GAO

United States General Accounting Office

Report to the Chairman, Federal Service, Post Office and Civil Service Subcommittee, Committee on Governmental Affairs, U.S. Senate

November 1991

# GOVERNMENT CONTRACTORS

# Are Service Contractors Performing Inherently Governmental Functions?

GAO/GGD-92-11

GAO

**United States**
**General Accounting Office**
**Washington, D.C. 20548**

145453

**General Government Division**

B-241388

November 18, 1991

The Honorable David Pryor
Chairman, Federal Services,
Post Office and Civil
Service Subcommittee
Committee on Governmental Affairs
United States Senate

Dear Mr. Chairman:

This report responds to your request that we review the use of contract consultants by federal agencies. You had expressed concern about the government's growing reliance on consultants to administer its basic work—work that may involve "inherently governmental functions." The issues discussed in this report also relate to a broad range of contract services obtained by the government, such as professional, administrative, and management support services.

As agreed with the Subcommittee, unless you publicly announce the contents earlier, we plan no further distribution until 30 days from the date of this report. At that time, we will send copies to the Office of Management and Budget, federal agencies included in our review, and other interested parties.

Please contact me on (202) 275-5074 if you have any questions concerning the report. Major contributors to this report are listed in appendix X.

Sincerely yours,

Bernard L. Ungar

Bernard L. Ungar
Director, Federal Human Resource
Management Issues

# Executive Summary

## Purpose

Who—government employees or contractors—should determine the eligibility of government employees for security clearances, operate prisons, or assess the effectiveness of weapons systems under development? Who should prepare and deliver testimony before congressional committees or conduct administrative hearings for a federal agency? These questions are part of the continuing debate about whether contractors should administer certain governmental functions and what controls or limitations should be placed on the government's authority to contract out these functions.

Because of his concern about the government's growing reliance on contract consultants to administer its basic work, which may be considered "inherently governmental functions,"[1] the Chairman, Federal Services, Post Office and Civil Service Subcommittee, Senate Committee on Governmental Affairs, asked GAO to review this matter.

## Background

The executive branch has generally assumed responsibility for defining governmental functions. OMB has issued Circulars A-120 and A-76, which address governmental functions. The circulars set out the principle that contractors are not to be used to do work of a policy, decision-making, or management nature, which is the direct responsibility of agency officials. In some cases, agencies have issued their own guidance on the subject of governmental functions.

Concern about which federal agency activities are inherently governmental functions is not new. It goes back as far as the early days of the nation, as evidenced, for example, by the discussions in the Federalist Papers among the framers of the Constitution over what functions are appropriate for the federal government to exercise.

To do this work, GAO reviewed over 100 contracts and contract task orders for consulting services at four agencies—the Departments of Energy (DOE) and Transportation (DOT), the Environmental Protection Agency (EPA), and the Department of Defense's Office of the Director, Operational Test and Evaluation (DOT&E). GAO also reviewed and analyzed the literature and prior GAO reports to determine what could happen in situations in which the government may have placed substantial reliance on contractors or in which the government may have lost its capacity to manage effectively. The issues discussed in this report relate

[1] The term "governmental functions" is used in this report because this is the term used by the Office of Management and Budget (OMB) in its guidance to federal agencies.

to a broad range of contract services obtained by the government, such as professional, administrative, and management support services. Consulting services are a part of this universe.

## Results in Brief

None of the documents GAO reviewed clearly defined inherently governmental functions. The basic principle to adhere to is that the government should not contract out its responsibilities to serve the public interest or to exercise its sovereign powers. A key criterion in determining whether service contracts are appropriate is whether the government maintains sufficient in-house capability to be thoroughly in control of the policy and management functions of the agency. In this context, government decisionmaking power means more than simply being a final authority or signatory to a document. Government officials should be active throughout the decisionmaking process.

OMB can improve its current guidance by defining governmental functions in terms of relative responsibilities of the government and contractors. OMB, guided by this concept, should develop a short generic list of inherently governmental functions. In addition, agencies should supplement OMB's guidance with their own, which would be based on their individual missions and circumstances.

Agencies should develop their own supplemental guidance, because, while some functions are inherently governmental, many others can properly be be contracted out. In making these decisions, agencies should keep in mind that regardless of whether the government carries out activities with its own employees or by contract, it must have the core capability—a sufficient number of trained and experienced staff—to properly manage and be accountable for its work. To do this, agencies must have appropriate authority and flexible resources.

Although most of the contracts GAO reviewed seemed appropriate for contractors to administer on the basis of existing OMB and agency policy guidance, GAO found that DOT, DOE, and EPA contracted out for some activities that may have involved governmental functions. Because of the difficulty in defining governmental functions, however, GAO was not able to definitively conclude that these activities involved such functions. In addition to the difficulty in defining governmental functions and providing guidance to agencies on this subject, agency officials told GAO that the major reasons that agencies use contractors to administer some functions that may be governmental in nature are the lack of authorized federal positions for employees and the lack of federal

employees with sufficient expertise to do the work. GAO also noted certain instances in which Congress had authorized agencies to contract out for functions that could be viewed as governmental in nature, such as the Medicare Insurance Program. Agency Inspectors General are also generally authorized by law to contract out for audit services.

# GAO's Analysis

## Governmental Functions Are Difficult to Define

GAO's review of historical documents, relevant books and articles, prior GAO work, applicable laws, government policy, and federal court cases showed that the concept of "governmental functions" is difficult to define. OMB developed the principal guidance on this subject. This guidance generally indicates that consultants should not be used to administer work of a policy,decisionmaking, or managerial nature, which is the direct responsibility of agency officials. OMB defines a governmental function as one that is so intimately related to the public interest that it must be administered by government employees. These functions include activities requiring either the exercise of discretion in applying government authority or the use of value judgment in making decisions for the government. Agency officials who participated in two symposiums held by GAO in June 1990 believed that governmental functions should be more clearly defined.

Some federal agencies, such as DOE and EPA, have developed their own guidance, which is more specific than OMB's guidance. The agency guidance has attempted to identify functions that are relevant to the agency's activities. For example, DOE's guidance considers the determination of environmental impacts of energy policies and projects as a governmental function. Such guidance is helpful but still does not ensure that consultants will not be used to administer governmental functions. According to agency officials GAO spoke with, federal staffing constraints contributed to agencies' use of consulting services in such instances. GAO believes, however, that this type of guidance is a significant improvement over the OMB guidance, because it provides more examples of the types of functions that should not be administered by contractors.

Agency officials often contend that contractors do not administer governmental functions—they only advise in the administration of such functions. GAO stated in a 1981 report on this subject that administration

begins when the contractor's involvement in basic management functions is so extensive that the agency's ability to develop and consider options other than those provided by the contractor is limited.[2]

Essentially, GAO believes that identifying the governmental functions to be reserved for government officials depends on the agency's relationship to the contractor and the technical and management capacity of the agency. Therefore, each situation must be examined separately. GAO suggests guidelines for making this determination (see fig. 2.1). To that end, GAO is recommending that OMB clarify its existing guidance to the agencies by issuing guidelines that the agencies can use in determining which activities are appropriate or inappropriate for contracting out. OMB plans to revise its guidance on governmental functions.

GAO believes that OMB should develop a short generic list of functions that should not be contracted out. GAO recognizes that such a list would be largely judgmental. OMB should exercise care in developing such a list because a fundamental distinction must be made between assistance and performance. GAO has identified a short list of functions that, as a matter of policy, should never be contracted out. Such functions include presenting testimony, holding hearings, representing an agency before the public, and supervising federal employees.

Each agency should develop its own list by identifing specific functions that should appropriately be administered only by government employees. The identification of these functions should be consistent with OMB policies.

## Some Service Contractors Appear to Be Administering Governmental Functions

Although 80 of the 108 randomly selected service contracts GAO reviewed at DOT, DOE, and EPA did not appear to involve governmental functions, portions of 28 contracts appeared to involve such functions or had other problems, such as the possibility that the agency contracted out to bypass personnel ceilings or that the cost of contracting out exceeded the cost to do the work in-house. Because of the difficulty in defining governmental functions, however, GAO was not able to definitively conclude that the activities it reviewed involved such functions. The contracts GAO questioned involved such activities as providing significant input into the development of DOT safety policy, preparing testimony and questions for DOE witnesses to use before a regulatory body,

[2]Civil Servants and Contract Employees: Who Should Do What for the Federal Government? (FPCD-81-43, June 19, 1981).

and developing criteria and definitions for EPA to use in defining inherently governmental functions.

## Why Some Federal Agencies May Be Using Service Contractors Rather Than Government Employees

Agency officials told GAO that the major reasons contributing to agencies' use of contractors to administer functions that may be governmental in nature are the lack of authorized federal positions for employees or the lack of federal employees with sufficient expertise to do the work. For example, officials in DOE's Office of the Inspector General told GAO that they used contractors for auditing services because they lacked sufficient staff to do their work. Even though the use of contractors for this purpose is authorized by law, the officials said they would have preferred to have government employees do this work because it would have been easier to maintain control over the work and it would have cost less.

GAO also noted certain other reasons agencies are contracting out for governmental functions. For example, (1) the legislative authority establishing the Medicare Program and (2) the budgetary restrictions imposed on the amount of the administrative costs for EPA's Superfund Program necessitate the use of contractors for these programs.

Because contracting for governmental functions cannot be curtailed or eliminated solely by revising guidance to agencies, other contributing matters should be considered for possible action. Agency officials GAO talked with generally believed that contracting for governmental functions is largely due to staff shortages, lack of staff with sufficient expertise, and the fact that contract money is easier to obtain than staff. To ensure that the government has the ability to administer activities that may involve governmental functions without having to rely on service contractors, GAO believes Congress should consider providing agencies with the authority and flexibility to accomplish this goal by staffing such functions internally. To do this, GAO believes that Congress and OMB should consider allowing civilian agencies to manage their activities within an authorized budget, without regard to personnel ceilings. This concept is now being implemented for certain DOD activities.

## Potential Effects of Relinquishing Government Control to Contractors

In GAO's view, service contracts are essential for carrying out the functions of the government because the government does not have employees in sufficient numbers with all the skills to meet every requirement. However, when contracting out, agencies should not relinquish government control to contractors, as appears to have happened

in some instances. GAO's review did not focus on identifying the specific effects of agencies using contractors to administer governmental functions for the contracts GAO reviewed. Many of these contracts were still in process, and the effects of contracting out for the work were not readily apparent.

However, GAO's review and analysis of the literature and prior GAO reports noted serious problems with various government programs in which the government had placed substantial reliance on contractors and as a result may have lost its capacity to manage effectively. The problems with the contracts did not necessarily relate to the fact that service contracts were used or that contractors performed governmental functions. They did, however, suggest that the government should not relinquish its control over important projects involving contractor support. For example, GAO cited problems with contractors having too much control over DOE's nuclear energy programs, EPA's Superfund Program, and the National Aeronautics and Space Administration's Space Shuttle Challenger and the Hubble Space Telescope.

## Recommendations

GAO recommends that the Director, OMB, take the following actions:

- Clarify OMB's guidance to agencies on contracting for consulting services. The OMB guidance now being developed should articulate the basic principles on which such judgments should be made and also provide guidelines to assist agencies in making the determinations. GAO makes suggestions for guidelines to be applied by the agencies in determining whether the use of contractors would be appropriate.
- Compile a short generic list of functions applicable throughout the government that, as a matter of policy, should never be contracted out.
- Require implementing instructions from each agency. Because each agency's mission is unique, OMB should require each agency head to examine his or her agency's activities and, taking into consideration the agency's role and responsibilities, identify those specific functions that should appropriately be administered only by government employees. Each agency head should be required to submit this list of activities to OMB for informational purposes and should consider revisions to the guidance in instances in which OMB believes the guidance may be inconsistent with governmentwide policies or among agencies without good justification.

## Matters for Consideration by the Senate Committee on Governmental Affairs

The Committee should hold hearings once OMB develops the revised guidance to ensure that the guidance is consistent with congressional views on this subject. If the Committee still has concerns with the revised guidance, it may want to consider legislation specifying which activities are not to be administered by contract.

In addition, the Committee should provide agencies with the authority and flexibility to use government employees for activities that may be considered to be inherently governmental in nature. To do this, the Committee may want to explore, with OMB, allowing civilian agencies to manage their activities within an authorized budget, without regard to personnel ceilings.

## Agency Comments

GAO obtained written comments from OMB, DOE, EPA, DOT, DOD, and NASA on a draft of this report. The agencies generally agreed with most of GAO's conclusions and recommendations. OMB did not concur, however, with GAO's recommendation that it should require agencies to supplement OMB's guidance with their own. OMB and DOD also did not agree with GAO's suggestion that if Congress still has concerns after OMB develops its revised guidance, it may want to include in legislation specific activities that are not to be administered by contract. OMB also did not agree with GAO's suggestion that Congress and OMB consider allowing civilian agencies to manage their activities within an authorized budget, without regard to personnel ceilings.

GAO continues to believe that its recommendations are appropriate. GAO did, however, modify its recommendation on having agencies supplement OMB's general guidance on the basis of a suggestion made by EPA, which could facilitate the issuance of agency-specific guidance. EPA suggested that each agency seek OMB advice and guidance rather than OMB approval.

GAO's analysis of the agencies' comments on its principal conclusions and recommendations, along with additional rationale for retaining those recommendations agencies disagreed with, is presented in chapter 6. The full text of each agency's letter, along with GAO's additional comments on the letters, is included in appendixes III through VIII.

## Comments From Nongovernment Representatives

GAO also obtained comments on its draft report from six of the nongovernment representatives who participated in GAO's June 1990 symposiums on governmental functions. GAO changed the report to reflect their views, as appropriate. Although each of the nongovernment representatives did not express views on all of the matters discussed in the report, overall, GAO believes the responses indicated that the nongovernment representatives generally agreed with its findings, conclusions, and recommendations. The National Academy of Public Administration disagreed with GAO's recommendation to OMB on clarifying its guidance on governmental functions. The Academy suggested an alternative approach to an OMB-driven effort whereby a panel of experts from within and outside the government would establish a forum to discuss the subject of governmental functions and to develop the needed guidance.

GAO continues to believe that OMB is in the best position to provide governmentwide guidance on the matter of governmental functions, along with assistance from each agency on activities specific to its mission. GAO agrees with the Academy that additional views of experts would be highly valuable to OMB and Congress in considering this issue but believes these views can be obtained within the framework of its recommendations.

GAO's analysis of the representatives' comments is presented in chapter 6, and a list of the six representatives who commented on the report is included in appendix IX.

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## Abbreviations

| | |
|---|---|
| DOD | Department of Defense |
| DOE | Department of Energy |
| DOT | Department of Transportation |
| EPA | Environmental Protection Agency |
| FAA | Federal Aviation Administration |
| FAR | Federal Acquisition Regulation |
| FPDC | Federal Procurement Data Center |
| FPDS | Federal Procurement Data System |
| FTE | full-time equivalent |
| FTP | full-time permanent |
| GSA | General Services Administration |
| IG | Inspector General |
| NASA | National Aeronautics and Space Administration |
| OMB | Office of Management and Budget |
| OTA | Office of Technology Assessment |
| DOT&E | Office of the Director, Operational Test and Evaluation |
| WAPA | Western Area Power Administration |

# Introduction

The government spends over $40 billion annually for a broad range of contract services. These include professional, administrative, and management support services. Consulting services are part of this universe. Although we were asked to and did focus our work on consulting services, the issues discussed in this report generally apply to the broad range of service contracts in addition to consulting services.

Service contractors can play a valuable role in government, and the government can benefit from the services and advice they provide. Service contractors are used by federal agencies for a variety of reasons. They can provide expertise that agencies may not be able to afford, cannot get, or may not need on a permanent basis. In addition, they can enable agencies to keep up to date in various fields and to obtain a variety of viewpoints from knowledgeable people with differing perspectives.

Data reported by federal agencies to the General Services Administration's (GSA) Federal Procurement Data Center (FPDC) indicated that agencies spent about $4 billion for contract consulting services during fiscal year 1989.[1] Such contracts are an important form of services obtained by the government through contracting. In addition to contracting, agencies also acquire consulting services through temporary appointments of consultants, experts, and advisory committee members as federal employees. However, this report is concerned only with contract consultants.

## Objectives, Scope, and Methodology

The Chairman, Senate Federal Services, Post Office and Civil Service Subcommittee, Committee on Governmental Affairs, has expressed concern about the government's growing reliance on consultants to administer its basic work—work that may be considered to involve

[1] To determine the extent to which federal agencies incurred obligations for consulting services, we used information given to us by FPDC, which compiles governmentwide information on contracting by using data that are based on certain product or service information furnished by federal agencies. Agencies are required to report to FPDC certain data on their contractual awards that exceed $25,000. FPDC operates a computer-based information system, the Federal Procurement Data System (FPDS), for collecting, developing, and disseminating these data. Among the items to be reported are the predominant type of product or service procured, as indicated in a reporting manual issued by FPDC. In 1984, the President's Cabinet Council on Management and Administration recommended that all contractual obligations grouped under four broad categories of FPDC product or service codes be considered consulting services. The $4 billion obligated by federal agencies in fiscal year 1989 is based on the Cabinet Council's recommended product and service codes for consulting services. Federal agencies reported this information to FPDC. We did not verify the accuracy of the information reported or the processing of it by FPDS.

"inherently governmental functions,"[2] which should appropriately be administered by government employees. As discussed later in this report, however, this is an extremely difficult concept to define. The Chairman asked us to review the use of contract consultants at several federal civilian agencies: the Departments of Energy (DOE) and Transportation (DOT) and the Environmental Protection Agency (EPA), and at one defense agency: the Department of Defense's (DOD) Office of the Director, Operational Test and Evaluation (DOT&E).

These three civilian agencies reported to FPDC that during fiscal year 1989, they obligated about $164 million for the four categories of FPDC product or service codes that are considered to be services, or about 4 percent of the total reported for these categories by all agencies that provide data to FPDC. DOT&E does not report contract obligations to FPDC, and it is our understanding that the agency does not compile information on how much it obligates specifically for services.

The Chairman asked that we address the following questions in our review:

- Are governmental functions clearly defined?
- Are federal agencies using consultants to administer governmental functions and, if so, why?
- What are the potential effects of relinquishing governmental control to contractors?
- Are changes needed to ensure that consultants are not used to administer governmental functions?

To determine whether governmental functions are clearly defined, we reviewed historical documents such as the Constitution and the Federalist Papers and researched relevant books on the subject. (See bibliography.) We also reviewed applicable laws, government policy set forth in Office of Management and Budget (OMB) circulars and the Federal Acquisition Regulation (FAR), which specify procurement requirements for federal agencies, relevant federal court decisions, and available agency policy guidance at the agencies where we did our review. In addition, we reviewed and summarized prior GAO reports and Comptroller General decisions, and journal and newspaper articles. Further, we obtained information from most of the state governments on state policies and procedures for contracting out for services. In June 1990,

[2]OMB uses the term "governmental functions" when discussing such functions in its guidance to federal agencies. Therefore, we use this term in our report.

we also sponsored two symposiums attended by representatives of the contracting community, including OMB and other agency officials, contractors, unions, various research organizations such as the National Academy of Public Administration and the Brookings Institution, and academia to obtain their views on how to define governmental functions.

To determine whether federal agencies were using consultants to administer governmental functions, we obtained a list of contract actions for fiscal year 1988 from FPDC for contracts identified with product and service codes, which generally indicated that services were involved. We used fiscal year 1988 data for our review because these were the most recent data available when we began our work. We randomly selected contracts for review at those civilian agencies for which the Chairman expressed particular interest—DOT, DOE, and EPA. He also asked that we review contract activities at DOT&E, which does not report contract actions to FPDC. All of DOT&E's support services were provided by one contractor, a not-for-profit organization. We randomly selected several DOT&E contract task orders under this contract for review. These task orders were selected from a list of task orders issued from September 1982 to June 1989 that we had on file from a previous review we made in 1990 of the agency's overview of test and evaluation work.

We reviewed 108 randomly selected contracts awarded by DOT, DOE, and EPA in Washington, D.C., and DOE field offices in Albuquerque, New Mexico; San Francisco and Sacramento, California; Golden, Colorado; Las Vegas, Nevada; and Billings, Montana. These contracts represented contract actions in fiscal year 1988 valued at about $241 million, or 50 percent of the total contract actions during that year for consulting services reported by these agencies. We also reviewed seven randomly selected task orders issued by DOT&E valued at about $2.1 million. These task orders represented about 10 percent of the dollar value of 44 DOT&E task orders in the universe from which our selection was made, which totaled about $21.3 million.

In the cases of DOE and EPA, we applied their internal guidance as well as OMB guidance to help us determine the appropriateness of the contracts. However, for EPA, this guidance was preliminarily issued in April 1990 and finalized in October 1990, and therefore was not in effect when the EPA contracts we reviewed were awarded. The guidance was useful, however, in helping us evaluate the nature of EPA's contracts for consulting activities. Our evaluations involved comparing work administered by the contractors with the applicable criteria cited earlier.

We discussed each of the contracts for which we had questions about the possible governmental nature of the functions with agency contract and program officials, and in some cases with contractors. Our review of contracts was not intended to enable us to generalize about the government as a whole or about the agencies visited. Our purpose was to obtain an understanding of the types of activities for which the four agencies were using contract consultants.

To identify the potential effects of relinquishing government control to contractors and to address the question of why federal agencies used contracts to administer governmental functions, we spoke with contract and program officials at the four agencies, reviewed appropriate laws, regulations, literature, and prior GAO work, and held discussions with representatives in the contracting community, as described earlier. Our review did not focus on identifying the specific effects of agencies using contractors to administer governmental functions for the contracts we reviewed because many of these contracts were still in process, and the effects of contracting out for the work were not yet readily apparent. The examples of problems we noted do not necessarily relate to consulting services or governmental functions. We also reviewed data on federal staffing levels, contracting costs, salaries, and hiring practices to obtain an understanding of how these matters may have contributed to agencies' use of contractors to administer governmental functions.

In addition, we obtained information on recent attempts by the Department of the Navy, the National Aeronautics and Space Administration (NASA), DOE, and EPA to reduce reliance on contractors. We also discussed federal staffing policies and staffing constraints with OMB officials to obtain their views on these matters.

Our work was done from November 1989 to February 1991 in accordance with generally accepted government auditing standards.

# Governmental Functions Are Difficult to Define

The concept of "governmental functions" is difficult to define and is, therefore, subject to varying interpretations. OMB's guidance to federal agencies on how to define governmental functions is limited and is subject to different interpretations. OMB's criteria do not clearly distinguish between contract consultant assistance and performance of basic management functions by government employees. As discussed later in this report, the principal reasons agencies may be using contract consultants for governmental functions appear to be the lack of authorized positions for federal employees and the lack of employees with sufficient expertise to do the work. However, the lack of useful guidance may also have contributed to agencies' use of contract consultants to administer functions that should be done only by federal employees. For about the past 10 years we have maintained in our reports on consulting service contracts that more specificity in OMB's definition of consulting services would help agencies to know which types of consulting services are appropriate for contracting.

Because the concept of governmental functions is difficult to define and the guidance to agencies is limited, we had difficulty in assessing the particular contracts we reviewed to determine whether governmental functions may have been involved. Similarly, we believe that agency officials may have difficulty in making decisions on whether to contract out for certain work because of shortcomings in the definition of governmental functions and the guidance. Members of the contracting community who participated in two symposiums we sponsored in June 1990 on this subject told us that they shared this view.

The problem of defining governmental functions becomes particularly complex because consultants and management support contractors administer a broad range of activities for government agencies. Such activities involve a variety of work, such as preparing studies and analyses that are to assist agencies in making policy decisions, researching technical issues that may be beyond the expertise of available agency technical staff, developing agency reports, preparing testimony, and conducting administrative hearings.

## The Executive Branch Has Generally Assumed Responsibility for Defining Governmental Functions

OMB has developed the principal criteria for defining governmental functions and, in some cases, federal agencies have issued their own implementing instructions. Overall, OMB's guidance is broad and subject to varying interpretations.

OMB has issued two circulars that address, at least in part, the issue of governmental functions. According to OMB Circular A-120, which is OMB's guidance on the use of advisory and assistance services, consultants "shall not be used in . . . performing work of a policy, decisionmaking, or managerial nature, which is the direct responsibility of agency officials." In this regard, OMB describes a governmental function in Circular A-76, which is OMB's guidance on the administration of commercial activities, as "a function which is so intimately related to the public interest as to mandate administration by government employees. These functions include those activities which require either the exercise of discretion in applying government authority or the use of value judgment in making decisions for the government." Circular A-76 appears to allow all functions not governmental in nature to be contracted out.

Circular A-76 places governmental functions in two categories—those related to the act of governing and those related to monetary transactions and entitlements. Table 2.1 lists the functions in each of these categories. FAR helps implement the OMB guidance but does not expand on the concept of governmental functions.

**Table 2.1: OMB Circular A-76—Categorization of Governmental Functions**

| Functions related to the act of governing | Functions related to monetary transactions and entitlements |
|---|---|
| Criminal investigations, prosecutions, and other judicial functions | |
| Management of government programs requiring value judgments, as in the direction of the national defense | Tax collection and revenue disbursements |
| Management and direction of the armed services | Control of the Treasury accounts and money supply |
| Activities performed exclusively by military personnel who are subject to deployment in a combat, combat support, or combat service role | Administration of public trusts |
| Conduct of foreign relations | |
| Selection of program priorities | |
| Direction of federal employees | |
| Regulation of the use of space, oceans, navigable rivers, and other natural resources | |
| Direction of intelligence and counter-intelligence operations | |
| Regulation of industry and commerce, including food and drugs | |

Members of the contracting community, including agency officials, who participated in the two symposiums we sponsored in June 1990 believed that the concept of "governmental functions" should be more clearly defined. The lack of a clear definition may be causing agencies to use consulting service contracts inappropriately. Further, a December 1990 report issued by the President's Council on Management Improvement, Study of OMB Circular A-76: Performance of Commercial Activities, concluded that:

"The identification of what are inherently governmental functions that must be administered by government employees and identification of commercial activities that can be contracted out is frequently contentious and difficult to accomplish. The identification process is normally unique to each organization's programs and circumstances . . . the definition of activities inherently governmental in nature is unclear, and there is little consensus as to which activities are governmental in nature and which are not."

The report recommended that a clear and mutually acceptable set of guidelines be developed to help agencies determine which functions are governmental.

An OMB official from the Office of Federal Procurement Policy advised us in February 1991 that as a result of concerns expressed by agency

officials, Members of Congress, and GAO, OMB plans to issue a policy that will address what type of work is inherently governmental for use by federal officials when they decide whether to contract out for a particular task. At the time of our review, this new policy was not yet available for our evaluation.

DOD's Inspector General recommended in February 1991 that DOD issue guidance that would define in detail what are governmental functions that should be administered by DOD employees. DOD agreed with this recommendation and said that such guidance should be consistent with OMB guidance. DOD officials also said that they will further modify the guidance in response to this GAO report.

Some federal agencies, such as DOE and EPA, have already developed their own guidance, which is more specific than OMB's instructions. DOE's guidance, issued in October 1985, defines government management functions as those functions so intimately connected with government operations that they must be administered by government employees in order for the government to retain essential control and responsibility. According to DOE's definition, government management functions include but are not limited to

- determining the success or failure of DOE internal management and program management activities;
- determining environmental impacts of energy policies and projects; and
- establishing administration goals, priorities, and schedules.

EPA's Administrator issued a policy memorandum to all agency personnel in April 1990 expressing concern about EPA's use of contractor support for activities that may leave the agency open to criticism. The Administrator said that certain activities are considered prohibited for contracting, such as (1) determining agency policy and (2) preparing congressional testimony. In addition, according to the Administrator, certain other areas of potentially vulnerable contractor activities may lead to the perception that contractors are administering governmental functions. These activities include

- support services, such as analyses and feasibility studies, in developing EPA policy;
- specialized expertise in developing statements of work, work assignments, and other contract-ordered tasks; and
- any situation in which a contractor has access to confidential business information and/or any sensitive information.

The Administrator said that agency officials must play an active role whenever contractors administer such tasks to ensure that the government makes the final decisions.

In addition, in October 1990, EPA issued an agency directive setting forth additional policy guidance concerning contracting at EPA. The guidance cited a number of activities that it would not allow to be administered by contractors. These included

- preparing congressional testimony,
- determining agency policy,
- preparing documents on EPA letterhead other than routine correspondence,
- preparing responses to congressional correspondence,
- representing oneself to outside parties as an EPA employee, and
- conducting administrative hearings.

Even with this guidance, however, DOE and EPA may still be using contractors to administer governmental functions. (This point is discussed further in ch. 3 and app. II.) The lack of sufficient numbers of federal employees and employees with sufficient expertise may be contributing to these agencies' use of contractors. In addition, according to DOE budget officials, the use of contractors has become part of the agency culture. DOE has become conditioned to look to contractors to provide many services. One reason for this may be, as EPA budget officials told us, that it has been much easier to get OMB to approve contract dollars than positions.

## Legislation That Addresses the Appropriate Use of Contractors, Particularly Service Contractors, Is Limited

Congress has generally not attempted to define governmental functions in legislation. We made a comprehensive legislative review and found little reference to this issue, except in cases that were agency-specific, such as those that follow. We noted in one example that Congress, when establishing a new federal program, authorized a federal agency to rely heavily upon private contractors to administer a large share of the work load. The Department of Health and Human Services is authorized by Public Law 89-97 to use private contractors to administer the Medicare Insurance Program. On the other hand, Congress specifically stated in the Water Resources Development Act of 1990 (P.L. 101-640) that certain activities must be administered by government employees. This act specifies that activities connected with the operation and maintenance of the hydroelectric power generating facilities at Corps of Engineers

water resource projects are to be considered governmental functions and not commercial activities.

Generally, however, legislation is silent about the use of contractors, and therefore, consistent with the OMB guidance, an agency may use contractors at its discretion. In the case of the Superfund Program, the realities of the situation required EPA to rely heavily on contractor assistance to administer the program. The Superfund Program, authorized by the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (P.L. 96-510), required EPA to ensure the cleanup of hazardous waste sites that threaten human health or the environment. To administer this program, EPA uses remedial engineering management contractors to study contamination at waste sites and develop cleanup alternatives. These contractors play a key role in the program's implementation. In the case of the Superfund Program, congressionally imposed limitations on the amount of administrative costs EPA may incur for payroll and travel expenses have necessitated the use of contractors to administer program functions.

## The Need for Meaningful Criteria on Governmental Functions Has Been a Long-Standing Concern to GAO

We have reported on the need to improve controls over consulting service contracts for many years. We reported in June 1980 that little progress had been made to resolve consulting service issues during the past 20 years. One of the major issues we identified was the use of consulting services to administer work that should be administered by government employees.[1]

We noted in another report dated June 19, 1981, that federal agencies had used contractors to do work that federal employees should do because the work involved basic management decisions. We found that DOE and DOD used contractors to substantially determine or influence national energy policies and to identify the requirements for the national defense. We reported that agency officials often contended that contractors did not administer governmental functions—they only advised on the administration of such functions. We stated in the report that, in our view, administration begins when the contractor's involvement in basic management functions is so extensive that an agency's ability to develop options other than those proposed by the contractor is limited.[2]

[1] Government Earns Low Marks on Proper Use of Consultants (FPCD-80-48, June 5, 1980).

[2] Civil Servants and Contract Employees: Who Should Do What for the Federal Government? (FPCD-81-43, June 19, 1981).

In a 1982 report concerning EPA activities, we noted that contractors may have administered work that should have been done by federal employees. We could not determine, however, whether the contractors' actions were improper because of the lack of OMB criteria to distinguish between "assistance" and "performance." OMB criteria did not define assistance or describe at what point contractor assistance ended and administration of basic management functions began.[3]

In several instances, the Comptroller General has been asked by federal agencies or Congress to render decisions about the governmental nature of certain specific functions. Two examples follow:

- Matter of: General Services Administration - Sale of Used Government Vehicles by Private Sector Auction Houses (64 Comp. Gen. 149, 1984) - It was determined that contractors may collect fees, as long as the agency set the minimum fee. Fee setting was considered a governmental function because it required discretion and judgment. The collection of the fee was considered to be purely administrative.
- Matter of: General Services Administration - Transportation Audit Contracts, March 20, 1985 (64 Comp. Gen. 366, 1985) - It was determined that contractors are permitted to examine billings, send notices of mistakes on billings, collect, and forward remittances to GSA, examine and respond to protests, and conduct other relevant functions. GSA, however, was to "retain the authority to resolve disputes, compromise claims, terminate collection actions, and initiate legal action." These latter functions were determined to be governmental because they involved discretion and judgment.

In an opinion regarding three functions at DOE and EPA (B-237356, Dec. 29, 1989), the Comptroller General addressed the following matters:

- Contracting for services of a hearing examiner and a personnel security review examiner (DOE) - In our view, these functions involved quasi-judicial services, which are governmental functions that should not be procured by contract. DOE, in commenting on the hearing examiner position, stated that this function was not governmental, because the examiner provided only an advisory recommendation to a senior agency official, who made the final determination for the agency. OMB, on the other hand, said that this function should have been administered by government personnel, because the position involved considering and ruling on evidence in a disputed matter, making specific findings, and reaching

[3]EPA's Use of Management Support Services (CED-82-36, Mar. 9, 1982).

determinations. These functions involved using discretion in applying government authority.

- Preparing testimony for agency officials (DOE) - We believed that a contractor who drafted congressional testimony exercised discretion, made value judgments for the government, and was in a position to establish policy for an agency. We therefore believed that this was a governmental function. DOE initially said that agency personnel reviewed all drafts of proposed testimony before adopting and presenting them as the official statement of the agency before Congress. However, DOE subsequently announced that it agreed that contractors must not draft testimony or responses to Congress. OMB said that writing testimony was a governmental function that should only be administered by government employees.
- Answering an agency's telephone hotline (EPA) - We questioned this contract involving a "Superfund Hotline" to the extent that the contractor might have been in a position to exercise discretion and make value judgments for the government in researching and responding to questions addressed to an agency. The contractor's staff determined whether to refer questions to agency personnel. In addition, it appeared that callers to the hotline were not informed that a contractor employee was responding to their questions. We recommended that the agency review this contract to ensure that the contractor did not provide original interpretations to agency regulations and that the contractor be required to tell all callers that the hotline was staffed by contract personnel.

EPA contended that the hotline contract did not fall within any examples of governmental functions set forth in OMB's guidance. According to the agency, the contractor did not exercise discretion in applying government authority or use value judgments in making decisions for the government. OMB said that the operation of a hotline would normally be considered to be a commercial activity. However, if the contractor was interpreting agency regulations, as opposed to providing responses based on prior government interpretations, the function should normally be administered by government employees.

## Current Efforts to Define Governmental Functions

To get additional insight into the issue of defining governmental functions, we considered, as part of this review, the conceptual and historical bases for defining and identifying governmental functions. As discussed in chapter 1, we studied historical documents such as the Constitution and the Federalist Papers, and we made a comprehensive examination of court cases to identify any legal bases or precedents on governmental functions. We also reviewed various books and articles on

the subject of governmental functions (see bibliography) and spoke with several authors to get more information on their work. We also asked all of the state governments whether any of them had information and/or experience that would be applicable. In addition, we sponsored two symposiums in June 1990, attended by representatives of the contracting community, including OMB and other agency officials, contractors, unions, various research organizations, and academia, to obtain their views on the concept and definition of governmental functions.

## The Constitution and the Federalist Papers

Under the Constitution, legislative powers are reserved for Congress, executive powers are reserved for the President, and judicial powers are reserved for the courts. Overall, each of the first three Articles of the Constitution specifies the functions granted to each of the branches of government. For example, Article I grants Congress the power to do such things as impose taxes and duties, borrow money, coin money, raise and support armies, and declare war. Article II grants powers to the President such as being the Commander-in-Chief of the Army and the Navy, making treaties, and appointing ambassadors and judges. Article III grants powers to the courts to hear cases arising under the Constitution, the laws of the United States, and treaties.

Each of the powers granted under the Constitution, in our view, involves the essence of government and is concerned with the act of governing. This subject is generally referred to in OMB's guidance. Circular A-76 enumerates under the definition of governmental functions two specific categories—those relating to the act of governing and those relating to monetary transactions and entitlements. While the Constitution clearly sets forth the specific powers assigned to each of the three branches of government, it does not discuss the types of functions that are not governmental and may therefore be administered under contract by the private sector.

Determining which functions are inherently governmental gets at the heart of the difference between the public and private sectors and their employees. The Federalist Papers, which provide authoritative commentary by Alexander Hamilton, James Madison, and John Jay on the Constitution, elaborate on the powers authorized by the Constitution. They do not, in our view, however, provide further insight into the types of functions that do not necessarily have to be administered solely by the government. For example, Article I of the Constitution grants Congress the power to coin money. James Madison, in his comments on this power in Federalist Paper No. 44, noted that this power was taken from the

states and given as an exclusive power to Congress to regulate the alloy and its value. Neither the Constitution nor the Federalist Papers, however, comment on whether the enumerated power of coining money necessarily must be done only by the government. Therefore, it is unclear whether the actual manufacture of the coins could be done by the private sector. The intent of the authors of the Constitution is not apparent in this case.

## The Courts

Our analysis of court cases provided us with some insights into governmental functions but did not provide us with a definitive means of establishing which functions are governmental. In most instances, the courts' discussions set forth some broad and general guidelines and then used these guidelines to determine whether a particular function was a governmental one. For example, in one U.S. Supreme Court case, the Court provided general guidance by holding that every activity administered by the government within its constitutional power is a governmental action or function.[4] The case, however, did not define this concept further, but went on to hold that when the government acts through a government-owned and -controlled corporation, the corporation's activities are governmental functions. The Court held that it was not a governmental function for a state to provide transportation for its citizens and that this was subject to federal taxation.[5] In another case involving whether a state had improperly delegated to a private company a governmental power, the resolution of private disputes, the U.S. Supreme Court noted that there are few governmental functions "exclusively reserved to the State" but that one such area is the conduct of elections.[6] Thus, for our purposes, the courts have not articulated any rules of law that would be applicable in all situations to determine which activities of an agency are inherently governmental and should not be contracted out.

Some courts, however, have recognized that the issue is often not whether a private contractor may administer a governmental function but the extent to which the private contractor can become involved in administering a governmental function. Consequently, it is not necessarily improper for an agency to have a contractor administer much of the work related to the statutory responsibilities of the agency, which are

[4]Graves v. People of the State of New York, 306 U.S. 466, 477 (1939).

[5]Helvering v. Powers, 293 U.S. 214, 216 (1934).

[6]Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 157-158 (1978).

clearly governmental functions. For example, although the Department of Housing and Urban Development is statutorily mandated to prepare an environmental impact statement before allowing development of a new community, the agency may delegate much of the work to private entities as long as "[t]he agency . . . independently perform[s] its reviewing, analytical, and judgmental functions and participate[s] actively and significantly in the preparation and drafting process."[7]

## The Literature and Its Interpretation

Our analysis of books and articles on the subject of governmental functions did not reveal a clear-cut basis in American political history upon which to categorically define governmental functions or to identify a comprehensive list of specific functions that should be administered solely by government employees. Those with whom we discussed the issue who had also studied it said they had also found this to be the case.

The academics and historians we talked with said that while most people would agree that certain key functions such as managing the national defense or conducting foreign policy should be reserved for government officials, the degree to which contractors may be used to assist in administering these functions is primarily an ideological one. They further indicated that the nation's acceptance of contractors in government service has evolved over the course of history as times have changed, and was not necessarily based on fundamental government documents.

Many people we talked with, both scholars and practitioners, believed that a short list of functions that should not be contracted out could be developed, but it would be basically judgmental in nature and would probably vary over time. They believed that governmental functions are best described in terms of the relative responsibilities of government officials and contractors and that the use of contractors is inappropriate if government officials will lose effective control of government programs to the contractors.

## The States

We asked each of the states to provide us with any guidance they had on contracting for governmental functions, particularly as it relates to consulting services. Thirty-eight states responded to our inquiry. Twenty-six of the states had various types of guidance that related to consulting

[7]Sierra Club v. Lynn, 502 F. 2d 43, 59 (5th Cir. 1974).

services, personal services, or contractor services. Fifteen of these states had a policy requiring a determination of whether it was possible for the service to be administered by state employees. For example, New York's guidelines for determining the need for consulting services included consideration of the availability of state personnel as well as other alternatives. The guidance required persons making the determination to answer the following questions:

- Can the project be accomplished through the state's in-house analytical capability?
- Can the project be accomplished through an ad hoc task force drawn from within the state?
- Has assistance been sought from other state sources such as advisory groups?
- Could the project be funded from outside sources as a research or a development effort using federal or private funds?
- Is it possible to obtain noncompensated management assistance from private or professional groups?

Of the 26 states, only Minnesota had guidance that specifically described the types of activities that were governmental functions, which were inappropriate for contracting. This guidance was not any more specific than the federal guidance and said only that contracts could not be awarded to represent a state agency in legislative matters or to make policy or management decisions. Minnesota is initiating a study to determine the extent state agencies rely upon private companies and contractors for technical, professional, and consulting services. The study will address such issues as the timeliness, quality, and cost of the work. The other 12 states that responded had either no guidance or only general guidance that related to the broader subject of contracting.

## GAO Symposiums on Governmental Functions

In June 1990, we held two symposiums with representatives of the contracting community to discuss the concept and definition of governmental functions and how to ascertain when the use of consultants is appropriate. The general agreements reached by participants in the symposiums on the subject of governmental functions are discussed below.

Governmental functions are probably best described in terms of the relative responsibilities of the government and contractors rather than as a specific list of functions. The basic principle to adhere to is that the government may not contract out its responsibility to serve the public

interest or to exercise its sovereign powers. This means that for a contract to be appropriate, the government must always be in control and, as the OMB guidance says, retain the decisionmaking power.

In this context, decisionmaking power means more, however, than simply being a final authority or signatory to a document. The government must have an active role in the decisionmaking process. Government officials must be the ones applying discretion and making value judgments throughout the process. A key criterion in determining whether consulting contracts would be appropriate is whether the government could maintain sufficient in-house capacity to be thoroughly in control of the policy and management functions of the agency. This includes the capacity to adequately direct, supervise, and monitor contracts. The government must be a "smart buyer" when purchasing assistance services and be able to make independent judgments about policy recommendations.

Agency officials often contend that consultants do not administer governmental functions—they only assist in the administration of such functions. This distinction between assistance and performance is critical to determining where to draw the line between the appropriate and inappropriate use of consultants. We stated in a 1981 report that administration begins when the contractor's involvement in basic management functions is so extensive that the agency's ability to develop and consider options other than those proposed by the contractor is limited.[8] On the basis of discussions at the two symposiums, we believe that the identification of governmental functions to be reserved for government officials depends on the relationship of the government to the contractor and on the technical and management capacity of the government agency. Each situation must be examined individually.

We believe a short generic list of functions that should not be administered by contractors could be developed. The list, however, would be largely judgmental. Care in developing such a list must be exercised because a fundamental distinction must be made between assistance and performance. The responsibility for national defense, for example, would be widely accepted as a governmental function. The important question, however, is to what extent and under what circumstance is it in the public interest for DOD to use consultants to assist in administering this function.

[8]FPCD-81-43, June 19, 1981.

The symposium participants agreed that guidelines, such as those listed in figure 2.1 could be helpful to agencies in determining whether contracting for consulting services would be appropriate in particular circumstances.

**Figure 2.1: Suggested Guidelines for Determining Whether Contracting Out for Consulting Services Would Be Appropriate**

- The work to be done must be specific enough that a detailed contract can be written regarding the work assignments, responsibilities, and products expected.
- The agency must retain the technical capability to prescribe, monitor, and evaluate the work of the contractor. In addition, the agency should consider the impact of contracting on the future technical capacity of the agency. Technical capacity should not be eroded over time through the use of contracts to the degree that future contracts could not be effectively monitored and evaluated.
- The institutional memory must reside with the agency, not with the contractor.
- Maintain competition at the time of the initial award and when renewal is being considered. Avoid situations in which the contractor, by virtue of its work for the agency, develops exclusive expertise to the degree that a monopoly is established.
- Only government officials are to make policy decisions. Government officials must be involved in the decisionmaking process to a greater degree than merely making the final policy decision on the basis of analysis and/or advice by a contractor. They must approve the analytical process leading to the decision options and use discretion and make the value judgments throughout the process.
- Government officials must set a definite time period for the use of the contractor. If the need is for a long or indefinite period, government employees should do the work. Also, the contract should require a finite or deliverable product, such as a report analysis or opinion, which is different from the normal, routine work products of the agency.
- Attention should be paid to possible individual or organizational conflicts of interest. To the extent possible, take steps to ensure that the advice or service to be received is impartial and that the contract will not result in an unfair competitive advantage to the contractor.
- Compare the costs and benefits, both long- and short-term, of using a contractor or government employee. However, in situations in which governmental functions are identified, most functions should more appropriately be done by government employees, and cost may not be a relevant consideration.

Overall, we found that the concept of governmental functions is difficult to define and is subject to substantial judgment. There are very few constitutional and statutory restrictions on those activities which may or not be contracted out by the federal government, and the courts have provided little additional insight. Further, we found that the existing policy guidance on this subject is limited. We believe that clarification of the guidance would be helpful to federal agencies when deciding whether or not to contract out for particular types of work. We believe that the guidance listed in figure 2.1 would be useful to agency officials in helping to make decisions as to when contracting out for consulting services may be appropriate. The work to be done must be specific enough that a contract can be written which is detailed regarding the work assignments, responsibilities, and products expected.

# Some Service Contractors Appeared to Be Administering Governmental Functions

Eighty of the 108 randomly selected service contracts we reviewed at DOT, DOE, and EPA did not appear to involve governmental functions. However, portions of 28 of the contracts appeared to have involved such functions or caused us to question other matters, such as the use of contractors to bypass personnel ceilings, using contractors when doing the job in-house would have been more cost effective, contract administration problems, conflicts of interest, and problems with contractor work. Because of the difficulty in defining governmental functions, we were not, however, able to definitively conclude that the activities in question involved such functions. We also questioned portions of the seven DOT&E contract task orders we reviewed because they did not show clearly the contractor's role relative to the degree of agency control over the contractor's work. Therefore, we could not determine from agency records the extent of DOT&E's reliance on the contractor's work when making policy decisions. We also found that rarely is an entire contract inappropriate. Generally, only specific contract tasks were subject to question.

It was often not clear from reviewing contracts whether the contractor was actually administering certain work or was merely assisting the government in administering the work. Agency officials we spoke with generally maintained that they were in control and were making decisions and value judgments for the government. Agency contract documents, however, did not provide reliable evidence about the specific roles of the contractor and the government. Our review showed that the wording of contract statements of work or task orders could easily be interpreted different ways. For example, contract terms that called for the contractor "to assist" or "to support" the agency in administering a function did not clearly show the extent of a contractor's involvement in a project.

Because the guidance on what constitutes a government function is vague, and because the contracts themselves were vague in delineating contractor and government responsibilities, we were unable to determine whether particular contracts were appropriate. We did, however, question certain contracts or contract terms that appeared to be inconsistent with OMB or agency principles as set forth in the existing guidance. Our evaluation was not intended to provide data that could be generalized for the entire government or even at the four agencies where we made our review. Our objective was to obtain a general view as to whether some service contracts appeared to involve governmental functions.

## Most Service Contracts We Reviewed Did Not Appear to Involve Governmental Functions

Of the 108 randomly selected contracts we reviewed at DOT, DOE, and EPA, 80 of them did not appear to involve governmental functions. Some examples of service contracts that did not seem to involve governmental functions are discussed in the following paragraphs. These contracts, in our view, were consistent with the requirements of the existing OMB and applicable agency policy guidance. On the basis of the contract documentation we reviewed, the government appeared to be in control of the contractors' activities, and the contractors did not seem to be making decisions and value judgments for the government.

### Case 1

DOT's Federal Aviation Administration (FAA) awarded a contract for about $2.8 million to a company to provide research and development services involving telecommunications computing equipment. The work to be provided by the contractor included the following tasks:

- Research the design of and developing logical components of electronic computing equipment used in air/ground communications to provide operating systems programs needed for effective use of computer equipment.
- Develop and implement a means for expanded regional access to a computer system.
- Study existing computer models of electronic navigation and air/ground radio communications and analyze the most cost-effective means to consolidate them.
- Study, investigate, and document the specific requirements for en route, approach, and terminal air/ground communications.
- Study and develop a comprehensive regional computing system requirements analysis.

The tasks to be administered under this contract seemed to be in accordance with OMB's guidance. For example, according to Circular A-120, the use of advisory and assistance services is a legitimate way to obtain advice regarding developments in industry research and to ensure the more efficient or effective operation of hardware systems. Also, Circular A-76 includes as appropriate examples of commercial activities systems engineering, installation, operation, maintenance, and testing of communications systems. In this case, it appears that the government obtained only the technical expertise of the contractor and did not rely on the contractor to administer work of a policy, decisionmaking, or managerial nature.

## Case 2

DOE awarded a contract for about $2.1 million to provide the Energy Information Administration with expert contractor support necessary to conceptualize, examine, and adapt mathematical/statistical theories to energy issues and problems and to the agency's statistical methods and procedures. The contract objectives included the following:

- The analysis of the mathematical and statistical methodologies and approaches of the collection and dissemination of data concerning energy reserves, production, distribution, pricing, and consumption.
- The analyses of the mathematical approaches for use of the data, such as in studies and forecasts of energy trends, and for other topics related to domestic and international energy subjects.
- The application of mathematical methods to respond to periodic requests from Congress or the executive branch to develop special data and analyses in support of policy development and decisionmaking functions.

The contractor was to administer such work as (1) analysis of data collection requirements and statistical quality control methods, reports, publications, and related documentation; (2) design, development, and implementation of new systems, or significant modification of existing systems; (3) development of specialized analyses of particular energy issues; and (4) implementation of improvements in systems, including design, programming, documentation, testing, training, and operation.

This contract appeared to be consistent with OMB and DOE requirements. For example, OMB Circular A-120 states that advisory and assistance services include activities such as studies, analyses, and evaluations. These activities are organized, analytic assessments needed to provide insights necessary for understanding complex issues or to improve policy development or decisionmaking. DOE's Order 4200.3B states that special studies and analyses are services of a purely advisory nature relating to government management functions. The Order also says that support services do not include the exercise of discretionary authority, which is the essence of a government function. In our view, the contractor appeared to provide support to the agency but did not make decisions for the agency.

## Case 3

EPA awarded a contract for about $100,000 to a company to provide logistical and document preparation support to the Office of Emergency and Remedial Response. The contractor was to administer work such as the following:

- Provide logistical arrangements and support for large- and small-scale conferences and meetings.
- Provide graphics and art work.
- Copy videotapes.
- Provide for binding, collating, and packaging of materials for mailing or distribution; maintain mailing lists; provide mailing labels; and distribute or mail materials.
- Provide typing, editing, and proofreading support.
- Make photocopies.

This contract appeared to be consistent with OMB guidance for the following reasons. OMB Circular A-120 states that advisory and assistance services include activities such as management and professional support services. Examples of such services include logistics management, paperwork management, records management, space management, and public relations. The contractor was not used to administer work involving policy, decisions or management. Also, Circular A-76 lists as examples of commercial activities art and graphics services and reproduction and duplication of audiovisual products.

## Some Service Contracts We Reviewed Appeared to Involve Governmental Functions

Of the contracts we reviewed at DOT, DOE, and EPA, portions of 28 of them appeared to involve governmental functions. We analyzed the contracts by looking at the contracts' terms and the products that were to result from them, and by discussing the contracts with the agency officials and contractor representatives. Table 3.1 breaks down the nature of the questions we had about the 28 contracts. Because of the difficulties with the concept and definition of governmental functions and also in distinguishing between assistance and performance by contractors, however, we were not able to determine whether these contracts were inappropriate.

**Table 3.1: Summary of Reasons GAO Questioned 28 Cases at DOT, DOE, and EPA**

| | |
|---|---|
| Cases that seemed inconsistent only with OMB guidance | 3 |
| Cases that seemed inconsistent only with agency guidance | 1 |
| Cases that seemed inconsistent with both OMB and agency guidance | 24[a] |
| **Total** | **28** |

Note: See appendix I for additional details.

[a]Includes 10 cases that seemed inconsistent with EPA internal guidance issued in April 1990 and October 1990, after the contracts we reviewed were awarded. EPA was not, therefore, required to follow this guidance at the time of the awards. However, the guidance is useful in describing EPA's current views on the issue of governmental functions.

We also questioned portions of most of the 28 contracts for other reasons not necessarily related to the issue of governmental functions (see table 3.2). As discussed in chapter 2, participants in the two symposiums sponsored by GAO agreed that guidelines such as those listed in figure 2.2 could be helpful to agencies in determining whether contracting for consulting services would be appropriate or inappropriate in certain circumstances. While we did not make this determination for the contracts we reviewed primarily because of the difficulty in distinguishing between contractor assistance and performance, these guidelines were helpful in our analysis of the contracts reviewed. Accordingly, we questioned these contracts for matters such as possibly contracting out to bypass personnel ceilings because of staffing constraints and the possible higher cost of contracting than if the work were done by government employees.

**Table 3.2: Summary of Other Reasons GAO Questioned Cases at DOT, DOE, and EPA**

| | |
|---|---|
| Possible contracting out to bypass personnel ceilings | 26 |
| Cost of contracting may have exceeded cost of doing work in-house | 9 |
| Problems with contract administration[a] | 5 |
| Possible conflict-of-interest situations | 2 |
| Problem with contractor work | 1 |

Note 1: Some contracts were questioned for more than one reason.

Note 2: See appendixes I and II for additional details.

[a]For purposes of this analysis, we considered such diverse matters as the lack of documentation of an agency's contract monitoring efforts and the issuance of a final agency report without appropriate recognition of a contractor's participation as problems which involved contract administration.

We also had questions on portions of each of the seven DOT&E contract task orders we reviewed because of the absence of evidence concerning the degree of agency control over the contractor's work. Therefore, we could not determine from agency records the extent of DOT&E's reliance on the contractor's work when making policy decisions. Summaries of some of the 28 contracts and 7 DOT&E task orders, and the reasons that we questioned them, follow. Summaries of five other contracts we reviewed are contained in appendix II.

## Cases 4 and 5

These cases involved two contracts awarded by DOE's Albuquerque Operations Office for consulting services involving utilities. The first contract, for about $1.6 million, was awarded in 1983; the second contract, for about $3.3 million, was awarded in 1988 to the same company and was a continuation of the earlier contract.

The Albuquerque Office administers utility service procurement for government research laboratories and production plants. DOE operates utility facilities for its own use and for supplying other users. According to DOE records, the agency routinely used utility consultants to conduct studies, support government negotiators, draft technical portions of contract language, present testimony in support of the government's position in regulatory proceedings, audit utility service invoices, as well as monitor and assist with site utility power and natural gas master planning. Under the two contracts we reviewed, the contractor was to administer work in the following areas under the two contracts:

- Prepare direct testimony in the format required by the regulatory body during the course of the hearings before the Public Service Commission.
- Review the testimony presented by all other witnesses and prepare cross-examination questions (interrogatories) for the witnesses.

In one example of the contractor's activities, the contractor provided services on behalf of DOE in a rate increase application case before the New Mexico Public Service Commission. The contractor testified on behalf of DOE and the Air Force on at least two occasions. The contractor also proposed his own work orders as part of this case, which would authorize the contractor to continue prosecuting this case on behalf of DOE and the Air Force.

In another example, the contractor provided services on behalf of DOE and the Air Force in litigation before the Colorado Utility Commission involving electrical service contracts. The contractor was required to

- develop a strategy for presenting the government's case to the utility commission,
- prepare the necessary direct testimony,
- prepare cross-examination questions, and
- assist with the litigation in federal court.

We had questions about portions of these cases for the following reasons. OMB Circular A-120 states that advisory and assistance services shall not be used to bypass or undermine personnel ceilings. In addition, DOE's policy, set forth in Order 4200.3B (Oct. 1985), is that support services contracts should not exceed 5 years, including options to renew. The first contract was awarded in 1983 and was renewed in 1988. The use of a contractor for such an extended period appeared to be an augmentation of agency staff which was inconsistent with the OMB and DOE guidance.

Regarding the specific work administered by the contractor involving testimony, the DOE Order prohibits using a contractor to draft or present, as a representative of the government, testimony before a regulatory body. Regarding the contractor's work on the cross-examination questions, the contractor documented that it distributed cross-examination questions and responses for the witnesses. The DOE Order also prohibits the use of contractors to initiate or originate drafts of official documents and correspondence that are intended to represent the policies or plans of the government. In addition, OMB Circular A-120 states that advisory and assistance services shall not be used to administer work of a policy or managerial nature, which is the direct responsibility of agency officials. In our view, the contractor's involvement in the work described seemed to involve agency policy issues, which were the responsibility of agency officials.

A DOE contract official told us the work in question was contracted out because DOE lacked staff with the necessary education and expertise to administer this work. He said the agency had considered establishing positions calling for the necessary skills, but were precluded from doing so because of personnel ceilings. Although a cost comparison had not been made, the official expressed the belief that it was more costly to administer such work by contract than with government employees. He also said the government loses its institutional memory when it contracts out. In this instance, the contractor had several more years' experience than the agency technical representative responsible for monitoring the contractor's work. The official added that the technical representative is nearing retirement, and is the only person in the agency knowledgeable in this area. The representative is, however, training other DOE employees in order to transfer his knowledge to them. The DOE official believed that the agency exercised sufficient control over the contractor's work to prevent the contractor from making decisions and policy for the agency. He said that a DOE representative must be present at all meetings or decisionmaking activities where the contractor is present. He acknowledged, however, that contractors are "on the edge" of making policy. For example, during hearings, policy questions are asked. Without DOE representation, he said that the government would lose control over policy-making actions.

The contractor told us that during testimony at hearings, a government representative had to be present or no business could be transacted. He said that the lack of the presence of a government representative had been a problem in the past, because government personnel (usually Air

Force personnel in joint rate cases) did not always meet hearing schedules. He said that this problem had been corrected. The contractor agreed that he had more institutional memory than the government because of his long and continuous administration involving utility service contracts.

## Case 6

This contract, for about $9 million, involved a broad range of management issues and concerns for EPA's Office of Administration and Resources Management. The contract called for assistance in designing and conducting detailed analyses of management issues such as (1) resources management and systems; (2) personnel and human resources management and services; (3) procurement through contracts; (4) assistance through grants and interagency and intergovernmental agreements; (5) initiatives in implementing agencywide internal controls, audit resolution and followup, and OMB circular requirements; and (6) initiatives in implementing governmentwide management improvement activities. One task, which was part of an effort to establish an effective groundwork and framework for EPA's A-76 program, required the contractor to develop criteria and definitions for EPA to use in defining commercial functions and "inherently governmental activities." This work was to provide the basis for EPA to further explore opportunities and to implement actions that could possibly lead to contracting out in-house commercial activities. Another task required the contractor to analyze and develop recommendations from which staffing options could be considered—including the relative mix of in-house and contractor-administered work.

We questioned whether the contractor was involved in work that is contrary to the requirements of OMB Circular A-120, because the work administered was of a policy, decisionmaking, or managerial nature, which is the direct responsibility of agency officials.

In addition, the contractor's work appeared to violate requirements of OMB Circular A-76, which considers the discretionary exercise of government authority to be a governmental function. For example, the contractor appeared to take the lead in shaping important agency policy. We are particularly concerned because the policy issues involved (1) the determination of when it is appropriate to contract out work and (2) staffing options for the agency concerning the relationship between work to be administered in-house and work to be administered under contract. In our view, determining policy matters is a discretionary exercise of government authority and should be done only by government

officials. We also believe that a contractor's involvement in determining which activities may be done under contract places the contractor in the position of possibly becoming associated in the future with some of the activities he identified as being appropriate for contracting. This would appear to be a conflict of interest.

This contract also seemed to be inconsistent with the requirements of recent EPA policy guidance from the Administrator, EPA, to all agency personnel (EPA Order 1900.2, Oct. 1990). Although this guidance was not in effect when the contract was awarded, it does define current agency thinking on the subject of contracting out governmental functions. This guidance lists several activities that, when administered by a contractor, may place the agency in a vulnerable or sensitive position if adequate controls are not implemented. One of these activities is obtaining contractor support on improving agency contract management. In such cases, the requesting program office requires a justification indicating why the work cannot be administered internally and what will be done to ensure that the final agency product is unbiased and represents agency thinking.

Agency officials told us that this work probably should have been done in-house. However, the agency did not have sufficient staff available and also did not have staff with sufficient expertise. The officials told us that generally controls were in place to ensure that the agency retained its decisionmaking authority and that a contractor's work was reviewed thoroughly. The contract files in this case did not, however, contain evidence that documented the agency's monitoring efforts. The officials also said that there was not sufficient in-house capability to adequately direct, supervise, and monitor this contract.

## Case 7

DOT&E had a slightly different situation than the other agencies in our review. All of its contract support services are now provided by one contractor, a nonprofit organization whose primary function is to provide analytical support services to the Office of the Secretary of Defense.

Under a single contract with this contractor, DOT&E periodically issues "task orders" to the contractor for projects in support of DOT&E's mission to evaluate the testing of weapons systems. Each task order authorizes an amount of funding for the contractor to administer a specific function and to issue a report to the agency by a specific date. DOT&E officials informed us that the contractor is to provide support for the evaluation of tests of specific weapons systems, or to evaluate plans for testing

before the tests are conducted, and occasionally to evaluate plans for other purposes.

Each contractor task has an "action officer" assigned whose responsibilities include monitoring the contractor's work. DOT&E officials told us that in a typical situation the action officer works closely with the contractor, observing and approving the analytical process. They told us that typically the action officer uses a report the contractor writes, along with information from other sources, to write an action officer's report, which is circulated throughout the agency for comment and is used to formulate an agency position on the issue. Ultimately, DOT&E makes a recommendation to the Defense Acquisition Board.

To evaluate whether the contractor was administering governmental functions, we focused on the degree to which DOT&E applied independent judgment to the issues that the contractor analyzed and to the contractor's reports. To do this we randomly selected 7 task orders from a list of 44 that we had on file from a 1990 review of the agency's oversight of operational test and evaluation work. (The task orders we reviewed are listed in table 3.3.)

For each of these seven task orders we asked DOT&E to provide us with (1) copies of the reports from the contractor and (2) documentation—an action officer's report, other internal documents, or a formal DOT&E report—that would demonstrate independent judgment on the substance of the issue by DOT&E. In response to this request, we received reports from the contractor for each of the seven tasks, but we found very little evidence of independent involvement by DOT&E personnel. In six of the seven cases, DOT&E told us that a formal action officer's report either had not been prepared or could not be located.

In two cases (Field Artillery Users' Needs and Operational Testing and Evaluation Issues), DOT&E officials told us that the contractor's reports were used only as background information and that no direct action was required by DOT&E. In two other instances (Strategic Defense Systems and Command, Control, and Communications Systems), DOT&E officials said that the testing programs were canceled, obviating the need for DOT&E action. In one instance (Close Air Support), an agency official said there was no need for an action officer's report because they had worked very closely with the contractor and the contractor's report was a joint product representing the work of both the agency and the contractor. DOT&E did provide a formal report to Congress on this issue in March 1989. In one other instance (Over-the-Horizon Radar System), the

action officer said he was unable to locate a contractor's report and doubted that one had been prepared. In the seventh case (Anti-Aircraft Gun System), DOT&E gave us a formal DOT&E action officer's report, which appeared to discuss concerns and issues not covered in the contractor report.

DOT&E issued a report to Congress in March 1989 concerning the Close Air Support case. We compared this report with the report submitted to DOT&E by the contractor, and they were virtually identical, from organization to conclusions. The only material difference was the inclusion of an executive summary in the DOT&E report, which was not in the contractor's report. DOT&E later provided us with documentation, which was not initially available, showing that the agency had been actively working with the contractor and had participated in the development of the report to Congress. The report to Congress acknowledged participation by several DOD offices in the project, but it did not mention the involvement of the contractor. In our view, the lack of attribution of this work to the contractor in the report to Congress is misleading because it suggests that the product is based on work administered solely by agency staff.

We recognize that in some instances it may be reasonable not to have a separate action officer's report. However, in only one of the seven DOT&E task orders was a separate report provided to us that was materially different from the contractor's report. This absence of documentation caused us to question the extent of DOT&E's involvement in reviewing the contractor's work as well as the degree of influence the contractor may have had on DOT&E policy determinations. In commenting on a draft of this report, DOD disagreed that insufficient documentation suggested that the contractor was administering inherently governmental functions. On the basis of the available documentation, however, we could not determine how thoroughly the agency may have reviewed five of the other six reports developed by the contractor to determine that no changes were necessary; nor could we determine whether the agency relied extensively on the contractor's judgment in these cases. As we noted, DOT&E did provide evidence showing the extent of its involvement in the Close Air Support case. Accordingly, because evidence was generally lacking concerning the contractor's role relative to the degree of agency control over the contractor's work in these seven cases, we could not reach conclusions concerning the propriety of the relationship between the contractor and the agency.

In addition, we have previously reported on DOT&E's lack of documentation for some of its principal activities. In March 1987, we noted that agency action officers frequently did not document the results of their reviews, changes made because of these reviews, or methods used to analyze service test reports. We reported that the lack of documentation made it difficult to accurately determine how well the agency carried out some of its principal activities. The Director of Operational Test and Evaluation acknowledged the problem and said that improvements would be made.[1] We believe, however, that action officers still need to document the results of their work.

**Table 3.3: Task Orders at DOT&E That GAO Reviewed**

Dollars in thousands

| Task orders | Description of task | Dollar amount |
|---|---|---|
| Strategic Defense Systems | To provide an independent review of planned operational assessments and operational test and evaluation programs for Strategic Defense Systems. | $700 |
| Interoperability of Command, Control, and Communications Systems | To develop requirements for operational testing of interoperability, develop concepts for operational testing, and develop guidelines for conducting such testing. | 100 |
| Field Artillery User's Needs | To develop a program plan for the test and evaluation of field artillery systems. | 10 |
| Close Air Support | To develop an operational test concept that provides the basis for a competitive flyoff of selected alternative aircraft for the close air support mission and assists in the resolution of related close air support issues. | 400 |
| Operational Test and Evaluation Issues | To provide a review and analysis of past and current issues concerning operational testing within DOD. | 30 |
| Anti-Aircraft Gun System | To advise on the selection of the site and the instrumentation to employ for the conduct of a DOT&E program for an Anti-Aircraft Gun, and to provide an analytical framework and reference for the review of the test plan for an Anti-Aircraft Gun System. | 570 |
| CONUS[a] Over-the-Horizon Radar System | To review test reports, studies, and other relevant documents pertaining to the Over-the-Horizon System. | $55 |

[a]Continental United States.

[1]Testing Oversight: Operational Test and Evaluation Oversight: Improving but More Is Needed (GAO/NSIAD-87-108BR, Mar. 18, 1987).

# Why Some Federal Agencies May Be Using Service Contractors Rather Than Government Employees

Overall, it appears that the two major reasons contributing to federal agencies' use of contractors to administer some functions that may be governmental in nature are the lack of authorized federal positions for employees and the lack of federal employees with sufficient expertise to do the work. In addition, as discussed in chapter 2, the difficulty in defining the concept of governmental functions has resulted in limited guidance to federal agencies on this subject. Recently, however, some federal agencies have attempted to increase staff to reduce their dependence on contractors.

## Lack of Sufficient Numbers of Federal Employees or of Employees With Sufficient Expertise

Of the 108 contracts that were reviewed at DOE, DOT, and EPA, we questioned whether 28 of them were appropriate on the basis of OMB and agency guidance. Twenty-four of the 28 involved headquarters contracts. The other four were field contracts. We discussed each of the 24 headquarters cases with responsible contract and program officials to obtain their views on why work was administered by contractors. Overall, we spoke with 48 agency officials. Most of them said that their agency did not have a sufficient number of employees or did not have employees with sufficient expertise to do the work; or they said that they were not sure. Only a relatively small number of the officials said that their staff was sufficient or that their agency had sufficient expertise.

- Regarding insufficient numbers of staff, 26 officials said their agency did not have sufficient staff to do the work in question. Ten said they were not sure whether their agency had enough people to do the job. Only four said that staff was sufficient. Eight chose not to respond.
- Regarding insufficient expertise of staff, 19 said their agency lacked sufficient expertise to do the work. Fourteen said they were not sure whether their agency had sufficient expertise. Ten said they thought their agency had sufficient expertise, and five chose not to respond.

These views were generally consistent with information we obtained on budget outlays, contract actions for services, and federal employment. This consistency seems to indicate that agencies find it easier to obtain contract dollars than authorization for full-time equivalent (FTE) work-years to do their work. Although contract money seems to be available, FTE work-years may be difficult to obtain because of staffing ceilings.

This perception appears to have become part of the culture in some agencies. For example, DOE budget officials told us that the use of contractors "is sort of ingrained in the Department . . . people are conditioned to look to contractors to provide a lot of services." EPA budget officials told us that "it is much easier to get OMB's approval of contract dollars" over positions. The officials told us that OMB asked EPA whether it was contracting out all the work that it could. The officials said that it was clearly OMB's position to curtail the size of the federal workforce. The officials added, however, that OMB has been relatively generous in approving positions for EPA.

In a recent report, Using DOE Employees Can Reduce Costs for Some Support Services,[1] we noted that recent actions indicate that OMB's position about personnel ceilings may be changing. OMB officials said that during the 1980s OMB had a clear policy of reducing federal employment and of aggressively studying federal positions to determine whether they should be contracted out. They said, however, that OMB is now willing to consider requests for additional staff if the requests adequately justify cost savings. While OMB has not issued a formal policy reflecting this change in its position, OMB officials cited DOE staffing as evidence of OMB's change in attitude.

OMB appears to be taking actions to change agency views on its staffing policies. For example, in February 1991, OMB budget officials told us that the OMB Director told agencies to do whatever was most cost effective to administer their programs. However, the officials recognized that incentives needed to be established to encourage agency officials to find the most efficient ways to manage their programs. Adequate incentives may not now be in place. Concerning incentives, we noted that in a March 1990 letter about employment ceilings, OMB attempted to provide an incentive to DOE to accomplish budget efficiencies. OMB said that if DOE reallocated its resources or implemented management efficiencies, OMB would allow DOE to reallocate the savings to other areas, including the upward adjustment of employment ceilings.

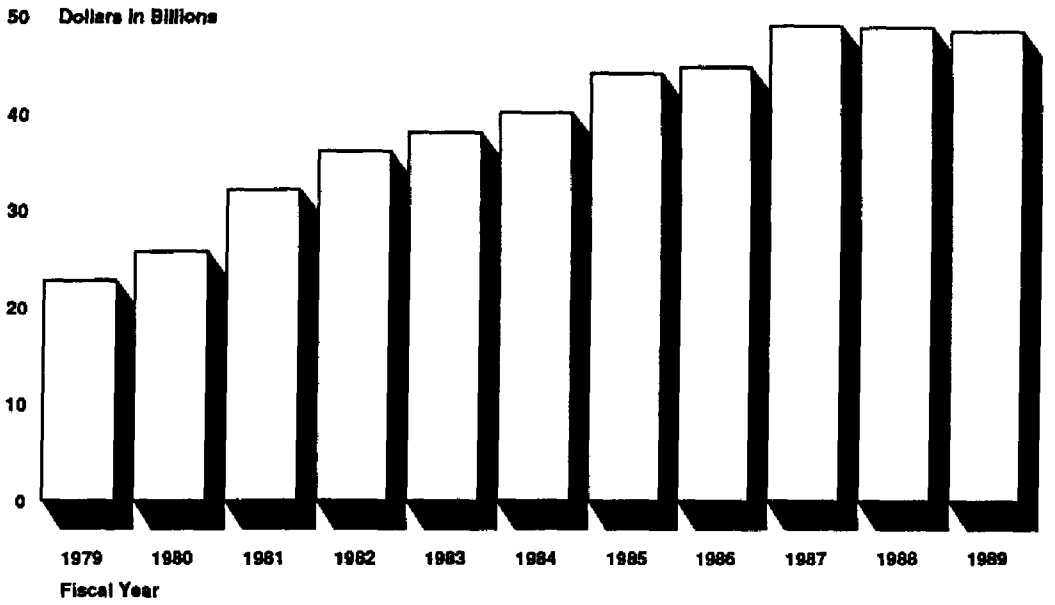
We also noted that in February 1991 OMB expressed concern that DOE may be inappropriately contracting with private sector firms for the administration of governmental functions. DOE was directed to ensure that its fiscal year 1993 staffing request included sufficient positions to administer governmental functions with federal staff. In addition, OMB advised DOE that organizations using contractors that could be converted

[1]GAO/RCED-91-186, Aug. 16, 1991.

to federal staff with a significant cost savings should consider these conversions when estimating fiscal year 1993 staffing requirements. We discuss this matter later in this chapter.

Federal expenditures have increased significantly over the last decade. Federal budget outlays have increased from about $591 billion in fiscal year 1980, to over $1.2 trillion in fiscal year 1990. Overall, funds available for services, including consulting services, have also increased. As shown in figure 4.1, during the period from fiscal year 1979 (the first year that data were compiled by GSA's Federal Procurement Data Center on federal contract actions) through fiscal year 1989 (the latest year for which data were generally available for most federal agencies reporting information to the center), contract actions for services increased from about $23 billion to about $48 billion.

**Figure 4.1: Total Executive Branch Contract Actions for Services, Fiscal Years 1979-1989**



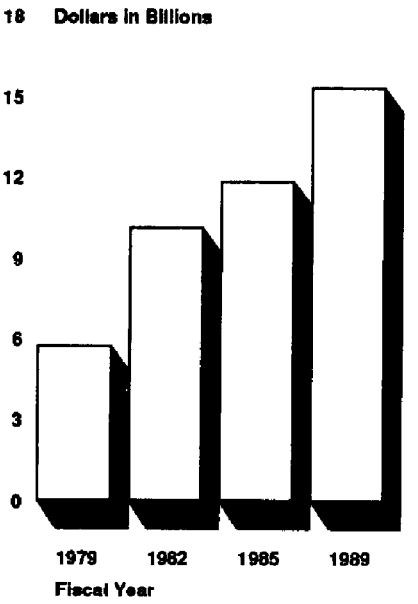

Source: The Federal Procurement Data Center.

As shown in figures 4.2, 4.3, and 4.4, contract actions for services at DOE, DOT, and EPA also generally increased in the last decade.

- At DOE, contract actions for services increased from about $5.7 billion in fiscal year 1979 to about $15.3 billion in fiscal year 1989.

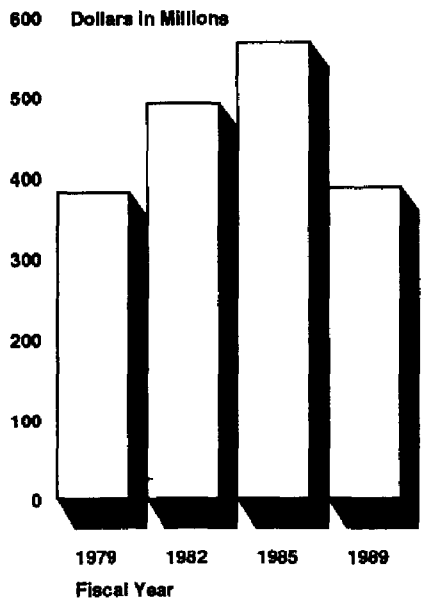
- At DOT, contract actions for services increased from about $381.5 million in fiscal year 1979 to about $566.6 million in fiscal year 1985 but then declined to about $386.8 million in fiscal year 1989.
- At EPA, contract actions for services increased from $130.8 million in fiscal year 1979 to $737.5 million in fiscal year 1989.

**Figure 4.2: Total Contract Actions for Services at DOE, Fiscal Years 1979-1989**



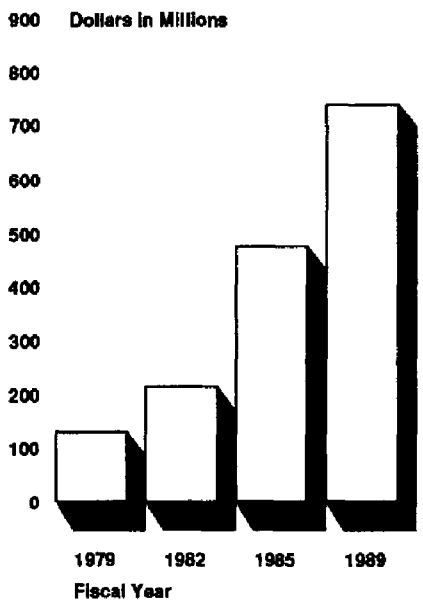

Source: The Federal Procurement Data Center.

**Figure 4.3: Total Contract Actions for Services at DOT, Fiscal Years 1979-1989**




Source: The Federal Procurement Data Center.

**Figure 4.4: Total Contract Actions for Services at EPA, Fiscal Years 1979-1989**

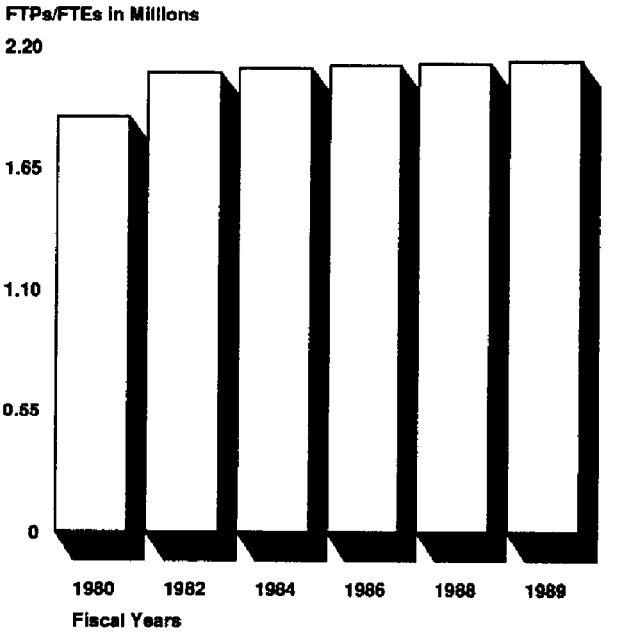



Source: The Federal Procurement Data Center.

Although both the budgets and the uses of contracting have greatly increased, the number of authorized federal positions has been limited at some federal agencies. This limited number of authorized positions may have contributed to the use of contractors to accomplish the agencies' missions.[2]

As shown in figure 4.5, federal staffing overall has been relatively constant since fiscal year 1982. In fiscal year 1982, there were about 2.08 million civilian employees in the executive branch; in fiscal year 1989, there were about 2.13 million employees.

**Figure 4.5: Trend of Full-Time Permanent and Full-Time Equivalent Civilian Employment in the Executive Branch, Fiscal Years 1980-1989**




Note 1: Data for 1980 are for full-time permanent (FTP) employment; data for 1982-89 are for FTE employment.

Note 2: Data exclude Postal Service employees.

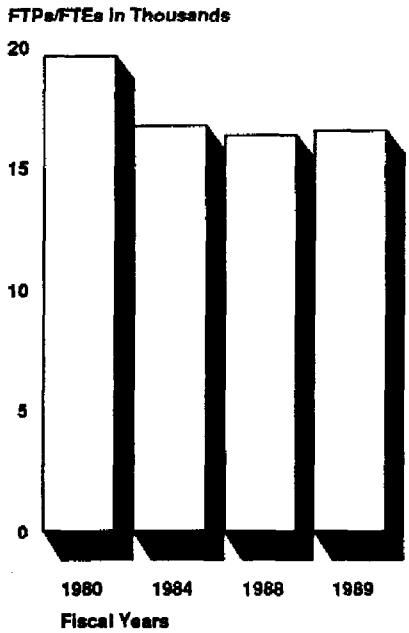
Source: The Budget of the U.S. Government.

Some agencies, however, were significantly affected by reductions in federal employment as shown in figures 4.6 and 4.7.

[2]Contract and employment figures are not shown for DOT&E because the agency is only about seven years old and has fewer than 50 employees. In addition, the agency does not report contract actions to GSA.

- At DOE, employment declined from 19,600 in fiscal year 1980 to about 16,500 in fiscal year 1989. (See fig. 4.6.)
- At DOT, employment declined from 68,800 in fiscal year 1980 to about 63,200 in fiscal year 1989. (See fig. 4.7.)

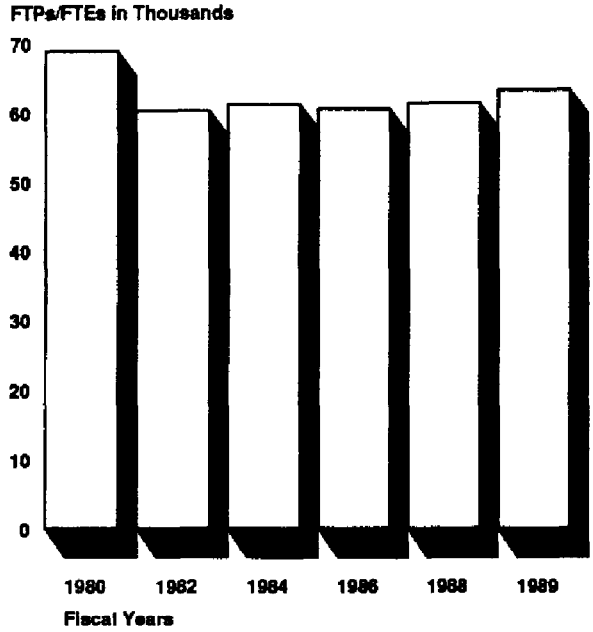
**Figure 4.6: Trend of FTP and FTE Civilian Employment at DOE, Fiscal Years 1980-1989**




Note 1: DOE was established on October 1, 1977.

Note 2: Data for 1980-81 are for FTP employment; data for 1982-89 are for FTE employment.
Source: The Budget of the U.S. Government.

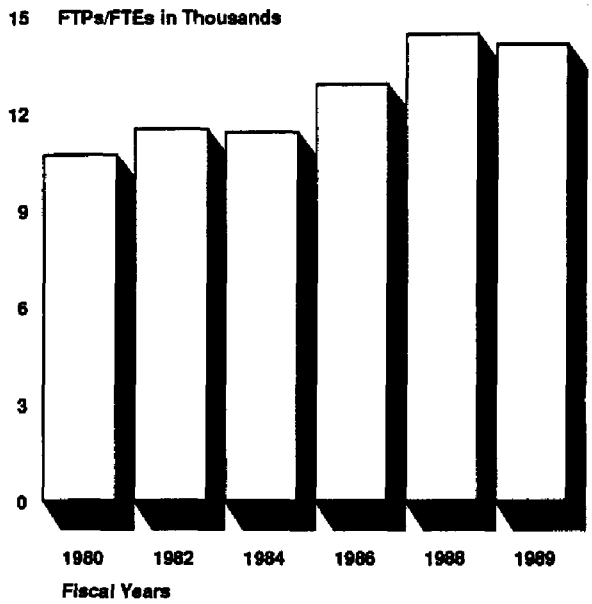
**Figure 4.7: Trend of FTP and FTE Civilian Employment at DOT, Fiscal Years 1980-1989**




Note: Data for 1980 are for FTP employment; data for 1982-1989 are for FTE employment.
Source: The Budget of the U.S. Government.

On the other hand, some agencies' staffs increased. For example, employment at EPA increased from 10,700 in fiscal year 1980 to about 14,100 in fiscal year 1989. (See fig. 4.8.) Despite this increase, EPA's contract expenditures still increased dramatically during this period.

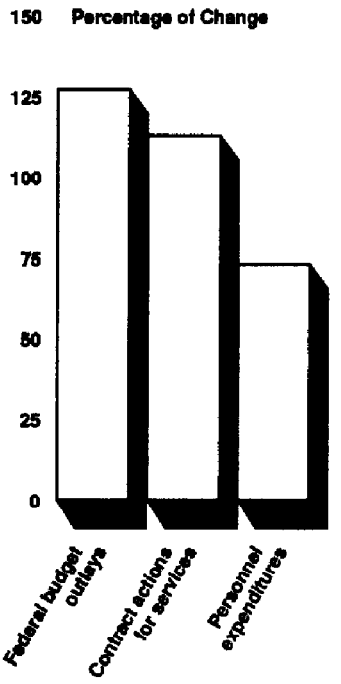
**Figure 4.8: Trend of FTP and FTE Civilian Employment at EPA, Fiscal Years 1980-1989**




Note: Data for 1980 are for FTP employment; data for 1982-1989 are for FTE employment.
Source: The Budget of the U.S. Government.

Figure 4.9 shows the relative percentages of change in overall federal budget outlays, executive branch contract actions for services, and executive branch personnel expenditures for fiscal years 1979 through 1989. During this period, federal budget outlays increased by about 127 percent, contract actions for services increased by about 113 percent, and personnel expenditures increased by about 73 percent. This comparative analysis shows that overall expenditures increased at a significantly higher rate than personnel expenditures. Some federal agencies have increased their use of contractors to accomplish their mission. However, our review did not include an in-depth analysis of the relationship between overall expenditures and personnel expenditures.

**Figure 4.9: Percentage of Change in Federal Budget Outlays, Contract Actions for Services, and Civilian Personnel Expenditures, Fiscal Years 1979-1989**




Note: Budget outlays represent government as a whole; contract actions for services (in dollars) represent executive branch only.
Source: The Budget of the U.S. Government, the Federal Procurement Data Center, and OPM.

The lack of staff with sufficient expertise may be the result of past inadequacies in federal salary rates. We testified that noncompetitive salary rates were the major reason for federal recruitment and retention difficulties, particularly in high-cost, high-paying localities.[3]

However, the difficulties associated with attracting and retaining persons with needed expertise to administer governmental functions may be somewhat alleviated by the new Federal Employees Pay Comparability Act of 1990. The act recognized that the government had lost its ability to hire and retain federal employees because government salaries were no longer competitive with those in the private sector. The legislation was designed to close the pay gap by providing locality-based adjustments for general schedule employees in high-cost areas.

[3]Federal White Collar Employee Salary Reform (GAO/T-GGD-90-22, Mar. 14, 1990).

## Recent Attempts by Some Federal Agencies to Increase Staffing

We noted that some federal agencies—Navy, NASA, DOE, and EPA—have recently tried to increase staffing to reduce their dependence on contractors.

### Navy

Before 1986, DOD program and contract officials usually justified the procurement of long-term consulting services contracts on the basis of the unavailability of military or civil service personnel to administer the tasks and of ceilings that precluded hiring additional personnel, according to a February 1991 report prepared by DOD's Inspector General.[4] However, since DOD's fiscal year 1985 appropriation, Congress annually has authorized the removal of DOD's civilian employment ceilings. In fiscal year 1986, DOD adopted a ceiling-free management policy.

The Inspector General report noted, however, that DOD had found little evidence that program officials had seriously attempted to define their staffing needs and to obtain enough staff. The Inspector General noted that of the armed forces, only the Navy had initiated an effort to operate without regard to manpower ceilings. This effort was the result of a 1988 Navy Inspector General report, which indicated that the Navy's procurement process substantially relied on contractor support. According to the report, the Navy realized that continued contractor support in the procurement process increased the Navy's vulnerability for potential misuse of sensitive information and could provide an unfair advantage to certain contractors in a competitive environment. The Navy also realized that relying on contractor personnel in systems engineering resulted in the use of contract personnel in areas and functions that were inappropriate. The Navy initiative involves a 6-year effort to recruit 3,178 additional full-time personnel to provide in-house engineering and management support.

Further, the Navy plans to reduce the use of contractor support in what it regards as the more critical or sensitive aspects of the procurement process, including acquisition planning, proposal and procurement requests, and the selection of procurement sources. Three commands plan to convert about 2,000 staff-years of contractor support to in-house positions over the next 5 years.

[4]Contracted Advisory and Assistance Services Contracts (No. 91-041).

A Navy budget official told us that the Navy's efforts to reduce contractor support were in response to a major procurement fraud scandal. The agency's focus was to limit contractor involvement in the sensitive procurement process. A memorandum dated August 3, 1988, from the Under Secretary of the Navy to commanders of several major commands said that DOD and Navy policies mandated that "we maintain the . . . resources necessary to administer our basic governmental functions. . . . Contractor support to the procurement process must be limited in accordance with this principle. . . . Our long-term goal is to assure that internal adequate Navy resources are available to support these critical functions and that contractor support be limited to meet minimum, nonrecurring needs." The memorandum also expressed concern about limiting the access of contractor personnel to sensitive information, both in terms of the information that they would see and the number of personnel that would have access to such information. A Navy budget official told us that the Navy expects savings of about 15 percent in the second year of the conversion of contractor personnel to government personnel.

In June 1989, we testified that the Navy's proposed reduction in contractor support was a positive step because it lessened the risk of transferring governmental functions to the private sector and the risk involved in contractor access to sensitive procurement information. We cautioned the Navy, however, that the commands will need to implement appropriate controls to ensure that as internal resources increase, the use of contractors is in fact reduced.[5]

## NASA

NASA has launched a review of its workforce, with a view toward converting a number of jobs held by contractor employees to in-house positions. In a February 1990 memorandum to officials at NASA headquarters, the Administrator said, "One of my highest priorities is the restoration of the institutional capability within the agency. This includes ensuring that core functions are being administered by civil servants and that staffing levels are adequate to meet our mission." Agency correspondence also indicated NASA was concerned that contract management and quality assurance suffered from a lack of sufficient personnel to adequately review contractor administration and to administer functions related to contract management.

[5]Use of Consulting Services in Defense Acquisition (GAO/T-NSIAD-89-36, June 7, 1989).

According to the Federal Contracts Report, dated June 4, 1990, NASA's Administrator had estimated in a December 1989 report to the White House that the agency would need to add 2,250 more employees to its work force of about 23,000 in order to carry out the agency's operations. In October 1990, NASA management officials told us that in order to convert contract positions to in-house positions, NASA needed authorization for more full-time positions. They also said that they had requested authority from OMB for the additional positions. In February 1991, they advised us that OMB had approved an increase of 1,060 positions.

## DOE

In a May 1990 memo, the Under Secretary of Energy tasked officials within DOE to evaluate which analytical and oversight functions within their organizations were being administered by contractor personnel but which should properly or more effectively be administered by federal employees. According to the Under Secretary's memo, the Secretary was particularly eager to have in-house personnel respond to congressional questions, draft testimony, and analyze and evaluate programs. The memo cited issues such as impropriety, over-reliance on contractors, loss of institutional memory and management control, and conflicts of interest as having been raised by congressional Subcommittees, GAO, and OMB during reviews of DOE's contracting practices. Accordingly, DOE's wide use of support services contractors was viewed as a subject of concern to external interests as well as the Secretary of Energy.

The Secretary asked for proposals that would outline the functions to be transferred, the numbers of contractor personnel to be replaced, and the federal personnel to be added over a 3-year period. The Secretary's goal was for DOE to reposition itself over the next few years to administer certain key functions in-house and to increase the management control over contractors.

These proposals were to be included in DOE's fiscal year 1992 budget deliberations. Although this information was not available at the time of our review, we were able to obtain information from one DOE component—the Western Area Power Administration (WAPA)—regarding its proposal to convert certain contract employees to federal employees. WAPA officials estimated that the agency could achieve annual savings of about $4.5 million dollars through the conversion of 105 positions that were then held by contractors to federal positions.

## EPA

As a result of the recent amendments to the Clean Air Act, EPA has estimated that it will require about $71 million of additional funding to implement the act in fiscal year 1991, as well as almost 200 additional positions. These positions will be used to carry out new agency responsibilities.

According to an EPA budget official, the agency preferred to have its employees rather than contractors administer the new responsibilities because in-house work usually has greater flexibility and is of better quality. The official also said that if the work in question is done by agency staff, the need for federal contract management staff is reduced, which allows federal staff to work on assigned responsibilities rather than to oversee the work of contractors. However, the official recognized that because of the administrative burden of personnel processing and the need for working space for new employees, an agency can only efficiently absorb a certain level of additional staffing.

The official said he was generally satisfied with OMB's favorable action on EPA's request for the additional resources, which were consistent with EPA's needs. He noted that EPA is a growing agency and is one of the few agencies to have been granted an increase in resources. During fiscal year 1991, EPA was granted about 900 new positions throughout the agency.

# Potential Effects of Relinquishing Government Control to Contractors

In our view, contracting is an essential tool for carrying out the functions of the government. The government cannot be expected to have all the skills in sufficient numbers to meet every requirement, but in some instances, agencies appear to be relinquishing government control to contractors. Our review, however, did not focus on identifying the specific effects that using contractors to administer governmental functions had on contracts we reviewed. Many of these contracts were still in process, so the effects of contracting out work were not readily apparent.

However, our review and analysis of the literature and earlier GAO reports showed some serious problems with various government programs in which the government may have placed substantial reliance on contractors and with that lost its capacity to manage the contracts effectively. The problems in the examples we found suggest that the government should not relinquish its control over important projects involving contractor support. When the government allows contractors to assume control over key functions, situations that are not in the government's best interest and that may be costly to correct could result. We believe that certain events that occurred concerning DOE, EPA, and NASA illustrate this point.

## DOE

A report to the Chairman, Subcommittee on Federal Services, Post Office and Civil Service, Senate Committee on Governmental Affairs, prepared by the Majority Staff, on DOE's reliance on private contractors to administer government work, contained a statement by the Secretary of Energy in June 1989 that managers and supervisors at DOE lacked the technical skills needed to run nuclear weapons production plants and were presenting him with unreliable information on the plants' problems.[1] According to a news account of the Secretary's statement, he said that some of the managers lacked the discipline needed for a safe operation of nuclear reactors. The Secretary said that he wanted to bring credibility to DOE, but his efforts had been slowed because of an insufficient number of technically qualified people on DOE's staff. The Secretary announced that he was involving himself in every major decision because of unreliably optimistic information he was receiving. The Secretary had, in effect, acknowledged the loss of capacity at DOE to administer its programs.

[1] The Department of Energy's Reliance on Private Contractors to Perform the Work of Government, n.d.

The report noted that the Subcommittee had previously expressed concern about DOE's workforce in a staff report prepared in 1980, which stated that "the role of private contractors was so pervasive that it appeared that the private workforce was by default . . . becoming the intelligence of government."[2]

We and other sources have reported on problems with DOE's nuclear energy programs in cases where DOE had substantially relied on the work of private contractors, as in the following examples.

- In the aftermath of the accident at the Chernobyl nuclear power station, DOE asked the National Research Council to examine possible implications that the accident held for the large reactors operated by DOE. The National Research Council's 1989 report, stated that most of the technical expertise regarding design, construction, and operations, as well as detailed knowledge of the facilities, resided with the contractor.[3] The report stated that if DOE sought to address a health, safety, or environmental issue or to assess a problem that has arisen, it must place principal reliance on the on-site contractor. The report contained recommendations that certain changes were needed; they included effective communications with contractors and the maintenance and improvement of the technical expertise and morale of personnel, whether federal or contract, upon whom the effectiveness of the entire nuclear weapons program depended. These recommendations were recognized in the report as basic principles that DOE had not applied consistently in the past.
- Another National Research Council report, issued in 1987, contained facts noting that its 1985 review showed that DOE's fundamental operational tenet was to place responsibility for safety primarily upon the contractors.[4] Although the report stated that this delegation of operational responsibility to contractors may be appropriate, it also stated that the assignment does not relieve DOE of its legal mandates to ensure public safety and to supervise contractor administration. The report concluded that DOE at both headquarters and certain field locations had

[2]"The Department of Energy's Use of Consultants and Contractors," in Oversight of the Structure and Management of the Department of Energy, Staff Report, Committee on Governmental Affairs, United States Senate, 96 Congress, 2nd Session Dec. 1980.

[3]The Nuclear Weapons Complex, Committee to Provide Interim Oversight of the DOE Nuclear Weapons Complex, Commission on Physical Sciences, Mathematics, and Resources.

[4]Safety Issues at the Defense Production Reactors, Committee to Assess Safety and Technical Issues at DOE Reactors, Commission on Physical Sciences, Mathematics, and Resources and Commission on Engineering and Technical Systems.

relied almost entirely on its contractors to identify safety concerns and to recommend appropriate actions. This reliance on contractors resulted from a marked imbalance in technical capabilities and experience between the contractors and DOE staff. The report also noted that the contractors at the production reactors had a large permanent staff, while DOE's personnel presence on these sites was relatively small.

- In the 1987 report, the National Research Council recommended that DOE should acquire and properly assign the resources and talent necessary to ensure a safe operation. In recognition of changes in staffing levels and budgets that would have been required to achieve such an undertaking, the Secretary of Energy tasked DOE officials to identify ways to have functions that were administered by contractor personnel done by federal employees. According to OMB officials, DOE has recently added staff at some locations.
- We have also voiced serious concerns over DOE's management and safety oversight of the weapons complex. For example, in September 1988, we testified on ineffective management and oversight over DOE's reactor at a specific location, the Savannah River Plant in South Carolina.[5] We expressed concern about DOE's management of contractors who operate facilities that were involved in the nation's nuclear defense. We cited the lack of direction to the contractor at Savannah River and expressed the belief that it appeared that contractors, rather than DOE, appeared to be in control. We noted that a complacent management attitude existed within DOE and that the nature of the relationship between DOE and the contractor was such that we continued to ask, "When will DOE take control?" We suggested that DOE needed to change its attitude to address that question. This report was one of over 30 reports and testimonies in recent years in which we identified serious problems in DOE's nuclear defense complex. Our findings regarding the Savannah River project supported the need to strengthen internal management of contractor operations.

## EPA

In a January 1989 report prepared by the Office of Technology Assessment (OTA) on its assessment of EPA's contractor use in Superfund work, OTA said that there has been a steady drain of people with experience and expertise away from government personnel to contract personnel. This drain compromises the environmental administration of Superfund because it makes it harder for EPA to supervise contractors adequately. The report indicated that the Superfund Program has been increasingly

[5] Ineffective Management and Oversight of DOE's P-reactor at Savannah River, S.C., Raises Safety Concern (GAO/T-RCED-88-68, Sept. 30, 1988).

dependent on contractors, who have received between 80 and 90 percent of its funds each year. This dependence is the outcome of both congressional and EPA decisions in the early 1980s. OTA recognized that the Superfund could not exist without contractors.

The issue, however, according to OTA, is how much contractors do, how the government manages them, and whether contract work is consistent with traditional views on what should be contracted out. OTA said that developing policies and regulations and providing management and oversight seemed the least appropriate activities for contracting out. However, contractors have done a lot of work in these areas for the Superfund that seemed to go far beyond supportive information and analysis. OTA further said that government workers held on to official decisionmaking, but that the turnover, limited experience, and high workload of the government workforce could cause it to shift from controlling and using contractor expertise to depending on it.

A September 1989 report, Management Review of the Superfund Program issued by EPA's Administrator contained this statement:

> The Superfund Program's dependence on contractors for certain categories of policy and regulation development has been the object of considerable criticism in Congress and from the public at large. While the practice of using contractors as an "extra pair of hands" in regulatory and policy work may have been viewed as a necessity in the past, it is clear that continuing along these lines in the future threatens the integrity of the program.[6]

EPA recognized that the program was at the outset legislatively designed to utilize a large contractor workforce to minimize the growth of a large EPA bureaucracy. However, the report concluded that this approach was sound only if the lines were clearly drawn between what work was done by EPA employees and what support was appropriately provided by contractors. The report also noted that in a program as complex as the Superfund, even well-intentioned contractors could have found themselves in awkward positions. For example, EPA expressed concern in the report about the potential for conflict of interest in situations in which contractors recommended using cleanup technologies or methods offered by their subsidiaries or were charged with implementing in the field the very policies or regulations they developed for EPA in Washington. The report recommended that to fully mitigate the serious perception problem that exists with regard to contractors assisting with

[6] A Management Review of the Superfund Program, EPA (Sept. 21, 1991).

policy and regulatory development, that EPA should begin to increase its in-house staff to reduce dependence on contractors.

We too have reported problems concerning the Superfund Program, involving agency understaffing, EPA's failure to monitor and control contractor costs, and the need to strengthen contractor conflict of interest controls. For example, in October 1987, we reported the results of a survey in which Superfund employees said they believed the program was understaffed by as many as 600 full-time technical employees. Our survey showed that about 80 percent of Superfund employees worked in units they believed were understaffed.[7]

In July 1988, we reported that EPA had not sufficiently monitored, controlled, or challenged contractor expenditures and professional staff usage. We noted at 50 percent of the sites that we reviewed that inadequate contractor or subcontractor administration, as determined by EPA, increased the cost of the work. EPA, however, did not challenge the questionable costs. By not challenging questionable contractor costs, EPA could have been conveying a message to contractors that it was willing to accept all costs regardless of the level of administration provided, thereby lessening the contractors' incentives to control costs.[8]

In February 1989, we reported that EPA's conflict of interest system contained weaknesses that hindered EPA's ability to adequately ensure that contractors were adhering to EPA's policy. In its routine reviews of contractors' administration, EPA did not check to determine that contractors had followed policies and procedures for preventing conflicts of interest and were in compliance with EPA's requirements.[9]

## NASA

In response to the accident on January 28, 1986, involving the Space Shuttle Challenger and its crew, the House Committee on Science and Technology conducted an investigation and issued a report on October 29, 1986. The Committee cited problems with contractor administration involving numerous cases in which contractor employees failed to comply with guidelines to carry out assigned duties. The report noted that during the last decade, NASA had experienced significant decreases

[7]Superfund: Improvements Needed in Work Force Management (GAO/RCED-88-1, Oct. 26, 1987).

[8]Superfund Contracts: EPA Needs to Control Contractor Costs (GAO/RCED-88-182, July 29, 1988).

[9]Superfund Contracts: EPA's Procedures for Preventing Conflicts of Interest Need Strengthening (GAO/RCED-89-57, Feb. 17, 1989).

in manpower. A disproportionate reduction may have occurred in the safety, reliability, and quality assurance at NASA headquarters and at the Marshall Space Flight Center.

The Committee noted that in the wake of the Challenger accident, serious questions arose over whether NASA had sufficient technical personnel to identify and solve problems. The Committee expressed concern that reductions in staffing levels and departures to the private sector by experienced NASA technical employees contributed to NASA's problem assessment capability. The Committee concluded that reductions in NASA's civil service personnel had adversely affected the agency's ability to maintain the appropriate level of oversight. The Committee said that although it was appropriate to establish strong contractor capabilities, the internal oversight and coordination responsibilities should have been NASA's.

NASA's November 1990 report on the Hubble Space Telescope optical systems failure concluded that the fabrication of the telescope was the responsibility of the contractor and that this fabrication was insulated from review or technical supervision. NASA's management and review units failed to follow the fabrication process with reasonable diligence and were unaware of the problems that occurred. NASA reported noted that the primary mirror development was particularly challenging because of stringent administration requirements. The contractor, however, had clearly specified in the proposal that it would place total reliance on a single test instrument and that it would not do an optical administration test at higher levels of assembly. Although NASA accepted this proposal, the methodology should have alerted NASA management to possible problems with this process. NASA concluded that its project management should have made an effort to identify those aspects of the project in which there was a risk of error with serious consequences to the mission. Upon recognizing the risks, NASA project management should have considered actions that would have mitigated the risk.

## Cost of Consulting Services Generally Unknown

Our review showed that agencies generally did not know whether contracting for consulting services cost more than administering the work in-house. OMB Circulars A-120 and A-76 did not require agencies to make cost comparisons before contracting out for consulting services. Therefore, agency officials were not sure whether contracting for consulting services cost more than using in-house staff. We discussed each of the 24 headquarters cases in which we questioned appropriateness—at DOT, DOE, and EPA—with responsible contract and program officials to obtain

their views of the relative costs of using contractors versus doing the work in-house. Overall, we spoke with 48 agency officials.

- Twenty told us that they were not sure whether it cost more to contract for the work in question than it would to administer the work in-house.
- Nine said they thought that it might cost more to contract for the work.
- Twelve said they thought it would not cost more to contract for the work.
- Seven chose not to respond.

Some agency officials believed contracting for consulting services cost more, and certain anecdotal evidence supported this belief. For example, DOE's Inspector General's Office said that it cost more to contract out for professional auditing services. Staff shortages, however, prevented the agency from keeping this work in-house. One contracting official said that in his opinion contract staff earned more than government auditors. Another official said that it cost at least $20,000 per staff-year more to contract out for audit services than to use federal employees. This case is discussed in appendix II.

In some cases, we noted that contracting in general—not necessarily contracting for consulting services—appeared to cost more than doing the work using government employees.

- As discussed in chapter 4, DOE planned to convert 105 positions held by contractors to federal positions at the Western Area Power Administration (WAPA). Agency officials estimated that annual savings of $4.5 million could result.
- Another case showed that contracting may cost more even in instances in which savings are anticipated. For example, a DOD Inspector General's report issued in July 1990 indicated that the armed services would realize some savings by contracting versus in-house operation on most of the contracts reviewed. However, overall, the armed services would spend over $158 million more because they were not effectively monitoring contractor work. Not only were the services not able to realize anticipated savings of about $95 million, they were also spending an additional $63 million as a result of contractor inefficiencies.

In August 1991, we reported to the Chairman, Senate Subcommittee on Federal Services, Post Office and Civil Service, that in some cases, DOE's use of support service contractors cost substantially more than the use of federal workers. We estimated that DOE spent about 25 percent more

by contracting for 11 of 12 contracts for which we conducted cost comparisons. The results were estimated to cost at least $5 million more than having the work done in-house.[10]

Overall, however, the question of whether contracting out for consulting services is more or less costly for the government is still largely unanswered. This review did not focus on this issue because we believe that when governmental functions are involved, cost may not be a relevant consideration. In such cases, if it is imperative that the government do the work in question, we believe that the government should absorb any associated costs.

[10]Energy Management: Using DOE Employees Can Reduce Costs for Some Support Services (GAO/RCED-91-186, Aug. 16, 1991).

# Conclusions, Recommendations, and Matters for Consideration by the Senate Committee on Governmental Affairs

## Conclusions

As we stated in chapter 1, our review was intended to provide answers to certain questions that were raised by the Chairman, Senate Subcommittee on Federal Services, Post Office and Civil Service, Committee on Governmental Affairs, because of his concern about the government's growing reliance on consultants to administer its basic work.

### Are Governmental Functions Clearly Defined?

The concept of governmental functions is difficult to define and is, therefore, subject to varying interpretations. As a result, guidance to federal agencies on how to define governmental functions is extremely limited and is also subject to different interpretations. The lack of useful guidance may have also contributed to agencies using contractors to administer functions that should only be done by federal employees. We believe that clarifying the guidance would help federal agencies to decide whether or not to contract out particular types of work.

The principal guidance on which activities are governmental functions was developed by OMB. The guidance generally indicated that contractors should not be used to administer work of a policy, decisionmaking, or managerial nature, which is to be the direct responsibility of agency officials. According to OMB, a governmental function is so intimately related to the public interest that it must be administered by government employees. These functions include activities that require either the exercise of discretion in applying governmental authority or the use of value judgments in making decisions for the government. Agency officials who participated in the two symposiums that we held in June 1990 told us they believed the guidance should be more clearly defined.

Some federal agencies such as DOE and EPA have developed their own, more specific guidance. These agency guidances have attempted to identify functions that are relevant to agency-specific activities. We believe that if each agency developed its own guidance then it could provide more examples of the types of functions that may or may not be administered by contractors. However, we found that sufficient guidance alone will not preclude federal agencies from using contractors to administer activities that could involve governmental functions. Staffing constraints and legislated authorization for specific federal programs and activities also contributed to agencies using contractors.

Essentially, we believe that the identification of governmental functions to be reserved for government officials depends on (1) the relationship of the government to the contractor and (2) the technical and management capacities of the government agency. However, each situation

must be examined individually. Therefore, we are recommending that OMB clarify its existing guidance to the agencies by issuing guidelines that the agencies can use in determining which activities are appropriate or inappropriate for contracting out. We are suggesting the guidelines that are outlined in figure 2.1 as a starting point.

We found little basis in American law on which to identify a comprehensive list of specific functions that must be administered solely by government personnel. We believe that it is often difficult to clearly distinguish between a contractor's assisting the agency in accomplishing a task and the contractor's actual accomplishment of that task for the agency. Most people would probably agree that the government's constitutional powers—powers that are specifically governmental, such as making treaties, imposing taxes, and declaring war—need to be administered by government employees. However, this raises the question about the extent to which and the manner in which the government may employ contractors to assist it in executing these powers. The question of which functions must be reserved for government employees depends on the control and relative management responsibilities of government officials over contractors and must be addressed on a case-by-case basis.

We believe a short list of functions that should not be contracted out could be developed, although such a list would be largely judgmental. We have identified some functions that if assigned to contractors would give them, in our opinion, too much influence and control over the policymaking and management of a government agency. These functions include developing and presenting testimony, holding hearings, representing an agency before the public, and supervising federal employees.

We also believe that each agency should develop its own implementing policies. Each agency should examine its agency-specific functions and identify those functions that should appropriately be administered only by government employees. The identification of these functions should be consistent with OMB policies.

## Are Federal Agencies Using Service Contractors to Administer Governmental Functions?

Although most of the contracts we reviewed seemed appropriate for contractors to administer based on the existing OMB and agency policy guidance, we found that each of the agencies we reviewed contracted out some work that might involve governmental functions. Because of the difficulty in defining governmental functions, we were not, however, able to specifically conclude whether the activities in question involved

such functions. We also questioned the following aspects of the contracts: whether the agency contracted out to bypass personnel ceilings, because of the lack of sufficient staff or of staff with sufficient expertise; whether the agency contracted out at a cost higher than that to do the work in-house; problems with contract administration; and possible conflicts of interest. Although DOE and EPA have issued internal guidance with more specificity than OMB's guidance, they were still contracting out some activities that may have involved governmental functions.

## Why Are Federal Agencies Using Service Contractors to Administer Governmental Functions?

Overall, it appears that the major reasons agencies use contractors to administer some governmental functions are the lack of authorized federal positions for employees or the lack of federal employees with sufficient expertise to do the work. Other reasons that agencies contract out for governmental functions include the legislative and budgetary authority provided for certain programs, such as the Medicare Insurance Program and the Superfund Program. Agency Inspectors General are also generally authorized by law to contract out for audit services. In addition, the lack of useful guidance to agencies about which functions are appropriate for contracting out may have contributed to agencies' use of contractors to administer governmental functions.

Because contracting out governmental functions cannot be curtailed or eliminated solely by revising guidance to agencies, other contributing factors should be considered for possible action. It is generally believed by the federal agency officials we spoke to that contracting for governmental functions is attributed largely to staff shortages, the lack of staff with sufficient expertise, and the fact that it is easier to obtain contract dollars rather than staff. We therefore believe that Congress and OMB should consider allowing civilian agencies to manage their activities within an authorized budget without regard to personnel ceilings. Although since 1985 Congress annually has enacted legislation to remove civilian employment ceilings from DOD activities, a report issued by DOD's Inspector General in February 1991 noted that of the armed forces, only the Navy had initiated an effort to operate without regard to manpower ceilings. The Inspector General found little evidence that program officials had seriously attempted to define needs and obtain sufficient staffing. The Navy, however, plans to reduce the use of contractor support in certain areas. In order to ensure that the government has the ability to administer governmental activities without having to rely on contract consultants, we believe that Congress should consider providing agencies with the authority and flexibility to staff such functions internally.

## What Are the Potential Effects of Relinquishing Government Control to Contractors?

Our review did not focus on identifying the specific effects of agencies using contractors to administer governmental functions for the contracts we reviewed. Many of these contracts were still in process, and the effects of contracting out the work were not readily apparent. However, our review and analysis of the literature and earlier GAO reports noted some serious problems with various government programs in which the government had placed substantial reliance on contractors, which may have resulted in the government losing its capacity to manage effectively. The contracts reviewed did not necessarily relate to contractors or to governmental functions. They did, however, suggest that the government should not relinquish its control over important projects involving contractor support. When the government allows contractors to assume control over key functions, situations can result that are not in the government's best interest and that may be costly to correct.

## Recommendations to the Director, OMB

Because the concept of governmental functions is difficult to define and is subject to varying interpretations, guidance to federal agencies on this subject is limited. The lack of clear guidance appears to be contributing to agency use of contractors to administer governmental functions. As noted in chapter 2, OMB plans to issue a policy that will address what type of work is inherently governmental and that can be used by federal officials when deciding whether to contract out for a particular task. At the time of our review, this new policy was not yet available for our evaluation. We believe that a policy clarification is needed, and because of the strong congressional concern about this matter, we believe that OMB should consult with the appropriate committees of Congress when formulating a new policy.

We recommend that the Director, OMB, take the following actions:

- Clarify OMB's guidance to agencies on contracting for consulting services. Because the identification of governmental functions requires consideration of the particular circumstances involved (e.g., the type of function as well as the relationship that will exist between the agency and the contractor), the OMB guidance should articulate the basic principles on which such judgments should be made and also provide guidelines to assist agencies in making their determinations. Chapter 2 of this report discusses the basic principles that resulted from our work. We suggest the guidelines in figure 2.1 as a starting point for agencies in determining whether the use of contractors would be appropriate. (See p. 32.)

- Compile a short generic list of functions that could be applied throughout the government, which, as a matter of policy, should never be contracted out. Care must be exercised in developing such a list, however, so that a distinction is made between assistance and administration of a task. We stated in a 1981 report that administration begins when the contractor's involvement in basic agency functions is so extensive that the agency's ability to develop and consider options other than those provided by the contractor is limited. Activities that should not be done by contractors could include the following:
  - developing and presenting testimony,
  - holding hearings,
  - signing agency correspondence,
  - representing an agency before the public as if the contractor's staff were federal employees, and
  - supervising federal employees.
- Require implementing policies from each agency. Because each agency's mission is unique, OMB should require each agency head to examine his or her agency's activities, take into consideration the agency's role and responsibilities, and identify those specific functions that should appropriately be administered only by government employees. Each agency head should submit this list to OMB for informational purposes and should consider making revisions to the guidance in instances in which OMB believes the guidance may be inconsistent (1) with governmentwide policies or (2) among agencies, unless there is good reason. As noted in chapter 2, DOE and EPA have already issued their own guidance on governmental functions, and DOD plans to issue such guidance. DOD officials said that its guidance is to be consistent with the OMB guidance and will also be based on the results of this GAO report.

## Matters for Consideration by the Senate Committee on Governmental Affairs

Given the difficulty in defining governmental functions, agencies need improved guidance to use when deciding which functions should be handled by federal employees and which functions may be appropriately handled by contractors. OMB is planning to develop new guidance for this purpose. Because of Congress' interest in this issue, the Committee should hold hearings once OMB develops the revised guidance to ensure that the guidance is consistent with congressional views on this subject. If the Committee is still concerned about the revised guidance, it may want to consider legislation specifying which activities are not to be administered by contractors.

Federal agency officials generally believed that contracting for governmental functions is largely the result of staff shortages, the lack of staff

with sufficient expertise, and the fact that contract money is more available than staff. If the government is to administer activities that may involve governmental functions without having to rely on contractors, the Committee should consider providing agencies with the authority and flexibility to use government employees for such activities. To do this, the Committee may want to explore with OMB allowing civilian agencies to manage their activities within an authorized budget without regard to personnel ceilings.

## Agency Comments and Our Evaluation

We obtained written comments from OMB, DOE, EPA, DOT, DOD, and NASA on a draft of this report. Overall, the agencies agreed with our conclusion that the concept of governmental functions is difficult to define and is subject to varying interpretations. Five of the six agencies agreed with our recommendations that OMB should (1) clarify its guidance to agencies on when it would be appropriate for agencies to contract out and (2) compile a short generic list of functions that should never be contracted out. DOE did not comment on these recommendations. Four of the six agencies agreed with our recommendation that OMB should require policies from each agency regarding which specific functions should appropriately be administered only by government employees. OMB did not agree with and DOE did not comment on this recommendation.

Four of the six agencies generally agreed with our conclusion that contracting for governmental functions is attributed largely to staff shortages and the lack of staff with sufficient expertise. OMB and DOT did not comment on it.

Our summary of agency views on the principal matters discussed in the report is in table 6.1.

**Table 6.1: Summary of Agency Views on Conclusions and Recommendations**

| | OMB | DOE | EPA | DOT | DOD | NASA |
|---|---|---|---|---|---|---|
| **Conclusions** | | | | | | |
| Agency agrees that | | | | | | |
| The concept of governmental functions is difficult to define and is subject to varying interpretations. | Yes | Yes | Yes | Yes | Yes | Yes |
| Contracting for governmental functions is attributed largely to staff shortages and the lack of staff with sufficient expertise. | [a] | Yes | Yes | [a] | Yes | Yes |
| **Recommendations** | | | | | | |
| Agency agrees that OMB should | | | | | | |
| Clarify its guidance to agencies on when it would be appropriate for agencies to contract out. | Yes | [a] | Yes | Yes | Yes | Yes |
| Compile a short generic list of functions that should never be contracted out. | Yes | [a] | Yes | Yes | Yes | Yes |
| Require implementing policies from each agency regarding specific functions that should appropriately be administered only by government employees | No | [a] | Yes | Yes | Yes | Yes |

Note: Views are either expressly stated or implied in agency letter.
[a]Agency letter did not indicate agency view on this matter.

Our analyses of each agency's comments on our principal conclusions and recommendations follow. The full text of each agency's letter along with our additional comments on the letters are included in appendixes III through VIII.

## OMB

OMB concurred with our conclusion that the concept of governmental functions is difficult to define. OMB also agreed that government officials should retain sufficient control and be held accountable when contractors are administering government work. OMB noted that it is currently revising its guidance to federal agencies on what constitutes governmental functions. According to OMB, the revised guidance is to include examples, as we recommended, to define more closely those activities that are inappropriate for contracting out. The revised guidance is to also make the crucial distinction, discussed in our report, between contractors' efforts that support governmental functions and those that constitute performance of those functions. When the guidance is revised, OMB said it will provide a copy of it to the appropriate congressional committees.

OMB did not concur with our recommendation that it should require agencies to supplement OMB's revised guidance with their own. OMB

believed that its revised guidance would be sufficiently comprehensive and preferred to minimize the proliferation of agency-generated instructions. In addition, OMB did not believe that legislation specifying governmental functions was necessary or desirable but that a regulatory approach offered more flexibility. OMB believed it was generally in agreement with GAO on the fundamental principles involved and that the final guidance to the agencies will clearly take into account congressional views on governmental functions.

Because agencies have varying missions and circumstances and it is unlikely that OMB's general guidance would be able to cover every mission and circumstance involved, we believe that implementing policies from each agency would enhance the agency's ability to decide when contracting out would be appropriate. As previously noted, four of the five other agencies that commented on this report agreed with our recommendation for agency-specific guidance, and DOE and EPA have already issued their own guidance; DOD plans to issue such guidance. We also believe that it would be useful to ensure consistency with OMB policies by having agency heads coordinate their implementing policies with OMB. If each agency develops supplemental guidance it is possible that some agencies could identify certain functions as inherently governmental that other agencies do not. To avoid such an inconsistency, we believe OMB should review the agencies' policies to ensure that this does not occur without good justification.

We did not specifically recommend, as OMB indicated, that Congress enact legislation specifying which functions are governmental. However, as a matter of congressional consideration, we suggested that once OMB develops its revised guidance, hearings should be held to ensure that the guidance is consistent with congressional views. If Congress still has concerns with the revised guidance, it may want to include in legislation specific activities that are not to be contracted out. We believe that our suggestions are consistent with OMB's approach to developing its guidance on inherently governmental functions. Congressional hearings on OMB's revised guidance should provide an open forum for discussion of the relevant issues by a variety of interested parties. If OMB is successful in reconciling and reflecting these views in its final guidance, legislation would not be necessary.

OMB also did not agree with our suggestion for congressional consideration that agencies should be permitted to manage contracts without regard to personnel ceilings. According to OMB, dollar constraints alone have not proven to be an effective management mechanism in all cases,

and personnel ceilings can provide a useful additional degree of oversight. OMB said that it has been responsive to agency requests for increases in personnel ceilings when legitimate deficiencies have been identified, such as in the area of contract administration. During our review, OMB officials told us that OMB is willing to consider requests for additional staff if the requests adequately justify cost savings. The officials cited DOE staffing as evidence of OMB's change in attitude toward agency staffing.

We noted recent OMB actions showing OMB's willingness to increase DOE's staffing to ensure that it includes sufficient positions to administer governmental functions. OMB's actions seem to be a step in the right direction. However, our review showed that some agencies believe that staff shortages and ceilings are precluding the administration of agency activities in the most efficient and effective manner. OMB seems to have adopted a reactive rather than a proactive policy toward agency staffing. That is, it appears that agencies will have to come to OMB on a case-by-case basis to get authorization to hire personnel instead of contractors. This situation could continue the perception that it is more difficult to justify the use of personnel than contractors.

We believe that OMB needs to clearly advise agencies if a change in its views concerning personnel ceilings reflects a significant change in the budget authorization process from that in effect over the last decade. Because of the significance of this matter and the concern expressed by the agencies that have commented on this report, we continue to believe that this is an appropriate matter for congressional consideration.

## DOE

In commenting on our discussion in appendix II on the Inspector General's use of contractors for audit services, DOE acknowledged that a fair argument can be made that services provided by auditors under contract are inherently governmental. DOE said, however, that it did not take a formal position on this question precisely because of the inconsistent guidance in that area, which we discussed in the report. DOE said that because of federal staffing limitations, the Inspector General could not meet legislatively mandated audit responsibilities unless the agency contracted for audit services. Given the audit responsibilities of the Inspector General, the lack of federal staff to carry them out, and the legal authority to contract for audit services, DOE said that its alternatives are few.

DOE's comments support our belief that Congress should consider the desirability of providing agencies with the authority and flexibility to use federal employees in appropriate instances. As noted in appendix II, officials in the Inspector General's Capital Region told us they would prefer to do auditing work with their own staff because then they can more easily maintain control over the work. One official said that such work would be less costly if done in-house and estimated additional costs from using contractors of about $20,000 per staff-year.

We noted that OMB has been receptive to the Inspector General's requests for staffing increases during the last 2 fiscal years. Because of the possible cost savings from using government employees, we believe that this is a step in the right direction. However, as previously noted, OMB has not issued a formal policy reflecting this increased receptivity to staffing increases.

## EPA

EPA said that it considers the quality of contract management and the various issues raised when contracting for services to be of critical importance. Because of the high visibility of environmental issues and EPA's extensive use of contractors to assist in accomplishing its mission, EPA's Administrator issued a policy statement in April 1990 and an EPA Order in October 1990 that recognized that certain activities are inherently governmental in nature. A number of these activities were identified as being prohibited from being contracted out, and other areas were cited as needing special control and oversight if they are to be contracted out.

EPA recognized that striking a proper balance between performing work in-house and contracting out certain activities is key to maintaining the integrity of the agency while it accomplishes its environmental mandate. The decision for contracting out services is made on a case-by-case basis depending on the nature of the services needed and the expertise of EPA staff.

EPA agreed that it would be helpful for OMB to develop a short generic list of actions that are inherently governmental and to include the list in an OMB policy letter on the subject. Once OMB develops such a list, EPA said that it would supplement, as necessary, the OMB policy with its own specific guidance tailored to meet EPA's discrete responsibilities.

In our draft report, we proposed that each agency head be required to submit its list of activities to OMB for approval to ensure consistency

# Reasons GAO Questioned 28 Cases at DOT, DOE, and EPA

| Agency/ contract number | OMB criteria | Agency criteria[a] | Bypassing personnel ceilings | Contract administration[b] | Quality of contractor work | May have cost more to contract | Possible conflict of interest |
|---|---|---|---|---|---|---|---|
| **DOT** | | | | | | | |
| 85Y01034 | x | | | | | x | |
| 84C00017 | x | | x | | | | |
| 88C41013 | x | | x | | | x | x |
| **DOE** | | | | | | | |
| 87CE40762 | x | x | x | | | | |
| 87RW00072 | x | x | x | | | | |
| 88IG00175[c] (p. 85) | x | x | x | x | | x | |
| 85IG00103[c] (p. 85) | x | x | x | x | | x | |
| 88EH79027 | x | x | x | | | | |
| 88NE46125 | x | x | x | | | x | |
| 88FE61666 | x | x | x | | | | |
| 83AL23275[c] (p. 38) | x | x | x | | | x | |
| 84AO26551[c] (p. 86) | x | x | x | x | | | |
| 86WA01445 | x | x | x | | | x | |
| 86WP16126 | x | x | x | | | x | |
| 87WA01937 | x | x | | | | | |
| 87AL43521[c] (p. 86) | x | x | x | x | x | | |
| 88AL43782[c] (p. 38) | x | x | x | | | x | |
| 88AL52259 | x | x | x | | | | |
| **EPA** | | | | | | | |
| 68017283[c] (p. 41) | x | x | x | x | | | x |
| 68017289 | x | x | x | | | | |
| 68017347[c] (p. 89) | x | x | x | | | | |
| 68017364 | x | x | x | | | | |
| 68017367 | x | x | x | | | | |
| 68017368 | x | x | x | | | | |
| 68017375 | x | x | x | | | | |
| 68017439 | x | x | x | | | | |
| 68017455 | x | x | x | | | | |
| 68017489 | | x | x | | | | |

[a]Includes 10 cases that seemed inconsistent with EPA's internal guidance that was issued in April 1990 and in October 1990 after the contracts reviewed were awarded. EPA was not, therefore, required to follow this guidance at the time of the awards. However, the guidance was useful in describing EPA's current views on the issue of governmental functions.

[b]For this analysis, we considered such diverse matters as the lack of documentation of an agency's contract monitoring efforts and the issuance of a final agency report without appropriate recognition of a contractor's participation as problems that involve contract administration.

[c]Contract is summarized as a case study in this report on the page indicated.

# Additional Summaries of Cases GAO Questioned

## Cases 8, 9, 10, and 11

These four cases involved professional audit services contracts awarded by DOE's procurement office for the Inspector General (IG). Because they involved relatively similar activities, we have combined them for discussion purposes. We summarize the contractors' duties first and then give our reasons for questioning them.

## Cases 8 and 9

These cases involved two contracts awarded by DOE's procurement office for the IG's Capital Region in the Washington, D.C., area. The two contracts were for professional audit services that were to be provided by the same contractor, a firm of certified public accountants. The first contract, for about $2.7 million, was awarded in 1985; the second contract, for about $2.0 million, was awarded in 1988 and was a continuation of the earlier contract.

Under both contracts, the contractor was to provide audit services involving any or all DOE organizations, programs, activities, and functions. The contractor was also to provide technical assistance to the IG in resolving audit findings. The contractor was to administer comprehensive audits, financial and compliance audits, economy and efficiency audits, program results audits, and special analyses and evaluations. The following are examples of tasks that the contractor performed under the initial and continuation contracts.

- One task under the first contract required the contractor to review DOE's audit resolution and follow-up system. The purpose of the audit was to evaluate the audit resolution decisions and to determine the validity and accuracy of documentation on amounts reported in DOE's tracking system. The audit was to result in a report on the system in order to meet the requirements of OMB Circular A-50, which requires that each agency's audit resolution and follow-up system be evaluated periodically. OMB Circular A-123 assigns responsibility for such evaluations to each agency's IG or the senior audit official.
- One task under the second contract required the contractor to review program results of the Hazardous Materials Survey Program in order to determine whether the organic analysis work at some DOE laboratories was sufficient and, if not, what options were available. The audit objectives were to determine (1) whether the testing laboratories administered analysis work for the environment surveys in conformance with prescribed procedures and protocols and (2) whether DOE could recoup the losses attributable to inadequate analysis that had made resampling and reanalysis necessary. The contractor was to write a final report on this review.

## Case 10

This case involved a contract awarded in 1988 by DOE's procurement office for the IG's Western Region in Albuquerque, New Mexico. This contract, for about $3.8 million, was for professional audit services to be provided by the same contractor that worked on cases 8 and 9. The contractor was to administer work for an initial 2-year period for about $1.5 million, with a 3-year renewal option for about $2.3 million. According to DOE, it did not extend the contract at the end of the 2-year period because of funding limitations. Contract documents indicated that DOE had problems with the quality of the contractor's audit work and reports. In the documents, DOE expressed concern to the contractor that (1) the audits were not well planned, (2) some contract employees did not meet contract requirements, (3) the working papers and reports were not prepared with due professional care, and (4) due dates were not met. This contract was a continuation of an earlier contract for $2.1 million awarded in 1984 to the same contractor.

Under the continuation contract, the contractor was to provide professional contract and financial assistance audit services involving the review of contract awards, costs incurred, overhead rates, close-outs, and post-award audits involving defective pricing. This contract required the contractor to

- review internal control methods used by DOE's Operations Office and its contractors to prevent costs from being incurred, or prevent the reimbursement of them to contractors, that were unallowable, unallocable, or unreasonable;
- review DOE's compliance with the Federal Managers' Financial Integrity Act; and
- make a pre-award audit of the cost proposal submitted by another contractor involving a separate contract.

## Case 11

This case involved a contract for about $3.3 million awarded by DOE's procurement office for the IG's Western Region in 1984. The initial contract period was for just over 1 year; however, the contract as extended was in effect for about 3 years. This contract was with a firm different from the one in the previous three contracts.

Under this contract, the contractor was required, as in cases 8 and 9, to administer expanded scope audits, financial and compliance audits, economy and efficiency audits, and program results audits as well as other services required by the IG. This contract required the contractor to do the following:

- Review DOE's automated field accounting system to determine whether (1) internal controls were adequate, (2) the system conformed to legal requirements, and (3) the system was operated efficiently and economically.
- Evaluate for economy and efficiency the financial management of employee benefit plans, such as pensions, savings, and stock ownership by contractors and DOE offices. As part of this work, the contractor was required to determine whether the pension plans allow for "double dipping" by former contractor or federal employees.

The contractor also proposed task orders for contract work, which were approved by DOE contract officials. One task order, for about $26,000, involved an audit proposed by the contractor of the Western Area Power Administration imprest funds.

Inspectors General are generally authorized by the Inspector General Act of 1978, as amended, to contract out for audit services. Also, OMB Circular A-120 says that advisory and assistance services include activities such as auditing. In the absence of this authority, however, we would have questioned these contracts because of other criteria contained in OMB Circular A-120 and in DOE guidance. For example, we had questions about portions of these auditing contracts for several reasons, such as inconsistencies in DOE requirements on the administration of government functions; the possible bypassing or undermining of agency personnel ceilings, which both OMB and DOE guidance prohibit; problems with contract administration; and the high cost of contracting when compared with the cost of agency staff doing the work.

DOE's own policy set forth in Order 4200.3B considers the determination of the success or failure of DOE internal management and program management activities a government management function that should be administered by government employees. As noted earlier, cases 8, 9, and 11 required the contractors to conduct program results audits. Although contractors are not prohibited by law or OMB policy from conducting program results audits, we questioned these contracts because this was inconsistent with DOE guidance. This guidance appears to be more restrictive than other guidance on this matter.

We also questioned case 10 because the DOE order says that the selection of procurement sources is a governmental function, and in this case the contractor was tasked with evaluating cost proposals submitted by another contractor before contract award. We believe that evaluating cost proposals is a key task in the selection of procurement sources. We

also questioned portions of case 11 because of the problems noted above concerning contract administration. DOE, however, elected not to continue the contract. In addition, we questioned case 11 because the DOE order says that DOE employees are solely responsible for determining work requirements, and a support service contractor must not be allowed to identify its own work requirements or write its own task assignments for an existing contract. As noted above, the contractor proposed some of his own task orders.

We did note that DOE's IG generally referred to the contractor's work in the audit reports, thereby disclosing the contractor's participation. The IG staff's involvement during the course of the contractor's work also was well documented in the files we reviewed. The report on the audit resolution and follow-up system, which the IG signed, included a statement in the executive digest that a contractor had participated with the Office of Inspector General in the audit. However, throughout the report, the work was described as if it had been done by the IG's staff. Phrases such as "our review," "our findings," "auditor comments," and "we recommend" conveyed the message that this was work administered by the IG. The brief reference in the executive digest to the contractor's participation was not repeated in the body of the report and, in our view, did not give enough attribution to the work the contractor did.

We also questioned a portion of this contract because of what appeared to be an inappropriate augmentation of agency staff. OMB Circular A-120 says that advisory and assistance services shall not be used to bypass or undermine personnel ceilings. Also, according to DOE policy guidance in Order 4200.3B, support services contracts shall not be longer than 5 years, including options. DOE has contracted with the two firms for auditing services for several years. We believe that the initial award in 1985 of the contract discussed in case 8 and the 1988 extension in case 9 of the initial contract for several years may be inconsistent with the intent of OMB and DOE policy. The contractor was still providing audit services to the IG when we reviewed these contracts in 1990. As discussed below, DOE officials told us that sufficient agency staff were not available to do audit work for the IG and that it became necessary to contract out for the work.

Officials in the IG's Capital Region told us they preferred to do auditing work with their own staff because it was easier to maintain control. An official in the IG's headquarters office said that the IG used contractors for audit services because of staffing constraints. He even said that he considered audit services to be a governmental function. He also said

that such work could be less costly if it were done in-house. He estimated that using contractors for audit services would cost at least $20,000 more per staff-year than if federal employees were used.

Officials in the IG's Western Region also told us that they considered internal auditing services to be a governmental function but that because of staff shortages they had to contract out for this work. They believed that Congress or OMB would give DOE the money for contractors. They said, however, that the Western Region was recently granted authority for several additional audit positions and that they believed that contractors would eventually not be used to administer audit work for the Inspector General.

These officials also said that instead of freeing in-house auditors to administer additional audit work, the use of contract auditors actually reduced in-house staff availability because of the time needed to review and monitor contractor activities. They said that although it might cost more to contract in the short run, over the long run, it could cost more to use government employees because of the cost of employee benefits. The officials said, however, that no cost study had been made to support this view. In December 1989, the Secretary of Energy wrote to the President that staffing inadequacies were severely affecting DOE's programs. The IG's fiscal year 1991 budget request indicated that increases in staffing for the Office of the Inspector General had been requested during the last two fiscal years. An official in the Office of the Inspector General said that OMB approved additional staff.

## Case 12

This contract, for about $136 million, required the contractor to provide support to EPA's programs for investigation, enforcement, and remedial planning activities. This work involved initial activities within the Superfund Program and established the database that formed the foundation of the overall program. EPA used reports developed by the contractor to assign a priority rating to hazardous substance disposal sites and to decide on an appropriate course of action to correct problems. The contractor was also required to provide support to EPA in enforcement proceedings against owners or operators of uncontrolled hazardous substance disposal sites or against generators and transporters of hazardous substances. Such proceedings may be directed toward obtaining an injunction against continued use of a site, an order to undertake remedial action, or recovery of costs the government incurred in undertaking such actions. The contract statement of work indicated

that this contract would provide the federal government's primary initial investigative capability and was essential to the development of the National Priorities List, which is a list of the most hazardous substance disposal sites. This list is the basis for EPA's site cleanup efforts.

As part of this effort, the contractor was to provide

- oversight of field activities, including monitoring remedial investigations and remedial actions;
- expert testimony during enforcement proceedings on the conduct of the personnel cited above and on observations of standard operating procedures; and
- affidavits and depositions, when required.

Generally, an EPA enforcement plan was to guide enforcement work. However, within the parameters of EPA's plan, the contractor appeared to be able to exercise considerable discretionary judgment on behalf of the agency, and the contractor's actions could have significantly affected EPA's cleanup program.

This contract involved Superfund activities for which EPA relied heavily on the use of outside contractors. We questioned a portion of this contract, however, because the activities that the contractor was to administer seemed to be inconsistent with OMB policy guidance. For example, according to OMB Circular A-76, the discretionary exercise of government authority is a governmental function that requires administration by government employees.

OMB Circular A-76 cites original investigations, prosecutions, and other judicial functions as examples of the discretionary exercise of government authority. As previously noted, this contract involved the provision of enforcement support to EPA.

Also, according to OMB Circular A-120, contractors should not be used to administer work of a policy, decisionmaking, or managerial nature, which is the direct responsibility of agency officials. In this case, the contractor's work provided the basis for EPA to assign priority ratings to hazardous substance disposal sites and to decide on appropriate courses of action to correct problems. It appeared that, in effect, the contractor's work could have heavily affected the day-to-day business of the agency and might have involved decisions that more appropriately should have been the responsibility of government employees. EPA enforcement action decisions appeared to have been substantially based on the work

of this contractor, who, on behalf of the government, was required to monitor the work of other parties outside the government to ensure that federal hazardous disposal requirements were being met.

Also, EPA Order 1900.2 considers the provision of support services, such as analyses to be used by EPA personnel in developing policy, as an activity that may place EPA in a vulnerable or sensitive position if adequate controls are not implemented. Such contract tasks, as noted earlier, would now require a justification to ensure that a final agency product is unbiased and represents agency thinking.

EPA officials told us EPA lacked sufficient staff to do this work, and they did not know whether the existing staff had the necessary expertise. They also did not know whether contracting was more costly to the government than doing the work in-house. However, they said that the administration wanted agencies to use contractors to the maximum extent possible. They told us the agency regularly monitored and reviewed the contractor's work. They said the contractor did not make decisions for the government; however, the contractor did make recommendations to EPA. The officials acknowledged that the contractor had more expertise in the subject area of this contract than EPA.

Our review of the contract files showed that EPA provided the contractor with more detailed guidance than that indicated in the contract itself and that EPA reviewed the contractor's work and modified it while the contract was in process. The files did not show, however, that EPA evaluated the contractor's methodology or made any changes to the contractor's final work products before accepting them. Accordingly, we were not able to determine the extent of EPA's involvement in these areas.

The contractor told us he believed that the firm had a greater corporate memory in this work area than the government. He said that in the 4 years that this contract had been in effect, he had dealt with 10 different contracting officers and four different technical representatives from EPA. The contractor said that the technical representative used to review the work on a weekly basis. This interval changed to once a month; now he meets with the contractor informally or telephones if there is a problem or the technical representative needs something. The contractor also said that EPA's technical representative had to confer with higher EPA authorities before decisions involving the contract could be made. The contractor believed this technical representative position

should be filled by someone at a higher level within EPA with more authority to make decisions.

# Comments From the Office of Management and Budget

Note: GAO comments supplementing those in the report text appear at the end of this appendix.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

OFFICE OF FEDERAL PROCUREMENT POLICY

SEP 17 1991

Mr. Richard L. Fogel
Assistant Comptroller General
United States General Accounting Office
Washington, DC 20548

Dear Mr. Fogel:

Thank you for your letter of July 19, 1991 to Director Darman. Your letter requests the Office of Management and Budget's (OMB) views on the draft General Accounting Office (GAO) report "Government Consultants," dated July 19, 1991. We believe the report represents an important effort to deal with a very difficult subject, and we appreciate the opportunity to comment on it in draft.

We concur wholeheartedly with the GAO's conclusion that the concept of "governmental functions" is difficult to define. We also agree that where contractors are performing work for the Government, Government officials should retain sufficient control of the process so that they can fairly be held accountable for the effort.

As the report notes, we are currently revising our guidance to Federal agencies on what constitutes governmental functions. The guidance includes examples, as you recommend, to define more clearly those activities that are inappropriate for contracting out. It also attempts to make the crucial distinction discussed in your report, namely, that between contractor efforts that support governmental functions and those that constitute performance of those functions themselves. We will provide a copy of the guidance to you, as well as to the appropriate Congressional committees.

We do not concur with the recommendation that OMB should require agencies to supplement our guidance with that of their own. We believe our guidance is sufficiently comprehensive and would prefer to minimize the proliferation of agency supplementing regulations.

We also do not believe that legislation specifying governmental functions is necessary or desirable. As there seems to be near universal agreement that specific governmental functions are difficult to identify, a regulatory approach offers more flexibility. Moreover, we believe OMB and GAO are generally in agreement on the fundamental principles applicable in this area. The final guidance to the agencies will clearly take into account Congressional views on this matter as well.

Finally, we do not agree with the report's recommendation that agencies should be permitted to manage contracts without regard to personnel ceilings. Dollar constraints alone have not proven to be an effective management mechanism in all cases, and personnel ceilings can provide a useful additional degree of oversight. Moreover, as the report makes clear, OMB has been responsive to agency requests for increases in personnel ceilings when legitimate deficiencies have been identified as, for example, in areas such as contract administration. However, even in this field, increasing agency staffing need not be necessary if better contracting techniques, such as performance-based contracting methods, are used. The Office of Federal Procurement Policy Memorandum for Agency Senior Procurement Executives, "Government-Wide Guidance on Contract Administration," dated March 15, 1991, and our Policy Letter No. 91-2, "Service Contracting," dated April 15, 1991, provide specific guidance to the agencies in this regard.

We have several other specific observations to make respecting the report, which we have enclosed. Thank you again for the opportunity to comment on the report.

Sincerely,

Allan V. Burman

Allan V. Burman
Administrator

Enclosure

**Additional OMB Comments on draft GAO Report "Government Consultants"**

See comment 1.

See pp. 46 and 23.

1. While there is a danger that control can shift imperceptibly to contractors, we also should not lose sight of the fact that our Civil Service workforce is a safeguard against contractors exerting too great an influence on Government policy. Civil servants certainly have the responsibility to detect deficiencies or biases in contractor work products. Moreover, we do not believe they are passive or indifferent in the performance of their oversight duties or in their roles as final signatories or authorizing officials.

See comment 2.

See p. 14.

Similarly, we should be aware of the danger of thinking of contractors as being opposed to the interests of the United States. Naturally, we strive for real and effective Government control, but Government errors of implementation do not invariably lead to the exercise of control, in whatever degree, by persons hostile to the goals of the agency they serve, or biased in favor of second rate solutions. To the extent the report does not bring out these points, we think it should be expanded.

2. Determination of what is the optimum balance between agency and contractor personnel is a highly sophisticated undertaking. It involves technical judgments, consideration of the short-term or long-term needs of the agency, and an understanding of the ability of the Civil Service system to attract and retain personnel with sufficient skills, among other things.

See comment 3.

See pp. 3, 34, and 38.

3. The report provides many interesting examples of contracts that "may" have, or "appear" to have, involved contract performance of a governmental function. However, while the report discusses the relevant considerations, it does not identify any one contract that did involve contractor performance of a governmental function. We believe the report should be amended to make this point clear. As it reads now, the impression is given that there are problems in the way that Federal agencies are dealing with the performance of governmental functions. In fact, it is probably the more accurate conclusion that examination of the contracts chosen by GAO revealed no instances where it could be concluded with confidence that contractors were in fact performing governmental functions.

See comment 4.

See p. 55.

While it is true that managerial span of control is a matter of serious concern, the report makes clear that Federal agencies have demonstrated an understanding of the imbalance that can grow up between Federal officials and contractor employees. More competitive salaries for certain technical specialties may be as much of a solution to this problem as the report's apparently preferred approach of eliminating personnel ceilings.

In addition, we are concerned by the suggestion in the report, as currently written, that functions agencies may have contracted due to in-house resource constraints were governmental functions. No such finding exists in the report.

See comment 5.

Now on p. 54.

4. The attempt to correlate increasing budgets, increasing contract dollar volumes, and budget ceiling decisions (pp. 82-89) should be deleted since the analysis bears little relationship to the problem of agencies using consultant services to perform governmental functions, the focus of the report.

The following are GAO's comments on the Office of Management and Budget's letter dated September 17, 1991.

## GAO Comments

1. We agree that civil servants have the responsibility to detect deficiencies or biases in contractor work products. Officials at DOE, DOT, and EPA told us, however, that their agencies did not have a sufficient number of employees or employees with sufficient expertise to do the work for the contracts that we questioned, or that they were not sure. In a prior report, we expressed our view that a contractor's performance begins when the contractor's involvement in basic management functions is so extensive that an agency's ability to develop options other than those proposed by the contractor is limited.[1] We are concerned that staffing constraints may limit an agency's ability to (1) have an input in designing a contractor's work, (2) review the contractor's progress and work products, and (3) offer an alternative when it does not agree with a contractor's proposals.

2. We believe that contractors, particularly consultants, can play a valuable role and that the government can benefit from the services they provide. We cite the benefits contractors can provide in chapter 1. We did not suggest in the report that contractors may be opposed to the interests of the United States. On the contrary, we believe they can provide a beneficial service to the government when used appropriately.

3. We stated in the report that because of the difficulty in defining governmental functions, we were not able to definitively conclude that the activities administered by the contractors for the cases we questioned involved such functions. Therefore, we did not take a position on whether any of the contracts in question were appropriate or inappropriate. We also questioned those contracts for other reasons, such as the possible bypassing of personnel ceilings, the possible higher costs of contracting out work, and the problems with contract administration.

4. We believe that the difficulties associated with attracting and retaining persons with needed expertise may be somewhat alleviated by the new Federal Employees Pay Comparability Act. The act recognized that the government had lost its ability to hire and retain federal employees because government salaries were no longer competitive with the private sector.

[1]FPCD-81-43, June 19, 1981.

5. The correlation cited by OMB of budgets, contract dollar volumes, and budget ceiling decisions has been modified as a result of comments made by agency officials and private-sector representatives. The report now discusses the correlation of federal budget outlays, contract actions for services, and personnel expenditures. The analysis shows considerable growth in budget outlays and contract actions for services and considerably less growth for personnel expenditures over the past decade. The data tend to corroborate the views of agency officials that agencies find it easier to obtain contract dollars than authorization for federal positions to do their work.

# Comments From the Department of Energy

Note: GAO comments supplementing those in the report text appear at the end of this appendix.

**The Under Secretary of Energy**
Washington, DC 20585

September 6, 1991

Mr. Donald Forcier
Director, General Government
Division
U.S. General Accounting Office
Washington, DC 20548

Dear Mr. Forcier:

The Department of Energy (DOE) appreciates the opportunity to review and comment on the General Accounting Office (GAO) draft report entitled "Government Consultants: Are Contract Consultants Performing Inherently Governmental Functions?"

See comment 1.

Now on p. 87.

GAO acknowledges in the Executive Summary that the criteria for defining governmental functions are inconsistent, difficult, and frequently judgmental. However, the report moves from these ambiguous criteria to the clear suggestion in Appendix II that, but for his statutory authority to contract for audit services, the DOE's Inspector General is contracting out functions that should be considered inherently governmental.

See comment 2.

See p. 88.

GAO also cites criteria that ultimately contradict its suggestion. The report states that in determining appropriateness of consulting contracts, a key criterion is "...whether the government maintains sufficient in-house control of the technical, policy, and management functions of the agency." Such control, according to the report "means more than simply being a final authority or signatory to a document." Audits performed under contract for the Department's Inspector General are subject to exactly the same professional standards as those performed by Federal employees including the GAO Yellow Book. It is precisely by applying those standards to contract work products that the Inspector General is clearly and objectively able to maintain "in-house control." They are signatories to no documents until the Inspector General is satisfied that audit work and reports meet the rigorous requirements of the Yellow Book and other applicable professional audit standards.

We point out these problems with the report only to illustrate that drawing conclusions based on inadequate criteria is counterproductive. We think a fair argument can be made that services provided by auditors under contract to the Inspector General are inherently governmental. However, we have not taken a formal position on this question precisely because of the inconsistent guidance in the area as discussed by GAO. The Inspector General has legislatively mandated audit responsibilities that it cannot meet, due to Federal staffing limitations, unless it contracts for audit services. Given the audit responsibilities of the Inspector General, the lack of Federal staff to carry them out, and the legal authority to contract for audit services, alternatives are few.

See comment 3.

In addition to these comments, we submit the following clarifications:

See pp. 85 and 86.

- Contracts for audit services are awarded on behalf of the Inspector General by the Department's procurement office.

See p. 86.

- The cited Western Region contract was not terminated due to dissatisfaction with the contractor's performance as stated in Appendix II. The Inspector General chose not to extend the contract due to funding limitations.

See p. 88.

- Auditors under contract with the Inspector General do not write their own task orders. They do, however, submit audit ideas which are sometimes approved.

DOE hopes that these comments will be helpful to GAO in their preparation of the final report.

Sincerely,

John C. Tuck

The following are GAO's comments on the Department of Energy's letter dated September 6, 1991.

## GAO Comments

1. We did not express the view that the IG is contracting out functions that should be considered inherently governmental. We recognize that IGs are authorized by the Inspector General Act of 1978, as amended, to contract out for auditing services. We questioned these contracts because of other criteria contained in OMB Circular A-120 and because of their inconsistency with DOE's own guidance.

DOE's policy set forth in Order 4200.3B considers the determination of the success or failure of DOE internal management and program management activities a government function that should be performed by government employees. We also questioned portions of these auditing contracts because of the possible bypassing or undermining of DOE personnel ceilings, the problems with contractor performance, and because contracting out appeared to cost more than doing the work with agency staff.

2. We noted in our discussion of the IG's contracts for auditing services that the IG staff's involvement during the course of the contractor's work was well documented in the files we reviewed. We did not question whether the IG maintained sufficient in-house control of the technical, policy, and management functions involved, or whether contractors followed required government auditing standards.

3. These comments relate to matters discussed in the draft report. We have made appropriate revisions to our report to reflect the comments. We did not state that the contractor wrote its own task order. We did note, however, that the contractor proposed some of its own task orders. DOE's policy guidance in Order 4200.3B states that DOE employees are solely responsible for determining work requirements under support service contracts. The Order also states that a support service contractor must not be allowed to identify its own work requirements.

# Comments From the Environmental Protection Agency

Note: GAO comments supplementing those in the report text appear at the end of this appendix.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

SEP 3 1991

OFFICE OF
POLICY, PLANNING AND EVALUATION

Mr. Richard L. Fogel
Assistant Comptroller General
General Government Division
General Accounting Office
Washington, D.C. 20548

Dear Mr. Fogel:

The U.S. Environmental Protection Agency (EPA) has reviewed the General Accounting Office (GAO) draft report entitled "Government Consultants: Are Contract Consultants Performing Inherently Governmental Functions?" In accordance with Public Law 96-226, I am hereby providing the formal Agency response to the draft report.

The quality of contract management and the various issues raised when contracting for services continue to be of critical importance to the EPA. Due to the high visibility of environmental issues and our extensive use of contractors to assist us in accomplishing our mission, the Administrator issued a policy statement on contracting in April 1990, which was then formalized as EPA Order 1900.2 in October 1990. The Administrator's Order recognized that certain activities are inherently governmental in nature, and identified seventeen that were prohibited from being contracted out. Additionally, it highlighted other areas where special control and oversight measures must be taken if a decision is made to contract for these activities.

Promulgation of the Order involved a great deal of thought and coordination on the part of the entire Agency, and we are pleased that the draft report acknowledges the significance and importance of this Order. Since the initial policy statement was issued, the Agency has been reviewing all statements of work for new contracts, as well as those for individual work assignments and delivery orders, to ensure that they do not violate established policy.

We recognize that striking a proper balance between performing work in-house and contracting for certain activities is key to maintaining the integrity of the Agency while accomplishing our environmental mandate. The decision whether or not to contract out for services is made on a case-by-case basis that is predicated on the nature of the services needed and the expertise of EPA staff.

See comment 1.

See p. 91.

We agree that it would be helpful to all executive agencies for the Office of Management and Budget (OMB) to develop a short, generic list of actions which are inherently governmental, and to include that list in an OMB policy letter on the subject. The suggested guidelines in Figure 2.1 of the subject report are particularly useful. In this regard, the Agency is currently formulating comments to an OMB draft policy letter containing proposed guidance on defining inherently governmental functions.

Once OMB developed its generic list, EPA would supplement as necessary the OMB policy with its own more specific guidance tailored to meet EPA's discrete responsibilities. However, the report endorses a requirement that each agency submit its list to OMB for approval prior to issuing it. This recommendation seems to run counter to GAO's recognition that "each agency's mission is unique," and that each agency itself is best positioned to identify the specific functions which should be performed only by government employees. The submission requirement would inhibit the Agency's ability to expeditiously implement such a list, and would constrain its capacity to review and update it on a periodic basis as its mission and programs change. We would suggest a more practical approach whereby the Agency would seek OMB advice and guidance on any proposed restriction which could be subject to differing interpretations.

As the draft report states, executive agencies should be given the flexibility to manage their activities within an authorized budget. Personnel ceilings and Congressionally mandated workyear caps place limits on our capacity to meet the management and environmental challenges we face. Appropriated funds should not contain restrictions regarding the maximum amounts usable for staffing purposes. The Agency recognizes the importance of retaining a technical "corporate memory," and needs the capability to staff at levels consistent with maintaining that knowledge.

See comment 1.

See p. 91.

One final comment relates to GAO's description of Field Investigation Team (FIT) contracts in Appendix II of the draft report. Under FIT contracts, contractors are required to collect data and write reports. EPA has internal controls in place to ensure that the Agency reserves decisionmaking authority.

Thank you for the opportunity to comment on the draft report. I can assure you that we will continue to be sensitive to the necessity of maintaining a proper balance between in-house capabilities and contracting out for program support services.

Sincerely,

Thomas E. Kelly for
Richard Morgenstern
Acting Assistant Administrator

The following are GAO's comments on the Environmental Protection Agency's letter dated September 3, 1991.

## GAO Comments

1. We have modified our discussions of the EPA contract to reflect EPA's comments where appropriate. EPA said that it has internal controls in place to ensure that it reserves decisionmaking authority. Our discussion of the contract noted that contract files showed that EPA provided the contractor with guidance and reviewed the contractor's work while the contract was in process. The files did not show, however, that EPA evaluated the contractor's methodology or made any changes to the contractor's final work products before accepting them. Accordingly, we indicated that we were not able to determine the extent of EPA's involvement in these areas.

# Comments From the Department of Transportation

Note: A GAO comment supplementing the comments in the report text appears at the end of this appendix.

U.S. Department of Transportation

Assistant Secretary for Administration

400 Seventh St., S.W. Washington, D.C. 20590

August 29, 1991

Mr. Richard L. Fogel
Assistant Comptroller General
General Government Division
U.S. General Accounting Office
Washington, D.C. 20548

Dear Mr. Fogel:

Enclosed are two copies of the Department of Transportation's comments concerning the U.S. General Accounting Office draft report entitled "Government Consultants: Are Contract Consultants Performing Inherently Governmental Functions?"

Thank you for the opportunity to review this report. If you have any questions concerning our reply, please call Martin Gertel on 366-5145.

Sincerely,

Paul T. Weiss
for Jon H. Seymour

Enclosures

DEPARTMENT OF TRANSPORTATION (DOT) REPLY

TO

GENERAL ACCOUNTING OFFICE (GAO) DRAFT REPORT

OF JULY 19, 1991

ON

GOVERNMENT CONSULTANTS:

ARE CONTRACT CONSULTANTS PERFORMING

INHERENTLY GOVERNMENTAL FUNCTIONS?

SUMMARY OF GAO FINDINGS AND RECOMMENDATIONS

The General Accounting Office draft report attempts to ascertain whether Federal agencies may be relying too heavily on contract consultants to perform their basic work, i.e., "inherently governmental functions." Office of Management and Budget (OMB) Circulars A-120, Guidelines for the Use of Advisory and Assistance Services, and A-76, Policies for Acquiring Commercial or Industrial Products and Services Needed by the Government, address governmental functions. The Circulars state that consultants are not to be used to do work of a policy, decisionmaking, or management nature which is the direct responsibility of agency officials. GAO could not find in any of the documents it reviewed a clear definition of inherently governmental functions. OMB and several agencies have attempted to identify specific functions as inherently governmental, but GAO found it difficult to apply OMB's broad definition objectively to functions that were not specifically identified in OMB's guidance or that of other agencies. In addition, GAO held two symposiums in June 1990 to discuss the issue, and agency officials who participated stated that the available guidance is vague and difficult to apply.

GAO recommends that the Director, OMB:

1. Clarify OMB's guidance to agencies on contracting for consulting services.

2. Compile a short generic list of functions which should never be contracted out.

3. Require implementing instructions from each agency which would identify specific functions within that agency which should be performed only by Government employees.

Each agency head should be required to submit this list of activities to OMB for approval to ensure consistency with OMB policies.

SUMMARY OF DEPARTMENT OF TRANSPORTATION POSITION

The Department agrees with the finding that the existing guidance on whether it would be appropriate to contract out could be expanded. Without clarification or more specific identification of the functions that can or cannot be contracted out, the Government risks relinquishing its control over traditional governmental functions.

The GAO report contained a number of specific findings regarding a Federal Highway Administration (FHWA) contract (DTFH 61-88-C-00106) for research, analysis, and writing necessary to produce a report to Congress. The Department does not agree with the findings, and we have included FHWA's detailed comments regarding this contract as an appendix.

POSITION STATEMENT

The GAO report makes the following recommendations for the Director, OMB:

RECOMMENDATION: Clarify OMB's guidance to agencies on contracting for consulting services.

RESPONSE: On July 2, 1991, OMB issued a draft policy letter for the Use of Contractor Support, and agency comments to OMB are required by September 2, 1991. We will provide comments on the proposed guidance and believe the draft policy letter reflects an improvement over existing guidance.

RECOMMENDATION: Compile a short generic list of functions which could be applied throughout the Government which, as a matter of policy, should never be contracted out.

RESPONSE: The OMB draft policy letter, mentioned above, provides illustrative lists of (1) functions considered to be governmental, and (2) functions that OMB does not consider to be governmental, but which could approach being in that category.

RECOMMENDATION: Require implementing instructions from each agency. Because each agency's mission is unique, OMB should require each agency head to examine his or her agency's activities, and, taking into consideration the agency's role and responsibilities, identify those specific functions which should appropriately be performed only by Government

employees. Each agency head should be required to submit this list of activities to OMB for approval to ensure consistency with OMB policies.

RESPONSE: We agree. Although "governmental functions" have been and continue to be difficult to define, we believe that the proposed recommendation would go far towards eliminating the confusion and uncertainty that currently prevails regarding contracting out.

See comment 1.

APPENDIX

**FEDERAL HIGHWAY ADMINISTRATION (FHWA) COMMENTS ON THE GENERAL ACCOUNTING OFFICE'S (GAO) FINDINGS REGARDING THE NATIONAL HIGHWAY RAILROAD CROSSING IMPROVEMENT AND MAINTENANCE NEEDS STUDY (CONTRACT DTFH 61-88-C-00106)**

See comment 1.

The GAO found that the FHWA inappropriately used a contract consultant to perform most of the research, analysis, and writing necessary to produce the report to Congress entitled "National Highway Railroad Crossing Improvement and Maintenance Needs Study" (contract DTFH 61-88-C-00106). Additionally, the GAO found that the FHWA did not provide adequate guidance and supervision for the consultant's work. Finally, the GAO believes the FHWA lacked the technical expertise to properly review and evaluate the finished report.

We do not concur in the GAO's findings. The FHWA believes the GAO did not consider the delineation of tasks outlined in the contract as well as the substantial amount of prior research and data provided to the consultant by the FHWA and the Federal Railroad Administration (FRA).

Contractor Responsibilities

The GAO draft states that the contractor was responsible for the writing, analysis, and consulting required to produce the report to Congress, while the FHWA essentially reviewed and approved the contractor's work. However, the consultant's contract (Section C: Delineation of Contractor Tasks) clearly indicates that the consultant was only responsible for providing support, not planning, researching, and writing the entire report.

The contract with this specific consultant started in August of 1988, over one year after the FHWA and FRA had initiated a joint Congressional study of this subject. The FHWA and FRA had already obtained input for the study design and scope from the Federal Register and the affected highway and railroad organizations. Both agencies were also working on developing a detailed outline of the report's content as well as some 30 different background studies, in-house analyses, and major national surveys of crossing characteristics and expenditures. These prior actions by FHWA and FRA defined the content, policy options and thrust of the report, not the contract and contractor.

The GAO only uses the general statement of contractor objectives to support their findings, not the delineation of contractor tasks. The contract objectives are only a general statement of what FHWA expects to gain overall. The delineation of tasks defines the contractor's role in the process. These tasks included (1) flow charting and helping synchronize key activities

APPENDIX

already underway; (2) helping arrange for and synthesizing meetings held with outside interest groups; (3) assisting in the updating and fleshing out an already established study design and report outline; (4) preparing specified sections of the report from material provided and six technical background papers on supplemental issues; and (5) editing the draft final report provided by FHWA for technical sufficiency and style accuracy. These are all appropriate and effective supporting services, not an overall control of policy, direction, and scope.

Additionally, this was not the only contract executed to assist in developing the report to Congress. In all, approximately $300,000 was expended for contract work, compared to the $600,000 actually authorized by Congress in anticipation of such needs. It spans only part of the time and only part of the effort.

**Analytical Processes and Report Preparation**

The original data gathered specifically for this report was primarily gathered from three sources - a comprehensive update of the national rail-highway crossing inventory maintained by FRA; an expenditure and needs survey of all States conducted in cooperation with the American Association of State Highway and Transportation Officials; and an expenditure and program cost survey of railroads conducted in cooperation with the Association of American Railroads and the American Short Line Railroad Association. Compilation, analysis, and application of the first two were accomplished almost exclusively in-house by FRA and FHWA staff. Some contractor assistance was used for the railroad survey and analysis because of specialized knowledge of certain rail operations, but this was not the major source of data.

The study design developed by FHWA and FRA called for the preparation of over 30 background and issue papers which would be used as input to appropriate parts of the report. All but six of these papers were assigned in-house to qualified FHWA and FRA staff. As the results came in and new perspectives were gained, the original FHWA report outline understandably underwent numerous revisions. These changes were catalogued but not decided by the contractor.

Additionally, there was no "contractor's draft report" as the GAO indicates. While the contractor did help construct Chapters 1 and 2 of the report (historical background and descriptive material) from available material, these chapters cannot be considered policy. In contrast, Chapters 7 and 8 which contained the most substantive policy issues were conceived and written by FHWA personnel. All major analytical processes used to quantify crossing hazards and needs and to estimate program cost

APPENDIX

effectiveness were developed and applied by FHWA or FRA. This was not an explicit or implicit responsibility of the contractor.

**Agency Competency**

The GAO bases their finding of undue contractor influence on vague or unsupported references to a lack of agency expertise in the area of railroads. This would seem to be a misunderstanding of the goals and objectives of this Congressionally mandated study.

The Congressional charge was a study of national highway-railroad crossing improvement and maintenance needs. The safety and operations at such crossings are controlled by the installation of highway traffic control devices or conflicts eliminated by the building of separation structures (a majority being highway bridges). The FHWA is responsible for establishing and implementing national standards for such devices as well as the design of such bridges. The FHWA is also responsible for administering substantial Federal assistance programs specifically aimed at the installation and modernization of such devices and structures, programs where in-house staff must evaluate and set criteria for needs, cost effectiveness, safety impact, and minimum standards on a routine basis.

The study was done and report prepared with the full cooperation and participation of the FRA staff, an agency with considerable skill and experience in overall railroad issues and crossing safety and operations. This report was also first publicly announced by the Federal Railroad Administrator.

**Documentation**

Finally, the GAO seems to base its finding that the contractor controlled the entire project on a lack of documentation in the contract files to the contrary. The rail-highway crossings needs study was managed and the report prepared as a part of the day-to-day operations of the Office of Highway Safety in the FHWA. They were responsible for content and completion. These activities would not be "documented" in FHWA's contract files for an outside contractor providing technical expertise for selected support services. We believe that a careful review of the contract tasks and deliverables would clearly indicate the contractor was supplementing or editing FHWA-generated plans, priorities, report chapters and options--not creating them.

The following is GAO's comment on the Department of Transportation's letter dated August 29, 1991.

## GAO Comment

1. This comment on a Federal Highway Administration contract relates to a case study that was included in our draft report. Our initial determination to include this case was made on the basis of available information contained in the contract files and our discussions with DOT officials. On the basis of the additional information DOT provided on this contract, we have deleted this case study from the report.

# Comments From the Department of Defense

Note: A GAO comment supplementing the comments in the report text appears at the end of this appendix.

ASSISTANT SECRETARY OF DEFENSE

WASHINGTON, D.C. 20301-4000

FORCE MANAGEMENT AND PERSONNEL

SEP 10 1991

Mr. Richard L. Fogel
Assistant Comptroller General
General Government Division
U.S. General Accounting Office
Washington, DC 20548

Dear Mr. Fogel:

This is the Department of Defense (DoD) response to the General Accounting Office (GAO) draft report entitled--"GOVERNMENT CONSULTANTS: Are Contract Consultants Performing Inherently Governmental Functions?"--dated July 19, 1991 (GAO Code 966408/OSD Case 8772). For the most part, the Department agrees with all of the eleven report findings, with all three recommendations, and with one of the two matters for Congressional consideration. The Department does not, however, agree with the first matter for Congressional consideration. The Department is working with the Office of Management and Budget to clarify the current guidance associated with inherently Governmental functions.

See comment 1.

In general, the Department observes the interchangeable use of the term "consultant" and "contractor" throughout most of the report text. There is a distinct difference in the way that the Federal government procures, manages, and controls consultants versus contractors. A more appropriate reference would be "service contractors" since the report includes all functions that are procured through some type of contractual arrangement.

See comment 2.

See p. 60.

In addition, one of the primary objectives of the report--the potential effects of relinquishing governmental control of functions to contractors--is only moderately addressed.

The Department appreciates the opportunity to comment on the draft report. Detailed DoD comments on the report findings, recommendations, and matters for Congressional consideration are provided in the enclosure.

Sincerely,

Christopher Jehn

Christopher Jehn

Enclosure:
As stated

GAO DRAFT REPORT - DATED JULY 22, 1991
(GAO CODE 966408) OSD CASE 8772

"GOVERNMENT CONSULTANTS: ARE CONTRACT CONSULTANTS PERFORMING INHERENTLY GOVERNMENT FUNCTIONS?"

DEPARTMENT OF DEFENSE COMMENTS

* * * * *

FINDINGS

Now on p. 2.

- **FINDING A**: **Determining What Functions Are Inherently Governmental May Be Subject To Varying Interpretations**. The GAO observed that determining what functions are inherently Governmental gets at the heart of the difference between the public and private sectors and public and private sector employees. According to the GAO, different people have varying philosophical or political views on the matter, especially when specific functions or activities are involved. The GAO noted that the concerns go back as far as the early days of the Nation--as evidenced, for example, by the debate among the framers of the Constitution over what functions are appropriate for the Federal Government to exercise. The GAO pointed out that, when private sector employees carry out activities believed to be Governmental in nature, additional concerns arise--such as (1) whether conflicts of interest exist, (2) whether Government employees are adequately discharging their obligations, or (3) whether accountability can be pinpointed. (pp. 2-3, pp. 17-18/GAO Draft Report)

  **DOD RESPONSE**: **Concur**. The Department agrees that the difference between public and private sector functions and roles may be subject to varying interpretations. The Department shares the GAO concerns regarding accountability, conflicts of interest, and the adequate discharge of responsibilities assigned to Government employees.

- **FINDING B**: **The Executive Branch Has Generally Assumed Responsibility For Defining Inherently Governmental Functions**. The GAO observed that the Office of Management and Budget issued two circulars, which address, at least in part, the issue of Governmental functions. According to the GAO, Office of Management and Budget Circular A-120 provides guidance on the use of advisory and assistance services. The GAO explained that the guidance states that consultants shall not be used in "performing work of a policy, decision-making, or managerial nature"--which is the direct responsibility of agency officials. The GAO reported that the Circular A-76 describes a Governmental function as, "a function which is so intimately related to the public interest as to mandate performance by Government employees."

ENCLOSURE

The GAO noted Governmental functions include those activities that require either (1) the exercise of discretion in applying Government authority or (2) the use of value judgements in making decisions for the Government." The GAO concluded that, conversely, Circular A-76 appears to allow all functions not Governmental in nature to be contracted.

The GAO observed that the Federal Acquisition Regulation implements the Office of Management and Budget guidance, but does not expand on the concept of Governmental functions. According to the GAO, members of the contracting community, including agency officials, who participated in the two symposiums sponsored by the GAO, believe the concept of "Governmental functions" is difficult to define and is, therefore, subject to varying interpretations. The GAO explained that those officials also believe that the Office of Management and Budget guidance was vague and difficult to implement.

The GAO referred to a December 1990 report issued by the President's Council on Management Improvement, Study of Office of Management and Budget Circular A-76: Performance of Commercial Activities, which recommended that a clear and mutually acceptable set of guidelines to help agencies determine which functions are Governmental should be developed.

The GAO found that, in February 1991 (as a result of concerns expressed by agency officials, members of the Congress, and the GAO), the Office of Management and Budget planned to issue a policy to address what type of work is inherently Governmental for use by Federal officials when they decide whether to contract out for a particular task. The GAO noted that, at the time of its review, the new policy was not yet available for evaluation.

The GAO further noted that the Inspector General, DoD recommended in February 1991, that the Department issue guidance that would define what are Governmental functions that should be performed by DoD employees. The GAO reported that the Department agreed with this recommendation and said that such guidance should be consistent with Office of Management and Budget guidance.

The GAO indicated DoD officials advised them that the guidance will also be based on the results of this GAO report. (pp. 3-9, pp. 26-33/GAO Draft Report)

Now on pp. 3-5 and 18-22.

**DOD RESPONSE**: **Partially Concur.** The Department agrees that two current circulars (A-76 and A-120) issued by the Office of Management and Budget address, in part, the issue of inherently Governmental functions. The Department does not, however, agree that the Federal Acquisition Regulation implements the guidance contained in Office of Management

See comment 3.
See p. 19.

and Budget Circulars A-76 and A-120. Federal Acquisition Regulation coverage of these subjects is limited to that information required by contracting offices to discharge their responsibilities properly, as set forth in the circulars and implementing agency publications. Within the Department, Office of Management and Budget Circular A-76 is implemented by DoD Directive 4100.15 and DoD Instruction 4100.33; Office of Management and Budget Circular A-120 is implemented by DoD Directive 4205.2. The Department concurred with the Inspector General February 1991 recommendation that the Department issue guidance defining what DoD functions are inherently Governmental. The Department agreed to defer the issuance of DoD-specific policy guidance on inherently Governmental functions so that it would not be inconsistent with Office of Management and Budget federal-wide policy on this same subject. On July 2, 1991, the Department received a draft Office of Management and Budget policy letter governing the use of contractor support. The Department is currently reviewing the proposed policy and plans to provide appropriate comments to the Office of Management and Budget in early September.

- **FINDING C: Generally, The Congress Has Not Addressed The Appropriate Use of Contractors, Particularly Contract Consultants, In Legislation.** The GAO observed that the Congress generally has not attempted to define inherently Governmental functions in legislation. The GAO performed a comprehensive legislative review and found little reference to the issue, except in agency-specific cases. In one example, the GAO noted that the Congress (when establishing a new Federal program) authorized a Federal Agency to rely heavily upon private contractors to perform a large share of the work load. The GAO explained that Public Law 89-97 authorizes the Department of Health and Human Services to use private contractors to administer the Medicare Insurance Program. The GAO further noted, however, that in another instance, the Congress specifically stated certain activities must be performed by Government employees. The GAO reported, for example, that the Congress passed the Water Resources Development Act of 1990 (Public Law 101-640), which said that activities connected with operation and maintenance of the hydroelectric power generating facilities at U.S. Army Corps of Engineers water resource projects are to be considered as Governmental functions and not commercial activities.

  The GAO concluded, however, that legislation is generally silent about the use of contractors, and an agency may use contractors at its discretion. The GAO pointed out that, in one instance, the realities of a situation required an agency to rely heavily on contractor assistance to administer a program. The GAO found that the Superfund Program, authorized by the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Public Law 96-510),

required the Environmental Protection Agency to ensure the clean up of hazardous waste sites that threaten human health or the environment. The GAO found that, to administer this program, the Environmental Protection Agency uses remedial engineering management contractors to study contamination at waste sites and develop cleanup alternatives. According to the GAO, the contractors play a key role in the program implementation. The GAO concluded that, in the case of the Superfund, congressionally-imposed limitations on the amount of administrative cost that the agency may incur for payroll and travel expenses have necessitated the use of contractors to administer program functions. (pp. 3-12, pp. 33-34/GAO Draft Report)

Now on pp. 3-7 and 22.

See comment 4.

**DOD RESPONSE: Partially Concur.** The Department agrees with the GAO finding that the Congress generally has not attempted to define inherently Governmental functions in legislation. However, the Department can cite numerous examples of Congressional legislation that, in effect, restrict the DoD options for accomplishing its civilian work load in the most efficient and effective manner possible. They include:

1) Legislative Ceiling on DoD Overseas Civilian Workyears. For the past five years, the Congress has legislated a ceiling on the number of in-house workyears that may be executed in support of DoD's overseas missions and work load. (Reference: Section 8065, title VIII of the DoD Appropriations Act for FY 1991, Public Law 101-511). The legislation forces the Department to consider more costly U.S. direct hire manpower to accomplish its missions overseas.

2) Legislative Time Restriction on Completion of Commercial Activities (A-76) Studies. Effective May 1991, the Congress prohibited the Department from continuing A-76 cost comparison studies that exceed, after initiation, 24 months for single function activities and 48 months for multi-function activities. (Reference: Section 8087, Title VIII of the DoD Appropriations Act for FY 1991, Public Law 101-511.) The legislation requires the Department to retain functions in-house in cases where the time limitations cannot be met.

3) Legislative Ceiling on the Use of Contracted Advisory and Assistance Services. In both FY 1990 and FY 1991, the Congress imposed a ceiling on the amount of appropriated funds that could be spent on DoD contracted advisory and assistance services. That ceiling restricts the ability of the Department to choose the most efficient and effective labor source to accomplish its requirements and, in some instances, essential work that can only be contracted out due to lack of organic capability, does not get done.

4) Legislative Limitation on Competing Depot Maintenance Work Load. More recently, in its report on the Department's FY 1992/1993 budget, the House Armed Services Committee recommended a limitation on Departmental depot work load competitions. If enacted, the legislation will restrict competitions with the private sector to 40 percent (or between $5 and $15 million) of depot maintenance work load annually.

Although the Congress has not legislated inherently Governmental functions, it has enacted other forms of legislative restrictions that influence what functions are performed by Government employees versus contractors.

- **FINDING D: The Need for Meaningful Criteria on Inherently Governmental Functions Has Been A Long-Standing Concern at the GAO.** The GAO indicated it had reported on the need to improve controls over consulting service contracts for many years. The GAO referred to a June 1980 report (OSD Case 5471), in which it was concluded that little progress had been made to resolve consulting service issues during the past 20 years. The GAO explained that one of the major issues identified was the use of consulting services to perform work that should be performed by Government employees.

The GAO also referred to 1981 report (OSD Case 5747), in which it had noted that Federal agencies used contractors to do work that Federal employees should do because the work involved basic management decisions. The GAO found that the Departments of Energy and Defense used contractors to determine substantially or influence national energy policies--and to identify the requirements for the national defense.

The GAO reported that agency officials often contended that contractors do not perform Governmental functions--they only advise on the performance of such functions. In the 1981 report, the GAO concluded that performance begins when the involvement of the contractor in basic management functions is so extensive that the ability of an agency to develop options other than those proposed by the contractor is limited.

The GAO also referred to a 1982 report concerning the Environmental Protection Agency (dated March 9, 1982--not related to the DoD), which noted that contractors may have performed work that should have been done by Federal employees. In that report, however, the GAO could not determine whether the actions of the contractor were improper because of the lack of Office Of Management and Budget criteria to distinguish between "assistance" and "performance." The GAO pointed out that the Office of Management and Budget criteria did not define assistance to

describe at what point contractor assistance ended and performance of basic management functions began.

The GAO further explained that the Comptroller General also was asked by Federal agencies or the Congress to render decisions as to the Governmental nature of certain specific functions. (pp. 3-12, pp. 35-39/GAO Draft Report).

Now on pp. 3-7 and 23-25.

**DOD RESPONSE**: The Department acknowledges the long-standing GAO concern over service contracting.

- **FINDING E**: **The GAO Has Sponsored Current Efforts To Define Inherently Government Functions**. The GAO also considered, as part of its review, the conceptual and historical basis for defining and identifying Governmental functions. The GAO studied historical documents such as the Constitution and the Federalist Papers, and made a comprehensive examination of court cases to identify any legal bases or precedents on Governmental functions. The GAO also reviewed various books and articles on the subject of Governmental functions and spoke to several authors to obtain further information on their work. The GAO also queried all of the state Governments to determine whether any of them had information and/or experience that would be applicable. Further, in June 1990, the GAO sponsored two symposiums, attended by representatives of the contracting community, including Office of Management and Budget and other agency officials, contractors, unions, various research organizations, and academia to obtain their views on the concept and definition of Governmental functions. (pp.3-12, pp. 39-50/ GAO Draft Report)

Now on pp. 3-7 and 25-31.

**DOD RESPONSE**: The Department acknowledges the recent GAO efforts to define inherently Governmental functions.

- **FINDING F**: **Determinations Whether Contractors Are Performing Inherently Governmental Functions Are Difficult To Make**. The GAO found that 79 of the 108 randomly-selected consulting services contracts reviewed at the Department of Transportation, the Department of Energy, and the Environmental Protection Agency did not appear to involve Governmental functions. The GAO did, however, identify portions of 29 contracts that appeared to involve such functions or had other problems--such as (1) contracting possibly to bypass personnel ceilings because of the lack of sufficient staff or staff with sufficient expertise, (2) the possible higher cost of contracting versus doing the work in-house, (3) problems with contract administration, possible conflict of interest, and (4) problems with contractor performance. The GAO also questioned portions of each of the seven contract task orders it reviewed that were issued by the Director, Operational Test and Evaluation. The GAO raised questions because of the absence of evidence concerning the role of the contractor relative to the degree

of agency control over the work of the contractor. The GAO could not determine from agency records the extent of reliance by the Director, Operational Test and Evaluation, on the work of the contractor when making policy decisions. The GAO also found, however, that rarely is an entire contract inappropriate. According to the GAO, generally, only specific contract tasks were subject to question.

The GAO explained that it is often not clear whether the contractor may actually be performing certain work, or is merely assisting the Government in performing a function. The GAO indicated that agency officials generally maintain that they are in control and are making decisions and value judgements for the Government. The GAO found, however, that agency contract documents may not provide reliable evidence about the specific roles of the contractor and the Government. The GAO review showed that the wording of contract statements of work or task orders could easily be subject to varying interpretations. The GAO cited an example where the contract terms could call for the contractor "to assist" or "or support" the agency in performing a function. The GAO noted that it may not be readily apparent exactly what is the extent of the involvement of the contractor in a project.

The GAO reaffirmed that the concept of "Governmental functions" is difficult to define and is, therefore, subject to varying interpretations. The GAO concluded that guidance to Federal agencies on how to define Governmental functions is extremely limited and is also subject to different interpretations. The GAO reported, therefore, that it did not make determinations whether particular contracts are appropriate or inappropriate. The GAO did, however, question certain contracts or contract terms, which appeared to be inconsistent with Office Management and Budget or agency principles, as set forth in the existing guidance. The GAO explained that its evaluation was not intended to provide data that can be generalized for the entire Government, or even at the four agencies reviewed. According to the GAO, the objective was to obtain a general view as to whether some consulting service contracts appeared to involve Governmental functions. The GAO also identified other related problems involving such matters as (1) agency staffing constriants, (2) contract administration, (3) quality of contracts performance, (4) cost of contracting, and (5) the possibility of conflict of interest. (pp. 3-12, pp. 51-53/GAO Draft Report)

Now on pp. 3-7 and 34.

**DOD RESPONSE**: **Concur**. The Department agrees that the wording of contract statements of work or task orders may be subject to varying interpretations.

Now on pp. 3-7 and 34-37.

- **FINDING G: Most Service Contracts That The GAO Reviewed Did Not Involve Inherently Governmental Functions.** The GAO found that 79 of the 108 randomly selected contracts at Department of Transportation, Department of Energy, and Environmental Protection Agency did not involve Governmental functions. Based on the contract documentation reviewed, the GAO concluded that the Government appeared to be in control of contractor activities for most of the contracts, and the contractors did not seem to be making decisions and value judgements for the Government. (pp. 3-12 pp. 53-58/ GAO Draft Report)

  **DOD RESPONSE: Concur.** The Department agrees that, for the most part, Government is in control of contractor activities.

- **FINDING H: Some Of The Service Contracts That The GAO Reviewed Appeared To Involve Inherently Governmental Functions.** The GAO found that portions of 29 contracts reviewed at the Department of Transportation, the Department of Energy, and the Environmental Protection Agency appeared to involve Governmental functions. The GAO also questioned the degree of influence the contractor may have had on agency policy decisions in each of the seven randomly-selected Director, Operational Test and Evaluation task orders.

  The GAO explained that all of the Director, Operational Test and Evaluation, contract support services are contract task orders currently being provided by one contractor, not-for-profit organization, whose primary function is to provide analytical support services to the Office of the Secretary of Defense.

  The GAO observed that, under a single contract with the one contractor, the Director, Operational Test and Evaluation, periodically issues "task orders" to the contractor for projects in support of the mission to evaluate the testing of weapons systems. The GAO explained that each task order authorizes an amount of funding for the contractor to perform a specific function and to issue a report to the agency by a specific date. According to the GAO, the contractor is frequently tasked to provide support for the evaluation of tests of specific weapons systems, or to evaluate plans for testing before the tests are conducted, and occasionally for other purposes.

  The GAO focused on the degree to which the Director, Operational Test and Evaluation, does or does not apply independent judgement to (1) the issues that the contractor analyzes and (2) the reports of the contractor. The GAO selected 7 of 44 task orders that it had on file from a previous GAO project involving a 1990 review of the oversight by the Department of test and evaluation work.

The GAO found reports from the contractor for each of the seven task orders, but very little evidence of independent involvement by DoD personnel. The GAO pointed out, for example, that six of the seven cases had no formal action officer report prepared.

The GAO observed that the Director, Operational Test and Evaluation, issued a report to the Congress in March 1989, concerning Close Air Support. The GAO compared the contractor report with the report submitted to the Congress and found that both reports are virtually identical. The GAO explained that the organization was identical, the table of contents was identical, and the conclusions appeared to be the same. The only noticeable difference identified by the GAO was the inclusion of an executive summary in the Director, Operational Test and Evaluation report, which is not in the contractor report--and a section acknowledging participation by several DoD offices in the project. The GAO noted that it did not, however, mention the involvement of the contractor. The GAO concluded that the lack of attribution of the work to the contractor in the report to the Congress is misleading, because it suggests that the product is based on work performed solely by agency staff.

The GAO recognized that, in some instances, it may be reasonable not to have a separate action officer report. The GAO noted, however, that only one of the seven randomly selected cases had a separate report in addition to the contractor report. The GAO reported that the absence of documentation caused them to question the extent of the involvement of the Director, Operational Test and Evaluation, in reviewing the work of the contractor, as well as the degree of influence the contractor may have had on Director, Operational Test and Evaluation, policy determinations. The GAO was not able to reach conclusions concerning the propriety of the relationship between the contractor and the agency because of the absence of evidence concerning the role of the contractor relative to the degree of agency control over the work of the contractor.

In a March 1987 report (OSD Case 7268), the GAO identified the lack of documentation for some principal activities by the Director, Operational Test and Evaluation. In that report, the GAO concluded agency action officers frequently do not document (1) the results of their reviews, (2) the changes made because of those reviews, or (3) the methods used to analyze test reports. The GAO observed that the lack of documentation makes it very difficult to determine accurately how well the agency carries out some of its activities. According to the GAO, in response to the prior report, the Director acknowledged the problem and agreed that improvements would be made. The GAO concluded, however, that there continues to be a need for action officers

Now on pp. 3-7 and 37-46.

See comment 5.

See pp. 42-45.

to document the results of their work. (pp. 3-12, pp. 58-77/GAO Draft Report)

**DOD RESPONSE**: **Partially Concur**. The Director, Operational Test and Evaluation recognizes the importance of documentation to demonstrate the independent involvement of the DoD in projects involving contractor support. Improvements have been made in response to the referenced March 1987 GAO report with respect to DoD test plan reviews and weapon system analyses. In the past, when a test plan was received informally, DoD comments were returned informally (not documented). However, current policy requires that each DoD action officer now document his/her comments in the respective project files. The Department does, however, disagree that insufficient documentation suggests that the Institute for Defense Analyses is performing inherently Governmental functions.

- **FINDING I**: **The Lack of Sufficient Numbers of Federal Employees or Employees With Sufficient Expertise Prompt Some Federal Agencies to Contract Out**. The GAO determined that 25 of the 29 contracts questioned involved headquarters contracts. According to the GAO, agency officials stated that their agency did not have a sufficient number of employees or employees with sufficient expertise to do the work--or they were not sure. The GAO noted that only a relatively small number of the 50 agency officials questioned said that the agency staff was sufficient or their agency had sufficient expertise.

The GAO indicated that those views were generally consistent with information obtained on budget outlays, contract expenditures, and Federal employment, which tend to indicate that agencies find it easier to obtain contract dollars than authorization for Federal positions to do their work. The GAO concluded that, although contract money seems to be available, Government positions may be difficult to obtain because of staffing ceilings.

The GAO reported that condition appears to have become part of the culture in some agencies. The GAO cited an example where the Department of Energy budget officials stated that the use of contractors "is sort of ingrained in the Department... People are conditioned to look to contractors to provide a lot of services." The GAO also reported that Environmental Protection Agency budget officials stated, "it is much easier to get OMB's approval of contract dollars" [over positions]. According to the GAO, the Office of Management and Budget asked the Environmental Protection Agency whether it was contracting out all it could. The GAO reported that, according to the Environmental Protection Agency official, the objective of the Office of Management and Budget is to curtail the size of the Federal work force. (pp. 3-12, pp. 78-99/GAO Draft Report)

Now on pp. 3-7 and 46-55.

See comment 6.

See pp. 48-55.

**DOD RESPONSE: Partially Concur.** The Department agrees that information obtained on Federal-wide budget outlays, contract expenditures, and employment may indicate that agencies find it easier to obtain contract dollars than authorization for Federal positions to do required work. That situation may be particularly true in civilian agencies, such as the Environmental Protection Agency, which are subject to employment ceilings. However, as discussed in Finding J, the Congress has prohibited the Department of Defense from operating under civilian end strength ceilings since FY 1985.

- **FINDING J: Some Federal Agencies Have Attempted To Increase Staff In Lieu of Contracting Out.** The GAO noted that, recently, some Federal agencies--the Navy, the National Aeronautics and Space Administration, the Department of Energy, and the Environmental Protection Agency--have made an effort to increase staffing to reduce their dependence on contractors.

  The GAO explained that, in FY 1985, the DoD adopted a ceiling-free management policy. According the GAO, a February 1991 report prepared by the inspector General, Department of Defense, Contracted Advisory and Assistance Services Contracts (OIG, DoD Audit No. 91-041), found that program and contract officials usually justified the procurement of long term consulting services contracts on the basis (1) that Military or civil service personnel were not available to perform the tasks, and (2) that personnel ceilings precluded hiring additional personnel. The GAO noted, however, that in the DoD FY 1985 Appropriation Act (Public Law (98-973), the Congress authorized the removal of the DoD civilian employment end-strength ceilings.

  According to the GAO, the Inspector General reported it had found little evidence that program officials had seriously attempted to define needs and obtain sufficient staffing. The GAO observed the Inspector General also noted that only the Navy had initiated an effort to operate without regard to manpower ceilings. The GAO indicated the Navy action was the result of a 1988 Navy Inspector General report, which indicated that contractor support was relied on to a substantial degree in the procurement process. According to the Navy Inspector General report, the Navy realized that continued contractor support in the procurement process increased the vulnerability of the Navy for potential misuse of business sensitive information and could provide an unfair advantage to certain contractors in a competitive environment. The GAO also noted the Navy realized reliance on contractor personnel in systems engineering resulted in the use of contract personnel in areas and functions that were inappropriate and involved systems interfaces and warfare requirements. The GAO reported that the Navy

initiative involved a 6-year effort to recruit 3,178 additional full-time personnel to provide in-house engineering and management support.

The GAO further reported that the Navy efforts to reduce contractor support also was in response to the "Ill Wind" procurement fraud scandal. The GAO explained that the Navy focus was to limit contractor involvement in the sensitive procurement process. The GAO referred to a memorandum dated August 3, 1988, from the Under Secretary of the Navy to commanders of several major commands, which stated that DoD and Navy policy mandate that "we maintain the... resources necessary to perform our basic governmental functions... Contractor support to the procurement process must be limited in accordance with this principle... Our long-term goal is to assure that internal adequate Navy resources are available to support these critical internal functions and that contractor support be limited to meet minimum, non-recurring needs." According to the GAO, the memorandum also expressed concern about limiting access of contractor personnel to sensitive information, both in terms of the information they see, and the number of personnel required to have access to such information. The GAO indicated a Navy budget official advised that the Navy anticipates achieving savings of about 15 percent from the conversion of contractor personnel to Government personnel.

The GAO also referred to its June 1989 testimony (OSD Case 8026), which indicated that the proposed reduction in contractor support was a positive step because it lessened the risk of transferring Governmental functions to the private sector and the risk involved in contractor access to sensitive procurement information. The GAO cautioned, however, that the Navy commands will need to implement appropriate controls to ensure that, as internal resources increase, the reduction in the use of contractors does, in fact, occur. (pp. 3-12, pp. 89-96/GAO Draft Report)

Now on pp. 3-7 and 56-59.

**DOD RESPONSE**: **Concur**. The Department acknowledges the Navy's effort to substitute in-house personnel for contractors in sensitive acquisition functions.

- **FINDING K**: **The Government Should Not Relinquish Control Over Important Projects/Functions To Contractors**. The GAO concluded that contracting is an essential tool for carrying out the functions of the Government. The GAO explained that the Government cannot possibly be expected to have all the skills in sufficient numbers to meet every requirement. The GAO nonetheless concluded that, in some instances, agencies appear to be relinquishing Government control to contractors. The GAO pointed out that its review did not focus on identifying the specific effects of agencies using contractors to perform Governmental functions. The GAO noted that many of the contracts were still in process,

and the effects of contracting out for the work were not readily apparent.

The GAO asserted that serious problems existed with various Government programs in which the Government had placed substantial reliance on contractors, or in which the Government may have lost its capacity to manage effectively. The GAO explained, however, that the contractors in question do not necessarily relate to consulting services or to Governmental functions. The GAO concluded that the Government should not relinquish its control over important projects involving contractor support. According to the GAO, when the Government allows contractors to assume control over key functions, it may result in situations which are not in the best interest of the Government, and may be costly to correct. (pp. 3-12, pp. 97-110/GAO Draft Report.

Now on pp. 3-7 and 60-67.

**DOD RESPONSE**. **Concur**. The Department agrees that contracting is an essential tool for carrying out the functions of the Government. The Department also agrees that the Government should not relinquish its control over important projects involving contractor support.

* * * * *

**RECOMMENDATIONS**

- **RECOMMENDATION 1**: The GAO recommended that the Director, Office of Management and Budget, clarify the guidance to agencies on contracting for consulting services. (The GAO noted that the identification of Governmental functions requires a consideration of the particular circumstances involved--e.g. the type of function as well as the relationship that will exist with the contractor. According to the GAO, the guidance should articulate the basic principles on which such judgements should be made and also provide guidelines to assist agencies in making the determinations.) (pp.13-14, pp. 119-121/GAO Draft Report).

Now on pp. 7 and 71-72.

**DOD RESPONSE**: **Concur**. The Department agrees that the Director, Office of Management and Budget should clarify the guidance to agencies concerning inherently Governmental functions.

- **RECOMMENDATION 2**: The GAO recommended that the Director, Office of Management and Budget compile a short generic list of functions, applicable throughout the Government-- which, as a matter of policy, should never be contracted out. According to the GAO, such prohibited activities could include such areas as:

  - developing and presenting testimony;

- holding hearing;
- signing agency correspondence;
- representing an agency before the public as if the contractor staff were Federal employees; or
- supervising Federal employees. (pp. 13-14, pp. 119-121/ GAO Draft Report)

Now on pp. 7 and 71-72.

**DOD RESPONSE**: **Concur.** The Department agrees that the Director, Office of Management and Budget, should compile a short generic list of functions, applicable throughout the Government--which, as a matter of policy, should not be contracted out. The Department plans to furnish comments to the Office of Management and Budget draft policy guidance in early September.

- **RECOMMENDATION 3**: The GAO recommended that the Director, Office of Management and Budget, require implementing policies from each agency. (The GAO emphasized that each agency head should be required to submit the list of activities to Office of Management and Budget for approval, and to ensure consistency with Office of Management and Budget policies.) (pp. 13-14, pp. 119-121/GAO Draft Report)

Now on pp. 7 and 71-72.

**DOD RESPONSE**: **Concur.** The Department agrees to issue implementing guidance on inherently Governmental functions, within 180 days, after the Office of Management and Budget's Federal-wide guidance is promulgated.

* * * * *

**MATTERS FOR CONSIDERATION OF THE SENATE COMMITTEE ON GOVERNMENT AFFAIRS**

- **SUGGESTION 1**: The GAO suggested that the Committee should hold hearings, once Office of Management and Budget develops the revised guidance, to ensure that the guidance is consistent with congressional views on this subject. (The GAO noted that, if the Committee still has concerns with the revised guidance, it may want to consider legislation specifying which activities are not to be administered by contract.) (p. 14, pp. 121-122/GAO Draft Report)

Now on pp. 8 and 72-73.

**DOD RESPONSE**: **Non-Concur.** The Department does not agree with the GAO suggestion that the Senate Committee on Government Affairs consider legislating which activities are not to be administered by contract. The Office of Management and Budget Federal-wide guidance, along with agency implementing policies, should be sufficient to alleviate Congressional concerns that Governmental controls are in place to ensure appropriate accountability.

Now on pp. 8 and 72-73.

- **SUGGESTION 2**: The GAO suggested the Committee may want to explore with Office of Management and Budget the desirability of allowing civilian agencies to manage their activities within an authorized budget, without regard to personnel ceilings. (p. 14, pp. 121-122/GAO Draft Report)

  **DOD RESPONSE**: **Concur**. The Department agrees that the Senate Committee on Government Affairs should explore with the Office of Management and Budget the desirability of allowing civilian agencies to manage their activities within an authorized budget, without regard to personnel ceilings.

The following are GAO's comments on the Department of Defense's letter dated September 10, 1991.

## GAO Comments

1. We have modified the title of the report to recognize that the matters discussed in the report address the broader subject of "service contractors" rather than just consulting services. This suggestion was also made by several nongovernment representatives who commented on our draft report. We agree with the comments made concerning this matter and recognize the broader applicability of the subject matter.

2. In chapter 5, we present several examples of serious problems with various government programs in which the government may have placed substantial reliance on contractors or in which the government may have lost its capacity to manage effectively. We believe that these examples suggest that the government should not relinquish its control over important projects involving contractor support.

3. We have modified the report to indicate that the Federal Acquisition Regulation "helps" implement the OMB guidance. We agree with DOD's observation that the regulation provides information required by contracting officers to discharge their responsibilities properly, as set forth in the OMB guidance and implementing DOD guidance. DOD cites its policy guidance, which implements the OMB policies. DOD said it will issue DOD-specific policy guidance on inherently governmental functions after OMB issues its revised policy. DOD is presently reviewing OMB's proposed policy and will provide OMB with its comments.

4. DOD agrees that Congress generally has not attempted to define inherently governmental functions in legislation. However, DOD cites examples of legislation that, in effect, restrict DOD's options for accomplishing its civilian workload in the most efficient and effective way possible. These examples include the following:

- legislative ceiling on DOD overseas civilian work-years;
- legislative time restriction on completion of commercial activities studies;
- legislative ceiling on the use of contracted advisory and assistance services; and
- legislative limitation on competing depot maintenance workload.

DOD notes that although Congress has not legislated inherently governmental functions, it has enacted other forms of legislative restrictions

that affect whether functions are performed by government employees or by contractors.

We agree with DOD's observations on this matter, and we acknowledge the possible impact of the legislation cited on DOD activities. We did not, however, evaluate how much this legislation may have influenced DOD policy decisions on contracting versus in-house performance.

5. DOD said it recognized the importance of documentation to demonstrate the independent involvement of DOD in projects involving contractor support. DOD said it has made improvements in response to our 1987 report.[1] Current policy requires that each DOD action officer document his/her comments in the project files. DOD does not agree, however, that insufficient documentation suggests that the contractor is performing inherently governmental functions.

We are pleased that DOD recognizes the need to document DOD involvement in projects involving contract support and that it now will require such documentation. In our analysis of the DOT&E task orders, we did not conclude that DOT&E permitted the contractor to administer governmental functions. We said, however, that on the basis of available documentation, we could not determine how thoroughly DOT&E might have reviewed several reports developed by the contractor to determine that no changes were necessary. Also, we said we could not determine whether DOT&E relied extensively on the contractor's judgment in these cases. We believe DOD's policy change, if properly implemented, will provide necessary evidence of DOD's control over contractor activities.

We recently met with DOT&E officials to discuss their involvement in the contractor's work involving one of the seven task orders. They provided us with additional information that was not furnished to us at the time of our review. On the basis of our analysis of the information, we have made appropriate revisions to our discussion of the DOT&E task orders to acknowledge that the additional evidence showed that DOT&E was actively involved in working with the contractor and did participate in the development of the product.

6. DOD noted that information in our report on budget outlays, contract actions, and employment may indicate that agencies find it easier to obtain contract dollars than authorization for federal positions. DOD indicated, however, that this situation may be particularly true in civilian

[1]GAO/NSIAD-87-108BR, Mar. 18, 1987.

agencies. However, Congress has prohibited DOD from operating under civilian end-strength ceilings since 1985.

We concur with DOD's observation and have addressed this issue as a matter for congressional consideration. We suggest that Congress may want to explore with OMB the desirability of allowing civilian agencies to manage their activities within an authorized budget without regard to personnel ceilings.

# Comments From the National Aeronautics and Space Administration

NASA

National Aeronautics and
Space Administration

Washington, D.C.
20546

Office of the Administrator

AUG 20 1991

Mr. Richard L. Fogel
Assistant Comptroller General
United States General Accounting Office
Washington, DC 20548

Dear Mr. Fogel:

Our review of the draft report, "Are Contract Consultants Performing Inherently Governmental Functions?", results in the conclusion that it is thorough, well thought out and on target. In particular, we in NASA support the concept that Government entities must have a core capability, "...a sufficient number of trained and experienced staff...to properly manage and be accountable for its work." This concept is one that NASA has long maintained as an absolute necessity if agencies, particularly research and development agencies, are to effectively perform their missions.

That portion of the draft report that deals directly with NASA issues is considered to be fair and appropriate. The Agency agrees that a strong contractor capability must be balanced by internal oversight responsibility that flows from the civil service staff. Our efforts over the past few years have been directed at strengthening the Agency's technical and managerial base to accomplish this end. Indeed, as we review this report, plans to convert personnel from certain contractor roles back into the civil service are being pursued. Such conversion actions are in response to studies that indicate too great a reliance on contractors has occurred in various core activities within NASA.

We have no changes to propose to the draft GAO report and appreciate the opportunity to review it in advance of its formal release.

Sincerely,

John E. O'Brien

John E. O'Brien
Assistant Deputy Administrator

# Nongovernment Representatives Who Commented on This Report

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James S. Hostetler, Partner, Kirkland and Ellis

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