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Dear Mr. Childs:

On behalf of the American Federation of Government Employees, AFL-CIO, the largest federal employees union, one which represents more than 600,000 government workers who are proud to serve the American people across the nation, throughout the world, and around the clock, I thank you for the opportunity to provide our comments on the radical revisions proposed by the Office of Management and Budget (OMB) to Circular A-76 in order to drastically accelerate the Bush Administration's aggressive and unrelenting effort to privatize the vital and important services performed by as many as 1,000,000 federal employees.

It is helpful to place the proposed rewrite of the circular in the proper context. All evidence suggests that this Administration has launched a war against the reliable and experienced working- and middle-class Americans who make up the federal government's civil service. As the battle over the establishment of the Department of Homeland Security made clear, if the Administration can't eliminate the civil service protections of federal employees or make it easier to eliminate their collective bargaining rights, then they'll privatize their jobs. Almost immediately after assuming power, the Administration imposed on all federal agencies onerous numerical privatization quotas, crafted to ensure that the jobs of at least 425,000 federal employees were reviewed for privatization by the end of 2004, either with or without public-private competition. With the rewritten circular, agencies will be directed to review for privatization at least 850,000

federal employee jobs, either through a multitude of new options to give work to contractors without any competition, or through a public-private competition process that will have been rendered so obviously pro-contractor. As a result of years and years of mindless downsizing and thoughtless privatization, the Bush Administration inherited what has accurately been described as a "human capital crisis." Rather than take the steps necessary to resolve this crisis, the Administration seems intent on turning it into a "human capital calamity."

Three tactical decisions made by OMB with respect to the rewrite of the circular should tell casual observers all they need to know about this proposal. First, OMB was careful to delay its release until after the November 5 Congressional elections. Second, OMB is allowing interested parties just thirty days to comment on a proposal that, if implemented, would drastically change an already extremely controversial privatization process. Third, OMB would implement the rewritten circular only a few days after the cut-off for the submission of public comments. According to the Director's draft memorandum, agencies would be instructed to start their engines for the mad rush towards 850,000 federal employee jobs and points ever northwards on January 3.

The bulk of my comments are devoted to pointing out how those who have rewritten the circular have done little more than publish for comment a contractor wish-list. First, however, I will examine the publicity campaign that was undertaken with the publication of the rewritten circular and demonstrate briefly how the proposal fails to achieve even the modest goals claimed for it by OMB.

1. "To lower costs for taxpayers…"

If OMB is so determined "to lower costs for taxpayers," why has it so quickly abandoned an ultimately cost-based public-private competition process for one that substitutes subjectivity for savings, and which has historically cost taxpayers more and taken longer to finish?

Why has OMB imposed a "best value" process that would allow a contractor to take work away from federal employees even when the in-house tender is less expensive and more responsive?

Why has OMB encouraged contractors to submit proposals in excess of the requirements so that taxpayers risk having agencies buy what they want, rather than what they need?

Why does OMB consider superfluous contractor "bells and whistles" as more important than the taxpayers' bottom line?

Why does OMB not specifically require the use of sealed bidding in all but the most extraordinary of circumstances, given that sealed bidding both reduces politics and bias, thus ensuring that the competitions are not compromised, and

is significantly less costly and time-consuming than processes involving negotiation?

Why does OMB actually expand the already excessive opportunities for contractors to take work away from agencies without public-private competition?

Why doesn't OMB ensure that federal employees will regularly have opportunities to compete against contractors for new work and currently privatized work, instead of shielding contractors from the scrutiny of public-private competition?

Why doesn't OMB establish a reliable and comprehensive contractor inventory to track the costs and quality of all contractor work, both that which has already been privatized as well as that which will soon be privatized?

Why doesn't OMB invest in contract administration resources to ensure that the billions and billions of additional dollars that are to be showered upon contractors are not wasted, as so many have been in the past?

Why does OMB emphasize privatization to the exclusion of all other, more proven methods for making the delivery of federal services more efficient?

2. "Significantly expand the use of public-private competition by…requiring periodic recompetitions of commercial activities for the government…"

A lot of disingenuous rhetoric notwithstanding, OMB is actually strongly anti-public-private competition. The jobs of federal employees are being given to contractors without public-private competition outside of the confines of OMB Circular A-76; and the jobs of federal employees are being given to contractors without public-private competition within the confines of OMB Circular A-76.

In fact, OMB's infamous privatization quotas explicitly encourage agencies to convert the jobs of federal employees to contractors without competition. The use of the notorious Native American direct conversion process has actually grown during this Administration. An OMB scheme to encourage agencies to engage in non-competitive preferential procurement in order to fulfill their privatization quotas had to be aborted when a well-timed leak provoked strong opposition from the Administration's anti-affirmative action supporters. "Federal agencies would have vast new authority to outsource work without giving civil servants a chance to compete for their jobs under a proposal being developed by the Bush administration," reported GovExec.com on September 7, 2001, in an article that described OMB's preferential procurement initiative as "allow(ing) all small businesses that are included in federal preferential contracting programs to receive contracts of any size to perform work that is currently done by federal employees…(T)he proposal would give agencies another option to meet the administration's competitive sourcing goals, according to the OMB official."

Moreover, OMB has failed to forcefully repudiate the efforts of the Department of the Army to review for privatization under its controversial and completely non-competitive "Third Wave" initiative more than 210,000 civilian and military jobs.

The rewritten circular inexplicably retains and even proudly polishes various direct conversion methods of giving work to contractors without public-private competition that are included in the current circular, including special authorities for smaller functions, whenever it can be claimed not to adversely impact federal employees, waivers, and business case analyses. [For the Actual Text, please see Attachment C, A.1., 2., 8., and 9, pages C-1, C-2.]

With respect to the authority for direct conversion of smaller functions, which is particularly prone to abuse because OMB's privatization quotas explicitly encourage direct conversions generally, why has OMB not at least required agencies to employ the Department of the Interior model that first performs a bare-bones cost comparison between the existing in-house workforce and private sector firms performing similar work before shifting any work to contractors? According to an April 8 GovExec.com article, "The Interior plan gives agencies a new option for holding public-private competitions on functions involving 10 or fewer employees. Currently, agencies may directly convert such small functions to the private sector without giving civil servants a chance to compete for their jobs. Interior's plan, by contrast, would allow federal employees to keep their jobs if they could perform the work at a lower cost than private firms." While less than the ideal of allowing federal employees to put their best bid forward as a real Most Efficient Organization (MEO), it's surely better than the wholly noncompetitive process mandated by the rewritten circular.

The direct conversion authority where there is ostensibly no impact on federal employees has been significantly expanded so that it applies without numerical limitation on the number of federal employees involved and could now also be used when "all directly affected Federal civilian employees within the agency…voluntarily retire." This is surely smart politics, encouraging agencies to give work to contractors when there might be no opposition from an in-house workforce, but is it good for government? Of course not. Divesting an agency of a function through privatization without making a formal make-or-buy decision simply because of its political expediency is clearly bad for government.

Merely because the federal employees who performed the work are no longer plentiful, perhaps because agencies have not invested appropriately in new human capital and have let their workforces grow too gray, should not determine whether the function should be given away to contractors. This is the sort of loophole that caused the "human capital crisis," and the rewritten circular's expansion of that loophole would only exacerbate that crisis.

For a precedent, we need look no further than the ruinous downsizing that has taken place in the Defense Department's acquisition workforce; as the Inspector General reported in 2000, DoD hired contractors to replace the civilian employees in the acquisition workforce who "voluntarily retired"—at higher costs. Among the adverse consequences reported by multiple acquisition organizations from the downsizing: insufficient staff to manage requirements efficiently, reduced scrutiny and timeliness in reviewing acquisition actions, increased backlog in closing out completed contracts, and lost opportunities to develop cost savings initiatives. The IG also reported that seven different acquisition organizations experienced "increased program costs resulting from contracting for technical support versus using in-house technical support." All such privatization occurred through direct conversions, the rationale being that the federal workforce had (been) retired. The results: inherently governmental work was privatized and taxpayers paid more than before.

Moreover, the rewritten circular would significantly increase the possibilities for direct conversions, something I discuss in much greater detail below. For example, if the managers responsible for submitting the in-house tenders don't do so punctually, the federal employees performing the work, utterly blameless, could pay for the failure of others by having their jobs directly converted without public-private competition. Similarly, if the competition is not finished by an arbitrary deadline, the federal employees performing the work, utterly blameless, could pay for the failure of others by having their jobs directly converted without public-private competition. Even when federal employees win under the new pro-contractor process, the rewritten circular explicitly encourages managers to consider directly converting their jobs to contractor performance without public-private competition when their performance periods expire.

Worse, because of the OMB privatization quotas, which give agencies credit whether federal employee jobs are competed or converted pursuant to the rewritten circular, agencies will have little incentive to submit good tenders on time, to complete competitions before the arbitrary deadlines, or even to ask for extensions if the competitions are running late. If the credit is the same, why bother, especially when there are insufficient resources to manage the competitions already underway pursuant to the current circular?

While OMB officials will occasionally concede that public-private competition should work both ways—subjecting work performed by contractors to public-private competition as well as work performed by federal employees, especially given that contractors have acquired almost all of their work without ever having to compete against federal employees and often without having to compete against one another—the privatization quotas are stubbornly one-way. Although anywhere from 850,000 to 1,000,000 federal employee jobs will be reviewed for privatization, not a single contractor job will be examined for insourcing.

The rewritten circular continues this anti-taxpayer, anti-federal employee approach. On the very first page of the draft, OMB Director Daniels insists that the rewritten circular is to be used on "all commercial activities performed by government personnel." (Emphasis added) Naturally, the rewritten circular reflects that bias. In order to perform new work, federal employees would have to compete—but not contractors. In order to continue to perform work that increases in value by just 30%, federal employees would have to compete—but not contractors. In order to retain work that they had already won through the pro-contractor rewritten circular, federal employees would have to compete or even be directly converted—but not contractors. In order to keep work after a default, federal employees would have to compete or even be directly converted—but not contractors. I will discuss those inequities in much greater detail below.

Whether or not contractors would have to compete in those circumstances is determined by the Federal Acquisition Regulation (FAR); and, as the OMB official principally responsible for the preparation of this draft has publicly acknowledged, the FAR has significant problems with respect to ensuring that the federal government's massive army of contractors face competition when acquiring and retaining government work paid for through taxpayer dollars.

Sealed bidding is the procurement method that minimizes the possibility for politics, favoritism, and conflicts of interest that undermine the integrity of competitions. Negotiation has become unduly popular in private-private competition, in large part because contracting officers can much more easily control the outcomes of competitions through their selection of objective and subjective evaluation factors and subfactors and their assignment of weights to those evaluation factors and subfactors. In the context of public-private competition, which is simply politics by other means, such discretion can be systematically used against in-house tenders. Despite the fact that sealed bidding is appropriate in all but the most extraordinary circumstances, the rewritten circular contains little guidance, and few restrictions, on the use of other processes that can and often do, result in compromised competitions.

The rewritten circular will extend the controversial and highly subjective "best value" competition process to encompass public-private competition as well as private-private competition. Under a "best value" process, federal employees can submit the less expensive / more responsive tender—and still lose to a contractor. In the rewritten circular's "best value" process, contracting officers will be free to use any subjective evaluation factors. Moreover, contracting officers will not be required to reveal the specific weights for those factors. And contracting officers will be able to rate a contractor's proposal higher than the agency's tender for exceeding the solicitation's requirements without giving the federal employees a chance to compete for those enhanced requirements. The benchmark test of any fair competition process is that offerors be graded on a common basis, that truly objective evaluation factors be used, that the terms of the solicitation be known in advance, and that the solicitation not be changed

after the submission of proposals. The rewritten circular's "best value" process fails this test on all counts, something I will discuss in much greater detail below.

3. "Make processes simpler and easier to understand, including greater reliance on concepts and practices set forth in the FAR that are familiar to, and well tested by, the acquisition community…"

As discussed just above, the FAR is a significantly-flawed procurement process. OFPP Administrator Styles herself remarked at a House Readiness Subcommittee hearing earlier this year, "There needs to be some recognition that there are problems in the private-private system for competition and FAR based competitions. It's not a perfect system and we may be exacerbating some of the problems when we try to apply the FAR based system private-private competitions to public-private competition." Unfortunately, not only has OMB failed to make a case why the FAR process must be incorporated into OMB Circular A-76, but OMB has also failed even to address—let alone correct—the FAR's many failings. OMB officials may unexpectedly declare their steely-eyed determination to reform the FAR. However, this Administration now focuses exclusively on rewarding contractors, not reforming them. Earlier indications that this OFPP would attempt to make the federal government's procurement practices more taxpayer-friendly have receded, having been ruthlessly put down by contractors and their indulgent benefactors on Capitol Hill and in the highest levels of the Administration. The problems in the FAR, particularly as they affect privatization, will get worse, not better, as anybody familiar with the recent controversy over time and material and labor hour contracts would surely understand.

4. "Improve the effectiveness of competitions by giving agencies greater flexibility to consider quality in source selections…"

Agencies, of course, have always had sufficient flexibility to consider quality in the context of public-private competition even though the current circular is ultimately a cost-based process. It is fundamentally wrong to insist, as so many contractors so blithely do, that a low price means a low quality service. Agencies should decide what services they want with the features they want, determine that the offerors can provide the services they want with the features they want, and then decide in favor of the offeror that can do that work for the least cost to the taxpayers. That's how it works under the current circular; and that's exactly how it would not work under the rewritten circular, which would impose the controversial "best value" process on public-private competitions in a way that would maximize the role of anti-federal employee bias and undermine the interests of taxpayers. Even the strongly pro-contractor Clinton Administration wanted no part of "best value"; it was that far beyond the pale. However, this Administration is granting the contractors' fervent "best value" wish list in its entirety.

5. “Increase visibility into the management of government by requiring agencies to develop lists of their commercial and inherently governmental activities and make them available to the public…”

The work of federal employees is already meticulously tracked through the budget, appropriations, and Federal Activities Inventory Reform (FAIR) Act processes. It is the massive, unaccountable, and uncountable contractor workforce that is missing in action—or inaction, depending on the circumstances. It is typical of the one-sided approach of the rewritten circular that the shadow workforce, one which consumes more than $125 billion annually and has been estimated to be as large as 4,000,000, remains shrouded in darkness, while even more light is shined on the always open, transparent, and accountable federal employee workforce. The fact that the “management of government” necessarily includes the management of contractors doing government work is lost on this administration, evidenced by OMB’s stubborn refusal and resistance to fulfill its responsibilities to taxpayers on this point.

6. “Strengthen accountability for achieving results by centralizing agency commercial activities…”

How can a process that, when combined with the infamous OMB privatization goals, reviews for privatization at least 850,000 federal employee jobs without increasing contract administration staff or funding ever be considered to promote accountability?

Does increasing the need to contract out the administration of the competitions and conversions promote accountability?

Does converting the jobs of federal employees without competition if the competition is not completed by an arbitrary deadline because an agency lacks sufficient expertise promote accountability?

Given that the rewritten circular doesn’t require contractors to compete in order to acquire new work, segregable work, or retain their own work, how does that promote accountability?

Contractors—and only contractors—would have the right to appeal a contracting officer’s decisions to the Court of Federal Claims and the General Accounting Office—but not rank-and-file federal employees. How does an utterly one-sided appellate process promote accountability?

Actually, what OMB is proposing is to completely politicize privatization by taking decisions away from the front-line managers responsible to taxpayers and customers and investing all authority in the political appointees in OMB, as well as those who will become the new agency privatization czars. Instead of decisions being made by career managers who have a personal and professional

investment in ensuring that their agencies fulfill their missions on the basis of what's best for taxpayers and customers, those decisions will now be made by short-term, political appointees, who if they weren't already well-connected with the contractor community soon will be, on the basis of what's best for a politically influential and financially generous constituency of the Administration. Corruption is the likely result.

I will now single out a few of the more blatant examples of pro-contractor favoritism in the rewritten circular:

1. Emphasize privatization to the exclusion of all other methods of making the provision of federal services more effective, efficient, and reliable.

Actual Text (Daniels Memorandum, 4., page 1): *"…(A)ll commercial activities performed by government personnel should be subject to the force of competition, as provided by this Circular."*

Contrary to OMB's protestations, the rewrite of the circular would subject at least 850,000 federal employees to review for privatization, given the Director's declaration in the draft memorandum that all commercial federal employee jobs should be reviewed for privatization and that there are currently 850,000 commercial federal employee jobs. Moreover, considering OMB's behind-the-scenes pressure to force agencies to increase the number of federal employees listed as commercial—particularly in the areas of personnel, procurement, information technology, clerical support, and administrative support, according to an internal Coast Guard memorandum—the rewritten circular's arbitrary narrowing of the definition of inherently governmental, on top of the rewritten circular's prejudice towards considering all work as commercial, the number of federal employee jobs to be slated for privatization will soon approach 1,000,000.

Earlier this year, the Administration attempted to coerce House and Senate lawmakers who had included an anti-OMB privatization quotas provision in the FY03 Treasury Appropriations Bill to eliminate the provision. According to GovExec.com, on September 17, "If OMB can't set targets, it will have no alternative but to issue a blanket policy that requires all commercial jobs in government to face private sector competition, (OFPP Administrator Angela) Styles and Jack Kalavritinos, associate administrator of the Office of Federal Procurement Policy, said Monday. `Critics and those that are fighting 15 percent should be careful what they are asking for, because making it 100 percent is the other option,' said Kalavritinos at a roundtable luncheon sponsored by the Heritage Foundation, a conservative Washington think-tank. `And if people push the 15, they might get 100.'" With the rewritten circular, OMB is carrying out that threat, drastically expanding the privatization quotas from increments of 5%, 10%, and 35%, to an immediate imposition of privatization quotas on 100% of the commercial federal employee workforce.

It must be pointed out the declaration in the Director's draft memorandum is an extremely misleading statement. Work performed by federal employees can be privatized without public-private competition outside of the confines of the circular. Likewise, work performed by federal employees can be privatized without public-private competition within the confines of the circular. Indeed, the rewritten circular would afford contractors many more opportunities to take work away from federal employees without having to bother to compete.

Worse, the emphasis on privatization to the exclusion of all other methods of improving services represents a fundamental and radical shift in philosophy. The current circular places the privatization process in its proper context, as just one tool in a manager's toolbox. The process of improving service delivery, according to the Introduction, page 1, "must consider a wide range of options, including: the consolidation, restructuring or reengineering of activities, privatization options, make or buy decisions, the adoption of better business practices…" Even the Department of Defense (DoD), the agency most partial to privatization, employs a "strategic sourcing" approach that involves a range of options similar to those recommended in the Introduction to the current circular. In other words, even though there are a variety of mechanisms that historically have been used to improve the delivery of federal services, the rewritten circular would emphasize privatization to the exclusion of all others.

2. <u>All</u> work should be considered appropriate for performance by contractors.

Actual Text (Daniels Memorandum, 4.b., page 1): *"Presume all activities are commercial in nature unless an activity is justified as inherently governmental."*

If anything, the prejudice should be the reverse. Given severe and longstanding problems with contract administration, the fact that too much inherently governmental work has already been privatized, and the difficulty in reconstituting a capability that has been privatized, there actually ought to be a fundamental bias towards considering all services inherently governmental.

3. It should be easier to contract out inherently governmental work.

Actual Text (Daniels Memorandum, 4.a., page 1): *"Perform inherently governmental activities with government personnel."*

It is disingenuous for those who have rewritten the circular to contend that it would ensure that inherently governmental work would be performed by reliable and experienced federal employees.

a. OMB has defied the will of Congress and rewritten the Federal Activities Inventory Reform (FAIR) Act to favor contractors with respect to the definition of "inherently governmental."

Actual Text (Attachment A, E.1., page A-3): "These activities require the exercise of substantial official discretion in the application of government authority and/or in making decisions for the government." (Emphasis added)

The addition of the word "substantial" represents a significant change from the actual language of the FAIR Act.

b. As noted earlier, at the request of contractors, OMB is constantly pressuring agencies to redefine as commercial work that agencies actually consider inherently governmental.

c. As noted earlier, the rewritten circular would presume that no work is inherently governmental.

d. By deferring to the wishes of contractors and refusing to establish an inventory to track the work performed by contractors similar to the one already used to track the work performed by federal employees, OMB makes it impossible for agencies to determine which inherently governmental work has been wrongly privatized, even though key figures in the Bush Administration's privatization effort concede that this has already happened.

In a December 26, 2001, memo to OMB asking for relief from the onerous privatization quotas, Undersecretary for Acquisition, Technology and Logistics Pete Aldridge, wrote that "a reassessment may very well show we have already contracted out capabilities to the private sector, that are essential to our mission…"

It was reported in a November 5, 2001, posting on GovExec.com that "Certain agencies have outsourced too many jobs and should consider bringing work currently done by contractors back in-house, the Bush administration's top procurement official said last week. Angela Styles, administrator of the Office of Federal Procurement Policy in the Office of Management and Budget, said that some agencies have sent so much work to the private sector that they are unable to provide effective oversight of the contracted work."

4. Only activities performed by federal employees should be subject to public-private competition.

Actual Text (Daniels Memorandum, 4., page 1): *"…(A)ll commercial activities performed by government personnel should be subject to the forces of competition."* (Emphasis added)

No sentence in the rewritten circular makes it more clear how one-sided the Bush Administration's privatization agenda actually is. The OMB quotas apply exclusively to federal employees. Despite the fact that contractors acquire and retain almost all of their work without public-private competition and precious little

private-private competition, OMB has never applied such quotas to the federal government's massive contractor workforce. And depsite the occasional reference in the rewritten circular to insourcing, it is clear from the text of the Director's memorandum that such an option exists only on paper. For those keeping score, between 850,000 and 1,000,000 federal employee jobs would be subjected to privatization, only some of them through public-private competition, and even then under a process that, as my response makes clear in abundant detail, has been written to benefit contractors at every possible opportunity. At the same time, not a single job in the competition-averse contractor workforce will be subject to public-private competition, let alone direct conversion to in-house performance, even when the work is inherently governmental.

5. The billions and billions of dollars in government work performed by contractors should not be inventoried and tracked, as the work performed by reliable and experienced federal employees already is.

Actual Text: None.

Despite making feverish preparations for the largest transfer of public sector services, taxpayer dollars, and federal employee jobs to politically well-connected private-sector interests in our nation's history, OMB refuses to establish a reliable and comprehensive system to track all government work performed by contractors. Even the Department of the Army, which is more extreme than OMB in its zeal for privatization, has established a contractor inventory.

The failure by OMB to establish a contractor inventory means that agencies will be unable to monitor the tens of thousands of additional service contracts that they must undertake because of OMB's privatization edict. It also means that agencies will be unable to systematically determine which work performed by contractors is actually inherently governmental or which work performed by competition-averse contractors is suitable for insourcing.

The failure to ensure that the billions and billions of dollars that agencies are being demanded to lavish upon politically well-connected contractors demonstrates that OMB intends to cover its tracks; that this privatization crusade is all about moving money from the public sector to the private sector, not about saving money for the taxpayers.

Finally, it should be noted that the OMB rewrite would require agencies to compile lists of inherently governmental jobs and publish those lists in order to provide contractors and their allies with opportunities to force agencies to redefine inherently governmental jobs as commercial. Contractors tried to have such a requirement included in the FAIR Act when the legislation was being drafted in 1998—but failed in their efforts with both Republicans and Democrats. However, OMB has given the contractors through regulation what they could never achieve through legislation.

6. Agencies should be able to convert work performed by federal employees to contractor performance without competition when management does not punctually submit in-house tenders; however, instead of canceling solicitations when contractors submit bad proposals or don't submit their proposals on time, agencies are expected to rewrite their solicitations to address the complaints of contractors.

Actual Text [Attachment B, C.3.(9), page B-9]: *"When the in-house bid is not submitted, the agency's privatization czar "may: (1) instruct the Contracting Officer to return received offers and tenders and amend the solicitation allowing additional time for resubmission of all offers and tenders, or (2) instruct the Contracting Officer to proceed with source selection without the Agency Tender."*

Two points need to be understood. If the Agency Tender Official, a management official, fails to submit the in-house tender by the deadline, the jobs of innocent rank-and-file federal employees, who are in no way responsible for the mechanics of the privatization process, could be given to contractors without any public-private competition.

Even worse, the problems associated with federal acquisition that likely explain management's inability to submit a timely tender are the result of OMB's historic refusal to devote sufficient resources to the contract administration process in favor of a policy of contracting out as much as possible, with as little public-private competition as possible, as rapidly as possible, and with as little oversight as possible. That won't prevent OMB from making innocent rank-and-file federal employees pay the price for OMB's own well-documented failures. So much for accountability!

Moreover, please note that because the OMB privatization quotas give agencies full credit for completing direct conversions pursuant to OMB Circular A-76, the same as if the jobs had been subjected to real public-private competitions, agencies will have little incentive to submit thoughtful in-house tenders in timely fashion. Why bother taking the time to craft the best possible in-house tender when the agency can do no work at all and get the same amount of credit, because OMB doesn't care whether the work is competed or converted, as long as any work performed by federal employees is ultimately privatized?

In the event management fails to punctually submit an in-house tender, the contracting officer can only allow additional time for the resubmission of all offers; she cannot change the solicitation in order to encourage the submission of an in-house tender. That takes on significance when we review what must be done when contractors don't submit proposals or don't submit good proposals.

According to Attachment B, C.3.(9)d, on page B-10, *"When a Standard Competition is attempted but private sector offers or public reimbursable tenders are either not received, or those received are found to be non-responsive or not*

responsible (sic)*…the contracting officer shall document, in writing, the following: (1) restrictive, vague, confusing, or misleading portions of the solicitation; (b) possible revisions to the solicitation to encourage participation; (2) the reasons provided by sources for not submitting responses; and (3) the reasons offers or tenders were either not responsive or not responsible. The contracting officer and the source selection authority shall evaluate the results of these discussions and propose a course of action in a written document to the (agency's privatization czar). The contracting officer shall provide a copy of this written document to the Performance Work Statement Team, Agency Tender Official, and to the public, upon request…(The agency's privatization czar) shall evaluate the contracting officer's written recommendation and make a written determination to either (a) revise solicitation or (2) implement the (in-house bid)."*

In other words, contractors need to be painstakingly surveyed about what they don't like about the solicitation and what it would take to get the contractors to submit better proposals, perhaps even submit them on time. Contracting officers will be encouraged to water down solicitations to accommodate various contractor failings. (Please remember that in the analogous situation for federal employees the contracting officer can only extend the deadline for resubmission of proposals, not rewrite the solicitation to certain specifications.) In fact, this indulgence towards contractors—the equivalent of a child not doing his homework and the teacher then allowing the child to say how much easier he'd like that homework assignment to be—is a form of contracting out the process of writing the solicitation. There are few things more inherently governmental than an agency determining what services it needs and how it wants those services provided. OMB's rewrite of the circular will subtly but certainly allow contractors to tell agencies how to write their solicitations and then submit matching proposals. OMB is actually institutionalizing a wholly anti-taxpayer conflict of interest!

Finally, it should be noted that the recommendation to the agency's privatization czar must be made public, unlike the paperwork associated with a decision to convert to contractor performance work performed by federal employees when management is late with its own tender submission. Whether it's a big deal or a little deal, OMB has clearly favored the contractors at every possible opportunity.

———————

7. Federal employees—but not contractors—must compete to perform new work.

Actual Text [Attachment A, A.2.b.(3), page B-2]: *"Agencies shall use Standard Competitions to justify…(a)gency…performance of a new requirement. A Standard Competition is not required for private sector performance of a new requirement competed (sic) in accordance with the Federal Acquisition Regulation."*

8. Federal employees—but not contractors—must compete when they are doing exactly the same work as before, but the value of that work increases by as little as 30%.

Actual Text: [Attachment A, A.2.b.(4), page B-2]: *"Agencies shall use Standard Competitions to justify…(a)gency…performance of an expansion of existing commercial activities. An expansion is the modernization, replacement, upgrade, or increased workload of an existing agency performed commercial activity that increases the operating cost of the activity by 30 percent or more…A Standard Competition is not required for private sector expansion competed (sic) in accordance with the FAR."*

9. Federal employees—but not contractors—must compete to continue to perform work when their contracts expire; or agencies may simply give such work away to contractors through direct conversions.

Actual Text [Attachment B, C.5.b.(2), page B-16]: *"By the end of the last performance period stated on the Standard Competition Form, another public-private competition or Direct Conversion shall be completed in accordance with this Circular."*

Actual Text: [Attachment B, C.5.b.(1), page B-16]: *"By the end of the last year of performance used in the Competition, a recompetition (sic) shall be performed in accordance with the FAR and this Circular."*

At the outset of this discussion, one point needs to be fully understood. The rewrite of the circular applies only to the circular, not the FAR. However, the rewrite of the circular inserts the the FAR into the circular. Consequently, to the extent the FAR has problems with private-private competition—and it does—those problems will now be spread to public-private competition. As OFPP Administrator Styles remarked at a House Readiness Subcommittee hearing earlier this year, "There needs to be some recognition that there are problems in the private-private system for competition and FAR based competitions. It's not a perfect system and we may be exacerbating some of the problems when we try to apply the FAR based system private-private competitions to public-private competition."

Although "full and open competition" is technically still the law of the land, recent "acquisition reform" (sic) law (e.g., the Federal Acquisition Streamlining Act and the Clinger-Cohen Act) has virtually made "full and open competition" the exception rather than the rule in awarding contracts, particularly with respect to service contracts.

First, there are so many exceptions to the rule that are technically deemed to involve competitive procedures [e.g., use of Government-Wide Acquisition Contracts (GWACs), multiple and single agency indefinite delivery / indefinite

quantity (ID/IQ) contracts, General Service Administration (GSA) schedules, the higher dollar threshold and other requirements for “commercial requirements,” etc.] that the “full and open competition” standard is essentially dead. (And, of course, it’s getting worse. The streamlined acquisition authority under Section 833 of the new Homeland Security Act allows any service to be deemed a commercial item for purposes of federal procurement laws.) Moreover, many of these “competitive alternatives” are protest proof, meaning that they are not even subject to administrative or judicial review.

Agency Inspectors General, the strongly pro-contractor General Accounting Office (GAO), respected judges, and even OMB officials have bemoaned the largely non-competitive state of government contract awards. Here are some examples:

According to a 2000 report of the DoD Inspector General, “(I)nadequate competition occurred for 63 of the 105 contract actions” surveyed.

Later that year, the GAO reported that most information technology orders were sole-sourced. In fact, “only one proposal was received in 16 of the 22 cases” (or about $444 million of the total $553 million).

The Associated Press reported earlier this year that the federal government “bought more than half its products and services (in 2001) without bidding or through practices that auditors say do not fully take advantage of the marketplace…Concerns about the government’s new (i.e., post-acquisition reform) style of shopping are simply put: Buying without competition often means the public treasury gets overcharged.”

At a March 6 hearing of the Senate Governmental Affairs Committee, a contractor representative insisted that "Contractors, for instance, are subject to a range of checks and balances, including continual competitive pressures. In fact, some 75 percent of all services contracting actions, and more than 90 percent of all information technology services contracting actions, are competitively awarded…" As AFGE pointed out, this is a very misleading use of statistics from the Federal Procurement Data System. Although the contract vehicle (a.k.a., "hunting license") in a multiple award scenario may be considered to be competitively awarded, funding is provided through task orders. Such task orders through September 30, 2001, were automatically classified as competitively awarded, regardless of the circumstances. Although it is not possible to recreate the records to determine whether task orders to multiple award service contracts were competitively awarded, a DoD IG review indicated that an astounding 72% of 423 multiple-award task orders awarded in fiscal years 2000 and 2001 were awarded on a sole-source or directed-source basis.

Judge Stephen M. Daniels, Chairman of the General Services Board of Contract Appeals, has declared that, “Although some parts of the (1984 Competition in Contracting Act) remain on the statute books, the guts have been ripped out of it.

Openness, fairness, economy, and accountability have been replaced as guiding principles by speed and ease of contracting. Where the interests of the taxpayers were once supreme, now the convenience of agency program managers is most important. Full and open competition has become a slogan, not a standard; agencies have to implement it only `in a manner that is consistent with the need to efficiently fulfill the Government's requirements.' It is now much easier to acquire goods and services without competition. Notice requirements have been reduced, particularly as the Government increasingly fulfills its needs without conducting formal procurements. The drive to have the Government present a single face to industry has been sent into retreat: agencies have been given greater discretion to procure in their own idiosyncratic ways, Government-wide regulations have been discarded or diminished in importance, and programs and whole agencies (the Federal Aviation Administration being just the first) are being allowed to procure under unique and sometimes vague rules and procedures."

OFPP Administrator Styles has said that "Since the beginning of the (acquisition) reform movement, over a decade ago, I have not seen a serious examination of the effects of reform on competition, fairness, integrity, or transparency. As a result, I think we are seeing some serious competitive problems surface with the proliferation of government-wide contracting vehicles and service contracting." In fact, at a December 4 briefing sponsored by the Office of Personnel Management for federal employee organizations on the rewritten circular, OFPP Administrator Styles repeatedly used the "hedge" word "presumably" when referring to the loosey-goosey competition provisions in the FAR.

Clearly, contractors are not always required to compete against one another to win or retain service contracts. Consequently, while the rewritten circular will require federal employees to compete to perform new work and segregable work as well as retain existing work, contractors will be able to acquire and keep such work without ever having to compete against federal employees or even one another.

Let's look in particular at segregable work. Under the rewritten circular, an automatic competition requirement kicks in for federal employees when the value of work that they are already performing merely increases in value by 30 percent. What happens to contractors in such circumstances? The FAR does not use the concept of percentage increases in scope of work in order to determine whether a new competition is required. Rather, the FAR and government contract case law use the concept of "scope."

For example, if operating a telephone servicing center is expected to cost $10,000,000 but ultimately costs $15,000,000, this does not necessarily mean that new work has been added. It could just be that the original cost estimates were low, that the winning offeror low-balled his bid, or that more effort was required than originally anticipated. The general test of whether new work has been added is whether the added work is within the original "scope" of

anticipated effort that the contractor was supposed to provide. Mere dollar value increases in the work under contract does not constitute expanded scope requiring a new competition. In practice, however, even if new scope is added to a contract, this is almost always performed by the original contractor. That's just a way of life in government procurement. If the contract is a high visibility contract, typically a sole source justification will be written, with the justification stating that "given the experience of the contractor in the work already performed, it is the only source that can continue to `practicably' complete the work in process."

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10. When federal employees are found in default, the work must automatically be converted or competed; for contractors, however, it could be business as usual.

Actual Text [Attachment B, C.5.c.(2), page B-16]: *"If an agency, private sector or public reimbursable provider fails to perform to the extent a termination for default is justified, agencies shall comply with the following: (a) for a private sector provider, the Contracting Officer complies with the FAR Part 49; (b) for an agency or public reimbursable provider, the head of the requiring organization shall issue a notice to terminate and shall recommend, in writing, that the (agency's privatization czar) approve either (1) a Direct Conversion based upon a Standard Competition Waiver or (2) a Standard Competition."*

What happens to federal employees under the rewritten Circular is clear. However, the consequences for defaulting contractors aren't quite so dire. Per FAR Part 49, "The following courses of action, among others, are available to the contracting officer in lieu of termination for default when in the Government's interest: (a) Permit the contractor, the surety, or the guarantor, to continue performance of the contract under a revised delivery schedule. (b) Permit the contractor to continue performance of the contract by means of a subcontract or other business arrangement with an acceptable third party, provided the rights of the Government are adequately preserved…"

Moreover, contractors can and do vigorously litigate to avoid default. "How To Avoid & Overturn Terminations for Default," a veritable Bible for contractors who have strayed from the path of compliance, lists a variety of aggressive defenses that have been used successfully by contractors to avoid default determinations, including excusable delay, defective specification and impossibility, waiver of contract due date, contracting officer's failure to follow procedural requirements, contracting officer's failure to exercise discretion, and contracting officer's abuse of discretion; and there are many more defenses for specific types of contracts.

We were recently reminded about how easily contractors can use litigation to delay justice for taxpayers when Boeing and General Dynamics filed motions with the Federal Court of Claims to prevent the Pentagon from withholding $2.3

billion in payments to the two contractors on current contracts. According to a December 5 posting on WashingtonTechnology.com, "the money in dispute arises from the 1991 termination of the A-12 stealth attack aircraft contract. The project was canceled after years of development without the plane ever reaching the production stage. General Dynamics and McDonnell Douglas Corp., which was later bought by Boeing, have been entangled in legal wrangling with the Defense Department ever since." (Emphasis added) AFGE has been advised that the two contractors could easily litigate this case for at least another ten years.

Similarly situated federal employees would neither have the second and third chances afforded defaulting contractors under the FAR; nor would it be easy for federal employees and their representatives to hire lawyers to lengthily litigate contracting officers' default determinations.

11. Agencies should provide much more justification before canceling an award to a contractor than when the work has been won by federal employees.

When federal employees win the work but the agency wants to cancel the solicitation, the contracting officer is merely required to cancel in accordance with the FAR.

However, when a contractor wins, the agency's privatization czar must personally certify the cancellation. But wait—there's more. The agency's most senior official must then submit a detailed report to the OMB Deputy Director for Management, the agency's third most senior official, that states the contracting officer's cancellation decision was in accordance with the FAR. But wait—there's still more. The agency's most senior official must also justify to one of the most important officials in the federal government's most powerful agency that the cancellation "was clearly in the public interest," "provide the agency's rationale for canceling the solicitation," and then state the "approximate date for reissuance of the solicitation…" [For the actual text, please see Attachment B, C.2.a.(14), page B-7.]

This provision, which must be read to be believed, is not only intended to discriminate against federal employees; it is also intended to give contractors opportunities to use their campaign contributions connections to force agencies to issue awards even after it has been determined that the original solicitations are no longer in the best interests of taxpayers or agencies' customers.

12. If managers responsible for conducting competitions for work performed by federal employees are unable to complete those competitions within 12 months, the work can simply be given to contractors.

"If you can't complete the (competition within 12 months) then you are not prepared to do the work, so we will outsource it," thundered OMB's David Childs, according to the November 18 edition of Federal Times.

According to a December 16 story in GovExec.com, "The White House considered giving agencies much more time to complete public-private job competitions before choosing a 12-month deadline…The Office of Management and Budget set the 12-month deadline in its proposed revision to OMB Circular A-76…But OMB considered longer deadlines in a series of internal draft revisions of the circular written during the late summer and fall. As late as early October, OMB favored giving agencies 15 months to finish a competition, according to a copy of the Oct. 7 draft… Earlier drafts proposed giving agencies 18 and 24 months to finish a competition, according to multiple sources familiar with the documents…The 12-month deadline is one of the most controversial provisions in the new circular because competitions seldom have been finished so quickly before, and some officials fear the deadline may be impossible to meet."

In fact, Mr. Childs, at two recent conferences on privatization, was reported by observers to have accelerated the direct conversion process, declaring that if a solicitation had not been issued by management by the first day of the eighth month after the original announcement that the work performed by federal employees that was under review would simply be given away to contractors.

Long accustomed to contracting out without competition, agencies have little if any experience at conducting competitions. The actual mechanics of the process will be little changed after the rewrite. In fact, some of the provisions, like the ones to account for indirect and even irrelevant in-house costs and impose a subjective "best value" process, will cause competitions to take even longer. Moreover, agencies aren't going to receive increases in staff or training budgets from the rewritten circular. Agencies will undoubtedly continue to contract out the writing of the performance work statements and the most efficient organization plans to the usual collection of "Beltway Bandits," who will continue to perform poorly because they aren't familiar with the agencies and what their customers actually need.

The real losers are taxpayers and federal employees. Agencies will rush through competitions and undertake even more wasteful contracting out. And, of course, federal employees will be directly converted if the competitions are not conducted within twelve months. OFPP officials maintain that agencies can always ask for more time to complete the competitions. But what managers want to so publicly acknowledge failure, especially when they get credit towards the infamous OMB privatization quotas for direct conversions completed pursuant to A-76 just as surely as if they had conducted finished competitions? OFPP officials remark that any agency that can't finish a competition in 12 months doesn't deserve to keep the work. That's perfectly ridiculous. The ability of rank-and-file federal employees to perform a service and the ability of management elsewhere in the agency to conduct a competition for that service are obviously apples and

oranges. To say that federal employees should be converted without competition because the agency didn't finish its competition on time is like saying that all OFPP officials should be fired because the OMB Director didn't submit his testimony on entitlement spending to the Senate Budget Committee on time.

No arbitrary deadline for the completion of a competition, particularly one that involves an automatic direct conversion of jobs to contractors as a penalty, is ever appropriate, period. This requirement is nothing more than corporate welfare-style direct conversions by another name. OMB officials insist that a 12-month deadline would reduce the anxieties experienced by federal employees—as if that were ever even remotely their concern. If OMB wants to reduce federal employees' anxieties, they should stop gaming the system in order to hand over as many 1,000,000 federal employee jobs to contractor cronies and campaign contributors.

Moreover, the concern of OMB officials about the length of time to complete competitions is extremely selective. If they think A-76 competitions for work performed by federal employees take too long, what about the thousands and thousands of contractors who acquire their work without public-private competition and are never subsequently subjected to public-private or even private-private competition? The twelve month direct conversion provision is, of course, yet another example of disparate treatment. Because work currently performed in the private sector need never be subject to public-private competition under the rewritten circular, no analogous provision applies to contractors.

Even the contractor-dominated CAP reluctantly acknowledged that, "Whether and to what extent FAR-based public-private competitions would be faster is unknown." That is, they could take even longer than the current process. Considering that contracting officers would be under no obligation to use an expeditious sealed bidding process but they would be required in many cases to use a complicated and time-consuming "best value" process in some cases and double-charge in-house bids for all manner of indirect labor costs no matter how irrelevant or tangential, there is no reason to believe that competitions run under the rewritten circular would be faster—let alone regularly concluded within the arbitrary deadline imposed by OMB—especially considering the marked shortages in all agencies of experienced contracting officers. Could OMB possibly be setting federal employees up to fail?

13. Under existing law and regulation, federal employees—but not contractors—should continue to be subject to a myriad of requirements and obligations.

Actual Text: None.

As the independent scholar Dan Guttman has written, federal employees, but not contractors, are subject to a variety of rules "that address conflict of interest (e.g., 18 U.S.C. 208), assure that government activities are (with limits) `open' to the

public (e.g., Freedom of Information Act), limit the pay for official service, and limit the participation of officials in political activities."

Despite this extraordinary effort to massively increase the number of politically well-connected contractors on the federal payroll and so completely blur the appropriate and vital distinction between public and private, OMB will make no effort to ensure that contractors are as accountable to the American people as federal employees already are.

14. The only conflicts of interest worth addressing are those that might conceivably benefit federal employees in the privatization process; the longstanding conflicts of interest which demonstrably benefit contractors should be permitted to continue to undermine the integrity of the privatization process.

Excerpted Actual Text [Attachment B, D.2.a.(1), D.2.b.(1), D.2.c.1., pages B-19-20]: *"To avoid any appearance of a conflict of interest, members of the Performance Work Statement Team shall not be members of the (In-House Bid) Team. Members of the (In-House Bid) Team shall not be members of the Source Selection Executive Board."*

As OFPP officials know very well, the reason managers experienced with privatization often had to play multiple roles in the process is precisely because agencies employ so few of them. Because the rewritten circular means more competitions and conversions but no more staff or training, agencies will be forced to rely even more on contractors to conduct the competitions, particularly with respect to writing performance work statements and in-house bids.

Again, because the radical overhaul of the privatization process is being accomplished only through a rewrite of the circular, contractors emerge completely unscathed. As anybody with even a modicum of experience with procurement understands, the privatization process is rife with conflicts of interest that benefit contractors. FAR Subpart 9.5 purports to be designed to minimize contractor conflicts of interest. However, it is largely full of empty exhortations. Conflicts of interest arise when contractors recommend or otherwise advise buying agencies to make additional purchases from the contractors with whom the recommending contractors have business interests. While the FAR tries to address blatant conflicts (e.g., contractors recommending themselves for jobs), the nature of modern day government contracting is replete with contractor "partnerships," "strategic relationships," and other arrangements in which various contractors agree to help one another out—usually through various subcontracting relationships. The rewrite of the circular raises the very real prospect that contractors will be increasingly responsible for evaluating the work of other contractors—contractors with whom they have business interests at many levels. The inevitable conflicts of interest and the resulting corruption have

the potential to make recent accounting and auditing scandals pale in comparison.

15. Contractors—but not rank-and-file federal employees directly affected by privatization or their union representatives—can participate in all appellate processes, to the Administrative Appeal Authority, the GAO, or the Court of Federal Claims.

Actual Text [Attachment B, C.6.a.(1), page B-17]: *"The Administrative Appeal Process provides directly interested parties an opportunity to have an independent agency official review the Performance Decision."*

"Directly interested parties" is not defined in the Definition of Terms. With respect to the in-house workforce, only the Agency Tender Official is identified in the rewritten circular as a "directly interested party." Actual Text [Attachment B, B.1., page B-3]: *"The ATO shall be considered a directly interested party."*

Directly affected federal employees and their union representatives would not be allowed to participate in this process. Moreover, as the Agency Tender Official is a management official, it is manifestly unreasonable to expect that he could act independently on behalf of directly affected federal employees in appealing to another management official who would serve as the Administrative Appeal Authority. Finally, it should be noted that the internal appellate process applies only after the Performance Decision. There is no provision for appeal of such important pre-performance questions as the decision whether to use sealed bidding or negotiation, the choice of evaluation factors and their weights, or an allegedly defective performance work statement. How can an internal appellate process be fair if it is forbidden to challenge the very "ground rules" of the competition?

While directly affected federal employees will be allowed only representation by a management official who will determine entirely on his own whether to appeal to another management official who is forbidden to review most questions raised by the privatization process, contractors, on the other hand, will still be allowed to appeal all pre-Performance Decision and post-Performance Decision questions to the GAO and the Court of Federal Claims. Moreover, per Attachment B, C.6.a.(1), page B-17, contractors will still be able to participate in the internal appellate process with respect to "questions regarding a private sector offeror's compliance with the scope and technical performance requirements of the solicitation."

The rewritten circular is needlessly punitive with respect to the involvement of federal employees in the appellate process. The current circular allows employees 20 calendar days during which to file an appeal. Per Attachment B C.6.a.(2), page B-17, the submission period is reduced to 10 working days. Given that federal employees, whether or not represented by unions, are less

likely to have legal representation, this change will have a disproportionately adverse effect on the in-house workforce.

16. The confidential nature of proprietary information of the contractors' bids—but not those submitted by federal employees—must be protected.

Actual Text [Attachment B, C.6.a.(2), page B-17]: *"Where private sector proprietary information is involved a redacted copy of the appeal and decision documentation will be made available."*

If agencies are to be able to compete fairly against contractors, then why doesn't OMB allow agencies to protect their own proprietary information? As might be expected, the rewritten circular protects only the proprietary information of contractors.

17. Tenders submitted by federal employees must include "all" costs, even when they are irrelevant or have already been counted, while contractors should be allowed to exclude significant costs from their proposals.

The calculation of costs has been an extraordinary obsession for contractors through the years. They know that if they could ever artificially inflate the cost of in-house tenders, they would win the vast majority of competitions. And, in OMB, contractors have allies who are eager to help contractors finally fulfill this long-sought dream.

OMB has made much ado about ensuring that in-house tenders account for all of their "indirect costs." The existing circular already requires in-house tenders to include such overhead costs. The rewritten circular would appear to require that in-house tenders be charged twice for the same overhead costs.

Actual Text [Definition of Terms, page F-7]: "*Overhead is a cost that is included in all cost proposals. The overhead used in cost estimates submitted by agency or reimbursable sources is the OMB required standard cost factor identified in Attachment E. This standardized cost factor accounts for indirect costs that are comparable to those included in private sector offers, represent costs to the taxpayer that are not necessarily visible at the installation, headquarters level or Department level, but are provided by the Government's budget at an expense to the taxpayer…"*

A 1998 GAO report (NSIAD-98-62) provides information on the origins of the 12 percent overhead that is charged to all in-house tenders: "Absent (actual cost data about in-house overhead), OMB selected a single overhead rate of 12 percent, a rate that was near the midpoint of overhead rates suggested by government agencies and private sector groups. Most government and private sector groups (GAO) contacted agreed that reasonable levels of overhead should be included in A-76 cost estimates and, absent anything better, the 12

percent rate is acceptable at this time." The report noted that 12 percent rate for "(o)verhead was supposed to include two types of costs on a marginal or proportional basis: (1) operations overhead, which includes the costs of managing an organization that are not 100 percent attributable to the activity under study, and (2) general and administrative costs, which include the salaries and equipment, and work space related to headquarters management, accounting and finance support, personnel support, legal support, data processing support, and other common support activities such as facilities maintenance."

The "standardized cost factor" for indirect costs would be retained in the rewritten circular. Actual Text [Attachment E, B.4.b., page E-11]: *"The 12 percent overhead factor is a rate established by OMB to represent an overhead cost factor for all Federal agencies when performing Standard Competitions…This overhead factor represents costs that are not visible, allocable, or quantifiable to the agency, activity, or the Most Efficient Organization (MEO, or in-house bid). Use of the rate accounts for all management and support costs internal and external to the agency not required on Line 1."*

The rewritten circular would require that in-house tenders be charged with indirect costs twice, once for the 12 percent overhead charge and then a second time under "personnel costs." Actual Text [Attachment E, B.1.b.(2), page E-4]: "Personnel costs for labor that is not dedicated to the MEO but clearly have responsibilities to the MEO are considered `indirect labor.' Indirect labor includes, but is not limited to, personnel costs for MEO management and oversight activities, such as managers and supervisors above the first line of MEO supervision who are essential to the performance of the MEO. Indirect labor also 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, OSHA Act compliance management)."

Not only would the rewritten circular charge the in-house tender twice for the same costs, but the definition of in-house indirect labor costs is so broad as to ensure that any time an agency wanted to ensure the privatization of a function under competition management could easily manufacture the additional superfluous overhead costs. Actual Text [Attachment E, B.1.b.(2), page E-4]: *"The agency shall include in the Agency Cost Estimate the cost of indirect labor to reflect personnel who are responsible to manage, control, regulate, preside over, oversee, or supervise MEO related activities but are not dedicated to the MEO as a direct labor cost."* With such a broad definition, the in-house tender could be charged for the cost of maintaining Air Force One because, of course, the President is ultimately charged with the responsibility for "managing, controlling, presiding over, overseeing, and supervising" the MEO. And, to belabor the obvious, the functions in the agency that are being charged twice against the MEO would in almost all cases need to exist, and thus require the

same resources, regardless of the MEO. Moreover, it must be noted that the rewritten circular actually exacerbates the perverse incentive to privatize work in order to reduce the pay and benefits of those who perform work for the federal government by imposing redundant and irrelevant indirect personnel costs on in-house tenders.

But it gets worse. Not only would the rewritten circular charge the in-house tender twice for indirect labor costs, some of them wholly irrelevant to the MEO, contractors would not even be charged for their indirect labor costs. While contractors are charged with the cost of contract administration, they are not charged with the indirect labor costs of contract administration. For example, the costs associated with the personnel responsible for paying the contract administrators, or the cost of the human resources staff who hire the payroll staff, or the security guards who keep safe the building in which the contract administrators work, or the cost of the maintenance staff who keep clean the facility in which contract administrators work, or the managers of the contract administrators, or, in the words of the rewritten circular with respect to in-house bids, all of the other "personnel who are responsible to manage, control, regulate, preside over, oversee, or supervise (contract administration-) related activities but are not dedicated to the (contract administration workforce) as a direct labor cost."

Just about every different type of privatization ultimately forces taxpayers to swallow contractor indirect labor costs and gives contractors unfair advantages in the cost comparison process vis-à-vis federal employees. For example, according to the October 31 edition of U.S. News ("America's Secret Armies: A Swarm of Private Contractors Bedevils the U.S. Military"), it was revealed that, "The Joint Staff ran a series of exercises called Focused Logistics 2001 that showed that contractors make the military more visible to its enemies, require more troops for force protection, and require backup plans should contractors default." Noted the Army's assistant secretary for logistics, "Units that depend on contractor personnel…must allocate precious resources to ensure their security and subsistence." However, the contractors' actual indirect labor costs are never considered in decisions to privatize.

While the rewritten circular would charge in-house tenders with costs not once but twice and even when such costs are irrelevant, OMB is increasingly unwilling to charge contractors for their most basic costs. This raises serious equity and efficiency issues in the context of the circular and privatization generally. One major factor in properly administering service contracts is cost control. Without adequate cost control mechanisms in place, ultimate contract costs, and consequently prices paid by the taxpayers, can rapidly spiral upward. And, although, much has been said about performance-based service contracting, the facts reveal that contractors continue to press government agencies to award contract types that minimize contractor risk and cost control.

With the exception of common commercially available off the shelf services, cost evaluations and / or determinations play a significant role in government contract pricing and / or reimbursement decisions. The simplest scenario is for cost-reimbursement contracts. For that contract type, actual reimbursement of the contractor is made on the basis of costs that have been determined to be allowable, allocable, and reasonable in accordance with specific accounting conventions, policy, and procurement regulations.

However, even for so-called fixed-price contracts, many times initial cost evaluations and / or determinations are required when estimating what a fair and reasonable price should be. In other cases, cost evaluations and / or determinations are required to estimate the pricing of “changed” or added work that occurs during contract performance. In still other cases, cost evaluations and / or determinations are required under fixed-price contracts in order to effect profit and/or fee adjustments, make progress (i.e., financing) payments, etc.

Traditionally, when cost evaluations were made, contractors were required to submit cost or pricing data (i.e., certified pricing data). Under the various acquisition reform (sic) laws, the need for formal cost evaluations has not been reduced, but the form in which submission are made has been. Frequently, contractors are now permitted to submit “information other than cost or pricing data” which is the same thing as cost or pricing data; it's just that the cost data is no longer certified, which legally relieves contractors from all manner of oversight. A contractor’s certification must be that the cost data submitted are current, accurate, and complete. If it is later determined to be untrue, the government can make a claim against the contractor for defective pricing under the Truth in Negotiations Act (TINA).

The latest incarnation of the phenomenon of contractors running away from their costs is the rapidly increasing use of time and material (T&M) and labor hour (LH) contracts. These contracts place nearly all risk of cost control on the taxpayers, and substantially reduce cost visibility. T&M/LH contracts are frequently touted by contractors as an alternative to cost-reimbursement contracts. Unfortunately, T&M/LH contracts are prone to even less cost control than cost-type vehicles.

T&M/LH contracts are contracts in which hourly rates are paid by the government as services are rendered (e.g., $75 hour for IT services). Added to these rates are any additional costs of material. Contractors claim that T&M/LH contracts are frequently used in the “commercial sector," thus, they should be used by the agencies. However, the increasing use of T&M/LH contracts has nothing to do with “commercial practice,” rather it has to do with shifting performance risk to the government, and increasing profits for contractors. Under a T&M/LH contract, a contractor only promises to use its “best efforts” to accomplish the work. Performance is not guaranteed. For example, if a computer programming job is budgeted at 500 hours x $75/hour, and the contractor does not complete the job

within the hours specified, the government's only real recourse is to pay for more hours. Worse yet, because contractors are asking that T&M/LH contracts be recognized as "commercial"—a euphemism for no price protections, oversight or auditing—the government has tremendously reduced its ability to ensure that taxpayers are getting a good deal. As FAR 16.601 has long stated "A time-and-materials contract provides no positive profit incentive to the contractor for cost control or labor efficiency."

Recently, as a part of a rule ostensibly designed to increase competition and accountability in DoD service contracting, OMB initially tried to specifically require that use of T&M/LH contracts be accompanied by audit and pricing protection clauses in order to ensure that the government was getting a good deal. In doing so, OMB was only trying enforce an existing FAR provision (FAR 12.207) that restricted use of T&M/LH contracts to circumstances in which audit and TINA clauses are included in the contract award vehicle. Ultimately, in the face of ferocious opposition, from information technology contractors and their Congressional supporters, particularly Representative Tom Davis (R-VA), Chair of the House Government Reform Subcommittee on Technology and Procurement Policy, OMB backed off its stance. It now appears reasonably likely that OMB will support allowing use of T&M/LH contracts without the safeguards provided by audit, TINA and Cost Accounting Standards contract clauses—while at the same time insisting the in-house tenders be charged twice for indirect labor costs, no matter how irrelevant.

Moreover, the rewritten circular changes how costs are calculated to benefit contractors in other ways as well. For example, the circular would exclude the cost of a performance bond, which is executed in connection with a contract in order to ensure performance so as to protect taxpayers and agencies' customers from the consequences of default, from the cost of the contractor's proposal. Actual Text [Attachment E, C.1.d., page E-12] *"When a solicitation requires the private sector offer to provide a performance bond, the cost of the performance bond is excluded from the private sector offer when entered on Line 7."* The expenses associated with performance bonds are clearly the costs of privatization. To exclude the costs of performance bonds is to give contractors yet another unfair advantage.

Security clearances are another example. Actual Text: [Attachement B, C.2.a.(12), page B-7]: *"The costs associated with security clearance requirements shall not be included on the Standard Competition Form for an agency tender, private sector offer, or public reimbursable tender."* With respect to security clearances for the federal employee workforce, that is a sunk cost, one that has already been amortized, which is not the case with contractors. Consequently, the exclusion of the significant costs that are associated with securing clearances provides contractors with yet another unfair advantage.

Phase-out costs are yet another example. [Actual Text, Attachment B, C.2.a.(6), page B-6]: *"For a Standard Competition, the Contracting Officer shall include in*

the solicitation a requirement for private sector offers, public reimbursable tenders and the agency tender to propose a phase-in plan to replace the existing incumbent service provider. Phase-in plans shall include details to minimize disruption, adverse personnel impacts, and startup requirements. The length and requirements of the phase-in must consider hiring, training, recruiting, security limitations, and any other special considerations to reflect a realistic phase-in plan. The costs associated with phase-out plans shall not be required by the solicitation or calculated on the Standard Competition Form." (Emphasis added)

The term "phase-out plans" does not appear in the rewritten circular's "Definition of Terms." However, phase-out costs are considered to include such significant one-time costs resulting from the transfer or disposal of employees, equipment, and facilities. For example, equipment that might have been used by the MEO could become surplus and then be made available for transfer to another in-house activity or to the contractor. In the event of transferring material to a contractor, it may be appropriate to do a special joint physical inventory, which would be a phase-out cost. Personnel, or labor-related costs, would include certain one-time labor-related expenses such as health benefit costs, severance pay, homeowner assistance, and relocation and training expenses.

A conversion to contract may also require an agency to take certain actions that would not be necessary if the activity had continued to be performed by federal employees. For example, it may not be possible to terminate a rent or lease agreement without a penalty fee, or it may be necessary to move materials that are not associated with the activity under study to another location in order to complete the transition. Moreover, there are costs of labor associated with the transfer or disposal of equipment, property or facilities. The rewritten circular should clearly define the many costs associated with phase-out and then count those costs against the proposals of the challenging offerors.

18. Federal employees should be reviewed for privatization under a controversial new “best value” competition process that will allow contractors to win awards even when they are more expensive and less responsive.

Actual Text [Attachment B, C.4.(3)c.1., page B-13]: *“Agencies may use the Integrated Evaluation Process (i.e., “best value”) in a Standard Competition of: (1) information technology activities performed by agency personnel, (2) contracted commercial activities, new requirements, or segregable expansions where an Agency Tender will be submitted, or (3) any other commercial activities where the (agency’s privatization czar) receives written approval from OMB prior to the issuance of the solicitation.”*

OMB officials have described the use of the controversial “best value” process, which emphasizes subjectivity and whimsy at the expense of savings and accountability, as a pilot project. Of course, it is not. Any time a completely

untried privatization process can be used on all information technology work, very expansively defined; all new work and all segregable expansions; and any time OMB says so after being lobbied by politically well-connected contractors, we are clearly not talking about a pilot project.

The interest in shifting from an ultimately cost-based process that best serves taxpayers towards a loosey-goosey "best value" process that best serves contractors is not difficult to explain. Contractors have been losing 50-60% of competitions conducted under the current circular; even when they do win, savings are far less than expected or nonexistent. Consequently, contractors have made a tactical decision: rather than claim to save money, they will promise better quality. And since agencies can't track objective data like the costs of contractors, there is no way that something as amorphous as the quality of contractors can possibly be systematically monitored—and no taxpayers will be the wiser.

But "best value" was too extreme even for the pro-contractor Clinton Administration, and contractor proposals gathered dust. However, using the contractor-dominated CAP as a vehicle, contractors launched a massive disinformation campaign to discredit the current circular's emphasis on costs as its ultimate criterion. The CAP's pro-contractor faction insisted, repeatedly and stridently, that agencies cannot make qualitative improvements in services without resorting to a FAR-based "best value" process. Interestingly, in the report itself and in the additional remarks of all eight members of the pro-contractor faction, no instances were cited where an agency was deprived of the opportunity to make the qualitative improvements it sought—as opposed to those being touted by contractors' salespersons—because of the current circular.

Moreover, it is a fundamental misconception that a low price means a low quality service. Agencies should decide what services they want with the features they want, determine that the offerors can provide the services they want with the features they want, and then decide in favor of the offeror that can do that work for the least cost to the taxpayers. That's how it works under the current circular; and that's exactly how it would not work under the rewritten circular.

Contractors note that "best value" has been used in private-private competition. That is true. However, its use has been accompanied by extraordinary controversy and litigation because of its intrinsic subjectivity. Some of its most fervent critics are small business contractors. And it is precisely that subjectivity that makes a "best value" process so dangerous in the context of public-private competition. While it is not possible to systematically discriminate against one group of contractors in favor of another group of contractors, "best value" could be used systematically to discriminate against federal employees in favor of contractors, especially when wielded by an openly and avowedly pro-contractor Bush Administration that is rushing to review for privatization as many as 1,000,000 federal employee jobs.

In fact, OMB has included the worst possible "best value" process in the rewritten circular, one that would maximize the possibility of bias against federal employees.

The rewritten circular would include two types of privatization processes, sealed bidding and negotiated. The latter process includes three different processes:

1. sealed bidding process
2. negotiation processes
    a. lowest price technically acceptable process
    b. cost / technical tradeoff process
        i. phased evaluation process
        ii. integrated evaluation process

I did not list the various processes randomly. Rather, I have ranked them in order—from best to worst—with respect to their fidelity to four basic principles of fair competition for government services.

1. While taking into account issues of quality, is the process ultimately cost-based, and thus in the best interest of taxpayers?

2. Does the process minimize possibilities for bias and conflict of interest that could undermine the integrity of competitions?

3. Does the process prohibit the use of inappropriate evaluation factors and subfactors that encourage subjectivity, and thus allow for favoritism?

4. Does the process ensure that all offerors will be evaluated on a common basis?

Sealed bidding is the process that is most faithful to the principles of fair competition because of its emphasis on the objective criterion of cost. The absence of negotiation ensures that competitions under the sealed bidding processes focus on facts and figures in the proposals instead of politics and personalities in the process. Sealed bidding is also the best process because it doesn't use subjective evaluation factors and subfactors and does judge all bids against the same solicitation.

Although involving negotiation, which inevitably introduce the possibility for bias and conflicts of interest, the lowest priced technically acceptable process is the second most faithful because it essentially awards the contract to the technically acceptable proposal that is least expensive to the taxpayers.

The phased evaluation process is similar in nature to the lowest priced technically acceptable process in that there is a prior determination whether the bids are technically acceptable. The crucial difference is that in the phased evaluation, offerors can add features that were not required in the solicitation.

However, if the contracting officer decides that the agency needs and can afford the features, the solicitation must be amended, and all other offerors are allowed to compete on the same basis. This process does allow for the unlimited use of subjective evaluation factors and subfactors—the specific weights of which need not be disclosed—that can erode the integrity of the competitions.

The least faithful is the integrated evaluation process. A contractor can offer features that exceed the solicitation's requirements, and the contracting officer can then decide that these features are desirable without ever telling federal employees that their tender should also include those additional features. In other words, federal employees can submit a more responsive and less expensive bid and still lose if the contracting officer changes his mind about what he wanted. Both offerors are not being judged on a common basis—the very essence of a fair competition. Like the phased evaluation process, this process does allow for the unlimited use of subjective evaluation factors and subfactors—the specific weights of which need not be disclosed—that can erode the integrity of the competitions. Also like the phased evaluation process, this process actually gives credit to contractors for submitting proposals in excess of the requirements in the solicitation, thus encouraging contracting officers to spend taxpayers dollars too freely, buying what they want, instead of what they need, in violation of the venerable minimum needs doctrine. Even under FAR private-private competitions, there is no requirement to report those, often excessive, price premiums on any of the standard contract reports under agency contract tracking systems.

Here are my specific criticisms of the regimen of privatization processes established under the rewritten circular.

a. No guidelines regarding the use of subjective competition processes, even though even OMB acknowledges the need for caution.

There are few requirements or limitations regarding the use of competition processes that are not ultimately based on cost. The announcement specifically recognized that there are "special considerations" that must be taken into account with a public-private competition and that, at least with integrated evaluation techniques, there should be limited use and testing before wider application is authorized. (67 Fed. Reg. at 69773) However, that appropriate caution is recognized nowhere in the rewritten circular because there are few hurdles that must be overcome before subjective evaluations based on factors other than price can be authorized.

b. No traditional preference for sealed bidding, which would minimize management bias against in the in–house workforce.

Negotiation has become unduly popular in private-private competition in large part because contracting officers can much more easily control the outcomes of competitions through their selection of evaluation factors and subfactors and their

assignment of weights to those evaluation factors and subfactors. In the context of public-private competition, which is simply politics by other means, such discretion could be systematically used against in-house bids.

Under FAR 6.401(a), sealed bidding should be used if time permits and it is not necessary to conduct discussions with responding offerors about their bids.

The only constraints on time in the context of the rewritten circular are those arbitrarily imposed by OMB, and thus are a wholly inadequate excuse to avoid sealed bidding.

Moreover, an agency's requirements in a public-private competition will be particularly well-known where the work is already being performed by the public sector (i.e., the preparation of the performance work statement will be based on known and previously performed requirements). Moreover, the members of the Source Selection Evaluation Board can be expected to have extensive experience with the activity to be described in the performance work statement.

Under FAR, no government contract can be awarded unless the contracting officer makes an affirmative determination of "responsibility." [FAR 9.103(b)] The detailed requirements for an affirmative determination of responsibility are set forth in FAR 9.104-1, including adequate resources, organization, facilities, quality, etc. An affirmative determination of responsibility basically requires a finding by the contracting officer that the offeror can perform the contract satisfactorily and in accordance with the required schedule.

An offeror has the burden of convincing the contracting officer that it is "responsible" (i.e., can perform satisfactorily and on time). [FAR 9.103(c).] Contracting officers have broad discretion in making responsibility determinations. The Comptroller General generally will not even question a negative determination of responsibility unless the protester can demonstrate a lack of any reasonable basis for the contracting officer's negative determination.

If the required activities are known, and if an affirmative finding of responsibility must be made reflecting that the public or private sector offeror can perform satisfactorily and in accordance with the required schedule, there should be few circumstances in which it will be necessary to conduct "discussions" with offerors about their bids.

However, the rewritten circular fails to express a strong preference for sealed bidding in all but the most extraordinarily exceptional circumstances.

c. No preference for the use of a lowest price technically acceptable process in the event it can be shown why sealed bidding absolutely cannot be used.

If it can be conclusively demonstrated that the preferred sealed bidding method is impractical, the secondary preference should be for the lowest price technically acceptable process. The determination of "technically acceptable" is basically a

finding that the proposal fully meets the requirements of the performance work statement and that the offeror can perform the contract satisfactorily and in accordance with the required schedule (much like a “responsibility” determination).

In the competitive procurement system, it is the responsibility of the offeror to submit a proposal that fully demonstrates the technical acceptability of the proposal. The offeror has the burden to convince the source selection official “within the four corners of its proposal” that it is capable of performing the contract. If the proposal fails to demonstrate that the offeror can comply, there is a reasonable basis to find the proposal technically unacceptable.

If a proposal or tender does not demonstrate that the offeror can perform the performance work statement “satisfactorily” and in accordance with the required schedule, the proposal or tender is, by definition, not “technically acceptable.” Therefore, there is minimum risk to agencies in using the lowest price technically acceptable process. Under these circumstances, the “lowest price” of a technically acceptable proposal assures an objective determination of the “best value” to the agencies.

d. No limitation on the use of evaluation factors and subfactors, both objective and subjective, in the “best value” process.

The rewritten circular allows an unlimited number of evaluation factors and subfactors to be used in the crafting of the performance work statement, giving contracting officers unlimited opportunities to bias the “best value” process against in-house proposals. For example, in one notorious case, the contracting officer employed 10 factors with each having up to 19 subfactors.

The rewritten circular’s “best value” process places no limitations on the use of subjective evaluation factors and subfactors, including those which are, by their nature, not appropriate to apply to public sector competitors operating under civil service and other government directed policies, but which are commonly used in private-private “best value” competitions (e.g., uncompensated overtime, political views, government contracts, vendor relationships, public relations, and business systems and practices).

The rewritten circular’s “best value” process would also allow the use of subjective evaluation factors and subfactors that could easily be used by contracting officers to skew competitions. Examples of such highly subjective factors and subfactors that are commonly used in private-private “best value” competitions include vision, reputation, aesthetics, efficiency, intrinsic value, and the availability of pop-up towel dispensers.

e. No requirement that the weights given to evaluation factors and subfactors, both objective and subjective, be revealed before proposals are submitted.

Although the FAR requires that the "relative importance" of evaluation factors and subfactors be revealed in the solicitation, there is no requirement that the specific weight of all evaluation factors and subfactors be revealed before offerors submit their proposals. That means contracting officers can wait until offerors have submitted their proposals until deciding how much weight to give the objective and subjective evaluation factors and subfactors. The possibilities for gaming the system are as numerous as there are evaluation factors and subfactors.

f. No requirement that federal employees be given a chance to reformulate their proposal if the contracting officer changes the solicitation in the "best value" process.

The integrated evaluation "best value" competition process is particularly discriminatory against in-house proposals. Federal employees can submit a less expensive, more responsive proposal—and still lose if the more expensive, less responsive contractor proposal includes a feature that management did not include in the performance work statement but subsequently determines is desirable. This arrangement maximizes the possibility for anti-federal employee bias. If an offer that exceeds requirements contains a feature that is sufficiently important, the solicitation should be amended to permit competition from all offerors for the additional feature (as is done in rewritten circular's phased evaluation "best value" competition process). "Innovation" should be encouraged to perform the government's requirements. However, if different performance standards are to be permitted, the solicitation should specifically describe the alternatives to be permitted, or the solicitation should be amended to incorporate the higher performance standard desired by the agency.

g. Despite OMB protestations about reviewing for privatization as many as 1,000,000 federal employee jobs in order to save dollars for taxpayers, the rewritten circular's "best value" process would not require cost to be emphasized in the weighting of evaluation factors and subfactors.

If OMB is really interested in using privatization to save money, why does the rewritten circular not assign a minimum weight to cost of at least 75%, especially considering that contracting officers can still obtain assurance that the offerors are technically qualified and otherwise able to perform satisfactorily through diligent responsibility determinations?

If OMB is really interested in using privatization to save money, why does the rewritten circular not specify that solicitations include a maximum amount or percentage by which the award price can exceed the cost of the lowest offer from a responsible offeror (i.e., the "price premium" paid for factors other than cost)?

If OMB is really interested in using privatization to save money, why does the rewritten circular's "best value" process allow offerors evaluation credit for exceeding the requirements of the performance work statement? If there is a "need" for higher performance, service, or quality, it should be set forth in the

original solicitation so that all offerors have a fair opportunity to compete. Giving extra evaluation credit for exceeding the agency's requirements violates the historical "minimum needs" doctrine (i.e., that the federal government has implied authority from an appropriation of funds to purchase only what it needs, not what it wants). The practice of giving credit for exceeding requirements also is subject to corruption by "leaking" desired features that are not contained in the performance work statement.

h. The rewritten circular's use of "past performance" is intrinsically biased against in-house proposals.

Actual Text [Attachment B, C.2.a.(13), page B-7]: *"Solicitation requirements for the following shall not apply to an Agency Tender:...(6) past performance criteria."*

FAR 15.304 requires evaluation of "past performance" in all competitions, although it provides an out if a contracting officer "documents the reason `past performance' is not an appropriate evaluation factor for the acquisition." The FAR also provides that if an offeror has no record of "past performance," the offeror "may not be evaluated favorably or unfavorably" on this factor. Historically, GAO has allowed agencies broad discretion in determining how to proceed. GAO has held that a Source Selection Authority, in making a trade-off decision, can weigh the value of a good (or poor) "past performance" rating against a neutral rating and conclude that the proposal with a good "past performance" rating offers better value than the offeror with a neutral rating. If this rule applies here, in competitions where cost and other technical factors are close a contractor's good "past performance" rating can make the difference and result in a decision in favor of the contractor on the basis of a factor not applicable to the agency. In other words, the approach to "past performance" could skew the evaluation results against the in-house bidder.

Actual Text [Attachment B, C.2.a.(13), page B-7]: *"For agency tenders where a government MEO has been implemented in accordance with…a previous competition, the Contracting Officer shall include Agency Tender past performance criteria in the solicitation and evaluation criteria…"*

The actual text includes references that are either mistaken or do not exist. Moreover, it is not clear if the MEO is to be evaluated on the same "past performance" criteria as contractor offerors. If so, that would be clearly inconsistent with the basic requirement of competition that all offerors be evaluated on a common basis.

i. Arbitrary imposition of a performance based standard on all privatization efforts.

Actual Text [Attachment B, C.2.a.(1), page B-5]: *"A performance work statement that is developed in a Standard Competition shall be performance based with measurable performance thresholds and may encourage innovation."*

Under performance based contracting, the contracting officer essentially specifies the outcome or result it desires and leaves it to the contractor to decide how to best achieve the desired outcome. Obviously, this is a standard that should be used with considerable caution.

The rewritten circular's blind mandate for the use of performance based service contracting is clearly premature. A recent GAO review "raise(d) concern as to whether agencies have a good understanding of performance based contracting…Agency officials themselves pointed to the need for better guidance on performance based contracting and better criteria on which contracts should be called `performance based.'"

Moreover, many activities targeted for privatization are clearly unsuitable for performance based contracting because they present the sort of safety, cost, and technical risks that require that contracting officers be prescriptive and exert rigorous oversight.

Performance based contracting is clearly inappropriate for all but genuinely fixed-price contracts. If a contractor is going to determine precisely how a service should be provided, it is clear that he should be held to a fixed price. Cost reimbursement contracts or fixed price contracts that include cost evaluations are clearly incompatible with performance based service contracting. Otherwise, a contractor would have an obvious incentive to prescribe the most expensive and lucrative methods to fulfill the contract.

After ensuring that the decision whether to use performance based contracting is: a) handled on a case-by-case basis, b) is deemed appropriate only for the most common services, and c) is restricted to only genuinely fixed-price contracts; it is imperative that any performance based service contracting include detailed requirements in terms of results, strong performance standards, and comprehensive quality assurance plans.

I will conclude my comments by reviewing whether—and if so, to what extent—the rewritten circular adheres to the ten principles established by the contractor-dominated CAP, in light of claims made by OMB officials that their proposal draws its inspiration from the often comical clashes of the three contractors, the four Administration officials, and the chairman who assembled the panel's pro-contractor majority, on the one hand, and the two union presidents and the two academics, on the other hand, who tried to represent the interests of taxpayers and federal employees.

1. *Support agency missions, goals, and objectives.*

The privatization quotas, along with the rewritten circular's insistence on reviewing for privatization at least 850,000 federal employee jobs, subordinates "agency missions, goals, and objectives" to OMB's political objective of fastidiously stroking an important constituency of the Administration. In OMB's view, agencies exist not to provide services, but to privatize services, jobs, and the public interest. Agencies don't decide how much they should privatize—OMB does. Agencies don't decide which services are inherently governmental—OMB does. Agencies' front-line managers don't decide which services are privatized and how that happens—agencies' privatization czars do.

Even the nuts and bolts of the rewritten circular demonstrate how privatization is relentlessly pursued at the expense of agencies' missions. If an agency doesn't receive any worthwhile contractor offers, then contractors should rewrite the solicitation. If an agency decides that it shouldn't have awarded a contract after all, that agency's officials had better be prepared to run through a political minefield. If an agency's contract administration apparatus is already stretched to the breaking point, too bad; many more competitions and conversions must be undertaken, and they've got to be run faster than ever before.

2. *Be consistent with human capital practices designed to attract, motivate, retain, and reward a high-performing federal workforce.*

With its consistently inadequate pay raises, its contempt for labor-management partnerships, its coddling of a particularly influential Federal Employees Health Benefits Program carrier at the expense of rigorous cost accounting, its determination to replace traditional civil service protections with management carte blanche, its disregard for federal employees' collective bargaining rights, and its tireless efforts to turn over hundreds of thousands of federal employee jobs to contractors, either through increased direct conversions authorities or through the establishment of an even more pro-contractor competition process, it is clear that the Administration has no interest in repairing the damage inflicted by the "human capital crisis." In fact, the Administration seems determined to make it all but impossible for agencies to attract and retain the best public servants. For some of us, the "human capital crisis" is a serious public policy

problem. But for others, it's way to help some people make a buck—billions of them, in fact.

The commentary to this principle insists that agencies should consider the impact of outsourcing on recruitment and retention and that the workforce should be treated as "valuable assets." Can anyone, no matter how pro-privatization, seriously contend that the rewritten circular shows any evidence whatsoever that the experienced and reliable women and men who make up the civil service are even remotely regarded as "valuable assets?"

It is surely self-evident that enlightened human capital practices are fundamentally in conflict with the widespread practice of privatizing work performed by federal employees in order to lower workers' wages and reduce their benefits. It is well-established that contracting out has been used in the private sector and in the non-federal public sector to shortchange workers on their pay and benefits. It is likely that this pernicious practice exists at the federal level as well. In 1998, at the request of AFGE, Representatives Steve Horn (R-CA) and Dennis Kucinich (D-OH) asked the GAO to examine the pay and benefits of the federal service contractor workforce. Congressional auditors, however, came back empty-handed: agencies couldn't be helpful because they did not keep the relevant information and contractors did not respond to surveys. A survey conducted by GAO in 1985 of federal employees who were involuntarily separated after their jobs were contracted out revealed that over half "said that they had received lower wages, and most reported that contractor benefits were not as good as their government benefits."

The Economic Policy Institute (EPI), in a ground-breaking 2000 study, has determined that more than one in ten federal contractor employees earn less than the "living wage" of $17,000 per annum, i.e., the amount of money necessary to keep a family of four out of poverty: "The federal government saves money by contracting work to employers who pay less than a living wage ($8.20 per hour). Even the federal government jobs at the low end of the pay scale have historically paid better and have had more generous benefits than comparable private sector jobs. As a result, workers who work indirectly for the federal government through contracts with private industry are not likely to receive wages and benefits comparable to federal workers…"

Contractors ritualistically invoke the Service Contract Act whenever the human toll from service contracting is raised. However, EPI's research reveals the very limited reach of prevailing wage laws: "In 1999, only 32% of federal contract workers were covered by some sort of law requiring that they be paid at least a prevailing wage…But even this minority of covered workers is not guaranteed a living wage under current laws. For example, the Department of Labor has set its minimum pay rate at a level below $8.20 an hour for the workers covered by the Service Contract Act in 201 job classifications."

Finally, it must be noted that the rewritten circular actually exacerbates the perverse incentive to privatize work in order to reduce the pay and benefits of those who perform work for the federal government by imposing redundant and irrelevant indirect personnel costs on in-house proposals.

3. *Recognize that inherently governmental and certain other functions should be performed by federal workers.*

As noted earlier, the rewritten circular includes an explicit bias against considering any work as inherently governmental and waters down the definition of inherently governmental. Behind-the-scenes, OMB is pressuring agencies to list jobs as commercial that agencies actually consider inherently governmental. Moreover, the failure to establish a contractor inventory means that agencies will be unable to systematically determine just how much inherently governmental work has already been privatized.

In the panel's commentary for this principle, it was said that "(c)ertain other capabilities…or other competencies such as those directly linked to national security, also must be retained in-house to help ensure effective mission execution." Although far too narrowly stated, this is an excellent point. That is, commercial functions can be contracted out to such an excessive extent that it undermines the government's ability to perform its work. However, if agencies aren't systematically tracking contractors' work, how do they know when too much commercial work has been contracted out?

4. *Create incentives and processes to foster high-performing, efficient and effective organizations throughout the federal government.*

As noted earlier, the rewritten circular emphasizes privatization to the exclusion of all other methods for improving the delivery of services, including, "public-private partnerships and enhanced worker-management cooperation," which were mentioned in the text to this principle. Moreover, High Performing Organizations, a pet project of the CAP Chairman, which would function both as an alternative and a complement to public-private competition, are very conspicuous in their absence, notwithstanding that all Administration panelists, including the OMB representative, voted in favor of their establishment.

5. *Be based on a clear, transparent, and consistently applied process.*

Can a process that allows contracting officers to use all manner of subjective evaluation factors be considered "clear" and "transparent?"

Can a process that allows contracting officers not to reveal the specific weights of objective and subjective evaluation factors and subfactors until after offerors have submitted their proposals be considered "clear" and "transparent?"

Can a process that allows a contractor to win when the in-house proposal is less expensive and more responsive be considered “clear” and “transparent?”

Can a process that allows a contracting officer to give special credit to a contractor for a feature not included in the solicitation but not then give federal employees an opportunity to reformulate their proposal to include that new feature be considered “clear” and “transparent?”

Can a process that charges in-house proposals twice for indirect labor costs—and contractors not even once—be considered “consistently applied?”

Can a process that requires federal employees to compete in order to acquire new and segregable work and retain existing and default work—but not contractors—be considered “consistently applied?”

Can a process, which when combined with the OMB privatization quotas, require that at least 850,000 federal employee jobs—but not a single contractor job—undergo conversions and competitions be considered “consistently applied?”

6. *Avoid arbitrary full-time equivalent or other arbitrary numerical goals.*

The rewritten circular is based on two arbitrary numerical goals, 100 and 0. Agencies are required to review for privatization 100% of their in-house commercial workforces. Agencies are required to allow federal employees to compete for 0% of new work. And agencies are required to review for insourcing 0% of contractor jobs.

7. *Establish a process that, for activities that may be performed by either the public or the private sector, would permit public and private sources to participate in competitions for work currently performed in-house, work currently contracted to the private sector, and new work, consistent with these guiding principles.*

As noted before, the rewritten circular must be placed in its political context, specifically the OMB privatization quotas. As the Director’s draft memo makes clear, the circular is to be used on “…all commercial activities performed by government personnel...” Opportunities for federal employees to compete for new work and contractor work exist only on paper.

8. *Ensure that when competitions are held, they are conducted as fairly, effectively, and efficiently as possible.*

I refer readers to the earlier section, which discussed in great detail how the rewritten circular favors contractors at every possible opportunity.

9. *Ensure that competitions involve a process that considers both quality and cost factors.*

This principle means different things to different people. Contractors see it as an endorsement of "best value." The CAP's pro-taxpayer minority saw it as a recitation of the obvious, understanding that any ultimately cost-based process allows for quality to be explicitly taken into account so that agencies can have the best of both worlds: the services they need, but at the lowest possible prices. However, even assuming for the sake of argument that the principle endorses "best value," it can be said that the OMB rewrite includes the worst possible "best value" process, one that increases the role of politics, bias, and corruption in the selection process and undermines taxpayer interests by encouraging agencies to buy what they want, rather than what they need.

10. *Provide for accountability in connection with all sourcing decisions.*

Work performed by federal employees is meticulously monitored. On the other hand, agencies don't even know what work contractors are doing—let alone how well they are performing. Is that accountable?

Rank-and-file federal employees have no appellate rights. Contractors can appeal decisions to the GAO and the Court of Federal Claims. Is that accountable?

When managers responsible for conducting a competition don't finish it on time, the utterly innocent federal employees under review could lose their jobs. How accountable is that?

When an MEO falls into default, the work is either recompeted or directly converted. However, when a contractor defaults, it could be business as usual? How accountable is that?

In-house proposals are charged twice for the same overhead costs, but contractors aren't even charged once. How accountable is that?

This rewrite of the circular reads as if it had been written by contractors; and as so often is the case with privatization, the work needs to be redone—by federal employees. If you have any questions, please don't hesitate to contact Jacque Simon in AFGE's Public Policy Department at (202) 639-6408 / simonj@afge.org or John Threlkeld in AFGE's Legislative Department at (202) 639-6413 / threlj@afge.org.

Sincerely,

Bobby L. Harnage, Sr.
National President