



USAID
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PERFORMANCE OF INHERENTLY
GOVERNMENTAL AND CRITICAL
FUNCTIONS ANALYSIS GUIDE AND
TEMPLATE

BUREAU FOR MANAGEMENT (M)
OFFICE OF ACQUISITION AND ASSISTANCE
TEMPLATES SERIES

DECEMBER 2012

Introduction

The Federal Acquisition Regulations (FAR) **7.503** states that contracts must not be used for the performance of inherently governmental functions. It provides a list of examples of functions considered to be inherently governmental functions or which must be treated as such; as well as a list of examples of functions generally not considered to be inherently governmental functions. It requires Agency implementation to include procedures requiring the agency head or designated requirements official to provide the Contracting Officer, concurrent with transmittal of the statement of work (or any modification thereof), a written determination that none of the functions to be performed are inherently governmental. This assessment should place emphasis on the degree to which conditions and facts restrict the discretionary authority, decision-making responsibility, or accountability of Government officials using contractor services or work products. Disagreements regarding the determination will be resolved in accordance with agency procedures before issuance of a solicitation.

Additionally, the **Office of Federal Procurement Policy (OFPP) Policy Letter 11-01** provides executive branch policy on the performance of inherently governmental and critical functions. The policy is intended to assist agencies in ensuring that only Federal employees perform work that is inherently governmental or otherwise needs to be reserved for 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, but rather to ensure 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.

Audience

- | | |
|---|--|
| <input type="checkbox"/> Agreement Officer | <input type="checkbox"/> Agreement Officer's Representative |
| <input checked="" type="checkbox"/> Contracting Officer | <input checked="" type="checkbox"/> Contracting Officer's Representative |
| <input checked="" type="checkbox"/> Contract Specialist | <input checked="" type="checkbox"/> Program Analyst/Activity Manager |
| <input type="checkbox"/> Agreement Specialist | <input type="checkbox"/> Budget Officer |

Acronyms

A&A Acquisition and Assistance
CO Contracting Officer
COR Contracting Officer's Representative
FAR Federal Acquisition Regulation
OFPP Office of Federal Procurement Policy

Roles and Responsibilities

Program Manager/Contracting Officer Representative.

Before submitting a procurement request to the Contracting Officer (CO), for services that exceed the simplified acquisition threshold, the **Program Manager (PM)/Contracting Officer Representative (COR)** is responsible for conducting an analysis, in accordance with 5-2(a) of the OFPP Policy Letter, that will form the basis for a written determination from the PM/COR to the contracting officer. The written documentation shall confirm that none of the functions are inherently governmental and the agency will be able to manage the contractor consistent with its responsibility to perform all inherently governmental functions while maintaining control of its mission and operations.

The **Contracting Officer (CO) must not accept a procurement request that exceeds the simplified acquisition threshold, without this required documentation.**

DEFINITIONS

Inherently Governmental Function: A function that is so intimately related to the public interest as to require performance by Federal Government employees. 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.

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: 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.

Operating Unit (OU): USAID missions, regional entities, and USAID/Washington offices that expend funds to support Agency programs and operations. This definition particularly includes

operating units performing the functions of formulating policy, strategic and budgetary planning, achieving results, procurement, personnel management, financial management, and statutory requirements.

GUIDANCE

An part of the acquisition and assistance (A&A) planning process, OUs must confirm that the services to be procured do not include work that must be reserved for performance by Federal employees and that the OU will be able to manage the contractor consistent with its responsibility to perform inherently governmental functions and maintain control of its mission and operations. PMs and CORs must adhere to the requirements in FAR 17.5 and use the guidelines in the **OFPP Policy Letter 11-01** (5-1) 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 employee 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 consideration of the totality of circumstances surrounding how, where, and when exceptions to the guidelines may exist. The requirements in FAR 17.5 do not apply to services obtained through either personnel appointments, advisory committees, or personal services contracts issued under statutory authority.

INHERENTLY GOVERNMENTAL AND CRITICAL FUNCTIONS REVIEW CHECKLIST

The checklist below is a tool to guide PMs and CORs in conducting an analysis of the work to be performed in light of the Federal policies regarding the performance of inherently governmental and critical functions. PMs and CORs must provide the checklist to the CO for each procurement of services that exceed the simplified acquisition threshold.

INHERENTLY GOVERNMENTAL AND CRITICAL FUNCTIONS CHECKLIST

In accordance with Federal policy, agencies must (1) ensure that contractors do not perform inherently governmental functions; (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; 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. This checklist documents the analysis conducted by the operating unit to confirm that the procurement of services above the simplified acquisition threshold (\$150,000) complies with this policy. Please check the appropriate boxes below and provide comments where needed.

Award Title:

<input type="checkbox"/>	<p>1. The function to be contacted does not appear on the illustrative list of inherently governmental functions in Appendix A of <u>OFPP Policy Letter 11-01</u> and does not otherwise qualify as an inherently governmental function taking into consideration, as necessary, the tests in subsection 5-1(a) of <u>OFPP Policy Letter 11-01</u>. The tests in 5-1(a) include evaluating, on a case-by-case basis, the nature of the work and level of discretion associated with performance of the work. Functions which involve the exercise of sovereign powers of the United States are governmental by nature. A function requiring the exercise of discretion is 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.</p> <p>Comments:</p>
<input type="checkbox"/>	<p>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.</p> <p>Comments:</p>
<input type="checkbox"/>	<p>3. The proposed role for the contractor is not so extensive that the ability of senior management to develop and consider options or take an alternative course of action is or would be preempted or inappropriately restricted.</p> <p>Comments:</p>

<input type="checkbox"/>	<p>4. If the function is closely associated with an inherently governmental one (a) special consideration has been given to using Federal employees to perform the function in accordance with applicable law and implementing guidance (b) 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; (c) the agency will comply with the checklist of responsibilities in Appendix C of <u>OFPP Policy Letter 11-01</u>.</p> <p>Comments:</p>
<input type="checkbox"/>	<p>5. If the function is a critical function, the operating unit has sufficient internal capability to control its mission and operations as provided in subsections 5-1(b) of <u>OFPP Policy Letter 11-01</u>. Determining the criticality of a function requires the exercise of informed judgment. The more important the function, the more important that the operating unit have internal capability to maintain control of the mission and operations. Sufficient internal capability generally requires that the operating unit have an adequate number of positions filled by Federal employees with appropriate training, experience, and expertise to understand the 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. Sufficient internal capability also requires that the operating unit have the ability and internal expertise to oversee and manage any contractors used to support the Federal workforce. Determinations concerning what constitutes sufficient internal capability must be made on a case-by-case basis taking into account, among other things the operating unit's mission, complexity of the function and the need for specialized skill; current strength of the in-house expertise, current size and effect of contractor default on performance.</p> <p>Comments:</p>
	<p>6. SIGNATURES</p> <p>_____</p> <p>Contracting Officer's Representative</p> <p>_____</p> <p>Operating Unit Management Official Division Chief Level or Above</p> <p>_____</p> <p>Date:</p> <p>_____</p> <p>Date:</p>