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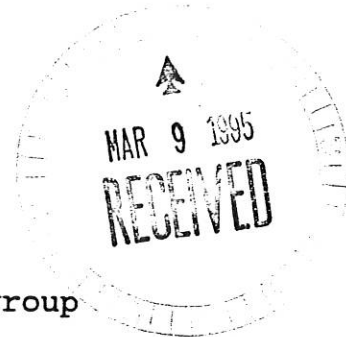


DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

Indian Health Service
Rockville MD 20857

MAR 1 1995



TO: Tribal Leaders
Health Directors
National Indian Organizations

FROM: IHS Co-Chair, Joint IHS/Tribal Workgroup

SUBJECT: Indian Health Service/Tribal Final Report of Residual Workgroup

Attached you will find a copy of the final report of a Joint IHS-Tribal Workgroup convened to study the residual resources required by the Indian Health Service (IHS) should 100 percent tribes exercise the Self-Governance option authorized under the Indian Self-Determination Act. This report offers appropriate definitions of the residual resource concept, specific Federal functions that must continue to be accomplished by the IHS, and recommendations to the Director, IHS, as to resources needed to perform these functions.

Please take the opportunity to review the report and consider its significance. The recommendations will be decided upon during the month of March for purposes of negotiating compacts with tribes for FY 1996. The IHS invites you to share your comments or concerns with us. You may send your comments to:

Craig Vanderwagen, M.D. (IHS Co-chair)
Director, Division of Clinical and Preventive Services
Room 6A-54
5600 Fishers Lane
Rockville, Maryland 20857
(301) 443-4644

Thank you for your consideration of this policy question confronting tribes and the IHS.

for
W. Craig Vanderwagen, M.D.

Attachment

**FINAL REPORT OF
INDIAN HEALTH SERVICE /
TRIBAL RESIDUAL
WORKGROUP**

FEBRUARY, 1995

TAB A.....	REPORT OF THE WORKSHOP FEBRUARY, 1995
.....	FEDERAL REGISTER SEPTEMBER 20, 1992
TAB B.....	CHARTS - RESIDUAL FUNCTIONS
TAB C.....	MINUTES - 2-3-94 2-9-94

Report of the Joint IHS/Tribal Residual Workgroup February, 1995

Introduction:

The Joint IHS/Tribal Residual Workgroup (hereafter called the workgroup) was initiated in September of 1994 at the direction of the Director, Headquarters Operations, Indian Health Service. The charge provided by the Director, Headquarters Operations to the workgroup was to:

1. "Develop the principles which will govern the identification of resources the Agency will retain to meet its inherently Federal functions should 100% of tribes exercise their right to compact under Self-Governance.
2. Develop the principles which will govern the identification of resources the Agency will retain, on a transitional basis, up to the point when 100% of the tribes have entered into compacts under Title III.
3. Develop the specific methods for use in identifying the resources that will be retained upon application of the above principles.
4. Calculate the total amount of resources that will be retained by the Agency applying the principles and methods in 1-3 above."

The workgroup undertook to achieve this charge with participation by representatives of IHS, Self-Governance tribes, and non-Self Governance tribes. There have been three meetings to this point and representatives of these groups have attended each meeting.

Since the initiation of the workgroup, new legislation has been passed revising the Indian Self-Determination Act (ISDA). These revisions have widened the opportunities for tribes contracting with the IHS under the ISDA authorities. Some of these widened authorities are similar to the authorities under Self-Governance. At its last meeting, the workgroup did discuss the applicability of its work to the new ISDA environment.

This document is a report on the progress of the workgroup and its recommendations to the Director, IHS in response to the above charge.

Background:

The need for this workgroup emanated from the passage of the Self-Governance provisions of the ISDA in 1992. These Amendments provided authority for the IHS to enter into Self-Governance agreements, called compacts, with a limited number of tribes. This authority provided for a demonstration project to assess the feasibility and applicability of this mechanism of service delivery in the IHS.

The tribes were given the authority to access resources used to support the delivery of health services to American Indian and Alaska Native (AI/AN) communities. The language of the Act provides that the Secretary shall make payments to the tribes for "programs, services, functions, or activities in an amount equal to that which the tribe would have been eligible to receive under contracts and grants under this Act, including direct program costs, and for any funds which are specifically related to the provision by the Secretaries of services and benefits to the tribe and its members." In the view of the tribes, this includes all activities, services, and programs of the Agency (IHS) including Headquarters and Area office activities as provided for in Section 106(a) of the Act. This would include resources in support of direct service delivery including: most quality assurance activities; training programs; recruitment activities; and technical assistance activities of the Agency. Tribes were also given authority to re-array the resources to accomplish outcomes determined by the tribe. This provides the tribes with greater latitude in reprogramming and managing the funds to achieve local program objectives than is available to IHS.

The Agency has argued that there are some resources expended by the Agency that are not available to the tribes since they are needed to meet those responsibilities that the Federal Executive, and the Federal Executive alone, must perform. The Agency has maintained that these may be functions specified under Constitutional requirements, statutory requirements, judicially-determined responsibilities, treaty-specified obligations, or moral requirements. Some tribes agree that there is an ongoing Federal responsibility, but have argued that the Federal responsibility is a limited one, specified under statutes.

This difference in perspective has led to difficulties in negotiating the agreements between the Federal government and the tribes. The difficulty in a common understanding of the Federal responsibility is not a mundane one. The definition of Federal responsibility, and the Federal resources necessary to discharge that responsibility, influences significantly the resources that are available to the tribes and the future role and responsibilities of the Agency.

This disagreement can be further clarified by examples of differing views on particular functions. The Agency has argued that under the Indian Health Care Improvement Act there are certain specified responsibilities for monitoring the health of AI/AN people including reports on progress in meeting 60+ specific health objectives. The tribes agree that there is a responsibility. The Agency and the tribes significantly disagree however on the locus of that responsibility and the Federal resources necessary to meet that requirement. As another example, the tribes argue that there is a very limited Federal responsibility for monitoring the quality of the product delivered to individual AI/AN people. The Agency agrees that most of the responsibility resides with the tribes, but there is disagreement as to the resources necessary for the Federal responsibility in assuring that the quality is as expected by Congress.

An element in the disagreement is the difficulty that both sides in the argument have in determining the mode in which the Agency will operate in the future. Where there is agreement about the functions and responsibilities, disagreements about staffing structure and organization still have much to do with how the resource requirements are projected into the future. In developing an assessment of the required resources, one must assume certain

operating principles. A more conservative approach that assumes that there will be many of the same organizational features to the Agency, such as twelve Area offices or continuation of many of the same accountability requirements, leads one to a particular resource requirement. Assuming that there will not be such geographic dispersion or ongoing Federal accountability practices leads one to a lesser Federal resource assessment.

Given these policy and operational uncertainties, the workgroup had a very difficult task in trying to determine a methodologic approach to those resources that must stay with the Federal Executive. The workgroup addressed many of these issues and the recommendations reflect decision making that was within the purview of the group. Those issues that require decision making in other settings (e. g., the Indian Health Design Team, or IHDT) are referenced with the views of the workgroup articulated.

Definitions. Methods. and Findings:

Definitions:

The workgroup first addressed the issue of defining residual activities. This definition development process was done in concert with the IHS/Tribal Joint Allocation Methodology Workgroup since their efforts in allocation included an examination of all allocable funds in the Agency. The workgroup recommends that the IHDT utilize this definition of residual in its deliberations.

The workgroup developed and publicized various definitions of residual following the September and October meetings, most notably at the National Indian Health Board Consultation Conference in November, 1994. Tribal comments were invited at that meeting and only two were received. The tribal comments received were incorporated into the definition now endorsed by the workgroup.

Two concepts corollary to residual were also defined. These two concepts are: *tribal shares*, and *retained tribal shares*.

The workgroup examined various alternative definitions of residual. These ranged from very restrictive definitions to very broad definitions. The restrictive definitions were thought to be potentially harmful by some members, since it reduced the Federal role severely. In the view of some these restrictions could have adversely influenced the ability of the Federal government to meet its treaty and moral obligations. Conversely, the broader definitions did not place the determination of residual in a meaningful context with definable criterion. In this perspective, the broader definition allowed for rather broad and arbitrary powers in the hands of the Federal Executive. The public dissemination of alternative definitions did lead to informal discussion among tribal and Federal participants and their constituents. The definition affirmed by the workgroup sought to preserve the rule of law in the definition, especially as regards the preservation of treaty responsibilities.

The corollary definitions simply follow from the definition of residual. The concept of transition has been incorporated into the concept of retained tribal shares. The term transitional resources is not given formal definition even though the workgroup recognizes that there are transitional activities and resource requirements. The workgroup believes that this is adequately handled in the definition of retained tribal shares. Tribes not

exercising their right to Self-Governance will de facto be leaving resources with the Agency managers during the transition. The questions that then arise are: Has the Agency restructured itself to meet its obligations most efficiently? Are these resources adequate to avoid a violation of Section 306 of the Act? This has to be justified and determined on a case-by-case basis employing criterion which will measure the reductions prohibited in Section 306, which states that there may be no reduction of funds, services, or contracts to tribes not participating in the compact.

The definitions endorsed by the workgroup are (consistent with its charge to develop a definition in a 100% compacted environment):

1. ***Residual:*** Those activities, functions, and services necessary for the United States government to fulfill and maintain its moral and legal responsibilities based upon treaties, statutes, and Executive Order that must be carried out by Federal officials.
2. ***Tribal shares:*** Tribal shares of Headquarters and Area resources not determined to be residual and allocated to individual tribes utilizing an agreed upon methodology. This does not include Service Unit or program base.
3. ***Retained tribal shares:*** Those resources which support the activities, functions, and services which are not residual, but which tribes elect to leave with the Federal government to administer.

Methods:

The workgroup then proceeded to an analysis of the functions to be performed by the Agency. The workgroup reviewed various statutes that have applicability to the IHS to ascertain if there was any clear direction as to function and staffing. Relevant sections of these statutes are provided in appendix A.

Some Applicable Statutes

The Snyder Act established the provision of health services to American Indians as a discretionary function of the Federal government. It did not specify any particular staffing pattern or program requirement.

The Transfer Act reinforced the health function of the Agency by transferring the activity from the Department of the Interior to the (then) Department of Health, Education, and Welfare. This affirmed the special health responsibility of the Agency. But again, no specific staffing requirements were specified.

The Indian Self Determination Act provided the authority for tribes to contract to provide the services for which the Secretary had responsibility. This gave tribes greater control of the program and was the first Act which specifically noted that some of the functions of the Secretary DHHS could be performed by non-Federal entities.

The Indian Health Care Improvement Act affirmed the special health responsibility of the Agency, and more

specifically addressed identified health programs. In fact, the Act specified measurable health objectives for the Agency and required reports designed to identify health deficiencies and required that the Secretary identify the resources needed to readdress the health deficiencies. The Act also for the first time identified the types and location of health staff to be employed by the Agency.

The Federal Managers' Fiscal Integrity Act did not specifically address the activities of the IHS, but did require certain accountabilities of all Federal managers. These accountabilities specify certain procedures and goals to be incorporated into the routine operations of Federal agencies.

The Government Performance and Results Act required Federal agencies to develop a strategic plan. This plan is to include a mission statement, goals and objectives, and program evaluations. The Act did not specify staff, but did require a report on what was accomplished for the resources expended.

Federal Functions

In summary, these various statutes did not provide a clear picture of federal functions and staffing requirements, but did clarify the expectation that the Agency provide a program of health services that are of the highest quality, goal directed, and measurably successful. The most detailed description of Federal functions was found in an Office of Management and Budget (OMB) policy letter based on the Constitutional requirements of the Federal Executive.

The OMB circular was published in the Federal Register of September 30, 1992. It was entitled Policy Letter on Inherently Governmental Functions. It listed 19 examples of inherently governmental functions. It also offered examples of functions not deemed to be inherently governmental. Based on a review of these functions, the workgroup believes that the following functions are consistent with the mission and activities of the IHS:

- o The determination of Secretarial policy (such as the content and application of regulations, Secretarial legislative initiatives, etc.);
- o The formulation of the President's budget (including Federal program priorities or budget requests);
- o The direction and control of Federal employees (including the approval of position descriptions and performance standards and the selection or non-selection of individuals for Federal employment);
- o The determination of what Government property is to be disposed of and on what terms (real property management);
- o Federal procurement activities (including prime contracts, determination of supplies and services to be acquired, approval of contractual documents, awarding of contracts, administering contracts, and termination of contracts);
- o The conduct of administrative hearings and handling of administrative appeals (including Federal Tort claims and FOIA requests);

- o Resource Allocation (including determination of budget policy, guidance, and strategy including collection and disbursement of fees and duties, and control of treasury accounts);

The workgroup determined that not all of the functions might be applicable under certain assumptions. For example, if all the Federal capital property currently managed by the IHS were to be ceded to tribes under Self-Governance, there may be no need to have staff to manage real property. Based on these generally accepted functions, the workgroup proceeded to an analysis of staffing requirements.

Staffing Estimates

The workgroup commissioned work to be done by IHS staff in developing an estimate of staffing needs. It provided the IHS staff with the Federal functions agreed to in the above analysis and requested that staffing requirements be determined based on actual work performed by the IHS staff to meet the functional activities. This staffing estimate could then be compared against various scenarios of operating conditions that might apply in a 100% compacted environment.

The IHS staff developed staffing estimates for Headquarters and for Area offices utilizing the the Federal functions described above as a guide. The specific tasks performed by each location were documented against these functions. The resources expended or judged to be appropriate to perform the tasks were documented as person-year equivalents (or full-time equivalents, FTE's). This assumes that the person-years could be done either by a Federal employee or with contract assistance (e.g., the Federal entity has a responsibility to maintain an overall accounting system for the appropriated funds, but certain technical aspects of that activity could be done by a contractor under Federal supervision). There were other assumptions inherent in the process and estimates provided by the IHS staff.

These include the following major assumptions:

- o The process of determining residual is dynamic and subject to periodic revision
- o The Federal government has an on-going responsibility for the health status of American Indian and Alaska Native people, including knowledge of health status of the entire population;
- o Congressional reporting requirements are still in force;
- o The Federal accounting practices will not radically change;
- o Residual functions performed at the Area level are an extension of the central residual, not independent of the Agency residual, but 12 Areas will continue to function;
- o Each tribe will submit a budget to be consolidated and reviewed by the Federal government for submittal to the President's budget;
- o The residual does not include staff to accommodate retrocession;

- o There are supplemental costs for residual staff (e.g., space, supplies, data processing, travel, training, etc) that need to be retained;
- o The existing budget structure will remain intact;
- o Procurement accountabilities (for contract activities) will remain the same.

Based on these assumptions the IHS projection of residual costs approximates 2.3% of the Agency budget, or \$45M. The projection included approximately 370 FTE in Headquarters and 360 FTE in Area offices (approximately 25% of FTE in those locations in FY 93). This compares favorably with other Federal overhead costs. The Health Care and Financing Administration's Medicare program has an overhead of approximately 3%. The Substance Abuse and Mental Health Services Administration has a Congressional set-aside of 5% of its services block grant budget for a variety of overhead functions. The detail of the IHS staffing analysis is provided as appendix B.

The workgroup accepted this product and used it as a basis for further analysis. The focus of the review of the IHS analysis was on the primary assumptions utilized by the Agency staff.

The workgroup members did not believe that the assumptions used by the Agency in its assessment were the only valid assumptions to be entertained. Specifically, concerns were raised regarding the level of staffing committed to the process of budget allocation and monitoring and certain procurement activities and appeals processes related to procurement. Other concerns were raised concerning the inability of the Agency to manage retrocession (should it occur) with the staffing projected. Some participants (both tribal and Federal) believed that the paucity of health staff in the Agency projection would lead to a decline in epidemiologic capacity, ineffective communication with other health entities (other providers, professional groups, State programs, etc.), and therefore inadequate Federal advocacy for the health needs of the service population.

The workgroup offered the following alternative assumptions in estimating residual:

- o The current budget structure will be simplified (line items will be reduced);
- o Current Federal accounting practices will be simplified;
- o Procurement oversight has been reduced significantly under the new amendments to the Indian Self-Determination Act, especially as regards construction activity;
- o Tribes will have less restrictive accounting requirements for line items, therefore, there will be less accounting requirements of the Federal entity;
- o Allocation of funds to tribes will be simplified (reduction in redundant accounting practices at Headquarters and Area);
- o Tribes will perform health needs assessments and analysis;

- o Tribes will manage quality assurance activities, training, technical assistance, and recruitment efforts locally;
- o Development of Secretarial policies does not include local standards and procedures development which will be done by tribes;
- o Tribes can represent their individual legislative needs for themselves;
- o Health professionals are needed for policy development since the business of the Agency is health;
- o FTE should not be identified as necessary given the current office structure of Hqtrs, but rather FTE in support of a function.

These assumptions were applied in an analysis of the staffing estimates provided by the IHS for Headquarters. Utilizing these assumptions, the workgroup felt that significant reductions could be made in the procurement and budget allocation functions, and other reductions made in policy development, supervision of Federal employees, real property management, and administrative appeals. The alternative staffing under these assumptions for headquarters would be approximately 240 FTE, or \$14.06M. In addition the workgroup considered additional funding for information systems support, travel, training, and supplies of \$1.5M for this level of staffing, for a total Headquarters cost of \$15.56M. See appendix C for meeting minutes and the detail of this analysis.

Various members of the workgroup suggested that the amount identified in this analysis could be considered as the total Agency residual amount. In their view there was no need for residual efforts at the Area to be separately identified, since they did not believe that there was compelling documentation of staffing efforts at the Area level in support of residual activities. Other members argued that the Areas needed full examination for documentable residual functions. Discussion of Area activities included many varying concerns and views.

Some participants asserted that there were no residual functions limited to individual Areas, rather all residual was Agency wide. The fact that there were staff efforts in support of residual functions in the Areas was based on an organizational structure historically developed by the Agency. They argued, however, that there were staff efforts currently existing in the Areas that were necessary to meeting the residual requirements. These should be added to the Headquarters staffing estimates to get a complete picture of residual resource requirements. Specifically noted were the policy development, budget formulation, and some resource allocation functions. In this view, these activities were in support of the health advocacy mission of the Agency and could not be eliminated.

Other participants agreed with this point of view, and argued further that under treaties there needed to be a local presence of the Federal government, even if it might only be one person. In this view, the Federal government had an obligation to provide a minimum level of geographic access to the Federal Executive. They argued further that local tribes must have the opportunity to examine more closely the residual proposals for the Area in which they reside. They argued that the workgroup could not determine a "final" staffing estimate for the Areas without further local involvement. These participants also asserted that there were activities beyond residual that tribes may want the Area to perform. This would need to be added to the projected Area staffing as well as retained tribal shares.

Other participants argued that the Areas should be advised to review their efforts to determine residual in light of the operating assumptions developed in the workgroup. They felt that there was the need for some staff at Areas, but probably in the range of 12-15 FTE per Area. (Estimates submitted by the Areas [8/12 reporting] showed a range of estimated staff from 11-49 FTE, with an average of 28.) They agreed that the Areas needed to meet with tribes in the Area to further refine the estimates provided.

Recommendations:

There is no reproducible theoretical methodology for calculating residual requirements at this time. There are definable Federal functions that must be accomplished, but the level of staffing necessary is empirical in its determination. Given this limitation, the workgroup did develop certain options for the residual amount as a goal for the Agency.

Options for residual amounts:

The workgroup recommends that the Director, IHS consider the following three options as he establishes a residual estimate for the Agency in the FY 96 negotiation with tribes:

1. The IHS residual estimate of 720 FTE and \$45M for an Agency-wide residual including Headquarters and Area tasks be used as FY 96 negotiations.

Pro:

- a. Best empirical estimate by the staff actually performing the tasks.
- b. Consistent with overhead costs expended by other health Agencies that distribute funds to others for direct services.
- c. Assumptions are conservative as to changes in the accountabilities required of the Agency, therefore protective of Federal resource.

Con:

- a. Assumptions are conservative as to accountabilities required of the Agency and therefore do not act to streamline the functions (and costs) of the Federal government.
 - b. Continues the Federal role of "dominating" the tribal perogitives contrary to the intent of Self-Governance legislation.
2. A workgroup derived estimate of 240 FTE and \$15.56M for Headquarters plus an amount for Area FTE and funding based on the assumptions developed by the residual workgroup with local tribal participation in the estimate development, by March 31 be used for FY 96 negotiations.

Pro:

- a. Assumes greater flexibility provided to the tribes and oversight is reduced in the Agency, thus streamlining the Federal government while protecting the Federal appropriation.
- b. Accounts for changes in the Indian Self-Determination Act authorities.
- c. Provides for increased tribal participation in the determination of residual.
- d. Provide increased resources for local program activities.

Con:

- a. Oversight reductions are substantial and may not protect the Federal appropriation adequately.
- b. May not adequately address the health advocacy responsibilities of the Agency.
- c. May not have a sound experiential basis for the staffing estimates.

3. A workgroup derived estimate of 240 FTE and \$15.56M for the Agency-wide residual to be used for the FY 96 negotiations.

Pro:

- a. Accounts for the intent of the changes in the Indian Self-Determination Act.
- b. Fully streamlines the Federal Agency and expands the resources available for local programs greatly.
- c. Provides for reduced oversight requirements of the Agency.

Con:

- a. May not account for residual workload currently provided through Areas.
- b. May not provide adequate oversight resources to protect the Federal appropriation adequately, that is, too liberally interprets the legislative authorities.
- c. May not adequately address the health advocacy responsibilities of the Agency.

The workgroup notes that these options could be employed in the negotiation of contracts under the new Self-

Determination Act authorities as well. There may need to be some funding adjustment to options 2 and 3 to account for some procurement oversight activities inherent in the new authorities. These adjustments should be minimal however since the oversight responsibilities in the Self-Governance process and the Self-Determination process do not differ in significant degree. These adjustments can be accomplished with tribal participation through the Area activities in option 2. The adjustments should not be developed without tribal participation.

Further recommendations of the workgroup

While the options offered above meet the charge of the workgroup, the workgroup believes that its discussion of various issues regarding organizational roles and structure have significance in the work of the Indian Health Design Team. Accordingly, we offer these thoughts to that body:

1. The significance of the Agency's health responsibilities needs to be fully considered by the IHDT. Planning for appropriate resources (especially staff and data) to adequately assess and represent the needs of all the tribes in a collective manner is critical. The residual functions and resources of the Agency may not be the only source for this capacity. Tribes should elect to leave shares with the Agency, or perform these function on a collective basis to meet these collective needs if the collective health needs are not adequately provided for under the residual.
2. The resources recommended as options by the workgroup should not be seen as a validation of the existing organizational structure. *It is our best estimate* of resources to accomplish the functions. The resources can be deployed in whatever manner is deemed most appropriate and prudent.
3. The workgroup did not specifically assess the appropriateness of all the funds currently labeled "Assessments" as a residual resource. The workgroup recommends that the IHDT appoint a sub-group to immediately analyze this account and reduce the amounts provided to PHS at the earliest possible date, as is prudent and appropriate.
4. The workgroup recommends that the residual staff located centrally be moved to a lower cost environment as is prudent and reasonable. Locating most staff in the Washington, D.C. may inflate the costs and selective placement of staff in lower cost area would economize. Attention should be paid to the advocacy functions in policy development and budget formulation to assure that these are not eroded by removing this advocacy from those who influence resources and policy outside the Agency.

characterized by the Department of Energy (DOE) for its suitability as the possible location of a permanent repository for civilian spent fuel and the high-level waste. The workshop, which is open to the public, will be held at the Stouffer Concourse Hotel, 3801 Quebec Street, Denver, Colorado 80207; (303) 399-7500.

The workshop tentatively has four sessions, each of which will consist of a brief status update by DOE staff and/or contractors followed by informal round-table discussion. Tentative session topics include (1) the baseline ESF—approaches to developing the baseline configuration and alternative strategies; (2) exploration and testing—the definition of early exploration and testing, and how the ESF can best be used to accomplish key elements of the site-suitability and site-characterization programs; (3) management and acquisition strategies—a review of alternatives for obtaining early delivery of construction at minimum cost; and (4) a summary and wrap-up of recommendations for a preferred alternative for obtaining early access to the underground.

The Board has invited representatives from the DOE and its contractors and from the construction industry to the workshop. Expert consultants to the Board also will be attending.

Transcripts of the workshop will be available on a library-basis from Virginia Reich, Board librarian, starting December 17, 1992. For further information, contact Paula N. Alford, Director, External Affairs, Nuclear Water Technical Review Board, 1100 Wilson Boulevard, suite 910, Arlington, Virginia 22209; (703) 235-4473.

Dated: September 25, 1992.

William Barnard,

Executive Director, Nuclear Technical Review Board.

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BILLING CODE 6820-AM-M

OFFICE OF MANAGEMENT AND BUDGET

Office of Federal Procurement Policy

Policy Letter on Inherently Governmental Functions

AGENCY: Office of Management and Budget, Executive Office of the President, Office of Federal Procurement Policy.

ACTION: Policy letter on inherently governmental functions.

SUMMARY: The Office of Federal Procurement Policy (OFPP) publishes

today the final version of a policy letter providing guidance to Executive Departments and agencies on (1) what functions are inherently governmental functions that must only be performed by Government officers and employees and (2) what contractible functions so closely support Government officers and employees in their performance of inherently governmental functions that the terms and performance of those contracts require closer scrutiny from Federal officials. This policy letter has been developed because executive agencies, members of Congress, the General Accounting Office, and the public have from time to time either requested guidance regarding, or inquired about, the propriety of awarding contracts for certain types of functions or administering contracts in certain ways. Previous guidance on this issue has also not been as detailed as that which we now provide.

FOR FURTHER INFORMATION CONTACT: Richard A. Ong, Deputy Associate Administrator, Office of Federal Procurement Policy, 725 17th Street, NW.—Suite 9001, Washington, DC 20503 (202) 395-7209. To obtain a copy of this policy letter, please call OMB's Publications Office at (202) 395-7332.

SUPPLEMENTARY INFORMATION: *Comments received.* We received 34 comments in response to our proposed policy letter published in the Federal Register on December 16, 1991 (58 Fed. Reg. 65279): Eight from industry or trade groups, four from private individuals, two from employee organizations, one from a Federally funded research and development center, and 19 from Government agencies.

1. *Purpose of the policy letter.* This policy letter on inherently governmental functions is being published to provide guidance on what kinds of functions, as a matter of policy, must be performed by officials of the Executive Branch of the United States and what kinds of functions may be performed by private persons under contract with the Federal Government.

Previous guidance on these matters that has been available to the Executive Branch has not been detailed and sometimes Federal agencies have permitted contractors to perform functions that should be performed by Government personnel. We now provide more detailed guidance.

2. *Relationship of policy letter to other OFPP publications on service contracting.* This policy letter is also one of several that the Office of Federal Procurement Policy (OFPP) has published recently that have focused on some aspect of service contracting in the

Federal Government. At this time, OFPP has determined it is best to deal with individual aspects of service contracting rather than trying to publish comprehensive guidance in one document. We will consider collecting all of the guidance on service contracts in one document in the future.

Thus, we do not cover in detail in this policy letter such matters as cost effectiveness of contracting for services, conflicts of interest of service contractors, and management of service contracts. These issues are dealt with in OMB Circular No. A-76, Performance of Commercial Activities, August 4, 1983 (under revision); OFPP Policy Letter 89-1, Conflict of Interest Policies Applicable to Consultants, 54 FR 51805 (December 18, 1989); OFPP Memorandum for Agency Senior Procurement Executives, Government-Wide Guidance on Contract Administration (March 15, 1991); OFPP Policy Letter 91-2, Service Contracting, 56 FR 15110 (April 15, 1991); proposed OFPP Policy Letter 92-_____ Past Performance Information, 56 FR 63988 (December 6, 1991); and proposed OFPP Policy Letter of 92-_____ Management of Service Contracting, 56 FR 66091 (December 20, 1991).

3. *Relationship to OMB Circular No. A-76.* One commenter asked that we make clear our apparent intent to clarify rather than alter the guidance originally found in OMB Circular No. A-76 on inherently governmental functions. That is our intent. No fundamental change is intended.

We have altered the form of the original Circular A-76 definition of an inherently governmental function in the interest of clarity. Specific examples cited in the original A-76 definition have been incorporated into appendix A and a list of the general principles underlying the selection of the functions listed in that appendix has been added in their stead.

The terms "function" and "activity" as used in this policy letter and Circular A-76, respectively, are interchangeable.

The same commenter above suggested that we add a new appendix C, containing a nonexclusive list of functions that are commercial activities that should be contracted. We have not adopted this suggestion because the scheme proposed is the same one we have implicitly adopted. The proposed appendix C is nothing more than the list of examples of commercial activities found as an Attachment to Circular A-76. We do not believe it is necessary to incorporate that A-76 attachment in this policy letter. The fact that we have not provided this appendix C thus should

not be construed as narrowing the scope of functions that have been contracted in the past. Nonetheless, we have added language to section 5 to clarify the relationship between Circular A-76 and this policy letter on this point.

Another commenter stated that the relationship between this policy letter and Circular A-76 is unclear. This policy letter is to be the exclusive source of guidance on what constitutes, as a matter of policy, an inherently governmental function.

4. Libraries. Several persons questioned the inclusion of library operations as a ministerial function that should be contracted out in subsection 7(a) of the December version of the policy letter. The fact that employees render professional services in performing a function does not mean that the function in question is necessarily inherently governmental. In fact, the Government frequently seeks out contract services precisely because of the level of sophistication required to perform a particular function. On the other hand, agencies may determine that aspects of their library operations, such as handling certain types of information in certain circumstances, involve performance of an inherently governmental function. Therefore, we have removed the reference to libraries.

5. Contract audits for inspectors general. One commenter suggested that Federal inspector general (IG) work should be done by using Government services, with exceptions justified on a case-by-case basis, unless specific technical expertise is needed temporarily and is not available within the Government. This suggestion was not adopted because (1) Congress has specifically authorized the use of contract auditors in § 6(a)(9) of the Inspector General Act codified at 5 U.S.C. App. 3, and (2) financial and compliance audit activities are not considered inherently governmental functions.

Another commenter questioned whether subsection 12(g) of Appendix A pertaining to the determination of whether contract costs are reasonable, allocable, and allowable proscribes the use of contract audit services. It does not. The decision on what costs are reasonable, allocable, and allowable is ultimately a Government decision, but that decision may be based on recommendations made by contract auditors. Certified public accountants, for example, only render "opinions" and contracts sometimes provide that audit reports are advisory only. Moreover, the use of contract auditors has been authorized by Congress, as noted above.

6. Agency determinations. One commenter interpreted the policy letter as authorizing Federal managers to make a final determination on whether a function is an inherently governmental function, under this policy letter, without such determination's being subject to being overturned by the Office of Management and Budget (OMB) or being subject to a cost comparison study under Circular A-76. In general, agencies are expected to make their own determinations, subject to oversight by OMB. Language has been added to subsection 7(c) to clarify this point.

7. Agency discretion. One commenter questioned the need for the language in former subsection 7(e) regarding agency discretion to award nonpersonal service contracts. We agree it is unnecessary. It is already clear that awarding a contract is an agency responsibility.

8. Incorporation in OMB Circular No. A-76, other documents. Several commenters suggested that the policy letter be incorporated in Circular A-76, "Commercial Activities," currently being revised. We did not incorporate this suggestion because A-76 is already a lengthy document. Also, contracting for inherently governmental functions is indeed a consideration in contracting out, but it is not unique to the A-76 program. All Federal officials who contract for nonpersonal services must consider the problem of inherently governmental functions, and we thus believe separate guidance applicable to all such contracting, not just to nonpersonal service contracting in the A-76 context, is the better alternative. Other commenters urged that the policy letter be combined with one or more other OFPP policy letters, such as those on conflict of interest, service contracting, and past performance and published in a form other than a policy letter. This suggestion has merit but we believe it best to try to deal with discrete portions of service contracting rather than to try to deal with all facets of a complex problem at once, as discussed in point 2. above.

9. Agency discretion regarding resource allocation. One commenter suggested we should address the issues of the future balance between official and contractor workforce in the performance of "basic governmental work," the specific expertise needed to manage the contractor workforce now or in the future, where this expertise should be located, and the way in which it can be maintained. We believe this is a matter for agencies themselves to determine, given their knowledge of their mission, their resources, the kinds of services they wish to contract, and

the size of their service contracting effort. We merely highlight the problem of lack of oversight as a loss of Government control and require agencies to be aware of their existing oversight responsibilities. They are, however, to use their own discretion to figure out how to manage their contracts.

10. Evaluation of proposals. One commenter believes there is an apparent conflict between former subsection 14(b) in appendix A and section 8 of appendix B. There is no conflict as new subsection 12(b) refers to participation as a voting member on source selection boards only.

11. Appendix B. controls. The same commenter also suggested that appendix B should contain a discussion of possible controls that the Government should employ to prevent the functions listed there from being perceived as inherently governmental function. We do not believe this is necessary, as any function that is in appendix B is by definition not an inherently governmental function.

12. Applicability to nonpersonal services. Three commenters questioned why the policy letter applies only to nonpersonal service contracts. Upon consideration, we have accordingly deleted the definition of "service contract" in section 5. No useful purpose is served by defining "personal services" differently from the FAR and no harm arises from having the policy letter apply to the minimal number of true personal service contracts. Personal service contracts that are really personnel appointments are excluded from the coverage of the policy letter. Thus, FAR 37.102(b) need not be amended as a result of this policy letter.

13. Subcontractors. Commenters questioned whether subsection 12(d) of appendix A should apply to subcontractors. It does not and clarifying language has been added.

14. Supplies or services purchased by prime contractors. Some commenters questioned the apparent effect of subsection 12 in appendix A of preventing contractors from buying supplies and services for their own account. It is not the intent of this policy letter to prevent contractor mess halls from buying food to be prepared for military personnel. Nor does it affect what or how contractors buy to be incorporated into supplies or services to be delivered to the Government. Similarly, contractors may purchase supplies or services for the Government while acting within reasonable Government guidelines. Section 12 is

only meant to address the Government's direct acquisition of supplies or services.

15. *Independent judgement.* The emphasis placed on independent judgement by this policy letter does not include the wholesale adoption of contractor advice, opinions, recommendations, ideas, or conclusions. They merely may not be adopted, in whole or in part, without officials' first exercising independent judgement.

16. *Duties of contracting officers.* We have added language to section 8 to spell out the analytical steps to be followed by contracting officers seeking to comply with this policy letter.

17. *Risk of injury to the public.* One commenter stated that the definition of an inherently governmental function does not clearly address the danger to the public interest when a function is contracted out and the public is at risk if contractors, such as fire fighters or military support contractors, fail or refuse to act in time of crisis. The risk of injury to the public is an important consideration. We believe, however, that §7(b)(5) appropriately identifies this point as a consideration in determining whether a function is, as a matter of policy, an inherently governmental function. The decision to include several of the functions listed in appendix A reflects an underlying concern for this risk.

18. *Binding nature of decisions.* This same commenter noted that it is an overstatement to say that the use of discretion (referred to in what is now section 7(a) of the policy letter) must have the effect of committing the Government to a course of action. This is because a scientific consulting firm, for example, could submit a study that would have a tremendous impact or regulations or other agency actions but would not necessarily lead to a commitment to a course of action.

We have addressed the element of discretion in subsection 7(a) to convey the idea that the mere existence of the element of discretion is not determinative of whether, as a matter of policy, an inherently governmental function is involved. Moreover, it is useful to observe that a study that has a tremendous impact is not per se a bad thing. A study may have that effect because of its great merit. We should be concerned, however, when a study is allowed to proceed to the point where alternative views, solutions, research, or conclusions, and so forth, cannot realistically be included or taken into account. In this case, the contractor has in effect made all important decisions. Section 7(b)(3) addresses this issue.

19. *Federally funded research and development centers (FFRDCs).* One

commenter stated that while profit-making contractors can perform functions listed in appendix B, the policy letter should cross-reference FAR 35.017 pertaining to FFRDCs and "recognize that FFRDCs are an equally viable source of expertise requiring less rigorous oversight." We have not adopted this suggestion. We do not agree that FFRDCs necessarily require less oversight. We do recognize, however, that they are dealt with in detail in FAR Part 35 and that its provisions may suffice to enable satisfactory agency oversight of FFRDCs. Whether fewer or additional control measures are necessary to ensure agency control over FFRDCs is a matter for agencies to decide in the circumstances of each case.

20. *Architect-engineer evaluation boards.* This same commenter questioned whether section 3, which states that services obtained by personnel appointments and advisory committees are not covered by this policy letter, could be construed to prohibit private individuals appointed to architect-engineer source evaluation boards in accordance with FAR 38.602 from voting. To the extent such boards are advisory committees, the policy letter is not applicable to them. If they are not, the commenter makes an excellent point. FAR 36.602-4 makes clear that the agency is to make the final selection and FAR 36.602-3(d) provides for the evaluation board to set out in its report the considerations upon which its recommendations were based. This is an acceptable mechanism and we have accordingly revised subsection 12(b) of appendix A and section 14 of appendix E to make clear that it is selection of sources that is the most sensitive function. Contractor activities that result in recommendations and that explain how those recommendations were arrived at adequately preserve agency options. A related change has been made in subsection 7(f) stating that requiring contractors to explain how they arrived at their recommendations is another available control measure.

21. *Factors to consider in totality of the circumstances—(a) Complexity and oversight.* One commenter questioned the inclusion of §7(d)(2) of the proposed policy letter relating to the complexity of the task to be performed. Upon consideration, we conclude that complexity is better considered in conjunction with the provision that was at 7(d)(12) relating to oversight procedures, resources, and practices. We have amended paragraph 12 accordingly and moved it, as well as the provision in former §7(d)(4) relating to the duration of the contract, to new

subsection 7(d). Post-award responsibilities. This was done to remove questions relating to contract oversight from the "totality of the circumstances" test. It is important to understand that, if an agency has inadequate oversight procedures or poor oversight practices, the underlying function of any agency contract affected by these deficiencies is not thereby transformed into an inherently governmental function. As the totality test focuses on the nature of the function in question and as there can be a transfer of oversight responsibility even if the underlying function is contractible, the issue of de facto transfer of control should therefore be dealt with elsewhere. (Note that a transfer of contract management responsibility to the contractor is explicitly not permitted by appendix A, subsection 12(e).)

(b) *Ultimate user of contractor work product.* Several commenters questioned the inclusion of this factor at §7(d)(3) of the proposed policy letter. We agree it should be taken out. Who will use the contractor's work product is important and this has bearing on how much management attention to give to the contract, but it doesn't say anything about the nature of the underlying function or the adequacy of agency contract administration.

(c) *Review of contractor action.* The same commenter questions the advisability of including a factor (new §7(d)(5)) that relates to the finality of any contractor's adjudication of any claim and the type of agency review of contractor adjudications. We see no problem with agencies' providing for contractor adjudication of claims so long as citizens know that they have a right of recourse to agency decisionmakers if they are dissatisfied with the decision of the contractor. (Note, however, that certain kinds of hearings may still not be conducted by contractors, e.g., hearings to determine the eligibility of any person for a security clearance, or hearings involving actions that affect matters of personal reputation or eligibility to participate in Government programs. See appendix A, section 14.)

Thus, we distinguish between, on the one hand, holding hearings and making recommendations and, on the other, retaining the authority to issue the final adjudicatory decision. Contractors may perform the former functions so long as there is adequate oversight, agencies retain the authority to issue the final decision, and the public has a right to insist that the agency make the final decision, if it so desires. This is easier to understand if one views the contractor's action as more of an advisory action

than one that binds the claimant with only limited opportunities to change the result before the agency. Note that in the absence of an appeal by a claimant, the agency need not rule on each contractor decision or ruling. It should, of course, inspect or sample contractor decisions or rulings from time to time to ensure that contractors comply with agency guidelines and procedures.

(d) *Limiting or extinguishing discretion.* The same commenter noted that our speaking in terms of contractor limiting or extinguishing discretion in former §7(d)(5) could mistakenly create the impression that some of the Government's authority can be exercised by a contractor. The policy letter attempts to clarify this issue at subsection 7(a).

(e) *Public perception.* Several commenters questioned the inclusion of this factor at §7(d)(11) of the proposed policy letter, believing that public perception is too ambiguous a concept. We agree. A function can probably be analyzed in the light of other factors listed without the need to resort to the concept of perceptions. Appendix A of the policy letter is itself an up-to-date listing that already takes into account the factor of public perceptions. The paragraph has been deleted.

(f) *Laws applicable to the Civil Service.* Several commenters questioned the inclusion of this factor at §7(d)(13) of the proposed policy letter. We agree and have deleted this factor. The considerations listed may be relevant to at good contract management should require by way of contract conditions, but they don't say anything about the nature of the function or the adequacy of agency contract administration practices.

(g) *Record keeping requirement.* One commenter found the meaning of paragraph 7(d)(15) of the proposed policy letter unclear. This factor was included to cover situations such as a contractor's providing aircraft-related training. If the contractor proves to be incompetent or negligent, the fact that the contractor did maintain or was required to maintain records of who was trained permits corrective action to be taken, such as locating improperly trained students and requiring retraining. If records are not maintained, the Government cannot exercise ultimate control because it cannot correct any errors. Nonetheless, the provision appears to have only limited application and has been deleted.

22. *Collection of fees.* Two commenters questioned the provisions of section 20 of appendix A of the proposed policy letter prohibiting collection of fees or other public

moneys, pointing out that contractors in mess halls for military personnel currently collect charges for meals and Department of Housing and Urban Development (HUD) contractors collect fees from purchasers of HUD properties. We have modified the policy letter to enable routine collection of fees where good cash management practices and other controls are in effect, where there is little danger of miscalculating the amount of money ultimately due the Government, and where there is little difficulty in obtaining payment. For example, a contractor could have discretion to determine that a family seeking entrance to a park consists of four people rather than three, and that one of the four is a child under 12, but the contractor would not have the discretion to determine the amount of the fee to be paid by each person in a particular category. HUD contractors may also collect fees from purchasers of HUD properties in accordance with subsection 17(a) of appendix A. We also make clear that routine voucher and invoice examination by contractors is an acceptable practice.

23. *Contract for one function or several.* One commenter questioned whether the policy letter reflects our belief that only contracts with multiple functions are susceptible to confusion with respect to inherently governmental functions. This is not our belief. The policy letter is intended to provide guidance with respect to discrete functions regardless of whether there is a mixture of several functions in a contract or there is only one function that is being contracted.

24. *Post-award responsibilities.* Section 7(e) has been amended to make clear that agency contract oversight is to ensure contractor performance in accordance with the terms of the contract, but that oversight must not be exercised so as to create a personal service contract. Language from subsection 7(d) of the proposed policy letter has been moved to subsection 7(e), as explained in section 21, above.

25. *Drafting of Congressional testimony, responses to Congressional correspondence, and agency responses to audit reports from an Inspector General, the General Accounting Office, or other Federal audit entity.* Two commenters questioned whether contractors should be able to draft Congressional testimony, subject to ultimate agency approval. Approval is a key power reserved to any official and we by no means agree that officials do or will approve contractor work in a perfunctory manner. We have nonetheless reexamined this issue and, because of the importance of

Congressional testimony and correspondence and of agency responses to audit reports, we are now deciding, as a matter of policy, that these documents should not be drafted by contractors. We have thus added a new subsection (c) to the body of the policy letter to this effect. We deleted the relative portions of appendix A because we do not believe that drafting documents *per se* is an inherently governmental function and failing to exercise sufficient oversight with respect to drafting of such documents does not transform the underlying function into an inherently governmental function, as noted in subsection 21(a), above. Contractor reports, conclusions, summaries, analyses, and other work products may, of course, still be quoted or otherwise referenced in Congressional testimony, correspondence, responses to audit reports, or set out in such things as attachments, appendices, or enclosures thereto.

26. *Reliance on contractor support.* One commenter called attention to our statement in section 4 of the policy letter that agencies "award service contracts for various reasons, such as to acquire special skills not available in the Government or to meet the need for intermittent services." The commenter pointed out that "'support service' contractors have come to serve as the permanent workforce for many programs" seemingly implying that our statement does not take this into account. In fact, our statement is an accurate one, citing only two of the reasons why agencies award service contracts as examples. Contracting actions under Circular A-76 are also a reason why agencies award service contracts.

Whatever the reason for using service contracts to accomplish agency missions, it is important to understand that agency use of service contracts is limited by our policy letter in two ways: the function must not be an inherently governmental function, and if it is not, the agency must be able to exercise effective oversight of any contract awarded. We make clear that management of a contract is just as important as deciding whether the contract may properly be awarded in the first place.

Our policy letter is limited in scope and does not focus on why agencies use service contracts. Rather we are concerned that service contracts, when used, are used only when contractors may perform the functions in question and when agencies have the resources to manage the contracts. It is true that

agencies have sometimes contracted functions that we have listed in the policy letter as inherently governmental functions, and it is true that they have sometimes failed to recognize that they are not exercising effective oversight of nongovernmental functions that has been contracted. Nonetheless, effective corrective action has been taken by the agencies in the past when oversight problems were identified.

Additional problems in this area will probably arise in the future. Even the General Accounting Office recognized the difficulty in defining inherently governmental functions and providing guidance to agencies on the subject. Are Service Contractors Performing Inherently Governmental Functions?, GAO/GGD-92-11, November 1991, p. 3. We have every reason to expect, however, that because our guidance is much more detailed than anything that was available to agencies in the past there will be fewer instances of problems in this area. We thus disagree strongly with the commenter that the policy letter is a mere exhortation to better management.

27. *Other issues.* One commenter also suggested that we should address whether "contractors who perform work historically performed by civil servants should be subjected to comparable limitations on pay and rules of conduct;" measurement of the short-term and long-term costs of reliance on contractors versus officials; whether Superfund and the savings and loan bailout programs provide models for public management next bailout or cleanup program;" the "practical meaning that we will give to the concept of 'public service' as the Federal Government heads into the 21st century."

The concept of work "historically performed" by civil servants is not useful because a function may have been performed by civil servants in the past for reasons other than the belief that the function was inherently governmental. In fact, the premise of Circular No. A-76 is that many functions historically performed by Government employees can more appropriately be performed by the private sector.

We believe that competition is the most powerful force available to keep costs down, even though there may be instances where this will not be so. In such instances, determinations shall be made in accordance with Circular No. A-76.

Measurement of the short-term and long-term costs of reliance on contractors versus officials is an aspect of cost effectiveness of service contracts and need not be dealt with here. Similarly, the efficacy of the Superfund

and savings and loan programs is a matter beyond the scope of this policy letter.

So far as the practical meaning of the concept of public service is concerned, this policy letter attempts to identify those functions that, as a matter of policy, should only be performed by Government officials and those that may be performed by service contractors. If our taxonomy and analytical methods are sound, our policy letter should define what public service entails in terms of the functions that officials must perform for the foreseeable future.

28. *Acknowledgement.* Finally, we wish to acknowledge our reliance on the excellent work of the Environmental Protection Agency in our drafting of the appendices to this policy letter. Also, the comments we received were all exceptionally well thought out. We are most grateful for the time, effort, and imagination that went into the preparation of those comments.

Dated: September 23, 1992.

Allan V. Burman,
Administrator.

Policy Letter 92-1

To the Heads of Executive Departments and Establishments

Subject: Inherently Governmental Functions
September 23, 1992.

1. *Purpose.* This policy letter establishes Executive Branch policy relating to service contracting and inherently governmental functions. Its purpose is to assist Executive Branch officers and employees in avoiding an unacceptable transfer of official responsibility to Government contractors.

2. *Authority.* This policy letter is issued pursuant to subsection 6(a) of the Office of Federal Procurement Policy (OFPP) Act, as amended, codified at 41 U.S.C. 405(a).

3. *Exclusions.* Services obtained by personnel appointments and advisory committees are not covered by this policy letter.

4. *Background.* Contractors, when properly used, provide a wide variety of useful services that play an important part in helping agencies to accomplish their missions. Agencies use service contracts to acquire special knowledge and skills not available in the Government, obtain cost effective services, or obtain temporary or intermittent services, among other reasons.

Not all functions may be performed by contractors, however, just as it is clear that certain functions, such as the command of combat troops, may not be contracted, it is also clear that other functions, such as building maintenance and food services, may be contracted. The difficulty is in determining which of these services that fall between these extremes may be acquired by contract. Agencies have occasionally relied on contractors to perform certain functions in such a way as to raise questions about whether Government policy is being created by private persons. Also, from time to time

questions have arisen regarding the extent to which de facto control over contract performance has been transferred to contractors. This policy letter provides an illustrative list of functions, that are, as a matter of policy, inherently governmental (see appendix A), and articulates the practical and policy considerations that underlie such determinations (see section 2).

As stated in section 9, however, this policy letter does not purport to specify which functions are, as a legal matter, inherently governmental, or to define the factors used in making such legal determinations. Thus, the fact that a function is listed in appendix A, or a factor is set forth in section 7(b), does not necessarily mean that the function is inherently governmental as a legal matter or that the factor would be relevant in making the legal determination.

5. *Definition.* As a matter of policy, an "inherently governmental function" is a function that is so intimately related to the public interest as to mandate performance by Government employees. These functions include those activities that require either the exercise of discretion in applying Government authority or the making of value judgements in making decisions for the Government. Governmental functions normally fall into two categories: (1) The act of governing, i.e., the discretionary exercise of Government authority, and (2) monetary transactions and entitlements.

An inherently governmental function involves, among other things, the interpretation and execution of the laws of the United States so as to:

- (a) Bind the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;
- (b) Determine, protect, and advance its economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise;
- (c) Significantly affect the life, liberty, or property of private persons;
- (d) Commission, appoint, direct, or control officers or employees of the United States; or
- (e) Exert ultimate control over the acquisition, use, or disposition of the property, real or personal, tangible or intangible, of the United States, including the collection, control, or disbursement of appropriated and other Federal funds.

Inherently governmental functions do not normally include gathering information for or providing advice, opinions, recommendations, or ideas to Government officials. They also do not include functions that are primarily ministerial and internal in nature, such as building security; mail operations; operation of cafeterias; housekeeping; facilities operations and maintenance; warehouse operations; motor vehicle fleet management and operations, or other routine electrical or mechanical services.

The detailed list of examples of commercial activities found as an attachment to Office of Management and Budget (OMB) Cir. No. A-76 is an authoritative, nonexclusive list of functions that are not inherently

governmental functions. These functions therefore may be contracted.

B. Policy—(a) Accountability. 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 who are ultimately accountable to the President. When the Government uses service contracts, such informed, independent judgment is ensured by:

(1) Prohibiting the use of service contracts for the performance of inherently governmental functions (See appendix A);

(2) Providing greater scrutiny and an appropriate enhanced degree of management oversight (see subsection 7(f)) when contracting for functions that are not inherently governmental but closely support the performance of inherently governmental functions (see appendix B);

(3) Ensuring, in using the products of those contracts, that any final agency action complies with the laws and policies of the United States and reflects the independent conclusions of agency officials and not those of contractors who may have interests that are not in concert with the public interest, and who may be beyond the reach of management controls otherwise applicable to public employees; and

(4) Ensuring that reasonable identification of contractors and contractor work products is made whenever there is a risk that the public, Congress, or other persons outside of the Government might confuse them with Government officials or with Government work products, respectively.

(b) *OMB Circular No. A-76.* This policy letter does not purport to supersede or otherwise effect any change in OMB Circular No. A-76, Performance of Commercial Activities.

(c) *Drafting of Congressional testimony, responses to Congressional correspondence, and agency responses to audit reports from an Inspector General, the General Accounting Office, or other Federal audit entity.* While the approval of a Government document is an inherently governmental function, its drafting is not necessarily such a function. Accordingly, in most situations the drafting of a document, or portions thereof, may be contracted, and the agency should review and revise the draft document, to the extent necessary, to ensure that the final document expresses the agency's views and advances the public interest. However, even though the drafting function is not necessarily an inherently governmental function, it may be inappropriate, for various reasons, for a private party to draft a document in particular circumstances. Because of the appearance of private influence with respect to documents that are prepared for Congress or for law enforcement or oversight agencies and that may be particularly sensitive, contractors are not to be used for the drafting of Congressional testimony; responses to Congressional correspondence; or agency responses to audit reports from an Inspector General, the General Accounting Office, or other Federal audit entity.

7. Guidelines. If a function proposed for contract performance is not found in appendix A, the following guidelines will

assist agencies in understanding the application of this policy letter, determining whether the function is, as a matter of policy, inherently governmental and forestalling potential problems.

(a) *The exercise of discretion.* While inherently governmental functions necessarily involve the exercise of substantial discretion, not every exercise of discretion is evidence that such a function is involved. Rather, the use of discretion must have the effect of committing the Federal Government to a course of action when two or more alternative courses of action exist (e.g., purchasing a minicomputer rather than a mainframe computer, hiring a statistician rather than an economist, supporting proposed legislation rather than opposing it, devoting more resources to prosecuting one type of criminal case than another, awarding a contract to one firm rather than another, adopting one policy rather than another, and so forth).

A contract may thus properly be awarded where the contractor does not have the authority to decide on the course of action to be pursued but is rather tasked to develop options to inform an agency decision maker, or to develop or expand decisions already made by Federal officials. Moreover, the mere fact that decisions are made by the contractor in performing his or her duties (e.g., how to allocate the contractor's own or subcontract resources, what techniques and procedures to employ, whether and whom to consult, what research alternatives to explore given the scope of the contract, what conclusions to emphasize, how frequently to test) is not determinative of whether he or she is performing an inherently governmental function.

(b) *Totality of the circumstances.* Determining whether a function is an inherently governmental function often is difficult and depends upon an analysis of the facts of the case. Such analysis involves consideration of a number of factors, and the presence or absence of any one is not in itself determinative of the issue. Nor will the same emphasis necessarily be placed on any one factor at different times, due to the changing nature of the Government's requirements.

The following factors should be considered when deciding whether award of a contract might effect, or the performance of a contract has effected, a transfer of official responsibility:

(1) Congressional legislative restrictions or authorizations.

(2) The degree to which official discretion is or would be limited, i.e., whether the contractor's involvement in agency functions is or would be so extensive or his or her work product is so far advanced toward completion that the agency's ability to develop and consider options other than those provided by the contractor is restricted.

(3) In claims adjudication and related services.

(i) The finality of any contractor's action affecting individual claimants or applicants, and whether or not review of the contractor's action is *de novo* (i.e., to be effected without the appellate body's being bound by prior legal rulings or factual determinations) on appeal of his or her decision to an agency official;

(ii) The degree to which contractor activities may involve wide-ranging interpretations of complex, ambiguous case law and other legal authorities, as opposed to being circumscribed by detailed laws, regulations, and procedures;

(iii) The degree to which matters for decision by the contractor involve recurring fact patterns or unique fact patterns; and

(iv) The contractor's discretion to determine an appropriate award or penalty.

(4) The contractor's ability to take action that will significantly and directly affect the life, liberty, or property of individual members of the public, including the likelihood of the contractor's need to resort to force in support of a police or judicial function; whether force, especially deadly force, is more likely to be initiated by the contractor or by some other person; and the degree to which force may have to be exercised in public or relatively uncontrolled areas. (Note that contracting for guard, convoy security, and plant protection services, armed or unarmed, is not proscribed by these policies.)

(5) The availability of special agency authorities and the appropriateness of their application to the situation at hand, such as the power to deputize private persons.

(6) Whether the function in question is already being performed by private persons, and the circumstances under which it is being performed by them.

(c) *Finality of agency determinations.* Whether or not a function is an inherently governmental function, the purposes of this policy letter, is a matter for agency determination. However, agency decisions that a function is or is not an inherently governmental function may be reviewed, and, if necessary, modified by appropriate OMB officials.

(d) *Pre-award responsibilities.* Whether a function being considered for performance by contract is an inherently governmental function is an issue to be addressed prior to issuance of the solicitation.

(e) *Post-award responsibilities.* After award, even when a contract does not involve performance of an inherently governmental function, agencies must take steps to protect the public interest by playing an active, informed role in contract administration. This ensures that contractors comply with the terms of the contract and that Government policies, rather than private ones, are implemented. Such participation should be appropriate to the nature of the contract, and should leave no doubt that the contract is under the control of Government officials. This does not relieve contractors of their performance responsibilities under the contract. Nor does this responsibility to administer the contract require Government officials to exercise such control over contractor activities as to convert the contract, or portion thereof, to a personal service contract.

In deciding whether Government officials have lost or might lose control of the administration of a contract the following are relevant considerations: the degree to which agencies have effective management procedures and policies that enable

meaningful oversight of contractor performance, the resources available for such oversight, the actual practice of the agency regarding oversight, the duration of the contract, and the complexity of the tasks to be performed.

(f) *Management controls.* When functions described in appendix B are involved, additional management attention to the terms of the contract and the manner of performance is necessary. How close the scrutiny or how extensive or stringent the management controls need to be is for agencies to determine. Examples of additional control measures that might be employed are:

(1) Developing carefully crafted statements of work and quality assurance plans, as described in OFPP Policy Letter 91-2, Service Contracting, that focus on the issue of Government oversight and measurement of contractor performance;

(2) Establishing audit plans for periodic review of contracts by Government auditors;

(3) Conducting preaward conflict of interest reviews to ensure contract performance in accordance with objective standards and contract specifications;

(4) Physically separating contractor personnel from Government personnel at the worksite; and

(5) Requiring contractors to (a) submit reports that contain recommendations and that explain and rank policy or action alternatives, if any, (b) describe what procedures they used to arrive at their recommendations, (c) summarize the substance of their deliberations, (d) report any dissenting views, (e) list sources relied upon, and/or (f) otherwise make clear the methods and considerations upon which their recommendations are based.

(g) *Identification of contractor personnel and acknowledgement of contractor participation.* Contractor personnel attending meetings, answering Government telephones, and working in other situations where their contractor status is not obvious to third parties must be required to identify themselves as such to avoid creating an impression in the minds of members of the public or the Congress that they are Government officials, unless, in the judgment of the agency, no harm can come from failing to identify themselves. All documents or reports produced by contractors are to be suitably marked as contractor products.

(h) *Degree of reliance.* The extent of reliance on service contractors is not by itself a cause for concern. Agencies must, however, have a sufficient number of trained and experienced staff to manage Government programs properly. The greater the degree of reliance on contractors the greater the need for oversight by agencies. What number of Government officials is needed to oversee a particular contract is a management decision to be made after analysis of a number of factors. These include, among others, the scope of the activity in question; the technical complexity of the project or its components; the technical capability, numbers, and workloads of Federal oversight officials; the inspection techniques available; and the importance of the activity. Current contract administration resources shall not be

determinative. The most efficient and cost effective approach shall be utilized.

(i) *Exercise of approving or signature authority.* Official responsibility to approve the work of contractors is a power reserved to Government officials. It should be exercised with a thorough knowledge and understanding of the contents of documents submitted by contractors and a recognition of the need to apply independent judgment in the use of these work products.

8. *Responsibilities—(a) Heads of agencies.* Heads of departments and agencies are responsible for implementing this policy letter. While these policies must be implemented in the Federal Acquisition Regulation (FAR), it is expected that agencies will take all appropriate actions in the interim to develop implementation strategies and initiate staff training to ensure effective implementation of these policies.

(b) *Federal Acquisition Regulatory Council.* Pursuant to subsections 6(a) and 25(f) of the OFPP Act, as amended, 41 U.S.C. 405(a) and 421(f), the Federal Acquisition Regulatory Council shall ensure that the policies established herein are incorporated in the FAR within 210 days from the date this policy letter is published in the Federal Register. Issuance of final regulations within this 210-day period shall be considered issuance "in a timely manner" as prescribed in 41 U.S.C. 405(b).

(c) *Contracting officers.* When requirements are developed, when solicitations are drafted, and when contracts are being performed, contracting officers are to ensure:

(1) That functions to be contracted are not among those listed in appendix A of this letter and do not closely resemble any functions listed there;

(2) That functions to be contracted that are not listed in appendix A, and that do not closely resemble them, are not inherently governmental functions according to the totality of the circumstances test in subsection 7(b), above;

(3) That the terms and the manner of performance of any contract involving functions listed in appendix B of this letter are subject to adequate scrutiny and oversight in accordance with subsection 7(f), above; and

(4) That all other contractable functions are properly managed in accordance with subsection 7(e), above.

(d) *All officials.* When they are aware that contractor advice, opinions, recommendations, ideas, reports, analyses, and other work products are to be considered in the course of their official duties, all Federal Government officials are to ensure that they exercise independent judgment and critically examine these products.

9. *Judicial review.* This policy letter is not intended to provide a constitutional or statutory interpretation of any kind and it is not intended, and should not be construed, to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person. It is intended only to provide policy guidance to agencies in the exercise of their discretion concerning Federal contracting. Thus, this policy letter is

not intended, and should not be construed, to create any substantive or procedural basis on which to challenge any agency action or inaction on the ground that such action or inaction was not in accordance with this policy letter.

10. *Information contact.* For information regarding this policy letter contact Richard A. Ong, Deputy Associate Administrator, the Office of Federal Procurement Policy, 725 17th Street, NW., Washington, DC 20503. Telephone (202) 395-7209.

11. *Effective date.* This policy letter is effective 30 days after the date of publication.

Allan V. Burman,
Administrator.

Appendix A

The following is an illustrative list of functions considered to be inherently governmental functions:¹

1. The direct conduct of criminal investigations.
2. The control of prosecutions and performance of adjudicatory functions (other than those relating to arbitration or other methods of alternative dispute resolution).
3. The command of military forces, especially the leadership of military personnel who are members of the combat, combat support or combat service support role.
4. The conduct of foreign relations and the determination of foreign policy.
5. The determination of agency policy, such as determining the content and application of regulations, among other things.
6. The determination of Federal program priorities or budget requests.
7. The direction and control of Federal employees.
8. The direction and control of intelligence and counter-intelligence operations.
9. The selection or nonselection of individuals for Federal Government employment.
10. The approval of position descriptions and performance standards for Federal employees.
11. The determination of what Government property is to be disposed of and on what terms (although an agency may give contractors authority to dispose of property at prices within specified ranges and subject to other reasonable conditions deemed appropriate by the agency).
12. In Federal procurement activities with respect to prime contracts,
 - (a) Determining what supplies or services are to be acquired by the Government (although an agency may give contractors authority to acquire supplies at prices within specified ranges and subject to other reasonable conditions deemed appropriate by the agency);

¹ With respect to the actual drafting of Congressional testimony, of responses to Congressional correspondence, and of agency responses to audit reports from an Inspector General, the General Accounting Office, or other Federal audit entity, see special provisions in subsection 6(c) of the text of the policy letter.

(b) Participating as a voting member on any source selection boards;

(c) Approval of any contractual documents, to include documents defining requirements, incentive plans, and evaluation criteria;

(d) Awarding contracts;

(e) Administering contracts (including ordering changes in contract performance or contract quantities, taking action based on evaluations of contractor performance, and accepting or rejecting contractor products or services);

(f) Terminating contracts; and

(g) Determining whether contract costs are reasonable, allocable, and allowable.

13. The approval of agency responses to Freedom of Information Act requests (other than routine responses that, because of statute, regulation, or agency policy, do not require the exercise of judgment in determining whether documents are to be released or withheld), and the approval of agency responses to the administrative appeals of denials of Freedom of Information Act requests.

14. The conduct of administrative hearings to determine the eligibility of any person for a security clearance, or involving actions that affect matters of personal reputation or eligibility to participate in Government programs.

15. The approval of Federal licensing actions and inspections.

16. The determination of budget policy, guidance, and strategy.

17. The collection, control, and disbursement of fees, royalties, duties, fines, taxes and other public funds, unless authorized by statute, such as title 31 U.S.C. 952 (relating to private collection contractors) and title 31 U.S.C. 3718 (relating to private attorney collection services), but not including:

(a) Collection of fees, fines, penalties, costs or other charges from visitors to or patrons of mess halls, post or base exchange concessions, national parks, and similar entities or activities, or from other persons, where the amount to be collected is easily calculated or predetermined and the funds collected can be easily controlled using standard cash management techniques, and

(b) Routine voucher and invoice examination.

18. The control of the treasury accounts.

19. The administration of public trusts.

Appendix B

The following list is of services and actions that are not considered to be inherently governmental functions. However, they may approach being in that category because of the way in which the contractor performs the contract or the manner in which the Government administers contractor performance. When contracting for such services and actions, agencies should be fully aware of the terms of the contract, contractor performance, and contract administration to ensure that appropriate agency control is preserved.

This is an illustrative listing, and is not intended to promote or discourage the use of the following types of contractor services:

1. Services that involve or relate to budget preparation, including workload modeling,

fact finding, efficiency studies, and should-cost analyses, etc.

2. Services that involve or relate to reorganization and planning activities.

3. Services that involve or relate to analyses, feasibility studies, and strategy options to be used by agency personnel in developing policy.

4. Services that involve or relate to the development of regulations.

5. Services that involve or relate to the evaluation of another contractor's performance.

6. Services in support of acquisition planning.

7. Contractors' providing assistance in contract management (such as where the contractor might influence official evaluations of other contractors).

8. Contractors' providing technical evaluation of contract proposals.

9. Contractors' providing assistance in the development of statements of work.

10. Contractors' providing support in preparing responses to Freedom of Information Act requests.

11. Contractors' working in any situation that permits or might permit them to gain access to confidential business information and/or any other sensitive information (other than situations covered by the Defense Industrial Security Program described in FAR 4.402(b)).

12. Contractors' providing information regarding agency policies or regulations, such as attending conferences of behalf of an agency, conducting community relations campaigns, or conducting agency training courses.

13. Contractors' participating in any situation where it might be assumed that they are agency employees or representatives.

14. Contractors' participating as technical advisors to a source selection board or participating as voting or nonvoting members of a source evaluation board.

15. Contractors' serving as arbitrators or providing alternative methods of dispute resolution.

16. Contractors' constructing buildings or structures intended to be secure from electronic eavesdropping or other penetration by foreign governments.

17. Contractors' providing inspection services.

18. Contractors' providing legal advice and interpretations of regulations and statutes to Government officials.

19. Contractors' providing special non-law enforcement, security activities that do not directly involve criminal investigations, such as prisoner detention or transport and non-military national security details.

[FR Doc. 92-23641 Filed 9-29-92; 8:45 am]

BILLING CODE 3110-01-M

RESOLUTION TRUST CORPORATION

Coastal Barrier Improvement Act;
Property Availability; Kachina Village,
Coconino County, AZ

AGENCY: Resolution Trust Corporation.

ACTION: Notice.

SUMMARY: Notice is hereby given that the property known as Kachina Village, located in Coconino County, Arizona, is affected by section 10 of the Coastal Barrier Improvement Act of 1990, as specified below.

DATES: Written notices of serious interest to purchase or effect other transfer of the property may be mailed or faxed to the RTC until December 29, 1992.

ADDRESSES: Copies of detailed descriptions of the property, including maps, can be obtained from or are available for inspection by contacting the following person: Mr. Robert Wessel, Resolution Trust Corporation, c/o Great American FSA, 600 B Street, M/C 5480, San Diego, CA 92183, (619) 231-3035, Fax (619) 231-4051.

SUPPLEMENTARY INFORMATION: The Kachina Village property is located in the unincorporated area of Kachina Village, south of the City of Flagstaff, Coconino County, Arizona. The site is situated west of Tovar Trail and about 200 feet north of Kachina Trail. The property contains wetlands, has recreational value and is adjacent to the Coconino National Forest. The property is covered property within the meaning of section 10 of the Coastal Barrier Improvement Act of 1990, Public Law 101-591 (12 U.S.C. 1441a-3).

Characteristics of the property include: The property consists of approximately 57.5 acres of undeveloped land. Several natural springs and streams run through the property and drain into a wash area. The northeast part of the property is slightly elevated above the rest of the property and is partially forested. There is no developed access to the property.

Property Size: Approximately 57.5 acres.

Written notice of serious interest in the purchase or other transfer of the property must be received on or before December 29, 1992 by the Resolution Trust Corporation at the address stated above.

Those entities eligible to submit written notices of serious interest are:

1. Agencies or entities of the Federal government;
2. Agencies or entities of State or local government; and
3. "Qualified organizations" pursuant to section 170(h)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 170(h)(3)).

Written notices of serious interest to purchase or effect other transfer of the property must be submitted by December 29 1992 to Mr. Robert Wessel

Financial assistance for construction of health facilities and community hospitals in carrying out provisions of this subchapter, see 42 USCA § 2005.
Indian Health Service, see 25 USCA § 1661.
Medical and dental care to Pribilof Island natives, see 16 USCA § 1164.
Menominee Indian Tribe, funds appropriated pursuant to this subchapter for grants for services, see 25 USCA § 903a.
Self-determination contracts with tribal organizations to carry out programs under this section, see 25 USCA § 450f.
Third party tort liability to United States for hospital and medical care, see 42 USCA § 2651 et seq.

§ 2001. Hospitals and health facilities transferred to Public Health Service; restriction on closing hospitals

(a) All functions, responsibilities, authorities, and duties of the Department of the Interior, the Bureau of Indian Affairs, Secretary of the Interior, and the Commissioner of Indian Affairs relating to the maintenance and operation of hospital and health facilities for Indians, and the conservation of the health of Indians, are hereby transferred to, and shall be administered by, the Surgeon General of the United States Public Health Service, under the supervision and direction of the Secretary of Health and Human Services: *Provided*, That hospitals now in operation for a specific tribe or tribes of Indians shall not be closed prior to July 1, 1956, without the consent of the governing body of the tribe or its organized council.

(b) In carrying out his functions, responsibilities, authorities, and duties under this subchapter, the Secretary is authorized, with the consent of the Indian people served, to contract with private or other non-Federal health agencies or organizations for the provision of health services to such people on a fee-for-service basis or on a prepayment or other similar basis.

Aug. 5, 1954, c. 653, § 1, 68 Stat. 674; Dec. 29, 1973, Pub.L. 93-222, § 6(a), 37 Stat. 935; Oct. 17, 1979, Pub.L. 96-88, Title V, § 509(b), 93 Stat. 695.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1954 Acts. Senate Report No. 1530 and Conference Report No. 2430, see 1954 U.S. Code Cong. and Adm. News, p. 2918.

1973 Acts. Senate Report No. 93-129 and Senate Conference Report No. 93-621, see 1973 U.S. Code Cong. and Adm. News, p. 3033.

1979 Acts. Senate Report No. 96-49 and House Conference Report No. 96-459, see 1979 U.S. Code Cong. and Adm. News, p. 1514.

Amendments

1973 Amendments. Pub.L. 93-222 designated existing provisions as subsec. (a) and added subsec. (b).

Effective Dates

1954 Acts. Section 6 of Act Aug. 5, 1954, as amended by Pub.L. 86-121, § 2, July 31, 1959, 73 Stat. 268, provided that: "Sections 1 to 5, inclusive, of this Act [enacting this subchapter and repealing sections 444 to 449 of Title 25, Indians] shall take effect July 1, 1959."

Transfer of Functions

The Office of the Surgeon General was abolished by section 3 of Reorg. Plan No.

Federal Management Manual
Regulatory Act

Pub.L. 97-255

31 U.S.C.

1005, 1113, 3512

MONEY AND FINANCE

31 § 1105

(c) When the President makes a basic change in the form of the budget, the President shall submit with the budget information showing where items in the budget for the prior fiscal year are contained in the present budget. However, the President may change the functional categories in the budget only in consultation with the Committees on Appropriations and on the Budget of both Houses of Congress. Committees of the House of Representatives and Senate shall receive prompt notification of all such changes.

[See main volume for text of (d) and (e)]

(As amended Pub.L. 99-177, Title II, § 224, Dec. 12, 1985, 99 Stat. 1060.)

HISTORICAL AND STATUTORY NOTES

1985 Amendment

Subsec. (c). Pub.L. 99-177, § 224, added provisions relating to notice to Committees of the House and Senate.

beginning after Sept. 30, 1985, see section 275(a)(1) of Pub.L. 99-177, set out as a note under section 901 of Title 2, The Congress.

Legislative History

Effective Date of 1985 Amendment

Amendment by Pub.L. 99-177 effective Dec. 12, 1985, to apply with respect to fiscal years

For legislative history and purpose of Pub.L. 99-177, see 1985 U.S. Code Cong. and Adm. News, p. 979.

§ 1105. Budget contents and submission to Congress

(a) On or after the first Monday in January but not later than the first Monday in February of each year, the President shall submit a budget of the United States Government for the following fiscal year. Each budget shall include a budget message and summary and supporting information. The President shall include in each budget the following:

[See main volume for text of (1) to (24)]

(25) a separate appropriation account for appropriations for each Office of Inspector General of an establishment defined under section 11(2) of the Inspector General Act of 1978.

(28) ¹ a separate statement of the amount of appropriations requested for the Office of Federal Financial Management.

(29) beginning with fiscal year 1999, a Federal Government performance plan for the overall budget as provided for under section 1115.

[See main volume for text of (b) to (d)]

(e)(1) The President shall submit with materials related to each budget transmitted under subsection (a) on or after January 1, 1985, an analysis for the ensuing fiscal year that shall identify requested appropriations or new obligational authority and outlays for each major program that may be classified as a public civilian capital investment program and for each major program that may be classified as a military capital investment program, and shall contain summaries of the total amount of such appropriations or new obligational authority and outlays for public civilian capital investment programs and summaries of the total amount of such appropriations or new obligational authority and outlays for military capital investment programs. In addition, the analysis under this paragraph shall contain—

(A) an estimate of the current service levels of public civilian capital investment and of military capital investment and alternative high and low levels of such investments over a period of ten years in current dollars and over a period of five years in constant dollars;

(B) the most recent assessment analysis and summary, in a standard format, of public civilian capital investment needs in each major program area over a period of ten years;

(C) an identification and analysis of the principal policy issues that affect estimated public civilian capital investment needs for each major program; and

(D) an identification and analysis of factors that affect estimated public civilian capital investment needs for each major program, including but not limited to the following factors:

(i) economic assumptions;

(ii) engineering standards;

- (iii) estimates of spending for operation and maintenance;
- (iv) estimates of expenditures for similar investments by State and local governments; and
- (v) estimates of demand for public services derived from such capital investments and estimates of the service capacity of such investments.

To the extent that any analysis required by this paragraph relates to any program for which Federal financial assistance is distributed under a formula prescribed by law, such analysis shall be organized by State and within each State by major metropolitan area if data are available.

(2) For purposes of this subsection, any appropriation, new obligational authority, or outlay shall be classified as a public civilian capital investment to the extent that such appropriation, authority, or outlay will be used for the construction, acquisition, or rehabilitation of any physical asset that is capable of being used to produce services or other benefits for a number of years and is not classified as a military capital investment under paragraph (3). Such assets shall include (but not be limited to)—

- (A) roadways or bridges,
- (B) airports or airway facilities,
- (C) mass transportation systems,
- (D) wastewater treatment or related facilities,
- (E) water resources projects,
- (F) hospitals,
- (G) resource recovery facilities,
- (H) public buildings,
- (I) space or communications facilities,
- (J) railroads, and
- (K) federally assisted housing.

(3) For purposes of this subsection, any appropriation, new obligational authority, or outlay shall be classified as a military capital investment to the extent that such appropriation, authority, or outlay will be used for the construction, acquisition, or rehabilitation of any physical asset that is capable of being used to produce services or other benefits for purposes of national defense and security for a number of years. Such assets shall include military bases, posts, installations, and facilities.

(4) Criteria and guidelines for use in the identification of public civilian and military capital investments, for distinguishing between public civilian and military capital investments, and for distinguishing between major and nonmajor capital investment programs shall be issued by the Director of the Office of Management and Budget after consultation with the Comptroller General and the Congressional Budget Office. The analysis submitted under this subsection shall be accompanied by an explanation of such criteria and guidelines.

(5) For purposes of this subsection—

(A) the term "construction" includes the design, planning, and erection of new structures and facilities, the expansion of existing structures and facilities, the reconstruction of a project at an existing site or adjacent to an existing site, and the installation of initial and replacement equipment for such structures and facilities;

(B) the term "acquisition" includes the addition of land, sites, equipment, structures, facilities, or rolling stock by purchase, lease-purchase, trade, or donation; and

(C) the term "rehabilitation" includes the alteration of or correction of deficiencies in an existing structure or facility so as to extend the useful life or improve the effectiveness of the structure or facility, the modernization or replacement of equipment at an existing structure or facility, and the modernization of, or replacement of parts for, rolling stock.

(f) The budget transmitted pursuant to subsection (a) for a fiscal year shall be prepared in a manner consistent with the requirements of the Balanced Budget and Emergency Deficit Control Act of 1985 that apply to that and subsequent fiscal years.

(As amended Pub.L. 98-501, Title II, § 203, Oct. 19, 1984, 98 Stat. 2324; Pub.L. 99-177, Title II, § 241, Dec. 12, 1985, 99 Stat. 1063; Pub.L. 100-119, Title I, § 106(f), Sept. 29, 1987, 101 Stat. 781; Pub.L. 100-418, Title V, § 5301, Aug. 23, 1988, 102 Stat. 1462; Pub.L. 100-504, Title I, § 108, Oct. 18, 1988, 102 Stat. 2529; Pub.L. 100-690, Title I, § 1006, Nov. 18, 1988, 102 Stat. 4187; Pub.L. 101-503,

proval and shall be adhered to by all agencies in the executive branch. Any such regulation or order may pertain to a single agency, a group of agencies, or all agencies in the executive branch.

Sec. 5. In the development of programs and the preparation of regulations and orders for issuance pursuant to Section 1 hereof, the Director shall consult Federal agencies whose activities will be substantially affected, and may consult non-Federal groups to the extent he finds it necessary to carry out the purposes of this order.

Sec. 6. The authority outlined in this order is in addition to and not in substitution for the existing authority of the Director, or of the Office of Management and Budget with respect to statistical and reporting activities. To the extent, however, that this order con-

flicts with any previous Executive order affecting statistical or reporting activities, the provisions of this order shall control.

Sec. 7. As required by Section 3(a) of the Paperwork Reduction Act of 1980 (94 Stat. 2825; 44 U.S.C. § 3503 note) [set out as a note under section 3503 of Title 44, Public Printing and Documents], the Director shall redelegate to the Administrator for the Office of Information and Regulatory Affairs, Office of Management and Budget, all functions, authority, and responsibility under Section 103 of the Budget and Accounting Procedures Act of 1950 [31 U.S.C. § 18b] [former section 18b of this title] which have been vested in the Director by this Order.

Sec. 8. [Revoked by Ex.Ord. No. 12318, Aug. 21, 1981, 46 F.R. 42833.]

Cross References

Executive agency accounting systems to provide reliable accounting results that will be basis for providing financial information required under subsec. (e) of this section, see section 3512 of this title.

Library References

United States \Rightarrow 26.

C.J.S. United States §§ 27, 28.

Notes of Decisions

1. Construction with other laws

President's authority under former section 16 of this title to prescribe rules and regulations for preparation of budget was subject to specific requirements of government in the

Sunshine Act, section 552b of Title 5. *Common Cause v. Nuclear Regulatory Commission*, 1982, 674 F.2d 921, 218 U.S.App.D.C. 262.

§ 1105. Budget contents and submission to Congress

(a) During the first 15 days of each regular session of Congress, the President shall submit a budget of the United States Government for the following fiscal year. Each budget shall include a budget message and summary and supporting information. The President shall include in each budget the following:

- (1) information on activities and functions of the Government.
- (2) when practicable, information on costs and achievements of Government programs.
- (3) other desirable classifications of information.
- (4) a reconciliation of the summary information on expenditures with proposed appropriations.
- (5) except as provided in subsection (b) of this section, estimated expenditures and proposed appropriations the President decides are necessary to support the Government in the fiscal year for which the budget is submitted and the 4 fiscal years after that year.

- (6) estimated receipts of the Government in the fiscal year for which the budget is submitted and the 4 fiscal years after that year under—
 - (A) laws in effect when the budget is submitted; and
 - (B) proposals in the budget to increase revenues.
- (7) appropriations, expenditures, and receipts of the Government in the prior fiscal year.
- (8) estimated expenditures and receipts, and appropriations and proposed appropriations, of the Government for the current fiscal year.
- (9) balanced statements of the—
 - (A) condition of the Treasury at the end of the prior fiscal year;
 - (B) estimated condition of the Treasury at the end of the current fiscal year; and
 - (C) estimated condition of the Treasury at the end of the fiscal year for which the budget is submitted if financial proposals in the budget are adopted.
- (10) essential information about the debt of the Government.
- (11) other financial information the President decides is desirable to explain in practicable detail the financial condition of the Government.
- (12) for each proposal in the budget for legislation that would establish or expand a Government activity or function, a table showing—
 - (A) the amount proposed in the budget for appropriation and for expenditure because of the proposal in the fiscal year for which the budget is submitted; and
 - (B) the estimated appropriation required because of the proposal for each of the 4 fiscal years after that year that the proposal will be in effect.
- (13) an allowance for additional estimated expenditures and proposed appropriations for the fiscal year for which the budget is submitted.
- (14) an allowance for unanticipated uncontrollable expenditures for that year.
- (15) a separate statement on each of the items referred to in section 301(a)(1)–(5) of the Congressional Budget Act of 1974 (2 U.S.C. 632(a)(1)–(5)).
- (16) the level of tax expenditures under existing law in the tax expenditures budget (as defined in section 3(a)(3) of the Congressional Budget Act of 1974 (2 U.S.C. 622(a)(3))) for the fiscal year for which the budget is submitted, considering projected economic factors and changes in the existing levels based on proposals in the budget.
- (17) information on estimates of appropriations for the fiscal year following the fiscal year for which the budget is submitted for grants, contracts, and other payments under each program for which there is an authorization of appropriations for that following fiscal year when

the appropriations are authorized to be included in an appropriation law for the fiscal year before the fiscal year in which the appropriation is to be available for obligation.

(18) a comparison of the total amount of budget outlays for the prior fiscal year, estimated in the budget submitted for that year, for each major program having relatively uncontrollable outlays with the total amount of outlays for that program in that year.

(19) a comparison of the total amount of receipts for the prior fiscal year, estimated in the budget submitted for that year, with receipts received in that year, and for each major source of receipts, a comparison of the amount of receipts estimated in that budget with the amount of receipts from that source in that year.

(20) an analysis and explanation of the differences between each amount compared under clauses (18) and (19) of this subsection.

(21) a horizontal budget showing—

(A) the programs for meteorology and of the National Climate Program established under section 5 of the National Climate Program Act (15 U.S.C. 2904);

(B) specific aspects of the program of, and appropriations for, each agency; and

(C) estimated goals and financial requirements.

(22) a statement of budget authority, proposed budget authority, budget outlays, and proposed budget outlays, and descriptive information in terms of—

(A) a detailed structure of national needs that refers to the missions and programs of agencies (as defined in section 101 of this title); and

(B) the missions and basic programs.

(23) separate appropriation accounts for appropriations under the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.) and the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 801 et seq.).

(24) recommendations on the return of Government capital to the Treasury by a mixed-ownership corporation (as defined in section 9101(2) of this title) that the President decides are desirable.

(25) a separate statement, for each agency having an Office of Inspector General, of the amount of the appropriation requested for the Office.

(b) Estimated expenditures and proposed appropriations for the legislative branch and the judicial branch to be included in each budget under subsection (a)(5) of this section shall be submitted to the President before October 16 of each year and included in the budget by the President without change.

(c) The President shall recommend in the budget appropriate action to meet an estimated deficiency when the estimated receipts for the fiscal year

for which the budget is submitted (under laws in effect when the budget is submitted) and the estimated amounts in the Treasury at the end of the current fiscal year available for expenditure in the fiscal year for which the budget is submitted, are less than the estimated expenditures for that year. The President shall make recommendations required by the public interest when the estimated receipts and estimated amounts in the Treasury are more than the estimated expenditures.

(d) When the President submits a budget or supporting information about a budget, the President shall include a statement on all changes about the current fiscal year that were made before the budget or information was submitted.

(Pub.L. 97-258, Sept. 13, 1982, 96 Stat. 908; Pub.L. 97-452, § 1(2), Jan. 12, 1983, 96 Stat. 2467.)

Historical and Revision Notes

1982 Act

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
1105(a)(1)-(14)	31:11(a) (less (5) (words after 2d comma)).	June 10, 1921, ch. 18, § 201(a), 42 Stat. 20; restated Sept. 12, 1950, ch. 946, § 102(a), 64 Stat. 832; Aug. 1, 1956, ch. 814, § 1(a), 70 Stat. 782; Oct. 26, 1970, Pub.L. 91-510, § 221(a), 84 Stat. 1169; July 12, 1974, Pub.L. 93-344, §§ 603, 604, 88 Stat. 324.
	31:19	June 10, 1921, ch. 18, § 211, 42 Stat. 22; Reorg. Plan No. 1 of 1939, eff. July 1, 1939, § 1, 53 Stat. 1423; Reorg. Plan No. 2 of 1970, eff. July 1, 1970, § 102(a), 84 Stat. 2085.
1105(a)(15)	31:11(d)	June 10, 1921, ch. 18, 42 Stat. 20, § 201(d)-(f), (g) (last sentence)-(i) (1st sentence); added July 12, 1974, Pub.L. 93-344, § 601, 88 Stat. 323.
1105(a)(16)	31:11(e)	
1105(a)(17)	31:11(h)	
1105(a)(18)-(20)	31:11(f)	
1105(a)(21)	31:25	Oct. 18, 1962, Pub.L. 87-843, § 304 (1st par.), 76 Stat. 1097; Reorg. Plan No. 2 of 1970, eff. July 1, 1970, § 102(a), 84 Stat. 2085; Sept. 17, 1978, Pub.L. 95-367, § 5(g)(2), 92 Stat. 603.
1105(a)(22)	31:11(i) (1st sentence)	
1105(a)(23)	31:11 (note)	Nov. 9, 1977, Pub.L. 95-164, § 305, 91 Stat. 1322.
1105(a)(24)	31:859	Dec. 6, 1945, ch. 557, § 204, 59 Stat. 601.
1105(b)	28:605 (last par.)	
	31:11(a)(5) (words after 2d comma)	
1105(c)	31:13	June 10, 1921, ch. 18, § 202, 42 Stat. 21.
1105(d)	31:11(g) (last sentence)	

Explanatory Notes

In the section, the word "current" is substituted for "in progress", and the word "prior" is substituted for "last completed", for consistency in the revised title.

In subsection (a), before clause (1), the text of 31:19 [former section 19 of this title] is

omitted as superseded by the broader authority of 31:11(a)(5) [former section 11(a)(5) of this title]. The words "for the following fiscal year" are added for clarity. The words "summary and supporting information" are substituted for "summary data and text, and supporting detail" in the introductory matter

"terminology, definitions, classifications, and codes" to eliminate unnecessary words. In clause (1), the words "The authority contained in this section shall include, but not be limited to" are omitted as surplus. In clause (2), the words "After June 30, 1975" are omitted as executed. The word "additional" is omitted as surplus. The words "establishment, maintenance, and use of" are substituted for "development, establishment, and maintenance, modification . . . implementation" to eliminate unnecessary words and for consistency in the revised section. The words "by the executive branch of the Government" are substituted for "executive" for clarity. The text of 31:1152(a)(2) [former section 1152(a)(2) of this title] (1st sentence) is omitted as executed. In clause (3), the

words "this subsection" are substituted for "this responsibility" because of the restatement.

In subsection (c)(1), the word "revenues" is omitted as being included in "receipts". The word "spending" is substituted for "expenditures" for consistency in the revised title.

In subsection (e), the word "President" is substituted for "Director of the Office of Management and Budget" because sections 101 and 102(a) of Reorganization Plan No. 2 of 1970 (eff. July 1, 1970, 84 Stat. 2085) [set out under section 501 of this title] designated the Bureau of the Budget as the Office of Management and Budget and transferred all functions of the Bureau to the President.

Cross References

File of information to meet recurring needs of Congress for fiscal, budget and program information, see section 1113 of this title.
Reports of Comptroller General, see section 719 of this title.

§ 1113. Congressional information

(a)(1) When requested by a committee of Congress having jurisdiction over receipts or appropriations, the President shall provide the committee with assistance and information.

(2) When requested by a committee of Congress, additional information related to the amount of an appropriation originally requested by an Office of Inspector General shall be submitted to the committee.

(b) When requested by a committee of Congress, by the Comptroller General, or by the Director of the Congressional Budget Office, the Secretary of the Treasury, the Director of the Office of Management and Budget, and the head of each executive agency shall—

(1) provide information on the location and kind of available fiscal, budget, and program information;

(2) to the extent practicable, prepare summary tables of that fiscal, budget, and program information and related information the committee, the Comptroller General, or the Director of the Congressional Budget Office considers necessary; and

(3) provide a program evaluation carried out or commissioned by an executive agency.

(c) In cooperation with the Director of the Congressional Budget Office, the Secretary, and the Director of the Office of Management and Budget, and Comptroller General shall—

(1) establish and maintain a current directory of sources of, and information systems for, fiscal, budget, and program information and a brief description of the contents of each source and system;

(2) when requested, provide assistance to committees of Congress and members of Congress in obtaining information from the sources in the directory; and

(3) when requested, provide assistance to committees and, to the extent practicable, to members of Congress in evaluating the information obtained from the sources in the directory.

(d) To the extent they consider necessary, the Comptroller General and the Director of the Congressional Budget Office individually or jointly shall establish and maintain a file of information to meet recurring needs of Congress for fiscal, budget, and program information to carry out this section and sections 717 and 1112 of this title. The file shall include information on budget requests, congressional authorizations to obligate and expend, apportionment and reserve actions, and obligations and expenditures. The Comptroller General and the Director shall maintain the file and an index to the file so that it is easier for the committees and agencies of Congress to use the file and index through data processing and communications techniques.

(e)(1) The Comptroller General shall—

(A) carry out a continuing program to identify the needs of committees and members of Congress for fiscal, budget, and program information to carry out this section and section 1112 of this title;

(B) assist committees of Congress in developing their information needs;

(C) monitor recurring reporting requirements of Congress and committees; and

(D) make recommendations to Congress and committees for changes and improvements in those reporting requirements to meet information needs identified by the Comptroller General, to improve their usefulness to congressional users, and to eliminate unnecessary reporting.

(2) Before September 2 of each year, the Comptroller General shall report to Congress on—

(A) the needs identified under paragraph (1)(A) of this subsection;

(B) the relationship of those needs to existing reporting requirements;

(C) the extent to which reporting by the executive branch of the United States Government currently meets the identified needs;

(D) the changes to standard classifications necessary to meet congressional needs;

(E) activities, progress, and results of the program of the Comptroller General under paragraph (1)(B)–(D) of this subsection; and

(F) progress of the executive branch in the prior year.

(3) Before March 2 of each year, the Director of the Office of Management and Budget and the Secretary shall report to Congress on plans for

meeting the needs identified under paragraph (1)(A) of this subsection, including—

- (A) plans for carrying out changes to classifications to meet information needs of Congress;
- (B) the status of information systems in the prior year; and
- (C) the use of standard classifications.

(Pub.L. 97-258, Sept. 13, 1982, 96 Stat. 914; Pub.L. 97-452, § 1(3), Jan. 12, 1983, 96 Stat. 2467.)

Historical and Revision Notes

1982 Act

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
1113(a)	31:20	June 10, 1921, ch. 18, § 212, 42 Stat. 23; Reorg. Plan No. 1 of 1939, eff. July 1, 1939, § 1, 53 Stat. 1423; Reorg. Plan No. 2 of 1970, eff. July 1, 1970, § 102(a), 34 Stat. 2085.
1113(b)-(d)	31:1153(a)-(c)	Oct. 26, 1970, Pub.L. 91-510, § 203(a)-(c), 84 Stat. 1163; restated July 12, 1974, Pub.L. 93-344, § 801(a), 88 Stat. 328.
1113(e)(1)	31:1152(c), (d)	Oct. 26, 1970, Pub.L. 91-510, § 202(c)-(f), 84 Stat. 1167; restated July 12, 1974, Pub.L. 93-344, § 801(a), 88 Stat. 328.
1113(e)(2)	31:1152(e)	
1113(e)(3)	31:1152(f)	

Explanatory Notes

In the section, the words "committee of Congress" are substituted for "committee of either House, of any joint committee of the two Houses" and variations of the substituted phrase to eliminate unnecessary words and for consistency in the revised title and with other titles of the United States Code.

In subsection (a), the word "President" is substituted for "Office of Management and Budget" because sections 101 and 102(a) of Reorganization Plan No. 2 of 1970 (eff. July 1, 1970, 84 Stat. 2085) [set out under section 501 of this title] designated the Bureau of the Budget as the Office of Management and Budget and transferred all functions of the Bureau to the President. The word "assistance" is substituted for "aid", and the word "receipts" is substituted for "revenue", for consistency in the revised title.

In subsections (b)-(d), the words "program information" are substituted for "program-related data and information" to eliminate unnecessary words.

In subsection (b)(1) and (3), the words "to such committee or joint committee, the Comptroller General, or the Director of the Congressional Budget Office" are omitted as unnecessary because of the restatement. In clause (1), the word "kind" is substituted for

"nature" for consistency in the revised title. In clause (2), the words "that fiscal, budgetary, and program information" are substituted for "such data and information" because of the restatement.

In subsection (c), the word "inventory" is omitted as unnecessary. In clause (1), the word "develop" is omitted as being included in "establish". In clause (2), the word "obtaining" is substituted for "securing" as being more precise. In clause (3), the word "evaluating" is substituted for "appraising and analyzing" for clarity and to eliminate unnecessary words.

In subsection (d), the words "individually or jointly . . . file" are substituted for "central file or files" for clarity. The word "information" is substituted for "data and information", and the word "needs" is substituted for "requirements", for consistency in the section. The words "carry out" are substituted for "carry out the purposes of" because of the restatement. A cross reference to 31:1155-1156 [former sections 1155 and 1156 of this title] is not included because those sections are not relevant to the information file described in the source provisions. The words "so that it is easier" are substitut-

3. **Forgery within section**
 "Forged endorsement" includes unauthorized endorsement which purports to be made in representative capacity. *Strann v. U.S.*, 1983, 2 (141, 782).

4. **Persons entitled to maintain action**
 There is no private right of action against bank created by this section which creates a revolving fund from which the treasury can reimburse payees whose government checks are negotiated over an unauthorized endorsement; taxpayers whose tax refund checks were mailed directly to their attorney, who endorsed the

checks without authorization and kept the money, did not have private right of action against banks which cashed the checks. *Allen v. Crocker Nat. Bank, C.A. Cal. 1984*, 733 F.2d 642.

Where payee's social security benefit check was improperly cashed on a forged indorsement but payee died before substitute check could be issued, administrator of payee's estate lacked standing to bring action under this section because payee's rights to check were not of type that survived his death and therefore could not be exercised by his administrator. *Stewart v. U.S.*, 1983, 3 Cl.Ct. 474.

CHAPTER 35—ACCOUNTING AND COLLECTION

SUBCHAPTER II—ACCOUNTING REQUIREMENTS, SYSTEMS AND INFORMATION

Sec. 3532.	Executive agency accounting and other financial management reports and plans.	3533.	Review of protests; effect on contracts pending decision.
3515.	Financial statements of agencies.	3555.	Regulations; authority of Comptroller General to verify assertions.
SUBCHAPTER V—PROCUREMENT PROTEST SYSTEM		3556.	Nonexclusivity of remedies; matters included in agency record.
3551.	Definitions.		

HISTORICAL AND STATUTORY NOTES

1990 Amendment
 Section analysis. Pub.L. 101-576, Title III, § 301(b), added item 3512.
 1984 Amendment
 Pub.L. 98-369, Title VII, § 2741(b), July 18, 1984, 98 Stat. 1203, added Subchapter V heading and items 3551 to 3556.

SUBCHAPTER II—ACCOUNTING REQUIREMENTS, SYSTEMS, AND INFORMATION

§ 3511. Prescribing accounting requirements and developing accounting systems

HISTORICAL AND STATUTORY NOTES

Adoption of Capital Accounting Standards
 Pub.L. 101-576, Title III, § 307, Nov. 15, 1990, 104 Stat. 2855, provided that: "No capital accounting standard or principle, including any human capital standard or principle, shall be adopted for use in an executive department or agency until such standard has been reported to the Congress and a period of 45 days of continuous session of the Congress has expired."

§ 3512. Executive agency accounting and other financial management reports and plans

(a)(1) The Director of the Office of Management and Budget shall prepare and submit to the appropriate committees of the Congress a financial management status report and a governmentwide 5-year financial management plan.

(2) A financial management status report under this subsection shall include—
 (A) a description and analysis of the status of financial management in the executive branch;

(B) a summary of the most recently completed financial statements—

(i) of Federal agencies under section 3515 of this title; and

(ii) of Government corporations;

(C) a summary of the most recently completed financial statement audits and reports—

(i) of Federal agencies under section 3521(e) and (f) of this title; and
 (ii) of Government corporations;

(D) a summary of reports on internal accounting and administrative control systems submitted to the President and the Congress under the amendments made by the Federal Managers' Financial Integrity Act of 1982 (Public Law 97-255); and
 (E) any other information the Director considers appropriate to fully inform the Congress regarding the financial management of the Federal Government.

(3)(A) A governmentwide 5-year financial management plan under this subsection shall describe the activities the Director, the Deputy Director for Management, the Controller of the Office of Federal Financial Management, and agency Chief Financial Officers shall conduct over the next 5 fiscal years to improve the financial management of the Federal Government.

(B) Each governmentwide 5-year financial management plan prepared under this subsection shall—

(i) describe the existing financial management structure and any changes needed to establish an integrated financial management system;

(ii) be consistent with applicable accounting principles, standards, and requirements;

(iii) provide a strategy for developing and integrating individual agency accounting, financial information, and other financial management systems to ensure adequacy, consistency, and timeliness of financial information;

(iv) identify and make proposals to eliminate duplicative and unnecessary systems, including encouraging agencies to share systems which have sufficient capacity to perform the functions needed;

(v) identify projects to bring existing systems into compliance with the applicable standards and requirements;

(vi) contain milestones for equipment acquisitions and other actions necessary to implement the 5-year plan consistent with the requirements of this section;

(vii) identify financial management personnel needs and actions to ensure those needs are met;

(viii) include a plan for ensuring the annual audit of financial statements of executive agencies pursuant to section 3521(b) of this title; and

(ix) estimate the costs of implementing the governmentwide 5-year plan.

(4)(A) Not later than 15 months after the date of the enactment of this subsection, the Director of the Office of Management and Budget shall submit the first financial management status report and governmentwide 5-year financial management plan under this subsection to the appropriate committees of the Congress.

(B)(i) Not later than January 31 of each year thereafter, the Director of the Office of Management and Budget shall submit to the appropriate committees of the Congress a financial management status report and a revised governmentwide 5-year financial management plan to cover the succeeding 5 fiscal years, including a report on the accomplishments of the executive branch in implementing the plan during the preceding fiscal year.

(ii) The Director shall include with each revised governmentwide 5-year financial management plan a description of any substantive changes in the financial statement audit plan required by paragraph (3)(B)(viii), progress made by executive agencies in implementing the audit plan, and any improvements in Federal Government financial management related to preparation and audit of financial statements of executive agencies.

(5) Not later than 30 days after receiving each annual report under section 902(a)(6) of this title, the Director shall transmit to the Chairman of the Committee on Government Operations of the House of Representatives and the Chairman of the Committee on Governmental Affairs of the Senate a final copy of that report and any comments on the report by the Director.

(b) The head of each executive agency shall establish and maintain systems of accounting and internal controls that provide—

(1) complete disclosure of the financial results of the activities of the agency;

(2) adequate financial information the agency needs for management purposes;

(3) effective control over, and accountability for, assets for which the agency is responsible, including internal audit;

(4) reliable accounting results that will be the basis for—

(A) preparing and supporting the budget requests of the agency;

(B) controlling the carrying out of the agency budget; and

(C) providing financial information the President requires under section 1104(e) of this title; and

(5) suitable integration of the accounting of the agency with the central accounting and reporting responsibilities of the Secretary of the Treasury under section 3513 of this title.

(c)(1) To ensure compliance with subsection (a)(3) of this section and consistent with standards the Comptroller General prescribes, the head of each executive agency shall establish internal accounting and administrative controls that reasonably ensure that—

(A) obligations and costs comply with applicable law;

(B) all assets are safeguarded against waste, loss, unauthorized use, and misappropriation; and

(C) revenues and expenditures applicable to agency operations are recorded and accounted for properly so that accounts and reliable financial and statistical reports may be prepared and accountability of the assets may be maintained.

(2) Standards the Comptroller General prescribes under this subsection shall include standards to ensure the prompt resolution of all audit findings.

(d)(1) In consultation with the Comptroller General, the Director of the Office of Management and Budget—

(A) shall establish by December 31, 1982, guidelines that the head of each executive agency shall follow in evaluating the internal accounting and administrative control systems of the agency to decide whether the systems comply with subsection (b) of this section; and

(B) may change a guideline when considered necessary.

(2) By December 31 of each year (beginning in 1983), the head of each executive agency, based on an evaluation conducted according to guidelines prescribed under paragraph (1) of this subsection, shall prepare a statement on whether the systems of the agency comply with subsection (b) of this section, including—

(A) if the head of an executive agency decides the systems do not comply with subsection (b) of this section, a report identifying any material weakness in the systems and describing the plans and schedule for correcting the weakness; and

(B) a separate report on whether the accounting system of the agency conforms to the principles, standards, and requirements the Comptroller General prescribes under section 3511(a) of this title.

(3) The head of each executive agency shall sign the statement and reports required by this subsection and submit them to the President and Congress. The statement and reports are available to the public, except that information shall be deleted from a statement or report before it is made available if the information specifically is—

(A) prohibited from disclosure by law; or

(B) required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs.

(e) To assist in preparing a cost-based budget under section 1108(b) of this title and consistent with principles and standards the Comptroller General prescribes, the head of each executive agency shall maintain the accounts of the agency on an accrual basis to show the resources, liabilities, and costs of operations of the agency. An accounting system under this subsection shall include monetary properly accounting records.

(f) The Comptroller General shall—

(1) cooperate with the head of each executive agency in developing an accounting system for the agency; and

(2) approve the system when the Comptroller General considers it to be adequate and in conformity with the principles, standards, and requirements prescribed under section 3511 of this title.

(g) The Comptroller General shall review the accounting systems of each executive agency. The results of a review shall be available to the head of the executive agency, the Secretary, and the President. The Comptroller General shall report to Congress on a review when the Comptroller General considers it proper.

(As amended Pub. L. 101-576, Title III, § 301(a), Nov. 15, 1990, 104 Stat. 2847.)

HISTORICAL AND STATUTORY NOTES

References in Text

The Federal Managers' Financial Integrity Act of 1982, referred to in subsec. (a)(2)(D), was repealed in the general revision of Title 31 by Pub. L. 97-258, Sept. 13, 1982, 96 Stat. 877, which enacted Title 31 into positive law. See, now, this section and sections 1113 and 3512 of this title.

"The date of enactment of this subsection," referred to in subsec. (a)(4)(A), means the date of enactment of Pub. L. 101-576, which enacted subsec. (a), and was approved Nov. 15, 1990.

1990 Amendment

Pub. L. 101-576, § 301(a), in hearing, substituted "and other financial management reports and plans for systems' following 'accounting'."

Legislative History
For legislative history and purpose of Pub. L. 101-576, see 1990 U.S. Code Cong. and Admin. News, p. 4030.

§ 3515. Financial statements of agencies

(a) Not later than March 31 of 1992 and each year thereafter, the head of each executive agency identified in section 901(b) of this title shall prepare and submit to the Director of the Office of Management and Budget a financial statement for the preceding fiscal year, covering—

(1) each revolving fund and trust fund of the agency; and

(2) to the extent practicable, the accounts of each office, bureau, and activity of the agency which performed substantial commercial functions during the preceding fiscal year.

(b) Each financial statement of an executive agency under this section shall reflect—

(1) the overall financial position of the revolving funds, trust funds, offices, bureaus, and activities covered by the statement, including assets and liabilities thereof;

(2) results of operations of those revolving funds, trust funds, offices, bureaus, and activities;

(3) cash flows or changes in financial position of those revolving funds, trust funds, offices, bureaus, and activities; and

(4) a reconciliation to budget reports of the executive agency for those revolving funds, trust funds, offices, bureaus, and activities.

(c) The Director of the Office of Management and Budget shall prescribe the form and content of the financial statements of executive agencies under this section, consistent with applicable accounting principles, standards, and requirements.

(d) For purposes of this section, the term "commercial functions" includes buying and leasing of real estate, providing insurance, making loans and loan guarantees, and other credit programs and any activity involving the provision of a service or thing of value for which a fee, royalty, rent, or other charge is imposed by an agency for services and things of value it provides.

(e) Not later than March 31 of each year, the head of each executive agency designated by the President may prepare and submit to the Director of the Office of Management and Budget a financial statement for the preceding fiscal year, covering accounts of offices, bureaus, and activities of the agency in addition to those described in subsection (a).

(Added Pub. L. 101-576, Title III, § 301(a)(1), Nov. 15, 1990, 104 Stat. 2849.)