

EPA Inventory of Commercial and Inherently Governmental Activities

GUIDE TO INVENTORY SUBMISSION
MARCH 2008

This guidance provides instructions for Environmental Protection Agency (EPA) Program and Regional offices (hereinafter referred to as Offices) to use in compiling their “2008 Inventory of Commercial and Inherently Governmental Activities” (commonly referred to as the FAIR Act Inventory, or simply the Inventory). When all data are combined, the full FAIR Act Inventory will serve as the database for responding to various reporting requirements, including, the FAIR Act and the Annual Report to Congress. The 2008 Inventory will identify full-time equivalents performing functions that are either (1) inherently governmental or (2) commercial, as defined by the FAIR Act of 1998.

The 2008 FAIR Act Inventory shall be completed using the instructions for each data field as provided in this guidance. There are **7 Exhibits** for additional guidance and clarification on specific fields within the database. For the 2008 Inventory, EPA will use the Lotus Notes data collection tool (system) to simplify the data collection process. The procedure inputs will be guided by use of drop down menus containing pre-determined data identifiers (e.g., city and state, position title, job series, function codes, and justifications) in FY 2008. Also an instruction manual is provided for further assistance. If you need additional assistance, please contact **Melanie Gooden at 202-564-3043**.

When the Competitive Sourcing Staff (CSS) compiles the information submitted by Offices into the final Inventory, the total FTE will match the total in the 2008 President’s Budget. For 2008, each office must reconcile their FTEs reported in the Inventory with the 2008 President’s Budget. Offices must provide a separate written explanation if the FTEs listed on their inventory submission (both commercial (all reason codes) and inherently governmental) do not match the FTE levels in the 2008 President’s Budget. As with the 2007 Inventory, CSS will provide the FTE in the 2008 President’s Budget for each office. Also, the Competitive Sourcing Staff will look at consistency in the application of Function, Status, and Reason codes (explained below) across the Agency.

FUNCTION CODES -

Function codes serve to categorize similar or related services, tasks, and functions into groupings that describe the general nature of work taking place within the Agency. A primary purpose of function codes is to allow Agency management to evaluate the use of resources compared to the Strategic Plan, and to evaluate workforce planning and mission needs. Function codes also allow OMB and the public to see how EPA is using its people.

Offices are encouraged to code a position by the function predominantly performed. However, recognizing that we often have multiple responsibilities, up to three function codes may be assigned to a single position. *OMB requires a 25% minimum of time for each function performed.* Any function code with less than 25% of time can only be designated for

commercial suitable for competition (CB) functions, and can only be entered by the Competitive Sourcing Staff.

The 2008 list of available function codes are those that used by the Agency in the 2007 inventory and summarized in Exhibit 1. Each function code is specifically defined for terminologies and descriptions germane to EPA¹. The list of function code definitions is in Exhibit 2.

The database drop down menu includes only those function codes provided in Exhibit 1. If a function code is not shown on the drop down menu, it cannot be used. If an Office believes that none of the function codes applies, the FAIR Coordinator should contact the CSS for approval to use another. Offices are strongly encouraged to use the function codes available on the drop down menu. No function code can be created or used if it is not on the OMB-approved list (<http://www.whitehouse.gov/omb/procurement/fair/2004functioncodes.html>).

STATUS CODES –

Status codes identify functions, services, and tasks as either Commercial (C) or Inherently Governmental (I). Definitions of both C and I are included in Exhibit 3. As stated above, function codes describe the kind of work being performed. Status codes reflect an assessment of whether the work is Inherently Governmental, meeting the criteria set forth in the definition found in OMB Circular A-76. If not, the position/activity is coded commercial by default. A function code in and of itself is neither inherently governmental (I) nor commercial (C) (see discussion below under Status Codes), but it does contribute toward an accurate assessment of whether performed is “I” or “C.” Accurately describing and categorizing the work by assigning the appropriate function code is a critical first step in assessing “I” or “C” status.

For example, assume there is a position with the responsibilities to process, research, and approve Government grants. The position spends 30% of its time processing grants, 45% researching, and 25% approving. Researching and processing grants are commercial in nature, while approving grants is an inherently governmental function, since it commits the Government to spend appropriated funds. While the function code may be the same for all tasks, different components of the position should be coded according to the appropriate commercial or inherently governmental status. Thus the position in this example would be coded L200 (Grants Monitoring and Evaluation) 75% “C,” 25% “I.”

CSS has provided criteria to determine the appropriate status/reason code within the data collection tool. The criteria are based on the FAIR Act, OMB Circular A-76, supplementary

¹ The Fair Coordinators Workgroup met throughout FY04 to refine the list of function codes most applicable to the Agency and then to define those that did apply in the context of EPA missions, functions, services, and tasks. In the past, function code definitions were provided by OMB and emanated from DOD. This made it difficult to make reasoned judgments about the applicability of specific function codes in given situations. By defining function codes using terminologies and descriptions more germane to EPA, we can more readily categorize the services that we perform and in the end make more defensible assessments about our services in terms of their inherently governmental or commercial nature.

guidance issued by OMB in memorandum number M-06-08, and review comments received from OMB on Inventory submissions. The database will automatically generate the appropriate status/reason code (I or C) based on the chosen justification criteria. The FAIR Act of 1998 and OMB Circular A-76 require written justifications for any positions that are determined to be commercial, but exempt from competition (C/A) in nature. Guidance on written justifications is provided below.

REASON CODES –

Reason codes are only applied to functions with a status code of “C”. Reason codes indicate whether a commercial activity has been exempted from consideration for competition by the Agency, has been competed, is being competed, or is suitable for consideration for competition. Reason codes for use in the 2008 Inventory are shown in Exhibit 4. Based on the selection of the “Justification Criteria” from the drop down menu (Exhibit 6), a reason code will be applied to a particular position. For commercial activities exempted from consideration for competition by the Assistant Administrator or Regional Administrator, reason codes are used to clarify this rationale for Government performance of those commercial activities. The definitions shown in the table at Exhibit 4 are self-explanatory. Be sure to include *ALL FTEs* in the 2008 inventory and consider all reason codes. The CSS will assist in identifying FTEs that have already been competed or are currently under study.

When an FTE is coded “Exempt from Competition” (C/A) in the Inventory, the Deputy Assistant Administrator/Deputy Regional Administrator has made a determination that a particular commercial FTE should be excluded from being considered for competition, because it represents too great a risk to the Agency or because of overriding strategic workforce planning needs. A written justification is required to support that determination. Also when an FTE is coded “Suitable for Competition” (C/B) in the Inventory and a change is needed, the Deputy Assistant Administrator/Deputy Regional Administrator **must** provide a written justification to the Competitive Sourcing Official (CSO) for approval and entry by the CSS. Guidance on the preparation of written justifications is provided below.

Please note. *If a position was previously determined to be commercial and suitable for competition, but not selected for competition during the Agency’s competition planning cycle, it is still commercial, suitable for competition. Additionally, in recognition of the level of authority required to meet the criteria for designation as “inherently governmental” the Agency will identify all positions at GS-08 and below as commercial in nature.*

JUSTIFICATIONS –

In accordance with the FAIR Act and OMB Circular A-76, functions determined to be commercial but exempt from consideration from competition will require written justifications by the DAA or DRA for approval by the CSO. CSS has provided criteria to determine the appropriate Status/Reason Code within the database. The criteria are based on the FAIR Act, OMB Circular A-76, supplementary guidance issued by OMB in memorandum M-06-08, and

review comments received from OMB in prior Inventory submissions. The data collection tool will automatically generate the appropriate status/reason code based on the chosen criteria.

The status reason criteria generated by the data collection tool for activities which are commercial but exempt from consideration from competition (CB), provide the general basis for the exemption, but do not explain why it represents a substantial risk, or how a determination was made regarding the “sufficient number” of FTE needed to maintain core-mission knowledge. Each Office must provide a summary level justification that addresses the commercial activities designated as exempt from competition. The justification should include an explanation to support the number. When explaining the rationale for the ratio, consider approximately what percentage of a function is currently provided by contractors, what are the risks of outsourcing too much of the function, what percentage would endanger the Agency’s ability to fulfill its’ core mission, and when would this occur. Also if these positions are being reserved for career progression, how does it fit in the EPA’s Human Capital Plan?

All justifications must be submitted to CSS, along with the overall Office inventory submission for compilation into the Agency inventory. CSS will review your submissions and may seek additional information or entries prior to submitting to OMB.

The CSS will compile and submit the Agency’s overall inventory and justifications to the Agency’s CSO for approval prior to submission to OMB. Exhibits 5 and 6 includes guidance and format to help ensure the justifications can withstand scrutiny by OMB, Agency employees and unions, and the private sector, all of whom may challenge the characterizations of the activities performed by our employees in the inventory and the supporting justifications.

AGENCY STRATEGIC PLAN –

We have included entries linking the functions, services, and tasks that are being performed throughout the Agency to the Annual Strategic Plan (ASP). All entries must relate to goals and objectives as described in the ASP. This will not be part of the Agency’s inventory submission to OMB, but rather will be used for internal Agency purposes. As indicated in the cover memo to this guidance, our intent in collecting this information is to help provide the Agency with a clearer picture of the activities performed by our workforce; to capture the alignment of Agency resources with its mission; and to enable management to make more strategic decisions on potential functional areas for Competitive Sourcing activities.

Definitions – Inherently Governmental / Commercial Activity¹

- I. Inherently Governmental.** An inherently governmental activity is “so intimately related to the public interest as to mandate performance by government personnel,” and that “these positions require the exercise of substantial discretion in applying government authority and/or in making decisions for the government.” These positions have the authority to bind the government to a course of action; to determine budget, priorities and policy; to significantly affect the life, liberty, or property of private citizens; or to exert ultimate control over the acquisition, use, or disposal of government property. The OMB A-76 Circular further clarifies that “not every exercise of discretion is evidence that an activity is inherently governmental”. In order to be considered inherently governmental, the discretion cannot already be “limited or guided by existing policies, procedures...and other guidance that (1) identify specified ranges of acceptable decisions or conduct and (2) subject the discretionary authority to final approval...by agency officials”.

Unless an employee has authority as defined above, they do NOT meet the definition of inherently governmental.

- II. Commercial Activities.** 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.

¹ Source of definitions – OMB Circular A-76, Attachment A

EXHIBIT 4

2008 Inventory Commercial Reason Codes

| REASON CODES FOR COMMERCIAL ACTIVITIES INVENTORY | |
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| Reason Code | Definition |
| A | The Commercial Activity is not appropriate for private sector performance pursuant to a written determination. The Agency has exempted this function from competition resulting in no competition. |
| B | The Commercial Activity is suitable for a Cost Comparison or Competition. |
| C | The Commercial Activity is the subject of an in-progress Cost Comparison or Competition. |
| D | The Commercial Activity is performed by a Most Efficient Organization (MEO) resulting from a Cost Comparison decision made within the past five years. |
| E | The Commercial Activity is pending an agency approved restructuring decision (e.g., closure, realignment). |
| F | Performance of the commercial activity by government personnel is required due to a statutory prohibition against private sector performance. |

EXHIBIT 5

Contracting Officer's Technical Representative (COTR) and Assistance Agreement Functions

The coding of Contracting Officer's Technical Representative (COTR) functions and Assistance Agreement functions have been handled in an inconsistent manner, therefore the following guidance is provided to assist offices in preparing their 2005 Inventory submissions:

Contracting Officer's Technical Representative (COTR) functions are a commercial activity that EPA has determined is too great a risk to consider for competition. On May 25, 2005, the Office of Management and Budget (OMB) guidance identified COTR functions as commercial. In applying that guidance to EPA, the Agency notes that it is highly reliant on contractor support to meet mission requirements. Additionally, EPA has struggled historically with contract administration as a material and agency level deficiency. These deficiencies led the Agency to bring contracted work back in-house to avoid actual or perceived personal services. Although, the deficiencies were cleared in fiscal year 2000, EPA continues to monitor contract administration, particularly as it relates to the relationship between EPA and its contractors, to avoid future problems. Therefore, after careful consideration the Agency has determined to exempt these functions from competition. FTE performing COTR functions should be coded as commercial, but exempt from competition in the inventory. The Competitive Sourcing Staff (CSS) will provide the written justification required by OMB Circular A-76 for these exemptions.

The Table entitled "Assistance Agreements" below is provided to guide Office in coding activities associated with Assistance Agreements.

| ASSISTANCE AGREEMENTS | |
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| ASSISTANCE AGREEMENTS ACTIVITIES - PROJECT OFFICERS | |
| Major Activity 1: Pre-Award | |
| <i>Commercial Sub-Activities</i> | <i>Inherently Governmental Sub-Activities</i> |
| Perform assessment of recipient=s technical capabilities required by the Policy on Assessing Capabilities for Non-Profit Applicants for Managing Assistance Awards. | Determine adequacy of capabilities. |
| Perform preliminary review of grant application packages for program related items such as statutory/regulatory compliance, program guidance or solicitation criteria; checking whether activities are in agreement with statutory authority, delegation of authority and program results code. | Determine compliance. |
| Perform and document cost review in the pre-award phase. | Determine eligibility, allowability, allocability, and reasonableness. |
| Prepare competitive announcement for review and approval by the Project Officer. | Determine eligibility and compliance with all requirements. Approve competitive announcement. |
| Receive, review and prepare initial analysis of proposals/applications for program related items such as statutory/regulatory compliance, program guidance or solicitation criteria; checking whether activities are in agreement with statutory authority, delegation of authority and program results code. | Determine eligibility and compliance. Determine applicant=s adherence to EPA Order 5700.7, AEnvironmental Results Under EPA Assistance Agreements.@ |
| Major Activity 2: Award/Amendment/Post-Award | |
| <i>Commercial Sub-Activities</i> | <i>Inherently Governmental Sub-Activities</i> |
| Prepare the funding recommendation form in the Integrated Grants Management System. - <i>Commercial, Exempt for competition (represents substantial risk to the Agency based on</i> | Approve and sign the funding recommendation |

| ASSISTANCE AGREEMENTS | |
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| ASSISTANCE AGREEMENTS ACTIVITIES - PROJECT OFFICERS | |
| <i>past Inspector General findings).</i> | package. |
| Perform both pre- and post-award advanced monitoring reviews, including on-site reviews, grants outputs and milestone tracking. | Determine if findings from reviews indicate acceptable performance and make final determination on recommendation to correct deficiencies. |
| Prepare the commitment notice, assigning accounting information for the award. | Determine funding source. |
| Major Activity 3: Monitoring and Compliance | |
| <i>Commercial Sub-Activities</i> | <i>Inherently Governmental Sub-Activities</i> |
| Monitor compliance in accordance with post-award monitoring procedures, including on-site reviews, grant output and milestone tracking. Document findings and recommend whether the recipient is in compliance with agreement conditions. Recommend whether grantee submittal of interim and final performance reports are in accordance with 40CFR S30.51 and 30.71. | Determine if findings from reviews indicate acceptable performance and make final determination on recommendation to correct deficiencies. |
| Compile programmatic findings and comments from Project Officer and convey those, along with any administrative comments, to applicants, and check revised applications to insure that identified administrative and programmatic deficiencies have been addressed. | Determine if findings from reviews indicate acceptable performance and make final determination on recommendations to correct deficiencies. |
| Receive and input into IGMS MBE/WBE reports and follow-up on delinquent reports. | |
| Review high-risk recipient's= payment requests and supporting documentation. | Approve payment. |
| Review reports to evaluate whether they adequately address progress in achieving agreed-upon outputs and outcomes. | Acceptance of grantee performance. Make determinations regarding recommendations to |

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| ASSISTANCE AGREEMENTS | |
| ASSISTANCE AGREEMENTS ACTIVITIES - PROJECT OFFICERS | |
| | correct grantee deficiencies. |
| Major Activity 4: Closeout | |
| <i>Commercial Sub-Activities</i> | <i>Inherently Governmental Sub-Activities</i> |
| Assess whether project is technically ready for closeout including whether all deliverables have been received. | Determine readiness for closeout. |
| Prepare documentation in IGMS for no-cost time extension and grant closeout. | Approve extensions or closeout. |

ASSISTANCE AGREEMENT

ASSISTANCE AGREEMENT ACTIVITIES - GRANTS SPECIALIST

Major Activity 1: Pre-Award

| <i>Commercial Sub-Activities</i> | <i>Inherently Governmental Sub-Activities</i> |
|--|--|
| Perform assessment of recipient=s administrative capabilities required by the Policy on Assessing Capabilities for Non-Profit Applicants for Managing Assistance Awards. | Determine adequacy of capabilities. |
| Perform and document cost review in the pre-award phase. | Determine eligibility, allowability, allocability, and reasonableness. |

Major Activity 2: Award/Amendment/Post-Award

| <i>Commercial Sub-Activities</i> | <i>Inherently Governmental Sub-Activities</i> |
|--|--|
| | Approve and sign the funding recommendation package. |
| Perform both pre- and post-award Advanced Monitoring Reviews to include on-site reviews, grant outputs and milestone tracking. | Determine if findings from reviews indicate acceptable performance and make final determination on recommendation to correct deficiencies. |
| Prepare documentation in IGMS for no-cost time extension and closeout. | Approve extension and/or closeout. |

Major Activity 3: Monitoring and Compliance

| <i>Commercial Sub-Activities</i> | <i>Inherently Governmental Sub-Activities</i> |
|--|---|
| Monitor compliance in accordance with post-award monitoring procedures, including on-site reviews, grant output and milestone tracking. Document findings and recommend whether the recipient is | Determine if findings from reviews indicate acceptable performance and make final determination on recommendation |

| ASSISTANCE AGREEMENT | |
|--|---|
| ASSISTANCE AGREEMENT ACTIVITIES - GRANTS SPECIALIST | |
| in compliance with agreement conditions. Recommend whether grantee submittal of interim and final performance reports are in accordance with 40CFR S30.51 and 30.71. | to correct deficiencies. |
| Receive and input into IGMS MBE/WBE reports and follow-up on delinquent reports. | |
| Review high-risk recipient's= payment requests and supporting documentation. | Approve payment. |
| Major Activity 4: Closeout | |
| <i>Commercial Sub-Activities</i> | <i>Inherently Governmental Sub-Activities</i> |
| Perform closeout for final approval by Grants Specialist, including preparing warning letters, collecting Final Statistics Reports (FSRs), following up on missing items and preparing closeout letters. | Approve closeout. |
| Major Activity 5: Training | |
| Provide routine non-specialized training, excluding areas regarding policy issues and training for Project Officers. | |

EXHIBIT 6

Justification Criteria and Format – Inherently Governmental and Commercial/Exempt

| Number | Justification Criteria |
|--------|--|
| 1 | Subjecting this FTE to competition creates a substantial risk to the Agency's ability to meet its mission. |
| 2 | This FTE must be retained within the Agency to maintain a sufficient number of FTE to perform independent, day-to-day oversight of core Agency functions. |
| 3 | This FTE must be retained in-house in order to maintain a sufficient number of trained and experienced FTE with historical knowledge to ensure continued performance of a core function. |
| 4 | This FTE must be retained in-house in order to maintain a sufficient number of specialized FTE with expertise of Agency systems and procedures. |
| 5 | This FTE must be retained in-house in order to maintain a sufficient number of FTE to provide policy recommendations to the Agency's inherently governmental decision makers. |
| 6 | This FTE must be retained in-house to meet strategic workforce planning needs of providing suitable candidates for career growth in mission critical areas of the agency. |
| 7 | This FTE is currently filled by an individual with disabilities hired using Schedule A authority. |
| 8 | This FTE is filled by a student intern as part of a formalized program for federal recruitment. |
| 9 | Agency regulations and/or policy require this activity to be performed by a government employee. |
| 10 | This FTE is commercial and suitable for competition. <i>(None of the criteria above is applicable; therefore it is suitable for consideration for competition).</i> |
| 11 | This FTE is CURRENTLY being competed under a public-private competition. |
| 12 | This FTE has PREVIOUSLY been competed under a public-private competition. |
| 13 | Statutory restrictions require this activity to be performed by a government employee. |
| 14 | This FTE is the final approval authority for establishing policy, strategy, program measures, and/or setting office priorities. |
| 15 | This FTE is the final approval authority for materials/products that will be used to represent the Agency to the public. |
| 16 | This FTE certifies invoices for payment (Funds Certifying Official). |
| 17 | This FTE is a warranted Contracting Officer or Grants Approval Officer. |
| 18 | This FTE represents the Agency in hearings, negotiations, or grievances and commits the Agency to a course of action for or against individuals or businesses in carrying out the mission or management of the Agency. |
| 19 | This FTE makes final determinations regarding the disposition of Agency assets or the use of Agency budgetary authority. |
| 20 | This FTE is accountable for Agency compliance with Government regulations or policy and/or represents the Agency in court hearings, negotiations, and litigations. |
| 21 | This FTE applies financial and enforcement discretion that may significantly affect the life, liberty, or property of private persons. |
| 22 | This FTE exerts ultimate control over the acquisition, use, or disposition of Agency property. |
| 23 | This FTE makes final determinations regarding eligibility, allowability, allocability, and/or reasonableness of activity. |
| 24 | Makes final determination regarding eligibility and compliance with all requirements, policy and/or guidance. |
| 25 | Approves and signs funding recommendations. |
| 26 | Obligates the Agency to a course of action. |

With the exception of numbers 10 through 12, the criteria set forth above explain why FTE are being withheld from consideration from competition by the Agency. FTE are withheld from competition because they are either inherently governmental or the Competitive Sourcing Official, or appropriate designee, has determined they will be exempted from consideration from competition. The FAIR Act of 1998 and OMB Circular A-76 require written justifications for all functions that are exempted from competition. These written justifications must be made available to OMB and the public upon request. OMB requires that justifications for functions determined commercial but exempted by the Agency from competition be submitted in conjunction with the annual FAIR Inventory submissions.

The criteria above establish the basis for the rationale to exclude FTE from competition but the strategic thinking can only be provided at the Office level. How did you determine what a “sufficient number” of FTE is? What is the “substantial risk” to the Agency? When explaining the rationale, please consider approximately what percentage of a function is currently provided by contractors, what are the risk of outsourcing too much of the function, what percentage would hinder the Agency’s ability to fulfill its’ core mission and when would this occur. If these positions are being reserved for career progression, explain how it fits in the EPA’s Human Capital plan. Do not simply define the activities that are associated with a function.

Written justifications should be short and to the point. No more than **two (2) pages** should be necessary to justify all exemptions from one Office. CSS will review the Office submissions and provide feedback as necessary. Office justifications will be collated and submitted to OMB as a part of the Agency Inventory submission. See an example format below.

Example Justification Format

| Function Code | Function Title | Status | Justification |
|---------------|--|--------|--|
| B302 | Manpower Research and Analysis | CA-06 | This FTE must be retained in-house to meet strategic workforce planning needs of providing suitable candidates for career growth in mission critical areas of the Agency; because EPA has determined that a “skill gap” exists in our ability to perform Strategic Workforce Planning. Therefore these positions, X% of Y, have been identified as training positions, to address this gap and position EPA for future success. |
| F320 | Contract Administration and Operations | CA-01 | Subjecting this FTE to competition creates a substantial risk to the Agency’s ability to meet its mission, because the activities under this function code are those performed by Contracting Officer’s Representatives and while currently corrected, the EPA has had material weaknesses in the area of contract oversight. Because of this history and continued sensitivities in contract administration, the Agency exempts these positions from consideration for competition. |