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June 1, 2010

VIA EMAIL (OFPPWorkReserved@omb.eop.gov)

Office of Federal Procurement Policy
ATTN: Matthew Blum
New Executive Office Building, Room 9013
724 17th Street, NW
Washington, DC 20503

Re: Comments to Proposed OFPP Policy Letter, March 31, 2010; 75 Fed. Reg. 16188

Dear Mr. Blum:

This submission is in response to the request for comments on the Office of Federal Procurement Policy's ("OFPP") "proposed policy letter to provide guidance addressing when work must be reserved for performance by federal employees." 75 Fed. Reg. at 16189. The proposed policy letter was published in response to the President's March 4, 2009 Memorandum on Government Contracting, which directed the Office of Management and Budget ("OMB") to clarify when outsourcing is appropriate and when it is not. Additionally, OFPP's letter resulted from Section 321, Subtitle C—Workplace and Depot Issues, Public Law 110-417 ("the Act"), which directs the OMB to: (1) provide a single, consistent definition of what is an "inherently governmental function;" (2) develop criteria for identifying critical functions given agencies' unique missions and structures; and (3) identify positions that should be filled by civilian or military government employees in order for the agency to maintain control of its mission/operations and "sufficient organic expertise and technical capability." P.L.110-417, §321(a)(4).

PilieroMazza PLLC is a law firm that represents many small businesses, including those that are owned by tribes, veterans, minorities and women. At a time when the economy is still struggling to turn the corner and unemployment remains high, many government agencies have been accelerating the President's initiative to eliminate outsourced functions – and jobs. Although insourcing is affecting businesses of all shapes and sizes, small businesses, often touted as the engine that will drive our economic recovery, have been most affected because they typically hold smaller contracts that make easier targets for agencies looking to shave their contracting budgets. Small businesses also have less leverage and resources to contest improper government hiring practices. And because small businesses are more apt to be dependent on fewer contracts, the impact of the government's decision to end a contract early is more severe.

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Against this backdrop, we are concerned that the proposed policy letter does not provide enough transparency for agencies' insourcing decisions, does not provide mechanisms for challenging insourcing decisions, does not give any special protections to small businesses and set-aside contracts, and appears to encourage the practice of hiring contractor personnel in the middle of existing contracts regardless of when the contract is set to expire. Our specific comments follow below regarding: (A) the proposed policy letter; (B) how small businesses have been impacted by insourcing; and (C) additional suggestions for the final guidance.

A. OFPP's Proposed Policies

A fundamental concern, which may have resulted in some of the negative impact on small business, is that OFPP is the wrong office to be conducting this inquiry and this is sending the wrong message to the contracting community. The legislation underlying the proposed policy letter is directed at identifying mission and operational control issues. While the Act does direct OMB to consult with the Chief Acquisition Officers Council under the OFPP Policy Act, it also directs OMB to consult with the Chief Human Capital Officers Council. In other words, the real intent of the Act is to ask OMB to help guide the Federal Government in managing both its procurement and human capital resources so that each agency can maintain control of its mission and operations; the Act is looking for OMB's advice on best management practices, not just procurement practices. OFPP's focus is on procurement and consequently the proposed policy letter is couched in outsourcing vs. insourcing concerns rather than management and operational control concerns. We respectfully request that issuance of this management policy be tasked to OMB, not OFPP.

As to the substance of the OFPP's letter, the first two sentences of Section 4 of the proposed policy state our position best:

It is the policy of the Executive Branch to ensure that government action is taken as a result of informed, independent judgments made by government officials. Adherence to this policy will ensure that the act of governance is performed, and decisions of significant public interest are made, by officials who are ultimately accountable to the President and bound by laws controlling the conduct and performance of Federal employees that are intended to protect or benefit the public and ensure the proper use of funds appropriated by Congress.

75 Fed. Reg. 16193-94. In order to achieve this objective, we submit that only inherently governmental functions must be done by Federal Government employees. We propose that "inherently governmental" should be linked by definition to the public interest and that most tasks that ultimately are determined to be inherently governmental are those sovereign powers enumerated in the Constitution.

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The list of functions in Appendix A may be a useful tool for distinguishing between what is an inherently government function and what is not, although the answer is not always as clear as the list suggests. As indicted in 11, 12(a), and 17, these acts seem to be inherently governmental, but in fact are not because the function can be defined with sufficient specificity so as to eliminate any element of discretion. In other instances, what is truly inherently governmental in the end may be limited. The approval of what is to be released pursuant to a Freedom of Information Act request is inherently governmental is one example. The review of the universe of material and an analysis of what is covered and what is not, could be performed by a contractor, and, arguably, is better done by a contractor since it may have more ready access to expertise needed in cases that may arise only from time to time and thus cannot be maintained on staff at an agency. The individual making the final decision must be knowledgeable and capable in order to review an analysis and make an informed decision; what that individual reviews should come from the best value source whether Federal employee or contractor. Similarly, in Federal procurement the Federal Government should be the best value to investigate technical solutions, while decisions regarding what will be purchased must be reviewed and decided by capable Federal employees.

Thus, the question of how other functions are performed is not a function of who does them, or whether they are inherently governmental, but how they are done so as to maintain the Federal Government's control of its mission and operations. We therefore suggest that the use of the terms "closely associated" and "critical" are not useful for the purposes of determining how to best maintain control of missions and operations. For example, a well drafted statement of work involving the critical work of email security, the performance of which is overseen by a technically capable Federal employee and an adequately staffed acquisition office, provides control of the agency's mission. Additionally, a statement of work for a proposed acquisition may be drafted by a contractor if capable and experienced program and acquisition Federal employees decide whether it adequately expresses the needs of the Federal Government. Similarly, a contractor construction inspector may inspect construction work as long as capable and experienced program and acquisition Federal employees decide whether the contract has been, or has not been, performed adequately. That is not to say that Federal employees could not perform this work, or conversely, that the work would always be contracted out. It is saying, however, that it is not necessary to reserve the work for Federal employees in order to have mission and operations control.

The proposed policy letter also leaves the consideration of cost virtually untouched. While mentioned, the letter provides no guidance on developing a cost comparison or when it should be done. This has left the impression on the contracting community that cost is not relevant. Any function other than inherently governmental functions could be performed by the private or public sector, but cost should be a factor, albeit not the only factor, in weighing the options available. If, after receipt of the comments, the emphasis in the proposed policy letter remains on procurement, we request that OFPP advise agencies to prepare a cost analysis and

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cost-benefit analysis as part of any make-buy decision and that both documents be made available to the public on the web.

With respect to the questions posed and answers solicited by OFPP in the preamble to the proposed policy letter, we agree with the comments being submitted by the U.S. Chamber of Commerce. We also agree with its comments on specific aspects of the proposed policy letter.

B. Impact on Small Businesses

OFPP's emphasis on procurement and "work reserved for performance by Federal Government employees" together with improper contracting guidance has already resulted in the cancellation of contracts with small businesses, many of them minority, veteran and woman owned. Agencies have received directives from the White House regarding adding more employees to their federal payrolls in order to "rebalance" the public/private ratio of contractor to federal employees. Reports that a contract is being cancelled are coming from the contractors' own employees as those employees receive job announcements e-blasted even before the contractor is notified by the contracting agency. Requests for cost analysis are ignored, and, in any event, are ineffective since the converted workforce has already taken the contract work.

Small businesses are vital to our national economy, the industrial base, and our leadership in innovative technology. An ample supply of financially sound and technically capable small business prime contractors and subcontractors is critical to our industrial base. For example, smaller sub-prime contractors in the national security space industrial base are "critical to future national defense capabilities" as "a fundamental crucible for innovation and development of the leading-edge technologies that have proven the hallmark of our asymmetrical advantage in the national security environment." Understanding and Addressing the Concerns at the Sub-Prime Contractor Level, The Space Foundation, April 4, 2006 at 11. Moreover, consolidation at the prime contractor level has not benefited the Department of Defense ("DoD") and competitive sourcing from numerous small and mid-sized firms remains critical to our national security. Creating an Effective National Security Industrial Base of the 21st Century: An Action Plan to Prevent the Coming Crisis, Defense Science Board Task Force on Defense Industrial Structure for Transformation, at 26-27, July 2008. While loss of jobs at small businesses is shared with losses by large business, "small firms provide the greater share of net new jobs." An Analysis of Small Business and Jobs, Brian Headd, Office of Advocacy, Small Business Administration, March 2010 at 3.

The Federal Government established small business programs to ensure federal contracting participation sufficient to enhance the success and growth of small businesses and small businesses owned by women, socially and economically disadvantaged individuals, and service disabled veterans. President Obama has established an initiative for increasing small business federal contracts, describing the small business goals in April 2010 as "aspirational goals that help ensure that all Americans share in the jobs and opportunities created by Federal

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procurement.” The President established an Interagency Task Force on Federal Contracting Opportunities for Small Businesses to ensure small business goals are met. Yet at the same time small businesses’ critical contribution to our economy and security is touted, the DoD and other agencies are terminating the very federal procurement contracts upon which the small business programs’ success depends. The just established Interagency Task Force cannot succeed if federal procurement is arbitrarily restricted.

Small businesses are experiencing widespread termination or downsizing of its contracts in both DoD and non-DoD environments as the Government hires small business employees while requiring small business to still recruit and train new hires who will be converted to federal employees. Indeed, the proposed policies suggest that accelerating insourcing by not exercising options and hiring in-house is appropriate. Accelerated insourcing generally means hiring the contractor’s employees. For example, a small disadvantaged business was told that all of its guard service employees that were former military would be hired immediately by the Government. Non-military personnel were told to apply for employment and regular hire. The contractor was told to keep recruiting, hiring and training so that trained contractor employees could later be hired by the Government. Building security is one of the services called out in the proposed regulations as “ministerial and internal in nature.” Yet this contract is experiencing *de facto* termination. This was done without a cost analysis, or, indeed, any analysis at all.

Another incident occurred recently with the Department of Labor (“Labor”). In this instance, Labor is cherry picking employees from the contractor’s mailroom contract. Labor interviews the contractor’s employees, offers them an increased salary, then directs the employees to consider the offer confidential and not disclose it to the contractor. The contractor’s employees then tender their resignations on a Friday with a Monday start as Government employees.

Additionally, the Department of the Interior gave one of its woman-owned small businesses only one week’s notice before insourcing the firm’s management support work.

Service disabled veterans are also being hard hit by the DoD’s insourcing. One service disabled veteran owned small business firm has seen two contracts representing 40% of the veteran’s contract work targeted for termination with its employees to be hired by the Air Force. The work is modeling and simulation for missile readiness. The Air Force has approached the contractor’s employees directly and informed them the work will be insourced. The Air Force even asked the contractor’s employees to write their Government position descriptions. The Air Force has refused to produce any agency analysis. The Air Force also has announced it will terminate another contract in six months. Together these comprise 40% of the Veteran’s business. In one year another SDVOSB has lost 30 employees and \$8.8 million of a \$13 million contract to the Government’s insourcing. After five years of performance, another Air Force logistical and management support contractor has been forced to lower its price and seen its

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performance term reduced to six months, both under the Air Force's threat of insourcing. The contract is 25% of the small disadvantaged contractor's revenue.

Last summer, SBA Section 8(a) firms spent three months and valuable bid proposal dollars responding to an 8(a) set-aside solicitation for Base Operations Support at Tyndall AFB. The solicitation was cancelled one day before proposals were due. It appears the entire contract will be insourced.

Finally, in the much discussed case of Rohmann Services, Inc. ("RSI") in the United States District Court for the Western District of Texas (No. 10-CV-0061), RSI challenged the Air Force's insourcing of RSI's multimedia and audiovisual services after RSI had performed the services for more than ten years. RSI was successful in its challenge because DoD's insourcing procedures require a cost analysis that considers the full costs of performance and the Air Force failed to include all the positions, overhead and other costs.

The foregoing anecdotes are just a sampling of those that we have been hearing from small and disadvantaged businesses. Therefore, we ask OFPP to more strongly consider the impact on small businesses when fashioning the final guidance.

C. Other Comments and Suggestions

1. OFPP should facilitate transparency and contractor challenges through a Justification and Approval process.

As discussed above, we believe that inherently governmental functions are the only functions that should not be subject to a best value analysis. Furthermore, what is and is not inherently governmental must be determined with regard to each agency function. The best means of ensuring that the decision-making process is being followed is transparency in the decision-making process.

One means already used for doing so is the Justification and Approval ("J&A") process. There should be a decision with regard to each function that is determined to be inherently governmental and that decision should be made public. We propose that each agency decision that a function is inherently governmental be memorialized by a J&A signed by the agency head. This is the process used with regard to many acquisition decisions, such as justifying limited or sole source acquisitions, and is well suited to a determination that a function is inherently governmental, that is, not subject to the acquisition process.

Thanks to technology, the means of releasing an insourcing J&A to the public is also already in place at www.fbo.gov, to which agencies already post J&As regarding procurement decisions. We propose therefore that each determination that a function (or position or activity,

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if OMB continues to utilize these terms) is inherently governmental be memorialized and justified in a J&A signed by the agency head, and further that the J&A be required to be posted to www.fbo.gov within five (5) calendar days of signature by an agency head.

Transparency has no purpose if there is no process for challenging the propriety of the decision. The J&A process is a good one in that it can provide the framework for a process to object to an agency decision and to do so in a manner that has the least interference with the Federal Government's operational needs. If the J&A must be posted within a short period of time, and we have suggested five (5) calendar days, we propose that any objection must be made within a short period of time. We suggest the same timeframe of five (5) calendar days. This is the timeframe required with regard to objections to a firm's size or HUBZone status and thus has been demonstrated to be manageable as a means to protect the integrity of the process while mitigating against a delay in the procurement process.

The process for review of a J&A could likewise have a decision timeframe that is relatively short since these would be one-issue protests. We suggest 30 calendar days. The Government Accountability Office currently has a process for reviewing objections to agency actions that could be made specific for review of inherently governmental decisions.

Transparency and a process for review of the decisions in the manner outlined above will go far to ensure that the first important step in the Federal Government's control of its mission and operations "is taken as a result of informed, independent judgments made by government officials." 75 Fed. Reg. 16193.

2. OFPP should establish special protections for small businesses.

As noted above, insourcing has had a disproportionately negative impact on small businesses. Consequently, there should be special policy considerations for small businesses since set-aside procurements are done pursuant to programs with separate and important goals and objectives. We are not advocating that inherently governmental functions be performed by small businesses. We are advocating that special consideration be given in reviewing work performed by small businesses to ensure that contract actions based on a determination of inherently governmental functions are reviewed by the Small Business Administration ("SBA") to ensure that only the actions necessary are taken. For example, there may a contract where there is one inherently governmental function and many non-governmental functions being performed by the small business. SBA's involvement would help ensure that the contract is modified only with regard to the inherently governmental function while continuing to have the small business perform the remainder of the work.

Programs that are designed to benefit groups that have been underrepresented in Federal procurement, such as those participating in the SBA's Section 8(a) program, the HUBZone

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program, Service-Disabled Veteran-owned Small Businesses, Veteran-owned Small Businesses, and Woman-owned Businesses, are awarded set-aside contracts because they are underrepresented or have business development plans to achieve as the result of participating in a Federal Program. Work performed under such contracts was determined to support the goals of those programs and should not be included in work reserved for Federal Government employees unless a function performed as part of the work is determined by the J&A process set forth above to entail an inherently governmental function and that, in addition, the SBA be the final decision-maker with regard to any action taken to determine all or part of set aside contracts.

3. OFPP should encourage more advance planning by agencies and discourage the insourcing of ongoing contracts.

Finally, we suggest that the OFPP should provide guidance to agencies that discourages the insourcing of contracts in the middle of the procurement cycle. In some instances, contractors have expended considerable bid and proposal costs for naught when an agency decided to cancel the solicitation on the eve of the proposal deadline in order to take the work in house. In other cases, contractors have committed substantial time and resources to what was expected to be an extensive, multi-year project, only to have the agency immediately start taking the contractor's personnel and then end the contract after less than one year. Such practices are very damaging to contractors, and they have been encouraging the kinds of government hiring practices described above. In a sense, the contract ends up being a Trojan Horse for the Government because the contractor hires and trains the qualified personnel to win the work, only to have the Government turn around and take that personnel once the contract has started.

Although the early end of a contract or cancellation of a solicitation is always a possibility for contractors, agencies should be required to better forecast and more methodically implement insourcing decisions. This will help to avoid what has been occurring in the current quota-driven environment, where insourcing decisions appear to be made without regard to the protocols and the effect on contractors. Both the contractors and the government should have more time to plan for the loss of a contract and the hiring of personnel. Therefore, the guidance should be clearer that the insourcing decision needs to be made before a solicitation is issued. And for contracts that are already awarded, the guidance should place an emphasis on the need to avoid insourcing a contract midstream whenever possible and to take steps to mitigate the impact on the contractor when there is no other alternative (including by making it clear to agencies that there may be cost implications for the contractor's contract and its indirect expense rate).

D. Conclusion

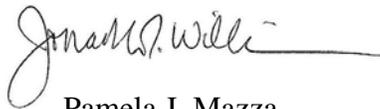
We support increased vigilance to ensure the Federal Government is performing inherently governmental functions. We support performing all other functions so as to ensure mission and operation control and fiscal responsibility. We look forward to an appropriately

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revised policy letter that focuses not on procurement, but on managing the multi-sector workforce to ensure mission and operation control while maintaining fiscal responsibility.

We do not advocate a wholesale insourcing of functions that are not inherently governmental. We particularly object to insourcing work performed by small business that is not inherently governmental. The small business program set-aside contracts were determined to be set aside pursuant to separate statutory criteria that remain good law and good policy. It is essential that the non-inherently governmental work remain with small business if the goals of the President's Task Force on Federal Contracting Opportunities for Small Businesses to ensure small business are to be met and that all Americans share in the jobs and opportunities offered by the Federal Government.

Sincerely,

A handwritten signature in cursive script, appearing to read "Jonathan T. Williams", with a horizontal line extending to the right.

Pamela J. Mazza
Paralee White
Jonathan T. Williams