

GC GUIDANCE ON INHERENTLY GOVERNMENTAL FUNCTIONS

Federal law prohibits contractors from performing “inherently governmental functions.” But determining which functions may be performed by contractors – and which may not – is not always self-evident. The rules are complex and the lines that must be drawn are often quite fine. This can be particularly vexing in an agency like the Department of Energy where contractors perform so many important functions. This guidance is designed to provide the basic rules applicable to the Department. Specifically, it: (1) identifies general principles for determining whether a function is inherently governmental; (2) lists functions that have been specifically identified as inherently governmental by one or more sources of Federal law, (3) notes the special considerations applicable to Federally Funded Research and Development Centers (FFRDCs); and (4) offers recommended practices when using contractors’ services.

General Principles

There is no definition of “inherently governmental functions” that can be easily applied to every circumstance. However, general principles emerge from the three principal sources of Federal law: the Federal Activities Inventory Reform (FAIR) Act,¹ the Federal Acquisition Regulations (FAR),² and Office of Management and Budget (OMB) Circular A-76.³

The first general principle is that inherently governmental functions involve discretion. Discretion, in this case, refers both to latitude in decision-making (i.e., the power to make decisions free from externally imposed guidance or limits) and finality in decision-making (i.e., the power to bind the government free from the need for approval by others). Merely implementing decisions made by others does not involve discretion. Likewise, merely providing advice or analysis in support of decisions made by others does not involve discretion.

Not every exercise of discretion makes a function inherently governmental. OMB Circular A-76 explains that discretion does not make a function inherently governmental where decision-making latitude is constrained by governmental direction and where such decisions are not final without further approval. Circular A-76 states:

[T]he use of discretion shall be deemed inherently governmental if it commits the government to a course of action when 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 (1) identify specified ranges of acceptable decisions or conduct and (2) subject the discretionary authority to final approval or regular oversight by agency officials.

However, even where Federal officials retain ultimate authority to approve and review contractor actions, the contractor may nonetheless be performing an inherently governmental

¹ Public Law 105-270, 31 U.S.C. § 501 note, available at http://www.whitehouse.gov/omb/procurement_fairact

² See FAR Part 7.5, available at <https://www.acquisition.gov/far/loadmainre.html>.

³ OMB Circular No. A-76 Revised (May 29, 2003), available at http://www.whitehouse.gov/omb/circulars_a076_a76_incl_tech_correction/.

action if its role is extensive and the Federal officials' role is minimal. OMB has stated that contractor performance “would be inappropriate 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.”⁴

The second principle, identified by the FAIR Act and OMB Circular A-76, states that functions involving the exercise of sovereign authority are inherently governmental. A proposed policy letter issued by OMB in 2010 states that functions involving exercise of sovereign authority are inherently governmental without regard to the level of discretion involved.⁵ Functions involve the exercise of sovereign authority when they involve actions that only the government can perform, such as representing the United States abroad, arresting a criminal suspect, or assessing criminal penalties.

Functions Specifically Identified as Inherently Governmental

Section 7.503 of the FAR provides a detailed list of functions considered to be inherently governmental. That list has been organized by subject area below and consolidated with functions identified as inherently government by other sources of law. The following list is not all-inclusive; functions that do not appear below may still be considered inherently governmental if they involve discretion or the exercise of sovereign authority as explained above.

The following functions are considered inherently governmental:

- **Management and Human Resources**

- The direction and control of Federal employees
- The selection or non-selection of individuals for Federal Government employment, including the interviewing of individuals for employment
- The approval of position descriptions and performance standards for Federal employees
- Occupying the position of Human Resource Advisor⁶

- **Policy Formation**

- The determination of agency policy, such as the content and application of regulations
- The determination of Federal program priorities for budget requests
- The determination of budget policy, guidance, and strategy
- The drafting of strategic plans as required by 5 U.S.C. § 306(e), performance plans as required by 31 U.S.C. § 1115(e), and program performance reports as required by 31 U.S.C. § 1116(f)⁷

⁴ OMB, Office of Federal Procurement Policy, Work Reserved for Performance by Federal Government Employees, Notice of proposed policy letter, 75 Fed. Reg. 16,188, 16,194 (March 31, 2010).

⁵ *Id.*

⁶ OMB Circular A-76 Att. B § A.8.

⁷ *See* Government Performance Results Act of 1993 §§ 3 – 4.

- The drafting of Congressional testimony, responses to Congressional correspondence, or agency responses to audit reports from the Inspector General, the Government Accountability Office, or other Federal audit entity. (Note that neither this item nor the one above prohibits assistance by contractors, including the collection of information, the conduct of studies, analysis, or evaluations, or the providing of advice).

- **Procurement and Disposition of Federal Property**

- Determining what Government property is to be disposed of and on what terms (an agency may give contractors authority to dispose of property at prices within specified ranges and subject to other conditions established by the agency)
- In Federal procurement activities with respect to prime contracts—
 - Determining what supplies or services are to be acquired by the Government (an agency may give contractors authority to acquire supplies at prices within specified ranges and subject to other conditions established by the agency)
 - Participating as a voting member on any source selection boards
 - Approving any contract documents, including those defining requirements, incentive plans, and evaluation criteria
 - Awarding contracts
 - Administering contracts (including ordering changes in contract performance or contract quantities, taking action based on evaluations of contractor performance, and accepting or rejecting contractor products or services)
 - Terminating contracts
 - Determining whether contract costs are reasonable, allocable, and allowable
 - Participating as a voting member on performance evaluation boards
- The collection, control, and disbursement of fees, royalties, duties, fines, taxes, and other public funds, unless authorized by statute . . . but not including—
 - 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 easily calculated or predetermined and the funds collected can be easily controlled using standard case management techniques
 - Routine voucher and invoice examination
- Occupying the position of Agency Tender Official, Contracting Officer, Performance Work Statement Team Leader, or Source Selection Authority⁸
- The control of the treasury accounts
- The administration of public trusts

- **Adjudication, Licensing and Criminal Prosecution Functions**

- The direct conduct of criminal investigations
- The control of prosecutions and performance of adjudicatory functions other than those relating to arbitration or other methods of alternative dispute resolution

⁸ OMB Circular A-76 Att. B § A.8.

- 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
- The approval of Federal licensing actions and inspections
- **FOIA Response**
 - 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
- **Diplomatic, Intelligence and Military Affairs**
 - The conduct of foreign relations and the determination of foreign policy
 - The direction and control of intelligence and counter-intelligence operations
 - The command of military forces, especially the leadership of military personnel who are members of the combat, combat support, or combat service support role
- **Ethics**⁹
 - Providing final opinions concerning the application of the conflict of interest laws or the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct), including giving advice directly to government employees
 - Serving as an “agency designee” under the Standards of Conduct, e.g., approving a Government employee’s request for outside employment or authorizing an employee’s participation in a widely attended gathering
 - Certifying public and confidential financial disclosure forms.
 - Determining agency ethics policies
 - Referring a matter to the appropriate Inspector General for investigation
 - Referring a criminal matter to the Department of Justice (DOJ), and ensuring that administrative action is taken after declination of prosecution by DOJ
 - Ensuring that administrative action is taken regarding regulatory violations
 - Granting personal financial interest waivers
 - Selecting deputy ethics officials

Special Considerations Applicable to FFRDCs

As contractors, FFRDCs may not perform inherently governmental functions. However, the FAR acknowledges the special role of FFRDCs, including the unusual depth and long-term nature of their working relationships with government agencies. Section 35.017 of the FAR states:

⁹ Office of Government Ethics Memorandum dated June 30, 2003, available at http://www.usoge.gov/ethics_guidance/opinions/advop_files/2003/03x4.txt.

An FFRDC meets some special long-term research or development need which cannot be met as effectively by existing in-house or contractor resources. FFRDC's enable agencies to use private sector resources to accomplish tasks that are integral to the mission and operation of the sponsoring agency. An FFRDC, in order to discharge its responsibilities to the sponsoring agency, has access, beyond that which is common to the normal contractual relationship, to Government and supplier data, including sensitive and proprietary data, and to employees and installations equipment and real property.

Given the depth of their involvement in Department of Energy operations, FFRDC activities may present more difficult and more nuanced questions regarding inherently governmental functions. Resolving these questions requires sensitivity to the special status of FFRDCs in Federal agency operations. The Office of General Counsel recommends consulting counsel when questions arise in this context.

Recommended Practices When Using Contractors' Services

Following the practices noted below will help ensure that contractors are not asked to perform, and do not inadvertently perform, inherently government activities.

- Require the contractor provide the Government with options at every phase or critical milestone in a project and ensure Federal officials make all final decisions
- Establish in advance what decisions can be made and/or what conduct can be performed by contractor employees to ensure their discretionary decisions remain subject to Government oversight and final approval, i.e., think about this issue in advance and ensure your conclusions are reflected in the contractual relationship by the contract's language and by your administration of it
- Ensure that contractor employees are properly identified in email communications, teleconference calls, and in meetings so that all participants can differentiate between Federal employees and contractors
- Remain vigilant in overseeing contract performance, especially in lengthy contracts, to ensure that, contractor roles do not expand such that they preempt Federal officials' decision-making, discretion, or authority

Questions

For questions about inherently governmental functions, Department of Energy headquarters employees should consult their Contracting Officers or the Office of the Assistant General Counsel for Procurement and Financial Assistance for additional guidance on specific matters. All other Departmental employees should consult their Contracting Officers or field counsel.

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