

INHERENTLY GOVERNMENTAL FUNCTIONS

1. With the increasing emphasis on the competitive sourcing (i.e., contracting out or privatization) of commercial activities/functions performed by the Government, it is important to understand that not all activities/functions presently performed by Government employees can be contracted out or privatized. Conversely, although each of us likes to believe that the services we render the American taxpayer are “inherently Governmental”, that may not necessarily be true. In fact, it often is not.
2. The cornerstone of the Government policy regarding the performance of commercial activities by either the private commercial sector or in-house by Government employees is Office of Management and Budget (OMB) Circular No. A-76 (revised) dated 4 August 1983. As set forth in the Circular, it is the policy of the Government to rely on commercial sources to supply products and services that the Government needs. If the Government is performing an activity that the commercial sector has the ability to perform, then as a matter of policy, that activity generally should be considered for conversion to private performance.
3. The major exception to the policy that the Government should rely on commercial sources to supply products and services is the performance of activities/functions that are considered to be inherently Governmental in nature. According to OMB, activities/functions are considered to be inherently Governmental when they are “so intimately related to the public interest as to mandate performance only by Federal employees.” Inherently Governmental activities/functions cannot be performed by the commercial sector. These activities/functions require either the exercise of discretion in applying Government authority or the use of value judgments in making decisions for the Government.
4. The OMB Circular sets forth two categories of activities/functions that are normally considered to be inherently Governmental. The first includes activities/functions that are considered to be acts of governing and the discretionary exercise of Government authority such as criminal investigations, prosecutions and other judicial functions. The second category includes monetary transactions and entitlements such as tax collection and revenue disbursements.
5. In the Supplemental Handbook to Circular No. A-76, dated March 1996, OMB expressly states that inherently Governmental activities/functions are not subject to the requirements of Circular A-76 or the Supplemental Handbook.

The decision as to whether an activity/function is inherently Governmental is dependent on a number of factors, including the level of Federal control required and the nature of the function. Although neither Circular A-76 nor the Supplemental Handbook specifically identifies any activity/function as being inherently Governmental, OMB refers to the guidance provided by the Office of Federal Procurement Policy (OFPP) Policy Letter 92-1, dated 23 September 1992, for assistance in identifying inherently Governmental activities.

6. In Appendix A to Policy Letter 92-1, OFPP provides an illustrative list of functions that are considered to be inherently Governmental. Additionally, OFPP indicates that inherently Governmental functions involve the following types of actions:

a. The interpretation and execution of the laws of the United States so as to bind the United States to take or not take some action by contract, policy, regulation, authorization, order or otherwise;

b. Actions that determine, protect and advance the Government's economic, political, territorial, property or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management or otherwise;

c. Activities that significantly affect the life, liberty or property of private persons;

d. Actions that commission, appoint, direct, or control officers or employees of the United States; or

e. Actions that exert ultimate control over the acquisition, use, or disposition of the property, real or personal, tangible or intangible, of the United States, including the collection, control, or disbursement of appropriated and other Federal funds.

7. According to OFPP, inherently Governmental activities/functions do not normally include gathering information for or providing advice, opinions, recommendations or ideas to Government officials. Inherently Governmental functions also do not include functions that are primarily ministerial and internal in nature, such as building security, mail operations, the operation of cafeterias, and housekeeping; facilities operations and maintenance; warehouse operations, motor vehicle fleet management or mechanical services. Further illustrations of non-inherently Governmental functions are included in Appendix B. It is clear, based on this guidance, that many Government activities/functions would not be considered inherently Governmental in nature.

8. In determining whether an activity/function is inherently Governmental, one of the key factors to consider is whether the activity/function involves the exercise of discretion. The greater the amount of discretion involved in performing the activity/function, the more likely it would be considered "inherently Governmental". However, not every activity/function that involves the exercise of discretion is inherently Governmental. The use of discretion must have the effect of

committing the Government to a course of action. Therefore, although a position that includes the authority to set or change regulatory policy would be considered inherently Governmental, a position that involves providing advice or recommendations on implementing such a regulatory policy would not be considered inherently Governmental. In determining if an activity/function is inherently Governmental, OFPP states that the totality of the circumstances must be considered.

9. The guidance issued by OMB and OFPP was incorporated into the Federal Acquisition Regulation (FAR), however, the FAR provides little additional illumination on the subject. Part 7 of the FAR sets forth the Government's policy on the use of private commercial sources and the limitations regarding inherently Governmental functions. FAR 7.301 states that the Government's policy is to rely on private commercial sources for supplies and services except for functions that are inherently Governmental. Additionally, FAR 7.503 specifically prohibits contracting out the performance of inherently Governmental functions.

10. FAR 7.503(c), however, does provide specific examples of inherently Governmental functions in the area of Federal procurement:

- a. Determining what supplies or services are to be acquired by the Government
- b. Participating as a voting member on any source selection board
- c. Approving any contractual document
- d. Awarding contracts
- e. Administering contracts, including ordering changes
- f. Terminating contracts
- g. Determining whether contract costs are reasonable, allocable, and allowable
- h. Participating as a voting member on a performance evaluation board
- i. Determining budget policy, guidance, and strategy

11. FAR 7.503(d) sets forth a non-exclusive list of functions that are considered not to be inherently Governmental. Among the listed functions are services that involve or relate to budget preparation; reorganization and planning activities; analyses, feasibility studies, and strategy opinions used by agency personnel in developing policy; the evaluation of regulations or another contractor's performance; acquisition planning; and the providing of assistance in the development of statements of work or the technical evaluation of contract proposals.

12. As the above discussion demonstrates, there is no clear definition as to what is or is not an inherently Governmental activity/function. Any final determination as to whether an activity/function is inherently Governmental and, therefore, exempt from the requirements of the OMB Circular and FAR Part 7 must be based on the totality of the facts and the guidance set forth in the FAR, the Circular and the OFPP Policy Letter.

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