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To: David C. Childs A-76comments/OMB/EOP@EOP
cc: Larry Baden <badenl@arts.endow.gov>, Eileen Mason <masone@arts.endow.gov>
Subject: Arts Endowment comments-proposed rev. A-76

Dear Mr. Childs:

Following are the comments of the National Endowment for the Arts regarding the proposed revised OMB Circular A-76, "Performance of Commercial Activities," which I am transmitting on behalf of

Mr. Laurence M. Baden
Deputy Chairman for Management & Budget
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Please let me know if you experience a technical problem receiving the transmission in full. Thank you.

Sincerely yours,

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VIA Electronic and First Class Mail

December 19, 2002

Mr. David C. Childs
Office of Federal Procurement Policy
U.S. Office of Management and Budget
725 17th Street, NW, Room 9013
Washington, DC 20503

Re: **Proposed Revision to OMB Circular A-76,
Performance of Commercial Activities**

Dear Mr. Childs:

We hereby submit comments on behalf of the National Endowment for the Arts to the Proposed Revision to OMB Circular A-76, "Performance of Commercial Activities."

The National Endowment for the Arts lauds the basic pro-competition principles behind the proposed revision. In particular, the present A-76 is labyrinthine, and simplification of the processes for performance of commercial activities is overdue. We also applaud the enhanced flexibility to make best-value decisions.

However, we are concerned that the one-size-fits-all approach of the proposed revision is a poor fit for small agencies such as the Arts Endowment. The preamble to the proposal notes that "subjecting ***larger*** in-house operations to competition has consistently generated cost savings exceeding 30 percent." 67 Fed. Reg. at 69772 (emphasis added). This is not, however, necessarily the case for ***small*** in-house operations. We believe that in small agencies, the cost of compliance with competition requirements frequently would far exceed any potential cost savings. We recommend that the proposal be revised to afford more discretion to the Contracting Officer to determine that a proposed competition would not be cost-effective, and that the current exemption for activities involving ten or fewer employees be retained.

1. Create an exemption for ten or fewer employees engaged in a commercial activity.

The current A-76 exempts "functions with 10 or fewer FTE," including them under "Conditions Permitting Government Performance of Commercial Activities" and leaving it to the discretion of the agency whether to perform them in-house or by contract. *Revised Supplemental Handbook, Exhibit 1*. The proposed draft, unlike the current A-76, provides no exemption for ten or fewer employees engaged in a commercial activity. We recommend that the exemption in the current circular be retained.

The reason for this longstanding exemption is clear. It is both expensive and time-consuming to do a cost comparison, and when only a small pocket of employees is involved, any cost savings to the government will likely be minimal at best. In the section on *Calculating Public-Private Competition Costs*, the proposal recognizes the costs of the competition and the conversion as an element in decision-making:

The minimum conversion differential is the lesser of 10 percent of agency personnel-related costs . . . or \$10 million over all the performance periods in the solicitation. The minimum conversion differential precludes conversions based on marginal estimated savings and captures non-quantifiable costs related to a conversion such as disruption and decreased productivity.

Attachment E A. 4. Absent an exemption for functions with ten or fewer employees, the agency may be looking at 10% of a very small number in calculating the minimum conversion differential. Retention of the exemption will enable agencies to avoid penny-wise, pound-foolish competitions.

Cost is not, however, the only factor favoring this exemption. In a small agency such as the Endowment, employees' duties typically are not specialized or segregated. Most employees perform multiple functions. Contracting out such generalized tasks is problematic. The administrative challenges are exacerbated by the presumption that if an employee's functions are in any part commercial, they are completely commercial. In a small agency, employees' responsibilities frequently mix the inherently governmental and the commercial. Retaining the exemption would afford additional flexibility to the agency in managing these tasks.

Accordingly, the Endowment recommends that the current exemption for activities involving ten or fewer FTEs be retained.

2. Establish procedural flexibility for small agencies without the requisite contracting hierarchy.

The proposed A-76 presumes a deeper hierarchy than typically exists in a small agency such as the Endowment.

For example, Attachment B, on Public-Private Competition, specifies a series of designations and responsibilities. The Agency Tender Officer, Contracting Officer, Human Resources Advisor, Source

Selection Authority, and Administrative Appeal Authority all must be inherently governmental agency officials, generally independent of each other and of the activity being competed.

The National Endowment for the Arts has a single contracting officer, with a single staff assistant. His second-level supervisor is the Deputy Chairman for Management & Budget, who presumably will become the Endowment's 4(e) official. The Endowment simply does not have sufficient independent agency officials with requisite expertise to comply with the proposed circular as drafted.

Similarly, the proposed Fair Act Challenge and Appeal process requires the 4(e) official to appoint an Inventory Challenge Review Authority and an Inventory Challenge Appeal Authority. The Appeal Authority must be independent and at a higher level than the Review Authority. In the Endowment, the 2002 FAIR Act inventory was prepared by an employee directly supervised by the Deputy Chairman for Management & Budget. The Endowment does not contain enough management levels to provide the requisite senior, independent review.

Moreover, it would be essentially impossible for a thinly-staffed agency to comply with the proposed requirements for separating those responsible for an agency tender from those responsible for solicitation and those responsible for evaluation. (See Attachment B. D. 2.) On a practical level, compliance with these requirements would all but preclude small agencies from ever developing a proposal to keep work in-house.

We recommend that the proposal be revised to exempt or to allow a modified procedure for small agencies.

3. Clarify whether direct conversion is required for smaller groups.

It is unclear whether the revised A-76 would *require* direct conversion when under ten employees are involved, or would leave the type of conversion to the discretion of contracting officer, as under the present A-76. We recommend that the use of direct conversion remain at the discretion of the contracting officer.

* * * *

We urge the Office of Management and Budget to consider these concerns as the final A-76 is developed.

Sincerely yours,

/s/

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