

The Role of Contractors in Government: Have We Gone Too Far?

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There has been a longstanding recognition that the federal government does not have enough employees with the requisite skills to meet every agency need. Nor should they. Agencies obtain real advantages in employing contractors that can offer specialized skills to handle short-term requirements. Moreover, using a competitive selection process helps to bring both efficiency and innovation to address government needs. However, there has been a growing disparity between the very low rate of growth in the number of civil servants over the last fifteen years and the enormous growth in funding for all types of contracted support. Contractors today are engaged in virtually all aspects of Federal agency operations.

Has the government gone too far in its reliance on contractors and are they performing mission-critical functions better left to civil servants?

This issue is by no means new. In the early 1990's Members of Congress raised concerns that governmental responsibilities were being unacceptably transferred to contractors. Largely in response to these concerns, the Office of Federal Procurement Policy in 1992 issued a government-wide policy on inherently governmental functions. The policy states that an "Inherently governmental function means, as a matter of policy, a function that is so intimately related to the public interests as to mandate performance by Government employees." The basic provisions of that policy are found today as Part 7.5 of the Federal Acquisition Regulation (FAR) and continue to form the basis of the determinations of what should or should not be contracted out. The FAR lists the types of activities that would be precluded from being carried out by a contractor, such as

- Binding the United States to take some action by contract, policy or regulation,
- Determining United States' interests by military or diplomatic action,
- Significantly affecting the life, liberty or property of private persons,
- Appointing or directing officers or employees of the United States, or
- Exerting ultimate control over the acquisition or use of property of the United States including the collection of Federal funds.

It cautions however that these prohibitions do not ordinarily affect gathering information or providing advice to government officials or affect functions that are primarily ministerial in nature. The difficulty in application comes from trying to apply a relatively general formula to specific cases, as for example, as to whether contractors should prepare agency testimony or provide security services in war zones.

Some contend that this concern about contractors' usurping Federal roles may be outmoded and irrelevant to how government works today given the prevalence of a multisector agency workforce.

Steven Schooner and Daniel Greenspahn in a Summer 2008 *Journal of Contract Management* article note "throughout the government, the private sector is intimately involved in functions perceived as inherently governmental, including those where the risk level is deemed highest, such as acquisition support, engineering or technical services, intelligence services, policy development and reorganization and planning." The implication is that with a policy so honored in the breach, there is little to be gained in trying

to enforce or improve it. This new multisector civil servant/contractor workforce has become a necessary fact of life for how Federal agencies carry out their responsibilities. In fact, contractor staff often find themselves sitting side by side with Federal employees and addressing the same problems, under the direct supervision of Federal officials as if they were personal services contractors. A personal services contract allows this type of direct supervision but it is rarely used and must be specifically authorized in law.

The Congress continues to see this expanding reliance on contractors as a problem.

Section 321 of the Duncan Hunter National Defense Authorization Act (NDAA) for 2009 requires the Director of the Office of Management and Budget (OMB) to review existing definitions of inherently governmental functions and to develop a single definition that could be applied across the government. The Director is also asked to see that agency heads identify critical positions in their agencies that are not inherently governmental but that Federal employees should fill. What is the objective? To see that the agency "maintains control of its mission and operations" and has "sufficient organic expertise and technical capability" to do its work. Other legislation in the same bill addresses related concerns. For example, new policies are being requested to deal with contractor personal and organizational conflict of interests, again reflecting concerns about operating in a multisector workforce environment.

Taking a second look at how "inherently governmental" is defined is warranted, given that the definition has been in place for some fifteen years and the workplace has changed over that time from an "arm's length" one to one where government and contractor staff tackle agency issues in a much more collaborative fashion. However, given longstanding political constraints on expanding Federal civilian employment, more attention should also be given to better planning on how the various elements of this multisector workforce can work together in an environment free of conflict of interest concerns.

Recommendations

The following reflects a series of practical steps that both OMB and agency leadership could take to improve multi-sector workforce planning and operations:

- Revisit the definition of inherently governmental functions to see if changes should be made based on differences in the nature of the resources Federal agencies use today to accomplish their missions.
- Ensure that personal conflict of interest and organizational conflict of interest provisions and regulations are structured so as to mitigate any risks that government decision-making is influenced by inappropriate or biased interests.
- Develop a human capital strategic plan for each agency that recognizes the various contributions of all the parties that support agency activities.
- Reconsider whether more opportunity should be provided for agencies to make use of personal services contracts, where individual contractors are directly supervised by Federal staff, allowing them effectively to serve as an agent of the principal individual responsible for accomplishing the agency mission.
- Identify someone at a senior leadership position in the agency to have responsibility for tackling the management issues and rules associated with the multi-sector workforce.

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