December 19, 2002

Mr. David C. Childs
Office of Federal Procurement Policy
Office of Management and Budget
725 17th Street, N.W.
NEOB, Room 9013, Washington, DC 20503

Dear Mr. Childs:

The Department of Veterans Affairs has reviewed the proposed revisions to OMB Circular A-76 dated November 14, 2002. We appreciate the opportunity to comment on these proposed revisions. We applaud your efforts to streamline the formal A-76 process. While we agree in principle with the proposed revisions, we have several comments that we would like you to consider. Our comments are enclosed.

In addition, we would like to clarify that VA is operating under the assumption that our agreement with the Director, Federal Procurement Policy, Angela Styles to use our 3-tiered competitive sourcing approach is still in effect irrespective of the proposed changes to the A-76 Circular, which applies to our Tier 3 process. As you know, VA has reached that agreement based on the legislative prohibition on its use of the formal A-76 studies without prior appropriations for that purpose. VA will continue to use our 3-tier approach and our 2003-2008 Competitive Sourcing Implementation Plan, which was shared with OMB in November 2002.

VA has particular concerns with the very narrow definition of “direct patient care” as including “highly specialized expertise and technical capability in critical areas.” This narrowly defined exception may not cover all “hands-on” patient care activities such as general medicine and nursing. Such a result would be contrary to previous informal advice from your office that OMB had no objection to VA exempting “hands-on” patient care activities from the cost comparison requirement under the current quality of care exception. Also, with respect to the FAIR Act Inventory, although VA has concerns about the new reason codes, VA will ensure that the FTE deemed eligible for competitive sourcing in our implementation plan will be placed appropriately in the newly established reason codes.

We welcome the opportunity to discuss our comments and questions with you at your convenience. In addition, should your office establish a Government-wide working group to review comments and recommend final changes to the Circular, VA would like to participate in the process. If you have any questions, please contact me at (202) 273-5033 or Mr. Gary Steinberg, Deputy Assistant Secretary for Planning and Evaluation at (202) 273-5068.

Sincerely,

/s/ Gary Steinberg for

Dennis Duffy

Enclosure

Department of Veterans Affairs
Comments on Proposed Revisions to the OMB A-76 Circular

General Comments:

The current A-76 Circular provides several exemptions to its general requirement for cost comparisons. In VA's most recent inventory of commercial activities, the Veterans Health Administration (VHA) classified all of its activities as commercial exempt. VHA relied on one of the following two exceptions to the A-76 cost-comparison requirement: 1) activities of 10 or fewer FTE where the offeror will provide the required levels of service at fair and reasonable prices; 2) commercial activities at Government hospitals when needed to maintain the quality of direct patient care.

VA Directive 7100 currently sets forth VA policy on competitive sourcing and compliance with A-76. It provides for a three-tier approach, which allows VA, in most cases, to demonstrate that it is meeting OMB's competitive sourcing objectives without having to use the formal A-76 cost comparison. Tier 1 applies to commercial activities of 10 or fewer FTE and essentially requires a cost-benefit analysis for day-to-day "make vs. buy" decisions. Tier 2, applies to commercial exempt activities of 11 or more FTE, is more complicated, more rigorous, and requires the Department to use many of the elements of an A-76 study such as the Performance Work Statement (PWS), the Most Efficient Organization (MEO) and the in-house cost estimate methodologies. Tier 3, applicable to commercial competitive activities over 11 FTE, requires a full A-76 study.

Given the nature of VA's mission, there are numerous occupations that could be competitively bid (maintenance, laundry, food service, and others). However, these occupations have the highest proportions of women and minorities and any significant effort to outsource these jobs will have huge diversity implications.

VA recommends that the effective date for the revised Circular be at the beginning of fiscal year 2004 to allow for a smooth and orderly transition. VHA recently sent out a call memo to all Networks and Chief Offices with guidance for all of FY 2003, based upon the existing VA Directive 7100. In addition, a requirement for the study of all VHA laundries using the Tier 1/Tier 2 process was sent to the Networks earlier this quarter. Since this revised Circular, as currently written, could impact on Tier 3 of the A-76 process overall, VA recommends that a transition phase be included to allow for training and revisions to current guidance if necessary.

ATTACHMENT A

Attachment A, B.1 (page A-1), It is unclear why inventories of activities not subject to the FAIR Act will be required? While commercial activities in VA are not affected, the requirement seems to add a burden without benefit.

Paragraph B.1. This paragraph would require agencies to submit an inventory of inherently governmental activities. This is a new requirement and would be quite onerous. This provision would also require agencies to inventory "commercial activities not subject to the FAIR Act." It is not clear what these activities are. If this is a reference to commercial activities not subject to the A-76 cost comparison then we recommend that the Circular be amended to so state.

Circular, Paragraph 4.b; Attachment A, Paragraphs D, E. These provisions would require agencies to presume that all activities are commercial unless the activity is justified as inherently governmental. This is a new presumption. Further, the agency official designated by the agency head to be responsible for implementation of the Circular, referred to as a "4.e. official," must provide a written determination as to why an activity is not appropriate for outsourcing, i.e. inherently governmental. Such justifications would be available to OMB and the public upon request. As VA currently has thousands of FTE classified as inherently governmental these provisions would create an additional administrative burden. We recommend that this requirement be eliminated.

Section C.1, (p. A-1) - The inventory process does not recognize the use of contractors in conjunction with government employees to perform functions as part of the annual Federal Activities Inventory Reform (FAIR) Act inventory. Business decisions involving the use of contractors versus Federal employees are consistent with competitive sourcing. For example, the Austin Automation Center (AAC) has 367 full-time employees (FTE) and 103 contractors to support customer requirements and the Records Center and Vault (RC&V) has 4 FTE and 17 contractors.

Section E.1, (p. A-3) - Assuring the security and protection of sensitive veteran data and the other sensitive information entrusted to the United States is not something that should be turned over entirely to a commercial entity. The information should be considered property of the United States, and the control over this property should only be by government personnel. This is not covered in the revised definition of inherently governmental.

ATTACHMENT B

Attachment B -There are rigid timeframes provided for the Competition--deviation from which requires approval of the Deputy Director, OMB. Agencies are provided goals for completion of studies as a percentage of FAIR Act inventory FTE that should provide sufficient incentive for agencies to proceed expeditiously. Setting arbitrary milestones to a process that is both complex and litigious may either result in costly process errors or provide a disincentive for proceeding with the study.

Attachment B – We note that the proposed revision would eliminate existing reason codes upon which Directive 7100 is based. Current reason codes indicate whether an activity is, or is not, subject to the A-76 cost comparison requirement, i.e. commercial exempt and commercial competitive. The proposed revisions would only use reason codes to indicate why the agency is performing an activity, or that the activity has been, or will be, subject to a "standard competition" (a formal A-76 study) or direct conversion (conversion of the performance of an activity without an A-76 study).

This requirement of the Circular will have a major impact on the need for HR staff, skilled in the requirements of A-76, devoted to this function.

Public announcements in FedBiz Ops should be by a contracting officer, not by HR staff.

Attachment B, B.1(page B-3) -Is the Agency Tender Official an official from the program office whose commercial activity is being competed?

Attachment B, B.4 (page B-4)-Does the contracting officer or the 4e official appoint the Source Selection Official -- is there a conflict with the FAR?

Attachment B, C.4.a.3(c) (page B-13)-The flexibility provided under the CTTO source selection process for an agency to accept an offer that is not the lowest price could be used to subvert the competitive process of competitive sourcing.

Attachment B, C.4.a. (page B-11) - Indicates that the "Agency Tender" (in-house bid) should be accepted without correction. However, how should circumstances where the in-house tender is so deficient that it cannot be fairly evaluated be handled? Simply go straight to the commercial offers and outsource accordingly? (Some issues with this occurred in VA's A-76 study).

Attachment B, A.1.a. (page B-2) - Conflicts with paragraph C.1.b.(3) (page B-5). Paragraph A.1.a. states that the 4.e. official, at the start of a competition, may waive the timeframes for completion (with no specified time limit) with notification to the Deputy Director for Management (DDM), Office of Management and Budget (OMB). However, paragraph C.1.b.(3) states that the 4.e. official must obtain the approval of the DDM before he or she can grant a single one-time 6-month time extension. These paragraphs should be consistent. Extensions should not be limited and should not require advanced approval of the DDM. The last sentence in paragraph C.1.b.(3) should be deleted.

Attachment B, A.1.a. (page B-2) - The time limits in Attachment B, paragraph A.1.a. (page B-2) and as shown on the chart (page B-1) are too restrictive and, for many studies, unrealistic. Many A-76 studies are very complicated and difficult and take far more than 8 months to assemble and 4 months to compete. One VA study has been ongoing for well over 2 years. The time frames should be eliminated, or if retained, made non-mandatory, with no notification or approval required.

Attachment B., 2.a.(10) (page B-7) - Provides that any performance bond costs will not be included in Line 7 of the Standard Competition Form (SCF). This requirement should be deleted. Just because the Government is self-insured doesn't mean the Government doesn't incur costs to ensure that the work is accomplished under any circumstances. The Government just doesn't pay a third party to cover performance deficiencies that may develop. If the work is so critical as to require bond protection, this cost should not be excluded from the SCF; it is an inherent cost to the particular scope of work for all parties submitting offers. This issue is also addressed in Attachment E, paragraph C.1.d., on page E-12 and should be deleted from both locations.

Attachment B., 2.a.(12) (page B-7), Provides that costs for security clearances should not be included on the SCF for any party to the competition. Security clearances are required not just for classified information, but for any access to data systems, whether classified or not. Contractors should be required to pay their own security clearance costs. Excluding these costs opens the competitive process to manipulation. The only way to exclude these costs from the SCF is to require each offeror to state its security clearance costs on its offer. Offerors could highball their estimated security clearance costs to obtain a reduced SCF price. This provision should be deleted from the draft Circular.

Attachment B, 3.a.(3) (page B-8)- Specifies the circumstances under which an Agency Tender may be changed. A mistake in bid (FAR 14.407 or 15.508) is not one of the circumstances listed. Agencies should have the same rights to claim mistakes in bid as private bidders/offerors and this should be one of the circumstances listed in this paragraph.

Paragraph C.2.a(2). This provision would require agencies to issue a solicitation within eight months of starting a cost comparison, or provide written notification to OMB within seven months of the start that it is unable to meet this deadline and identify planned corrective actions. This new requirement imposes a uniform timetable on solicitations, which may vary greatly depending upon the type and scope of the activity under review.

Paragraph 5.c(2). This provision would provide that where an agency or public reimbursable provider fails to perform to the extent that a termination for default is justified the head of the requiring organization shall issue a notice to terminate and recommend to the 4.e. official that he/she approve either a direct conversion based upon a competition waiver, or an A-76 study. This differs from the current requirement, which, where feasible, would allow award of the work performed by the activity to the next lowest bidder who participated in the initial cost comparison prior to the agency having to conduct another A-76 study. The current provision appears to be less burdensome as default by an agency or public reimbursable provider would not necessarily result in the agency having to perform an A-76 study.

Paragraph D.2.a(2), b(2), c(2). Citing the Procurement Integrity regulation and procurement statute on competition, these provisions would provide that agency personnel who participate personally and substantially in developing the solicitation, the agency tender (the agency management plan submitted to respond to the requirements and bid structure of a solicitation), and on the source selection evaluation board, shall not be afforded the right-of-first-refusal. That right affords adversely affected employees right-of-first-refusal to non-management vacancies with the contractor created by the conversion of agency-performed work to contract or public reimbursable performance. In relevant part, Procurement Integrity law would only preclude an employee from accepting compensation for employment from a contractor for a period of one year after such employee served, at the time of selection of the contractor or an award of a contract to that contractor, as the procuring contracting officer, the source selection authority, a member of the source selection evaluation board or the chief of a financial or technical evaluation team in a procurement in which the contractor was selected for an award of a contract in excess of $10,000,000. 41 U.S.C. § 423 (d); 48 C.F.R.§ 3.104-4(d). Hence, Procurement Integrity law would only preclude an employee who participated personally and substantially on the source selection evaluation board from exercising the right-of-first-refusal, and then only where the contract award is in excess of $10,000,000. See id.

Section B.2, (p. B-3) - Requires the contracting officer (CO) running the competition to be independent of the activity being competed, the Agency Tender Official (ATO), and Administrative Appeal Authority (AAA). Does this mean the CO must be independent from the AAC if an AAC activity is being competed? Also, it's conceivable the ATO may be the AAC Director; so the designated CO would appear to be outside the AAC in order to avoid a conflict of interest.

Section B.3, (p. B-3) - Requires the Human Resources Advisor (HRA) to be independent of the CO, the Source Selection Authority (SSA), and AAA. Note that in VA the CO and SSA are the same official. This raises the same question in the comment above; that is, does this mean the HRA and CO must work for different entities in order to maintain independency?

Section C.1.b.(1), (p. B-4) - The revamped A-76 requires the designation, in writing, of an assistant secretary or equivalent official with responsibility for implementing the circular (see Circular A-76, Revised, Draft November 14, 2002, Section 4.e, p. 1). Note that it refers to this official as the "4.e official" throughout the circular. This part gives the 4.e official the authority to appoint the competition officials, such as the ATO, CO, HRA, SSA, and AAA. If the 4.e. official is a VACO official, it appears that the designation of the competition officials for an AAC activity could be from outside the AAC. It also raises a question of whether the responsibilities of the 4.e. official can be delegated to a designee such as the AAC Director. The draft circular is unclear if the 4.e. official can delegate his/her responsibilities.

Section C.5.c(1) & (2), (p. B-16) - This section imposes a responsibility on the head of the requiring agency to notify a "public reimbursable provider," such as a franchise activity like the AAC, of poor performance through deficiency notices, cure notices, and show cause notices, as with any acquisition. Also, if a public reimbursable provider fails to perform, a termination for default will be justified. This is noteworthy because this states a public policy giving a government agency a right to default another agency for poor performance. However, it appears to stop short of giving the requesting agency the right to hold the defaulting agency (service provider) liable for the excess costs of reprocurement since it does not extend Federal Acquisition Regulation (FAR) Part 49 to this situation.

Section D.1 (p.B b-18) - Right of first refusal does not apply for displaced "nonappropriated fund civilian employees"; however, potential reduction-in-force costs are not clearly calculated in the cost comparison process. Additionally, public providers are required to consider displaced employees.

Attachment B, C.1.b.6: Recommend that the cost to the agency to implement this Circular be included as a factor in determining savings resulting from Standard Competitions.

ATTACHMENT C

The proposed revision narrowly defines "direct patient care" as including "highly specialized expertise and technical expertise in critical areas." It thus appears that the new exception may not cover all "hands-on" patient care activities such as general medicine and nursing. Such a result would be contrary to informal advice provided by OMB's Office of Federal Procurement Policy that they had no objection to VA exempting "hands-on" patient care activities from the cost comparison requirement under the current quality of care exception. To maintain the Department's flexibility to contract for hands-on patient care the definition of direct patient care must thus be broadened to include all hands-on patient care, or the current quality of care exception must be retained.

Attachment C - Eliminates the "Preferential Procurement" direct conversion option (with the exception of JWOD). While its elimination is favorable, it does provide a useful option should an agency wish to exercise it.

Under Attachment C, Direct Conversion Process, Business Case Analysis Documentation, B.2.b: VA recommends that the limitation for comparing the Agency Tender to "four comparable, existing, fixed price, Federal contracts of similar size, workload and scope" be revised to allow for comparison with time and material contracts. The requirement to compare only with fixed price contracts is very restrictive, especially since the alternative if there are not four such contracts available for comparison is to conduct a Standard Competition.

ATTACHMENT D

Attachment D, E (page D-2)-The right of first refusal seems to be needlessly circumscribed. It will be difficult to get employees to participate in the formation of an agency tender if it means there will be no opportunity for those employees to be hired by the private contractor if they lose the competition.

Attachment D -The new competition requirements for ISSAs in Attachment D will curtail the economies of cooperation between agencies. We see no reason to change the prior circular, which grandfathered in ISSA's established prior to 1996.

Attachment D, C.1.e. (page D-2)-States that agencies shall publish notices to renew or obtain new or expanded commercial inter-service support agreements (ISSAs) in FedBizOpps. There are no dollar or other limits placed on this requirement. This requirement should be limited to only those ISSAs subject to competition as specified in paragraph A (e.g., over $1 million in revenue).

Attachment D, Paragraph A. This provision would provide that "[c]ustomer agencies shall compete all Commercial ISSAs exceeding $1 million annually. ISSAs are not subject to competition if . . . the ISSA is statutorily mandated . . . ." The VA-Department of Defense health care resources sharing statute was recently amended by the National Defense Authorization Act for Fiscal Year 2003 to require that the two Departments enter into sharing agreements pursuant to that statute. 38 U.S.C. § 8111 as amended by P.L. 107-314, § 721. That statute now provides that "the Secretary of Veterans Affairs and the Secretary of Defense *shall* enter into agreements and contracts for the mutually beneficial coordination, use or exchange of use of the health care resources of the Department of Veterans Affairs and the Department of Defense . . . ." (Emphasis added). Hence, we assume that VA-DOD sharing agreements would be exempt from the competition requirements of the proposed revision. In addition, due to VA's increasing responsibilities in the area of emergency management and preparedness, it is very likely that VA may have similar mandatory sharing agreements with the Department of Homeland Security. VA would expect those agreements to also be exempt from the proposed revision.

Paragraph B.4. The proposed revision would require agencies to submit an annual ISSA competition plan. This is a new requirement that would create an additional administrative burden. We recommend that this requirement be eliminated.

Section A, (p. D-1) - This section requires competitions for Commercial Interservice Support Agreements (ISSAs) exceeding $1 million annually. However, it exempts ISSAs from competition if, among other things: (1) the revenue generated by the reimbursable rate does not exceed $1 million annually, and (2) the ISSA provides inherently governmental activities. Also, the definition of "Commercial ISSA" appears to limit the definition to "an agency that sells a service to another agency on a reimbursable basis," and does not appear to address intra-service support agreements within an agency. The requirements for commercial ISSAs, with the proposed competition parameters, create disincentives for agencies to explore other Federal providers when considering outsourcing options. Agencies may choose a least cost-effective solution, without competition or cost comparison, to avoid the new administrative burdens associated with an ISSA.

Section B.1 & 3, (p. D-1) – This section gives customer agencies 5 years from the effective date of the circular to compete all applicable existing commercial ISSAs. Also, it mandates that customer agencies shall not renew commercial ISSAs prior to compliance with the competition requirements of the revamped A-76. The proposed effective date of the revised A-76 is upon publication in the Federal Register and applies to all competitions where the solicitation date is on or after January 1, 2003 (see Circular A-76, Revised, Draft November 14, 2002, Section 7, p. 2). Does this mean that all franchise agreements with other government agencies (OGAs) must be competed by those OGAs before renewing them by September 30, 2003?

Section B.4, (p. D-2) – This section requires agencies to submit an Annual Agency ISSA Competition Plan by June 30 of each year. It's not clear whether this plan applies to the current fiscal year or the next fiscal year. As mentioned above, we recommend eliminating the requirement for this plan.

ATTACHMENT E

Attachment E, B.1.b.(2) and (3) (page E-4)-Address indirect and prorated labor. Agencies will have indirect and prorated labor costs regardless of the outcome of a competition. Even if a private sector source is selected as the awardee, the agency will still have personnel costs for overseeing the work, with associated supervision, human resources, general counsel, and other costs. These two paragraphs should specifically state that any costs associated with contract oversight, regardless of who the awardee is, should be excluded from indirect labor (paragraph 2) and prorated labor (paragraph 3) costs. Only those costs that can be directly attributed to an award to the agency, but not to an award to any other party, should be included.

Attachment E, C.6.b. (page E-14)-Provides that the projected gain from the sale or transfer of Government assets must be entered on the SCF at the net book value. It is rare that the Government can sell assets at or anywhere near the net book value. If data is available to support the use of a lower figure, such as actual bid prices on recent auctions, the agency should be allowed to use the lower figure.

Paragraph B.1.b(2). This provision would require that indirect personnel cost of agency performance of an activity "includes the labor of individuals who are responsible for oversight and compliance actions implicitly required by the MEO in order to comply with the solicitation (e.g., supervision, human resources, comptroller, general counsel environmental, Occupational Safety and Health Administration (OSHA) Act compliance management)." Currently, such costs, e.g. headquarters management, accounting, personnel, legal support, are included as part of administrative overhead at a fixed rate of 12 percent of the direct personnel costs of agency performance of the activity. Having to calculate the amounts attributable to the MEO (the agency performance of the activity) for each of the indirect costs listed in the proposed revision, as opposed to using a fixed rate, may prove to very difficult. For example, General Counsel's office maintains a time tracking system that can attribute attorney time to a particular client. However, the system may not be able to show how much attorney time can be attributed to a specific activity performed by a client.

Paragraph B.1.g. This provision would require the inclusion of other entitlements in agency personnel costs such as "premium pay for . . . law enforcement officers." This could be read to imply that agencies may contract out for law enforcement officers. However, we have held, and would continue to hold, that VA may not contract for law enforcement. See VAOPGCADV 30-95.

ATTACHMENT F

Section B, (p. F-8) - The definition of **Public Reimbursable Source** implies that the competition requirements for ISSAs apply only to services being provided to agencies outside of the Department of Veterans Affairs. However, "agency" is not specifically defined. Agreements with internal customers would be impacted by the FAIR Act competition requirements in Attachment A.