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# Definitions of “Inherently Governmental Function” in Federal Procurement Law and Guidance

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December 23, 2014

**Congressional Research Service**

7-5700

[www.crs.gov](http://www.crs.gov)

R42325

## Summary

Functions that federal law and policy require to be performed by government personnel, not contractor employees, are known as “inherently governmental functions.” Such functions have been a topic of interest in recent Congresses, in part, because of questions about sourcing policy (i.e., whether specific functions should be performed by government personnel or contractor employees). There have also been questions about the various definitions of *inherently governmental function* given in federal law and policy and, particularly, whether the existence of multiple definitions of this term may have resulted in contractor employees performing functions that should be performed by government personnel.

Two primary definitions of *inherently governmental function* currently exist in federal law and policy. One is a statutory definition, enacted as part of the Federal Activities Inventory Reform (FAIR) Act of 1998. This definition states that an *inherently governmental function* is “a function so intimately related to the public interest as to require performance by Federal Government employees.” The other is a policy-oriented definition contained in Office of Management and Budget (OMB) Circular A-76. This definition states that an *inherently governmental activity* is “an activity that is so intimately related to the public interest as to mandate performance by government personnel.” These two definitions arguably do not differ significantly in and of themselves. However, both the FAIR Act and OMB Circular A-76 include further elaboration and expansion upon the meaning of *inherently governmental function* that differ in certain ways.

Other statutes, regulations, and guidance documents that define *inherently governmental function* do so either by reproducing the language of the FAIR Act or OMB Circular A-76, or by incorporating their definitions by reference. Most notably, the Federal Acquisition Regulation (FAR) incorporates by reference or otherwise adopts the definition of OMB Circular A-76, while Office of Federal Procurement Policy (OFPP) Policy Letter 11-01, discussed below, adopts the FAIR Act’s definition. However, like the FAIR Act and OMB Circular A-76, both the FAR and Policy Letter 11-01 also include some unique elaboration and expansion upon the term.

In addition to these definitions, there are numerous statutory, regulatory, and policy provisions designating specific functions as inherently governmental or, alternatively, commercial. (A *commercial function* is one that could be performed by contractor employees, although there is generally no requirement that contractor employees perform commercial functions.) Such designations also help establish the meaning of *inherently governmental function* by specifying what is—and is not—included within this category. Similarly, while not offering their own definitions of *inherently governmental function*, the Government Accountability Office (GAO) and the federal courts have developed tests that they use in identifying specific functions as inherently governmental or commercial. However, a judicial declaration that a particular function is inherently governmental under a constitutional test would not necessarily preclude the executive branch from contracting out this function.

The 110<sup>th</sup> Congress tasked OMB with reviewing existing definitions of *inherently governmental function* and developing a “single consistent definition” of this term. Partly in response to this charge, OMB, though the OFPP, issued Policy Letter 11-01. Policy Letter 11-01 adopts the FAIR Act’s definition of *inherently governmental function*, rather than establishing a new definition. However, Policy Letter 11-01 does establish two tests for identifying inherently governmental functions, as well as defines a *critical function* as one “that is necessary to the agency being able to effectively perform and maintain control of its mission and operations.”



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Functions that federal law and policy require to be performed by government personnel, not contractor employees, are known as "inherently governmental functions." Such functions have been a topic of interest in recent Congresses, in part, because of questions about sourcing policy (i.e., whether specific functions should be performed by government personnel or contractor employees).<sup>1</sup> There have also been questions about the various definitions of *inherently governmental function* given in federal law and policy and, particularly, whether the existence of multiple definitions of this term may have resulted in contractor employees performing functions that should be performed by government personnel.

Previously, the 110<sup>th</sup> Congress had tasked the Office of Management and Budget (OMB) with

- reviewing existing definitions of *inherently governmental function* to determine whether such definitions are "sufficiently focused" to ensure that only government personnel perform inherently governmental functions or "other critical functions necessary for the mission of a Federal department or agency";
- developing a "single consistent definition" of inherently governmental function that would address any deficiencies in the existing definitions, reasonably apply to all agencies, and ensure that agency personnel can identify positions that perform inherently governmental functions;
- developing criteria for identifying "critical functions" that should be performed by government personnel; and
- developing criteria for identifying positions that government personnel should perform in order to ensure that agencies develop and maintain "sufficient organic expertise and technical capacity" to perform their missions and oversee contractors' work.<sup>2</sup>

Partly in response to this charge, OMB, through the Office of Federal Procurement Policy (OFPP), issued Policy Letter 11-01 on September 12, 2011.<sup>3</sup> As explained below, Policy Letter 11-01 adopts the definition of *inherently governmental function* given in the Federal Activities Inventory Reform (FAIR) Act of 1998, rather than creating a new definition.<sup>4</sup> However, Policy Letter 11-01 does establish two tests for identifying inherently governmental functions, as well as

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<sup>1</sup> For further discussion of sourcing policy, see generally CRS Report RL32833, *Sourcing Policy: Statutes and Statutory Provisions*, by Elaine Halchin and CRS Report R42341, *Sourcing Policy: Selected Developments and Issues*, by Elaine Halchin. Also, an earlier report, archived CRS Report R40641, *Inherently Governmental Functions and Department of Defense Operations: Background, Issues, and Options for Congress*, by John R. Luckey, Valerie Bailey Grasso, and Kate M. Manuel, discussed aspects of sourcing policy as they pertain to Department of Defense (DOD) operations, including DOD's use of private security contractors, a particular issue during the Iraq War.

<sup>2</sup> National Defense Authorization Act for FY2009, P.L. 110-417, §321(a)(1)-(4), 122 Stat. 4411 (October 14, 2008).

<sup>3</sup> Office of Management and Budget, Office of Federal Procurement Policy, Publication of the Office of Federal Procurement Policy (OFPP) Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions, 76 *Federal Register* 56227 (September 12, 2011). This letter also responds to President Obama's instruction, in his March 4, 2009, memorandum on government contracting, that OMB clarify when outsourcing is "appropriate." The White House, Office of the Press Secretary, Government Contracting, March 4, 2009, *available at* [http://www.whitehouse.gov/the\\_press\\_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-Subject-Government](http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-Subject-Government). This memorandum specifically notes that "the line between inherently governmental activities that should not be outsourced and commercial activities that may be subject to private sector competition has been blurred and inadequately defined. 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." *Id.*

<sup>4</sup> P.L. 105-270, 112 Stat. 2382 (1998) (codified at 31 U.S.C. §501 note).

defines a *critical function* as one "that is necessary to the agency being able to effectively perform and maintain control of its mission and operations."<sup>5</sup>

This report surveys the definitions of *inherently governmental function* given in Policy Letter 11-01, the FAIR Act, and other sources. It also notes specific functions that have been designated as inherently governmental or commercial by statute, regulation, policy, or GAO or judicial decision. Its primary focus is upon government-wide statutes, regulations, and policy documents, not agency-specific ones.<sup>6</sup> The report begins with (1) statutory definitions and declarations before turning to those in (2) policy guidance, (3) administrative law, and (4) judicial decisions. However, the report's discussion of one type of definition often cross-references other types of definitions because of the complex interrelationships Congress and the Executive have established between the various provisions of law and policy on this topic.<sup>7</sup>

## Statutory Definitions and Declarations

The Federal Activities Inventory Reform (FAIR) Act of 1998 provides the primary statutory definition of *inherently governmental function*. There are, however, several other statutory definitions of *inherently governmental function* and "functions closely associated with inherently governmental functions." Some of these definitions mirror the definitions of the FAIR Act or Office of Management and Budget (OMB) Circular A-76, discussed below, while others incorporate the definitions of the FAIR Act or OMB Circular A-76 by reference. There are also numerous statutory provisions declaring that specific functions are inherently governmental.

### The FAIR Act

Originally introduced as the Freedom from Government Competition Act of 1997, the FAIR Act was designed to promote executive agencies' compliance with OMB Circular A-76.<sup>8</sup> OMB Circular A-76 predates the FAIR Act and expresses the federal government's general policy of

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<sup>5</sup> 76 *Federal Register* at 56241.

<sup>6</sup> For example, the Defense Federal Acquisition Regulation Supplement (DFARS) contains several provisions addressing functions closely associated with inherently governmental functions, in particular. *See, e.g.*, 48 C.F.R. §207.503 (allowing the head of a defense agency to enter a contract for the performance of acquisitions functions closely associated with inherently governmental functions only if certain conditions are met). *See also* Dep't of Defense Instruction Number 1100.22: Policies and Procedures for Determining Workforce Mix, April 12, 2010, pg. 17, available at <http://www.dtic.mil/whs/directives/corres/pdf/110022p.pdf> ("Command of military forces is an [inherently governmental] function.").

<sup>7</sup> *See infra* note 26 (noting a statutory definition of inherently governmental function that defines this term by incorporating another statutory definition that itself incorporates the definition in the Federal Acquisition Regulation (FAR), which, in turn, reproduces and incorporates by reference the definition given in Office of Management and Budget (OMB) Circular A-76).

<sup>8</sup> *See, e.g.*, H.R. 4244, FEDERAL ACTIVITIES INVENTORY REFORM ACT: HEARING BEFORE THE SUBCOMM. ON GOV'T MGMT., INFO., & TECH. OF THE COMM. ON GOV'T REFORM & OVERSIGHT, 105<sup>TH</sup> CONG., 2D SESS. 1 (August 6, 1998) (statement of John J. Duncan, Jr., Representative from Tennessee). As originally introduced, the Freedom from Government Competition Act would have prohibited agencies from beginning or carrying out any activity whose products or services could be provided by the private sector. Bills with the same title (i.e., Freedom from Government Competition Act) have been introduced in later Congresses, notwithstanding the enactment of the FAIR Act. *See, e.g.*, H.R. 1072, 113<sup>th</sup> Cong. (exempting inherently governmental functions from a proposed requirement that all supplies and services "necessary for or beneficial to" the accomplishment of an agency's "authorized functions" be obtained from private sources); S. 523, 113<sup>th</sup> Cong. (same).

relying on competitive private enterprises to supply the commercial supplies and services it needs.<sup>9</sup> OMB Circular A-76 also provides procedures for agencies to conduct cost comparisons to determine whether the government or private enterprises should perform specific activities on the government's behalf.<sup>10</sup> However, although OMB Circular A-76 established these policies and procedures prior to 1998, it reportedly failed to result in public-private competitions for the performance of commercial activities, or in agencies' contracting with the private sector for performance of their commercial activities.<sup>11</sup> The FAIR Act sought to address this situation by requiring agencies to compile annual lists of all commercial activities they perform and make these lists available to Congress and the public.<sup>12</sup> The FAIR Act does not require agencies to contract out any particular activities, however. It requires only that agencies use competitive processes to select the source when they consider contracting with private sector sources for performance of certain activities performed by government employees.<sup>13</sup>

Although the FAIR Act's primary focus is upon commercial activities performed by government agencies, it defined *inherently governmental function* in order to contrast such functions with commercial activities.<sup>14</sup> The FAIR Act's definition of *inherently governmental function* is brief: "The term 'inherently governmental function' means a function that is so intimately related to the public interest as to require performance by Federal Government employees."<sup>15</sup> This definition is, however, followed by extensive elaboration on the types of functions included in and excluded from the definition of inherently governmental functions under the act.<sup>16</sup>

The FAIR Act describes the "functions included" within its definition of *inherently governmental function* as functions that "require either the exercise of discretion in applying Federal Government authority or the making of value judgments in making decisions for the Federal Government, including judgments relating to monetary transactions and entitlements."<sup>17</sup> The act then gives a non-exclusive list of the types of "functions included," namely:

1. binding the United States to take, or not to take, action by contract, policy, regulation, authorization, order, or otherwise;
2. determining, protecting, and advancing U.S. economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise;
3. significantly affecting the life, liberty, or property interests of private persons;

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<sup>9</sup> See *infra* note 39 and accompanying text.

<sup>10</sup> See archived CRS Report RS21489, *OMB Circular A-76: Explanation and Discussion of the Recently Revised Federal Outsourcing Policy*, by John R. Luckey. (Questions about this report may be referred to Kate M. Manuel.)

<sup>11</sup> See, e.g., H.R. 4244, *supra* note 8, at 30 (statement of Stephen Horn, Chairman, House Subcommittee on Government Management, Information, and Technology) ("Outside of the Department of Defense, not one single agency uses A-76 competitions.").

<sup>12</sup> 31 U.S.C. §501 note, at §2(a) & (c).

<sup>13</sup> 31 U.S.C. §501 note, at §2(e).

<sup>14</sup> 31 U.S.C. §501 note, at §5(2)(A). The FAIR Act does not define commercial activities. Only OMB Circular A-76 provides such a definition. See *infra* note 50 and accompanying text.

<sup>15</sup> 31 U.S.C. §501 note, at §5(2)(A).

<sup>16</sup> 31 U.S.C. §501 note, at §5(2)(B)&(C).

<sup>17</sup> 31 U.S.C. §501 note, at §5(2)(B).

4. commissioning, appointing, directing, or controlling officers or employees of the United States; or
5. exerting ultimate control over the acquisition, use, or disposition of the real or personal, tangible or intangible, property of the United States, including the collection, control, or disbursement of appropriated and other federal funds.<sup>18</sup>

The FAIR Act further describes the "functions excluded" from its *definition of inherently governmental function* as functions involving (1) gathering information for or providing advice, opinions, recommendations, or ideas to federal officials, or (2) any function that is primarily ministerial and internal in nature.<sup>19</sup> It concludes by giving examples of ministerial and internal functions, which include building security, mail operations, cafeteria operations, housekeeping, facilities operations and maintenance, warehouse operations, motor vehicle fleet management operations, and other routine electrical or mechanical services.<sup>20</sup>

The FAIR Act's definition of *inherently governmental function* and listing requirements apply to all executive branch agencies named in 5 U.S.C. §101, all military departments named in 5 U.S.C. §102, and all independent establishments as defined in 5 U.S.C. §104.<sup>21</sup> However, the FAIR Act explicitly exempts from the act's requirements (1) the Government Accountability Office (GAO); (2) government corporations or government-controlled corporations, as defined in 5 U.S.C. §103; (3) non-appropriated funds instrumentalities, as described in 5 U.S.C. §2105(c); (4) certain depot-level maintenance and repair activities of the Department of Defense, as described in 10 U.S.C. §2460; and (5) agencies with fewer than 100 full-time employees as of the first day of the fiscal year.<sup>22</sup>

## Other Statutory Definitions

In addition to the FAIR Act, other statutes have "definitions" sections that include *inherently governmental function* or *functions closely associated with inherently governmental functions*.

Two of these statutes provide a definition of *inherently governmental function* that, while closely related to the definitions of the FAIR Act and OMB Circular A-76, discussed below, does not reproduce either of these definitions verbatim. Specifically, the Coast Guard appropriations authorization act for FY2004 and FY2005 and the National and Community Service Trust Act of 1993 both define an inherently governmental function as:

any activity that is so intimately related to the public interest as to mandate performance by an officer or employee of the Federal Government, including an activity that requires either the exercise of discretion in applying the authority of the Government or the use of judgment in making a decision for the Government.<sup>23</sup>

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<sup>18</sup> 31 U.S.C. §501 note, at §5(2)(B)(i)-(v).

<sup>19</sup> 31 U.S.C. §501 note, at §5(2)(C).

<sup>20</sup> *Id.*

<sup>21</sup> 31 U.S.C. §501 note, at §4(a)(1)-(3).

<sup>22</sup> 31 U.S.C. §501 note, at §4(b)(1)-(5).

<sup>23</sup> National and Community Service Trust Act of 1993, P.L. 103-82, §196, 107 Stat. 785 (codified at 42 U.S.C. §12651g(a)(1)(C)(iii)); A Bill to Authorize Appropriations for Fiscal Years 2004 and 2005 for the United States Coast Guard, and for Other Purposes, P.L. 108-293, §302, 118 Stat. 1028 (codified at 33 U.S.C. §1223(e)).



The verb "mandate" in this definition matches the verb in the definition of OMB Circular A-76, but the definition otherwise departs from the definition of OMB Circular A-76 by using "officer or employee of the Federal Government" where OMB Circular A-76 uses "Federal Government employees."<sup>24</sup> However, this definition does expressly incorporate the functions of exercising discretion and using judgment that are mentioned in OMB Circular A-76 and are among the "functions included" within the FAIR Act's definition of inherently governmental functions.<sup>25</sup>

Outside of the Coast Guard appropriations authorization act for FY2004 and FY2005 and the National and Community Service Trust Act of 1993, however, no statute provides a definition of *inherently governmental function* different from that in the FAIR Act or OMB Circular A-76. Many statutes incorporate the definition from OMB Circular A-76, in particular, by reference when defining *inherently governmental function*.<sup>26</sup> Several of these statutes also use the related term, "functions closely associated with inherently governmental functions," but likewise incorporate the definition of OMB Circular A-76 by reference.<sup>27</sup>

## Statutory Declarations of Specific Functions as Inherently Governmental

Several provisions of federal law declare that specific functions are inherently governmental without defining *inherently governmental function*. Sometimes, specific functions are defined as inherently governmental without reference to the FAIR Act or the employees performing the functions at the time of the statute's enactment. Examples of such functions are (1) the preparation of agency strategic plans and program performance reports under the Government Performance and Results Act of 1993,<sup>28</sup> and (2) functions connected with the operation and maintenance of hydroelectric power-generating facilities at water resources projects of the Army Corps of Engineers.<sup>29</sup> At other times, specific groups of employees, who were performing certain functions at the time of the statute's enactment, are classified as inherently governmental for purposes of the FAIR Act. Examples include federal employees at the National Energy Technology Laboratory<sup>30</sup> and instructor staff at the Federal Law Enforcement Training Center.<sup>31</sup> At yet other times, Congress effectively renders certain functions inherently governmental, at

<sup>24</sup> Compare 33 U.S.C. §1223(e) and 42 U.S.C. §12651g(a)(1)(C)(iii) with OMB Circular A-76, Attachment A, at (B)(1)(a).

<sup>25</sup> Compare 33 U.S.C. §1223(e) and 42 U.S.C. §12651g(a)(1)(C)(iii) with OMB Circular A-76, Attachment A, at (B)(1)(a) and 31 U.S.C. §501 note, at §5(2)(B).

<sup>26</sup> See, e.g., 10 U.S.C. §2330a(g)(4) (defining *inherently governmental function* by reference to 10 U.S.C. §2383(b)(2)). The U.S. Code section referenced here, i.e., 10 U.S.C. §2383(b)(2), does not itself define *inherently governmental function*. Rather, it incorporates the FAR's definition by reference. The FAR, in turn, reproduces and incorporates by reference the definition of OMB Circular A-76. See *infra* notes 122-124 and accompanying text.

<sup>27</sup> See, e.g., 10 U.S.C. §2330a(g)(3) (defining *functions closely associated with inherently governmental functions* by reference to 10 U.S.C. §2383(b)(3)); 10 U.S.C. §2463(e) (same). 10 U.S.C. §2383(b)(3) also does not itself define functions closely associated with inherently governmental functions. Rather, it incorporates by reference the definition of the FAR, which, in turn, reproduces and incorporates the definition of OMB Circular A-76.

<sup>28</sup> P.L. 103-62, 107 Stat. 285 (August 3, 1993) (codified at 5 U.S.C. §306; 31 U.S.C. §§1115-1116; 39 U.S.C. §2805).

<sup>29</sup> Water Resources Development Act of 1990, P.L. 101-640, §314, 104 Stat. 4641 (November 28, 1990) (codified at 33 U.S.C. §2321).

<sup>30</sup> U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007, P.L. 110-28, §6201, 121 Stat. 112 (May 25, 2007).

<sup>31</sup> See, e.g., Consolidated Appropriations Act, 2014, P.L. 113-76, §519, 128 Stat. 272 (Jan. 17, 2014).

least temporarily, without classifying them as such, by providing that appropriated funds cannot be expended to contract them out.<sup>32</sup> Finally, Congress sometimes signals its concerns about the executive branch's classification of specific functions without either enacting legislation designating the functions as inherently governmental, or precluding the use of appropriated funds to contract the functions out. Congress can do this by expressing its sense that certain functions are inherently governmental,<sup>33</sup> or by imposing additional restrictions—beyond those in the FAIR Act, OMB Circular A-76, the Federal Acquisition Regulation (FAR), or OFPP Policy Letter 11-01—upon contracting out activities that some commentators may assert are inherently governmental.<sup>34</sup>

Alternatively, but more rarely, Congress expresses its sense that certain functions are commercial.<sup>35</sup> As discussed below, *commercial functions* are functions that could potentially be performed by contractor personnel.<sup>36</sup> In other cases, Congress appropriates funds to contract out activities that some commentators might seek to classify as inherently governmental.<sup>37</sup>

## Policy-Based Definitions and Declarations

OMB Circular A-76 provides the other main definition of inherently governmental functions used in federal law and policy. Office of Federal Procurement Policy (OFPP) Policy Letter 11-01,

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<sup>32</sup> See, e.g., Consolidated Appropriations Act, 2008, P.L. 110-161, §730, 121 Stat. 1846 (December 26, 2007) ("None of the funds made available in this Act may be used to study, complete a study of, or enter into a contract with a private party to carry out, without specific authorization in a subsequent Act of Congress, a competitive sourcing activity of the Secretary of Agriculture, including support personnel of the Department of Agriculture, relating to rural development or farm loan programs."). See also *id.* at §§103, 111, 415, 739.

<sup>33</sup> See, e.g., Duncan Hunter National Defense Authorization Act for FY2009, P.L. 110-417, §832, 122 Stat. 4535 (October 14, 2008) ("It is the sense of Congress that ... the regulations issued by the Secretary of Defense pursuant to section 862(a) of the National Defense Authorization Act for Fiscal Year 2008 ... should ensure that private security contractors are not authorized to perform inherently governmental functions in an area of combat operations.").

<sup>34</sup> See, e.g., 5 U.S.C. §1101 (providing that functions formerly performed by the Defense Security Service and transferred to the Office of Personnel Management (OPM) may not be converted to contractor performance until the Director of OPM makes a written determination that they are commercial or appropriate for contractor performance); 10 U.S.C. §2330a(e)(2)(B)-(C) (requiring the secretary or head of each defense agency responsible for activities on a list created under the FAIR Act to review the list and ensure that it does not include inherently governmental functions or, to the maximum extent practicable, functions closely associated with inherently governmental functions); 10 U.S.C. §2383 (allowing the head of a defense agency to enter into a contract for the performance of acquisition functions closely associated with inherently governmental functions only when there are appropriate military and civilian employees to supervise the contractor's performance and perform all inherently governmental functions associated with the functions to be performed under the contract, among other things).

<sup>35</sup> See, e.g., National Aeronautics and Space Administration Authorization Act of 2008, P.L. 110-422, §901, 122 Stat. 4803-04 (October 15, 2008) ("It is the sense of Congress that a healthy and robust commercial sector can make significant contributions to the successful conduct of NASA's space exploration program. While some activities are inherently governmental in nature, there are many other activities, such as routine supply of water, fuel, and other consumables to low Earth orbit or to destinations beyond low Earth orbit, and provision of power or communications services to lunar outposts, that potentially could be carried out effectively and efficiently by the commercial sector at some point in the future.").

<sup>36</sup> See *infra* note 50 and accompanying text.

<sup>37</sup> See, e.g., 31 U.S.C. §3711 & 3718 (allowing use of private contractors to collect debts owed to the United States); Social Security Amendments of 1965, P.L. 89-97, 79 Stat. 286 (July 30, 1965) (authorizing the Department of Health and Human Services to use contractors to administer the Medicare Insurance Program); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, P.L. 96-510, 94 Stat. 2767 (December 11, 1980) (authorizing the use of contractors in the Superfund program).

which was issued on September 12, 2011, also provides guidance on inherently governmental and related functions. Policy Letter 11-01 adopts the FAIR Act's definition of *inherently governmental function*,<sup>38</sup> as well as the listings of inherently governmental functions and functions closely associated with the performance of inherently governmental functions given in the Federal Acquisition Regulation (FAR). Policy Letter 11-01 does, however, establish a definition of *critical functions*, as well as new tests for identifying inherently governmental functions and guidance on pre- and post-award management of contracts for critical functions and functions closely associated with the performance of inherently governmental functions.

## OMB Circular A-76

Like its predecessors,<sup>39</sup> the current OMB Circular A-76 "establishes federal policy for the competition of commercial activities."<sup>40</sup> It both (1) articulates the "longstanding policy of the federal government ... to rely on the private sector for needed commercial services," and (2) establishes procedures for agencies to use in determining whether their commercial activities should be performed under contracts with the private sector or in-house by agency personnel.<sup>41</sup> Although pre-2003 versions of OMB Circular A-76 focused on listing only commercial activities, the current version of OMB Circular A-76 requires agencies to list all activities they perform and classify these activities as commercial or inherently governmental.<sup>42</sup> All activities classified as inherently governmental under OMB Circular A-76 must be performed by government personnel.<sup>43</sup> Only those activities classified as commercial may be considered for contracting out.

Even in its pre-2003 versions, before agencies were required to list and classify inherently governmental activities, OMB Circular A-76 defined *inherently governmental function* when characterizing such functions as the opposite of commercial activities. Circular A-76's definition is itself brief, like the definition in the FAIR Act. The current version of OMB Circular A-76 says only that "[a]n inherently governmental activity is an activity that is so intimately related to the

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<sup>38</sup> An earlier OFPP policy letter, Policy Letter 92-1, had previously defined *inherently government function*, but was superseded by the 2003 revision of OMB Circular A-76. See OMB, Policy Letter 92-1, September 23, 1992 (copy on file with the author).

<sup>39</sup> Bulletin 55-4 of the Bureau of the Budget, issued on January 15, 1955, first articulated the policy of OMB Circular A-76. Bulletin 55-4 was revised in 1957 and 1960 before being reissued as OMB Circular A-76 in 1966. OMB Circular A-76 was itself revised in 1967, 1979, 1983, 1991, 1999, and 2003. For more on OMB Circular A-76, see archived CRS Report RS21489, *OMB Circular A-76: Explanation and Discussion of the Recently Revised Federal Outsourcing Policy*, by John R. Luckey. (Questions about this report may be referred to Kate M. Manuel.)

<sup>40</sup> OMB Circular A-76 Revised, May 29, 2003, at §1.

<sup>41</sup> OMB Circular A-76, at §4.

<sup>42</sup> Compare OMB Circular A-76, at §4(a) ("[A]gencies shall ... [i]dentify all activities performed by government personnel as either commercial or inherently governmental.") with OMB Circular No. A-76, Revised 1999, at §10 (copy on file with the author) ("As required by the Federal Activities Inventory Reform Act of 1998 and Appendix 2 of the Supplement, no later than June 30 of each year, agencies shall submit to OMB a Commercial Activities Inventory and any supplemental information requested by OMB."). Indeed, the current version of OMB Circular A-76 requires that agencies "justify, in writing, any designation of governmental personnel performing inherently governmental functions." This difference between the 1999 and 2003 versions of OMB Circular A-76 reflects the Bush Administration's attempt in 2002 to create a presumption that all functions of government agencies are commercial. See 67 *Federal Register* at 69772 ("The revised Circular will require agencies to presume that all activities are commercial in nature unless an activity is justified as inherently governmental.... To reinforce this presumption, agencies will be required to submit annual inventories of their inherently governmental positions."). The Obama Administration has not revised Circular A-76.

<sup>43</sup> OMB Circular A-76, at §4.b.

public interest as to mandate performance by government personnel.”<sup>44</sup> However, OMB Circular A-76, also like the FAIR Act, follows its brief definition of *inherently governmental function* with clarification and examples. Thus, the paragraph within the current version of OMB Circular A-76 that defines *inherently governmental function* continues by stating:

[Inherently governmental] activities require the exercise of substantial discretion in applying government authority and/or in making decisions for the government. Inherently governmental activities normally fall into two categories: the exercise of sovereign government authority or the establishment of procedures and processes related to the oversight of monetary transactions or entitlements. An inherently governmental activity involves:

- (1) Binding the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;
- (2) Determining, protecting, and advancing economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise;
- (3) Significantly affecting the life, liberty, or property of private persons; or
- (4) Exerting ultimate control over the acquisition, use, or disposition of United States property (real or personal, tangible or intangible), including establishing policies or procedures for the collection, control, or disbursement of appropriated and other federal funds.<sup>45</sup>

This language largely corresponds to that in the FAIR Act’s examples of “functions included” in its definition of *inherently governmental function*.<sup>46</sup> However, the FAIR Act does include one example that is not included in OMB Circular A-76: the commissioning, appointing, directing, or controlling of officers or employees of the United States.<sup>47</sup>

The current version of OMB Circular A-76 then provides some further explanations that are unlike those in the FAIR Act or other sources. It first distinguishes between the exercise of discretion *per se*, which it says does not make a function inherently governmental, and the exercise of “substantial discretion,” which it says makes a function inherently governmental.<sup>48</sup> It

<sup>44</sup> OMB Circular A-76, Attachment A, at §(B)(1)(a).

<sup>45</sup> *Id.*

<sup>46</sup> See 31 U.S.C. §501 note, at §5(2)(B)(i)-(v).

<sup>47</sup> See *id.* at §5(2)(B)(iv).

<sup>48</sup> OMB Circular A-76, Attachment A, at §(B)(1)(b) (“While inherently governmental activities require the exercise of substantial discretion, not every exercise of discretion is evidence that an activity is inherently governmental. Rather, the use of discretion shall be deemed inherently governmental if it commits the government to a course of action when 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 and (2) subject the discretionary authority to final approval or regular oversight by agency officials.”). The focus upon the exercise of substantial discretion, as opposed to discretion *per se*, is a difference between the 1999 and 2003 versions of OMB Circular A-76. See OMB Circular No. A-76, Revised 1999, *supra* note 42 (“[T]hese functions include those activities which require either the *exercise of discretion* in applying Government authority or the use of value judgment in making decisions for the Government.”) (emphasis added). Some commentators have suggested that the addition of “substantial” in 2003 represented a significant change in the definition of *inherently governmental function* and facilitated the alleged contracting out of inherently governmental functions by the Bush Administration. See, e.g., Am. Fed’n of Gov’t Employees (AFGE), *Privatization: Cleaning Up the Mess*, February 9, 2009, available at (continued...)

then notes that “[a]n activity may be provided by contractor support ... where the contractor does not have the authority to decide on the course of action, but is tasked to develop options or implement a course of action, with agency oversight,” before listing six factors that agencies should consider to avoid transferring inherently governmental functions to contractors (e.g., the nature of the activity; the degree of discretion involved).<sup>49</sup>

The current version of OMB Circular A-76 also explicitly defines commercial activity:

A commercial activity is a recurring service that could be performed by the private sector and is resourced, performed, and controlled by the agency through performance by government personnel, a contract, or a fee-for-service agreement. A commercial activity is not so intimately related to the public interest as to mandate performance by government personnel. Commercial activities may be found within, or throughout, organizations that perform inherently governmental activities or classified work.<sup>50</sup>

Additionally, OMB Circular A-76 includes—but does not define—a category of activities that are commercial but “not appropriate for private sector performance.”<sup>51</sup>

OMB Circular A-76 and its definition of *inherently governmental function* apply to all executive departments named in 5 U.S.C. §101 and all independent establishments as defined in 5 U.S.C. §104. There are no exemptions. However, OMB Circular A-76 repeatedly describes itself as a “policy” document, and expressly states that it “shall not be construed to create any substantive or procedural basis for anyone to challenge any agency action or inaction on the basis that such action or inaction was not in accordance with [the] Circular,” with certain narrow exceptions involving appeals of cost comparisons and specific matters addressed in the FAIR Act.<sup>52</sup> While OMB Circular A-76’s characterization of itself in this manner is not necessarily dispositive of its legal effect,<sup>53</sup> courts in some cases have found that OMB Circular A-76 is not the product of a

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<http://www.afge.org/index.cfm?page=2005LegislativeConferenceIssuePapers&fuse=Content&ContentID=1745> (“OMB officials illegally watered down the statutory definition when they overhauled the A-76 Circular” in 2003). However, OFPP Policy Letter 92-1 also referred to the exercise of “substantial discretion” as characterizing inherently governmental functions, and the Bush Administration’s revision of OMB Circular A-76 incorporated and superseded Policy Letter 92-1. *See supra* note 84. As previously noted, the Obama Administration has not revised Circular A-76.

<sup>49</sup> OMB Circular A-76, Attachment A, at §(B)(1)(c). These factors take into consideration: (1) any statutory restrictions that define an activity as inherently governmental; (2) the degree to which official discretion is or would be limited (i.e., whether involvement of the private sector is or would be so extensive that the ability of senior agency management to develop and consider options is or would be inappropriately restricted); (3) in claims or entitlement adjudication and related services, the finality of any action affecting individual claimants or applicants, among other things; (4) the provider’s authority to take action that will significantly and directly affect the life, liberty, or property of individual members of the public, including the likelihood of the provider’s need to resort to force in support of a police or judicial activity, among other things; (5) the availability of special agency authorities and the appropriateness of their application to the situation at hand; and (6) whether the activity in question is already being performed by the private sector.

<sup>50</sup> OMB Circular A-76, Attachment A, at §(B)(2).

<sup>51</sup> OMB Circular A-76, Attachment A, at §(C)(1). Pre-2003 versions of OMB Circular A-76 also listed examples of 108 commercial activities, grouped within 16 categories. OMB Circular No. A-76, Revised 1999, Attachment A, *supra* note 42. One of these categories was security, which included guard and protective services. *Id.*

<sup>52</sup> OMB Circular A-76, at §7(c)(8).

<sup>53</sup> In certain circumstances, policy documents may be found to be legally binding upon the agency, if the agency intended to be bound or has employed the guidelines in such a manner that they are binding as a practical matter. *See, e.g., United States v. Alameda Gateway Ltd.*, 213 F.3d 1161, 1168 (9<sup>th</sup> Cir. 2000); *Chiron Corp. v. Nat’l Transp. Safety Bd.*, 198 F.3d 935, 943-44 (D.C. Cir. 1999); *Troy Corp. v. Browner*, 120 F.3d 277, 287 (D.C. Cir. 1997); *Am. Portland* (continued...)



congressional grant of legislative authority promulgated in accordance with any procedural requirements imposed by Congress,<sup>54</sup> which is one of the requirements for a policy document to be seen as legally binding.<sup>55</sup> In other cases, the courts have found that the plaintiffs lacked standing to challenge alleged violations of OMB Circular A-76.<sup>56</sup> It is worth noting, however, that OMB Circular A-76's definition of *inherently governmental function* is incorporated into the Federal Acquisition Regulation (FAR), as discussed below, and the FAR is generally seen to be legally binding.

## OFPP Policy Letter 11-01

Issued on September 12, 2011, partly in response to the requirements of the National Defense Authorization Act for FY2009 (P.L. 110-417), OFPP Policy Letter 11-01 constitutes the most recent guidance for federal agencies on inherently governmental and related functions.<sup>57</sup> In several key places, Policy Letter 11-01 relies upon existing authorities. For example, rather than giving its own definition of "inherently governmental function," it adopts the FAIR Act's definition of an inherently governmental function as "one that is so intimately related to the public interest as to require performance by Federal Government employees."<sup>58</sup> It also provides clarification and elaboration of this definition like that provided in the FAIR Act, noting, for example, that inherently governmental functions require "the exercise of discretion in applying Federal Government authority or the making of value judgments in making decisions for the

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Cement Alliance v. Env'tl. Prot. Agency, 101 F.3d 772, 776 (D.C. Cir. 1996). *But see* U.S. Tel. Ass'n v. Fed. Comm'n's Comm'n, 28 F.3d 1232, 1234-35 (D.C. Cir. 1994) (policy statement not binding on agency unless promulgated as rule).

<sup>54</sup> See, e.g., Diebold v. United States, 947 F.2d 787, 800 (6<sup>th</sup> Cir. 1991) (finding that the 1983 version of OMB Circular A-76 was issued pursuant to statutory authority, although an earlier version of the circular was not); Labat-Anderson, Inc. v. United States, 65 Fed. Cl. 570, 578 (2005) ("The 2003 version was [issued pursuant to statutory authority.]."). *But see* United States Dep't of Health & Human Servs. v. Fed. Labor Relations Auth., 844 F.2d 1087, 1096 (4<sup>th</sup> Cir. 1988) (Circular A-76 was not "applicable law" for purposes of the Civil Service Reform Act of 1978 because it was not issued pursuant to statutory authority); Defense Language Inst. v. Fed. Labor Relations Auth., 767 F.2d 1398 (9<sup>th</sup> Cir. 1985) (similar).

<sup>55</sup> See, e.g., Chrysler Corp. v. Brown, 441 U.S. 281, 295-302 (1979) (articulating the requirements for a statement of executive branch policy to have the force of law). The other requirement—that the policy be a substantive- or legislative-type rule affecting individual rights and obligations—has generally not been addressed by a court as to OMB Circular A-76.

<sup>56</sup> See, e.g., Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO Naval Air Lodge 1630 v. Sec'y of Navy, 915 F.2d 727, 729 (D.C. Cir. 1990); Nat'l Federation of Fed. Employees v. Cheney, 883 F.2d 1038 (D.C. Cir. 1989). See also Nat'l Maritime Union of Am. v. Commander, Military Sealift Command, 824 F.2d 1228, 1238, 1240 (D.C. Cir. 1987) (declining to reach questions of standing or justiciability relating to claims stemming from OMB Circular A-76 because claims clearly failed on their merits).

<sup>57</sup> For a more thorough analysis of the Policy Letter, see CRS Report R42039, *Performance of Inherently Governmental and Critical Functions: The Obama Administration's Final Policy Letter*, by Kate M. Manuel, Elaine Halchin, and Erika K. Lunder.

<sup>58</sup> 76 *Federal Register* at 56236. The policy letter similarly follows other authorities when it directs agencies to give "special consideration" to using government personnel to perform functions closely associated with the performance of inherently governmental functions. *Id.* at 56236, 56238. Currently, agencies are required by statute to give "special consideration" to using federal employees to perform functions closely associated with the performance of inherently governmental functions. Omnibus Appropriations Act, 2009, P.L. 111-8, div. D, §736(b)(2)(A)(ii), 123 Stat. 690 (March 11, 2009) (civilian agencies); National Defense Authorization Act for FY2008, P.L. 110-181, div. A, §324(a)(1), 122 Stat. 60 (January 28, 2008) (codified at 10 U.S.C. §2463(b)(1)(B)) (defense agencies).

Federal Government, including judgments relating to monetary transactions and entitlements.”<sup>59</sup> Similarly, the listings of inherently governmental functions and functions closely approaching inherently governmental functions provided in its Appendices mirror those in the Federal Acquisition Regulation (FAR),<sup>60</sup> discussed below.

Policy Letter 11-01 also expands upon existing authorities, however. For example, it establishes two new tests for identifying inherently governmental functions that agencies are required to use when considering whether particular functions may be contracted out.<sup>61</sup> One is a “nature of the function” test, which categorizes functions involving the exercise of U.S. sovereign power as inherently governmental due to their “uniquely governmental nature,” regardless of any “type or level of discretion associated with them.”<sup>62</sup> The other is an “exercise of discretion” test, which prohibits agencies from contracting out functions involving an exercise of discretion that would:

commit[] 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 authority to final approval or regular oversight by agency officials.<sup>63</sup>

In addition, the policy letter requires agencies to take certain steps, before and after awarding a contract, to ensure that contractors do not come to perform inherently governmental functions. Before awarding a contract, agencies must review the listings of functions designated as inherently governmental in statute and the Appendices to Policy Letter 11-01 to ensure that their requirements do not entail the performance of inherently governmental functions, as well as analyze their requirements in light of the tests described above.<sup>64</sup> Then, after awarding a contract, agencies must monitor both contractor performance and agency contract management.<sup>65</sup> If monitoring reveals that contractors *are* performing inherently governmental functions, agencies are instructed to “reestablish control” over these responsibilities by strengthening oversight, insourcing the work, refraining from exercising options under the contract,<sup>66</sup> or terminating all or part of the contract.<sup>67</sup>

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<sup>59</sup> 76 *Federal Register* at 56236.

<sup>60</sup> *Id.* at 56240-42.

<sup>61</sup> The version of the policy letter first proposed on March 31, 2010, solicited comments on a potential third test, the “principal-agent test,” which would have required agencies to identify functions as inherently governmental “where serious risks could be created by the performance of these functions by those outside the government, because of the difficulty of ensuring sufficient control over such performance.” 75 *Federal Register* at 16192. However, OFPP ultimately decided not to include this test in the final policy letter. *See* 76 *Federal Register* at 56231 (noting that OFPP instead “made refinements” to the other tests).

<sup>62</sup> 76 *Federal Register* at 56237.

<sup>63</sup> *Id.*

<sup>64</sup> *See id.* at 56238-39.

<sup>65</sup> *Id.* at 56239.

<sup>66</sup> An *option* is a unilateral right in a contract under which the government may, for a specific period, purchase additional supplies or services or otherwise extend the contract. The prototypical federal contract is for one year, but could potentially be extended to five years through agencies’ use of options. 48 C.F.R. §17.204(e). It is always within the government’s power to decline to exercise an option.

<sup>67</sup> *See* 76 *Federal Register* at 56239. Such a termination would generally be a termination for convenience, requiring the government to pay the contractor an agreed-upon amount or, in the absence of such an agreement, (1) the costs incurred in performing the terminated work, (2) the costs of settling and paying settlement proposals under terminated (continued...)

Policy Letter 11-01 also establishes a definition of and guidance regarding "critical functions"—or functions "necessary to the agency being able to effectively perform and maintain control of its mission and operations"<sup>68</sup>—that were previously lacking in federal law and policy. The policy letter requires that agencies ensure "federal employees perform and/or manage critical functions to the extent necessary for the agency to operate effectively and maintain control of its mission and operations."<sup>69</sup> However, it would permit agencies to contract out critical functions provided that certain conditions are met (e.g., the agency determines in writing, prior to issuing a solicitation, that it has "sufficient internal capability" so that federal employees maintain control of missions and operations).<sup>70</sup> The policy letter also expressly notes that functions deemed to be critical will differ among agencies, as well as within each agency over time.<sup>71</sup>

Finally, the policy letter provides certain guidance regarding functions closely associated with the performance of inherently governmental functions that was also previously lacking in federal law and policy. Pursuant to this guidance, before awarding a contract for a function closely associated with the performance of an inherently governmental function, the agency must determine in writing that it (1) has given special consideration to having federal employees perform the work; (2) has the resources to give "special management attention" to contract performance; and (3) will comply with the agency responsibilities laid out in Policy Letter 11-01.<sup>72</sup> Similarly, after awarding the contract, the agency must regularly monitor both contractor performance and agency contract management, as it must do with critical functions.

Policy Letter 11-01 applies to all "executive departments and agencies."<sup>73</sup> Like OMB Circular A-76, Policy Letter 11-01 is a policy document that arguably lacks the force and effect of law.<sup>74</sup> However, OFPP does appear to contemplate amending other authorities, including the Federal Acquisition Regulation (FAR), in light of Policy Letter 11-01.<sup>75</sup>

## Administrative Law Provisions and Declarations

The key administrative law source on inherently governmental functions is the Federal Acquisition Regulation (FAR), which is the "primary document" in the Federal Acquisition

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subcontracts, and (3) a fair and reasonable profit on work performed. *See* 48 C.F.R. §49.103.

<sup>68</sup> 76 *Federal Register* at 56236.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 56238-39. The agency must also ensure that it is cost effective to use private-sector contractors. *See id.*

<sup>71</sup> *See id.* at 56238.

<sup>72</sup> *See id.* at 56239, 56241-42 (requiring agencies to "limit or guide" contractors' exercise of discretion and reasonably identify contractors and their work product, among other things).

<sup>73</sup> *See* [http://www.whitehouse.gov/omb/procurement\\_index\\_work\\_performance/](http://www.whitehouse.gov/omb/procurement_index_work_performance/). Policy Letter 11-01 was originally addressed to "the heads of civilian executive departments and agencies." 76 *Federal Register* at 56236. However, it was subsequently amended to include defense agencies. *See* Office of Management and Budget, Office of Federal Procurement Policy, Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions, 77 *Federal Register* 7609 (February 13, 2012).

<sup>74</sup> *See supra* notes 52 to 56 and accompanying text.

<sup>75</sup> 76 *Federal Register* at 56227 ("The definition provided by this policy letter will replace existing definitions in regulation and policy, including the Federal Acquisition Regulation (FAR)."). However, as of the date of this report, the FAR had not been amended to reflect the issuance of Policy Letter 11-01.



Regulations System established for the “codification and publication of uniform policies and procures for acquisition by all executive agencies.”<sup>76</sup> Further declarations of specific functions as inherently governmental or commercial come from executive orders and GAO decisions construing executive branch regulations and guidance.

## Federal Acquisition Regulation

In addition to the FAIR Act, OMB Circular A-76, and Policy Letter 11-01, the Federal Acquisition Regulation (FAR) is another source of federal law and policy on inherently governmental functions. Two subparts of the FAR—Subpart 7.3 on “contractor versus government performance” and Subpart 7.5 on “inherently governmental functions”—address such functions.

Subpart 7.3 is designed to provide executive branch officials with procedures for contracting out those functions that were found to be appropriate for private-sector performance under OMB Circular A-76 or other authority. This subpart incorporates the definition of OMB Circular A-76 by reference<sup>77</sup> and, like OMB Circular A-76, specifies that “[c]ontracts shall not be used for the performance of inherently governmental functions.”<sup>78</sup>

Subpart 7.5, in contrast, is intended to ensure that “inherently governmental functions are not performed by contractors.”<sup>79</sup> It relies on a definition of *inherently governmental function*, contained in Subpart 2 of the FAR, which essentially mirrors the definition of OMB Circular A-76:

“Inherently governmental function” means, as a matter of policy, a function that is so intimately related to the public interest as to mandate performance by Government employees. This definition is a policy determination, not a legal determination. An inherently governmental function includes activities that require either the exercise of discretion in applying Government authority, or the making of value judgments in making decisions for the Government. Governmental functions normally fall into two categories: the act of governing, *i.e.*, the discretionary exercise of Government authority, and monetary transactions and entitlements.

(1) An inherently governmental function involves, among other things, the interpretation and execution of the laws of the United States so as to—

(i) Bind the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;

(ii) Determine, protect, and advance United States economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise;

(iii) Significantly affect the life, liberty, or property of private persons;

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<sup>76</sup> 48 C.F.R. §1.101.

<sup>77</sup> 48 C.F.R. §7.301 (“Definitions of ‘inherently governmental activity’ and other terms applicable to this subpart are set forth at Attachment D of the Office of Management and Budget Circular No. A-76 (Revised), Performance of Commercial Activities, dated May 29, 2003.”).

<sup>78</sup> Compare 48 C.F.R. §7.503(a) with OMB Circular A-76, §4(b).

<sup>79</sup> 48 C.F.R. §7.500.

- (iv) Commission, appoint, direct, or control officers or employees of the United States; or
- (v) 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 Federal funds.

(2) Inherently governmental functions do not normally include gathering information for or providing advice, opinions, recommendations, or ideas to Government officials. They also do not include functions that are primarily ministerial and internal in nature, such as building security, mail operations, operation of cafeterias, housekeeping, facilities operations and maintenance, warehouse operations, motor vehicle fleet management operations, or other routine electrical or mechanical services.<sup>80</sup>

However, Subpart 7.5 also goes beyond OMB-Circular A-76 by providing lengthy, but "not all inclusive," listings of (1) functions that are to be considered inherently governmental,<sup>81</sup> and (2) functions that, although not inherently governmental, "may approach being in that category because of the nature of the function, the manner in which the contractor performs the contract, or the manner in which the Government administers contract performance."<sup>82</sup> The former category includes direct control of criminal investigations, leadership of military personnel, conducting foreign relations, and directing and controlling federal employees. The latter category includes services involving or related to budget preparation, services in support of acquisition planning, participating as technical advisors on source selection boards, and serving as arbitrators or providing alternative methods of dispute resolution.

Beyond the examples in these lists, the FAR provides none of the elaboration upon the meaning or identification of inherently governmental functions given by the FAIR Act, OMB Circular A-76, or OFPP Policy Letter 11-01. The FAR also provides no guidance upon "functions that approach being inherently governmental" beyond identifying them. In particular, it does not bar agencies from contracting out these functions, and at least one federal court decision suggests that agencies may contract for the performance of functions closely associated with inherently governmental functions.<sup>83</sup>

The FAR's provisions on inherently governmental functions and functions approaching inherently governmental functions generally apply to all executive branch agencies not specifically exempted from the FAR.<sup>84</sup> However, Subpart 7.5 does not apply to services obtained through personnel appointments, advisory committees, or personal services contracts issued under statutory authority.<sup>85</sup> A *personal services contract* is "a contract that, by its express terms or as administered, makes the contractor personnel appear to be, in effect, Government employees."<sup>86</sup>

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<sup>80</sup> 48 C.F.R. §2.101.

<sup>81</sup> 48 C.F.R. §7.503(c).

<sup>82</sup> 48 C.F.R. §7.503(d).

<sup>83</sup> *Gulf Group, Inc. v. United States*, 61 Fed. Cl. 338, 341, n.7 (2004) (treating items on the FAR's list of "functions approaching inherently governmental" as capable of being contracted out by agencies).

<sup>84</sup> See 48 C.F.R. §2.101. Examples of agencies exempted from the FAR include the Federal Aviation Administration and the Postal Service.

<sup>85</sup> 48 C.F.R. §7.502.

<sup>86</sup> 48 C.F.R. §2.101. Because obtaining personal services by contract, rather than by direct hire under competitive appointment or other procedures required by the civil service laws, can "circumvent" civil service laws, agencies are prohibited from awarding personal services contracts unless specifically authorized by statute. Most contracts for (continued...)

As a regulation promulgated through notice-and-comment procedures, the FAR is generally legally binding.<sup>87</sup> However, agencies are expressly authorized to deviate from the FAR on a contract-specific or "class" basis provided that certain conditions are met.<sup>88</sup>

## Executive Orders

Executive orders have also been used to designate certain functions as inherently governmental or commercial. For example, Executive Order 13180, issued by President Clinton on December 7, 2000, designated the "provision of air traffic services" as an inherently governmental function.<sup>89</sup> This order was effectively repealed by Executive Order 13264, issued by President George W. Bush on June 4, 2002, which removed the language designating provision of air traffic services as an inherently governmental function from its discussion of such services.<sup>90</sup> There do not appear to be other such designations presently in effect.

## GAO Decisions

Numerous GAO decisions have also addressed the designation of specific functions as inherently governmental or commercial. GAO comes to address this question in two contexts: (1) in issuing advisory opinions, requested by agency officials, addressing whether agencies' proposed uses of appropriated funds are permissible and (2) in deciding bid protests when a protester challenges agencies' proposed contracting out of allegedly inherently governmental functions.<sup>91</sup> GAO's decisions in bid protests lack the force of law and do not bind federal agencies or protesters.<sup>92</sup> Moreover, in neither context does GAO offer its own definition of inherently governmental

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services entered into by government agencies are not personal services contracts because neither their terms nor their administration results in contractor personnel appearing to be government employees.

<sup>87</sup> See generally CRS Report R41546, *A Brief Overview of Rulemaking and Judicial Review*, by Todd Garvey and Daniel T. Shedd.

<sup>88</sup> See 48 C.F.R. §1.403 (contract-specific or "individual" deviations may be authorized by the agency head, and the contracting officer must document the justification and the agency approval in the contract file); 48 C.F.R. §1.404 (class deviations, applicable to more than one contract, may generally be made by the agency head after consultation with or the approval of certain parties specified in the FAR). For more on deviations, see CRS Report R42826, *The Federal Acquisition Regulation (FAR): Answers to Frequently Asked Questions*, by Kate M. Manuel et al.

<sup>89</sup> Executive Order 13180 of December 7, 2000: Air Traffic Performance-Based Organization, 65 *Federal Register* 77493, 77493 (December 11, 2000).

<sup>90</sup> Executive Order 13264 of June 4, 2002: Amendment to Executive Order 13180, Air Traffic Performance-Based Organization, 67 *Federal Register* 39243, 39243 (June 7, 2002).

<sup>91</sup> See, e.g., 2B Brokers et al., B-298651 (November 27, 2006) (a pre-award bid protest claiming that the agency's request for proposals provided for the performance of inherently governmental functions by winning bidders); Gerald P. Carmen, B-198137.1 (June 3, 1982) (advising the General Services Administration on its proposal to contract out seven functions involved in the conduct of transportation audits).

<sup>92</sup> GAO may only issue recommendations to executive branch agencies because it is a legislative branch agency, and the doctrine of separation of powers precludes it from compelling the actions of executive branch agencies. See *Ameron, Inc. v. United States Army Corps of Eng'rs*, 809 F.2d 979, 986 (3d Cir. 1986). However, when agencies decline to implement the recommendations in GAO bid-protest decisions, they must notify GAO within a certain time frame. GAO then notifies four congressional committees. 31 U.S.C. §3554(b)(3). Similarly, protesters who are dissatisfied with the recommendations in GAO bid-protest decisions may file suit on the same matter in the Court of Federal Claims. See Robert S. Metzger & Daniel A. Lyons, *A Critical Reassessment of the GAO Bid-Protest Mechanism*, 6 *Wis. L. REV.* 1225, 1232, 1248 (2007).

functions. Rather, GAO uses a test for identifying inherently governmental functions that is based heavily on OMB Circular A-76 and the FAR. In part because GAO focuses on executive branch sources in identifying inherently governmental functions, its decisions are discussed here, instead of with federal court decisions, in the following section.

GAO's test of inherently governmental functions looks for (1) the exercise of substantial discretionary authority by government contractors, or (2) the contractor's making value judgments on the government's behalf.<sup>93</sup> Both are factors mentioned along with the definitions of inherently governmental functions in the FAIR Act and OMB Circular A-76 and illustrated by the examples in the FAR.<sup>94</sup> For example, in its decision in *NRC Contracts for Reactor Licensing Tests*, GAO applied this test to the Nuclear Regulatory Commission's (NRC's) proposal to contract out some of its functions in administering licensing tests for nuclear reactor operators. Under the proposed contract, the contractor would have prepared, administered, and graded the tests, as well as provided the NRC with recommendations on which candidates should be granted licenses. GAO found that the proposed contract did not involve inherently governmental functions because the NRC guidelines relating to the tests provided "such extensive detail and guidance" that the contractors had no opportunity to exercise discretion or make value judgments in preparing, administering, or grading the tests. GAO also emphasized that agency personnel—not the contractor—would ultimately decide who received licenses. When emphasizing ultimate agency decision making, GAO highlighted a further distinction between *performing* a function and *advising* or *assisting* with a function that GAO and the courts sometimes also use when identifying inherently governmental functions.<sup>95</sup>

GAO's decision in the *Matter of GSA Transportation Audit Contracts* similarly illustrates another characteristic of GAO decisions addressing whether specific functions are inherently governmental.<sup>96</sup> In this case, the General Services Administration (GSA) proposed to contract out seven functions it had formerly performed in-house when conducting transportation audits. Based upon GSA's descriptions of the proposed contracts, GAO ultimately found that two of these functions were inherently governmental, two were commercial, and the remaining three were not clearly inherently governmental or commercial.<sup>97</sup> As this decision illustrates, GAO examines the context of contractual performance, including the degree of actual supervision that agencies exercise over contractors allegedly performing inherently governmental functions. It generally does not classify functions as inherently governmental or commercial in the abstract.

Among the functions that GAO has classified as inherently governmental, at least in certain circumstances, are:

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<sup>93</sup> See, e.g., Nuclear Regulatory Commission, B-242942 (August 27, 1991).

<sup>94</sup> Compare *id.* with 31 U.S.C. §501 note, at §5(2)(B); OMB Circular A-76, Attachment A, at §(B)(1)(a); and 48 C.F.R. §7.503.

<sup>95</sup> See, e.g., Internal Revenue Service: Issues Affecting IRS' Private Debt Collection Pilot, B-275430 (July 18, 1997) (distinguishing between collection of taxes, which is inherently governmental, and assisting in collecting taxes by locating and contacting taxpayers to remind them of their tax liability and suggest payment methods, which is not inherently governmental).

<sup>96</sup> Gerald P. Carmen, B-198137.1 (June 3, 1982).

<sup>97</sup> The three functions that could not be categorized as inherently governmental or commercial based upon the contractual descriptions of them were (1) answering carriers' protests on behalf of GSA, (2) communicating with bankruptcy courts, and (3) preparing proofs of claims under Chapter 11. See *id.*

- requesting set-off actions against transportation carriers;<sup>98</sup>
- communicating with U.S. attorneys to request collection actions against delinquent transportation carriers;<sup>99</sup>
- the functions of the organization head, contracting officer, and supply branch;<sup>100</sup>
- serving as an agency hearing officer;<sup>101</sup>
- preparing congressional testimony on behalf of an agency;<sup>102</sup>
- performing legally required audit tasks;<sup>103</sup>
- deciding to accept or reject a particular candidate for a program;<sup>104</sup>
- approving departures from policy and guidance in issuing certifications;<sup>105</sup>
- certifying new or unproven technologies;<sup>106</sup>
- determining what constitutes a standard of safety equivalent to a required standard;<sup>107</sup>
- finding the existence of special conditions or exceptions;<sup>108</sup>
- making preemptive or other attacks;<sup>109</sup> and
- determining individuals' suitability for employment or eligibility for security clearances.<sup>110</sup>

GAO has similarly recognized the following functions as commercial, at least in certain contexts:

- identifying overcharges related to billing above established audit minima;<sup>111</sup>
- sending notices of overcharges or other notices;<sup>112</sup>
- collecting user fees in national forests;<sup>113</sup>

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> JL Assocs., Inc., B-218137 (May 6, 1985).

<sup>101</sup> Questions Regarding DOE and EPA Use of Contractors, B-237356 (December 29, 1989).

<sup>102</sup> *Id.*

<sup>103</sup> Questions Concerning Reimbursement of GSA Audit Contractors, B-198137 (April 29, 1980).

<sup>104</sup> Management of Young Adult Conservation Corps, B-192518 (August 9, 1979).

<sup>105</sup> Vertol Sys. Co., Inc., B-295936 (April 19, 2005).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> Brian X. Scott, B-298370, B-298490 (August 18, 2006).

<sup>110</sup> Privatizing OPM Investigations, T-GGD-95-186 (June 15, 1995).

<sup>111</sup> Gerald P. Carmen, B-198137.1 (June 3, 1982).

<sup>112</sup> *Id.*

<sup>113</sup> Debt Collections, B-207731 (April 22, 1983).

- answering an agency hotline where the answers do not involve interpretation of laws or regulations;<sup>114</sup>
- examining vouchers, verifying invoice accounts and identifying billing errors;<sup>115</sup>
- administering programs in accordance with agency regulations and policy;<sup>116</sup>
- writer-editor services in preparing statements or testimony where the government's position is established;<sup>117</sup>
- property accountability, forecasting, programming and budgeting;<sup>118</sup>
- examination, inspection, and testing services necessary to issue certifications;<sup>119</sup>
- provision of guard or protective services;<sup>120</sup> and
- gathering and reporting information on investigations.<sup>121</sup>

## Judicial Decisions

Federal courts have also addressed the question of whether specific functions are inherently governmental or commercial. Two contexts typically prompt courts to determine what is an inherently governmental function. The first context involves litigation under the FAIR Act, OMB Circular A-76, and the FAR.<sup>122</sup> This context actually entails a smaller number of published decisions than the second context, which involves litigation concerning constitutional rights. The litigation concerning constitutional rights itself can take two forms. First, there are cases involving the "state action doctrine," which consider whether private actors are performing inherently governmental functions in determining (1) whether those actors must provide the same constitutional rights to third parties that the government must provide, and (2) whether those actors can claim sovereign immunity for certain actions like government officials can.<sup>123</sup> Second, there are cases involving the "private delegation doctrine," which center upon whether a private

<sup>114</sup> Questions Regarding DOE and EPA Use of Contractors, B-237356 (December 29, 1989).

<sup>115</sup> Questions Concerning Reimbursement of GSA Audit Contractors, B-198137 (April 29, 1980).

<sup>116</sup> Management of Young Adult Conservation Corps, B-192518 (August 9, 1979).

<sup>117</sup> *Id.*

<sup>118</sup> Tecom, Inc., B-253740.3 (July 7, 1994).

<sup>119</sup> Vertol Sys. Co., Inc., B-295936 (April 19, 2005).

<sup>120</sup> Brian X. Scott, B-298370, B-298490 (August 18, 2006).

<sup>121</sup> Privatizing OPM Investigations, T-GGD-95-186 (June 15, 1995).

<sup>122</sup> *See, e.g.*, Nat'l Air Traffic Controllers Ass'n v. Sec'y of the Dep't of Trans., 654 F.3d 654, 658-59 (6<sup>th</sup> Cir. 2011) (finding that amendments made to 49 U.S.C. §47124(b)(2) in 2003 demonstrate Congress's intent that certain air traffic control activities are commercial functions that may be contracted to private entities); *United States v. Kenney*, 185 F.3d 1217 (11<sup>th</sup> Cir. 1999) (stating functions are not inherently governmental, for purposes of contracting out, unless the contractor is in a position to make decisions that are binding on the agency); *Northrop Grumman Info. Tech., Inc. v. United States*, 74 Fed. Cl. 407 (2006) (addressing information management and technology services under OMB Circular A-76); *Arrowhead Metals, Ltd. v. United States*, 8 Cl. Ct. 703, 714 (1985) (finding that coinage of money is inherently governmental but that the U.S. Mint has discretion to determine whether the stamping of blanks constitutes coinage and is thus exempt from Circular A-76).

<sup>123</sup> *See, e.g.*, *Street v. Corrections Corp. of Am.*, 102 F.3d 811, 814 (6<sup>th</sup> Cir. 1996) (finding that operation of a prison is an inherently governmental function requiring the prison's operators to respect prisoners' constitutional rights); *Giron v. Corrections Corp. of Am.*, 14 F. Supp. 2d 1245, 1248-50 (D.N.M. 1998) (similar).



party was given impermissible authority to legislate or make rules on the government's behalf.<sup>124</sup> Legislating and rulemaking are inherently governmental functions.<sup>125</sup>

The courts, like GAO, do not have an independent definition of inherently governmental functions. In deciding cases under the FAIR Act or other authorities, the courts use the definitions provided in these sources.<sup>126</sup> Moreover, in at least some such cases, courts give considerable deference to the executive branch's classification of a function as inherently governmental or commercial because of the political question doctrine, under which courts decline to hear issues that have been entrusted to the discretion of another branch of government and that lack judicially discoverable and management standards for their resolution.<sup>127</sup> In *Arrowhead Metals, Ltd. v. United States*, for example, the court categorized the coinage of money as inherently governmental because it is one of the powers that the Constitution grants to Congress.<sup>128</sup> However, the court also found that the U.S. Mint has discretion to determine whether the stamping of blanks constitutes coinage.<sup>129</sup> In reaching this conclusion, the court noted its "desire to avoid a legislative-executive controversy" regarding whether the striking of blanks in the production of coins constitutes an inherently governmental function.<sup>130</sup>

In other cases not involving the FAIR Act or specific provisions of procurement law or policy, the courts use a test of inherently governmental functions much like that used by GAO, focusing upon the degree to which a private party exercises substantial discretion,<sup>131</sup> or makes

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<sup>124</sup> See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238 (1938) (finding the Bituminous Coal Conservation Act unconstitutional, in part, because the statute penalized people who failed to observe the requirements for minimum wages and maximum hours drawn up by prescribed majorities of coal producers and employees); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935) (finding unconstitutional the provisions of the National Industrial Recovery Act, which allowed trade and industry groups to develop codes of fair competition that would become binding on all participants in the industry once they were approved by the president); *St. Louis, Iron Mt. & So. Ry. v. Taylor*, 210 U.S. 281 (1908) (upholding the constitutionality of a statute which gave the American Railway Association the authority to determine the standard height of draw bars on freight cars and to certify that figure to the Interstate Commerce Commission, which was required to accept it).

<sup>125</sup> See, e.g., U.S. Const. art. II, §1, cl. 1 (entrusting the legislative function to Congress); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (striking down as an unconstitutional private delegation legislation that would have subjected an industry to maximum hours agreed to by a supermajority of workers and producers in the industry); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (striking down as an unconstitutional private delegation legislation that would have allowed industrial organizations or trade associations to establish "codes of fair competition" for their industry).

<sup>126</sup> See, e.g., *Arrowhead Metals*, 8 Cl. Ct. at 714; *Northrop Grumman Info. Tech., Inc. v. United States*, 74 Fed. Cl. 407 (2006); *United States v. Kenney*, 185 F.3d 1217 (11<sup>th</sup> Cir. 1999); *Nat'l Air Traffic Controllers Ass'n v. Sec'y of the Dep't of Transp.*, 997 F. Supp. 874 (N.D. Ohio 1998).

<sup>127</sup> See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cr.) 137, 170 (1803) ("The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive can never be made in this court."). See also *Martin v. Mott*, 25 U.S. (12 Wheat.) 19 (1827) (holding that the President acting under congressional authorization has exclusive and unreviewable power to determine when the militia should be called out); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796) (declining to determine whether a treaty had been broken).

<sup>128</sup> *Arrowhead Metals*, 8 Cl. Ct. at 717 (citing U.S. Const. art. I, §8, cl. 5).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> See, e.g., *Doe v. V. of T.*, 2003 U.S. Dist. LEXIS 17570 (N.D. Ill., September 30, 2003) (characterizing maintaining a fire department as inherently governmental because it entails "the exercise of discretion on almost every level of operation").

judgments,<sup>132</sup> on the government's behalf. Functions classified as inherently governmental under the constitutional test include:

- conducting elections;<sup>133</sup>
- exercising the power of eminent domain;<sup>134</sup>
- providing police services;<sup>135</sup>
- investigating allegations of child abuse;<sup>136</sup>
- exercising prosecutorial discretion;<sup>137</sup>
- chartering, oversight, and regulation of companies;<sup>138</sup>
- creation of public monopolies;<sup>139</sup>
- holding the personal property of prisoners;<sup>140</sup>
- limiting the First Amendment rights of prisoners;<sup>141</sup>
- taxing and paying governmental indebtedness or obligations;<sup>142</sup>
- devising tariff regimes;<sup>143</sup> and
- hiring diplomatic staff or civil servants.<sup>144</sup>

Functions categorized as commercial, in contrast, include providing transportation services to citizens,<sup>145</sup> and selling government land on the government's behalf.<sup>146</sup>

Designations of specific functions as inherently governmental in judicial decisions have the force of law, at least within the jurisdictions where the decisions are precedent and for so long as the decisions are not overturned. However, a judicial declaration that a function is inherently governmental under a constitutional test would not necessarily preclude the executive branch from contracting out this function under the FAIR Act, OMB Circular A-76, the FAR, or OFPP Policy Letter 11-01. Rather, in the "state action" context, the designation of a function as

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<sup>132</sup> See, e.g., *Sierra Club v. Lynn*, 502 F.2d 43, 59 (5<sup>th</sup> Cir. 1974) (emphasizing that the agency independently performed its "judgmental functions" despite the contractor's involvement).

<sup>133</sup> *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 157-58 (1978).

<sup>134</sup> *Contributors to Pa. Hospital v. Philadelphia*, 245 U.S. 20 (1917); *Republic of the Philippines v. Marcos*, 818 F.2d 1473 (9<sup>th</sup> Cir. 1987); *Chesapeake & Ohio Ry. Co. v. Greenup County*, 175 F.2d 169 (6<sup>th</sup> Cir. 1949).

<sup>135</sup> *Takle v. Univ. of Wisc. Hosp. & Clinics Auth.*, 402 F.3d 768 (7<sup>th</sup> Cir. 2005).

<sup>136</sup> *Kauch v. Dep't for Children, Youth & Their Families*, 321 F.3d 1 (1<sup>st</sup> Cir. 2003).

<sup>137</sup> *Sigman v. United States*, 208 F.3d 760 (9<sup>th</sup> Cir. 2000).

<sup>138</sup> *Week v. Cayman Islands*, 1992 U.S. App. LEXIS 32985 (7<sup>th</sup> Cir. 1992).

<sup>139</sup> *Republic of the Philippines v. Marcos*, 818 F.2d 1473 (9<sup>th</sup> Cir. 1987).

<sup>140</sup> *Kimbrough v. O'Neil*, 545 F.2d 1059 (7<sup>th</sup> Cir. 1976).

<sup>141</sup> *Bonner v. Coughlin*, 545 F.2d 565 (7<sup>th</sup> Cir. 1976).

<sup>142</sup> *S.J. Constr., Inc. v. Lewis & Clark Reg'l Water Sys.*, 2008 U.S. Dist. LEXIS 62192 (D.S.D. 2008).

<sup>143</sup> *Royal Thai Gov't v. United States*, 441 F. Supp. 2d 1350 (Ct. Int'l Trade 2006).

<sup>144</sup> *Elliott v. British Tourist Auth.*, 986 F. Supp. 189 (S.D.N.Y. 1997).

<sup>145</sup> *Helvering v. Powers*, 293 U.S. 214, 216 (1934).

<sup>146</sup> *Week v. Cayman Islands*, 1992 U.S. App. LEXIS 32985 (7<sup>th</sup> Cir. 1992).



inherently governmental means only that the contractor performing the inherently governmental function (1) owes private individuals the same constitutional rights that the government owes them and (2) can potentially claim sovereign immunity like government officials can.<sup>147</sup> Similarly, in the "private delegation" context, the designation means only that any regulations issued by the contractor cannot be constitutionally applied to private individuals.<sup>148</sup> The "private delegation" doctrine would not necessarily preclude the contractor from performing other functions under the contract that resulted in the contractor's issuance of the regulations.

## Conclusion

In sum, the various authorities discussed herein differ somewhat in their treatment of inherently governmental and other functions. The primary differences between them are arguably not in their definitions of *inherently governmental function*, however, as **Table 1** illustrates. Rather, the key differences are in their provisions elaborating and expanding on the definition of inherently governmental functions, provisions which arguably reflect the source's intended purpose and use, not differing conceptions of what constitutes an inherently governmental functions. For example, OMB Circular A-76, which "establishes federal policy for the competition of commercial activities,"<sup>149</sup> includes a definition and discussion of commercial services that is not found in other sources. Similarly, OFPP Letter 11-01, which is designed to "assist agency officers and employees in ensuring that only Federal employees perform work that is inherently governmental or otherwise needs to be reserved to the public sector,"<sup>150</sup> includes a definition of critical functions and tests for identifying inherently governmental functions, among other things, not found in other sources.

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<sup>147</sup> See, e.g., *West v. Atkins*, 487 U.S. 42, 55-56 (1988) (finding that a private doctor was a state actor for purposes of the Eighth Amendment duty to provide adequate medical care to prisoners). See generally Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397, 431 (2006) ("[T]he state action concept does not limit the functions that government can delegate. Instead it 'constitutionalizes' after-the-fact delegations that amount to the exercise of public authority.").

<sup>148</sup> See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238 (1938) (finding the Bituminous Coal Conservation Act unconstitutional, in part, because the statute penalized people who failed to observe the requirements for minimum wages and maximum hours drawn up by prescribed majorities of coal producers and employees).

<sup>149</sup> OMB Circular A-76 Revised, May 29, 2003, at §1.

<sup>150</sup> 76 *Federal Register* at 56236.

**Table I. Side-by-Side Comparison of the Definitions of Inherently Governmental Functions Provided in the FAIR Act, OMB Circular A-76, the FAR, and OFPP Policy Letter 11-01**

	<b>FAIR Act</b>	<b>OMB Circular A-76</b>	<b>FAR<sup>a</sup></b>	<b>OFPP Policy Letter 11-01</b>
Type of definition	Legal definition	Policy-based definition	Legal definition	Policy-based definition
Used for	Compiling lists of agency functions, classified as commercial or inherently governmental, for Congress and the public	Determining which agency functions are commercial and may be contracted out; establishing procedures for contracting them out	Determining which agency functions are commercial and may be contracted out; establishing procedures for contracting them out	Ensuring that only federal employees perform work that is inherently governmental or otherwise needs to be reserved to the public sector (e.g., to maintain control of agency’s mission)
Basic definition	The term “inherently governmental function” means a function that is so intimately related to the public interest as to require performance by Federal Government employees.	Inherently Governmental Activit[y:] An activity that is so intimately related to the public interest as to mandate performance by government personnel.	“Inherently governmental function” means, as a matter of policy, a function that is so intimately related to the public interest as to mandate performance by Government employees.	“Inherently governmental function,” as defined in Section 5 of the Federal Activities Inventory Reform Act, P.L. 105-270, means a function that is so intimately related to the public interest as to require performance by Federal Government employees.
Functions Included	The term includes activities that require either the exercise of discretion in applying Federal Government authority or the making of value judgments in making decisions for the Federal Government, including judgments relating to monetary transactions and entitlements. An inherently governmental function involves, among other things, the interpretation and execution of the laws of the United States so as—  (i) to bind the United States to take or not to take some action by contract, policy, regulation, authorization,	These activities require the exercise of substantial discretion in applying government authority and/or in making decisions for the government. Inherently governmental activities normally fall into two categories: the exercise of sovereign government authority or the establishment of procedures and processes related to the oversight of monetary transactions or entitlements. An inherently governmental activity involves:  (1) Binding the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;	An inherently governmental function includes activities that require either the exercise of discretion in applying Government authority, or the making of value judgments in making decisions for the Government. Governmental functions normally fall into two categories: the act of governing, i.e., the discretionary exercise of Government authority, and monetary transactions and entitlements.  An inherently governmental function involves, among other things, the interpretation and execution of the laws of the United States so as to—  (i) Bind the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;	The term includes functions that require either the exercise of discretion in applying Federal Government authority or the making of value judgments in making decisions for the Federal Government, including judgments relating to monetary transactions and entitlements. An inherently governmental function involves, among other things, the interpretation and execution of the laws of the United States so as—  (1) to bind the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;

FAIR Act	OMB Circular A-76	FAR <sup>a</sup>	OFPP Policy Letter 11-01
order, or otherwise;			
(ii) to determine, protect, and advance United States economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise;	(2) Determining, protecting, and advancing economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise;	(ii) Determine, protect, and advance United States economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise;	(2) to determine, protect, and advance United States economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise;
(iii) to significantly affect the life, liberty, or property of private persons;	(3) Significantly affecting the life, liberty, or property of private persons; or	(iii) Significantly affect the life, liberty, or property of private persons;	(3) to significantly affect the life, liberty, or property of private persons;
(iv) to commission, appoint, direct, or control officers or employees of the United States; or	(4) Exerting ultimate control over the acquisition, use, or disposition of United States property (real or personal, tangible or intangible), including establishing policies or procedures for the collection, control, or disbursement of appropriated and other federal funds.	(iv) Commission, appoint, direct, or control officers or employees of the United States; or	(4) to commission, appoint, direct, or control officers or employees of the United States; or
(v) 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.		(v) 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 Federal funds.	(5) to exert ultimate control over the acquisition, use, or disposition of the property, real or personal, tangible or intangible, of the United States, including the collection, control, or disbursement of appropriations and other Federal funds.

	<b>FAIR Act</b>	<b>OMB Circular A-76</b>	<b>FAR<sup>a</sup></b>	<b>OFPP Policy Letter 11-01</b>
Functions excluded	<p>The term does not normally include—</p> <p>(i) gathering information for or providing advice, opinions, recommendations, or ideas to Federal Government officials; or</p> <p>(ii) any function that is primarily ministerial and internal in nature (such as building security, mail operations, operation of cafeterias, housekeeping, facilities operations and maintenance, warehouse operations, motor vehicle fleet management operations, or other routine electrical or mechanical services).</p>	<p>While inherently governmental activities require the exercise of substantial discretion, not every exercise of discretion is evidence that an activity is inherently governmental. Rather, the use of discretion shall be deemed inherently governmental if it commits the government to a course of action when 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 and (2) subject the discretionary authority to final approval or regular oversight by agency officials.</p> <p>c. An activity may be provided by contract support (i.e., a private sector source or a public reimbursable source using contract support) where the contractor does not have the authority to decide on the course of action, but is tasked to develop options or implement a course of action, with agency oversight.</p>	<p>Inherently governmental functions do not normally include gathering information for or providing advice, opinions, recommendations, or ideas to Government officials. They also do not include functions that are primarily ministerial and internal in nature, such as building security, mail operations, operation of cafeterias, housekeeping, facilities operations and maintenance, warehouse operations, motor vehicle fleet management operations, or other routine electrical or mechanical services.</p>	<p>The term does not normally include—</p> <p>(1) gathering information for or providing advice, opinions, recommendations, or ideas to Federal Government officials; or</p> <p>(2) any function that is primarily ministerial and internal in nature (such as building security, mail operations, operation of cafeterias, housekeeping, facilities operations and maintenance, warehouse operations, motor vehicle fleet management operations, or other routine electrical or mechanical services).</p>
Lists exemplary functions classified as inherently governmental	No	No	Yes	Yes
Addresses functions closely associated with inherently governmental functions	No	No	Yes	Yes

	<b>FAIR Act</b>	<b>OMB Circular A-76</b>	<b>FAR<sup>a</sup></b>	<b>OFPP Policy Letter 11-01</b>
Definition of commercial activities	None	A commercial activity is a recurring service that could be performed by the private sector and is resourced, performed, and controlled by the agency through performance by government personnel, a contract, or a fee-for-service agreement. A commercial activity is not so intimately related to the public interest as to mandate performance by government personnel. Commercial activities may be found within, or throughout, organizations that perform inherently governmental activities or classified work.	None	None
Definition of critical functions	None	None	None	“Critical function” means a function that is necessary to the agency being able to effectively perform and maintain control of its mission and operations. Typically, critical functions are recurring and long-term in duration.

- a. This definition is the one given in the “definitions” section of the FAR and used for purposes of Subpart 7.5 (“inherently governmental functions”). Subpart 7.3 of the FAR (“contractor versus government performance”) incorporates by reference the definition of inherently governmental functions given in OMB Circular A-76.

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## **Acknowledgments**

Former CRS legislative attorney, John R. Luckey, co-authored this report.