



Construction Industry Round Table

May 27, 2010

The Honorable Daniel I. Gordon
Administrator
Office of Federal Procurement Policy
Eisenhower Executive Office Building, Room 263
1650 Pennsylvania Avenue, N.W.
Washington, DC 20503

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Work Reserved for Performance by Federal Government Employees; [75 Fed. Reg. 16,188 (March 31, 2010)]

Dear Administrator Gordon:

On behalf of the Construction Industry Round Table (CIRT)¹, we wish to have our views included in the official record of comments regarding the above captioned policy letter concerning the matter of "inherently governmental functions."

CIRT, along with the design and construction community, has long maintained that a balance between private and public sector professionals serve the American taxpayers best when it comes to the delivery of services from our industry. In that spirit, we have consistently seen the value in a well trained, professional, and motivated federal public work force that is competent and responsible for managing the design/construction services contracts traditionally signed to meet taxpayer needs.

However, the guidance letter's construct reverses the original and long-held intent of federal policy to contract-out for goods and services unless they were "inherently governmental" in nature, to one that now suggests that agency officials must prove it is not "inherently governmental" to contract-out.

Discussion

The critical principle regarding government contraction first articulated by President Eisenhower is missing from the proposed policy letter – and with it the traditional and intended reliance on the private sector.²

Absent from the proposal is the powerful, yet simple statement of public policy which remains as true today as it did over 50 years ago: "*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.*" [Bureau of the Budget, Bulletin 55-4].

Instead, the letter is replete with a series of dictates that direct agency behavior with respect to assuring no contract is let that may be deemed "inherently governmental." These directives include agency responsibilities that obligate every federal employee to avoid such contracts, develop agency

procedures, create training programs, review internal management controls, and designate management officials all for the express purpose of preventing any contracts that should be reserved to federal employees. [See, 75 Fed. Reg. 16,196 (March 31, 2010)].

Beyond the need to return (i.e., incorporate) the original guiding principle back into the proposal, the letter is a complicated, convoluted, layered document that creates uncertainty and conflict within its context.

(1) The proposed policy letter adopts the FAIR Act's (Public Law 105-270) definition as the single, government-wide definition for "inherently governmental functions." But later appears to cloud and/or extend that definition with confusing additions and language. For instance:

- Beyond the simple FAIR definition is added the concept of "*or otherwise needs to be reserved to the public sector*" and "*functions closely associated with the performance with the performance of inherently governmental functions.*" The later addition requires an illustrative list to help define what functions would fall within the "closely associated" phrase. These extensions appear beyond the scope of the FAIR definition – and stretch the authority of OFPP.
- The section on: "Post-award" states: "*Agencies should review, . . . the functions being performed by their contractors, paying particular attention to the way in which contractors are performing, and agency personnel are managing, contracts involving functions that are closely associated with inherently governmental functions . . . or contracts for professional and technical services.*" *Id.* at 16,195.

Never before have professional and technical services – such as those provided by design professionals (which are required to obtain licenses to hold themselves out for contracts with federal government agencies) been potentially added to the definition of an "inherently governmental function." This language should be deleted from the final version of the policy letter.³

- The policy letter includes an "*Appendix B. Examples of functions closely associated with the performance of inherently governmental functions*" as guidance. This illustrative list of functions is meant to represent the types of things considered likely to fall within the "closely associated" phrase. Item 16 lists: "*Construction of buildings or structures intended to be secure from electronic eavesdropping or other penetration by foreign governments.*" 75 Fed. Reg. 16,197 (March 31, 2010).

In truth and in fact, every federal building could be the target of foreign (or domestic) eavesdropping or other penetration attempts – whether abroad or on U.S. soil. The contractors building the structure are not in the process of "inherently governmental" activities while *building* the facility – even if highly sensitive government functions occur once the building is occupied.

It makes absolutely no sense to suggest that government employees should construct/build a structure just because at a later date it may be targeted for espionage. This item should be struck from the list of potential "closely associated with the performance of inherently governmental functions."

Conclusion

Government *should* rely on the diverse and teeming private sector to deliver on a myriad of program needs and services. The relationship between the private sector and the government rests upon a proper balance that takes into account the inherent governmental nature of the work, management of the contracted services, and a final accounting of the product.

The proposed policy letter does not reflect this important balance and fails to provide the proper fundamental principle of reliance on the private sector – *unless*, it is an "inherently governmental function." Therefore, we respectfully request that the changes suggested be adopted in the final version of the policy letter on this subject.

Sincerely,

Mark A. Casso, Esq.
President

¹ The Construction Industry Round Table (CIRT) strives to create one voice to meet the interest and needs of the design and construction community. CIRT supports its members by actively representing the industry on public policy issues, by improving the image and presence of its leading members, and by providing a forum for enhancing and/or developing strong management approaches in an ever changing environment through networking and peer interaction.

The Round Table is composed of approximately 100 CEOs from the leading architectural, engineering, and construction firms in the United States. Together these firms deliver on billions of dollars of public and private sector infrastructure projects that enhance the quality of life of all Americans while directly employing half-million workers.

² The policy letter dismisses the role and importance of the private sector in delivering goods and services for the taxpayers. This traditional/guiding principle or preference – is at best given lip service in a backhanded acknowledgement that flips the burden to: "Nothing in this guidance is intended to discourage the appropriate use of contractors." 75 Fed. Reg. 16,193.

³ The Congressional Record accompanying the FAIR Act specifically notes that professional services like design and mapping are not "inherently governmental" as a function. It is conceivable that a given project that requires design capabilities and skills could be an "inherently governmental" BUT, that is not what is being suggested by the policy letter. The potential exists (based on a reading of the letter) that agencies could (or will) view the generic design service as off limits for contracting – and given the nature of the guidance and its requirements to prevent such contracts from occurring – who could blame a contracting official from erring on the side of caution?