



A. Description

Inherently governmental functions are functions that are so intimately related to the public interest and government operations that they must be performed by government employees in order to retain essential control and responsibility. These functions involve exercising discretionary authority and making final value judgments which affect day-to-day or long-term development, execution, and evaluation of government programs.

B. General Guidelines

- (1) Does the function involve committing the government to a course of action when two or more alternative courses of action exist?
- (2) Would a contractor's involvement be so extensive—or a contractor's work product so advanced—as to limit the agency's (government employee's) ability to develop or consider other options; i.e., does the reliance on the contractor effectively limit the discretion for a government employee decision?
- (3) Does the function involve a monetary transaction or an entitlement?
- (4) Would the contractor's performance of the function cause an appearance of private influence? Examples of these functions include:
 - Drafting/modifying congressional testimony,
 - Responses to congressional correspondence,
 - Responses to congressional Questions and Answers (Q&As), and
 - Responses to audit reports from the Inspector General (IG), the Government Accountability Office (GAO), or other federal audit entities.

Note: With respect to governmental functions, services of a purely advisory nature include: management and professional services, special studies and analyses, management support services, training, and consulting support services.

C. Non-Inclusive List of Inherently Governmental Functions

Supervisory Functions:

- (1) Direction and supervision of government employees.
- (2) Establishment of employment goals and priorities.
- (3) Evaluation of federal employee performance.
- (4) The selection or non-selection of individuals for federal government employment.
- (5) The approval of position descriptions and performance standards for federal employees.
- (6) Assignment and evaluation of organizational responsibilities.

Policy Development:

- (7) The determination of agency policy, such as determining the content and application of regulations.
- (8) Development and formulation of program goals, policy, strategy, and guidance.
- (9) Promulgation of any regulation.
- (10) Determination of the legality of proposed policies.
- (11) Representation of the U.S. Department of Energy (DOE) in policy matters.

Government Representation:

- (12) Speaking before public or private groups as a representative of the government.
- (13) Initiating or originating draft testimony or presenting, as a representative of the government, testimony before a congressional committee or regulatory body.
- (14) Editing transcripts of congressional committee or regulatory body hearings; or drafting, without attribution, inserts to transcripts.
- (15) Initiating or originating drafts of official documents and correspondence that are intended to represent the policies or plans of the government.

- (16) Initiating contact or following up, on behalf of the Department, with members of Congress, congressional committees, congressional staff members, or officials of state or foreign governments.
- (17) Drafting official correspondence to congressional offices except to provide requested routine information.
- (18) Drafting official correspondence to state and local governments except to provide requested routine information.
- (19) Drafting official responses to correspondence requiring substantial technical research, where the response reflects a departmental policy position.
- (20) The drafting of agency responses to audit reports from IG, GAO, or other federal audit entity.
- (21) The approval of agency responses to Freedom of Information Act requests.

Budget and Financial Management:

- (22) Development, justification, and approval of input into the President's Budget.
- (23) Determination and advocacy of legislative initiatives on behalf of the Department.
- (24) The determination of federal program priorities or budget requests.
- (25) The determination and development of budget policy, guidance, and strategy.
- (26) Distribution and accountability of government funds.
- (27) Management of project contingency funds.
- (28) Action in a fiduciary capacity in the control and disbursement of government funds.
- (29) Determination of final agency action on claims for or against the United States.

Procurement:

- (30) Determination of program/project and contract scope.

- (31) Establishment of the program/project management and contracting approach.
- (32) Determination of acquisition strategy and development of acquisition plans.
- (33) Selection of procurement sources.
- (34) Federal procurement activities for prime contracts (not subcontracts)
 - Determining what supplies or services are to be acquired by the government;
 - Participating as a voting member on any source selection boards;
 - Approving any contractual documents;
 - Selecting contractors and awarding contracts;
 - Administering contracts, including the determination of satisfactory contractor performance and acceptance of completed work;
 - Terminating contracts; and
 - Determining whether contract costs are reasonable, allocable, and allowable.

Program Management:

- (35) Establishment of performance goals, priorities, and schedules.
- (36) Determination of the success or failure of DOE internal management and program management activities.
- (37) Determination of reporting requirements.
- (38) Determination of requirements for, and design of, management information systems.
- (39) Determination of requirements for, and final design of, program or project management systems.
- (40) Determination of environmental impacts of energy policies and projects.

- (41) Determination of economic barriers and trade-offs for particular energy technologies.
- (42) Establishment of technical performance criteria for energy technologies.
- (43) Determination of energy production and consumption targets.
- (44) Establishment of assumptions for scientific and economic models.
- (45) Assurance of project cost, schedule, and technical performance.
- (46) Final determinations regarding performance of DOE projects.
- (47) Assurance of project execution within agreed-upon objectives.

D. Discussion of the Above List

Supervisory Functions: Inherently Governmental

Policy Development Functions: Inherently Governmental

Government Representation Functions: Interagency or advisory committees are governmental. Contractors are allowed to attend general meetings and give technical speeches and presentations; however, they must clearly state their affiliation. Any of these functions that address policy matters are governmental. Contractors may be allowed to prepare general letters and routine correspondence. Testimony, responses (includes Q&As), and representation with Congress, other governmental entities, federal audit entities, and foreign dignitaries are governmental.

Budget and Financial Management: Contractors are limited to researching issues related to the budget. Budget formulation, defense, and briefings are governmental. Financial management functions are governmental.

Procurement: For prime contracts, these are governmental. National laboratories have similar responsibilities for their subcontracts. However, national laboratories are precluded from financial assistance awards.

Program Management: Governmental functions include strategic planning, policy development, milestones, content, direction, evaluation, and performance reviews. Personal services, such as daily directions and file management, are governmental. Contractors may provide input to planning and suggestions for project scopes. In addition, contractors may create presentations, publications, brochures, and displays; perform research and studies and provide corporate history on issues; provide database support; and provide conference and meeting logistics.

NOTE: It should be stressed that contractors can neither be directed nor permitted to perform inherently governmental functions. Government employees, however, are not solely limited to the performance of inherently governmental functions. However, non-governmental functions are subject to competitive outsourcing (President’s Management Agenda).

References:

Department of Energy’s Office of Procurement and Assistance Management. (1999). Restrictions on Support Service Contracting. United States Federal Government, USA.

Federal Acquisition Regulations, Subpart 37.1—Service Contracts—General; Subpart 37.2—Advisory and Assistance Services—General. An updated version of the Federal Acquisition Regulation may be retrieved at:

<http://www.acqnet.gov/far/>