

July 24, 2003

The Honorable Joshua Bolten
Director
The Office of Management and Budget
Executive Office Building
Washington, DC 20503

Dear Mr. Bolten:

I am very concerned that the Administration appears to have disregarded a clear directive from Congress, prohibiting the use of arbitrary numerical quotas in its push to privatize work performed by federal employees. When you recently appeared before the Senate Governmental Affairs Committee for confirmation to the position of Director of Office of Management and Budget (OMB), you agreed that OMB had failed to provide Congress with a report, required by law, on the Administration's use of numerical quotas. You declined to answer other questions, and as a result it is impossible to determine the extent of the Administration's non-compliance with the law. I regard this as a very serious matter, and now that you have been confirmed as OMB Director, I ask that you provide complete answers to the Governmental Affairs Committee, as you had promised you would during your confirmation proceedings.

As you are aware, in February of this year Congress precluded the Administration from using appropriated funds to implement the arbitrary numerical quotas that the White House had set for outsourcing federal government jobs. Section 647 of the FY'03 Omnibus Appropriations Bill (P.L. 108-7), which was enacted on February 20, 2003, provides, in part:

[N]one of the funds made available in this Act may be used by an agency of the executive branch to establish, apply, or enforce any numerical goal, target, or quota for subjecting the employees of the executive agency to public-private competitions or for converting such employees or the work performed by such employees to private contractor performance under the Office of Management and Budget Circular A-76 or any other administrative regulation, directive, or policy unless the goal, target, or quota is based on considered research and sound analysis of past activities and is consistent with the stated mission of the executive agency.

The conferees included report language clarifying both chambers' "strong opposition" to the use of arbitrary quotas:

The conferees agree to a Senate provision prohibiting the use of funds to establish, apply, or enforce any numerical goal, target, or quota for contracting out unless the goal, target, or quota is based on considered research and sound analysis of past

activities and is consistent with the stated mission of the executive agency. Although the Senate provision was somewhat different than the provision adopted by the House, the conferees want to emphasize the strong opposition in both chambers to the establishment of arbitrary goals, targets, and quotas. If any goals, targets, or quotas are established following "considered research and sound analysis" under the terms of this provision, the conferees direct the Office of Management and Budget to provide a report to the Committees on Appropriations no later than 30 days following the announcement of those goals, targets, or quotas, specifically detailing the research and sound analysis that was used in reaching the decision.

Like many in Congress, I strongly oppose the imposition of any numerical quotas on federal agencies in furtherance of the Administration's outsourcing agenda. When managed properly, equitable competition for new and existing federal government work is one of several tools that can help agencies reduce costs and become more responsive to customers and taxpayers. The Administration's arbitrary quantitative targets, however, chill other more creative means of achieving costs savings, overtax agencies already struggling to monitor work performed by contractors, and undermine the civil service through procedures biased against federal employees.

In the Senate, I supported a provision, identical to one that had passed the House, that would have prohibited outright the use of numerical quotas. The language quoted above was the result of a Republican amendment watering down the prohibition, which narrowly passed on a party-line vote. Nevertheless, even this watered-down language requires the Administration to base its quotas on considered research and sound analysis of each agency's past activities, and to ensure that the quotas are consistent with the stated mission of each executive agency. In short, each agency may only be subject to a quota that is appropriately tailored to its circumstances and derived using a sound methodology.

The Administration's outsourcing policies have never been based on considered research and sound analysis, and they have never been based on the circumstances of individual agencies. Rather, they have been driven by an untested ideological assumption that contractors should be doing much more of the work that is currently performed by federal employees. At the beginning of his Administration, the President set a goal of competing or converting 50% of the 850,000 jobs listed on agencies' FAIR Act inventories. In furtherance of that arbitrary numerical goal, the Administration established another arbitrary numerical quota of competing or converting 15% of the listed federal jobs. OMB made clear that all agencies had to meet this 15% goal by September 30, 2003, and that non-compliance would be noted. For example, the Administration's budget for FY'04, released in February of 2003, automatically gave agencies "red" scores on its management scorecard if they had "[c]ompleted public-private or direct conversion competition on less than 15 percent of the full-time equivalent employees listed on the approved FAIR Act inventories."

In your answers to written questions posed during the Committee's confirmation process, you made a few unsubstantiated assertions regarding OMB's compliance with the law, but declined to provide substantive answers to most of the questions on this topic. For example, you confirmed that

the OMB has not provided Congress with the report required by law, but declined to explain why a report has not been submitted. You claimed that since the enactment of the FY '03 Omnibus Appropriations bill, "agencies are no longer required to meet a government-wide competitive sourcing quota." You suggested that individual agency competitive sourcing plans were already in effect, and "are based on considered research and sound analysis," but you disclaimed any knowledge of "the specific research and analysis used to establish these plans." You also acknowledged that the 15% goal formulated "early in the Administration" was developed "as a good faith estimate of the amount of activity that would help generate an infrastructure for public-private competition." In other words, far from responding to the needs of individual agencies, the goal was developed to expedite the Administration's overall outsourcing policies.

Now that you are Director of OMB, I am writing to seek complete answers from you regarding the status of the OMB's and agencies' compliance with Section 647 of the FY'03 Omnibus Appropriations Bill. Your promises that the law, for the most part, was being respected do not reassure me in the absence of supporting evidence (evidence that should have been provided in the Congressionally mandated report). Considering that any actions taken to implement the 15% goal would be a clear violation of the law, I would have expected OMB to take quick and unequivocal action to inform agencies that they were not expected to meet the goal, and to disavow the rigid approach mandated as recently as February in the FY '04 budget. I have not seen evidence of this. Some statements by OMB and agency officials convey the clear impression that agencies are still expected to meet the government-wide 15% numerical goal. In other cases, government officials have alluded vaguely to "negotiated" or "tailored" goals, but that leads to another question: if new goals have been developed for all agencies, where is the agency-specific research and analysis that the law requires? Congress has not seen it, and I question whether it has been done.

For example, Angela Styles, Administrator of the Office of Procurement Policy at OMB, has continued to refer publicly to the 15% goal being imposed on agencies, long after having claimed that tailored plans were in effect. As early as March 19, in testimony before the Senate Armed Services Committee, Ms. Styles stated that "[w]e have worked so hard to make sure that the plans are appropriate for the mission of each agency, that are carefully considered, that are based on sound analysis and research, that we have that available for almost every department and agency." Ms. Styles gave this assurance to Congress that the OMB was following the law, and that it had developed agency-specific goals, three months ago. Yet there has been no report to Congress, as required by law, describing the new numerical goals OMB supposedly developed, nor is it clear that agency officials themselves were aware of new, tailored goals.

Other statements by Ms. Styles suggests that agencies were still being judged by their ability to meet the 15% quota. On May 29 and May 30, both *The Washington Post* and *Government Executive* quoted Styles declaring that only a few agencies would meet OMB's September 30 deadline for finishing competitions on 15% of their commercial jobs. On June 11, *Federal Human Resources Week* reported that Ms. Styles had recently decided to give agencies several more months to meet their 2003 target of competing 15% of their commercial jobs. On June 26, in testimony before the House Government Reform Committee, Ms. Styles testified that OMB had "asked the agencies to generally presume that 15 percent was going to be appropriate for them," that it had "developed tailored,

individual plans for each department and agency,” and that no more than four or five agencies would “actually compete 15% of their commercial activities before the end of this fiscal year.”

Ongoing OMB management initiatives also appear to have violated Section 647 of the FY’03 Omnibus Appropriations Bill. In an April 17 memorandum, Clay Johnson, then the nominee for OMB Deputy Director for Management, distributed to agencies exhortations to reach pre-determined mileposts towards fully implementing the President’s Management Agenda. An attached “assessment” from Angela Styles indicates that, by July of 2004, “[c]ompetitions for 15% of government’s commercial activities will have been initiated or completed.” Even more arbitrarily, the Styles assessment included a “stretch goal”: “If DoD commits to subject an additional 130,000 positions to competition, the civilian agencies will subject additional positions to competition.” Imposing a higher quota on civilian agencies, should the Department of Defense meet an arbitrary number, could not possibly qualify as a goal based on considered research and sound analysis of each agency’s past activities. Making clear that numerical quotas were still in effect, Robert Shea, Counselor to the Deputy Director for Management, wrote to *Government Executive*, in response to an article reporting on the Johnson memo, to assure the magazine that the deadline for competing 15% of listed federal jobs had not been extended: “Despite the contention of your May 21 article, July 2004 is not a deadline for anything. We haven't moved the date by which agencies are expected to complete 15 percent of their commercial activities, as the article states.”

In a new management scorecard released by OMB on July 14, all but three agencies received “red” scores for the third quarter of FY ‘03 for their outsourcing initiatives. The OMB’s compilation of the scores did not list any new numerical goals based on each agency’s past practices and missions, but the evaluation did note that the Department of Justice had “[I]nitiated competitions covering 15 percent of its commercial positions.” Although the OMB web-site contains links to budget documents and management scorecards reflecting that agencies automatically received “red” scores for failing to meet the 15% competitive sourcing goal, no update on the site indicates that the automatic imposition of the 15% goal has been invalidated by Congress.

Given these statements from the OMB officials responsible for directing agencies’ procurement activities, it is hardly surprising that agency officials would continue to believe the 15% goals were in effect, long after Congress had prohibited the use of that arbitrarily derived quota. For example, at a May 1 hearing before the Senate Appropriations Committee, NASA Administrator Sean O’Keefe testified the agency had “achieved the government-wide, 15 percent competitive sourcing goal.” At a May 6 hearing before the House Government Reform Committee, Kay Coles James, Director of the Office of Personnel Management, referred to the 15% competitive sourcing mandate applicable to her agency.

In a May 28 internal memorandum, the General Counsel of the Department of Veterans Affairs determined that “[b]ecause the OMB directives cited in paragraph 2 [referring to the 15% competitive sourcing goal for FY ‘03] mandate that studies be undertaken for all activities, VA is required to carry out these mandates using other funding sources, and employees paid from these sources, if legally available.” In other words, not only did the VA believe that the OMB was still requiring it to meet the

15% quota, agency personnel felt they had no choice but to divert funds appropriated for other purposes so that it could conduct the required competitions.

Similarly, in a June 9 memo to regional administrators, the Forest Service proposed submitting to competition thousands of jobs in order to meet annual numerical targets, including the Administration's 15% target for FY'03. The proposal even envisioned the possibility of contracting out firefighting jobs. The Senate Appropriations Committee recently noted in a committee report, ". . . significant sums are being expended in violation of the Committee's reprogramming guidelines and at the expense of critical on-the-ground work such as maintenance of Federal facilities. The Forest Service alone plans to spend \$10,000,000 on competitive sourcing in fiscal year 2003, including \$8,000,000 to establish a competitive sourcing office." (Senate Rpt. 108-89, P. 8) Not only is Forest Service money being misspent on enforcing competitive sourcing quotas in violation of the law, the money is being misspent for that purpose when the agency is stretched thin battling fires in the West.

Collectively, this adds up to clear evidence that the OMB and federal agencies have been violating the law in pursuit of the Administration's pre-established numerical quotas for outsourcing. It seems inconceivable to me that officials at each of these agencies understood they were only to apply numerical quotas "based on considered research and sound analysis" of the agency's activities. It is less likely still that any meaningful research and analysis on individual agencies' circumstances would have led to the same result: the Administration's pre-existing goal of 15%.

Accordingly, I ask you address the following questions regarding the Administration's compliance with Section 647 of the FY '03 Omnibus Appropriations bill.

1. Since the enactment of the FY'03 Omnibus Appropriations bill on February 20, 2003, have the OMB or any agencies established, applied, or enforced any numerical goal, target or quota for subjecting federal employees to public-private competitions or for converting work performed by federal employees to private contractor performance?
2. Please list and describe each numerical goal, target, or quota established, applied, or enforced by OMB or agencies since February 20, 2003. For each one, describe:
 - a) the agency or agencies affected by the numerical goal;
 - b) the nature of the numerical goal;
 - c) the date or time period in which the numerical goal was established, applied, or enforced, as well as the date the goal was first developed;
 - d) the methodology with which the goal was developed, including, where applicable, the research and analysis used, and factors taken into account, in developing the goal and reaching the decision to use it;
 - e) the manner in which the numerical goal was communicated to personnel at the relevant agency; and
 - f) all instances in which federal employees were subjected to public-private competitions or direct conversions based on the numerical goal, including the number of employees affected and the results of the activity.

3. During any time period between February 20, 2003, and the present, have any agencies established, applied, or enforced numerical goals, targets, or quotas that were not based on considered research and sound analysis of the agency's past activities, or were not consistent with the agency's stated mission? For each such instance, describe:
 - a) the agency or agencies using the numerical goal;
 - b) the nature of the numerical goal;
 - c) the date or time period in which the numerical goal was established, applied, or enforced;
 - d) the methodology with which the goal was developed;
 - e) all instances in which federal employees were subjected to public-private competitions or direct conversions based on the numerical goal, including the number of employees affected and the results of the activity; and
 - f) the funds expended on establishing, applying, or enforcing the numerical goal.
4. Have agencies been informed that they are no longer expected to comply with the 15% goal described in the Administration's FY '04 budget, and that their failure to reach that goal will not lead to a "red" score or other administrative action? If so, when and how were they so informed?
5. The conference report to the FY '03 Omnibus Appropriations bill provided that "[i]f any goals, targets, or quotas are established following 'considered research and sound analysis' under the terms of this provision, the conferees direct the Office of Management and Budget to provide a report to the Committees on Appropriations no later than 30 days following the announcement of those goals, targets, or quotas, specifically detailing the research and sound analysis that was used in reaching the decision." Why hasn't a report been submitted under this provision? When will a report be submitted?
6. How much money has been spent by the federal government since February 20, 2003, to establish, apply or enforce numerical goals, targets, or quotas for subjecting federal employees to public-private competitions, or for converting the work performed by federal employees to private contractor performance? For each agency that has expended funds, list and describe:
 - a) the amounts expended by the agency;
 - b) how the funds were spent;
 - c) how much of the funds were spent for activities that were not based on considered research and sound analysis of the agency's past activities or were not consistent with agency's mission.
7. If you determine that funds have been spent in violation of Section 647 of P.L. 108-7, how would you respond?

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8. What will be done to reverse job competitions illegally based on arbitrary numerical quotas?

I look forward to your prompt response to the above questions. Please contact Kevin Landy of my staff at (202) 224-2627 if you have any questions.

Sincerely,

Joseph I. Lieberman
Ranking Member

cc: Senator Susan Collins