

## Country case: Inherently governmental and critical functions in the United States

### Description

As governments rely more heavily on contractors to provide services in support of policy development and citizen-facing activities, risks arise that functions properly belonging to the government may be undertaken or unduly influenced by private sector suppliers. To address these risks, the United States Congress directed the Office of Management and Budget to:

- i. create a single definition for the term “inherently governmental function” that addresses any deficiencies in the existing definitions and reasonably applies to all agencies
- ii. establish criteria to be used by [US federal government] agencies to identify “critical” functions and positions that should only be performed by federal employees
- iii. provide guidance to improve internal agency management of functions that are inherently governmental or critical

Public Procurement  
Principle: **Access, Capacity**

Procurement Stage:  
**All phases**

Audience: **Procuring Entity,  
Private Sector**

To implement this direction, the Office of Management and Budget, through its office of Federal Procurement Policy, issued a policy letter to better identify such situations and provide guidance regarding the management of internal staffing decisions to ensure critical management roles are filled by federal employees or members of the Armed Forces. The policy letter unified existing definitions of the term “inherently governmental functions,” which are defined as a function that is so intimately related to the public interest as to require performance by Federal Government employees. According to the policy letter, this 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.” Specific examples such as binding the government by contract, engaging in policy making, and managing officers or employees of the government are also included. The term normally excludes gathering information or providing policy advice and functions that are primarily ministerial and internal, such as building security and mail operations.

While inherently governmental functions cannot be performed by contractor employees, contractors are eligible to perform functions closely associated with inherently governmental functions, subject to certain conditions. When the nature of a function that is not inherently governmental but may impinge on federal officials’ performance of inherently governmental functions, agencies are required to give special consideration to using federal employees to conduct the function. In cases where contractors are used to conduct such functions, special management attention is required on the part of the agency to guard against expansion into a role in performing inherently governmental functions.

The policy letter includes examples of closely associated functions, as well as a checklist of responsibilities for management of contractors performing functions closely associated with inherently governmental functions, including contractual provisions to limit discretion, appropriately identifying contractor work as such when there is a risk of confusion with government work products, and maintaining sufficient and effective management and oversight of contractor performance.

The policy letter defines a critical functions as “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.” Due to the mission-oriented nature of this definition, whether a function is critical or not can vary by agency, but some examples are provided – for instance, performing mediation services for the Federal Mediation and Conciliation Service. The policy letter requires that agencies identify such functions “in order to ensure that they have sufficient internal capacity to maintain control over functions that are core to the agency’s mission and operations.”

While critical functions may be performed by contractor personnel (as long as they are not also inherently governmental), the policy letter requires that agencies have an “adequate number of positions filled by Federal employees with appropriate training, experience, and expertise to understand the agency’s requirements, formulate alternatives, manage work product, and monitor any contractors used to support the Federal workforce” with respect to critical functions. This determination should be based on a number of case-by-case factors, including the agency mission, complexity of the function, the need for specialised staff, and the potential impact on mission performance of a default of performance by the contractor.

Source: OECD (2016), [The Korean Public Procurement Service: Innovating for Effectiveness](#), OECD Publishing, Paris.