December 17, 2002

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

Subject: NOVEMBER 19, 2002, *FEDERALREGISTER* NOTICE REGARDING PROPOSED REVISION TO OMB CIRCULAR NO. A-76, "PERFORMANCE OF COMMERCIAL ACTIVITIES"

Dear Mr. Childs:

I am submitting the following comments in response to the proposed revision of OMB Circular A-76.

1. To begin, please consider this comment as an official request to reopen and extend the public comment period on OMB's November 19, 2002, *Federal Register* notice regarding the proposed revision of Circular A-76. If OMB were to apply its own criteria for determining the significance of agency actions to this document, this action would likely be deemed "major" and perhaps even "economically significant." The summary area of the notice itself supports this contention, as it states that the action proposes "major" revisions to Circular A-76. Proposed revisions of the extensive nature and broad scope of this one are typically allotted at least a 60-day public comment period—and even longer, in some cases. By limiting the public comment period on this proposal to only 30 days (and by issuing the proposed revision to coincide with the holiday season, when fewer interested and potentially affected parties are likely to see and thoroughly review the document), OMB could receive fewer comments, and those received will likely be less substantive. This could, in effect, short circuit deliberations and the development of effective, public interest-driven policy regarding this important matter.

2. In addition, the *Federal Register* notice does not mention making comments received by the closing date available for public viewing. I am not aware of any provisions within the Administrative Procedure Act that would prevent OMB from providing all comments received (within the parameters of applicable laws, of course) on this document to the public for evaluation. If no processes are in place to ensure that all comments received before the close of the comment period are properly logged in and made available to the public, how can taxpayers be sure that *all* views have been evaluated and appropriately considered by OMB in its deliberations on this matter?

3. I strongly believe that OMB's presumption that *all* government activities should be considered commercial unless proven otherwise is fallacious and in conflict with Congressional intent and public need. The federal government was not established as a for-profit enterprise, to be sold off to the lowest bidder (see point 4 below). Its principal purpose is to ensure that public needs that are not being fulfilled by the private sector are met. If the revised version of Circular A-76 is fully implemented, there will be no limitations on the numbers and types of contracts agencies will be required to manage. This will, in turn, result in blurred lines of accountability, creating an environment where management will be consumed by contractual details rather than operational or regulatory effectiveness.

4. In a June 2001 article published in *GovernmentExecutive* magazine, the late Harold Seidman—one of the principle creators of Circular A-76 in 1966—said that the question of whether a function is inherently governmental is only one of many practical questions managers should ask before contracting out for certain types of services, such as management consulting or program planning. According to the article, Seidman would ask:

a. How would contracting out affect basic government structure?
b. How would it affect accountability?
c. How would it affect the character of the function itself?

The article goes on to state that, "while government is ultimately responsible for work it outsources, agencies are subject to ethical and legal rules—such as the Freedom of Information Act—that typically do not apply to private firms. In Seidman's view, private firms will also perform a function differently than civil servants—perhaps more efficiently, perhaps not—because the private sector is governed by profit motive...The two [sectors] are governed by different values."

Concerns such as these are not addressed to any degree in the revised version of A-76. I would appreciate learning OMB's views on these important considerations and how they will be fully addressed in the final version of the revised circular.

5. One primary difference between government and the private sector is that key rules governing Federal officials do not govern private actors who perform the work of government, or, as in the case of conflict of interest rules, apply to them in a lesser degree. As the 1962 Bell report to President Kennedy observed, when we contract out government work, "we can no longer presume that those who actually do the work of government are themselves governed by the laws enacted to define the limits of government and to protect ourselves against "official" abuse–the Constitution of the United States, and statutory ethics, openness, and political conduct provisions." For example, Federal merit systems principles ensure equal opportunity in hiring and promotions and work to ensure that the government workforce reflects the makeup of the U.S. population. The revised circular would radically decrease the number of individuals performing government work who are subject to these principles. This creates the

opportunity for widespread contractor hiring tied to personal contacts and political cronyism.

In addition, because contractors are subject to less stringent conflict of interest rules, which themselves may not be effectively enforced, there is a strong possibility that the public interest will not be best served. In the study by Senator Pryor cited above, he found that "DOE was unaware that the contractor it was employing to forward a highly controversial modification to the nuclear nonproliferation treaty before Congress was simultaneously reporting back to the foreign beneficiaries of the modification." Senator Pryor's subcommittee found systematic failure to comply with the conflict of interest review process throughout DOE.

6. The emphasis on outsourcing is also inconsistent with the Administration's stated goals of recruiting and retaining Federal employees to avert the widely anticipated human capital crisis. More than half–53 percent–of the Federal workforce will be eligible to retire in the next five years.1 This includes 71 percent of the government's senior managers–presumably the individuals with the expertise and responsibility for overseeing government contracts. If current talented, dedicated mid-level employees have their jobs contracted out, or leave the government because they fear this will occur, who will remain to assume these management positions and guide the work of a largely third-party run government? Moreover, how can we expect to recruit new, talented, highly qualified government employees? If they face the prospect of having their jobs contracted out or of having to manage contracts rather than employees, and if they continue to receive the message that public sector employees are less than capable, won't the best and brightest choose private sector employment over public service?

7. If the revised circular were to be adopted in its current form, it would greatly expand the number of employees subject to public-private competitions, both by requiring the competition of commercial interservice support agreements and by revising the definition of "inherently governmental" with the presumption that an activity is commercial unless proven otherwise. This would presumably increase the number of Federal contract employees substantially. There is nothing in the revised circular that ensures that Agencies will reliably and comprehensively track and manage the size, cost, and performance of this vast federal contractor workforce.

The *Federal Register* notice announcing the new circular indicates that a shortcoming of the current circular is that "accountability for results is limited." The notice indicates that "When public employees compete and win work, government managers are often not held fully accountable for making good on the projected savings and improved performance identified in the Agency's offer." This leads to the questions of whether contract employees are held accountable for meeting their performance and cost requirements. The evidence seems to indicate otherwise. In 1989-90 Senator Pryor's subcommittee of the Government Affairs Committee (Federal Services) investigated contracting out at the Department of Energy and found that (1) DOE knew that taxpayers were paying $25,000 per person year more for support service contractors to do the work

of government than government officials cost; (2) DOE's rule for checking contractors' conflicts of interest were systematically violated; (3) contractor use was so invisible within DOE that the Secretary of Energy did not know that contractors had written his Congressional testimony, among other things.2 In 2001, we learned that Mellon Bank, a contractor hired by the Internal Revenue Service, had hidden or destroyed 70,000 tax returns containing payments worth $1.2 billion.

The General Accounting Office (GAO) has also identified problems in Federal agencies' ability to manage and account for their existing contracts. In its December 2000 report to Congressional Committees, "DOD Competitive Sourcing: Results of A-76 Studies Over the Past 5 Years," GAO admitted that they could not be sure of the accuracy of the data "because of historical weaknesses in the services' and Defense agencies' databases used to record information on completed A-76 studies." Recently, Comptroller General David Walker told *Government Executive* magazine, "I'm not confident that agencies have the ability to effectively manage cost, quality and performance in contracts." Several agencies are currently on the GAO's high-risk list of management problems because of weaknesses in contract management. If agencies lack the ability to effectively manage contracts now, why would we increase the number of contracts they need to manage?

The revised circular includes two requirements that are presumably intended to monitor the performance of competitive service providers, including contractors. These are the Performance Work Statement (PWS) and the Quality Assurance Surveillance Plan (QASP). Agencies are instructed to develop and implement the QASP, which "identified methods used to measure performance of the service providers against the requirements in the PWS," and to "monitor actual cost of performance." However, these very general instructions constitute the full extent of the Circular's provisions for managing cost and performance. There are no specific methods identified for carrying out these tasks and no guidance as to what data should be tracked and maintained or how it should be measured and evaluated. The burden is placed on the individual manager/contracting organization. Moreover, because there are no requirements for standardized data-gathering and recordkeeping on contracts and no provision for public access to this information, there is no mechanism for making the operations of the contractor workforce transparent and accountable to the public. Without reporting requirements to the Federal government, such as those required by the Securities and Exchange Commission of publicly held corporations, taxpayers will have no way to track contractor accounting versus government spending. The opportunity for mismanagement of public funds is enhanced by the lack of accounting principles for such public-private business arrangements.

Without being able to effectively manage and track contracts, we cannot ensure that we are meeting the stated goals of the A-76 process--saving taxpayers money while providing them with more efficient services. We cannot provide the taxpayers transparency as to where their money is spent, or even who makes up their government. We cannot ensure that contractors do not have a conflict of interest in the work they are employed to do. We cannot ensure that taxpayer money is not funneled through contractors who support and do business with terrorist organizations–

witness the current investigation of federal software contractor Ptech for ties to an Al Qaeda financier. Moreover, we cannot generate reliable data to tell us whether or not private-public competition actually serves the public interest.

The resources required to effectively manage and monitor a massive Federal contractor force would be extensive. While it is conceivable that we could build effective monitoring and oversight systems and hire and appropriate train enough qualified individuals to perform this function, it seems likely the resources required to do so would significantly offset any cost savings gained by private-public competitions.

8. In performing a side-by-side comparison of the previous version of A-76 with OMB's proposed revision, I noticed that the newer version stated that assistant secretary or equivalent level officials may, in certain circumstances, delegate in writing responsibilities to implement the circular to comparable officials in the agency or agency components. However, this language differs from that contained in the previous version of the circular, which states that an official at the assistant secretary level or equivalent level *and* (emphasis added) officials at a comparable level in major component organizations [shall be] designated to have responsibility for implementation of the circular and its supplements within the agency. By placing the authority for implementing the circular primarily in the hands of assistant secretary or other political appointees without specifically requiring input from career agency administrators or other agency decisionmakers, it is conceivable that the process itself could become politicized, to the ultimate detriment of the taxpaying public.

9. On a similar note, I am also concerned about the Competition Waiver provision contained in Attachment C of the proposed revision of the circular. The provision states that such waivers—which permit direct conversions "for any commercial activity" under potentially subjective criteria—shall be approved by the 4.e. official in writing without delegation. This apparently means that agency administrators and decisionmakers will not be delegated authority to made decisions to issue competition waivers. Why is this situation treated differently than others described in the revised version of Circular A-76? Will the competition waiver provision possibly be used by political appointees to make wholesale changes to agencies, without providing career agency administrators and policymakers the opportunity to provide input in the decisionmaking process?

In conclusion, as a taxpayer and citizen I am concerned that the veiled, underlying goal of this revised version of OMB Circular A-76 is the outright privatization of many legitimate government functions. I respectfully request that OMB act on the side of caution with respect to protecting and preserving in-house capabilities of government agencies, in particular regulatory agencies, in order to protect public interests.

Thank you for the opportunity to submit my comments.

Sincerely,

John Scott
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1 Congresswoman Connie Morella, Testimony beofre the National Commission on the Public Service, July 18, 2002.

2 Testimony of Dan Guttman, fellow of the National Academy of Public Administration and the Johns Hopkins' Washington Center for the Study of American Government, before the U.S. Senate's Committee on Governmental Affairs, March 6, 2002.