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12/19/2002 06:08:52 PM

Record Type: Record

To: David C. Childs A-76comments/OMB/EOP@EOP
cc:
Subject: SIIA comments to proposed revisions to OMB Circular A-76

Please find the enclosed comments from SIIA President Ken Wasch regarding the proposed revisions to OMB Circular A-76. If you have difficulty accessing this document, or questions, please contact me by return email, or at the number below. Thank you.

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Submitted via email: A-76comments@omb.eop.gov

December 19, 2002

Mr. David Childs
Office of Federal Procurement Policy
New Executive Office Building Room 9013
Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

Dear Mr. Childs:

Thank you for the opportunity to comment on the proposed revision to Office of Management and Budget (OMB) Circular No. A-76, regarding "Performance of Commercial Activities."

The Software & Information Industry Association (SIIA) is the principal trade association for the software and digital content industry. SIIA provides global services in government relations, business development, corporate education and intellectual property protection to more than 500 leading software and information companies. SIIA's membership consists of some of the largest and oldest technology enterprises in the world, as well as many smaller and newer companies.

Two of the key principles of Circular A-76 has always been that "in the process of governing, the Government should not compete with its citizens" and that "a commercial activity is not a governmental function." These principles provide fundamental policy direction to agencies that the Government should not be in the business of providing commercial goods and services in competition with private markets. Rather, A-76 required that government should rely on the private sector to perform such functions under the American economic model, including the provision of the goods and services the government needs for fulfillment of its essential operating missions and requirements.

While we believe that the proposed changes to this Circular go a long way towards maximizing Government reliance on the private sector for needed commercial products and services, we are concerned that the emphasis placed on public-private competition could be misinterpreted by agencies to encourage new competitions for products and services neither presently provided by the Government, nor *needed* by the Government to perform its own inherently governmental activities. Specifically, by stating that "all commercial activities performed by the government personnel should be subject to forces of competition," and deleting the statement previously included in Circular A-76 that "[i]n the process of governing, the Government should not compete with its citizens," the

proposed revisions to the Circular threaten to perhaps unintentionally reverse long-standing U.S. policy about the appropriate role of government. As crafted, the language would encourage Government competition with the private sector in providing commercial goods and services, regardless of potential economic harm to private sector businesses, or the U.S. economy as a whole. Therefore, we urge you to clarify the “Purpose” section of this Circular to state that:

This Circular establishes federal policy for the competition of commercial activities that the government needs for performance of its inherent functions.

Such a clarification would ensure that the policy pertains to services that agencies *need for their own use*, rather than services that an agency determines it ought to provide to others because it believes it can do so at a lower price than private sector providers, or because an agency determines that it can or should provide a commercial product or service to the public—regardless of whether the function is inherently or traditionally governmental or not — by using public funds to provide the product or service for “free” or for a lower price than commercial providers can offer.

To be certain that the revision of Circular A-76 is not misinterpreted as a reversal or erosion of current policy, it is critical that the revision still include the following existing policy statements:

- “[i]n the process of governing, the Government should not compete with its citizens”, and
- “a commercial activity is not a governmental function.”

We believe the most effective placement of these critical principles is in the overarching policy statement at the beginning of the Circular, setting the tone and foundation for the entire document.

Problems already exist in the Executive Branch with the application of the Circular, as agency adherence to the explicit principles of A-76 are uneven at best—indeed, adherence often appears to be the exception, not the rule. Without changes and clarification to the language of the proposed revision of Circular A-76, there is significant risk that commercial activities could come to be viewed by agencies in the future as an acceptable governmental function, anticipated and acknowledged in the policy, thus effectively nullifying the actual policy in practice, and creating a major de facto change in U.S. economic policy over time. The current—growing—encroachment of government agencies into performance of private sector electronic commerce activities provides existing proof of this very real problem. As such, it is critical that the A-76 revision bring clarity, provide renewed direction and especially make all efforts to avoid further uncertainty or confusion about the Government’s appropriate role in U.S. commercial markets.

General Comments Regarding Proposed Revisions to OMB Circular A-76

As noted in the outline of purpose and procedures regarding proposed changes to the Circular, the list of commercial activities that the government relies on range widely from custodial services to data collection, computer services and research. SIIA supports revisions to Circular A-76 to provide a more effective framework for assessing and evaluating the Government's performance of commercial activities, particularly those that involve information technology (IT) services and resources. Advancements in technology have greatly increased the need for reevaluating the processes and procedures for agencies to determine whether particular IT commercial activities are best performed by public or private sources. In general, SIIA supports the objectives and proposed revisions to Circular A-76. We have highlighted the three primary benefits from the proposed revisions with respect to the Government's assessment and procurement of IT services.

1. Improving the process for competition of commercial activities and simplifying the evaluation of commercial activities.

The presumption that all activities are commercial in nature, unless an activity is justified as inherently governmental, is an efficient approach—one that is likely to result in less commercial activities being performed by the Government, rather than more. Conversely, in recent years, many agencies have interpreted broad mission statements to include provision of services that we have identified as commercial activities. SIIA strongly agrees with the statement in *Attachment A* that “[a] commercial activity is not so intimately related to the public interest as to mandate performance by government personnel.” This statement will serve to guide agency performance of activities that are governmental, rather than seeking to provide commercial activities to provide for the public interest as identified by the Government. We encourage strict scrutiny and compelling justification for determining activities as inherently governmental and for excluding commercial activity from potential private sector performance.

Additionally, the inventory process created and outlined in *Attachment A* would provide an effective set of guidelines for agencies that is greatly needed, but not presently available. That is, by requiring each agency to annually perform an independent inventory of all services, inherently governmental and commercial, much needed attention will be focused on the provision of *all* current services and *all* proposed new services. Moreover, OMB review of agency inventories and publishing of a notice in the Federal Register regarding availability of agency inventories will significantly open this review process. Finally, establishment of FAIR Act Challenge and Appeal process, as well as appropriate authorities to lead this process, will help to improve scrutiny of commercial activities performed by agencies, and it will facilitate correct categorization of activities as commercial or inherently governmental.

2. Increasing agency flexibility to consider quality in source selection, particularly through the use of cost-technical tradeoffs for information technology.

By expanding agencies ability to conduct a best value source selection process, particularly cost-technical trade-off, agencies will be better equipped to meet their IT needs. As agencies have been making the transition to electronic government, contracting for IT services presents a challenge to accurately compare IT needs, expectations and costs across a wide range of technologies with different performance criteria. IT services are often difficult to compare simply by cost. The proposed increase in focus on best value will enable agencies to obtain IT services it needs to best perform its critical functions.

3. Improving the oversight and management of public-private competitions and partnerships, and increasing the visibility of this process.

Implementation of this new policy and execution of the new requirements are critical to improving the Government's processes regarding performance of commercial activities. Therefore, the proposed changes to oversight and management, both within agencies and OMB, are critical to the new policies taking effect. Moreover, this enhanced oversight and visibility promises to effectively demonstrate the improvements to the public. Specifically, centralizing oversight responsibility in one or more offices and requiring full accountability of agency officials designated to implement and comply with this circular on an annual basis should improve the oversight process and provide more effective management.

Again, thank you for the opportunity to comment. We look forward to working with you as you implement these policies.

Sincerely,



Ken Wasch
President