U.S. Department of Justice

Washington, D.C. 20530

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

Dear Mr. Childs:

This letter transmits the comments of the Department of Justice on the proposed revisions to Circular A-76, Performance of Commercial Activities. We support the competitive sourcing initiative but are concerned about the impact of the proposed changes to the process. Our comments follow.

The revised Circular and attachments do reduce the time period for completing competitions, allows the evaluation of the agency tender at the same time as the private sector offers, and adheres more to the Federal Acquisition Regulation (FAR) Part 15 on negotiated procurements. However, we still find this revised process to be too detailed in assigning responsibilities, overly broad in the new coverage of activities exempt from the FAIR Act and Inter-service support Agreements (ISSAs), and too repetitive of existing FAR language. It is not as simplified as it could be and still is far too complex for the many employees who will become involved in A-76 competitions as a result of this revision.

The proposed effective date for this revised Circular is for all solicitations issued on or after January 1, 2003. That is an unrealistic, if not impossible, deadline. This is a very significant program that requires considerable staff and dollars to implement, and which can be very detrimental to the careers of current employees. Allowing 12 days for consideration of the heavy volume of comments we anticipate is not sufficient time for proper analysis of the comments. Also, this process should apply to competitions announced after the effective date of this Circular. The Department has three ongoing competitions for which solicitations will be issued early in calendar year 2003, and there is no way to make them compliant with the responsibilities spelled out in this proposed Circular. We cannot change the rules more than halfway through the process, and then be subject to administrative appeal at the end under the new requirements.

The revised Circular starts with a broad presumption that all Federal Government activities are commercial and that senior management must provide written justification for all inherently governmental activities. The FAIR Act simply requires that the head of an agency determine which activities are not inherently governmental (commercial) and to provide an annual inventory of those activities. The additional requirement to provide written justification for all inherently governmental activities and

commercial activities with "A" reason codes (which are not subject to challenges) is overly burdensome, unnecessary, and opens for debate the decisions of the head of the agency. These officials should be able to make these decisions without going through the administrative burden of arguing the decisions based on the wording of a written justification. We do not have the resources to prepare the justifications and particularly for the number of criticisms this process would invite. This whole inventory process still does not allow agencies to report or get credit for the amount of recurring service contracts awarded by executive agencies.

There is a new requirement in Attachment A, paragraph C.2 for an additional inventory of non-FAIR Act commercial activities. We find this requirement at variance with the FAIR Act which has a very specific exemption for wholly-owned government corporations. This creates an even more burdensome process with no apparent benefit.

The Circular should specifically allow, in Attachment A, paragraph F, a delegation of the authority to components for making determinations on challenges.

The 12 months timeframe in Attachment B, paragraph C.1.(b)(3) is (by Department of Defense experience and General Accounting Office reporting) too short a time to complete most competitions and the agencies should not have to get an extension approved by the Deputy Director of Management, OMB, for necessary extensions. Non-approval determinations would mean the waste of extensive resources and funds without being allowed to complete the competition. Writing performance-based statements of work alone will add considerable time to the pre-solicitation process. Extensions should be at agency discretion. OMB could be inundated with the various approvals required by this Circular and actually delay agency competitions.

The designation of so many competition officials (Attachment B) and their inability to communicate with each other will create bottlenecks to the aggressive timeframes for accomplishing these competitions. This is particularly true in small organizations that cannot commit so many of their valuable and limited resources to A-76 competitions. Many of the procurement and past performance processes described throughout Attachment B duplicate current FAR provisions and should be eliminated.

The new policy addresses the employee right of first refusal on temporary appointments only. We would like to see Attachment B include a clarification as to whether this would also include term appointments.

The 15 day period for competing a Business Case Analysis (BCA) provided as a direct conversion process in Attachment C is too short. Also, we should be able to use the average price of the four contracts rather than the lowest price when making the price comparison to in-house operations. It would also be reasonable to use Federal Supply Contracts for price comparison purposes. The preferential procurement exception has been eliminated for 8(a) contracts and should be retained in Attachment C, paragraph A.

The definition of ISSAs in Attachment D should not include intra-agency agreements. The requirement to inventory ISSAs is extremely burdensome and should not be implemented until the year 2004 or 2005 inventory process. Agencies do not have all the data on ISSAs readily available in central offices. We do not believe this requirement should apply to agreements with state and local governments. The dollar threshold for competing ISSAs should be $10 million and an agency level exemption authority should be provided. We would like the Circular to be amended to provide for Economy Act determinations to fully utilize existing contracts before the Circular applies. The competition plan should only include those ISSAs which we feel are appropriate for competition.

Thank you for the opportunity to comment. If you have any questions on this response please contact Mr. Robert F. Diegelman on (202) 514-3101.

Sincerely,

Paul R. Corts
Assistant Attorney General
for Administration