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| U.S. DEPARTMENT OF LABOR Employment and Training Administration Washington, D. C. 20210 | CLASSIFICATION OWS |
| | CORRESPONDENCE SYMBOL TEUL |
| | ISSUE DATE 12/28/00 |
| RESCISSIONS None | EXPIRATION DATE Continuing |

DIRECTIVE : UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 12-01

TO : ALL STATE EMPLOYMENT SECURITY AGENCIES

FROM : GRACE A. KILBANE
Administrator
Office of Workforce Security

SUBJECT : Outsourcing of Unemployment Compensation Administrative Functions

1. **Purpose.** To inform States of the Department of Labor's (Department) interpretation of Federal law concerning the "outsourcing" of unemployment compensation (UC) administrative functions.
2. **References.** Sections 303(a)(1), (3), and (8) of the Social Security Act (SSA); the Intergovernmental Personnel Act of 1970 (IPA); 5 U.S.C. Section 2301(b); 42 U.S.C. Sections 4701 and 4728; 5 CFR Sections 900.603, 900.604; 20 CFR Part 602; 20 CFR Section 652.3; 26 CFR Section 31-3306(i)-1; [Office of Management and Budget \(OMB\) Circular No. A-76 \(Revised\)](#) (48 Fed. Reg. 37110 (August 16, 1983); 64 Fed. Reg. 33927 (June 24, 1999)); [OMB Office of Federal Procurement Policy \(OFPP\) Policy Letter No. 92-1](#) (57 Fed. Reg. 45096 (September 30, 1992)).
3. **Background.** The Department has received numerous inquiries concerning the outsourcing (or contracting out) of functions related to the administration of the UC program. This UIPL is issued in response to these inquiries. As this issuance applies only to the outsourcing of UC administrative functions, it is not to be construed as applying to, permitting, or prohibiting the outsourcing of non-UC functions. Further, where outsourcing is permitted, this UIPL neither encourages nor discourages the outsourcing of UC administrative functions.

A longstanding tenet in the administration of public programs is the desirability of using merit systems. In the IPA, Congress declared that the quality of public service is maintained and improved by the development and maintenance of systems of personnel administration consistent with merit principles. (42 U.S.C. 4701.) A basic merit principle is that governmental employees are responsible to the public as represented by the elected officials who head the executive branch of government (for example, the President or Governor). A second merit principle is that public employees covered by a merit system are able to administer the law in an unbiased, professional manner without undue outside influence. Because many decisions made by public employees affect the rights and property of individuals, these decisions must be made in a fair and unbiased manner that is consistent with the rule and intent of the law.

Impartiality in administering the UC program is especially important because UC is a major economic stabilizer. It is often the only source of income during a worker's period of involuntary unemployment. Further, employers are charged for UC paid to their former employees. The lack of impartiality could lead to individuals being improperly paid or denied UC due to outside pressures. In addition, because employers' experience rates are calculated based on the payment of UC to their former workers, impartiality is needed to assure not only that eligibility is determined properly, but that charges to the employer are proper. For reasons such as these, Congress included a specific merit staffing requirement in Federal UC law. This requirement, and other Federal law requirements affecting outsourcing, are discussed below.

4. Federal Requirements.

- a. Merit Staffing. Section 303(a)(1), SSA, contains the merit staffing requirement for the UC program. This section requires, as a condition of States receiving UC administrative grants, that State law include provision for:

- (1) Such methods of administration (including after January 1, 1940, **methods relating to the establishment and maintenance of personnel standards on a merit basis**, except that the Secretary of Labor shall exercise no authority with respect to the selection, tenure of office, and compensation of any individual employed in accordance with such methods) as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due; [Emphasis added.]

Interpretive authority for this merit system requirement was transferred to the U.S. Office of Personnel Management (OPM) in 1970 by the IPA. (42 U.S.C. Section 4728.) However, the enforcement authority for this merit system requirement remains with the Department, and this requirement is a condition for receipt of UC administrative grants.

No specific merit system standards are contained in the SSA. Instead, Section 208(b) of the IPA assigns OPM responsibility for prescribing personnel standards that are to be followed by States which must operate merit-based personnel systems as a condition of eligibility for Federal assistance or participation in an intergovernmental program. OPM has implemented these standards at 5 CFR Section 900.603, and OPM, as explained more fully below, prohibits outsourcing of administrative functions in programs to which the standards apply if outsourcing would compromise these standards. Since Section 303(a)(1), SSA, conditions receipt of administrative grants on the provision of a merit system, 5 CFR Section 900.603 applies to the administration of the Federal-State UC program.

The merit system standards at 5 CFR Section 900.603 include: (1) the recruitment, selection, and advancement of employees on the basis of their relative ability, knowledge, and skills, including the open consideration of qualified applicants for initial appointment; (2) providing equitable and adequate compensation; (3) training employees, as needed, to assure high quality performance; (4) retaining employees on the basis of the adequacy of their performance; (5) assuring fair treatment of applicants and employees in all aspects of personnel administration without regard to political affiliation, race, color, national origin, sex, religious creed, age or handicap and with proper regard for their privacy and constitutional rights as citizens; and (6) assuring that employees are protected against coercion for partisan political purposes and are prohibited from using their official authority for the purpose of interfering with or affecting the result of an election or nomination for office.

- b. Guidance Pertaining to Outsourcing. In determining what functions may be outsourced in State offices where Federal merit-staffing requirements apply, States are to rely on guidance in OMB Circular No. A-76 (Revised) and OFPP Policy Letter 92-1. These documents offer guidance on what functions may be outsourced by the Federal government. While these issuances, by their terms, apply only to the Federal government, their guidance, combined with the merit system standards listed above, are considered to be persuasive concerning what functions a State may outsource under a program where a Federal merit-staffing requirement applies. Also, the Department values consistency between what functions may be outsourced by a State and what functions may be outsourced by the Federal Government, as it

would be illogical to prohibit a State from outsourcing a function that the Federal Government is permitted to outsource. Therefore, these OMB issuances will also serve as the interpretative guides for the merit-staffing requirement of Section 303(a)(1), SSA, and the Secretary of Labor will use the guidance provided by these documents in determining whether outsourcing a UC administrative function is consistent with the merit system requirement under Section 303(a)(1), SSA, for purposes of certifying a State's law under the SSA.

These OMB issuances distinguish between "inherently governmental functions," which must be carried out by merit-staffed governmental employees and may not be outsourced, and "commercial activities," which may be outsourced. OPM directs Federal grantor agencies to use these two categories as a tool for determining whether a grant-recipient State may outsource a specific function. An "inherently governmental function" may not be outsourced as doing so would evade the merit requirements as non-governmental employees would be performing governmental functions.

OFPP Policy Letter 92-1 defines an inherently governmental function as a function "that is so intimately related to the public interest as to mandate performance by Government employees." Such functions include those activities that require "the exercise of discretion in applying Government authority or the making of value judgements in making decisions for the Government." An inherently governmental function involves, among other things, the interpretation and execution of law so as to: (1) bind the Government to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise; (2) determine, protect, and advance its economic, political, or property interests by civil or criminal judicial proceedings, contract management, or otherwise; (3) significantly affect the life or property of the individual; or (4) exert ultimate control over the acquisition, use, or disposition of the property of the Government, including the collection, control, or disbursement of appropriated or other funds.

According to OFPP Policy Letter 92-1, inherently governmental functions do not normally include gathering information for, or providing advice, opinions, recommendations, or ideas to, Government officials. They also do not include functions that are primarily ministerial and internal in nature, such as (but not limited to) building security, mail operations, housekeeping, or facilities operations and maintenance. [\(1\)](#)

Section 6(a) of OMB Circular No. A-76 (Revised) defines a commercial activity as one which is operated by an "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 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." The application of this test is illustrated below in Section 5 of this directive.

- c. Additional Federal Law Requirements. Sections 303(a)(3) and (8), SSA, also contain requirements applicable to the outsourcing of UC activities. These sections require, as a condition of States receiving UC administrative grants, that State law include provision for:

(3) Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied;

* * *

(8) . . . the expenditure of all moneys received pursuant to section 302 of this title solely for the purposes and in the amounts found necessary by the Secretary of Labor for the proper and efficient administration of such State law;

Impartiality is explicit in the requirement of Section 303(a)(3), SSA, that individuals whose claims have been denied be given the opportunity for a fair hearing before an "impartial tribunal." Impartiality may be achieved only when the deciding official is free from partisan political purposes as required by the OPM

regulations discussed in section 4.a. of this UIPL. The Department interprets this provision to have been met as long as the first level of appeal available to the individual is merit staffed.

The requirement of Section 303(a)(8), SSA, that amounts received for the administration of the UC program be used solely "in the amounts found necessary by the Secretary of Labor for the proper and efficient administration of State law" also restricts outsourcing. Any moneys expended to outsource UC functions that are required to be merit staffed, or any moneys spent on outsourcing UC functions which could be performed more efficiently by governmental personnel, would not be necessary for the proper and efficient administration of the State's UC law.

Also, the "methods of administration" requirement of Section 303(a)(1), SSA, beyond the merit staffing requirement, is applicable here. The Department has interpreted Section 303(a)(1), SSA, as requiring that eligibility decisions be accurate. (See 20 CFR Part 602.) It follows that the individuals making these decisions must have the knowledge and training necessary to make the correct decisions. Advancement for UC administrative staff based on knowledge, and the provision of training for such staff as needed, are requirements found in the OPM regulations discussed in section 4.a. of this directive.

Finally, outsourcing is not permitted when it otherwise creates a conflict with Section 303(a)(1), SSA, or any other Federal law requirement. For example, Section 303(a)(1), SSA, is interpreted to require that States keep UC information with personal identifiers confidential. An outsourcing arrangement that jeopardizes the confidentiality of the UC information would be impermissible.

5. **Application of Federal Requirements.** This section indicates UC functions which may or may not be outsourced. The items identified in this discussion constitute some of the major functions involved in administering the UC program. It is not necessarily an exhaustive list of functions. For functions that are not identified or discussed in this program letter or its attachments, the Department, in consultation with OPM, will review and decide the permissibility of outsourcing on a case-by-case basis, applying the principles in this issuance.

a. **Functions Which May Not Be Outsourced.** Many functions relating to the UC program are inherently governmental and, therefore, may not be outsourced.

Determining whether to pay (or not pay) UC is an inherently governmental function. Because one of the major functions of the UC program is to act as an economic stabilizer, these decisions ultimately involve the interpretation and execution of law in a manner which affects general economic interests. In addition, decisions made by employees who administer the UC system bind the State government to make payments to individuals based on applicable law and regulation, significantly affect the life of the individual, and affect disbursement of unemployment funds with respect to the individual. These types of decisions are identified specifically in OMB Circular A-76 (Revised) and OFPP Policy Letter 92-1 as inherently governmental.

Whether an individual will receive UC is determined through a process which involves taking claims, determining the facts of the individual's situation, and if necessary, adjudicating issues and hearing and deciding first-level appeals. These three basic functions involved in determining eligibility for UC also are inherently governmental in nature, as they require the exercise of discretion in applying governmental authority.

Claims taking involves providing claimants with an understanding of their rights to UC and with advice concerning when to file as well as what type of claim to file (e.g., intrastate, interstate, or combined-wage). Discretion must be exercised as to what advice is given. Fact-finding is extremely dependent upon the exercise of discretion as it involves asking the necessary questions and establishing the proper facts in order to ensure that a correct eligibility determination be made.

The adjudication of issues cannot be conducted without the adjudicator exercising discretion in the interpretation of the State law. In response to our inquiry, which arose from a request for guidance

concerning the merit system requirement as it related to appeals referees, OPM advised the Department that appeals referees must be covered by a merit system, meaning the position must be filled by a merit staffed government employee. This determination was based on the need to insulate hearing officers and adjudicators from political or other extraneous pressures. The need for this requirement is illustrated at the Federal level by the fact that Administrative Law Judges (ALJs) were specifically excluded from the Senior Executive Service (SES) at its creation, because the greatly relaxed merit staffing principles applied to members of the SES are not sufficient to assure the impartiality that is required of ALJs. Requiring adjudicators to be merit-staffed governmental employees is necessary to meet the impartial hearing requirement of Section 303(a)(3), SSA.

While the management of the Unemployment Trust Fund (UTF) is primarily a function of the United States Treasury, each State manages the clearing and benefit payment accounts in the State's unemployment fund. As stated in section 4.b of this directive and in OFPP Policy Letter 92-1, inherently governmental functions include all those where the individual interprets or executes the law so as to "exert ultimate control over the acquisition, use, or disposition of the property of the Government, including the collection, control, or disbursement of appropriated or other funds." Section 6(e)(2) of OMB Circular No. A-76 (Revised) specifically defines monetary transactions and entitlement, such as tax collection and revenue disbursements, control of the treasury accounts and money supply, and the administration of public trusts, as inherently governmental functions. As such, they must be performed by merit-staffed governmental employees.

Determination of employer liability and experience rates are also inherently governmental functions. To determine an employer's experience rate, determinations have to be made concerning noncharging of benefits paid (if allowed under the State law), determinations of successions, rate transfers, and whether penalty rates will be used. Employer monetary liability also includes determinations about whether to assess penalties and interest. Because these decisions have an affect on the amount owed by an employer, they have the potential to significantly affect the property of an individual. Decisions concerning coverage determine the employers who are liable for contributions and workers who accrue benefit rights under State law, and as such, significantly affect the property of individuals. For these reasons, all these functions must be performed by merit-staffed governmental employees.

Most aspects of the collection of contributions also must be performed by governmental employees. OMB Circular No. A-76 (Revised) specifically identifies monetary transactions and entitlement, such as tax collection and revenue distribution, as "functions so intimately related to the public interest as to mandate performance by governmental employees." Therefore, with the exception of the functions described in section 5.b of this directive, which follows, the functions involved in the collection of contributions must be performed by merit-staffed governmental employees.

- b. Functions for Which Outsourcing is Permitted. As noted in Section 4.b of this directive, for purposes of the merit system provisions of Section 303(a)(1), SSA, based on OPM's guidance, if a function may be outsourced by the Federal government, it may be outsourced by State governments, if it also does not conflict with State or other Federal law. We note, however, that further limitations on outsourcing, even where it otherwise would be permitted, are explained below in Sections 5.c and 5.d of this directive. The following discussion of permissible outsourcing is illustrative of the types of functions which may be outsourced and is not an exhaustive list of such functions.

One aspect of functions related to the collection of contributions where merit staffing is not required is the collection of >delinquent contributions which have been determined to be uncollectible by the State agency. In the case of such delinquent contributions, the determination as to the amount owed and the propriety of the decision already have been made by governmental employees. Moreover, the governmental agency will have taken all the actions required by law to collect the contributions due.

The requirement, discussed in section 5.a of this directive, that only merit-staffed governmental employees may collect, control, or disburse funds does not prohibit the use of commercial banks as depositories for clearing and benefit payment accounts, provided that the decisions concerning those

accounts (that is, when checks are written, the amount of money to be transferred or drawn down from the UTF, etc.) are made by merit-staffed governmental employees. These banking functions are ministerial in nature and, therefore, are not required to be merit-staffed. Similarly, States are not prohibited from using a commercial bank as the collection point for contributions (that is, a clearing account) because lockbox collection functions are ministerial functions as they involve no judgement.

Audits do not have to be performed by governmental employees. OMB Circular A-76 (Revised) specifically identifies financial auditing as an example of a commercial activity. Because this function involves the gathering of information rather than the determination of liability, the function may be outsourced if doing so is not inconsistent with State and Federal laws relating to procurement of services. The basic UC tax audit function, as well as certain program audit functions (such as workload validation) may be outsourced, to the extent they do not involve the exercise of discretion in applying governmental authority, but rather, involve only the investigation and verification of past actions taken by governmental or contract employees. (See section 5.c of this directive for additional discussion.)

Automated data processing (ADP) functions also are identified in OMB Circular A-76 (Revised) as commercial activities that may be outsourced. ADP functions do not require the use of discretion in applying governmental authority, nor do they impact the decisions concerning whether or not an individual is eligible to receive UC. Therefore, ADP functions may be outsourced.

In all cases where outsourcing is contemplated, safeguards must be in place to ensure that any confidential data available to the contractor is not disclosed. Otherwise, outsourcing would not be appropriate, as it would be inconsistent with the confidentiality requirements of Section 303(a)(1), SSA.

- c. **Determinations Concerning Outsourcing Must be Based on the Function, Not the Title of the Position to be Outsourced.** The Department recognizes that many UC staff positions entail the performance of multiple functions. A given UC staff position may include some duties that must be performed by merit-staffed governmental personnel, and some duties that may be outsourced. A decision as to whether it is permissible and/or appropriate to outsource an activity must be made by determining the function(s) performed, and must not be based on the title of the position charged with performing the function(s). If the function involves the application of governmental authority, it may not be outsourced, even if the title of the position suggests the absence of governmental authority. For example, as is usually the case for UC field audits, determining when audits are to be performed and decisions made as a result of the audit (for example, whether the employer owes back taxes, determinations of coverage, etc.) are inherently governmental functions that are an integral part of the UC audit function. Therefore, if auditors have the responsibility for making determinations of monetary liability or coverage decisions based on their audit findings, as is normally the case with tax auditors and in the various quality control programs, the auditors must be merit-staffed governmental employees and not contractors. If the ministerial functions can be separated out from the inherently governmental functions, the ministerial functions may be outsourced. However, a legal prerequisite still applies, as explained in section 5.d.2 of this directive, that doing so must not be less cost effective than having the entire function performed by merit-staffed governmental employees.

When deciding whether to outsource a position, States first should determine whether any inherently governmental functions are included in the duties of the position. If inherently governmental functions are included in the duties of the position, and they cannot be separated from the other function(s) to be performed, the position must be filled by a merit-staffed, governmental employee. If the inherently governmental function(s) can be separated from the position, and performed by merit-staffed governmental employees, then the rest of the function which is not inherently governmental may be outsourced, provided all other requirements for outsourcing are met. The Department will advise States on a case-by-case basis when requested to do so or when issues are identified regarding the outsourcing of specific functions and positions.

- d. **Further Limitations on Outsourcing.** The above discussions of outsourcing relate to whether a particular function may be outsourced. However, other factors must be taken into account before outsourcing the

function is permissible. These factors relate to whether a **de facto** employer-employee relationship exists between a contractor and governmental employees, and whether the government can perform the function in a more cost effective manner than a contractor.

(1) Functions, even if commercial activities, may not be outsourced if doing so would create an employer-employee relationship between government and contract employees. As noted above, commercial activities may be outsourced. However, even if a function is deemed to be a commercial activity, its outsourcing is impermissible if it creates a **de facto** employer-employee relationship between government and contract employees. A **de facto** employer-employee relationship, where contract employees are under the direction, supervision, and evaluation of government employees, but without merit system protections, would circumvent the Federal merit system requirements. In this case, the **de facto** employer-employee relationship would serve to achieve in a backhanded manner that which could not be achieved otherwise: performance of the work by **de facto** government employees **without** merit system protections. This would undermine the very basis for requiring merit system protections in the first place, and is, therefore, impermissible.

Conversely, under no circumstances may governmental employees be under the direction and control of contract employees. If governmental employees are subject to direction, supervision, and evaluation by contract personnel, the chain of governmental responsibility to the public would be broken. In this case, the contractor, who is not accountable to the public, would exert major influence over the employees, rather than government officials who are directly accountable to the public.

OPM has advised the Department that the existence of a **de facto** employer-employee relationship, in the context of government contractors, is determined under the Federal common law test (as opposed to the State law tests) for determining the existence of an employer-employee relationship. The determination whether an employer-employee relationship exists must be made on a case-by-case basis. Federal regulations defining the employer-employee relationship are found at 26 CFR Section 31.3306(i)-1.

(2) Functions, even if commercial activities, may not be outsourced if they can be performed in a more cost effective manner by the government. As noted above, Section 303(a)(8), SSA, requires that a State's law provide for the expenditure of all moneys received by the State under Section 302, SSA, "solely for the purposes and in the amounts found necessary by the Secretary of Labor for the proper and efficient administration" of the State's UC law. If a UC function can be performed more efficiently and cost effectively by the Government than by a contractor, outsourcing of the function, even if it is a commercial activity, would be inconsistent with Section 303(a)(8), SSA, as it would not constitute "efficient administration" of the State's UC law.

(3) Outsourcing may not be used to circumvent personnel or salary ceilings. OMB Circular A-76 (Revised) states that the circular shall not be used to justify the outsourcing of functions solely to avoid personnel ceilings or salary limitations. In applying this principle to the States, if such ceilings or limitations exist, granted funds must be used in a manner consistent with the ceilings or limitations in order to insure the "proper administration" of the State's law under Section 303(a)(8), SSA.

6. **Frequently Asked Questions.** While developing this directive, the Department received several questions concerning its contents. The following Questions and Answers respond to questions which have not already been addressed.

Q States frequently hire additional staff to handle temporary workload increases. These staff are let go when the workload decreases. In some cases, these staff may be retirees who return to work. Are these actions inconsistent with merit-staffing?

A The Department recognizes that it is necessary on occasion to bring on temporary employees to handle temporary workload increases. To ensure that these temporary employees are competent to perform the tasks for which they are hired, they must have been hired through a merit system. If a retiree was hired and trained under a merit system in the first place, the merit system requirement is maintained. No issue is created when these temporary employees are laid-off due to a workload reduction.

Q Members of Boards of Review which administer the second level of appeals are not required to be merit-staffed. Why is this so? May the higher appeals authority be outsourced?

A The higher appeals authority may not be outsourced as it performs an inherently governmental function that requires discretion in applying Government authority or the making of value judgements in making decisions for the Government. However, the Department has long held that Boards of Review need not be merit-staffed. Boards exist to provide an independent analysis of, and ensure consistency of, first-level appeals decisions. Board members typically represent both employer and employee interests and as such are chosen for their representation of those groups. This position was stated as early as 1963 in Section 0595(B), Part I, of the >Employment Security Manual. (This section is now obsolete.)

7. **Action Required.** Administrators are requested to provide this information to the appropriate staff. States should take appropriate action to assure that they meet the requirements of Federal law as explained by this UIPL.
8. **Inquiries.** Questions concerning the outsourcing of UC functions should be directed to the appropriate Regional Office.
9. **Attachments.** [OMB Circular No. A-76 \(Revised\)](#) and [OFPP Policy Letter 92-1](#).

1. Much of the guidance on inherently governmental functions contained in OFPP Policy letter 92-1 was codified in the Federal Activities Inventory Reform (FAIR) Act at FAIR Act §5(2). However, OPM has advised the Department that because the FAIR Act only codified-and did >not modify-the guidance in OMB Circular A-76 (Revised) and OFPP Policy Letter 92-1, OPM's analysis has not changed.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

CIRCULAR NO. A-76 (REVISED 1999)

August 4, 1983

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: Performance of Commercial Activities

1. Purpose. This Circular establishes Federal policy regarding the performance of commercial activities and implements the statutory requirements of the Federal Activities Inventory Reform Act of 1998, Public Law 105-270. The Supplement to this Circular sets forth the procedures for determining whether commercial activities should be performed under contract with commercial sources or in-house using Government facilities and personnel.
2. Rescission. OMB Circular No. A-76 (Revised), dated March 29, 1979; and Transmittal Memoranda 1 through 14 and 16 through 18.
3. Authority. The Budget and Accounting Act of 1921 (31 U.S.C. 1 et seq.), The Office of Federal Procurement Policy Act Amendments of 1979. (41 U.S.C. 401 et seq.), and The Federal Activities Inventory Reform Act of 1998. (P. L. 105-270).
4. Background.
 - a. 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.
 - b. This national policy was promulgated through Bureau of the Budget Bulletins issued in 1955, 1957 and 1960. OMB Circular No. A-76 was issued in 1966. The Circular was previously revised in 1967, 1979, and 1983. The Supplement (Revised Supplemental Handbook) was previously revised in March 1996 (Transmittal Memorandum 15).
5. Policy. 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. When conducting cost comparisons, agencies must ensure that all costs are considered and that these costs are realistic and fair.
 - b. Retain Governmental Functions In-House. Certain functions are inherently 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 and its Supplement, 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.

6. Definitions. For purposes of this Circular:

- a. A commercial activity 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 are not commercial activities. A representative list of commercial activities is provided in [Attachment A](#). 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.
- b. A conversion to contract is the changeover of an activity from Government performance to performance under contract by a commercial source.
- c. A conversion to in-house is the changeover of an activity from performance under contract to Government performance.
- d. A commercial source is a business or other non-Federal activity located in the United States, its territories and possessions, the District of Columbia or the Commonwealth of Puerto Rico, which provides a commercial product or service.
- e. An inherently Governmental function 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 and OFPP Policy Letter 92-1, 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 inherently Governmental functions, such as those listed in [Attachment A](#), are commercial activities and are normally subject to this Circular. Inherently Governmental functions normally fall into two categories:

- (1) The act of governing; i.e., the discretionary exercise of Government authority. Examples include criminal investigations, prosecutions and other judicial functions; management of Government programs requiring value judgments, as in direction of the national defense; management and direction of the Armed Services; activities performed exclusively by military personnel who are subject to deployment in a combat, combat support or combat service support role; conduct of foreign relations; selection of program priorities; direction of Federal employees; regulation of the use of space, oceans, navigable rivers and other natural resources; direction of intelligence and counter-intelligence operations; and regulation of industry and commerce, including food and drugs.

- (2) Monetary transactions and entitlements, such as tax collection and revenue disbursements; control of the Treasury accounts and money supply; and the administration of public trusts.

- f. A cost comparison is the process of developing an estimate of the cost of Government performance of a commercial activity and comparing it, in accordance with the requirements of the Supplement, to the cost to the Government for contract performance of the activity.
- g. Directly affected parties are Federal employees and their representative organizations and bidders or offerors on the instant solicitation.
- h. Interested parties for purposes of challenging the contents of an agency's Commercial Activities Inventory under the Federal Activities Inventory Reform Act of 1998 are:

- (1) A private sector source that (A) is an actual or prospective offeror for any contract or other form of agreement to perform the activity; and (B) has a direct economic interest in performing the activity that would be adversely affected by a determination not to procure the performance of the activity from a private sector source.
- (2) A representative of any business or professional association that includes within its membership private sector sources referred to in (1) above.
- (3) An officer or employee of an organization within an executive agency that is an actual or prospective offeror to perform the activity.
- (4) The head of any labor organization referred to in section 7103(a) (4) of Title 5, United States Code that includes within its membership officers or employees of an organization referred to in (3) above.

7. Scope.

- a. Unless otherwise provided by law, this Circular and its Supplement shall apply to all executive agencies and shall provide administrative direction to heads of agencies.
- b. This Circular and its Supplement apply to printing and binding only in those agencies or departments which are exempted by law from the provisions of Title 44 of the U.S. Code.
- c. This Circular and its Supplement shall not:
 - (1) Be applicable when contrary to law, Executive Orders, or any treaty or international agreement;
 - (2) Apply to inherently Governmental functions as defined in paragraph 6.e.;
 - (3) Apply to the Department of Defense in times of a declared war or military mobilization;
 - (4) Provide authority to enter into contracts;
 - (5) Authorize contracts which establish an employer-employee relationship between the Government and contractor employees. An employer-employee relationship involves close, continual supervision of individual contractor employees by Government employees, as distinguished from general oversight of contractor operations. However, limited and necessary interaction between Government employees and contractor employees, particularly during the transition period of conversion to contract, does not establish an employer-employee relationship.
 - (6) Be used to justify conversion to contract solely to avoid personnel ceilings or salary limitations;
 - (7) Apply to the conduct of research and development. However, severable in-house commercial activities in support of research and development, such as those listed in [Attachment A](#), are normally subject to this Circular and its Supplement; or
 - (8) Establish and shall not be construed to create any substantive or procedural basis for anyone to challenge any agency action or inaction on the basis that such action or inaction was not in accordance with this Circular, except as specifically set forth in Part 1, Chapter 3, paragraph K of the Supplement, "Appeals of Cost Comparison Decisions" and as set forth in Appendix 2, Paragraph G, consistent with Section 3 of the Federal Activities Inventory Reform Act of 1998.
- d. The requirements of the Federal Activities Inventory Reform Act of 1998 apply to the following executive agencies:
 - (1) an executive department named in 5 USC 101,

(2) a military department named in 5 USC 102, and

(3) an independent establishment as defined in 5 USC 104.

e. The requirements of the Federal Activities Inventory Reform Act of 1998 do not apply to the following entities or activities:

(1) the General Accounting Office,

(2) a Government corporation or a Government controlled corporation as defined in 5 USC 103,

(3) a non-appropriated funds instrumentality if all of its employees are referred to in 5 USC 2105(c), or

(4) Depot-level maintenance and repair of the Department of Defense as defined in 10 USC 2460.

8. Government Performance of a Commercial Activity. Government performance of a commercial activity is authorized under any of the following conditions:

a. No Satisfactory Commercial Source Available. Either no commercial source is capable of providing the needed product or service, or use of such a source would cause unacceptable delay or disruption of an essential program. Findings shall be supported as follows:

(1) If the finding is that no commercial source is capable of providing the needed product or service, the efforts made to find commercial sources must be documented and made available to the public upon request. These efforts shall include, in addition to consideration of preferential procurement programs (see Part I, Chapter 1, paragraph C of the Supplement) at least three notices describing the requirement in the Commerce Business Daily over a 90-day period or, in cases of bona fide urgency, two notices over a 30-day period. Specifications and requirements in the solicitation shall not be unduly restrictive and shall not exceed those required of in-house Government personnel or operations.

(2) If the finding is that a commercial source would cause unacceptable delay or disruption of an agency program, a written explanation, approved by the assistant secretary or designee in paragraph 9.a. of the Circular, must show the specific impact on an agency mission in terms of cost and performance. Urgency alone is not adequate reason to continue in-house operation of a commercial activity. Temporary disruption resulting from conversion to contract is not sufficient support for such a finding, nor is the possibility of a strike by contract employees. If the commercial activity has ever been performed by contract, an explanation of how the instant circumstances differ must be documented. These decisions must be made available to the public upon request.

(3) Activities may not be justified for in-house performance solely on the basis that the activity involves or supports a classified program or the activity is required to perform an agency's basic mission.

b. National Defense.

(1) The Secretary of Defense shall establish criteria for determining when Government performance of a commercial activity is required for national defense reasons. Such criteria shall be furnished to OMB, upon request.

(2) Only the Secretary of Defense or his designee has the authority to exempt commercial activities for national defense reasons.

c. Patient Care. Commercial activities performed at hospitals operated by the Government shall be retained in-house if the agency head, in consultation with the agency's chief medical director,

determines that in-house performance would be in the best interests of direct patient care.

- d. Lower cost. Government performance of a commercial activity is authorized if a cost comparison prepared in accordance with the Supplement demonstrates that the Government is operating or can operate the activity on an ongoing basis at an estimated lower cost than a qualified commercial source.
9. Action Requirements. To ensure that the provisions of this Circular and its Supplement are followed, each agency head shall:
 - a. Designate an official at the assistant secretary or equivalent level and officials at a comparable level in major component organizations to have responsibility for implementation of this Circular and its Supplement within the agency.
 - b. Establish one or more offices as central points of contact to carry out implementation. These offices shall have access to all documents and data pertinent to actions taken under the Circular and its Supplement and will respond in a timely manner to all requests concerning inventories, schedules, reviews, results of cost comparisons and cost comparison data.
 - c. Be guided by Federal Acquisition Regulation (FAR) Subpart 24.2 (Freedom of Information Act) in considering requests for information.
 - d. Implement this Circular and its Supplement with a minimum of internal instructions. Cost comparisons shall not be delayed pending issuance of such instructions.
 - e. Ensure the reviews of all existing in-house commercial activities are completed within a reasonable time in accordance with the Federal Activities Inventory Reform Act of 1998 and the Supplement.
 10. Annual Reporting Requirement. As required by the Federal Activities Inventory Reform Act of 1998 and Appendix 2 of the Supplement, no later than June 30 of each year, agencies shall submit to OMB a Commercial Activities Inventory and any supplemental information requested by OMB. After review and consultation by OMB, agencies will transmit a copy of the Commercial Activities Inventory to Congress and make the contents of the Inventory available to the public. Agencies will follow the process provided in the Supplement for interested parties to challenge (and appeal) the contents of the inventory.
 11. OMB Responsibility and Contact Point. All questions or inquiries should be submitted to the Office of Management and Budget, Room 6002 NEOB, Washington, DC 20503. Telephone number (202) 395-6104, FAX (202) 395-7230.
 12. Effective Date. This Circular and the changes to its Supplement are effective immediately.

Attachment A
OMB Circular No. A-76

EXAMPLES OF COMMERCIAL ACTIVITIES

Audiovisual Products and Services

Photography (still, movie, aerial, etc.)

Photographic processing (developing, printing, enlarging, etc.)

Film and videotape production (script writing, direction, animation, editing, acting, etc.)

- Microfilming and other microforms
- Art and graphics services
- Distribution of audiovisual materials
- Reproduction and duplication of audiovisual products
- Audiovisual facility management and operation
- Maintenance of audiovisual equipment

Automatic Data Processing

- ADP services - batch processing, time-sharing, facility management, etc.
- Programming and systems analysis, design, development, and simulation
- Key punching, data entry, transmission, and teleprocessing services
- Systems engineering and installation
- Equipment installation, operation, and maintenance

Food Services

- Operation of cafeterias, mess halls, kitchens, bakeries, dairies, and commissaries
- Vending machines
- Ice and water

Health Services

- Surgical, medical, dental, and psychiatric care
- Hospitalization, outpatient, and nursing care
- Physical examinations
- Eye and hearing examinations and manufacturing and fitting glasses and hearing aids
- Medical and dental laboratories
- Dispensaries
- Preventive medicine
- Dietary services
- Veterinary services

Industrial Shops and Services

- Machine, carpentry, electrical, plumbing, painting, and other shops
- Industrial gas production and recharging
- Equipment and instrument fabrication, repair and calibration
- Plumbing, heating, electrical, and air conditioning services, including repair
- Fire protection and prevention services
- Custodial and janitorial services
- Refuse collection and processing

Maintenance, Overhaul, Repair, and Testing

- Aircraft and aircraft components

- Ships, boats, and components
- Motor vehicles
- Combat vehicles
- Railway systems
- Electronic equipment and systems
- Weapons and weapon systems
- Medical and dental equipment
- Office furniture and equipment
- Industrial plant equipment
- Photographic equipment
- Space systems

Management Support Services

- Advertising and public relations services
- Financial and payroll services
- Debt collection

Manufacturing, Fabrication, Processing, Testing, and Packaging

- Ordnance equipment
- Clothing and fabric products
- Liquid, gaseous, and chemical products
- Lumber products
- Communications and electronics equipment
- Rubber and plastic products
- Optical and related products
- Sheet metal and foundry products
- Machined products
- Construction materials
- Test and instrumentation equipment

Office and Administrative Services

- Library operations
- Stenographic recording and transcribing
- Word processing/data entry/typing
- Mail/messenger
- Translation
- Management information systems, products and distribution
- Financial auditing and services
- Compliance auditing
- Court reporting
- Material management
- Supply services

Other Services

- Laundry and dry cleaning
- Mapping and charting
- Architect and engineer services
- Geological surveys
- Cataloging
- Training -- academic, technical, vocational, and specialized
- Operation of utility systems (power, gas, water steam, and sewage)
- Laboratory testing services

Printing and Reproduction

- Facility management and operation
- Printing and binding -- where the agency or department is exempted from the provisions of Title 44 of the U.S. Code
- Reproduction, copying, and duplication
- Blueprinting

Real Property

- Design, engineering, construction, modification, repair, and maintenance of buildings and structures; building mechanical and electrical equipment and systems; elevators; escalators; moving walks
- Construction, alteration, repair, and maintenance of roads and other surfaced areas
- Landscaping, drainage, mowing and care of grounds
- Dredging of waterways

Security

- Guard and protective services
- Systems engineering, installation, and maintenance of security systems and individual privacy systems
- Forensic laboratories

Special Studies and Analyses

- Cost benefit analyses
- Statistical analyses
- Scientific data studies
- Regulatory studies
- Defense, education, energy studies
- Legal/litigation studies
- Management studies

Systems Engineering, Installation, Operation, Maintenance, and Testing

- Communications systems - voice, message, data, radio, wire, microwave, and satellite
- Missile ranges
- Satellite tracking and data acquisition
- Radar detection and tracking

Television systems - studio and transmission equipment, distribution systems, receivers, antennas, etc.
Recreational areas
Bulk storage facilities

Transportation

Operation of motor pools
Bus service
Vehicle operation and maintenance
Air, water, and land transportation of people and things
Trucking and hauling

POLICY LETTER 92-1
TO THE HEADS OF EXECUTIVE AGENCIES AND DEPARTMENTS

SUBJECT: Inherently Governmental Functions

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

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

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

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

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

- (a) bind the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;
- (b) determine, protect, and advance its economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise;

- (c) significantly affect the life, liberty, or property of private persons;
- (d) commission, appoint, direct, or control officers of employees of the United States; or
- (e) exert ultimate control over the acquisition, use, or disposition of the property, real or personal, tangible or intangible, of the United States, including the collection, control, or disbursement of appropriated and other Federal funds.

Inherently governmental functions do not normally include gathering information for or providing advice, opinions, recommendations, or ideas to Government officials. They also do not include functions that are primarily ministerial and internal in nature, such as building security; mail operations; operation of cafeterias; housekeeping; facilities operations and maintenance, warehouse operations, motor vehicle fleet management and operations, or other routine electrical or mechanical services.

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

6. Policy.

(a) **Accountability.** It is the policy of the Executive Branch to ensure that Government action is taken as a result of informed, independent judgments made by Government officials who are ultimate accountable to the President. When the Government uses service contracts, such informed, independent judgment is ensured by:

- (1) prohibiting the use of service contracts for the performance of inherently governmental functions (See [Appendix A](#));
- (2) providing greater scrutiny and an appropriate enhanced degree of management oversight (see subsection 7(f)) when contracting for functions that are not inherently governmental but closely support the performance of inherently governmental functions (see [Appendix B](#));
- (3) ensuring, in using the products of those contracts, that any final agency action complies with the laws and policies of the United States and reflects the independent conclusions of agency officials and not those of contractors who may have interests that are not in concert with the public interest, and who may be beyond the reach of management controls otherwise applicable to public employees; and
- (4) ensuring that reasonable identification of contractors and contractor work products is made whenever there is a risk that the public, Congress, or other persons outside of the Government might confuse them with Government officials or with Government work products, respectively.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(5) requiring contractors to (a) submit reports that contain recommendations and that explain and rank policy or action alternatives, if any, (b) describe what procedures they used to arrive at their

recommendations, (c) summarize the substance of their deliberations, (d) report any dissenting views, (e) list sources relied upon, and/or (f) otherwise make clear the methods and considerations upon which their recommendations are based.

- (g) **Identification of contractor personnel and acknowledgment of contractor participation.** Contractor personnel attending meetings, answering Government telephones, and working in other situations where their contractor status is not obvious to third parties must be required to identify themselves as such to avoid creating an impression in the minds of members of the public or the Congress that they are Government officials, unless, in the judgment of the agency, no harm can come from failing to identify themselves. All documents or reports produced by contractors are to be suitably marked as contractor products.
- (h) **Degree of reliance** The extent of reliance on service contractors is not by itself a cause for concern. Agencies must, however, have a sufficient number of trained and experienced staff to manage Government programs properly. The greater the degree of reliance on contractors the greater the need for oversight by agencies. What number of Government officials is needed to oversee a particular contract is a management decision to be made after analysis of a number of factors. These include, among others, the scope of the activity in question; the technical complexity of the project or its components; the technical capability, numbers, and workload of Federal oversight officials; the inspection techniques available; and the importance of the activity. Current contract administration resources shall not be determinative. The most efficient and cost effective approach shall be utilized.
- (i) **Exercise of approving or signature authority.** Official responsibility to approve the work of contractors is a power reserved to Government officials. It should be exercised with a thorough knowledge and understanding of the contents of documents submitted by contractors and a recognition of the need to apply independent judgment in the use of these work products.

8. Responsibilities.

- (a) **Heads of agencies.** Heads of departments and agencies are responsible for implementing this policy letter. While these policies must be implemented in the Federal Acquisition Regulation (FAR), it is expected that agencies will take all appropriate actions in the interim to develop implementation strategies and initiate staff training to ensure effective implementation of these policies.
- (b) **Federal Acquisition Regulatory Council.** Pursuant to subsections 6(a) and 25(f) of the OFPP Act, as amended, 41 U.S.C. Sections 405(a) and 421(f), the Federal Acquisition Regulatory Council shall ensure that the policies established herein are incorporated in the FAR within 210 days from the date this policy letter is published in the **Federal Register**. Issuance of final regulations within this 210-day period shall be considered issuance "in a timely manner" as prescribed in 41 U.S.C. Section 405(b).
- (c) **Contracting officers.** When requirements are developed, when solicitations are drafted, and when contracts are being performed, contracting officers are to ensure:
- (1) that functions to be contracted are not among those listed in Appendix A of this letter and do not closely resemble any functions listed here;
 - (2) that functions to be contracted that are not listed in Appendix A, and that do not closely resemble them, are not inherently governmental functions according to the totality of the circumstances test in subsection 7(b), above;
 - (3) that the terms and the manner of performance of any contract involving functions listed in Appendix B of this letter are subject to adequate scrutiny and oversight in accordance with subsection 7(f), above; and
 - (4) that all other contractible functions are properly managed in accordance with subsection 7(e), above.

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

9. **Judicial review.** This policy letter is not intended to provide a constitutional or statutory interpretation of any kind and it is not intended, and should not be construed, to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person. It is intended only to provide policy guidance to agencies in the exercise of their discretion concerning Federal contracting. Thus, this policy letter is not intended, and should not be construed, to create any substantive or procedural basis on which to challenge any agency action or inaction on the ground that such action or inaction was not in accordance with this policy letter.
10. **Information contact.** For information regarding this policy letter contact Richard A. Ong, Deputy Associate Administrator, the Office of Federal Procurement Policy, 725 17th Street, N.W., Washington, DC 20503. Telephone (202) 395-7209.
11. **Effective date.** This policy letter is effective 30 days after the date of publication.

(signed by)
Allan V. Burman
Administrator

APPENDIX A

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

The direct conduct of criminal investigation.

The control of prosecutions and performance of adjudicatory functions (other than those relating to arbitration or other methods of alternative dispute resolution).

The command of military forces, especially the leadership of military personnel who are members of the combat, combat support or combat service support role.

The conduct of foreign relations and the determination of foreign policy.

The determination of agency policy, such as determining the content and application of regulations, among other things.

The determination of Federal program priorities or budget requests.

The direction and control of Federal employees.

The direction and control of intelligence and counter-intelligence operations.

The selection or nonselection of individuals for Federal Government employment.

The approval of position descriptions and performance standards for Federal employees.

The determination of what Government property is to be disposed of and on what terms (although an agency may give contractors authority to dispose of property at prices with specified ranges and subject to other reasonable conditions deemed appropriate by the agency).

In Federal procurement activities with respect to prime contracts,

- (a) determining what supplies or services are to be acquired by the Government (although an agency may give contractors authority to acquire supplies at prices within specified ranges and subject to other reasonable conditions deemed appropriate by the agency);
- (b) participating as a voting member on any source selection boards;
- (c) approval of any contractual documents, to include documents defining requirements, incentive plans, and evaluation criteria;
- (d) awarding contracts;
- (e) administering contracts (including ordering changes in contract performance or contract quantities, taking action based on evaluations of contractor performance, and accepting or rejecting contractor products or services);
- (f) terminating contracts; and
- (g) determining whether contract costs are reasonable, allocable, and allowable.

The approval of agency responses to Freedom of Information Act requests (other than routine responses that, because of statute, regulation, or agency policy, do not require the exercise of judgment in determining whether documents are to be released or withheld), and the approval of agency responses to the administrative appeals of denials of Freedom of Information Act requests.

The conduct of administrative hearings to determine the eligibility of any person for a security clearance, or involving actions that affect matters of personal reputation or eligibility to participate in Government programs.

The approval of Federal licensing actions and inspections.

The determination of budget policy, guidance, and strategy.

The collection, control, and disbursement of fees, royalties, duties, fines, taxes and other public funds, unless authorized by statute, such as title 31 U.S.C. Section 952 (relating to private collection contractors) and title 31 U.S.C. Section 3718 (relating to private attorney collection services), but not including:

- (a) collection of fees, fines, penalties, costs or other charges from visitors to or patrons of mess halls, post or base exchange concessions, national parks, and similar entities or activities, or from other persons, where the amount to be collected is easily calculated or predetermined and the funds collected can be easily controlled using standard cash management techniques, and
- (b) routine voucher and invoice examination.

The control of the treasury accounts.

APPENDIX B

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

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

Services that involve or relate to budget preparation, including workload modeling, fact finding, efficiency studies, and should-cost analyses, etc.

Services that involve or relate to reorganization and planning activities.

Services that involve or relate to analyses, feasibility studies, and strategy options to be used by agency personnel in developing policy.

Services that involve or relate to the development of regulations.

Services that involve or relate to the evaluation of another contractor's performance.

Services in support of acquisition planning.

Contractors' providing assistance in contract management (such as where the contractor might influence official evaluations of other contractors).

Contractors' providing technical evaluation of contract proposals.

Contractors' providing assistance in the development of statements of work.

Contractors' providing support in preparing responses to Freedom of Information Act requests.

Contractors' working in any situation that permits or might permit them to gain access to confidential business information and/or any other sensitive information (other than situations covered by the Defense Industrial Security Program described in FAR 4.402(b)).

Contractors' providing information regarding agency policies or regulations, such as attending conferences on behalf of an agency, conducting community relations campaigns, or conducting agency training courses.

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

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

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

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

Contractors' providing inspection services.

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

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