December 19, 2002

Mr. David C. Childs
Office of Federal Procurement Policy
Office of Management and Budget
725 17th St. NW
Washington, DC 20503

VIA EMAIL

Re: Proposed Revision to OMB Circular A-76

Dear Mr. Childs:

On behalf of the United States Patent and Trademark Office (USPTO), I am submitting this comment in order to bring to your attention what I believe may be an unintended consequence of the proposed revisions to OMB Circular A-76 with respect to Labor-Management Relations.

At least since 1993, there has effectively been no requirement for agencies to engage in collective bargaining over the A-76 process or decisions made thereunder. Agencies have enjoyed this freedom from collective bargaining requirements because of the intersection of provisions of the Circular, specifically its exclusive appeals process, with the Federal Labor Relations Act.

Under the Act, contracting out work is a management right under 5 U.S.C. § 7106(a)(2)(b). This provision eliminates any requirement to bargain over the substance of a contracting out decision. Absent any other exception, however, unions would remain entitled to negotiate procedures for contracting out and appropriate arrangements for employees adversely affected by the contracting out process. See 5 U.S.C. § 7106(b)(2) and (3). In addition, unions would be entitled under 5 U.S.C. § 7121(a)(1) to negotiate grievance procedures providing for review of management actions related to contracting out through binding arbitration.

In 1993, the United States Court of Appeals for the District of Columbia held that compliance with OMB Circular A-76 was entirely non-negotiable. IRS v. FLRA, 996 F.2d 1246, 1250. Simply summarized, the court held that entering a collective bargaining agreement concerning the Circular would result in disputes over the Circular being subject to binding arbitration in response to a union grievance. Because A-76 established an exclusive appeal procedure, subjecting disputes to arbitration would conflict with the Circular, and compliance with the Circular's requirements was therefore non-negotiable. The court relied on the following language in the version of the Circular then in effect in holding that the Circular's appeals procedure was exclusive:

> [t]his Circular and its Supplement shall not ... establish and shall not be construed to create any substantive or procedural basis for anyone to challenge any agency action or inaction on the basis that such action or inaction was not in accordance with this Circular.

The court also cited language in the Supplement to the effect that a decision in the appeals process could not be appealed outside the agency. The Federal Labor Relations Authority (FLRA) subsequently adopted the court's holding. AFGE and Fort Carson, 48 FLRA 168, 206 (1993).

After the 1996 Revised Supplemental Handbook (RSH) was issued, the FLRA observed that OMB had expressed its continued intent that the A-76 appeals process be exclusive. This observation was based on the following language in the introduction to the RSH:

> The Circular and this Supplement are not intended and should not be construed to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers or any person. It should not be construed to create any substantive or procedural basis on which to challenge any agency action or inaction, except as set forth in Part I, Chapter 3, Paragraph K, of this Supplement.

The FLRA also relied on the following language at RSH Part I, Chapter 3, Paragraph K(7): "The procedure does not authorize an appeal outside the agency or judicial review, nor does it authorize sequential appeals. . . ." AFGE and Naval Air Station Whidbey Island, 52 FLRA 717, Fn. 4 (1996).

Attachment B, paragraph 6(C)(6)(a)(6), of the proposed Circular prohibits agencies from entertaining sequential appeals of agency determinations, but the proposed Circular, unlike its predecessors, does not appear to explicitly prohibit any other form of additional review. If the language relied upon in the IRS, Fort Carson, and Whidbey Island cases is omitted from a revised Circular, the FLRA or a court could determine the holdings reached in those cases are no longer viable. In fact, omission of the language could give rise to an inference that OMB intended that procedures, appropriate arrangements, and grievance provisions relating to A-76 determinations be subject to collective bargaining.

If the IRS, Fort Carson, and Whidbey Island holdings no longer applied, agencies would be prohibited from implementing A-76 determinations, and quite possibly from conducting A-76 cost comparisons, before they had reached agreements with affected unions on procedures related to A-76 and on appropriate arrangements for employees adversely affected by any determination. If no agreement could be reached, agencies would be required to bargain to impasse and await a determination from the Federal Services Impasses Panel before proceeding.

The USPTO believes that the A-76 procedures themselves provide adequate protections for employees, and that collective bargaining over procedures and appropriate arrangements, as well as establishment of union grievance procedures, are unnecessary. Further, unions will frequently have an incentive to delay A-76 cost comparisons and the implementation of resulting decisions, and a right to collective bargaining in this context would give them a powerful tool to do so. Finally, a requirement to bargain procedures with one party to the cost comparison would appear to be inconsistent with the proposed revised Circular's increased reliance on FAR-based procedures and its move toward greater symmetry between the treatment of public- and private-sector offers.

The USPTO recommends that OMB expressly state in any revised version of Circular A-76 that the Circular's administrative appeals procedure is intended to operate to the exclusion of any review under any negotiated grievance procedure. This should ensure that the exemption from collective bargaining requirements that has existed since 1993 remains in force.

Sincerely,

BERNARD J. KNIGHT, JR.
Deputy General Counsel for General Law