

What Congress Needs to Know About Inherently Governmental Functions and Privatization

Friday, March 26

12:00 - 1:30 P.M.

Which functions of the government should be deemed “inherently governmental,” or those that must only be performed by government employees? Which functions may be privatized, or “outsourced” to the private sector? Scholars and policymakers have debated these questions since the founding of the country.

Inherently Governmental Defined:

1. Office of Management and Budget’s (OMB) Circular A-76 (1966, amended 2003, 2006)

Circular A-76 outlines the federal government’s policy of relying on the private sector to supply commercial goods and services. It provides the agencies procedures for determining whether government employees or private contractors should perform certain activities.

http://www.whitehouse.gov/omb/Circulars_default/

2. Federal Activities Inventory Reform (FAIR) Act (Public Law 105-270, 31 U.S.C. § 501 note (1998))

Enacted “to provide a process for identifying the functions of the Federal government that are not inherently governmental functions.” [http://frwebgate.access.gpo.gov/cgi-](http://frwebgate.access.gpo.gov/cgi-bin/usc.cgi?ACTION=RETRIEVE&FILE=$$xa$$busc31.wais&start=213885&SIZE=135636&TYPE=PDF)

[bin/usc.cgi?ACTION=RETRIEVE&FILE=\\$\\$xa\\$\\$busc31.wais&start=213885&SIZE=135636&TYPE=PDF](http://frwebgate.access.gpo.gov/cgi-bin/usc.cgi?ACTION=RETRIEVE&FILE=$$xa$$busc31.wais&start=213885&SIZE=135636&TYPE=PDF)

http://www.whitehouse.gov/omb/rewrite/procurement/fair/2005_fair/2005_inv_function_codes.html

3. Federal Acquisition Regulation (FAR) Subpart 2.1 -- Defined

https://www.acquisition.gov/far/current/html/Subpart%202_1.html#wp1145507

4. Federal Acquisition Regulation (FAR) Subpart 7.5

Subsection (c) provides 20 examples of functions considered to be inherently governmental functions and (d) lists 19 examples of functions generally not considered to be inherently governmental functions, but could be.

https://www.acquisition.gov/far/current/html/Subpart%207_5.html#wp1078196

Recent Actions:

1. **Public Law 109-364, § 820** (“Government performance of critical acquisition functions,” including program manager, deputy program manager, chief engineer, systems engineer, and cost estimator) – NDAA 2007
2. **Public Law 110-181, §§ 324** (insourcing guidelines), **807** (DoD contractor inventories) – NDAA 2008 **Public Law 111-8, §§ 736** (insourcing guidelines), **737** (ban on A-76 competitions) – Omnibus Appropriations Act 2009
3. **Public Law 110-417, §§ 321** (development of government-wide definition of inherently governmental function and criteria for critical functions), **1057** (Sense of Congress on interrogation of detainees) – NDAA 2009
4. **Public Law 111-84, § 325** (temporary suspension of public-private competitions under A-76 for conversion of department of defense functions to performance by a contractor) – NDAA 2010
5. **President Obama Memo on “Government Contracting,” March 4, 2009.**
Stating that “the line between inherently governmental activities that should not be outsourced and commercial activities that may be subject to private sector competition has been blurred and inadequately defined.”
http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-Subject-Government/
6. **OMB Memo, Managing the Multi-Sector Workforce, July 29, 2009.**
The memo provides initial guidance to help agencies improve their management of the federal government’s multi-sector workforce, including using contractors and warning against “excessive reliance” on them. Clarifying inherently governmental, critical, and essential functions. http://www.whitehouse.gov/omb/assets/memoranda_fy2009/m-09-26.pdf
7. **Office of Federal Procurement Policy inherently governmental function clarification (TBD 2010)**