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Subject: Comments on OMB A-76

#### Statement of Interested Party

As a federal employee, taxpayer and attorney, I thank you for the opportunity to provide the following electronic comments on the proposed revisions to OMB Circular A-76. For the reasons that follow, Federal Sector EEO should be designated an inherently governmental activity. Gale Barron Black, Washington, D.C. December 18, 2002

"The American people do not and should not expect government to do everything. However, when it comes to those functions which are inherently government in nature, Americans need to have the confidence that their government will serve them and will serve them well". Speech by Kay Coles James, Director, Office of Personnel Management, at the John Whitehead Forum, Excellence in Government, November 15, 2001.

#### Comments on OMB Circular A-76

Certain functions are reserved to the Government. Federal Sector equal employment opportunity policy, coordination, and enforcement of the equal employment opportunity (EEO) laws are governmental in nature. They should not be presumptively deemed "commercial". Since they serve an important national goal, they should never be subject to the lowest contract bid.

#### Inherent Presumption of Competition as the Norm

The directive proposes to make an inherent assumption that everything is commercial. The proposed revision to Circular A-76 would require agencies to presume that all activities are commercial in nature unless an activity is justified as inherently governmental. Using OMB as an example, this would mean that the presumption would be that all of its 500+ positions are commercial, rather than the 2 percent of positions now deemed commercial. It is difficult to respond to this proposal in a vacuum. It would be helpful to know which positions, by series number, title, locations and grades are being seriously considered for outsourcing.

The enforcement of federal sector equal employment opportunity laws (such as Section 717 of Title VII of the Civil Rights Act of 1964 as amended in 1972, the Age Act, the Rehabilitation Act or the Merit System Principles at 5 USC 2301) are inherently governmental in nature for the following reasons:

1. Congress, by statute, gave EEOC certain responsibilities that carry out the public interest: federal sector EEO policy, coordination, enforcement and compliance accountability are inherently governmental in nature and expressly reserved as a government function, by statutes.
2. The Federal EEO activities bind the United States to take, or not take, action by statute, regulation, EEOC final order or in accordance with EEOC instructions.
3. A focus on costs / benefit analysis could compromise the national interest on EEO.
4. A focus on accountability by quantifiable results could have the unintended consequence of fostering quotas. This would be antithetical to the spirit and letter of the law which measures good faith efforts to provide equal opportunities, rather than the achievement of numerical results.

1. Federal EEO is governmental in nature.

The functions of federal EEO policy, coordination, enforcement and performance accountability (including federal sector compliance) are all "governmental in nature," as expressly defined by our governing laws. These functions also serve an important national interest, equal opportunity for all. It is a long standing "policy of the Government of the United States to provide equal opportunity in Federal employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, national origin, disability, or age, and to promote the full realization of equal employment opportunity through a continuing affirmative program in each executive department and agency. This policy of equal opportunity applies to, and must be an integral part of, every aspect of . . . policy and practice in the employment, development,

advancement, and treatment of civilian employees in the Federal Government." Executive Order 11478, incorporated by Executive Order 12106, December 26, 1978. In accordance with the Section 1-2 of the President's Reorganization Plan Number 1 of 1978 (43 FR 19807) (effective July 1, 1978) (set out at Title VII section 2000e-4 and in the Appendix to Title 5 of the United States Code, Government Organizations and Employees), the Equal Employment Opportunity Commission was given the responsibility to provide leadership and coordination to the efforts of Federal departments and agencies to enforce all Federal statutes, Executive orders, regulations, and policies which require equal employment opportunity without regard to race, color, religion, sex, national origin, age or disability. To that end, Congress directed EEOC to "strive to maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among the operations, functions and jurisdictions of the Federal departments and agencies having responsibility for enforcing such statutes, Executive orders, regulations and policies."

In the legislation that transferred the enforcement authority for federal sector EEO enforcement to EEOC, in 1978, from the former Civil Service Commission, Congress said that the Equal Employment Opportunity Commission shall be responsible for directing and furthering the implementation of the policy of the Government of the United States to provide equal opportunity in Federal employment for all employees and applicants for employment and to prohibit discrimination in employment because of race, color, religion, sex, national origin, disability, or age. Section 4 gave EEOC the authority to issue such rules, regulations, orders, and instructions and request such information from the affected departments and agencies as it deems necessary and appropriate to carry out this Order. (Emphasis added).

2. EEOC Office of Federal Operations can bind agencies and require compliance by Federal agencies.

Since EEOC has the authority to require compliance and impose relief against the Sovereign (federal government agencies) its functions should be considered governmental in nature. This extends to EEO policy, Enforcement, enforcement performance audits, Performance Accountability and federal legal support for EEO compliance. Similarly, federal data security and integrity are inherently governmental functions.

### 3. Costs

Cost comparisons have been the traditional focal point of Circular A-76; and cost comparisons may be the most important consideration, but EEO is not amenable to cost determinations. It does not lend itself well to cost / benefit analysis because the benefit is an intangible. Certain functions are so important to the national interest that they should not be a matter of contract cost or subject to the lowest bid.

### 4. Measurable Results

Similarly it is hard to quantify success with regard to EEO. If the ultimate measure of success is strengthening accountability for delivering results and an emphasis of best value, agencies are likely to jettison EEO for activities that provide quantifiable results. This creates a tension between the goal of generating equal employment opportunities, versus quantifiable results. You may have an equal and fair chance to compete. There is no guarantee of results. To the extent that agencies will be held accountable for delivering quantifiable results, we may be creating a problem.

Federal EEO can be distinguished from administrative support functions like investigations, software services, financial audits, ADP, and certain record keeping work that may be properly contracted. A grey area would be Library Services, Information services (where government records could be copyrighted marketed), or data maintenance, especially over data subject to the Privacy Act. The government, however, has not historically contracted out matters that are inherently governmental.