for other costs to the government, including “[c]hild education-impact aid ..., Veterans’ employment and training ..., Treasury contribution to retirement ..., Treasury contribution for concurrent receipts ..., [and] Veterans’ benefits....”
- Contingency special pay.
- Dwell ratio at 1-to-2, including “special pay for the one year deployed.”¹⁶¹

The commission used the following costs to estimate the total cost for federal civilians in a contingency operation.

- Base salary.
- 40 hours of overtime.
- Post differential pay.
- Danger pay.
- Benefits (36.25% of base salary).
- Overhead (12% of base salary).¹⁶²

The methodology also deducted the amount of federal taxes recouped.¹⁶³

For contractors, the Commission considered two different measures: “direct-labor cost per FTE and billing-cost per FTE.”¹⁶⁴ The former excludes “benefits, overhead, general and administrative [costs], and other costs.”¹⁶⁵ No description was provided for contract billing costs per FTE.

¹⁶⁰ *Ibid.*, p. 226.

¹⁶¹ *Ibid.*, pp. 229-230. Dwell time is the amount of “time spent between deployments.” A dwell ratio of 1-to-2 represents one month of deployment for every two months of dwell time. The dwell ratio increases the cost of using military personnel because “[i]n order to always have a unit deployed, an additional two units are required to provide sufficient dwell time.” (*Ibid.*, p. 230.)

¹⁶² *Ibid.*, p. 232.

¹⁶³ *Ibid.*, p. 231. “[B]ecause federal civilian employees’ compensation is subject to federal income tax, a recoupment of 20 percent (the average tax rate according to the Internal Revenue Service), should be deducted form the compensation costs of these employees to place federal civilian employees on a basis comparable to U.S.-citizen contractor employees or military personnel.” (*Ibid.*)

Project on Government Oversight

Motivated by the claim made by others that private sector performance can “produce substantial savings” for the federal government, the Project on Government Oversight (POGO) reviewed a “sampling of comparable jobs and their costs when they are performed by government, private sector, and *contractor* employees.”¹⁶⁶ POGO “compared the average rate of full annual compensation paid to federal and private sector employees with the average annual billing rates for contractor employees performing comparable services at government sites” for 35 occupations.¹⁶⁷ To determine federal employee compensation, POGO used base salaries and benefits (36.25% of base salary).¹⁶⁸ Benefits were included “[b]ecause the private contractor billing rates published by GSA [General Services Administration] include ... salaries ... and other costs including benefits contractors provide to their employees.”¹⁶⁹ POGO acknowledged that “its methodology does not incorporate some governmental cost factors,” such as “non-directly associated overhead (e.g., executive management and administration, information technology, and legal support), material and supplies (e.g., insurance and maintenance), or facilities (e.g., depreciation, rent, insurance, maintenance and repair, utilities, capital improvements)” because “many of these cost factors would essentially be canceled out” since POGO “relied exclusively on listed contractor bill rates for performance at government sites.”¹⁷⁰ To calculate “the average annual salary for private sector employees performing the jobs” POGO analyzed in its report, it used the Bureau of Labor Statistics’ (BLS’) National Compensation Survey (NCS). The survey contains base salaries, so POGO added BLS’s 33.5% load factor “to reflect the full fringe benefit package paid to all full-time employees in service-providing organizations that employed at least 500 workers.”¹⁷¹ The load factor includes “(1) paid leave, (2) supplemental pay, (3) insurance, (4) retirement and savings, and (5) legally required benefits, which were not specified.”¹⁷² Using hourly rates found in GSA schedule contracts, POGO calculated average annual contractor billing rates.¹⁷³ Specifically, POGO multiplied the average hourly rate for each job it analyzed by 2,080 hours, which is “the national standard for full-time employees.”¹⁷⁴ The billing rates include

(...continued)

¹⁶⁴ Ibid., p. 234.

¹⁶⁵ Ibid.

¹⁶⁶ Project on Government Oversight, *Bad Business: Billions of Taxpayer Dollars Wasted on Hiring Contractors*, September 13, 2011, pp. 4-5, at <http://www.pogo.org/pogo-files/reports/contract-oversight/bad-business/co-gp-20110913.html>. (Italics in original.)

¹⁶⁷ Ibid., p. 11.

¹⁶⁸ The 36.25% benefit rate reflects “life and health insurance, ... standard civilian retirement, ... Medicare, ... and ... miscellaneous fringe benefits....” (Ibid, p. 3 (Appendix A).)

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

¹⁷¹ Ibid., p. 4 (Appendix A).

¹⁷² Ibid., pp. 4-5 (Appendix A).

¹⁷³ Under its schedules program, “GSA establishes long-term governmentwide contracts with commercial to provide access to millions of commercial supplies (products) and services at volume discount pricing” to federal agencies and other entities authorized to use the schedules. (U.S. General Services Administration, “Welcome to GSA Schedules,” at <http://www.gsa.gov/portal/category/100615>.)

¹⁷⁴ Project on Government Oversight, *Bad Business: Billions of Taxpayer Dollars Wasted on Hiring Contractors*, p. 7 (Appendix A). For each job it examined, POGO “average[ed] the hourly rates found in individual contracts listed in GSA Advantage!®.” (Ibid.)

“employee compensation (actually salary plus whatever benefit costs are incurred by the contractor), overhead, general administrative expenses, and profits.”¹⁷⁵

Center for Strategic and International Studies

The effort by the Defense-Industrial Initiatives Group at the Center for Strategic and International Studies (CSIS) stands out from the other examples presented here. CSIS’s purpose was to develop a cost estimation methodology and ensure that it included “all the identifiable costs.”¹⁷⁶ CSIS drew upon both Circular A-76 and the Defense Department’s Directive-Type Memorandum (DTM) 09-007 in developing its methodology.¹⁷⁷ The organization focused on DOD, though perhaps the methodology could be applied to civilian agencies as well. CSIS identified six major cost components of government performance. They are as follows:

1. “Personnel (direct labor and fringe costs for military and civilian personnel, including health insurance and retirement)”
2. “Material and supply (general, inflation, insurance, maintenance and repair)”
3. “Facilities (cost of facility, rent, insurance, maintenance and repair, capital improvements, utilities)”
4. “Capital (cost of capital assets and depreciation of existing capital assets)”
5. Overhead¹⁷⁸
6. “Additional costs (liability insurance, travel, subcontracts, nonrecurring workloads, minor items, medical exams, training, cost growth, conversion costs, administration and oversight costs)”¹⁷⁹

CSIS suggests that the cost of contractor performance could be calculated using the following information:

- Base contract price (the price “includes most of the ... cost components [identified for government performance]”)
- Income tax adjustments (“private bids must be credited for the additional federal, state, and local taxes that would be foregone with public performance”)
- Cost of contract administration and oversight
- Cost of converting the work from public sector performance to private sector performance¹⁸⁰

¹⁷⁵ Ibid.

¹⁷⁶ David Berteau et al., *DOD Workforce Cost Realism Assessment*, Defense-Industrial Initiatives Group, Center for Strategic and International Studies, Washington, D.C., May 2011, p. 2, http://csis.org/files/publication/110517_Berteau_DoDWorkforceCost_Web.pdf.

¹⁷⁷ DTM 09-007 is available at <http://www.dtic.mil/whs/directives/corres/pdf/DTM-09-007.pdf>.

¹⁷⁸ “The following line items should be used to generate an estimate of public-sector overhead for a specific function: [o]perational overhead—management and oversight; [i]nformation technology, [h]uman resources (HR)/personnel, [p]ersonnel, [l]egal support, [a]ccounting, [p]ayroll, [h]eadquarters management, [and] [m]iscellaneous.” (Berteau et al., *DOD Workforce Cost Realism Assessment*, p. 15.)

¹⁷⁹ Ibid., p. 16.

¹⁸⁰ Ibid., p. 19.

Are Cost Savings a Goal of Multi-Sector Workforce Management?

As discussed above, OMB's guidance on multi-sector workforce management and Policy Letter 11-01 advise agencies to use cost analysis as, in effect, a tie-breaker when performance by either sector is acceptable. Restated, cost savings is neither a goal nor a purpose of multi-sector workforce management, or, more specifically, insourcing.¹⁸¹ Nevertheless, cost savings might result from an agency's efforts to manage properly its multi-sector workforce.

Although the following passage was excerpted from a letter written by the Chairman and Ranking Member of the Senate Committee on Homeland Security and Governmental Affairs to the Secretary of Homeland Security, its message might have wider application.

While the fundamental question in deciding whether a federal employee should perform a task, or whether the task may appropriately be assigned to a contractor, should not simply be which option is cheapest but rather whether or not the government's interests are best served by having the work performed by federal employees, nonetheless it is notable that the shift to a more appropriate employee-to-contractor ratio may well also save the Department and the taxpayers money.¹⁸²

Focusing on the phrase "whether or not the government's interests are best served by having the work performed by federal employees" suggests a possible alternative to using cost savings as a tie-breaker. In Policy Letter 11-01, OFPP requires agencies, as part of their strategic human capital planning efforts, to "dedicate a sufficient amount of work to performance by Federal employees in order to build competencies (both knowledge and skills), provide for continuity of

¹⁸¹ Some observers might assume that achieving cost savings is a goal of multi-sector workforce management, or expect that this policy will yield significant savings, even though relevant documents do not support, for civilian agencies, this particular outcome. On the other hand, the assumption or expectation of savings might be fueled by an OMB report that was released in December 2009 which included insourcing as one of several major categories of savings. (U.S. Office of Management and Budget, *Acquisition and Contracting Improvement Plans and Pilots*, December 2009, p. 4, at http://www.whitehouse.gov/sites/default/files/omb/assets/reports/2009_acquisition_contracting_improvement.pdf.) Yet, identifying insourcing as a means of achieving savings is not consistent with the Administration's July 2009 memorandum that outlined acquisition savings goals and ways to achieve them. OMB required agencies to "develop a plan to save 7 percent of baseline contract spending by the end of FY2011; and ... reduce by 10 percent the share of dollars obligated in FY2010 under new contract actions that are awarded with high-risk contracting authorities." (High risk contracting authorities include "noncompetitive contracting, cost-reimbursement contracts, and time-and-materials and labor-hour (T&M/LH) contracts.") OMB provided the following examples of ways that agencies could realize savings: "(1) ending contracts that do not meet program needs or projects that are no longer needed, (2) building the skills of the acquisition workforce and recruiting new talent so as to negotiate more favorably priced contracts and manage contract costs more effectively, (3) developing more strategic acquisition approaches to leverage buying power and achieve best value for the taxpayer, (4) increasing the use of technology to improve contract management, and (5) reengineering ineffective business processes and practices to reduce cost to spend." (Peter R. Orszag, Director, U.S. Office of Management and Budget, "Improving Government Acquisition," memorandum, M-09-25, July 29, 2009, pp. 1-2, at http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_fy2009/m-09-25.pdf.) The Department of Defense, on the other hand, identified insourcing as a means of generating cost savings, as shown in this excerpt from the department's insourcing initiative clearinghouse: "The Department [of Defense] is committed to utilizing in-sourcing, consistent with its statutory obligations under Title 10 of the United States Code, as one tool to: Reduce reliance on contracted services; Appropriately realign inherently governmental and critical work from the private sector to government performance; Generate efficiencies and savings; and Ensure the Department has the necessary capabilities and skills to meet its missions." (Department of Defense, "DOD Insourcing Initiative Clearinghouse," at <http://prhome.defense.gov/RSI/REQUIREMENTS/INSOURCE/>.)

¹⁸² Senate Committee on Homeland Security and Governmental Affairs, "Lieberman, Collins Astounded DHS Contract Workers Exceed Number of Civilian Employees," press release, February 24, 2010, at http://hsgac.senate.gov/public/index.cfm?FuseAction=Press.MajorityNews&ContentRecord_id=01a96af1-5056-8059-7687-4190c852b289.)

operations, and retain institutional knowledge of operations.”¹⁸³ Would agencies benefit if strategic human capital planning is conducted, or reviewed, prior to conducting a cost analysis? Are there other factors or circumstances that an agency might wish to consider prior to carrying out a cost analysis?

Resources¹⁸⁴

Considering the responsibilities and tasks described in the policy letter, some agencies might discover that they need additional personnel to implement fully the letter’s provisions. At a minimum, agency personnel will be needed to perform pre-award and post-award tasks; address small business contracting under certain circumstances as specified in the policy letter; develop agency procedures and training and accomplish other management responsibilities; and, if the agency has contractors performing “closely associated” functions, also perform the tasks found in Appendix C of Policy Letter 11-01.¹⁸⁵ Furthermore, additional federal employees may be needed to perform an inherently governmental function that is currently performed by a contractor’s employees; perform all, or a portion, of a critical function; administer contracts; or oversee and manage contractors and their performance. Options for ensuring sufficient personnel are available to accomplish these tasks and responsibilities include recruiting, hiring, and training new employees, or re-allocating incumbent employees (which also may necessitate implementing training), either temporarily or permanently depending upon the circumstances. Agencies may find, however, that “limited budgets and resources may constrain insourcing efforts” and other efforts to improve management of their multi-sector workforces.¹⁸⁶

The policy letter addresses personnel issues with its discussion of strategic human capital planning. In brief, this provision directs agencies to ensure they are able to build competencies, retain institutional knowledge, and maintain continuity of operations using federal employees; maintain sufficient personnel to manage every contractor’s performance and evaluate every contractor’s work products and services; and address the size and quality of their acquisition workforces. Agencies are also to consider how available funding, or decisions involving “a specified level of government employee authorizations (or military end strength),” might affect

¹⁸³ Office of Federal Procurement Policy, “Publication of the Office of Federal Procurement Policy (OFPP) Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions,” p. 56237.

¹⁸⁴ This section is excerpted from CRS Report R42039, *Performance of Inherently Governmental and Critical Functions: The Obama Administration’s Final Policy Letter*, by Kate M. Manuel, L. Elaine Halchin, and Erika K. Lunder. A few minor revisions were made to this section so that it would conform to the purpose and text of this report.

¹⁸⁵ Office of Federal Procurement Policy, “Publication of the Office of Federal Procurement Policy (OFPP) Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions,” pp. 56238-39, 56241-42. Some of the tasks include “limit[ing] or guid[ing] a contractor’s exercise of discretion and retain[ing] control of government operations” and ensuring that contractors and their work products are identified “whenever there is a risk that Congress, the public, or other persons outside of government might confuse contractor personnel or work products with government officials or work products, respectively.” (Ibid., p. 56242.)

¹⁸⁶ U.S. Government Accountability Office, *Civilian Agencies’ Development and Implementation of Insourcing Guidelines*, p. 8. “For example, if after applying its guidelines, an agency determines that a function should be insourced and additional government employees need to be hired, the agency must ensure the funds are available to pay for them. There may also be a significant time lag between the decision to insource and the process for reprogramming funds in an effective and timely manner.” (Ibid.) The text associated with this footnote was added to the section excerpted from CRS Report R42039, *Performance of Inherently Governmental and Critical Functions: The Obama Administration’s Final Policy Letter*.

their ability to use federal employees “to perform work that should be reserved for performance by such employees and take appropriate action if there is a shortfall.”¹⁸⁷

Some of the crucial responsibilities and tasks described in the policy letter, such as managing contractors and paying special attention to contractors who are performing “closely associated” functions, will need to be performed by agencies’ acquisition workforces. Although acquisition staff already perform some of these tasks, the expansion of the typology of agency functions and the accompanying guidance and responsibilities might tax a workforce that reportedly has been understaffed and undertrained since the 1990s.¹⁸⁸ Testifying in fall 2010, the head of the Office of Federal Procurement Policy summarized the problem as follows:

As this Commission [Commission on Wartime Contracting] and the Gansler Commission have reported, the federal government has not invested in the acquisition workforce enough to allow it to adequately cope with the growth in contract spending or the increased complexity of agencies’ missions. From 2001 to 2008, contract spending more than doubled to over 500 billion dollars, while the size of the acquisition workforce – both civilian and defense – remained relatively flat.¹⁸⁹

If an agency’s acquisition workforce is not at full strength in terms of both size and capability, and it is not able to augment this segment of its workforce, then its ability to comply fully with the policy letter might be compromised.

Department of Homeland Security’s Balanced Workforce Strategy

Among civilian agencies, the Department of Homeland Security’s (DHS) Balanced Workforce Strategy (BWS) is perhaps the best-known effort to manage an agency’s multi-sector workforce.¹⁹⁰ In 2010, the Secretary of Homeland Security described the Balanced Workforce Strategy’s three-pronged approach as follows:

¹⁸⁷ Office of Federal Procurement Policy, “Publication of the Office of Federal Procurement Policy (OFPP) Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions,” p. 56237.

¹⁸⁸ Steven L. Schooner and David J. Berteau, “Emerging Policy and Practice Issues (2010),” Legal Studies Research Paper No. 529, George Washington University Law School, December 1, 2010, p. 9-6. Schooner and Berteau wrote: “We agree with those who assert that the government has not hired an appropriate number of new acquisition professionals in any year since the 1980’s. Accordingly, a disproportionate share of the existing workforce is aging and, in large part, retirement-eligible; most of that workforce was neither hired nor trained to primarily purchase services using flexible contractual vehicles. In addition ... the volume of purchasing exploded during the last decade. Thus, the government faces a problem of enormous proportions.” (Ibid.)

¹⁸⁹ Daniel I. Gordon, “Statement of the Honorable Daniel I. Gordon, Administrator for Federal Procurement Policy, Office of Management and Budget, Before the Commission on Wartime Contracting,” September 16, 2010, p. 1, at http://www.whitehouse.gov/sites/default/files/omb/legislative/testimony/ofpp/2010-09-16_Gordon-OFPP.pdf.

¹⁹⁰ The history of the Department of Homeland Security aids in understanding the department’s efforts to achieve a balanced workforce. “While heavy reliance on contractors when DHS stood up in 2002 may have made sense, it is unlikely that operating in such a manner today is the most efficient and effective way to carry out our mission. DHS was dependent on contractors to fulfill many of its professional and management support services. In doing so, DHS Executive Management did not fully address the risk to the mission associated with this dependence on contractors to fulfill mission-critical services; the priorities lay in getting the new Agency up and running.” (U.S. Department of Homeland Security, “Balanced Workforce System—Software Tool,” solicitation number RFI-OCHCO-BWS, February 14, 2011 (date posted), at https://www.fbo.gov/index?s=opportunity&mode=form&id=c8c1989c98dab8c2c3d1ba45e8e4ed3a&tab=core&_cview=0.) In February 2010, the Secretary of Homeland Security, in response to a query from the Chairman and Ranking Member of the Senate Committee on Homeland Security and Governmental Affairs, estimated that DHS had 188,000 federal employees and over 200,000 contractor employees (continued...)

1. Ensure that no inherently governmental work is performed by contractors.
2. Establish and implement “rigorous review procedures to ensure that future activities” of the department do not increase its reliance on contractors.
3. Coordinate “workforce assessments across the Department to seek economies and service improvements and reduce [its] reliance on contractors.”¹⁹¹

The Office of the Chief Human Capital Officer (OCHCO), which oversees this effort, is home to the Balanced Workforce Program Management Office (BWPMO).¹⁹²

The BWS is described as “a repeatable, legally-centric risk analysis and workforce planning decision-making process” that includes these three steps.¹⁹³

1. “Identify/define the work [that is] currently performed (or slated for future performance) by the contractors and/or federal workforce.”
2. Analyze the work using the BWS Tool. The BWS Tool is a “complex, web-based questionnaire” that includes approximately 55 questions.¹⁹⁴ When a user has completed the questionnaire, the BWS Tool “recommends one of five possible

(...continued)

performing the work of the department. (Senate Committee on Homeland Security and Governmental Affairs, “Lieberman, Collins Astounded DHS Contract Workers Exceed Number of Civilian Employees,” press release, February 24, 2010, at http://hsgac.senate.gov/public/index.cfm?FuseAction=Press.MajorityNews&ContentRecord_id=01a96af1-5056-8059-7687-4190c852b289.) In early 2011, however, a news article reported that the correct figures were approximately 200,000 federal employees and 100,000 contractor employees. The revision occurred after the Department of Homeland Security reportedly discovered an error in the methodology used to determine the number of contractor employees. (Deborah Billings, “DHS Official Says Agency Has Cut Professional Services Contracts by 11%,” *Federal Contracts Report*, April 6, 2011, at http://news.bna.com/fcln/FCLNWB/split_display.adp?fedfid=20361168&vname=fcrnotallissues&wsn=502156000&searchid=15401175&doctypeid=1&type=date&mode=doc&split=0&scm=FCLNWB&pg=0.)

¹⁹¹ Janet Napolitano, Secretary of Homeland Security, “Statement for the Record, The Honorable Janet Napolitano, Secretary, United States Department of Homeland Security, Before the United States Senate Subcommittee on Homeland Security Appropriations,” February 24, 2010, p. 3, at <http://appropriations.senate.gov/ht-homeland-security.cfm?method=hearings.view&id=6656fc5c-41a1-48c0-b4b6-0a1c5a05127e>.

¹⁹² U.S. Department of Homeland Security, “Balanced Workforce System—Software Tool.” “The BWS will serve as the strategic underpinning for the DHS workforce planning model, which takes a long-term view of organizational needs and functional changes as a result of evolving missions, priorities, and environmental factors. In the near term, the BWS process is focused on assessing and eliminating potential overreliance on contractors, resulting in an appropriate balance of federal employees to contractors. Over time, BWS will dovetail with and be subsumed into the Department’s overall workforce planning model, including the identification, tracking and successful closing of competency gaps.” (Ibid.) The Balanced Workforce Initiative apparently originated from the Secretary’s DHS Efficiency Review, which was launched in early 2009. The Efficiency Review plan included, as a long-term effort, “an assessment of all full-time/part-time employees and contractors to better manage our [the department’s] workforce and fulfill our core mission.” (U.S. Department of Homeland Security, “Secretary Napolitano Rolls Out DHS Efficiency Review Initiative,” press release, March 27, 2009, at http://www.dhs.gov/ynews/releases/pr_1238172270388.shtm.)

¹⁹³ U.S. Department of Homeland Security, “Balanced Workforce Strategy (BWS) Process Description,” August 2011, p. 1, at https://www.fbo.gov/index?s=opportunity&mode=form&tab=core&id=a961fd8e8dd64de40416252bb3860c8&_cview=1. (Italics in original.)

¹⁹⁴ “The BWS Tool is designed in a question-and-answer format. After some initial background information-gathering, the questionnaire focuses on attributes of the function being analyzed. BWS Tool navigation is dynamic, with a user’s answers determining the sequence of questions presented. Using built-in survey logic and branching, users encounter and respond to approximately 55 questions during their analyses. Depending on user responses, the BWS Tool generates questions reflecting consideration of mission risk, contract oversight and management issues, and cost analysis.” (Ibid., pp. 1-3.)

sourcing decisions.” The possibilities are as follows: the “[f]unction must be performed by a federal employee, [the] [f]unction should be performed by a federal employee, [the] [f]unction should be performed by a contractor, [the agency has the] [o]ption to hire a contractor with additional federal oversight, or [the agency may] [t]emporarily contract [with a private firm or other entity] until it is feasible to hire a federal employee.”

3. “Implement the sourcing decision[,] which involves execute[ing] the existing acquisition and workforce planning processes to put in place the appropriate workforce for the function.”¹⁹⁵

In September 2011, DHS posted an updated sources sought notice on the Federal Business Opportunities website that solicited information regarding the development of the Balanced Workforce Strategy System.¹⁹⁶ As described by the department, the system would “include a new version of the questionnaire contained in the existing BWS Tool.”¹⁹⁷

On the one hand, the BWS Tool appears to be a promising initiative. Widespread implementation of the tool by all of the department’s components apparently ensures consistent application of relevant guidance (e.g., Policy Letter 11-01) while drawing upon the knowledge and expertise of those agency personnel who are most familiar with a particular function. It remains to be seen, however, whether the BWS Tool is valid and reliable. That is, does the tool assess what it is intended to assess, and does it produce repeatable results? Finally, if it is determined that the tool is both valid and reliable, might other agencies benefit from adopting it?

DHS’s guidance regarding its Balanced Workforce Strategy Section is found in Section 3007.751 of the department’s acquisition manual.

3007.571 Balanced Workforce Strategy. The requiring activity, in consultation with the Chief Human Capital Office (OCHO) must employ a Balanced Workforce Strategy (BWS) for service contracts. The BWS is a systematic approach for determining the appropriate mix of federal employees and contractors to perform DHS work functions. The analysis uses a specifically designed tool to analyze current DHS service contracts. The results of the analysis, along with discussions with program managers will be applied to acquisition and workforce planning. Currently, the BWS tool is used to analyze existing contracts; however, effective on or about August 1, 2011, it will be used to analyze new work to ensure that DHS maintains control of its mission. The results obtained from the BWS tool should be provided to the contracting officer for placement in the contract file. The BWS analysis will provide insight into:

- What level of skills, experience, and expertise is needed to perform critical functions and functions that are closely associated with inherently governmental functions?

¹⁹⁵ Ibid.

¹⁹⁶ The Department of Homeland Security posted the initial sources sought notice on February 14, 2001. It may be found at https://www.fbo.gov/index?s=opportunity&mode=form&id=c8c1989c98dab8c2c3d1ba45e8e4ed3a&tab=core&_cview=0.

¹⁹⁷ U.S. Department of Homeland Security, “Department of Homeland Security (DHS) Statement of Work (SOW) for Balanced Workforce Strategy System,” p. 5, at https://www.fbo.gov/index?s=opportunity&mode=form&id=c8c1989c98dab8c2c3d1ba45e8e4ed3a&tab=core&_cview=0. Generally, a sources sought notice is issued when an agency needs information for acquisition planning purposes. (48 CFR § 15.209(c).)

- Information and consideration of the management controls and oversight activities that may be needed to reduce the risk of contractor performance of work that is considered closely associated with inherently governmental or critical functions to ensure that the government maintains internal capability to exercise effective control over its mission.

If work is not reserved for Federal performance, and may be performed by either Federal employees or contractors, the acquisition plan must address whether a cost analysis performed commensurate with the size and complexity of the function to be performed as well as its importance to the Department's mission.¹⁹⁸ Particular attention must be given to work that is closely associated with inherently governmental and critical functions to ensure proper oversight of service contracts pursuant to OFPP guidance on Managing the Multi-sector Workforce, Service Contract Inventories, and OFPP draft guidance on the Management of Inherently Governmental and Critical Functions. For further information on the BWS or Workforce Planning, please refer to the Balanced Workforce Connect site at: <http://dhsconnect.dhs.gov/org/comp/mgmt/dhshr/mgr/Pages/BWF.aspx>.¹⁹⁹

Concluding Remarks

The introduction of multi-sector workforce management, combined with the issuance of Policy Letter 11-01 and the enactment of a statutory provision requiring agencies to develop insourcing guidelines, represents, perhaps, a new chapter in sourcing policy. It remains to be seen how this strain of sourcing policy, which is predicated on safeguarding the government's missions and operations, might mesh with the longstanding policy of governmental reliance on the private sector. However, as the federal government addresses budgetary constraints and policy challenges, continued congressional and executive engagement in sourcing policy is anticipated.

¹⁹⁸ CRS has confirmed with the Department of Homeland Security that some words are missing from the latter portion of this sentence, and that the department is in the process of revising this section. (E-mail from David O'Leary, Office of Legislative Affairs, Department of Homeland Security, October 4, 2011.)

¹⁹⁹ U.S. Department of Homeland Security, *Department of Homeland Security Acquisition Manual*, October 2009, pp. 7-19-7-20, at http://www.dhs.gov/xlibrary/assets/opnbiz/cpo_hsam.pdf. Although this publication is dated October 2009, a record of changes following the "Foreword" includes changes dated 2010 and 2011. The Balanced Workforce Connect site is part of DHSCConnect, which is an intranet and apparently is not available to the public. A description of DHSCConnect follows: "The Department-wide utilization of DHSCConnect, a Web-based collaboration tool, boasts a uniform Internet landing page for all DHS employees. This provides unprecedented collaboration and an element of focus not permitted by multiple standalone sites with varying services and accessibility. This 'single intranet' will also include a forum for collaboration that allows employees to set up team sites for functional areas where coordination and information sharing is essential. Improving Department-wide communication, workflow and coordinating processes, document management, content search and group collaboration to support the development of a culture will help unify the Department and strengthen the resolve of the workforce." (U.S. Department of Homeland Security, Open Government Plan, Department of Homeland Security, June 10, 2010, version 1.1, p. 28, at http://www.dhs.gov/xlibrary/assets/dhs_open_government_plan.pdf.)

Appendix. Selected Sources

The following is a list of selected government documents related to sourcing policy, arranged in chronological order.

U.S. Bureau of the Budget, “Commercial-Industrial Activities of the Government Providing Products or Services for Governmental Use,” Bulletin No. 55-4, January 15, 1955.

U.S. Bureau of the Budget, “Commercial-Industrial Activities of the Government Providing Products or Services for Governmental Use,” Bulletin No. 57-7, February 5, 1957.

U.S. Bureau of the Budget, “Commercial-Industrial Activities of the Government Providing Products or Services for Governmental Use,” Bulletin No. 60-2, September 21, 1959.

U.S. Bureau of the Budget, “Policies for Acquiring Commercial or Industrial Products and Services for Government Use,” Circular No. A-76, March 3, 1966.

U.S. Bureau of the Budget, “Policies for Acquiring Commercial or Industrial Products and Services for Government Use,” Circular No. A-76 (Revised), August 30, 1967.

U.S. Office of Management and Budget, “Acquiring of Commercial or Industrial Products and Services Needed by the Government; Policy Revision,” 44 *Federal Register* 20556-20563, April 5, 1979. (This is the March 29, 1979, revision of Circular A-76.)

U.S. Office of Management and Budget, “Issuance of OMB Circular No. A-76 (Revised) ‘Performance of Commercial Activities’,” 48 *Federal Register* 37110-37116, August 16, 1983. (This is the August 4, 1983, revision of Circular A-76.)

Office of Federal Procurement Policy, “Inherently Governmental Functions,” Policy Letter 92-1, September 23, 1992, at http://www.whitehouse.gov/omb/procurement_policy_letter_92-01/.

P.L. 105-270, Federal Activities Inventory Reform (FAIR) Act, at <http://www.congress.gov/cgi-lis/toGPO/http://www.gpo.gov/fdsys/pkg/PLAW-105publ270/pdf/PLAW-105publ270.pdf>.

U.S. Office of Management and Budget, “Performance of Commercial Activities,” Circular No. A-76, August 4, 1983 (Revised 1999), at <http://www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a076.pdf>.

Sean O’Keefe, Deputy Director, U.S. Office of Management and Budget, “Performance Goals and Management Initiatives for the FY 2002 Budget,” memorandum M-01-15, March 9, 2001, p.1, at <http://www.whitehouse.gov/sites/default/files/omb/assets/omb/memoranda/m01-15.pdf>.

U.S. Office of Management and Budget, “Performance of Commercial Activities,” Circular No. A-76 (Revised), May 29, 2003, at http://www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a076/a76_incl_tech_correction.pdf.

P.L. 110-417, Duncan Hunter National Defense Authorization Act, FY2009. (Section 321 required, among other things, the Office of Management and Budget to develop a single consistent definition of “inherently governmental.”)

President Barack Obama, “Government Contracting,” memorandum to the heads of executive departments and agencies, March 4, 2009, at http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-Subject-Government/.

Peter R. Orszag, Director, U.S. Office of Management and Budget, “Managing the Multi-Sector Workforce,” July 29, 2009, at http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_fy2009/m-09-26.pdf.

Office of Federal Procurement Policy, “Work Reserved for Performance by Federal Government Employees,” 75 *Federal Register* 16188, March 31, 2010, at <http://www.gpo.gov/fdsys/pkg/FR-2010-03-31/pdf/2010-7329.pdf>. (proposed policy letter)

Office of Federal Procurement Policy, “Publication of the Office of Federal Procurement Policy (OFPP) Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions,” 76 *Federal Register* 56227, September 12, 2011, at <http://www.gpo.gov/fdsys/pkg/FR-2011-09-12/pdf/2011-23165.pdf>. (final policy letter)

Section 2.101(b) of Title 48 of the Code of Federal Regulations. (This section contains a definition of *inherently governmental*.)

Subpart 7.5 of Title 48 of the Code of Federal Regulations.

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