

Subchapter 3007.5 Inherently Governmental Functions

3007.502 Applicability.

This subchapter applies to all contracts and orders for services pursuant to FAR 7.502.

3007.503 Policy.

The requirements official and contracting officer shall ensure inherently governmental functions are reserved exclusively for performance by Federal employees pursuant to FAR 7.503.

3007.503-70 Definitions.

(a) “Inherently governmental functions” as defined in section 5 of the Federal Activities Inventory Reform (FAIR) Act of 1998, Public Law 105-270 are functions that are so intimately related to the public interest as to require performance by Government employees. The term includes functions that require either the exercise of discretion in applying Government authority, or the making of value judgments in making decisions for the Federal Government including judgments relating to monetary transactions and entitlements. The Federal Government cannot contract for inherently governmental functions under any circumstance. An inherently governmental function involves, among other things, the interpretation and execution of the laws of the United States so as –

- to bind the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;
- 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;
- to significantly affect the life, liberty, or property of private persons;
- to commission, appoint, direct, or control officers or employees of the United States; or
- 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.

Inherently governmental functions do not normally include gathering information for or providing advice, opinions, recommendations, or ideas to Government officials. They also do not include functions that are 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.

See FAR 7.503(c) for a list of examples of functions considered to be inherently governmental functions or which shall be treated as such. This list is not all inclusive.

(b) “Closely Associated with Inherently Governmental Functions” are functions that are not generally considered to be inherently governmental functions but 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. If the agency determines that contractor performance of a function closely associated with an inherently governmental function is appropriate, specific safeguards and monitoring systems must be addressed to ensure that work being performed by contractors will not evolve into inherently governmental functions. See FAR 7.503(d) for a list of examples of functions closely associated with inherently governmental functions. This list is not all inclusive.

(c) "Critical Functions" are functions that are necessary to the agency being able to effectively perform and maintain control of its mission and operations. Per the Office of Federal Procurement Policy (OFPP) Policy Letter 11-01: Performance of Inherently Governmental and Critical Functions, dated October 12, 2011, agencies must identify "critical functions" and ensure that the agency has sufficient internal capability to maintain control over functions that are core to the agency's mission and operations. Typically, critical functions are recurring and long-term in duration.

3007.503-71 Documentation.

(a) The Inherently Governmental and Critical Functions Analysis is located at the following link: <http://dhsconnect.dhs.gov/org/comp/mgmt/ocpo/APL/APLDocuments/Job%20Aids/Performance%20of%20Inherently%20Governmental%20and%20Critical%20Functions%20Checklist%20Final.pdf>. The Inherently Governmental and Critical Functions Analysis consists of sections that:

- (1) Provide general requirement information to include the Special Interest Function (SIF) List;
- (2) Assist in identifying inherently governmental functions;
- (3) Assist in identifying functions closely associated with inherently governmental functions;
- (4) Provide various considerations to assist in identifying critical functions; and
- (5) Provide examples of oversight tasks, safeguards or mitigation strategies for functions that are closely associated with the performance of inherently governmental functions, special interest functions and critical functions.

(b) The Product Service Code (PSC) Exemption List is located at the following link: <http://dhsconnect.dhs.gov/org/comp/mgmt/ocpo/APL/Pages/Guides&Tools.aspx>. The PSC Exemption List identifies the PSCs for which completion of the Inherently Governmental and Critical Functions Analysis is not required. The functions identified on the PSC Exemption List have been determined to have a low risk of being inherently governmental or closely associated with an inherently governmental function.

(c) The PSC Exemption Memo template is located at the following link: <http://dhsconnect.dhs.gov/org/comp/mgmt/ocpo/APL/Pages/Guides&Tools.aspx>.

3007.503-72 Requirements.

(a) The requirements official and contracting officer shall ensure inherently governmental functions are reserved exclusively for performance by Federal employees pursuant to FAR 7.503. Also see OFPP Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions, dated October 12, 2011. 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.

(b) Inherently Governmental and Critical Functions Analysis:

(1) The Inherently Governmental and Critical Functions Analysis is mandatory and shall be completed by the requirements official for all proposed service contracts above the simplified acquisition threshold (SAT) (includes base plus options), including contractor services obtained using inter/intra-agency acquisition procedures (direct and assisted) when the Product Service Code (PSC) associated with the procurement is not on the PSC Exemption List.

(2) This Inherently Governmental and Critical Functions Analysis shall be updated when there is a change to the requirement that impacts the inherently governmental functions, closely associated with inherently governmental functions, special interest functions, or critical functions determination in Sections I, II or III of the analysis.

(3) If a function is not listed in Section I of the Inherently Governmental and Critical Functions Analysis or FAR 7.503, requirements officials shall determine whether the function otherwise falls within the definition of inherently governmental 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 following tests. This shall be documented at the conclusion of Section I of the analysis. A function meeting either of the following tests should be considered inherently governmental.

(i) *Test 1.* The nature of the function test. 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.

(ii) *Test 2.* The exercise of discretion test. 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.

(4) If it is determined that contractor performance of a function closely associated with an inherently governmental function, special interest function or critical function is appropriate, oversight tasks, safeguards and/or mitigation strategies shall be implemented and documented on the analysis. Examples of oversight tasks, safeguards and/or mitigation strategies are provided in Attachment 1 of the analysis.

(5) *Class Determinations.* A class determination provides authority for a class of contract actions under a single Inherently Governmental and Critical Functions Analysis. The requirements official may execute a class determination for the same or similar related services described in the Statement of Work (SOW), Performance Work Statement (PWS), or Statement of Objective (SOO) that require essentially identical justification or rationale to support the entire class.

- (i) The class determination shall state a specified period of time but may not exceed five years and shall include the effective date and an expiration date in the document.
- (ii) A copy of the class determination shall be placed in each individual contract file that is covered by the class determination.

(6) *Additional Reviews.* Additional Component reviews of the Inherently Governmental and Critical Functions Analysis are at the discretion of the contracting activity.

(c) *Requirements Official.*

(1) Shall complete and sign an Inherently Governmental and Critical Functions Analysis or Inherently Governmental and Critical Functions PSC Exemption Memo, as applicable, for all proposed service contracts above the SAT (includes base plus options), including contractor services obtained using inter/intra-agency acquisition procedures (direct and assisted). One of these documents shall be transmitted to the contracting activity with the procurement request package.

(2) Shall include a statement with the purchase request package asserting “none of the functions to be performed are inherently governmental” for all proposed service contracts below the SAT (includes base plus options), including contractor services obtained using inter/intra-agency acquisitions procedures (direct and assisted).

(3) Shall review FAR 7.503(c) for examples of functions considered inherently governmental and FAR 7.503(d) for examples of functions generally not considered inherently governmental. If the requirements official is unsure whether the function is inherently governmental, the requirements official should request assistance from the contracting officer and/or legal counsel.

(4) Shall review, on an ongoing basis, the functions being performed by 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.

(d) *Contracting Officers.*

- (1) Shall not issue a solicitation for services above the SAT (includes base plus options) without a completed and signed Inherently Governmental and Critical Functions Analysis or Inherently Governmental and Critical Functions PSC Exemption Memo.
- (2) Shall not issue a solicitation for services below the SAT (includes base plus options) without a statement in the purchase request package that asserts “none of the functions to be performed are inherently governmental.”
- (3) Shall conduct an independent review of the Statement of Work (SOW), Performance Work Statement (PWS), or Statement of Objective (SOO) for proposed service contracts exceeding the SAT (includes base plus options), including contractor services obtained using inter/intra-agency acquisitions procedures (direct and assisted), to ensure that no inherently governmental functions are included before the solicitation is issued. If the requirements official and the contracting officer disagree as to whether a function is inherently governmental, closely associated with an inherently governmental function, special interest function or critical function, or on the PSC, the Head of the Contracting Activity or designee shall make the final determination and the contract file shall be documented appropriately.
- (4) Shall take prompt post award corrective actions if a determination is made that a contractor is performing work that is inherently governmental.
- (5) If the contracting officer intends to make contract award with a different PSC than the PSC identified by the requirements official, the contracting officer shall work with the requirements official and appropriately document the contract file.

(e) *Indefinite Delivery Vehicles.* For Indefinite Delivery Vehicles (IDVs), Basic Ordering Agreements (BOAs), and Blanket Purchase Agreements (BPAs) for proposed services, the Inherently Governmental and Critical Functions Analysis may be prepared at the IDV, BOA or BPA level as long as the SOW, PWS, or SOO provides sufficient detail to conduct an analysis. If the Inherently Governmental and Critical Functions Analysis or Inherently Governmental and Critical Functions PSC Exemption Memo is applicable to the delivery/task orders it must be stated on the document. In addition, a copy of the Inherently Governmental and Critical Functions Analysis or Inherently Governmental and Critical Functions PSC Exemption Memo shall be included with the procurement request package of all individual task orders and calls. If the SOW, PWS, or SOO do not provide adequate details, the Inherently Governmental and Critical Functions Analysis shall be prepared for each individual task order, or call order unless an exception applies.

(f) *Emergency Acquisitions.* The requirements in this section apply to emergency acquisitions as described in FAR 18 and HSAM 3018, Emergency Acquisitions.