

Bureau :

Procurement Customer: Division \_\_\_\_\_ POC \_\_\_\_\_ Tel/Email \_\_\_\_\_

Req # \_\_\_\_\_ Title: \_\_\_\_\_ Dollar Value: \$ \_\_\_\_\_  
If action against existing contract: Contract # \_\_\_\_\_ Vendor: \_\_\_\_\_

Coding Determination: \_\_\_\_\_ Closely Associated (Program Related- analysis attached)  
\_\_\_\_\_ Critical (Administrative – analysis attached)  
\_\_\_\_\_ Other

Exercise of Discretion: \_\_\_\_\_ Low ( little possibility of contractor performing IG work)  
\_\_\_\_\_ Medium (some possibility of contractor performing IG work)  
\_\_\_\_\_ High (strong possibility of contractor performing IG work)

*I hereby approve and certify that this requirement does not involve an inherently governmental function (see attached analysis) and the coding determination is appropriate for the work to be completed. For work that involves closely associated with inherently governmental or critical functions, the bureau has sufficient internal capacity to oversee and manage contractor activities and maintain control of its mission and operations. There are also no stipulations that the function must be performed by Federal employees.*

## Checklist to Identify Inherently Governmental Functions Based on Office of Federal Procurement Policy Policy Letter 11-01

“*Inherently Governmental*” is defined as a “function that is so intimately related to the public interest as to require performance by Federal Government employees (Section 5 of the Federal Activities Inventory Reform Act (FAIR), Public Law 105-270).

The following functions constitute inherently governmental functions and cannot be contracted for. **The function must be performed in-house by Federal employees** (see FAIR Act, 31 U.S.C. § 501). Review the work statement to determine if work to be performed involves any of the below functions. Any “Yes” answer to the functions listed below requires the work be completed in-house by a Federal employee.

**Does the work:**

<b>Function</b>	<b>Yes</b>	<b>No</b>
Involve the direct conduct of criminal investigation?		
Involve the control of prosecutions and performance of adjudicatory functions (other than those relating to arbitration or other methods of alternative dispute resolution)?		
Involve the command of military forces, especially the leadership of military personnel who are performing combat, combat support or combat service support role?		
Involve combat?		
Involve 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): <ul style="list-style-type: none"> <li>a) Security operations performed in direct support of combat as part of a larger integrated armed force;</li> <li>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.</li> <li>c) Security that entails augmenting or reinforcing others (whether private security contractors, civilians, or military units) that have become engaged in combat.</li> </ul>		
Involve the conduct of foreign relations and the determination of foreign policy?		
Involve the determination of agency policy, such as determining the content and application of regulations?		

Involve the determination of budget policy, guidance, and strategy?		
Involve the determination of Federal program priorities or budget requests?		
Involve the selection or non-selection of individuals for Federal Government employment, including the interviewing of individuals for employment?		
Involve the direction and control of Federal employees?		
Involve the direction and control of intelligence and counter-intelligence operations?		
Involve the approval of position descriptions and performance standards for Federal employees?		
Involve 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)?		
<p>Involve Federal Procurement Activities with respect to prime contracts:</p> <ul style="list-style-type: none"> <li>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);</li> <li>b) Participating as a voting member on any source selection boards;</li> <li>c) Approving of any contractual documents, including documents defining requirements, incentive plans, and evaluation criteria;</li> <li>d) Determining that prices are fair and reasonable;</li> <li>e) Awarding contracts;</li> <li>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);</li> <li>g) Terminating contracts;</li> <li>h) Determining whether contract costs are reasonable, allocable, and allowable; and</li> <li>i) Participating as a voting member on performance evaluation boards</li> </ul>		

<p>Involve the selection of grant and cooperative agreement recipients including:</p> <ul style="list-style-type: none"> <li>a) Approval of agreement activities;</li> <li>b) Negotiating the scope of work to be conducted under grants/cooperative agreements;</li> <li>c) Approval of modifications to grant/cooperative agreement budgets and activities; and</li> <li>d) Performance monitoring</li> </ul>		
<p>Involve 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?</p>		
<p>Involve 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?</p>		
<p>Involve the approval of Federal licensing actions and inspections?</p>		
<p>Involve the collection, control, and disbursement of fees, royalties, duties, fines, taxes and other public funds, unless authorized by statute, but not including:</p> <ul style="list-style-type: none"> <li>(a) Collection of fees, fines, penalties, costs or other charges from visitors 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</li> <li>(b) Routine voucher and invoice examination</li> </ul>		
<p>Involve control of the Treasury accounts?</p>		
<p>Involve the administration of public trusts?</p>		
<p>Involve 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?</p>		
<p>Involve the representation of the government before administrative and judicial tribunals, unless a statute expressly authorizes the use of attorneys whose services are procured through contract?</p>		

*Note:* This is an illustrative list of functions that are generally considered to be inherently governmental. Other functions not included on this list may be considered inherently governmental. There are two tests used to identify inherently governmental functions:

- **Test 1: Nature of the Function**

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. 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.

- **Test 2: 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 that: (1) identify specified ranges of acceptable decisions or conduct concerning the overall policy or direction of the action; and (2) subject the discretionary decisions or conduct to meaningful oversight and, whenever necessary, final approval by agency officials.

# Guidance for Determination of Service Contract Code

## SECTION I. INSTRUCTIONS

### Applicability

Procurement Customer shall complete and sign the Coding of Service Contract Requirements Worksheet (with higher level official signature for any contract at or over \$150,000, or otherwise as required by Bureau policy), for each requirement for

- a new service contract (new action exceeding the micro-purchase threshold) to be awarded on or after March 1, 2012; or
- a modification to an existing service contract that was awarded on or after March 1, 2012. Only modifications for additional work or change to contract performance requirements are subject to these procedures.

### Completion and Submission of Worksheet

1. Review the work statement and compare it with the Checklist to Identify Inherently Governmental Functions Based on Office of Federal Procurement Policy Letter 11-01.

***If the work to be performed under the contract involves any work described in the Checklist, the work must be performed in-house by Federal employees. No further action on the contract will be taken.***

2. If the work to be performed under the contract does not involve any inherently governmental work, designate the work as either “Closely Associated with Inherently Governmental Function” or “Critical Function” or “Other” on the Coding of Service Contract Requirements Worksheet.

***For guidance on determining whether work is “Closely Associated” or “Critical Function” see Sections II and III of this document.***

***Work that is neither “Inherently Governmental” nor “Closely Associated” nor “Critical Function” may be designated as “Other.”***

3. If the appropriate coding for the contract is either “Closely Associated with Inherently Governmental Function” or “Critical Function,” attach a written analysis showing how that decision was arrived at and how the customer will maintain sufficient internal capability to oversee and manage contractor activities and maintain control of its mission and operations.

***For “Closely Associated”: The analysis should include a discussion on:***

- a) ***whether special consideration has been given to using Federal employees to perform the function;***

- b) *whether the agency has sufficient 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; and*
- c) *the plan for ensuring compliance with the checklist of responsibilities listed under Section II.*

*For “Critical Function”: The analysis should also include a discussion on whether the agency has sufficient internal capability to control its mission and operations taking into account the bulleted items listed under Section III.*

#### 4. Points of Contact

<b>For Questions On...</b>	<b>Name/Office</b>	<b>Contact Information</b>
Coding of service contract requirements	Jim Sullivan, Office of Deputy Assistant Secretary for Human Resources and Chief Human Capital Officer (DASHR-CHCO)	202-622-9395 James.Sullivan@treasury.gov
<b>Bureau Coding POC</b>	<b>Insert</b>	<b>Insert</b>
Coding of contracts in FPDS and other procurement-specific policy	Cathy Higginbotham, Office of the Procurement Executive	202-622-6585 Cathy.Higginbotham@Treasury.Gov
<b>Bureau Procurement Policy</b>	<b>Insert</b>	<b>Insert</b>

#### 5. References

- Office of Federal Procurement Policy (OFPP) Policy Letter (P. L.) 11-01, “[Performance of Inherently Governmental and Critical Functions](#),” dated September 2011
- OFPP Memorandum, “[Service Contract Inventories](#),” dated December 19, 2011
- Acquisition Procedures Update (APU) 2012-01, “Performance of Inherently Governmental and critical Functions and the Coding of Service Contract Requirements,” dated January 31, 2012 (link to be added)

**SECTION II. CLOSELY ASSOCIATED WITH INHERENTLY GOVERNMENTAL FUNCTIONS**

“*Closely Associated with Inherently Governmental Function*” 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.

The following functions constitute functions closely associated with inherently governmental functions. In accordance with 10 U.S.C. 2330a, agencies should in-source closely associated with inherently governmental functions “to the maximum extent practicable.” Review the work statement to determine if work to be performed involves any of the below functions. Any “Yes” answer to the functions listed below requires special consideration in using Federal employees to perform these functions.

**Does the work:**

<b>Function</b>	<b>Yes</b>	<b>No</b>
Involve services in support of in support of inherently governmental functions, including, but not limited to the following: <ul style="list-style-type: none"> <li>a) Performing budget preparation activities, such as workload modeling, fact finding, efficiency studies, and should cost analyses;</li> <li>b) Undertaking activities to support agency planning and reorganization;</li> <li>c) Providing support for developing policies, including drafting documents, and conducting analyses, feasibility studies, and strategy options</li> <li>d) Providing services to support the development of regulations and legislative proposals pursuant to specific policy direction;</li> <li>e) Supporting acquisition, including in the areas of:               <ul style="list-style-type: none"> <li>Conducting market research, developing inputs for government cost estimates, drafting statements of work and other pre-award documents, preparing a technical evaluation and associated documentation, participating as a technical advisor to a source selection board as a nonvoting member of a source selection evaluation board, drafting the price negotiations memorandum, assisting in the evaluation of a contractor’s performance (e.g. by collecting information performing an analysis, or marking a recommendation for a proposed performance rating), providing support for assessing contract claims and preparing termination settlement documents; and</li> </ul> </li> <li>f) Preparation of responses to Freedom of Information Act requests</li> </ul>		
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))?		

<b>Function</b>	<b>Yes</b>	<b>No</b>
Dissemination of information regarding agency policies or regulations, such as conducting community relations campaigns, or conducting agency training courses?		
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?		
Service as arbitrators or provision of alternative dispute resolution (ADR) services?		
Construction of buildings or structures intended to be secure from electronic eavesdropping or other penetration by foreign governments?		
Provision of inspection services?		
Provision of legal advice and interpretations of regulations and statutes to government officials?		
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?		

*Note:* This is an illustrative list of functions that are generally considered to be closely associated with inherently governmental functions. Other functions not included on this list may be considered closely associated with inherently governmental functions. In determining whether a function is closely associated, agencies should analyze the nature of the function and the risk that performance may impinge on Federal officials' performance of an inherently governmental function.

If the work to be completed is closely associated with an inherently governmental function and the agency determines that contractor performance is appropriate, the agency shall comply with the following checklist of responsibilities:

- limit or guide the contractor's exercise of discretion and retain control of government operations by –
  - (a) establishing in the contract specified ranges of acceptable decisions and/or conduct; and
  - (b) 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;
- assign 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, and do not interfere with Federal employees' performance of the closely-associated inherently governmental functions

- ensure that the level of oversight and management that would be needed to retain governmental 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;
- 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
- 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 identified 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.

### **SECTION III. CRITICAL FUNCTIONS**

“*Critical Function*” means a function that is necessary to the agency being able to effectively perform and maintain control of its mission and operations.

When making the determination as to whether a function is critical, you should consider the importance that a function holds for the agency and its mission and operations. Where a critical function is not inherently governmental, an agency may consider filling positions dedicated to the function with both Federal employees and contractors. However, 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.

Determinations as to what constitutes sufficient internal capability must be made on a case-by-case basis taking into account, among other things the:

- agency's mission;
- complexity of the function and the need for specialized skill;
- current strength of the agency's in-house expertise;
- current size and capability of the agency's acquisition workforce; and
- effect of contractor default on mission performance.

#### **Does the work:**

Involve a function that is necessary to the agency being able to effectively perform and maintain control of its mission and operations?

**YES**

**NO**