

## GC OPINION ON CONTRACTOR PARTICIPATION IN THE FEDERAL HIRING PROCESS

On September 22, 2010, the Office of the Inspector General (IG) provided the Secretary of Energy a Report (Report Number: OAS-SR-10-04) in response to a Special Inquiry. The IG Report, entitled "Review of Allegations Regarding Hiring and Contracting in the Office of Energy Efficiency and Renewable Energy" concerned hiring and contracting practices. The IG Report, among other things, recommended the Department "determine whether the support services contract employee participation on interviewing panels violates [the Federal Acquisition Regulation (FAR)] or other requirements concerning inherently governmental functions." *Id.*, Recommendation 5, at 15. This Opinion is a response to that recommendation.

Applicable regulations make it clear that contractor personnel are *not* permitted to make hiring decisions for federal employment or even to interview applicants for federal employment. The FAR provides that, "Contractors shall not be used for the performance of inherently governmental functions."<sup>1</sup> The FAR then provides "a list of examples of functions considered to be inherently governmental functions or which shall be treated as such ...."<sup>2</sup> This list includes "[t]he selection or non-selection of individuals for Federal Government employment, including the interviewing of individuals for employment."

Inherently governmental functions are those functions so intimately related to the public interest as to require performance only by Federal Government employees. Making final decisions about government action, whether about policy or about the expenditure of funds, is the type of activity that is commonly described as an inherently governmental function that cannot be performed by contractors. Contractors may, however, generally advise federal decision-makers. In this case though, the FAR makes clear that contractors are prohibited even from conducting interviews and, thus, from providing advice. This may be because in the hiring process it is difficult, as a practical matter, to separate advice resulting from an interview from a final hiring decision. In any case, contractors may neither interview nor decide whether the federal government should hire an applicant for employment. Indeed, given the concern reflected in the FAR about contractor involvement in hiring decisions, we think it advisable that contractors not be in any way involved in the subjective evaluation of applicants for federal employment.

January 10, 2011

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<sup>1</sup> 48 C.F.R. § 7.503(a)

<sup>2</sup> 48 C.F.R. § 7.503(c).