



'Inherently Governmental' Defies Quick Definition

Former OFPP administrator Allan Burman describes his effort to define the term in 1992

By Matthew Weigelt

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In 1992, staff members of the Office of Federal Procurement Policy holed up in a small office to draft a policy letter that would attempt to define the jobs only government employees should perform. They worked late many nights, trying to determine just what those inherently governmental functions were.

Many people in government — including administration officials — believed contractors were doing too much. OFPP and its administrator, Allan Burman, were under pressure from Congress and the first Bush administration to set a clear policy.

“They wanted a bright line” between work that only government employees could perform and the jobs contractors could do, said Burman, who is now president of Jefferson Solutions.

In the end, they chiseled out a 317-word definition of inherently governmental functions with 8,500 additional words and two appendices to support and clarify what they had written.

“Because of the appearance of private influence with respect to documents that are prepared for Congress or for law enforcement or oversight agencies and that may be particularly sensitive, contractors are not to be used for the drafting of Congressional testimony; responses to Congressional correspondence; or agency responses to audit reports from an Inspector General, the General Accounting Office, or other Federal audit entity,” the policy letter states.

OFPP considered specific examples of inherently governmental jobs, as officials requested. They found a few. Contractors can’t directly conduct a criminal investigation or fully conduct a prosecution. They can’t command the military. They can’t determine the priorities of an agency program.

With regard to procurement, private-sector employees can’t determine what the government is going to buy or what properties it will dispose of. They can’t approve contractual documents or terminate a contract.

Beyond those obvious functions, any bright line disappears, experts say.

Today, as the Office of Management and Budget struggles to say exactly what jobs contractors should not do, the 1992 definition remains in place. Many experts say it’s a good starting point, but being too specific about what jobs are inherently governmental is unwieldy, especially from a governmentwide perspective.

“Officials can’t define ‘inherently governmental’ in 25 words or less,” said Lisa Mascolo, managing director of Accenture’s U.S. Federal Client Service Group for Health and Public Service.

OFPP Policy Letter 92-1, published Sept. 23, 1992

As a matter of policy, an “inherently governmental function” is a function that is so intimately related to the public interest as to mandate performance by government employees. These functions include those activities that require either the exercise of discretion in applying government authority or the making of value judgments in making decisions for the government. Governmental functions normally fall into two categories: (1) the act of governing, i.e., the discretionary exercise of government authority, and (2) monetary transactions and entitlements.

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 and operations; or other routine electrical or mechanical services.

Policy.

- (a) Accountability. 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 who are ultimately accountable to the President. When the government uses service contracts, such informed, independent judgment is ensured by:
- (1) prohibiting the use of service contracts for the performance of inherently governmental functions;
 - (2) providing greater scrutiny and an appropriate enhanced degree of management oversight when contracting for functions that are not inherently governmental but closely support the performance of inherently governmental functions;
 - (3) ensuring, in using the products of those contracts, that any final agency action complies with the laws and policies of the United States and reflects the independent conclusions of agency officials and not those of contractors who may have interests that are not in concert with the public interest, and who may be beyond the reach of management controls otherwise applicable to public employees; and
 - (4) ensuring that reasonable identification of contractors and contractor work products is made whenever there is a risk that the public, Congress, or other persons outside of the government might confuse them with government officials or with government work products, respectively.



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