

Inherently Governmental Functions: A Bright Line Rule Obscured by the Fog of War

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“The ‘fog of war’ still requires a direct line of sight on contractors.”¹

I. Introduction

The concept of “inherently governmental functions” distinguishes actions that a civilian contractor can take on behalf of the U.S. government from actions that are so important that they must be performed directly by the government. A judge advocate should have a firm grasp of what is and what is not an inherently governmental function. Recent headlines in some of America’s leading newspapers hint at some of the delicate legal issues judge advocates might find themselves grappling with in the realm of contracting. For example, according to the *Washington Post*, “the U.S. military is relying on private contractors to provide and operate PC-12 spy planes in the search for Kony, the fugitive leader of the Lord’s Resistance Army, a group known for mutilating victims, committing mass rape, and enslaving children as soldiers.”² If your command asks you to render a legal opinion regarding the propriety of such an action, what law governs? Where do you look? Can the government contract for such things? Your commander will have to sign a Request for Services Contract Approval Form³ indicating that the requested contracted service is not an inherently governmental function according to the Army Federal Acquisition Regulation Supplement.⁴

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² Craig Whitlock, *U.S. Expands Secret Intelligence Operations in Africa*, WASH. POST, June 13, 2012, http://www.washingtonpost.com/world/national-security/us-expands-secret-intelligence-operations-in-africa/2012/06/13/gJQAHyvAbV_story.html?wprss=rss_politics.

³ U.S. Dep’t of Army, Request for Services Contract Approval (SCA) Form (10 Aug. 2012) [hereinafter SCA Form], available at <http://www.asamra.army.mil/scra/documents/ServicesContractApprovalForm.pdf>. For easy reference, the form is also found at the Appendix (Request for SCA Form).

⁴ U.S. DEP’T OF ARMY, ARMY FEDERAL ACQUISITION REG. SUPP. pt. 5107.503(e) (Apr. 1, 2010, revision #25) [hereinafter AFARS].

Requiring officials must provide the contracting officer with a copy of the “Request for Services Contract Approval” form signed by an appropriate General Officer or Accountable member of the Senior Executive Service. Contracting officers shall not complete or sign the service contract approval form and shall not initiate any contract for service, or exercise an option, without

This article identifies the tools needed to determine whether a contracting request falls into the category of an inherently governmental function. Part II gives a historical background, discussing the issues surrounding the definition of inherently governmental functions. Part III examines the history of contractors on the battlefield and the evolving definition of inherently governmental functions. Part IV summarizes the current state of the law and discusses the recent changes to the definition. Finally, Part V of the article applies the law to a fictional operational law scenario. Knowing how to identify inherently governmental functions in daily practice benefits the command in both operational and garrison environments.

II. Background

In the past, there have been questions regarding the definition of inherently governmental functions, such as how inherently government functions are identified. A recent Office of Federal Procurement Policy (OFPP) policy letter⁵ attempts to settle the debate. The letter is applicable to all executive agencies, to include the Department of Defense.⁶ According to the policy letter, the final definition of what constitutes an inherently governmental function is built around the well-established statutory definition in the Federal Activities Inventory Reform Act (FAIR Act), Public

an approved certification. The approval and completed worksheets shall be included in the official contract file. The accountable General Officer or Senior Executive may delegate certification authority for requirements valued less than \$100,000 in accordance with Command policy. Contracting officers shall document the contract file with a copy of the Command policy before accepting a service contract approval that is signed below the General Officer/Senior Executive level.

Id.

⁵ Office of Fed. Procurement Policy, Office of Mgmt. & Budget, Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions, 76 Fed. Reg. 56,227 (Sept. 12, 2011) [hereinafter OFPP 11-01].

⁶ Office of Fed. Procurement Policy, Office of Mgmt. & Budget, Technical Correction to Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions, 76 Fed. Reg. 7609-01 (Feb.13, 2012) (“The Office of Federal Procurement Policy (OFPP) in the Office of Management and Budget (OMB) is making a correction to the Final Policy Letter ‘Performance of Inherently Governmental and Critical Functions’. . . to clarify that the Policy Letter applies to both Civilian and Defense Executive Branch Departments and Agencies. The original publication of the policy letter was inadvertently addressed only to the Heads of the Civilian Executive Departments and Agencies.”) (citation omitted).

Law 105-270.⁷ The FAIR Act defines an activity as inherently governmental when it is so “intimately related to the public interest as to mandate performance by Federal employees.”⁸ While this language is simple, applying it to real world situations in the operational environment is complex. One critic has sarcastically commented that trying to define what is inherently governmental is like “trying to nail Jell-O to the wall, only nailing Jell-O is easier.”⁹ While the issues seem daunting, a review of the history of warfare suggests that contractors and the complex issues they bring are no strangers to the fields of battle. Contemplating the role of the contractor in the past helps to inform our analysis of current and future problems related to contracting in a contingency environment.

III. Contractors on the Battlefield Throughout History

Today, the conflict in Afghanistan is a “war where traditional military jobs, from mess hall cooks to base guards and convoy drivers, have increasingly been shifted to the private sector. Many American generals and diplomats have private contractors for their personal bodyguards.”¹⁰ As one commentator stated, “contractors are fully integrated into U.S. national security and other government functions. To paraphrase a popular commercial about the American Express credit card, the United States cannot go to war without them.”¹¹

Contemporary society holds mixed views regarding the propriety of engaging in the act of warfare with the assistance of contractors. This is a debate that reaches back centuries. “Hiring outsiders to fight your battles is as old as war itself. Nearly every past empire, from the ancient Egyptian to the Victorian British, contracted foreign troops in some form or another.”¹² In today’s lexicon, the term mercenary is often met with disdain. However, in the past

that was not always the case. Many nations relied almost exclusively on mercenaries to achieve military objectives.

“Our general assumption of warfare is that it is engaged by public militaries, fighting for the common cause. This is an idealization. Throughout history, the participants in war were often for-profit private entities loyal to no one government.”¹³ Even the Pharaoh of ancient Egypt used mercenaries. “The battle of Kadesh (1294 B.C.E.) is the first great battle in history of which we have any detailed account. In this fight, where the Egyptians fought the Hittites, the army of Pharaoh Ramses II included units of hired Numidians.”¹⁴ Likewise, the Greeks,¹⁵ Macedonians,¹⁶ and Carthaginians¹⁷ all utilized mercenaries. One of the greatest empires in history, Rome, also employed mercenaries in their quest for an expanded empire. “Although early Rome was distinguished by its citizen army, it too was highly reliant on mercenaries. Even during the Republic period, it relied on hired units to fill such specialties as archers and cavalry.”¹⁸

After the fall of Rome, the Dark Ages set in and with it, the continued need for outsiders to assist in the dirty business of war. “Western Europe sank into the Dark Ages and any semblance of a money-based economy faltered. In a world with little or no governance capabilities, feudalism, the system of layered obligations of military service, became the mechanism by which armies were created.”¹⁹ During this period, tenants were required to perform military service for landlords.

The thirteenth century provides excellent examples of contracting for military services. The rise of contracting coincided with a rise in prosperity, especially in Italy. “Particularly important was the growth of banking. Trading companies emerged in this period, and several Italian towns

⁷ Federal Activities Inventory Reform Act of 1998, Pub. L. No. 105-270, 112 Stat. 2382 (1998); see 31 U.S.C.A. § 501 editor’s note (West 2012).

⁸ OFPP Letter 11-01, *supra* note 5.

⁹ David Isenberg, *To Be, or Not to Be, Inherent: That Is the Question*, HUFFINGTON POST (Apr. 15, 2010), http://www.huffingtonpost.com/david-isenberg/to-be-or-not-to-be-inhere_b_539933.html.

¹⁰ Rod Nordland, *Risks of Afghan War Shifts from Soldiers to Contractors*, N.Y. TIMES, Feb. 11, 2012, http://www.nytimes.com/2012/02/12/world/asia/afghan-war-risks-are-shifting-to-contractors.html?_r=0.

¹¹ David Isenberg, *Security Contractors and U.S. Defense: Lessons Learned from Iraq and Afghanistan*, CATO INST., <http://www.cato.org/publications/commentary/security-contractors-us-defense-lessons-learned-iraq-afghanistan> (last visited Apr. 2, 2013). This article appeared in *World Politics Review* on June 14, 2011. *Id.*

¹² PETER WARREN SINGER, CORPORATE WARRIORS, THE RISE OF THE PRIVATIZED MILITARY INDUSTRY 19 (2003).

¹³ *Id.*

¹⁴ *Id.* at 20.

¹⁵ *Id.* at 20–21 (“Although a few of the Greek city-states, such as Sparta, relied on citizen armies, it was a general practice for ancient Greek armies to build up their forces through the hire of outside specialists.”).

¹⁶ *Id.* at 21 (“The Macedonians honed their craft fighting on behalf of the varied Greek city-states during the Peloponnesian War (431–404 B.C.E.).”).

¹⁷ *Id.* (“[T]he Carthaginian empire was almost entirely dependent on mercenary troops and saw both the benefits and the costs. At the conclusion of the First Punic War (264–241 B.C.E.), the hired army which had not been paid and was threatened with disbandment, revolted, in what was known as the Mercenary War. The rebels were only put down when the Carthaginians were able to hire other mercenary units.”).

¹⁸ *Id.*

¹⁹ *Id.* at 22.

even turned themselves over to private investors to run.”²⁰ During this time of change, the “condotta (contract) system blossomed. This arrangement, by which military services were contracted out to private units, initially was driven by business guilds that saw it as reasonable and economical to avoid mobilizing all of society and keep the most efficient citizens (themselves) from the waste of warfare.”²¹ During this point in history, the concept of contracting begins to resemble what contemporary society would today recognize as contracting out state actions.

At the conclusion of the fourteenth century, private soldiers replaced their feudal predecessors. “The way to form an army now consisted of ‘commissioning’ (the term still used today to denote the rise to an officer rank) a private individual to raise troops, clothe them, equip them, train them, and lead them.”²² “The French Revolution and ensuing Napoleonic wars (1789–1815) signaled the end of hired soldiers playing a serious role in warfare, at least for the next two centuries.”²³ Skilled generals such as Napoleon ushered in a new era in which the state became the primary purveyor of warfare.

In our own nation’s history, mercenaries appeared on the shores of America early on. Britain employed mercenaries during the American War for Independence. “The British government did not have the troops to both maintain its worldwide colonial obligations, including holding down the ever simmering Ireland, and also defeat the numerous American patriot forces.”²⁴ The troops came from the German principalities and “29,875 hired German troops crossed the Atlantic.”²⁵ However, the British did not foresee the consequences of entering into contracts with the German forces. “As history shows, the Hessian experience did not turn out as their British employers anticipated. Rather than intimidating the American rebels into submission, news of the contracts signed with the German states was one of the factors that fomented the Declaration of Independence by the colonies.”²⁶

The American forces also utilized paid military actors. Of particular note, “Baron von Steuben’s military training at Valley Forge is credited with turning the Continental Army into a true fighting force.”²⁷ General Washington’s men subsequently defeated Hessian forces in 1776 at Trenton and Princeton.²⁸ Here we see how two contracts, one drafted by the British Crown retaining the services of the Hessians and one drafted by the Continental Army retaining the services of Baron von Steuben, contributed to the outcome of the Revolutionary War. Although it would be unthinkable today to hire a European general to oversee the majority of training prior to a major offensive, during the birth of the United States, the concept of contracting out functions that would be considered inherently governmental today were woven into the fabric of our nation at an early stage.

History shows us that that a contract can do more than retain the services of foot soldiers. Charter companies, also known as joint stock companies, granted private contractors vast powers. “[J]oint stock companies were licensed to have monopoly power over all trade within a designated area, typically land newly discovered by Europeans.”²⁹ Here, the control of trade encompassed a myriad of inherently governmental acts. For example, the Dutch East India Company was given the right to trade in the Indian Ocean, a right no other Dutch citizen outside the company possessed. “While nominally under the control of their license back home, abroad, the charter ventures quickly became forces unto themselves.”³⁰ The Dutch East India Company derived great profit by building fortifications, coining money, and deploying over “140 ships and 25,000 men permanently under arms.”³¹

The “outsourcing of trade controls to private companies had unintended consequences, particularly as the firms often engaged in activities that were contrary to their home government’s national interest.”³² For example, when the English East India Company entered the Indian Ocean, it sided with the Mogul emperor against Portugal and

²⁰ *Id.* (citing PG.V. SCAMMELL, THE ENGLISH TRADING COMPANIES AND THE SEA 5 (1982)).

²¹ SINGER, *supra* note 12, at 22 (citing PHILIPPE CONTAMINE, WAR IN THE MIDDLE AGES 158 (1984)).

²² *Id.* at 23, 29 (“[T]he ‘state’ is a fairly new emergence in the overall flow of history. It was not until the seventeenth century that the use of official armies, loyal to the nation as a whole and not to the specific rulers or houses that led it, took hold in Europe.”).

²³ *Id.* at 31.

²⁴ *Id.* at 33.

²⁵ *Id.* at 32. (“Approximately two-thirds were from the Hesse-Kassel [region], so the formations were called ‘Hessians’ by the Americans.”).

²⁶ *Id.*

²⁷ *Id.* (citing ANTHONY MOCKLER, THE NEW MERCENARIES 127 (1985)) (“The war also saw the Americans commission over 800 privateers.”).

²⁸ SINGER, *supra* note 12, at 33 (“Even in the face of hostilities, it is interesting to note that many of the German Soldiers found America as a place they could call home. ‘Hessian troops found that life in America compared quite nicely to life in Germany and by the end of the war roughly a third of the force deserted.’”).

²⁹ *Id.* at 34.

³⁰ *Id.* Companies like the Dutch East India company made it their business to monopolize “trade in spices such as nutmeg, cloves, cinnamon and pepper, tea, and later, silk, Chinese porcelain, gold, and opium.” *Id.*

³¹ *Id.* at 34–35. The 25,000 men were comprised primarily of Japanese and German mercenaries. *Id.*

³² *Id.* at 36.

destroyed most of the Portuguese ships in the area, thereby securing exclusive trade rights in that area.³³ The problem with this course of action was that the British Crown had previously directed “[t]he company to avoid unprovoked attacks on the Portuguese as [the monarch] needed their alliance, but it chose the path of profits instead.”³⁴ The company made the calculated decision to opt for profits over the diplomatic mission of the monarch. This provides a lesson for modern times regarding inherently governmental functions: what is good for the bottom line of a company is not always the best thing for the sovereign.

The concept of state sovereignty ruled supreme during the twentieth century. The use of private soldiers on a large scale was no longer acceptable; thus, the “international trade in military services was marginalized and mostly pushed underground.”³⁵ Independent ex-soldiers would “hire themselves out on an informal basis, usually to rebel groups operating in weak state zones such as Latin America, China, and later Africa.”³⁶

As discussed, at various times in world history, commanding and fielding soldiers was an inherently governmental act that required soldiers be organic to the sponsoring state. At other times in history, it was perfectly acceptable to field a charter company, like the Dutch East India Company, that took on all the functions of a country through contract. During these time periods, such acts were not deemed inherently governmental.

A review of select periods of military history illustrates that “[a]t numerous times in history, governments did not possess anything approaching a monopoly on force.”³⁷ While that is not the case today, one should note that “the lines between economics and warfare were never clear cut. From a broad view, the state’s monopoly of both domestic and international force was a historical anomaly. Thus, in the future, we should not expect that organized violence would only be located in the public realm.”³⁸ As one contemplates a modern legal analysis regarding what is and is not inherently governmental in nature today, it is useful to reflect on the past to inform the decisions of the future.

³³ *Id.* at 35.

³⁴ *Id.* (“The Dutch approach was similar. They militarily eliminated Portuguese and Spanish markets and also aimed at new areas, such as what is now Indonesia. If local leaders refused to trade with them, they were punished with bombardment and invasion.”).

³⁵ *Id.* at 37.

³⁶ *Id.*

³⁷ *Id.* at 39.

³⁸ *Id.* at 39.

It is important to keep that history in mind while reviewing the government’s contemporary interpretation of what constitutes inherently governmental functions. “Since World War I, one of the primary arenas for the public/private debate and the definition of inherently governmental functions has been federal contracting.”³⁹ The next section discusses contemporary views related to inherently governmental functions and provides the current definition of the concept.

IV. Modern Developments: Inherently Governmental Functions

What constitutes an inherently governmental function affects numerous scenarios that involve everything from the ability to contract certain aspects of minting our nation’s currency, to the ability to contract command and control of combat troops. This section deals only with federal contracting and how the executive branch has dealt with the issue. “Federal contracting has been at the center of a long debate regarding what constitutes an inherently governmental act. The emphasis on public or private entities as the preferred source of goods or services has swung back and forth over the years with the change of administrations.”⁴⁰ While some administrations have done little to define inherently governmental functions, most have elected to shape the use of civilian contractors.⁴¹ A brief overview of modern presidential administrations illustrates how the concept of inherently governmental functions and the use of civilian contracts have evolved.

A. Presidential Administrations

In his effort to combat the Great Depression, President Franklin D. Roosevelt expanded the role of the federal government and moved functions from the private sector to the government sector.

President Roosevelt essentially reversed the relative use of civilian and military contractors as compared to the 1920s. Prior to World War II, the Roosevelt

³⁹ JOHN R. LUCKEY ET AL., CONG. RESEARCH SERV., R40641, INHERENTLY GOVERNMENTAL FUNCTIONS AND DEPARTMENT OF DEFENSE OPERATIONS: BACKGROUND, ISSUES, AND OPTIONS FOR CONGRESS 4 (2009), available at <http://www.fas.org/sgp/cts/misc/R40641.pdf>.

⁴⁰ *Id.*

⁴¹ *Id.* The Administration of President Harry S. Truman was “generally a period of change and reorganization in the federal government’s procurement of goods and services” with the addition of several statutes that “greatly changed the federal procurement landscape, although they did not directly address which functions the government must perform (i.e., what is inherently governmental).” *Id.*

Administration placed renewed emphasis on the government's role and the benefits of the government performing functions for socioeconomic purposes even when doing so brought it into competition with the private sector (e.g., creation of the Civilian Conservation Corps and the Public Works Administration).⁴²

In contrast, President Dwight D. Eisenhower was the first president to state that the government should not compete with private markets, noting that "[i]t is the stated policy of the administration that the Federal government will not start or carry on any commercial activity to provide a service or product for its own use if such product or service can be procured from private enterprise through ordinary business channels."⁴³ This language eventually "entered the vernacular as Office of Management and Budget's (OMB's) Circular A-76 in 1966 during the Johnson Administration,"⁴⁴ and since "has become the primary focal point for discussions of what is an inherently governmental function."⁴⁵ The administrations of President Ronald Reagan and President George H.W. Bush made clear moves toward minimizing the government's role in private citizen's lives.

President Reagan's administration battled Congress when trying to implement smaller government.⁴⁶ President Bill Clinton "was arguably on both sides of the public/private debate, sponsoring plans, such as comprehensive health care reform, that might have expanded the public sector, as well as attempting to end 'big government' with its 'reinventing government' initiative."⁴⁷ The administration of President George W. Bush held a narrow view of what was considered the appropriate role of the public sector. "Among other things, the Bush Administration proposed amending OMB Circular A-76 so that all functions were presumed commercial unless agencies justified why they were inherently governmental."⁴⁸ The Bush Administration drew fire from some critics for

⁴² *Id.* (citing JAMES F. NAGLE, A HISTORY OF GOVERNMENT CONTRACTING 379-459 (2d ed. 1999)).

⁴³ *Id.* at 5.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* ("This administration would propose or attempt to privatize particular functions, such as depot maintenance. Congress would then respond with an appropriations rider, prohibiting or conditioning the use of funds to implement the privatization, or with a substantive law declaring a function inherently governmental, among other things.")

⁴⁷ *Id.*

⁴⁸ *Id.* at 6.

"improperly contract[ing] out acquisition, armed security, and contract management functions, among others."⁴⁹

The administration of President Obama sought to provide its own guidance regarding government contracting. His "Memorandum for the Heads of Executive Departments and Agencies"⁵⁰ addressed several initiatives related to government contracting, one of which was to ensure that functions considered to be inherently governmental were not contracted out. Of particular note, the memorandum stated:

[T]he 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. As a result, contractors may be performing inherently governmental functions. Agencies and departments must operate under clear rules prescribing when outsourcing is and is not appropriate.⁵¹

Based on President Obama's guidance, the Director of the Office of Management and Budget directed the OFPP to take action. On 30 March 2012, the OFPP issued a memorandum entitled "Work Reserved for Performance by Federal Government Employees."⁵² The memorandum sought to clarify when governmental outsourcing of services was appropriate consistent with section 321 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009.⁵³ Section 321 required the OMB to create a single definition for the term "inherently governmental function" and address any deficiencies in the existing definition.⁵⁴ The

⁴⁹ *Id.*

⁵⁰ Memorandum from Office of the Press Sec'y, The White House, to Heads of Exec. Dep'ts & Agencies, subject: Government Contracting (Mar. 4, 2009) [hereinafter White House Government Contracting Memo], available at http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-Subject-Government. Although not discussed in this article, there were other initiatives addressed in the memorandum besides the one that dealt with inherently governmental functions. Those initiatives included increased competition; the use of fixed-price contracts; and ensuring that the acquisition workforce could manage and oversee contracts. *Id.*

⁵¹ *Id.*

⁵² Office of Fed. Procurement Policy, Office of Mgmt. & Budget, Policy Letter 11-01, Work Reserved for Performance by Federal Employees, 76 Fed. Reg. 16,188-02 (Mar. 31, 2010) [hereinafter Proposed OFPP 11-01].

⁵³ Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, 122 Stat. 4356 (2008).

⁵⁴ *Id.* Though not discussed in this article in great detail, note that the act also required that the OMB establish criteria to be used by agencies to identify critical functions and positions that should only be performed by federal employees and provide guidance to improve internal agency management of functions that are inherently governmental or critical. *Id.*

OFPP conducted an extensive review of current laws, regulations, policies, and reports that addressed the definition of inherently governmental functions.⁵⁵ Additionally, comments were solicited from the public and a public meeting was held regarding the definition of inherently governmental functions. During the research phase of the inquiry, the OFPP highlighted the fact that there were three main sources providing definitions for the term inherently governmental function. The “FAIR Act, FAR, and Circular A-76 each make clear that the term ‘inherently governmental function’ addresses functions that are so intimately related to the public interest as to require performance by federal government employees.”⁵⁶ While the definitions were similar, the way the sources dealt with the types of functions included in the definition were different. For example, the “FAIR Act states that the term includes activities that require the ‘exercise of discretion’ in applying ‘Federal Government authority,’ whereas the Circular speaks in terms of the exercise of ‘substantial discretion’ in applying ‘sovereign’ Federal government authority.”⁵⁷ This type of situation creates an environment rife with ambiguity; when there is ambiguity in a world of contracts measured by millions of dollars, there is a very real potential for problems to arise. The OFPP stated that “[i]t is unclear what the impact of this type of variation has been. This notwithstanding, these variations can create confusion and uncertainty.”⁵⁸

The Obama Administration ultimately cut through the confusion and uncertainty surrounding the definition of inherently governmental functions by providing a final definition. On 12 September 2012, the OFPP issued a policy letter to “provide to Executive Departments and agencies guidance on managing the performance of inherently governmental and critical functions.”⁵⁹ The letter “clarified what functions are inherently governmental and must always

be performed by Federal employees” and “provided a single definition of inherently governmental function” built around the well-established statutory definition in the FAIR Act.⁶⁰ The policy letter provides several means to determine whether a function is inherently governmental:

1. Apply the clear language of the definition.
2. Compare the acts to those listed in Appendix A: Policy Letter 11-01, Examples of Inherently Governmental Functions.⁶¹
3. Apply the two tests set forth in Policy Letter 11-01 to determine whether an organization is dealing with an inherently governmental function.

These methods are discussed below.

B. Means to Determine Whether a Function Is Inherently Governmental

1. The Current Definition of Inherently Governmental Functions

“Inherently governmental functions” are currently defined in section 5 of the FAIR Act as functions that are so “intimately related to the public interest as to require performance by Federal Government employees.”⁶² The letter explains that “[t]he definition provided by this policy letter will replace existing definitions in regulation and policy, including the Federal Acquisition Regulation (FAR). The policy letter provides examples and tests to help agencies identify inherently governmental functions.”⁶³ The OFPP received public comments from over 30,000 respondents in response to the proposed definition, list of inherently governmental functions, and tests used to determine whether one is dealing with an inherently governmental function. Based on these comments and a review of the existing law and regulation, the OFPP forged a final product that appears to meet the needs of the respondents.

⁵⁵ Proposed OFPP 11-01, *supra* note 52, at 16190. The review was conducted with the assistance of an interagency team that included representatives from the Chief Acquisition Officers Council and the Chief Human Capital Officers Council. *Id.* The OFPP reviewed the definitions of inherently governmental functions in the following sources: “Federal Activities Inventory Reform Act (FAIR Act), Public Law 105-270, section 2383 of title 10 (which cites to definitions in the Federal Acquisition Regulation (FAR)), the FAR, OMB Circular A-76, OFPP Policy Letter 92-1, Inherently Governmental Functions (which was rescinded and superseded by OMB Circular A-76 in 2003) and reports by the Government Accountability Office (GAO).” *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ OFPP 11-01, *supra* note 5 (“[The policy letter was] issued pursuant to section 6(a) of the Office of Federal Procurement Policy Act, 41 U.S.C. 405(a), the President’s March 4, 2009, Memorandum on Government Contracting, and section 321 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Public Law 110-417.”).

⁶⁰ *Id.* at 56227 (citation omitted).

⁶¹ The list contains twenty-four historically and commonly accepted examples of inherently governmental functions. Some examples include: the direct conduct of criminal investigation; the determination of budget policy, guidance, and strategy; the direction and control of intelligence and counter-intelligence operations; the approval of federal licensing actions and inspections; and the administration of public trusts. *Id.* at 56240.

⁶² *Id.* at 56236.

⁶³ *Id.* at 56227 (citation omitted).

Two lines of thought emerged during the comments period. Some expressed concern about excessive outsourcing and recommended expanding the definition of inherently governmental functions. These respondents proposed changing the list of inherently governmental functions to include all security functions and intelligence activities; training for interrogation, military, and police; and maintenance and repair of weapons systems.⁶⁴ This sector was concerned about too much privatization. Senator Russ Feingold's comment to the OFPP during the comment period serves as an example of concerns surrounding too much privatization: "I urge you to amend federal regulations and policy to clarify that the following functions are inherently governmental and should not be outsourced: security services in war zones, oversight of security contractors, and the interrogation of detainees."⁶⁵ He went on to state that "[f]or the last nine years, the government has failed to establish meaningful control over security contractors in war zones, as a result, numerous civilians have been killed in both Iraq and Afghanistan, [and] the reputation of the United States has been tarnished . . ."⁶⁶ A second group of respondents had different concerns, "cautioning that the policy letter and the increased attention on having non-inherently governmental functions performed by Federal employees will inappropriately discourage Federal managers and agencies from taking full and effective advantage of the private sector and the benefits of contracting."⁶⁷ This rationale stretches back to the Eisenhower Administration and appears, in some form, in each successive presidential administration.

The use of contractors can be a good thing when it saves taxpayers' money. Indeed, at the outset of his administration's overhaul of government contracting, President Obama stated, "[W]hile inherently governmental activities should be performed by Government employees, taxpayers may receive more value for their dollars if non-inherently governmental activities that can be provided commercially are subject to the forces of competition."⁶⁸ The challenge for the OFPP was to find a solution that balanced the differing views the public held about defining inherently governmental functions.

⁶⁴ *Id.* at 56229.

⁶⁵ Comments of Senator Russell Feingold on Proposed OFPP Policy Letter, OFPP-2010-0001-0124 (June 7, 2010), available at <http://www.regulations.gov/#!documentDetail;D=OFPP-2010-0001-0124>.

⁶⁶ *Id.* Senator Feingold's comments illustrate the concern many Americans had regarding the utilization of contractors; in sum, government officials have to be in control of sensitive issues that impact the appearance and legitimacy of the United States. *Id.*

⁶⁷ OFPP 11-01, *supra* note 5, at 56229.

⁶⁸ White House Government Contracting Memo, *supra* note 50.

In the end, the American people had the opportunity to comment on the definition, and shape the direction of contracting with the U.S. government. The OFPP coupled these comments with research on existing law and found common ground that satisfied most respondents by using the FAIR Act as the final definition of what constitutes inherently governmental functions. The OFPP charted a similar course when fashioning a list of examples of inherently governmental functions, discussed further in the next section.

2. List of Inherently Governmental Functions

As mentioned above, Appendix A of Policy Letter 11-01 lists twenty-four historically and commonly accepted examples of inherently governmental functions.⁶⁹ The OFPP reacted to respondents' comments to the proposed policy letter and not only inserted the illustrative list found in Federal Acquisition Regulation 7.5,⁷⁰ but also added new examples of functions to the policy letter. The OFPP added "all combat, security operations in certain situations connected with combat or potential combat, determination of an offer's price reasonableness, final determinations about a contractor's performance, including approving award fee determinations or past performance evaluations and taking action based on those evaluations, and selection of grant and cooperative agreement recipients."⁷¹

During the comment period, most respondents did not object to retaining a list with illustrative examples; however, some felt the list was too narrow, while others thought it too broad. Those who felt the list was too narrow suggested adding private security firms and intelligence functions that occur in hostile environments to the list.⁷² A sampling of the final list includes "[t]he direct conduct of criminal investigation,"⁷³ "[t]he control of prosecutions and performance of adjudicatory functions (other than those relating to arbitration or other methods of alternative dispute resolution),"⁷⁴ and "[t]he command of military forces, especially the leadership of military personnel who are performing a combat, combat support or combat service support role."⁷⁵ The list is not exhaustive, but does inform a practitioner of a baseline of what constitutes an inherently

⁶⁹ *See supra* note 61.

⁷⁰ FAR 7.503 (2010).

⁷¹ OFPP 11-01, *supra* note 5, at 56229.

⁷² *Id.* at 56231.

⁷³ *Id.* at 56240.

⁷⁴ *Id.*

⁷⁵ *Id.*

governmental function. If a judge advocate still has questions regarding what constitutes an inherently governmental function after reviewing the definition and the list, the final step is to apply the two tests set forth in Policy Letter 11-01.

3. Tests: Inherently Governmental Functions

During the comment period, the OFPP proposed “creat[ing] tests for agencies to use in determining whether functions not appearing on the list [would] otherwise fall within the definition of inherently governmental.”⁷⁶ For example, the OFPP stated that “[t]he nature of the function test would ask agencies to consider whether the direct exercise of sovereign power is involved. Such functions are uniquely governmental, and therefore, inherently governmental.”⁷⁷ The nature of the function test states “[f]unctions which involve the exercise of sovereign powers of the United States are governmental by their very nature.”⁷⁸ During the comment period, “[a] number of comments questioned the likely effectiveness of the proposed ‘nature of the function test,’ which would ask agencies to consider if the direct exercise of sovereign power is involved.”⁷⁹ The OFPP acknowledged the concern, stating that “[it] appreciates that the value of this test may be limited, but believes it still can contribute to an agency’s overall understanding and analysis in differentiating between functions that are inherently governmental and those that are not.”⁸⁰ The second proposed test, known as the discretion test, has its roots in OMB Circular A-76,⁸¹ and “would ask agencies to evaluate whether the discretion associated with the function, when exercised by a contractor, would have the effect of committing the government to a course of action.”⁸² Respondents had few concerns with regard to the use of tests and the OFPP ultimately issued the final policy letter

⁷⁶ Proposed OFPP 11-01, *supra* note 52, at 16190.

⁷⁷ *Id.*

⁷⁸ OFPP 11-01, *supra* note 5, at 56237. The definition further explains “[e]xamples 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.” *Id.*

⁷⁹ *Id.* at 56231.

⁸⁰ *Id.*

⁸¹ OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIR. NO. A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES (May 29, 2003) [hereinafter OMB Cir. A-76], available at http://www.whitehouse.gov/omb/circulars_a076_a76_incl_tech_correction#a.

⁸² *Id.*

featuring both the discretion test and the new nature of the function test.

The exercise of discretion test states:

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:

(I) identify specified ranges of acceptable decisions or conduct concerning the overall policy or direction of the action; and

(II) subject the discretionary decisions or conduct to meaningful oversight and, whenever necessary, final approval by agency officials.⁸³

The discretion test allows a practitioner to apply an assessment regarding how much individual discretion a contractor might utilize in areas where there is little guidance. This test allows unique factors to be weighed in the test and ensures that a contractor does not perform jobs that require unique assessment and discretion in areas requiring the sole judgment of a U.S. official.

Both tests allow a practitioner to consider a variety of factors in order to arrive at an informed decision as to whether something is inherently governmental. However, what is a practitioner to do if faced with a function that is closely associated with inherently governmental functions?

C. Functions Closely Associated with Inherently Governmental Functions

While not the primary focus of this article, it is prudent to briefly highlight functions that are closely related to inherently governmental functions. These legal landmines⁸⁴

⁸³ OFPP 11-01, *supra* note 5, at 56238.

⁸⁴ Additionally, personal services can be a legal landmine, as they are often confused with inherently governmental functions. Pursuant to FAR 37.104, personal services are defined by the employer-employee relationship created between the government and the contractor’s personnel. The government is normally required to obtain its employees by direct hire under competitive appointment or other procedures required by the Civil Service laws. Obtaining personal services by contract rather than by direct hire under competitive appointment circumvents those laws unless Congress has specifically authorized acquisition of those services. FAR 37.104 (2010). Basically, contractors cannot be used to circumvent

can wreak havoc on a command. The danger with a closely related function is that when a contractor performs such a function, there is a risk that the function will morph into inherently governmental functions over time. The OFPP stated that when functions that “generally are not considered to be inherently governmental 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, agencies must give special consideration to using Federal employees to perform these functions.”⁸⁵

The definition is daunting; fortunately, illustrative examples of closely related functions are included in Appendix B of Policy Letter 11-01, entitled “Examples of Functions Closely Associated With the Performance of Inherently Governmental Functions.” The list of closely related functions includes “performing budget preparation activities, such as workload modeling, fact finding, efficiency studies . . . undertaking activities to support agency planning and reorganization, and providing support for developing policies, including drafting documents, and conducting analyses, feasibility studies, and strategy options.”⁸⁶ If contractors are hired to perform similar tasks, agency management must monitor the employees closely to make certain the function does not grow into one that comprises the characteristics of inherently governmental functions. Policy Letter 11-01 provides a checklist of responsibilities in Appendix C that agencies must rely on when contractors perform such functions.⁸⁷

V. Counterintelligence Scenario

This article began by referring to an article in the *Washington Post* that reported the U.S. military is searching for the fugitive leader of the Lord’s Resistance Army with the use of spy planes provided by private contractors.⁸⁸ For

standards Congress has put in place. A judge advocate should consult Worksheet C of Request for Services Contract Form to avoid running afoul of the intent of Congress, as personal services can be easily confused with inherently governmental functions. See Appendix (Request for SCA Form).

⁸⁵ OFPP 11-01, *supra* note 5, at 56238 (“Although closely associated functions are not reserved exclusively for performance by Federal employees, section 736 of Division D of the Omnibus Appropriations Act, 2009, Public Law 11-8, requires civilian agencies subject to the FAIR Act to give special consideration to using Federal employees to perform these functions. Similarly, the Department of Defense is required to ensure special consideration is given to Federal employee performance consistent with the requirements of 10 U.S.C. 2463 . . .”).

⁸⁶ *Id.* at 56228.

⁸⁷ *Id.* at 56242. Appendix C of the OFPP Policy Letter 11-01 is titled, “Responsibility Checklist For Functions Closely Associated with Inherently Governmental Functions” and provides agency measures to ensure that contractors steer clear of inherently governmental functions. *Id.*

⁸⁸ Whitlock, *supra* note 2.

purposes of this article, suppose a well-known retired general has approached your commander and offered the services of his intelligence firm to assist in apprehending a fictional war criminal similar to Kony. The former general states that he will field aircraft, determine what areas to survey, and decide which intelligence is important for your commander to see. The only things he will require of your command are military pilots and several uniformed enlisted intelligence analysts whom he will supervise and direct. Your commander needs a very basic question answered: Is the general’s proposition one that falls into the realm of an inherently governmental function? As a new brigade judge advocate, you know next to nothing about this issue. Where do you look?

With limited time, the best thing to do is to first apply the tests provided by Policy Letter 11-01. Apply the nature of the functions test and ask, is this something that involves the “exercise of sovereign powers of the United States”⁸⁹ in any manner? Commanding Soldiers is a sovereign power reserved to the United States. Likewise, the retired general’s business proposition also fails the exercise of discretion test which, in short, requires a decision maker to determine a course of action when there is no clear guidance available to limit the decision and little or no oversight.⁹⁰ Deciding what intelligence will be relayed to the command fails the discretion test, as it is not a government actor who uses their discretion to determine what intelligence should be passed on. What if there is a need to cross into air space of a country that is hostile to the United States? Determining where to fly or when to fly requires the use of discretion that also runs afoul of the policy letter, as it would have the effect of committing the government to a course of action. At a minimum, the action could have dire diplomatic results and, at worst, could potentially incite armed conflict. If the tests are not clear enough, a practitioner can find additional clarification by consulting the list of inherently governmental functions provided in appendix A of Policy Letter 11-01.

The Request for Services Contract Approval Form is a twelve-page document that allows a judge advocate to review most of the applicable law in one place.⁹¹ Only the sections of the form that directly apply to the scenario will be discussed. To determine whether an action is inherently governmental, simply look to page two of the form entitled “Worksheet A (1 of 3), Inherently Governmental Functions.”⁹² This three-page worksheet features thirty-two

⁸⁹ OFPP 11-01, *supra* note 5, at 56237.

⁹⁰ *Id.* For purposes of this article, the exercise of discretion test has been summarized for application to this scenario.

⁹¹ Appendix (Request for SCA Form); SCA Form *supra* note 3.

⁹² *Id.*

questions that prompt the reader to consider whether the particular function is an inherently governmental function. While many of the questions apply to the fictional scenario, for purposes of our scenario, questions four and nine are the most relevant. Question four asks if the function “[i]nvolve[s] the command of military forces, especially the leadership of military personnel who are members of the combat, combat support, or combat service support role.”⁹³ Question nine asks if the function “[i]nvolve[s] the direction and control of intelligence and counter-intelligence operations.”⁹⁴ From the above fact pattern, it is apparent that the retired general would direct and control the operations. Furthermore, the retired general wanted enlisted intelligence analysts to work for him and military pilots to fly the planes. Finally, he alone would determine what intelligence would go to the commander. Based on a comparison with the list, it appears the general’s proposition contains inherently governmental functions.

Further guidance is provided in Worksheet A, which states that the “FAIR ACT (31 United States Code Section 501), the Federal Acquisitions Regulation (FAR) Part 7.5, . . . and OFPP Policy Letter 11-01 are all applicable.”⁹⁵ The above scenario will focus only on FAR Part 7.5, which provides a nonexclusive list of inherently governmental functions. Of particular import for purposes of the scenario, FAR 7.503(c)(3) states that “the command of military forces, especially leadership of military personnel who are members of combat, combat support, or combat service support” are inherently governmental functions.⁹⁶ Likewise, FAR 7.05(c)(8) states that “the direction and control of intelligence and counter-intelligence operations”⁹⁷ are also inherently governmental functions. Again, based on the information your commander gave you, it appears that in light of the plain language of the tests listed in Policy Letter 11-01, the list provided in Appendix A of Policy Letter 11-01, and the plain language of the FAR, the proposed operation would be inherently governmental. With a firm idea of what the law is, a judge advocate can help to shape operations in a manner that does not violate federal law. The retired general’s plan will have to be scoped down and military commanders will need to take over the managerial aspects of the operation.

VI. Conclusion

In this day and age, a judge advocate is required to make initial substantive determinations on a moment’s notice when dealing with military operations. The purpose of this article is not to explore every legal issue related to the definition of inherently governmental functions. Instead, it is to give a judge advocate a quick, accurate method to vet a proposed scenario that will assist in guiding the initial planning stages of an operation. Once a judge advocate makes a determination that a proposed course of action is one that falls within the definition of an inherently governmental function, a legal course of action can be developed to give the commander’s intent effect, while staying within the now settled definition of inherently governmental functions.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ FAR 7.503(c)(3) (2013).

⁹⁷ *Id.* 7.05(c)(8).

WORKSHEET A (1 OF 3)

INHERENTLY GOVERNMENTAL FUNCTIONS

See rules for required use of the certification and worksheets on page 12, "Instructions."

The following functions constitute inherently government functions and may not be legally contracted. The FAIR Act (31 United States Code Section 501); the Federal Acquisition Regulation (FAR) Part 7.5; the Department of Defense Instruction (DoDI) 1100.22, Guidance for Determining Workforce Mix; and OFPP Policy Letter 11-01 are all applicable.

Answer "Yes" or "No" to the functions that apply below, based on the work statement or the way the contract is performed. Any "Yes" response to a function below must be performed in-house and may not be contracted.

INHERENTLY GOVERNMENTAL		YES	NO
	Does the function:		
1	Involve contractors providing legal advice and interpretations of regulations and statutes to Government officials?		
2	Involve the direct conduct of criminal investigations?		
3	Involve the control of prosecutions and performance of adjudicatory functions other than those relating to arbitration or other methods of alternative dispute resolution?		
4	Involve the command of military forces, especially the leadership of military personnel who are members of the combat, combat support, or combat service support role?		
5	Involve the conduct of foreign relations and the determination of foreign policy?		
6	Involve the determination of agency policy, such as—among other things—determining the content and application of regulations?		
7	Involve the determination of Federal program priorities for budget requests?		
8	Involve the direction and control of Federal employees?		
9	Involve the direction and control of intelligence and counter-intelligence operations?		
10	Involve the selection or non-selection of individuals for Federal Government employment, including the interviewing of individuals for employment?		
11	Involve the approval of position descriptions and performance standards for Federal employees?		
12	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 within specified ranges and subject to other reasonable conditions deemed appropriate by the agency)?		
13	Involve:		
	i) 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);		
	ii) Participating as a voting member on any source selection boards;		
	iii) Approving any contractual documents, including documents defining requirements, incentive plans, and evaluation criteria;		

WORKSHEET A (2 OF 3)

INHERENTLY GOVERNMENTAL FUNCTIONS

See rules for required use of the certification and worksheets on page 12, "Instructions."

Answer "Yes" or "No" to the functions that apply below, based on the work statement or the way the contract is performed. Any "Yes" response to a function below must be performed in-house and may not be contracted.

INHERENTLY GOVERNMENTAL		YES	NO
	Does the function:		
	iv) Awarding contracts;		
	v) Administering contracts (including ordering changes in contract performance or contract quantities, taking action based on evaluations of contract performance, and accepting or rejecting contractor products or services);		
	vi) Terminating contracts;		
	vii) Determining whether contract costs are reasonable, allocable, and allowable; and		
	viii) Participating as a voting member on performance evaluation boards.		
14	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 response to the administrative appeals of denials of Freedom of Information Act requests?		
15	Involve the conduct of administrative hearings to determine the eligibility of any person for a security clearance, or involve actions that affect matters of personal reputation or eligibility to participate in Government programs?		
16	Involve the approval of Federal licensing actions and inspections?		
17	Involve the determination of budget policy, guidance, and strategy?		
18	Involve the collection, control, and disbursement of fees, royalties, duties, fines, taxes, and other public funds, unless authorized by statute, such as 31 U.S.C. 952 (relating to private collection contractors) and 31 U.S.C. 3718 (relating to private attorney collection services), but does not include:		
	i) Collection of fees, fines, penalties, costs, or other charges from visitors to 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 easily calculated or predetermined and the funds collected can be easily controlled using standard case management techniques; and		
	ii) Routine voucher and invoice examination.		
19	Involve the control of the treasury accounts?		
20	Involve the administration of public trusts?		
21	Involve the drafting of Congressional testimony, responses to Congressional correspondence, or agency responses to audit reports from the Inspector General, the Government Account Office, or other Federal audit entity?		

WORKSHEET A (3 OF 3)

INHERENTLY GOVERNMENTAL FUNCTIONS

See rules for required use of the certification and worksheets on page 12, "Instructions."

Answer "Yes" or "No" to the functions that apply below, based on the work statement or the way the contract is performed. *Any "Yes" response to a function below must be performed in-house and may not be contracted.*

INHERENTLY GOVERNMENTAL		YES	NO
	Does the function:		
22	Require the exercise of discretion in applying Federal Government Authority?		
23	Require the making of value judgments in making decisions for the Federal Government?		
24	Require making judgments relating to monetary transactions and entitlements?		
25	Involve the interpretation and execution of the laws of the United States so as to bind the US to take or not take some action by contract, policy, regulation, authorization, order, or otherwise?		
26	Involve the interpretation and execution of the laws of the United States to determine, protect, and advance the United States' economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management or otherwise?		
27	Involve the interpretation and execution of the laws of the United States to significantly affect the life, liberty, or property of private persons?		
28	Involve the interpretation and execution of the laws of the United States to commission, appoint, direct, or control officers or employees of the United States?		
29	Involve the interpretation and execution of the laws of the United States 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 appropriated and other Federal funds?		
30	Involve security operations performed in direct support of combat as part of a larger integrated combat force, or performed in environments where there is significant potential for the security operations to evolve into combat? (Where the US military is present, the judgment of the military commander should be sought regarding the potential for the operations to evolve into combat.)		
31	Involve representation of the government before administrative and judicial tribunals, unless a statute expressly authorizes the use of attorneys whose services are procured through contract?		
32	Involve combat?		

WORKSHEET B (1 OF 2)

CLOSELY ASSOCIATED WITH INHERENTLY GOVERNMENTAL FUNCTIONS

See rules for required use of the certification and worksheets on page 12, "Instructions."

The following kinds of services are defined as "closely associated with inherently governmental functions" in 10 U.S.C. 2383(b) (3) and FAR 7.503; 10 U.S.C. 2330a(e) notes that reliance on contractors to perform closely associated with inherently governmental functions ought to be reduced "to the maximum extent practicable." Pursuant to 10 U.S.C. 2463, special consideration must be given to in-sourcing contracts performing the functions listed below. Additionally, special consideration must be given to using government employees in lieu of contractors if the answer is "No" to questions 24-26.

Answer "Yes" or "No" to the functions that apply below, based on the work statement or the way the contract is performed. (The list below is not comprehensive, as it excludes examples from DoDI 1100.22.)

CLOSELY ASSOCIATED WITH INHERENTLY GOVERNMENTAL		YES	NO
	Does the performance involve:		
1	Services that involve or relate to budget preparation, including workload modeling, fact finding, efficiency studies, and should-cost analyses, etc.?		
2	Services that involve or relate to reorganization and planning activities?		
3	Services that involve or relate to analyses, feasibility studies, and strategy options to be used by agency personnel in developing policy?		
4	Services that involve or relate to the development of regulations?		
5	Services that involve or relate to the evaluation of another contractor's performance?		
6	Services in support of acquisition planning?		
7	Contractors providing assistance in contract management (such as where the contractor might influence official evaluations of other contractors)?		
8	Contractors providing technical evaluation of contract proposals?		
9	Contractors providing assistance in the development of statements of work?		
10	Contractors providing support in preparing responses to Freedom of Information Act requests?		
11	Contractors working in any situation that permits or might permit them to gain access to confidential business information and/or any other sensitive information (other than situations covered by the National Industry Security Program described in 4.402(b))?		
12	Contractors providing information regarding agency policies or regulations, such as attending conferences on behalf of an agency, conducting community relations campaigns, or conducting agency training courses?		
13	Contractors participating in any situation where it might be assumed that they are agency employees or representatives?		
14	Contractors participating as technical advisors to a source selection board or participating as voting or non-voting members of a source evaluation board?		

WORKSHEET B (2 OF 2)

CLOSELY ASSOCIATED WITH INHERENTLY GOVERNMENTAL FUNCTIONS

See rules for required use of the certification and worksheets on page 12, "Instructions."

Answer "Yes" or "No" to the functions that apply below, based on the work statement or the way the contract is performed. (The list below is not comprehensive, as it excludes examples from DoDI 1100.22.)

CLOSELY ASSOCIATED WITH INHERENTLY GOVERNMENTAL		YES	NO
	Does the performance involve:		
15	Contractors serving as arbitrators or providing alternative methods of dispute resolution?		
16	Contractors constructing buildings or structures intended to be secure from electronic eavesdropping or other penetration by foreign governments?		
17	Contractors providing inspection services?		
18	Contractors providing special non-law enforcement, security activities that do not directly involve criminal investigations, such as prisoner detention or transport and non-military national security details? (The direction and control of confinement facilities in areas of operations, however, is inherently governmental.)		
19	Private security contractors in operational environments overseas?		
20	Contract interrogators?		
21	Contractors providing combat and security training?		
22	Contract logistics support required for weapon systems that deploy with operational units?		
23	Do the contracted functions involve work that is at risk of becoming inherently governmental?		
24	Is there sufficient organic government expertise to oversee contractor performance of the contract?		
25	Are there sufficient control mechanisms and sufficient numbers of military and civilian employees to ensure that contractors are not performing inherently governmental functions?		
26	Is there a sufficient number of CORs appointed to ensure oversight of contract performance?		

WORKSHEET C

PERSONAL SERVICES

See rules for required use of the certification and worksheets on page 12, "Instructions."

Pursuant to FAR Part 37.104, a personal services contract is characterized by: "the employer-employee relationship it creates between the Government and the contractor's personnel. The Government is normally required to obtain its employees by direct hire under competitive appointment or other procedures required by the Civil Service laws. Obtaining personal services by contract rather than by direct hire under competitive appointment circumvents those laws unless Congress has specifically authorized acquisition of those services." If a contract—by its written terms or in the way it is actually performed—involves any of the below elements, then action must be taken: the contract must be modified; the contracted functions must be performed in such a way as to avoid creating an employer-employee relationship; or the contract must be in-sourced (adapted from FAR Part 37.104(d)).

PERSONAL SERVICES		YES	NO
1	The contractor personnel are subject to the relatively continuous supervision and control of a governmental officer.		
2	The contractor personnel are performing on a government site.		
3	The principal tools and equipment are furnished by the government.		
4	The services are applied directly to the integral effort of agencies or an organizational subpart in furtherance of an assigned function or mission.		
5	The need for the service provided can reasonably be expected to last beyond one year.		
6	The inherent nature of the service, or the manner in which it is provided, reasonably requires (directly or indirectly) Government direction or supervision of contractor employees in order to:		
	a) Adequately protect the Government's interest;		
	b) Retain control of the function involved; or		
	c) Retain full personal responsibility for the function supported in a duly authorized Federal officer or employee.		
7	Comparable services meeting comparable needs are performed in this agency or similar agencies using civil-service personnel.		

Specific statutory authority for personal services is provided in 10 United States Code §129b for:

- experts or consultants where the services cannot be adequately provided by the Department;**
In general, the authority to procure personal services for experts and consultants pursuant to 10 U.S.C. §129b requires the approval of the ASA(AL&T) unless the services being acquired are covered by the delegation of authority covered in AFARS Sub Part 5137.104-90-2 (i.e. Stenographic reporting; stage, motion picture, or television productions; or legal services outside the United States). In all cases, additional procedures required by AFARS Part 5137.104-90 must be followed with appropriate approval authority.
- direct support of a defense intelligence component or counter-intelligence organization of the Department of Defense where the services are urgent or unique and cannot be practically obtained within the Department;**
Pursuant to DFARS SubPart 237.104(b)(iii)(A), the Head of a Contracting Activity must provide written approval.
- direct support of special operations command where the services are urgent or unique and cannot be practically obtained within the Department;**
Pursuant to DFARS SubPart 237.104(b)(iii)(A), the Head of a Contracting Activity must provide written approval.
- services provided by individuals outside the United States regardless of their nationality;**
Pursuant to DFARS SubPart 237.104(b)(iii)(A), the Head of a Contracting Activity must provide written approval.
- or 10 U.S.C. §1091 for carrying out healthcare responsibilities in medical treatment facilities of the Department of Defense.**
DoDI 6025.5 limits this exception to healthcare personnel who participate in clinical patient care and does not include personnel whose duties are primarily administrative or clerical, nor personnel who provide maintenance or security services.

WORKSHEET D

See rules for required use of the certification and worksheets on page 12, "Instructions."

WORKSHEET D		YES	NO
1	Has in-sourcing been considered? Special consideration should be given to civilians in the following situations:		
	i) This function has been performed by Department of Defense civilian employees at any time during the previous ten-year period.		
	ii) The function is closely associated with the performance of an inherently governmental function (see Worksheet B).		
	iii) The function is performed pursuant to a contract awarded on a non-competitive basis.		
	iv) The contracting officer has determined that the contract has been performed poorly because of excessive costs or inferior quality.		
	v) The function is an acquisition workforce function.		
	vi) The function is a critical function (see Worksheet F).		
2	Has the contract been accurately reported in the Contractor Manpower Reporting Application (CMRA) (https://cmra.army.mil/) pursuant to Secretary of the Army policy? For new requirements, has the CMRA Requirement been included in the work statement? (CMRA reporting pursuant to Secretary of the Army policy is being used by the Department of the Army to comply with most of the reporting required by the National Defense Authorization Act for FY 2008, Section 807.)		
3	Has the contract requirement been documented in the Panel for Documentation of Contractors module of CMRA?		

WORKSHEET E

OUT-SOURCING AND CONVERSION OF FUNCTIONS

See rules for required use of the certification and worksheets on page 12, "Instructions."

A "Yes" response to questions 1-4 below may make contracting this function prohibited by 10 U.S.C. Section 2461, which prohibits converting a function performed by at least one appropriated fund government employee to contract performance unless there has been a public-private competition under OMB Circular A-76. There is currently a Congressional moratorium on public-private competitions pursuant to the National Defense Authorization Act for FY 2010, Section 325. However, "conversion" of functions does not include the augmenting of civilian staff with contractors unless government employees are displaced, reassigned, subjected to a reduction in force, or otherwise adversely affected. (For additional information, please see the Government Accountability Office case John P. Santry B-402827. Agencies are recommended to discuss the issue with their employment and personnel law advisor and their contract law advisor.)

Pursuant to 10 U.S.C. 129a(f), contracting out some functions is prohibited under certain conditions. Agencies should take care to ensure that these circumstances do not arise; answering "Yes" to either or both of questions 5 and 6 below indicates that contracting is not allowed.

OUT-SOURCING AND CONVERSION OF FUNCTIONS		YES	NO
1	Will any non-temporary or non-term appropriated fund employee currently performing any functions described in the contract Statement of Work be displaced, reassigned, subjected to a reduction in force, or otherwise adversely affected as a result of the proposed contract action?		
2	Is the function proposed for contract performance meeting a requirement previously performed by a particular Army civilian position (or positions) when a program or budget decision eliminated the civilian position (whether that position was formerly documented with an authorization or was undocumented and performed by an overhire)?		
3	Is the function proposed for contract performance meeting a requirement previously approved for in-sourcing but that was never encumbered?		
4	Will the proposed contract action fundamentally change the nature of the work performed by appropriated fund employees?		
5	Is this new contract (or this increase in level of effort on a pre-existing contract) the result of the establishment of numerical goals or budgetary savings targets regarding the civilian workforce?		
6	Is this contract the result of the imposition of a civilian hiring freeze?		

WORKSHEET F

CRITICAL FUNCTIONS

See rules for required use of the certification and worksheets on page 12, "Instructions."

Pursuant to 10 U.S.C. 2463(b) and OFPP Policy Letter 11-01, special consideration should be given to in-sourcing "critical functions" to ensure that agencies have sufficient internal capability to maintain control over functions that are central to the agency's missions and operations. Agencies should have an adequate number of positions filled by Federal employees with the appropriate training, experience, and expertise to understand the agency's requirements, formulate alternatives, manage work product, and monitor any contractors used to support the Federal workforce.

One or more "Yes" responses to questions 1-3 below, and/or one or more "No" responses to questions 4-5 below, may indicate a "critical function."

CRITICAL FUNCTIONS		YES	NO
1	Is the function necessary to the agency being able to effectively perform and maintain control of its missions and operations and/or to maintain sufficient Government expertise and technical capabilities?		
2	Is the function recurring and long-term in duration?		
3	Does the performance of the function by a contractor entail operational risk (for example, if the contractor were to quit or otherwise suddenly be unable to perform their duties)?		
4	Does the agency have an adequate number of positions filled with Federal employees with the appropriate training, experience, and expertise to continue critical operations with in-house resources, another contractor, or a combination of the two in the event of contractor default?		
5	Does the agency have the capability and internal expertise to oversee and manage any contractors being used to support the Federal workforce?		

WORKSHEET G

SECURITY AND FIREFIGHTING FUNCTIONS

See rules for required use of the certification and worksheets on page 12, "Instructions."

Section 332 of the NDAA for FY 2003 allowed for the waiving of the prohibition—under 10 U.S.C. Section 2465(a)—on the use of contracts for the performance of security guard or firefighting functions under certain circumstances. The statutory authority to hire contract security guards was extended through FY 2012 by Section 343 of the NDAA for FY 2008 and has expired. If the answer to question 1 is "Yes" and none of the subsequently-listed exceptions apply, then contracting is prohibited.

SECURITY AND FIRE-FIGHTING FUNCTIONS		YES	NO
1	Is this contract for the performance of security guard or firefighting functions?		
	If the answer to the above question is "Yes," do any of the following exceptions apply?		
	a) The contract is to be carried out at a location outside the United States, its commonwealths, territories, possessions, and military installations, at which members of the armed forces would have to be used at the expense of unit readiness.		
	b) The contract is to be carried out on a Government-owned but privately-operated installation.		
	c) The contract (or renewal of the contract) is for the performance of a function under contract on September 24, 1983.		
	d) The contract is for a firefighting function for a period of one year or less and covers only the performance of firefighting functions that, in the absence of the contract, would have to be performed by members of the armed forces who are not readily available to perform such functions by reason of a deployment.		

INSTRUCTIONS

FOR USE OF THE REQUEST FOR SERVICES CONTRACT APPROVAL FORM

The following rules govern the required use of the certification and worksheets of this form:

1. The Request for Services Contract Approval Form is required by Army Federal Acquisition Regulation Supplement (AFARS) Subpart 5107.503(e).

2. The most current version of the form must be used and can be found at:

<http://www.asamra.army.mil/scra/documents/ServicesContractApprovalForm.pdf>

This form may not be altered in any way; local supplementation is acceptable only when such supplements are used with—and attached to—this form.

3. The form and Checklist are required and must be completed in the following circumstances:

- »Before new solicitations are issued or contracts are awarded;
- »Before options are exercised;
- »Before contracts are modified;
- »When each task order/delivery order is issued;
- »When funds are added (although the incremental funding of contracts does *not* require re-submission of the form);
- »When Army funds are being used to buy contractor labor, regardless of which organization is awarding or administering the contract;
- »When Army is the requiring activity, or is the executive agent for the mission/organization requiring the services;
- »When Army funds are being transferred to contracts outside of the Department of Defense.

This form is required for all service contracts, regardless of whether the contracts are enduring, temporary, about to end, funded in the base budget, or funded under Overseas Contingency Operations.

4. The Services Contract Approval Form is required for all service contracts (see FAR 7.502 Applicability). A “service contract” is for tasks to be performed, rather than supplies to be delivered. The following are not considered services:

- »Manufacturing/production contracts;
- »Utilities;
- »Subscriptions;
- »Off-the-shelf software;
- »Construction projects funded using Military Construction Army funds (however, repairs, maintenance, construction, and demolition projects that utilize Operations and Maintenance funds do require the Form);
- »Help desk and customer service support incidental to equipment or off-the-shelf software purchases;
- »Software licensing agreements and updates (customized software development, maintenance, and upgrades, however, *are* considered services);
- »Foreign Military sales/services;
- »Manufacturer’s warranties (extended maintenance/repair beyond the standard manufacturer’s warranty, however, *is* considered a service);
- »Delivery services incidental to a supply purchase.

5. Certification by the accountable GO/SES at the requiring activity is required.

»For a contract with a total value of less than \$100,000 (including all supplies and services, as well as all the option years combined), the accountable GO or SES in a requiring activity may delegate signature authority to a GS-15/O-6.

»For National Guard contracts, the U.S. Property and Fiscal Officer (USPFO) may approved/certify the Form.

»For services to support Courts-Martial, no approval/certification is required, but the Checklist must still be completed.

6. Checklist questions should be answered by persons in the requiring activity who know how the contract is administered, how it is performed, and who thoroughly understand the work being performed by the contractor. Checklist questions should be answered carefully, to ensure that the accountable GO/SES and the contracting officer have all relevant facts to support their decisions and/or certification.

7. If issues arise regarding the correct use or completion of the Request for Services Contract Approval Form, please contact the Office of the Assistant Secretary of the Army (Manpower and Reserve Affairs) Force Management, Manpower and Resources, at 703-693-2109.