



ACQUISITION LETTER

This Acquisition Letter is issued under the authority of the Senior Procurement Executives of DOE and NNSA. It is intended for use by procurement professions of DOE and NNSA, primarily Contracting Officers, and other officials of DOE and NNSA that are involved in the acquisition process. Other parties are welcome to its information, but definitive interpretations of its effect on contracts, and related procedures if any, may only be made by DOE and NNSA Contracting Officers.

Subject: Performance of Inherently Governmental and Critical Functions

References:

Office of Federal Procurement Policy (OFPP) Policy Letter 11-01, Performance of
Inherently Governmental and Critical Functions
FAR 7.5 - Inherently Governmental Functions
FAR 19.5 - Set-asides for Small Business
FAR 35 - Research and Development Contracting
Federal Activities Inventory Reform Act (FAIR Act), Public Law 105-270

When Is this Acquisition Letter (AL) Effective?

This AL is effective immediately upon issuance.

When Does this AL Expire?

This AL remains in effect until superseded or canceled.

Who Is the Intended Audience For this AL?

Department of Energy (DOE) and National Nuclear Security Administration (NNSA)
Heads of Contracting Activities (HCAs) and Contracting Officers (COs) are the intended
audience for this AL.

Who Is the Point of Contact For this AL?

DOE Contracting Officers may contact Kevin M. Smith of the Contract and Financial
Assistance Policy Division, Office of Policy, Office of Acquisition Management, at (202) 287-
1614, or via email at Kevin.M.Smith@hq.doe.gov. NNSA Contracting Officers may contact
Kenneth West at (505) 845-4337, or via email at Kenneth.West@nnsa.doe.gov.

Need More Information on ALs?

Visit <http://energy.gov/management/office-management/operational-management/procurement-and-acquisition/guidance-procurement> for information on Acquisition Letters and other policy issues.

What is the Purpose of this AL?

This AL provides guidance to DOE and NNSA HCAs and COs for implementing OFPP Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions. Note that we removed item 24 from the examples of Inherently Governmental Functions in Appendix A of the OFPP Policy Letter because the issue of whether representation of the government by a contractor-attorney before administrative and judicial tribunals constitutes an inherently governmental function is not yet settled. The guidance included in this AL is intended to serve as interim guidance for DOE until such time as the Federal Acquisition Regulation (FAR) is amended to implement the Policy Letter in full detail.

What is the Background?

OFPP issued Policy Letter 11-01 to provide guidance to federal agencies for managing the performance of inherently governmental and critical functions. The Policy Letter is intended to implement direction in the President's March 4, 2009, Memorandum on Government Contracting, which requires OMB to clarify when governmental outsourcing for services is and is not appropriate, consistent with section 321 of Public Law 110-417 (31 U.S.C. 501 note).

Among other things, the Policy Letter -

- Clarifies what functions are inherently governmental and must always be performed by Federal employees.

The Policy Letter provides a single definition of "inherently governmental function" built around the well-established statutory definition in the Federal Activities Inventory Reform Act (FAIR Act), Public Law 105-270. The FAIR Act defines an activity as inherently governmental when it is so intimately related to the public interest as to mandate performance by Federal employees. The definition provided by this Policy Letter will replace existing definitions in regulation and policy, including the Federal Acquisition Regulation (FAR). The Policy Letter provides examples and tests to help agencies identify inherently governmental functions.

- Explains what agencies must do when work is "closely associated" with inherently governmental functions.

Specifically, when functions that generally are not considered to be inherently governmental 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, agencies must give special consideration to using

Federal employees to perform these functions. If contractors are used to perform such work, agencies must give special management attention to contractors' activities to guard against their expansion into inherently governmental functions. The Policy Letter includes examples to help agencies identify closely associated functions and a checklist of responsibilities that must be carried out when agencies rely on contractors to perform these functions.

- Requires agencies to identify their "critical functions" in order to ensure they have sufficient internal capability to maintain control over functions that are core to the agency's mission and operations.

The Policy Letter holds an agency responsible for making sure it has an adequate number of positions filled by Federal employees with appropriate training, experience, and expertise to understand the agency's requirements, formulate alternatives, manage work product, and monitor any contractors used to support the Federal workforce. Federal officials must evaluate, on a case-by-case basis, whether they have sufficient internal capability, taking into account factors such as the agency's mission, the complexity of the function, the need for specialized staff, and the potential impact on mission performance if contractors were to default on their obligations.

- Outlines a series of agency management responsibilities to strengthen accountability for the effective implementation of these policies.

Agencies must take specific actions, before and after contract award, to prevent contractor performance of inherently governmental functions and overreliance on contractors in "closely associated" and critical functions.

HCAAs and COs shall review the guidance contained in the OFPP Policy Letter to ensure familiarity with these government-wide requirements. The full Policy Letter is available at: http://www.whitehouse.gov/omb/procurement_index_work_performance/.

Are the FAR and DEAR being revised to incorporate this Policy Letter?

Yes. OFPP is coordinating with the Federal Acquisition Regulatory Council, the Defense Acquisition Regulations Council, and the Civilian Agency Acquisition Council to develop and implement appropriate changes to the FAR to implement this Policy Letter. Once the FAR is updated, the Department of Energy Acquisition Regulation (DEAR) will be updated as necessary to reflect the new guidance.

Will training be offered on this Policy Letter?

Yes. OFPP is coordinating with the Federal Acquisition Institute and the Defense Acquisition University on appropriate training materials for the acquisition workforce and other affected stakeholders. Once this Government-wide training is developed, DOE will determine what, if any, additional training is needed specifically for DOE personnel.

What is the Guidance contained in this AL?

A. Government-wide 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.

The guidance contained in Policy Letter 11-01 is intended to assist federal 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 the Policy Letter 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.

1. 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:

- Ensure that contractors do not perform inherently governmental functions.
- 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.

- 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.

2. 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.

B. 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.

1. 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 –

(a) to bind the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;

(b) 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;

(c) to significantly affect the life, liberty, or property of private persons;

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

(e) 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.

2. The term does not normally include –

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

(b) 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.

C. HCA and Contracting Officer Responsibilities

The OFPP Policy Letter identifies many agency responsibilities that are to be implemented by agency acquisition personnel, with the assistance of program requirements staff. In DOE, these responsibilities are identified within the HCA function, and flow down to acquisition and program personnel as necessary. The responsibilities in the Policy Letter are identified and summarized below, however, HCAs, COs, and their program staff also must familiarize themselves with the specific requirements of the Policy Letter.

The initial step that HCAs, COs, and requirements officials must perform involves determining-

- Whether their requirements involve the performance of inherently governmental functions, functions closely associated with inherently governmental functions, or critical functions.
- 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.

1. Guidelines for identifying inherently governmental functions and critical functions.

HCAs must ensure that inherently governmental functions are reserved exclusively for performance by Federal employees. They 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. HCAs should review the definition of inherently governmental functions above, any other relevant statutory provisions that identify a function as inherently governmental, and the illustrative list of inherently governmental functions in the attached Appendix A. Note that we removed item 24 from the examples of Inherently Governmental Functions in Appendix A because the issue of whether representation of the government by a contractor-attorney before administrative and judicial tribunals constitutes an inherently governmental function is not yet settled. 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, HCAs should determine whether the function otherwise falls within the definition 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.

(b) Tests for identifying inherently governmental functions.

A function meeting either of the following tests should be considered inherently governmental.

- 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.

- The exercise of discretion.

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.

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.

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 Federal employees 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.

(c) Functions closely associated with inherently governmental functions.

Appendix B includes a list of examples of those functions closely associated with inherently governmental functions. As HCAs identify inherently governmental functions, they should consider 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.

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, including DOE, to give special consideration to using Federal employees to perform these functions.

2. 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 it is that the agency have internal capability to maintain control of its mission and operations.

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.

At the time of the issuance of this Acquisition Letter, the Office of the Chief Human Capital Officer was in the process of identifying the critical functions for DOE. This information will be forwarded to HCAs and COs when available.

3. 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. HCAs and COs should refer to the requirements in FAR Part 35 regarding requirements pertaining to the conduct of FFRDCs.

4. Pre-award acquisition responsibilities.

As part of acquisition planning, HCAs and COs 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 (the HCA), to the CO. The contract file should include an analysis that establishes, at a minimum, that -

- 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. Note that we removed item 24 from the examples of Inherently Governmental Functions in Appendix A because the issue of whether representation of the government by a contractor-attorney before administrative and judicial tribunals constitutes an inherently governmental function is not yet settled.
- 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.
- 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.
- If the effort is closely associated with an inherently governmental function, that -
 - (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 the attached Appendix C.

- If the function is a critical function, the agency has sufficient internal capability to control its mission and operations.

5. Post-award acquisition responsibilities.

HCAAs and COs 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 and contracts involving critical functions. These reviews should be conducted in connection with the development and analysis of inventories of service contracts, when required. 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.

6. 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 does not entail performance of inherently governmental functions or unauthorized personal services, the CO, with the appropriate support of the HCA, 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 (also see 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.

7. Overreliance on contractors to perform critical functions.

While contractor performance of critical functions is common, if an HCA 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.

8. 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 which 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.

9. Contracting with Small Businesses.

The Policy Letter, in section 5-3, addresses responsibilities relating to contracting with small businesses. Basically, when prioritizing what outsourced work should be reviewed for potential insourcing, HCA's generally should place a lower priority on reviewing work currently performed by small businesses when the work is not inherently governmental.

Additionally, when contracted work has been identified for insourcing, and the work is being performed by both large and small businesses, the "rule of two" should be applied in deciding between small and large businesses for the contracted work that remains in the private sector (see FAR 19.5).

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 that we removed item 24 from the examples of Inherently Governmental Functions in Appendix A because the issue of whether representation of the government by a contractor-attorney before administrative and judicial tribunals constitutes an inherently governmental function is not yet settled.

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.

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 the Policy Letter 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 Policy Letter 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.