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WASHINGTON, D.C. 20503**
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STATEMENT OF
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BEFORE THE
SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT,
THE FEDERAL WORKFORCE, AND THE DISTRICT OF COLUMBIA
COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

MAY 20, 2010

Chairman Akaka, Ranking Member Voinovich, and Members of the Subcommittee, I welcome the opportunity to appear before you today to discuss the Administration's efforts to rebalance the mix of work performed by Federal employees and contractors. As public stewards, we are entrusted to deliver the most effective and efficient government performance possible, and to do so we must recognize the proper role for each sector and draw on its skills appropriately. The civil service is the lifeblood of our Government, and, in many of their interactions with our citizens, Federal employees *are* the Government. We must make sure they have the capacity, skills, and resources to manage and carry out their agencies' missions and operations. For our Federal employees, contractors are an important resource. They offer expertise, innovation, and cost-effective performance to support a wide range of services that the Government provides to our citizens. While contractors play, and will continue to play, a vital role, there are situations where the mix of work performed by our Federal employees and

contractors is out of balance – where agencies have contracted out functions that should be performed by Federal employees. As the President said in his March 4, 2009 Memorandum on Government Contracting, the line between work that may be contracted out and work that must be reserved for Federal employees has become blurred. We must clarify the rules and carefully consider the way we use contractors to ensure that we strike the right balance to both protect the public’s interest and serve the American people in a cost-effective manner.

This afternoon, I would like to share with the Committee the steps the Office of Management and Budget (OMB) is taking to help agencies strike the best balance. Your letter of invitation asks, in particular, about efforts by the Office of Federal Procurement Policy (OFPP) to define, or redefine, inherently governmental functions, functions closely associated with inherently governmental ones, and critical functions. You also ask about challenges and associated actions with regard to right-sizing the Federal employee-to-contractor mix and the tools available or needed to facilitate in-sourcing. To address your questions, I would like to begin by discussing what we are doing to clarify the rules for when work must be reserved for performance by Federal employees. Then, I would like to describe some of the specific actions we are taking to address potential overreliance on contractors. In rebalancing our relationships with contractors, our goal is not to change the size of government but rather to ensure that government is effective in meeting the needs of the American people.

Establishing a clear and comprehensive policy framework

Both the President and Congress have directed OMB to improve the rules for determining when it is—and is not—appropriate for work to be performed by contractors. Unfortunately,

many of the rules for drawing this line were written nearly two decades ago and do not always reflect the present-day challenges of managing the Government. In addition, the policies addressing these issues are scattered throughout the Federal Acquisition Regulation (FAR), a circular, and multiple OMB memoranda, which has further complicated the ability of our Federal managers to develop a clear and comprehensive understanding of what rules apply and their responsibilities for implementing them. Whether due to confusion about the rules or for other reasons, some work has been contracted out that needs to be performed by Federal employees.

To address these concerns, we published a draft OFPP policy letter in the *Federal Register* on March 31, 2010, to begin a process for reviewing and improving, with the public's input, the policies governing the reservation of work for performance by Federal employees. The policy letter is designed to clarify policies, as well as management responsibilities, for determining when functions must be carried out by Federal employees and when they may be performed by either Federal employees or contractors. The policy letter focuses on three types of functions: (1) inherently governmental functions, (2) functions closely associated with inherently governmental ones, and (3) functions that are "critical" to the agency's mission.

Here is what the draft policy letter would do in each of these areas:

- ***Establish a single definition for the term "inherently governmental function."*** The draft policy letter would establish a single definition by directing agencies to adhere to the single existing statutory definition, as set out in the Federal Activities Inventory Reform Act (FAIR Act). That definition states that a function is inherently governmental if it is "so intimately related to the public interest as to require performance by Federal Government employees," and the Act includes further clarifying language. We believe the FAIR Act definition is

reasonable and that interested stakeholders have reached a similar conclusion -- based on what we heard at a public meeting held last summer in connection with the President's March 4, 2009 Memorandum on Government Contracting, our review of relevant reports (such as the report of the Congressionally-chartered Acquisition Advisory Panel), and other discussions. At the same time, confusion has arisen in the application of the FAIR Act definition, because there are currently multiple, and potentially inconsistent, tests to determine whether or not a function is inherently governmental. Elimination of these variations should help to address much of this confusion. The policy letter would preserve a long-standing list of examples – set out in the Federal Acquisition Regulation (FAR) – of the most common inherently governmental functions, such as the determination of agency policy, hiring of Federal employees, and awarding of Federal contracts. As part of the invitation to comment on the draft policy letter, we have solicited the public's views on whether the final policy letter should add any activities to the list. The draft policy letter would also refine existing criteria, provide new ones, and help an agency decide if a particular function that is not identified on the list is, nonetheless, inherently governmental.

- ***Clarify when work should be considered “closely associated” with inherently governmental functions.*** In order to help agencies comply with the FY 2009 Omnibus Appropriations Act, which requires agencies to give special consideration to Federal employee performance of functions closely associated with inherently governmental ones, the policy letter also would clarify when work should be considered to be in that category. Although contractors may continue to perform those functions, the draft policy letter states that, if contractors are used to perform such work, agencies must give heightened management attention to the contractors' activities to guard against their expansion into

inherently governmental functions. Steps might entail providing clearer prescriptions in the statement of work of what the contractor may and may not do, and ensuring adequate and adequately trained personnel to oversee the contractor's work. As with the coverage on inherently governmental functions, the draft would preserve a long-standing FAR list of examples of "closely associated" functions and solicit public comment on whether changes should be made to the list.

- ***Ensure that agencies have the internal capacity to perform their critical functions.*** Last year, Congress identified a new category of "critical functions," which are functions that, while not inherently governmental, are needed for an agency to effectively perform its mission and maintain control of its operations. The identification of this new category fills a void in current policy and gives us an important new concept to help agencies address functions that are at the core of an agency's mission and other important operational activities.

Unlike inherently governmental functions, which can only be performed by Federal employees, critical functions often can be performed by both Federal employees and contractors. Key, though, is that there always be a sufficient number of Federal employees performing, or managing, the function so that the agency can maintain control. For this reason, the draft policy letter would hold agencies responsible for ensuring that a sufficient number of positions performing critical functions are filled by Federal employees possessing the appropriate training, experience, and expertise to understand the agency's requirements, formulate alternatives, manage work product, and supervise any contractors used to support the Federal workforce. Federal officials would need to evaluate, on an

agency-by-agency basis, whether they had sufficient internal capability, taking into account factors such as the agency's mission, the complexity of the function, the need for specialized staff, and the potential impact on mission performance if contractors were to default on their obligations. The draft policy letter makes clear that, so long as agencies have the internal capacity needed to maintain control over their operations, they are permitted to contract out positions within critical functions.

In addition to guidance on each type of function, OFPP's draft policy letter would require agencies to take specific actions, before and after contract award, to prevent contractor performance of inherently governmental functions and overreliance on contractors in the performance of "closely associated" and critical functions. Agencies would also be required to develop agency-level procedures, provide training, and designate senior officials to be responsible for implementation of these policies.

OFPP is encouraging commenters to offer their views on a series of questions focused on some of the more difficult or pressing policy challenges. For example, one question asks for input on the use of contractors in the performance of areas that have been the source of particular controversy or confusion – such as acquisition support, strategic planning, and security operations performed in direct support of combat. Another question invites commenters to offer their thoughts on the types of practical considerations that arise during the everyday management of a Federal organization, such as the circumstances under which a contractor may attend or represent an agency at a policy-making meeting, or the steps contractor employees should be required to take when working on a government site so that their status is clearly understood. Responses to the draft guidance will be posted on

regulations.gov for review by the public and considered by OMB as we determine the shape of the final guidance.

Rebalancing the Federal employee-to-contractor mix

We do not anticipate that the content of the draft policy letter, if finalized in something like its current form, will lead to a widespread shift away from contractors. However, we do expect every agency to work actively to identify if and where rebalancing is needed and to take appropriate actions to fix any identified imbalances.

In many cases, overreliance on contractors may be corrected by allocating additional resources to contract management. In other words, rebalancing does not require an agency to in-source, that is, to convert work from contract to in-house performance, provided the agency can hire, retrain, or reassign sufficient Federal employees with the requisite skills at managing contractors to maintain control of their activities. In this regard, we are working to make sure agencies have the resources they need to manage and oversee their contractors and that they take steps to recruit and retain the necessary Federal talent where it is lacking. The President's FY 2011 Budget includes \$158 million for civilian agencies to build the capacity and capability of their acquisition workforce. This small investment in our workforce will go a long way in making sure agencies are able to maintain control of their contractors and their operations – allowing them to watch more carefully for situations where contractor activity may be impinging on Federal officials' performance of inherently governmental functions and putting an end to the inappropriate, and risk-laden, practice of having contractors manage other contractors.

In some cases in-sourcing may be the appropriate remedy. We are working with agencies to make sure that when in-sourcing is being considered, the agency's basis for taking action is well-grounded. Last summer, OMB issued criteria to facilitate the measured application of statutory requirements in the FY 2009 Omnibus Appropriations Act regarding the use of Federal employees to perform new work and work currently performed by contractors.

OMB's guidance provides specific bases for in-sourcing. For instance, one basis may be that the work is determined to be inherently governmental. In this case, the agency must act expeditiously to in-source by developing and executing, on an accelerated basis, a hiring plan to convert the work to performance by Federal employees. Another basis may be that the agency has determined that continued contractor performance puts the agency at risk of losing control of its operations. If the agency determines that hiring of Federal employees is needed to address this situation, the agency should also develop and execute a hiring plan and secure the necessary in-house capacity and expertise as promptly as possible. The Office of Personnel Management's ongoing initiative to streamline hiring rules should greatly assist agencies in more expeditiously bringing on board new employees to perform work that needs to be performed by Government personnel. Yet another basis for in-sourcing may be cost – that is, that public sector performance is more cost effective than private sector performance. If cost is the basis, officials need to ensure that the agency's analysis fairly takes into account the full cost of performance by both sectors to support a determination that insourcing will save money.

Tools and techniques for rebalancing

Identifying the best remedy and taking effective action to achieve the right mix of Federal employees and contractors for a given organization requires certain skills and tools. To help agencies build these capabilities, OMB asked each major Department and agency to identify at least one of its organizations where there was concern about overreliance on contractors, and to use multi-disciplinary teams – with human capital, acquisition, and program officials – to develop plans for determining the best mix of skills and workforce size for the organization. More than half of the agencies identified acquisition and information technology organizations for their pilots. We will work with agencies in sharing experiences and processes they used to support their analyses. We will also review agency analyses of the historical drivers for using contractors – such as challenges related to recruiting Federal employees and resource considerations – when performance by Federal employees may have been more appropriate.

In addition, we are preparing guidance to support agencies' development of annual inventories of their service contracts in accordance with the FY 2010 Appropriations Act. A contractor inventory can be a beneficial tool to help agencies keep closer track of how contractors are being used to perform work that is closely associated with inherently governmental functions or other sensitive or mission-critical functions where there may be concerns about the balance of Federal employees and contracted resources and the government's ability to maintain control of its operations. Development of the inventory methodology is being closely coordinated with our draft policy letter so that the inventory can,

among other things, help agencies meet their responsibilities under the draft policy letter when it is finalized.

Conclusion

As you can see, rebalancing the mix of work performed by Federal employees and contractors is a top management priority for OMB. There are a number of difficult questions yet to be answered, but we are optimistic that the draft policy letter and our measured approach to rebalancing, supported by appropriate implementation tools, will lead to meaningful and lasting improvements in the way we use the talents of our Federal employees and contractors to serve the American people. I look forward to working with the Committee, other members of Congress, and our other stakeholders as we move forward together on this important effort. I am happy to answer any questions you might have.