

In-Sourcing Initiative

How Did We Get Here? Where Are We Going?¹

1-6-2006	<p><u>National Defense Authorization Act for FY 2006</u></p> <p>Section 343 of the FY06 NDAA required DoD to issue guidelines and procedures for ensuring that consideration was given to Federal Government employees for work performed under DoD contracts. The Under Secretary of Defense for Acquisition, Technology, and Logistics issued guidelines on July 27, 2007 that allowed the conversion of contracted activities or functions for up to 3 percent of a Component’s authorizations coded as “commercial reviewable,” required prior notification of the DoD Competitive Sourcing Official for actions that would exceed the 3-percent limit, and gave the DoD Competitive Sourcing Official authority to intervene or stop a section 343 action. This guidance was subsequently canceled, as required by section 324 of the FY08 NDAA.</p>
1-28-2008	<p><u>National Defense Authorization Act for Fiscal Year 2008</u></p> <p>Section 324 of the FY08 NDAA requires the Under Secretary of Defense for Personnel and Readiness to develop guidelines and procedures to ensure that consideration is given to using DoD civilian employees to perform new functions or functions that are performed by contractors. New guidance was issued on April 4, 2008, with additional guidance issued on May 8, 2008.</p>
10-14-2008	<p><u>Duncan Hunter National Defense Authorization Act for FY 2009</u></p> <p>Section 321 of the FY09 NDAA required OMB to “review the definitions of the term ‘inherently governmental function’ [as found in FAIR, the FAR, OMB Circular A-76, and other federal law deemed relevant by the director of OMB] and develop a single consistent definition of inherently governmental. Based on the statutory deadline, OMB originally was supposed to issue a new definition by September 2009. Now, OMB is expected to release the new definition by the end of March.</p>
3-4-2009	<p><u>Presidential Memorandum on Government Contracting</u></p> <p>On March 4, 2009 the President issued a memorandum on government contracting to the heads of executive departments and agencies. The memorandum raised the concern that the proportion of contracts awarded without full and open competition has become too high, and the line between what is “inherently governmental” and what can properly be contracted out has become blurred and contractors are performing inappropriate tasks. To address these concerns, the memo directed OMB to collaborate with DoD and other agencies to issue guidance in two parts:</p>

¹ Presented to the ABA Public Contract Law Section, Midyear Council Meeting on March 6, 2010. Special thanks to Suzanne Sivertsen of Arnold & Porter LLP for her assistance in preparing this presentation.

	<ul style="list-style-type: none"> • OMB was to issue by July 1, 2009 government-wide guidance for evaluating existing contracts and to formulate corrective action. OMB issued two memos addressing these subjects on July 29, 2009. • By September 30, 2009, OMB was to issue guidance on the use and oversight of all contract types, and to assist agencies in evaluating the capacity and ability of the federal acquisition workforce. The memo was issued by OFPP on October 27, 2009. <p>Pursuant to the Defense Authorization Act, OMB should also “clarify when governmental outsourcing for services is and is not appropriate.”</p>
3-11-2009	<p><u>Omnibus Appropriations Act, 2009</u></p> <p>Section 736 of Division D of the Omnibus Appropriations Act, 2009, P.L. 111-8, March 11, 2009, requires agencies to issue “guidelines and procedures to ensure that consideration is given to using, on a regular basis, Federal employees to perform new functions and functions that are performed by contractors and could be performed by Federal employees.”</p>
5-28-2009	<p><u>DoD Memo - In-sourcing Contracted Services - Implementation Guidance</u></p> <p>DOD issued additional in-sourcing guidance that stated an in-sourcing plan should include all stakeholders – programming/budget, resources management, contracting, manpower and civilian human resources, as well as the requiring community – and states that in-sourcing should be part of a total force approach to workforce management and strategic human capital planning. The guidance further outlines the steps that should be taken to prioritize and review contracted services for in-sourcing.</p> <p>The DoD memo requires evaluation of current contracts and identifies five categories of contracts that should be in-sourced:</p> <ol style="list-style-type: none"> 1. Contracts where functions performed are inherently governmental, 2. Contracts where functions performed are exempted from private sector performance, 3. Unauthorized personal services contracts, 4. Contracts where there are problems with contract administration because of a lack of sufficiently trained and experienced officials available to oversee contract functions, and 5. Contracts where it would be more cost-effective to have services performed by DoD civilian employees. This last category requires special consideration of certain types of positions. 6. <p>The decision tree included in the memo showing the process for reviewing contracted services for in-sourcing is attached.</p> <p>Deputy Secretary Lynn also reportedly issued a policy memo in November 2009 which outlined actions that should be taken to remove impediments to in-sourcing. Three main impediments were highlighted:</p> <ul style="list-style-type: none"> • Lack of data systems to provide historical data necessary for accurate in-sourcing analysis; • Inadequate human resources (including inconsistent hiring processes and inflexible hiring authorities); and • Challenges on total force strategic planning and management.

7-29-09

OMB Memo - Improving Government Acquisition

This memo directed agencies to achieve two specific goals. First, agencies must review existing contracts and “develop a plan to save 7 percent of baseline contract spending by the end of FY 2011.” The Administration set a dollar amount of \$40 billion in net savings “through better acquisition and acquisition-related program practices.” Second, agencies must decrease “by 10 percent the share of dollars obligated in FY 2010 under new contract actions that are awarded with high-risk contracting authorities.” The high-risk contracting authorities are non-competitive contracting authority, cost reimbursement contracts, and time-and-materials and labor-hour (T&M/LH) contracts. The 10 percent goal is to be calculated using FY2008 figures. There was a deadline of November 2, 2009 for agencies to submit their plans to OMB, however every agency missed this deadline in part because OMB missed its own deadlines to issue further guidance on when outsourcing is appropriate and the definition of “inherently governmental.”

OMB’s examples of steps agencies should consider in achieving savings targets

- end contracts that are ineffective, wasteful, support programs that are being terminated, reduced or changed in scope, or not otherwise likely to meet the agency’s needs,
- improve acquisition practices by strengthening the acquisition workforce,
- reviewing acquisition practices to improve competition for contracts and compare them to best practices at other agencies, and
- increase agencies’ participation in government-wide acquisition initiatives.

One specific example given was the Department of Energy cutting \$30 million from FY 2010 budget by terminating funding for a contract to refurbish Los Alamos Neutron Science Center since it no longer plays a central role in weapons research.

OMB announced in December 2009 that the major contracting agencies are on track to meet the \$40 billion two-year net savings goal, and they identified \$19 billion of savings for the first year. *Acquisition and Contracting Improvement Plans and Pilots* (December 2009).

Managing Risk in High-Risk Contracts

OMB also directed agencies to better manage high-risk contracts. Specifically, to

- apply additional resources to the analysis and negotiation of fair and reasonable prices for non competitive contracts,
- migrate work from a cost-type to fixed-price contract as requirements become better defined, and analyze the organizations within the agency that repeatedly renew high-risk contract types and determine whether less risky alternatives, including in-sourcing, would result in lower costs.

7-29-2009

OMB Memo - Managing the Multi-Sector Workforce

The goal stated in the memo is nebulous - to improve management of the federal government's multi-sector workforce. The goal implicitly recognizes the existence of, and necessity for, a multi-sector workforce. The memo set out three more specific steps for agencies to take:

- Adopt a framework for managing the multi-sector workforce that emphasizes the need for various offices within the agency to cooperate on human capital planning;
- Conduct a pilot human capital analysis of one program where the agency has concerns about the reliance on contractors. The pilot analyses are due by May 1, 2010. A list of the pilot projects is available in the OMB memorandum "Acquisition and Contracting Improvement Plans and Pilots" issued December 2009; and
- Establish guidelines for in-sourcing, pursuant to the requirement in section 736 of Division D of the Omnibus Appropriations Act, 2009, P.L. 111-8. Section 736 requires agencies subject to the FAIR Act to "devise and implement guidelines and procedures to ensure that consideration is given to using, on a regular basis, Federal employees to perform new functions and functions that are performed by contractors and could be performed by Federal employees." To fulfill this statutory requirement, OMB developed guidance along with DoD, which had issued similar guidelines on May 28, 2009. The attached chart summarizes OMB's criteria for in-sourcing under Section 736, which applies only to civilian agencies. The attached decision tree is from the DoD's May 2009 memo and summarizes the in-sourcing process established by and for DoD.

Multi-Sector Workforce Management Framework

As Attachment 1 to the memo, OMB included an Initial Framework for Managing the Multi-Sector Workforce. It provided guidance in three areas, workforce planning, sourcing determination, and management. The most significant guidance was that for sourcing determinations, because it established the threshold at which contractor sourcing could be considered.

- **Workforce planning.** OMB's workforce planning guidelines focused on the need to derive workforce needs from organizational goals and to use the workforce needs to determine skill mix and total labor requirements.
- **Management.** OMB gave three management guidelines: (1) to facilitate collaboration from intra-agency organizations including human capital, acquisition, and budget and finance offices, (2) to provide for processes to support reasoned and impartial decision-making, and (3) to give top management attention to multi-sector workforce management, policy, and performance issues.
- **Source Determination.** Source determination provided the most significant language because it established the threshold at which the agency can consider utilizing contractors to fulfill needs. Agencies are to analyze different functions and put them into one of three categories: inherently governmental; critical, but not inherently governmental; or essential, but not inherently governmental.² The table below explains the consequence on hiring options of putting a particular function into one of these categories. A cost analysis will only be performed if an analysis of the function being performed allows for consideration of performance by both federal employees and contractors.

² The memo does not further define any of the categories. As noted above, OMB is required by statute to issue a single definition of "inherently governmental," but it has not yet done so. OFPP expects to issue a draft notice in the *Federal Register* in March 2010.

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10-27-2009	<p><u>OFPP Memo - Increasing Competition and Structuring Contracts for Best Results</u></p> <p>The memo offers guidelines for Chief Acquisition Officers (CAOs) and Senior Procurement Executives (SPEs) to evaluate the effectiveness of their agency’s competition practices and processes for selecting contract types. The guidelines ask the CAOs and SPEs to address three questions:</p> <ol style="list-style-type: none"> 1. How is the agency maximizing the effective use of competition and choosing the best contract type for the acquisition? 2. How is the agency mitigating risk when noncompetitive, cost-reimbursement, or T&M/LH contracts are used? 3. How is the agency creating opportunities to transition to more competitive and lower risk contracts? 								
2-1-2010	<p><u>President’s FY 2011 Budget</u></p> <p>“[A]gencies must be alert to situations in which excessive reliance on contractors undermines the ability of the Federal Government to control its own operations and accomplish its missions for the American people. ... Too often agencies have neglected the investments in human capital planning, recruitment, hiring, and training that are necessary for building strong internal capacity.”</p> <p>To ensure that federal agencies have the expertise they need to keep tabs on their contractors, Obama called for \$158 million for an initiative to improve the “capacities and capabilities” of the civilian acquisition workforce, building on a similar initiative at the Defense Department. “The initiative included in the 2011 Budget provides resources sufficient for most civilian agencies to increase their acquisition workforce by 5 percent and to invest in training and technology that will make the acquisition workforce more effective.”</p>								

3-4-2010	OFPP Administrator Daniel Gordon announced to the Section that in March 2010, OMB will be releasing a draft notice in the <i>Federal Register</i> addressing three categories of work: inherently governmental, closely associated with inherently governmental and critical functions. Public comments will be solicited on the guidance and whether the list of inherently governmental jobs should be updated.
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Lack of Definitions of Key Terms Continues to be a Critical Issue

Continued uncertainty as to what is meant by terms used in section 736 and OMB's criteria such as "inherently governmental," "mission-critical," "core competency," and "consideration" versus "special consideration."

- OMB still has not issued its guidance on the definition of "inherently governmental." OFPP Administrator Gordon announced that comments will be solicited via the *Federal Register* later in March 2010.
- Query whether the proper focus is instead on "critical function" rather than on "inherently governmental"
- To define "inherently governmental," the FAIR Institute suggested looking to Policy Letter 92-1 issued Sept. 23, 1992 by OFPP, and it focused on three key factors: (1) retention of government decision-making powers, (2) conflicts of interest, and (3) use of contractors for support activities to provide data, information, etc., as long as the first two conditions are addressed.
- The FAIR Institute also offered a method to determine which positions represent "core competency." What specific positions are required at a minimum to provide oversight to contractors, interpret contractors' work, and ensure avoidance of OCIs?

Other In-sourcing Issues

- Building government capability to ensure government can perform critical functions - partly a reaction to LSI and OCI issues
- Reticence to outsource core functions - we should be able to do some of this in-house
- Identifying offices within the agency that will be involved in in-sourcing efforts and the roles each will play
- Confusion as to when a cost analysis is needed and the appropriate procedures to conduct one.
- Difficulty in gathering and analyzing certain types of service-contracting data needed for making in-sourcing decisions.
- Limited budgets and resources may constrain in-sourcing efforts.
- Overcoming institutional inertia now that the policy focus has shifted from outsourcing to in-sourcing.
- Outsourcing was competitive under A-76, and still most of the work stayed in the government. The in-sourcing effort doesn't seem to be competitive - it's just a unilateral mandate
- Concern that in-sourcing - as was also the case with outsourcing - will be driven by arbitrary goals or arbitrary cost savings goals, or that it will be done just because a contract is ending. In-sourcing should be based on a more strategic plan.
- Does FAR Part 7 need to be changed to reflect in-sourcing goals?

On the Horizon

- OMB's comprehensive definition of "inherently governmental"
- Completion of agency pilot human capital analyses
- Issuance of agency-specific in-sourcing guidelines
- Increased visibility through the launch of an online dashboard allowing the public to track whether agencies are progressing and meeting the Administration's goals
- Expansion of the agencies' savings plans. For example, OMB challenged agencies to aggressively seek deeper discounts on "blanket purchase agreements."
- Improved access to contractors' past performance evaluations leading to increased scrutiny as a result of the establishment of government-wide database.
- Congressional support for in-sourcing - does this mean we'll have stand-alone legislation?
- What will be in the NDAA? Look to upcoming Defense Acquisition Panel report for clues?

GAO summarized the §736 requirements, as interpreted by OMB, as follows:

GAO Chart: OMB’s Criteria for Insourcing under Section 736

Key sections	Agency responsibilities/actions and factors to consider
General Management Responsibilities	<ul style="list-style-type: none"> ● review contractor performance on an ongoing basis and where a determination is made that contractors are performing inherently governmental responsibilities, insource such work on an accelerated basis ● monitor internal human-capital capacity to minimize the risks associated with overreliance or improper reliance on contractors ● ensure that there are sufficient resources to manage and oversee contractors
General Consideration of Federal Employee Performance	<ul style="list-style-type: none"> ● augment existing management reviews when appropriate, to consider and evaluate opportunities to improve performance with the use of federal employees <ul style="list-style-type: none"> ○ evaluations should <ul style="list-style-type: none"> ▪ consider opportunities for new and already-contracted work ▪ generally include a cost analysis that addresses the full cost of performance and provides “like comparisons” of relevant costs to determine the most cost-effective source of support ● situations when insourcing may be justified without a full cost analysis: <ul style="list-style-type: none"> ○ to establish or build internal capacity or maintain ○ to perform a function that is closely associated with an inherently governmental function and in-house performance is necessary for an agency to maintain control of its mission and operations; or ○ to avoid the compromise of a critical agency or administration policy
Special Consideration of Federal Employee Performance	<ul style="list-style-type: none"> ● go beyond existing agency management reviews and evaluate the specific function to be performed prior to the pursuit or nonpursuit of a contract action <ul style="list-style-type: none"> ○ key issues and actions for evaluations <ul style="list-style-type: none"> ▪ if an agency determines that contractor performance causes the agency to lack sufficient internal expertise to maintain control of its mission and operations, then the agency is to take actions to obtain needed in-house capacity ▪ if a preliminary analysis suggests that public-sector performance is more cost-effective and it is feasible to hire federal employees for a particular function, the agency is to initiate a more-detailed analysis of insourcing options ▪ extent of analysis should generally be commensurate with the size and complexity of the function in question and its importance to the agency’s mission ▪ cost analysis should address the full costs of government and private-sector performance ▪ insourcing should not be used unless performance and risk considerations in favor of federal employee performance will clearly outweigh cost considerations
Competition Restrictions	<ul style="list-style-type: none"> ● reiterates restriction in section 736 from conducting public-private competitions under OMB Circular A-76 as a prerequisite to federal performance of certain functions

GAO report, “Civilian Agencies’ Development and Implementation of Insourcing Guidelines” issued October 6, 2009

PROCESS FOR PRIORITIZING AND REVIEWING CONTRACTED SERVICES FOR IN-SOURCING

