



Construction Industry Round Table

Regulatory News

A force for positive change in the design / construction industry

4/02/10 – OMB’s Language May Result in Less Federal Design Service Contractor Opportunities

As a key member of the Business Coalition for Fair Competition (BCFC), CIRT has been a strong advocate for a balance between private and public sector contracting, wherein the private sector firms should not have to compete for work against in-house government employees – when the services they provide are commercial in nature and not “inherently governmental.” Of course, this begs the question: What is “inherently governmental?” To this long standing discourse the Obama Administration has released its proposed guidance on “inherently governmental” activities – those activities that only government employees, and not private contractors, can perform – with what appears to be an ominous expansion on the long-standing phrase. [See, 75 Fed.Reg.16,188 (03/31/10) for the official rulemaking with a public comment deadline of June 1, 2010].

BCFC President, John Palatiello’s statement on the newly proposed ruling by the Office of Federal Procurement Policy (OFPP) on “*Work Reserved for Performance by Federal Government Employees*” points out: The Administration’s proposed definition of “inherently governmental” is a mixed bag. On the positive side, it adheres to the statutory definition in the FAIR Act.

On the other hand, the proposed policy never uses the term “commercial activities” and does not strike a balance between inherently government and commercial activities; it fails to state or reinstate the original Eisenhower 1955 policy (Bureau of the Budget Bulletin 55-4, the predecessor of OMB Circular A-76) that the government should utilize the private sector to the maximum extent possible and should not compete with its citizens. Also it does not address the 850,000 federal employee positions identified under the FAIR Act that are commercial in nature and activities of agencies that duplicate and compete with the private sector; it does not address when a direct conversion to contractor performance is appropriate or discuss activities that should be reserved for performance by private sector employees.

And, most troubling of all, OFPP introduces a new term “**inherently governmental activities and professional and technical services**”. Professional and technical services have been considered commercial activities for decades and should continue to be so defined. [Certainly, design services would squarely fall within anyone’s reasonable definition of a “professional” and/or “technical” service. So, does that mean design services are now to be done only by government employees?] Moreover, the document fails to provide any criteria that is or will be used for in-sourcing.

At a time when our economy is hemorrhaging private sector jobs, this document should outline the efficiency standards that will be utilized to determine whether the government or the private sector should be performing an activity, to assure a vibrant private sector tax base, as well as growth and jobs creation in the private sector, including small business.