

POLICY LETTER 11-01

**TO THE HEADS OF CIVILIAN EXECUTIVE DEPARTMENTS AND
AGENCIES**

SUBJECT: Performance of Inherently Governmental and Critical Functions

1. Purpose. This guidance establishes Executive Branch policy addressing the performance of inherently governmental functions and critical functions. The policy is intended to assist agency officers and employees in ensuring that only Federal employees perform work that is inherently governmental or otherwise needs to be reserved to the public sector. The policy is further intended to help agencies manage functions that are closely associated with inherently governmental functions and critical functions, which are often performed by both Federal employees and contractors.

Nothing in this guidance is intended to discourage the appropriate use of contractors. Contractors can provide expertise, innovation, and cost-effective support to Federal agencies for a wide range of services. Reliance on contractors is not, by itself, a cause for concern, provided that the work that they perform is not work that should be reserved for Federal employees and that Federal officials are appropriately managing and overseeing contractor performance.

2. Authority. This policy letter is issued pursuant to section 6(a) of the Office of Federal Procurement Policy Act, 41 U.S.C. 405(a), the President's March 4, 2009, *Memorandum on Government Contracting*, and section 321 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Public Law 110-417.

3. Definitions.

"*Inherently governmental function*," as defined in section 5 of the Federal Activities Inventory Reform Act, Public Law 105-270, means a function that is so intimately related to the public interest as to require performance by Federal Government employees.

(a) The term includes functions that require either the exercise of discretion in applying Federal Government authority or the making of value judgments in making decisions for the Federal Government, including judgments relating to monetary transactions and entitlements. An inherently governmental function involves, among other things, the interpretation and execution of the laws of the United States so as --

- (1) to bind the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;
- (2) to determine, protect, and advance United States economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise;
- (3) to significantly affect the life, liberty, or property of private persons;

(4) to commission, appoint, direct, or control officers or employees of the United States; or

(5) to exert ultimate control over the acquisition, use, or disposition of the property, real or personal, tangible or intangible, of the United States, including the collection, control, or disbursement of appropriations and other Federal funds.

(b) The term does not normally include –

(1) gathering information for or providing advice, opinions, recommendations, or ideas to Federal Government officials; or

(2) any function that is primarily ministerial and internal in nature (such as building security, mail operations, operation of cafeterias, housekeeping, facilities operations and maintenance, warehouse operations, motor vehicle fleet management operations, or other routine electrical or mechanical services).

“Critical function” means a function that is necessary to the agency being able to effectively perform and maintain control of its mission and operations. Typically, critical functions are recurring and long-term in duration.

4. Policy. It is the policy of the Executive Branch to ensure that government action is taken as a result of informed, independent judgments made by government officials. Adherence to this policy will ensure that the act of governance is performed, and decisions of significant public interest are made, by officials who are ultimately

accountable to the President and bound by laws controlling the conduct and performance of Federal employees that are intended to protect or benefit the public and ensure the proper use of funds appropriated by Congress. To implement this policy, agencies must reserve certain work for performance by Federal employees and take special care to retain sufficient management oversight over how contractors are used to support government operations and ensure that Federal employees have the technical skills and expertise needed to maintain control of the agency mission and operations.

(a) Performance of work by Federal employees. To ensure that work that should be performed by Federal employees is properly reserved for government performance, agencies shall:

- (1) ensure that contractors do not perform inherently governmental functions (see section 5-1);
- (2) give special consideration to Federal employee performance of functions closely associated with inherently governmental functions and, when such work is performed by contractors, provide greater attention and an enhanced degree of management oversight of the contractors' activities to ensure that contractors' duties do not expand to include performance of inherently governmental functions (see sections 5-1(a) and 5-2(a) and Appendices B and C); and
- (3) ensure that Federal employees perform and/or manage critical functions to the extent necessary for the agency to operate effectively and maintain control of its mission and operations (see sections 5-1(b) and 5-2b).

(b) Management and oversight of Federal contractors. When work need not be reserved for Federal performance and contractor performance is appropriate, agencies shall take steps to employ and train an adequate number of government personnel to administer contracts and protect the public interest through the active and informed management and oversight of contractor performance, especially where contracts have been awarded for the performance of critical functions, functions closely associated with the performance of inherently governmental functions, or where, due to the nature of the contract services provided, there is a potential for confusion as to whether work is being performed by government employees or contractors. Contract management should be appropriate to the nature of the contract, ensure that government officials are performing oversight at all times, and make clear to other government organizations or to the public when citizens are receiving service from contractors.

(c) Strategic human capital planning.

(1) As part of strategic human capital planning, agencies shall –

- (i) dedicate a sufficient amount of work to performance by Federal employees in order to build competencies (both knowledge and skills), provide for continuity of operations, and retain institutional knowledge of operations;
- (ii) ensure that sufficient personnel with appropriate training, experience, and expertise are available, and will remain available for the duration of the contract, to manage and oversee every contractor's performance and evaluate

and approve or disapprove the contractor's work products and services,
recruiting and retaining the necessary Federal talent where it is lacking; and

(iii) consider the impact of decisions to establish a specified level of government employee authorizations (or military end strength) or available funding on the ability to use Federal employees to perform work that should be reserved for performance by such employees and take appropriate action if there is a shortfall.

(2) Agencies' annual Human Capital Plan for Acquisition shall identify specific strategies and goals for addressing both the size and capability of the acquisition workforce, including program managers and contracting officer's representatives. The number of personnel required to administer a particular contract is a management decision to be made after analysis of a number of factors. These include, among others:

(i) scope of the activity in question;

(ii) technical complexity of the project or its components;

(iii) technical capability, numbers, and workload of Federal management officials;

(iv) inspection techniques available;

- (v) proven adequacy and reliability of contractor project management;
- (vi) sophistication and track record of contract administration organizations within the agency;
- (vii) importance and criticality of the function; and
- (viii) the level of risk associated with performance of the function and its performance by a contractor.

5. Implementation guidelines and responsibilities. Agencies shall use the guidelines below to determine: (1) whether their requirements involve the performance of inherently governmental functions, functions closely associated with inherently governmental functions, or critical functions; and (2) the type and level of management attention necessary to ensure that functions that should be reserved for Federal performance are not materially limited by or effectively transferred to contractors and that functions that are suitable for contractor performance are properly managed. Determining the type and level of management required typically requires agencies to consider the totality of circumstances surrounding how, where, and when work is to be performed. Special exceptions to these guidelines may exist, such as for statutorily authorized personal services contracting.

5-1. Guidelines for identifying inherently governmental functions and critical functions. Agencies must ensure that inherently governmental functions are reserved exclusively for performance by Federal employees. Agencies must further ensure that a sufficient number of Federal employees are dedicated to the performance and/or management of critical functions so that Federal employees can provide for the accomplishment of, and maintain control over, their mission and operations. Proper identification of inherently governmental and critical functions is the first step for meeting these requirements.

(a) Determining whether a function is inherently governmental. Every Federal Government organization performs some work that is so intimately related to the public interest as to require performance by Federal Government employees. Agencies should review the definition of inherently governmental functions in section 3, any other statutory provisions that identify a function as inherently governmental, and the illustrative list of inherently governmental functions in Appendix A. In no case should any function described in the definition, identified in statute as inherently governmental, or appearing on the list be considered for contract performance. If a function is not listed in Appendix A or identified in a statutory provision as inherently governmental, agencies should determine whether the function otherwise falls within the definition in section 3 by evaluating, on a case-by-case basis, the nature of the work and the level of discretion associated with performance of the work using the tests below.

(1) *Tests for identifying inherently governmental functions.* A function meeting either of the following tests should be considered inherently governmental.

(i) *The nature of the function.* Functions which involve the exercise of sovereign powers of the United States are governmental by their very nature. Examples of functions that, by their nature, are inherently governmental are officially representing the United States in an inter-governmental forum or body, arresting a person, and sentencing a person convicted of a crime to prison. A function may be classified as inherently governmental based strictly on its uniquely governmental nature and without regard to the type or level of discretion associated with the function.

(ii) *The exercise of discretion.*

(A) A function requiring the exercise of discretion shall be deemed inherently governmental if the exercise of that discretion commits the government to a course of action where two or more alternative courses of action exist and decision making is not already limited or guided by existing policies, procedures, directions, orders, and other guidance that:

(I) identify specified ranges of acceptable decisions or conduct concerning the overall policy or direction of the action; and

(II) subject the discretionary decisions or conduct to meaningful oversight and, whenever necessary, final approval by agency officials.

(B) A function may be appropriately performed by a contractor consistent with the restrictions in this section – including those involving the exercise of discretion that has the potential for influencing the authority, accountability, and responsibilities of government officials – where the contractor does not have the authority to decide on the overall course of action, but is tasked to develop options or implement a course of action, and the agency official has the ability to override the contractor’s action. The fact that decisions are made, and discretion exercised, by a contractor in performing its duties under the contract is not, by itself, determinative of whether the contractor is performing an inherently governmental function. For instance, contractors routinely, and properly, exercise discretion in performing functions for the Federal Government when, providing advice, opinions, or recommended actions, emphasizing certain conclusions, and, unless specified in the contract, deciding what techniques and procedures to employ, whether and whom to consult, what research alternatives to explore given the scope of the contract, or how frequently to test.

(C) A function is not appropriately performed by a contractor where the contractor’s involvement is or would be so extensive, or the contractor’s work product so close to a final agency product, as to effectively preempt the Federal officials’ decision-making process, discretion or authority. Such circumstances may be avoided by: (i) carefully delineating in the

statement of work the contractor's responsibilities and types of decisions expected to be made in carrying out these responsibilities and (ii) having Federal employees oversee and, as necessary, give final approval of contractor conduct and decisions. This requires that a sufficient number of in-house personnel with the appropriate training and expertise be available and remain available through the course of the contract to make independent and informed evaluations of the contractor's work, approve or disapprove that work, perform all inherently governmental functions, and preclude the transfer of inherently governmental responsibilities to the contractor. Agencies should consider whether time constraints, the operational environment, or other conditions may limit their ability to effectively manage the contractor's actions or inappropriately restrict their final approval authority. If this is the case, government performance may be the only way that Federal officials can retain control of their inherently governmental responsibilities. For example, providing security in a volatile, high-risk environment may be inherently governmental if the responsible Federal official cannot anticipate the circumstances and challenges that may arise, and cannot specify the range of acceptable conduct (as required by paragraph 5-1(a)(1)(ii)). Agencies should also consider if the level of management and oversight that would be needed to retain government control of the operation and preclude the transfer of inherently governmental responsibilities to the contractor would result in

unauthorized personal services. In such cases, the function should not be contracted out.

- (2) *Functions closely associated with inherently governmental functions.* As agencies identify inherently governmental functions, they should bear in mind that certain services and actions that generally are not considered to be inherently governmental functions may approach being in that category because of the nature of the function and the risk that performance may impinge on Federal officials' performance of an inherently governmental function. See Appendix B for list of examples. Although closely associated functions are not reserved exclusively for performance by Federal employees, section 736 of Division D of the Omnibus Appropriations Act, 2009, Public Law 111-8, requires civilian agencies subject to the FAIR Act to give special consideration to using Federal employees to perform these functions. Similarly, the Department of Defense is required to ensure special consideration is given to Federal employee performance consistent with the requirements of 10 U.S.C. 2463. The Department is further required, to the maximum extent practicable, to minimize reliance on contractors performing functions closely associated with inherently governmental functions consistent with 10 U.S.C. 2330a. Civilian agencies shall refer to OMB Memorandum M-09-26, *Managing the Multi-Sector Workforce* (July 29, 2009), Attachment 3 for criteria addressing the in-sourcing of work under Public Law 111-8. The OMB Memorandum is available at

http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_fy2009/m-09-26.pdf.

- (b) Determining whether a function is critical. Determining the criticality of a function requires the exercise of informed judgment by agency officials. The criticality of the function depends on the mission and operations, which will differ between agencies and within agencies over time. In making that determination, the officials shall consider the importance that a function holds for the agency and its mission and operations. The more important the function, the more important that the agency have internal capability to maintain control of its mission and operations. Examples of critical functions might include: analyzing areas of tax law that impose significant compliance burdens on taxpayers for the Internal Revenue Service's Office of the Taxpayer Advocate and performing mediation services for the Federal Mediation and Conciliation Service. Where a critical function is not inherently governmental, the agency may appropriately consider filling positions dedicated to the function with both Federal employees and contractors. However, to meet its fiduciary responsibility to the taxpayers, the agency must have sufficient internal capability to control its mission and operations and must ensure it is cost effective to contract for the services.

- (1) Sufficient internal capability --

- (i) generally requires that an agency have an adequate number of positions filled by Federal employees with appropriate training, experience, and expertise to understand the agency's requirements, formulate alternatives, take other appropriate actions to properly manage and be accountable for the work product, and continue critical operations with in-house resources, another contractor, or a combination of the two, in the event of contractor default; and
 - (ii) further requires that an agency have the ability and internal expertise to oversee and manage any contractors used to support the Federal workforce.
- (2) Determinations concerning what constitutes sufficient internal capability must be made on a case-by-case basis taking into account, among other things the:
- (i) agency's mission;
 - (ii) complexity of the function and the need for specialized skill;
 - (iii) current strength of the agency's in-house expertise;
 - (iv) current size and capability of the agency's acquisition workforce; and
 - (v) effect of contractor default on mission performance.

(c) Handling of work performed by Federally Funded Research and Development Centers (FFRDCs) and University Affiliated Research Centers (UARCs). In some circumstances, work that is closely associated with the performance of inherently governmental functions, or work that is critical to maintaining control of an agency's mission and operations, may be performed by FFRDCs or UARCs (with appropriate oversight by Federal officials and pursuant to properly executed contracts). These contractors provide essential engineering, research, development, and analysis capabilities to support agencies in the performance of their responsibilities and mission. FFRDCs and UARCs and their employees are not allowed to perform inherently governmental functions. Agencies shall also refer to the requirements in FAR Part 37 regarding requirements pertaining to the conduct of FFRDCs.

5-2. Management responsibilities in connection with the planning and awarding of contracts.

(a) Pre-award. As part of acquisition planning, agencies shall confirm that the services to be procured do not include work that must be reserved for performance by Federal employees and that the agency will be able to manage the contractor consistent with its responsibility to perform all inherently governmental functions and maintain control of its mission and operations. For the procurement of services above the simplified acquisition threshold, the contract file shall include documentation of this confirmation from the agency head or designated requirements official to the contracting officer. The contract file should include analysis that establishes, at a minimum, that:

- (1) the function to be contracted does not appear on the list of inherently governmental functions in Appendix A and does not otherwise qualify as an inherently governmental function, taking into consideration, as necessary, the tests in subsection 5-1(a);
- (2) a statute, such as an annual appropriations act, does not identify the function as inherently governmental or otherwise require it to be performed by Federal employees;
- (3) the proposed role for the contractor is not so extensive that the ability of senior agency management to develop and consider options or take an alternative course of action is or would be preempted or inappropriately restricted;
- (4) if the function is closely associated with an inherently governmental one –
 - (i) special consideration has been given to using Federal employees to perform the function in accordance with applicable law and implementing guidance;
 - (ii) the agency has sufficient capacity and capability to give special management attention to contractor performance, limit or guide the contractor's exercise of discretion, ensure reasonable identification of contractors and contractor work

products, avoid or mitigate conflicts of interest, and preclude unauthorized personal services;

(iii) the agency will comply with the checklist of responsibilities in Appendix C;
and

(5) if the function is a critical function, the agency has sufficient internal capability to control its mission and operations as provided at subsection 5-1(b).

(b) Post-award. Agencies should review, on an ongoing basis, the functions being performed by their contractors, paying particular attention to the way in which contractors are performing, and agency personnel are managing, contracts involving functions that are closely associated with inherently governmental functions (see subsection 5-1(a) and Appendix B) and contracts involving critical functions (see subsection 5-1(b)). These reviews should be conducted in connection with the development and analysis of inventories of service contracts. Through the use of an inventory, an agency manager can gain insight into where, and the extent to which, contractors are being used to perform activities by analyzing how contracted resources are distributed by function and location across the agency and within its components. Civilian agencies should refer to section 743 of Division C of the Consolidated Appropriations Act, 2010 (Public Law 111-117) and OFPP Memorandum to Chief Acquisition Officers and Senior Procurement Executives,

Service Contract Inventories, November 5, 2010. Department of Defense services and agencies should refer to section 2330a of Title 10 of the United States Code.

(1) Contractor performance of inherently governmental functions. If a determination is made that a contractor is performing work that is inherently governmental (or involves unauthorized personal services), but the contract, properly defined, does not entail performance of inherently governmental functions or unauthorized personal services, the agency shall take prompt corrective actions. In some cases, government control over, and performance of, inherently governmental responsibilities can be reestablished by strengthening contract oversight using government employees with appropriate subject matter expertise and following the protocols identified in FAR 37.114 (see also Appendix C). However, agencies must ensure that increasing the level of government oversight and control does not result in unauthorized personal services as provided by FAR 37.104. If government control of inherently governmental functions cannot be reestablished, agencies will need to in-source work on an accelerated basis through the timely development and execution of a hiring plan timed, if possible, to permit the non-exercise of an option or the termination of that portion of the contract being used to fulfill inherently governmental responsibilities.

(2) Overreliance on contractors to perform critical functions. While contractor performance of critical functions is common, if the agency determines that internal control of its mission and operations is at risk due to overreliance on

contractors to perform critical functions, requiring activities should work with their human capital office to develop and execute a hiring and/or development plan. Requiring activities should also work with the acquisition office to address the handling of ongoing contracts and the budget and finance offices to secure the necessary funding to support the needed in-house capacity. Agencies should also consider application of the responsibilities outlined in Appendix C, as appropriate.

If an agency has sufficient internal capability to control its mission and operations, the extent to which additional work is performed by Federal employees should be based on cost considerations. Supporting cost analysis should address the full costs of government and private sector performance and provide like comparisons of costs that are of a sufficient magnitude to influence the final decision on the most cost effective source of support for the organization.

- (c) Analyzing functions. A function often includes multiple activities, or tasks, some of which may be inherently governmental, some of which may be closely associated with inherently governmental work, and some may be neither. By evaluating work at the activity level, an agency may be able to more easily differentiate tasks within a function that may be performed only by Federal employees from those tasks that can be performed by either Federal employees or contractors without blurring the line between the role of Federal employees and contractors.

5-3. Management responsibilities in connection with small business contracting.

- (a) Lower prioritization for review. When prioritizing what outsourced work should be reviewed for potential insourcing, agencies generally should place a lower priority on reviewing work performed by small businesses when the work is not inherently governmental and where continued contractor performance does not put the agency at risk of losing control of its mission or operations, especially if the agency has not recently met, or currently is having difficulty meeting, its small business goals, including any of its socioeconomic goals. The agency should involve its small business advocate if considering the insourcing of work currently being performed by small businesses.
- (b) Considerations when contracted work is identified for insourcing. If part of a contracted function to be insourced is currently being performed by both small and large businesses, the “rule of two” should be applied in deciding between small and large businesses that will perform the contracted work that remains in the private sector. The “rule of two” set out in FAR subpart 19.5 requires that acquisitions be reserved for award to small businesses, or certain subsets of small businesses, if there are two or more responsible small businesses capable of performing the work at fair market prices. The agency should involve its small business representative in the same manner as it would in working with the acquisition and program office in evaluating opportunities for small businesses for new work. In addition, if contracted work not currently being performed by small businesses is reduced as part of an

insourcing, the agency should carefully consider during recompetition whether it can be totally or partially set-aside for small businesses.

5-4. Additional agency management responsibilities.

- (a) Duty of Federal employees. Every Federal manager and their employees have an obligation to help avoid performance by contractors of responsibilities that should be reserved for Federal employees. Although contractors provide important support to the agency, they may not be motivated solely by the public interest, and may be beyond the reach of management controls applicable to Federal employees. As part of this obligation, Federal managers and employees who rely on contractors or their work product must take appropriate steps, in accordance with agency procedures, to ensure that any final agency action complies with the laws and policies of the United States and reflects the independent conclusions of agency officials and not those of contractors. These steps shall include increased attention and examination where contractor work product involves advice, opinions, recommendations, reports, analyses, and similar deliverables that are to be considered in the course of a Federal employee's official duties and may have the potential to influence the authority, accountability, and responsibilities of the employee.
- (b) Development of agency procedures. Agencies shall develop and maintain internal procedures to address the requirements of this guidance. Those procedures shall be reviewed by agency management no less than every two years.

- (c) Training. Agencies shall take appropriate steps to help their employees understand and meet their responsibilities under this guidance. Steps should include training, no less than every two years, to improve employee awareness of their responsibilities.
- (d) Review of internal management controls. Agencies should periodically evaluate the effectiveness of their internal management controls for reserving work for Federal employees and identify any material weaknesses in accordance with OMB Circular A-123, *Management's Responsibility for Internal Control*, and OFPP's *Guidelines for Assessing the Acquisition Function*, available at http://www.whitehouse.gov/omb/circulars_a123/.
- (e) Designation of responsible management official(s). Each Federal agency with 100 or more full-time employees in the prior fiscal year shall identify one or more senior officials to be accountable for the development and implementation of agency policies, procedures, and training to ensure the appropriate reservation of work for Federal employees in accordance with this guidance. Each such agency shall submit the names and titles of the designated officials, along with contact information, by June 30 annually to OMB on the following MAX website: <https://max.omb.gov/community/x/VwkQIg>.

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

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

7. Effective date. This policy letter is effective October 12, 2011.

Daniel I. Gordon

Administrator

Appendix A. Examples of inherently governmental functions

The following is an illustrative list of functions considered to be inherently governmental. This list should be reviewed in conjunction with the list of functions closely associated with inherently governmental functions found in Appendix B to better understand the differences between the actions identified on each list.

Note: For most functions, the list also identifies activities performed in connection with the stated function. In many cases, a function will include multiple activities, some of which may not be inherently governmental.

1. The direct conduct of criminal investigation.
2. The control of prosecutions and performance of adjudicatory functions (other than those relating to arbitration or other methods of alternative dispute resolution).
3. The command of military forces, especially the leadership of military personnel who are performing a combat, combat support or combat service support role.
4. Combat.

5. Security provided under any of the circumstances set out below. This provision should not be interpreted to preclude contractors taking action in self-defense or defense of others against the imminent threat of death or serious injury.
 - (a) Security operations performed in direct support of combat as part of a larger integrated armed force.
 - (b) Security operations performed in environments where, in the judgment of the responsible Federal official, there is significant potential for the security operations to evolve into combat. Where the U.S. military is present, the judgment of the military commander should be sought regarding the potential for the operations to evolve into combat.
 - (c) Security that entails augmenting or reinforcing others (whether private security contractors, civilians, or military units) that have become engaged in combat.
6. The conduct of foreign relations and the determination of foreign policy.
7. The determination of agency policy, such as determining the content and application of regulations.
8. The determination of budget policy, guidance, and strategy.

9. The determination of Federal program priorities or budget requests.
10. The selection or non-selection of individuals for Federal Government employment, including the interviewing of individuals for employment.
11. The direction and control of Federal employees.
12. The direction and control of intelligence and counter-intelligence operations.
13. The approval of position descriptions and performance standards for Federal employees.
14. The determination of what government property is to be disposed of and on what terms (although an agency may give contractors authority to dispose of property at prices with specified ranges and subject to other reasonable conditions deemed appropriate by the agency).
15. In Federal procurement activities with respect to prime contracts:
 - (a) determining what supplies or services are to be acquired by the government (although an agency may give contractors authority to acquire supplies at prices within specified ranges and subject to other reasonable conditions deemed appropriate by the agency);

- (b) participating as a voting member on any source selection boards;
- (c) approving of any contractual documents, including documents defining requirements, incentive plans, and evaluation criteria;
- (d) determining that prices are fair and reasonable;
- (e) awarding contracts;
- (f) administering contracts (including ordering changes in contract performance or contract quantities, making final determinations about a contractor's performance, including approving award fee determinations or past performance evaluations and taking action based on those evaluations, and accepting or rejecting contractor products or services);
- (g) terminating contracts;
- (h) determining whether contract costs are reasonable, allocable, and allowable; and
- (i) participating as a voting member on performance evaluation boards.

16. The selection of grant and cooperative agreement recipients including: (a) approval of agreement activities, (b) negotiating the scope of work to be conducted under grants

/cooperative agreements, (c) approval of modifications to grant/cooperative agreement budgets and activities, and (d) performance monitoring.

17. The approval of agency responses to Freedom of Information Act requests (other than routine responses that, because of statute, regulation, or agency policy, do not require the exercise of judgment in determining whether documents are to be released or withheld), and the approval of agency responses to the administrative appeals of denials of Freedom of Information Act requests.
18. The conduct of administrative hearings to determine the eligibility of any person for a security clearance, or involving actions that affect matters of personal reputation or eligibility to participate in government programs.
19. The approval of Federal licensing actions and inspections.
20. The collection, control, and disbursement of fees, royalties, duties, fines, taxes and other public funds, unless authorized by statute, such as title 31 U.S.C. 952 (relating to private collection contractors) and title 31 U.S.C. 3718 (relating to private attorney collection services), but not including:
 - (a) collection of fees, fines, penalties, costs or other charges from visitors to or patrons of mess halls, post or base exchange concessions, national parks, and similar entities or activities, or from other persons, where the amount to be

collected is predetermined or can be readily calculated and the funds collected can be readily controlled using standard cash management techniques, and

(b) routine voucher and invoice examination.

21. The control of the Treasury accounts.
22. The administration of public trusts.
23. The drafting of official agency proposals for legislation, Congressional testimony, responses to Congressional correspondence, or responses to audit reports from an inspector general, the Government Accountability Office, or other Federal audit entity.
24. Representation of the government before administrative and judicial tribunals, unless a statute expressly authorizes the use of attorneys whose services are procured through contract.

Appendix B. Examples of functions closely associated with the performance of inherently governmental functions

The following is an illustrative list of functions that are generally not considered to be inherently governmental but are closely associated with the performance of inherently governmental functions. This list should be reviewed in conjunction with the list of inherently governmental functions in Appendix A to better understand the differences between the actions identified on each list.

Note: For most functions, the list also identifies activities performed in connection with the stated function. In many cases, a function will include multiple activities, some of which may not be closely associated with performance of inherently governmental functions.

1. Services in support of inherently governmental functions, including, but not limited to the following:
 - (a) performing budget preparation activities, such as workload modeling, fact finding, efficiency studies, and should-cost analyses.
 - (b) undertaking activities to support agency planning and reorganization.

- (c) providing support for developing policies, including drafting documents, and conducting analyses, feasibility studies, and strategy options.

- (d) providing services to support the development of regulations and legislative proposals pursuant to specific policy direction.

- (e) supporting acquisition, including in the areas of:
 - i) acquisition planning, such as by –
 - I) conducting market research,
 - II) developing inputs for government cost estimates, and
 - III) drafting statements of work and other pre-award documents;
 - ii) source selection, such as by –
 - I) preparing a technical evaluation and associated documentation;
 - II) participating as a technical advisor to a source selection board or as a nonvoting member of a source selection evaluation board; and
 - III) drafting the price negotiations memorandum; and
 - iii) contract management, such as by –
 - I) assisting in the evaluation of a contractor's performance (e.g., by collecting information performing an analysis, or making a recommendation for a proposed performance rating), and
 - II) providing support for assessing contract claims and preparing termination settlement documents.

- (f) Preparation of responses to Freedom of Information Act requests.
2. Work in a situation that permits or might permit access to confidential business information or other sensitive information (other than situations covered by the National Industrial Security Program described in FAR 4.402(b)).
 3. Dissemination of information regarding agency policies or regulations, such as conducting community relations campaigns, or conducting agency training courses.
 4. Participation in a situation where it might be assumed that participants are agency employees or representatives, such as attending conferences on behalf of an agency.
 5. Service as arbitrators or provision of alternative dispute resolution (ADR) services.
 6. Construction of buildings or structures intended to be secure from electronic eavesdropping or other penetration by foreign governments.
 7. Provision of inspection services.
 8. Provision of legal advice and interpretations of regulations and statutes to government officials.

9. Provision of non-law-enforcement security activities that do not directly involve criminal investigations, such as prisoner detention or transport and non-military national security details.

**Appendix C. Responsibilities checklist for functions closely associated with
inherently governmental functions**

If the agency determines that contractor performance of a function closely associated with an inherently governmental function is appropriate, the agency shall –

- (1) limit or guide a contractor’s exercise of discretion and retain control of government operations by both –
 - (i) establishing in the contract specified ranges of acceptable decisions and/or conduct; and
 - (ii) establishing in advance a process for subjecting the contractor’s discretionary decisions and conduct to meaningful oversight and, whenever necessary, final approval by an agency official;
- (2) assign a sufficient number of qualified government employees, with expertise to administer or perform the work, to give special management attention to the contractor’s activities, in particular, to ensure that they do not expand to include inherently governmental functions, are not performed in ways not contemplated by the contract so as to become inherently governmental, do not undermine the

integrity of the government's decision-making process as provided by subsections 5-1(a)(1)(ii)(b) and (c), and do not interfere with Federal employees' performance of the closely-associated inherently governmental functions (see subsection 5-2(b)(2) for guidance on steps to take where a determination is made that the contract is being used to fulfill responsibilities that are inherently governmental);

- (3) ensure that the level of oversight and management that would be needed to retain government control of contractor performance and preclude the transfer of inherently governmental responsibilities to the contractor would not result in unauthorized personal services as provided by FAR 37.104;
- (4) ensure that a reasonable identification of contractors and contractor work products is made whenever there is a risk that Congress, the public, or other persons outside of the government might confuse contractor personnel or work products with government officials or work products, respectively; and
- (5) take appropriate steps to avoid or mitigate conflicts of interest, such as by conducting pre-award conflict of interest reviews, to ensure contract performance is in accordance with objective standards and contract specifications, and developing a conflict of interest mitigation plan, if needed, that identifies the conflict and specific actions that will be taken to lessen the potential for conflict of interest or reduce the risk involved with a potential conflict of interest.

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