

DoC FAIR ACT Inventory Guidance

General information on the inventory

The FAIR Act of 1998 (P.L. 105-270) requires federal agencies to prepare and submit to the Office of Management and Budget (OMB) inventories of commercial activities performed by government employees. This inventory is used by federal agencies to identify inherently governmental functions and commercial activities. For purposes of the FAIR Act, there are two kinds of activities that are performed by federal employees: those activities that are "commercial" in nature and those that are "inherently governmental." The FAIR Act requires each agency to prepare an inventory of activities that "are not inherently governmental functions" meaning "commercial." As a matter of policy, OMB has also directed agencies to issue an inventory each year of their inherently governmental activities performed by federal employees. This inventory is required as a part of the OMB Circular A-76 and by OMB's annual inventory guidance.

Major milestones

- Data call start – April 16
- Review with bureaus/offices – 2nd and 3rd week in May
- Inventory due to OAM – May 14th. Extension may be granted (if requested) up to the 1st week in June
- Inventory analysis report developed – 2nd week in June
- Questions on inventory posed to agency – 2nd and 3rd week in June
- Changes, if applicable, incorporated into inventory, spread sheet and narratives delivered to OMB – by June 30
- OAM meets with OMB to discuss inventory – July

General inventory guidance

The DoC Office of Competitive Sourcing within Office of Acquisition Management (OAM) will allow the Bureaus to determine the framework for compiling their 2004 FAIR Act inventory. Several Bureaus have indicated that they will be using last year's submission as a starting point.

- 1.) Submit information using OMB spreadsheet (located for downloading at <http://www.whitehouse.gov/omb/procurement/fair-index.html> under TAB #7 "Inventory"). Additional guidance provided from OMB on the Inventory coding procedures is contained in Attachment A.
- 2.) Report FTE numbers to match those that are provided by OMB. Any deviation in numbers must be fully explained ((located for downloading at <http://www.whitehouse.gov/omb/procurement/fair-index.html> under TAB #2 "Ag Bu FTEs").

3.) Submit written narrative to explain (by function code) all reason codes outside of reason code B (commercial and competitive). Justification should try to address the questions, to the extent possible, contained in the FY2003 Jefferson report (Attachment B).

4.) Submit cover memo that provides the following information:

- Brief description of the organization's mission and unique characteristics that may help explain some of the coding decisions
- Description of the FY2004 inventory process (include a summary of the process, analysis, changes from previous year)
- Challenges and appeals to the FY 2003 inventory and response process
- Status of any ongoing competitive sourcing studies
- Brief summary of justification of use of all codes other than "B". It is understood that the accompanying narrative by function by code will contain amplifying information.

Submittal Procedures

Bureaus/Offices will submit their inventories and accompanying justifications electronically (hard copy to follow) to:

- DOC's OAM
 - Maile Arthur, marthur@doc.gov
- Jefferson Consulting:
 - Jennifer Tress, jtress@jeffersonconsulting.com

Where to Start

The process of conducting the FAIR Act inventory starts with an agency's position organizational listing (POL) of permanent positions. Each region and headquarters will evaluate every permanent position (Full-Time and Part-Time) and determine the following:

- Whether a federal position is inherently governmental or a commercial activity.
- If a position is a commercial activity, assign a reason code.
- Assign the function code that describes and categorizes the type of activity carried out by that position.

To determine if the position is inherently governmental or commercial in nature, use DoC, FAIR Act and OMB guidance. Contact DoC's OAM for additional guidance in making a reasonable interpretation.

- If you determine the position is inherently governmental in nature, you must provide a justification. The use of reason code A requires the approval of the

Director. Generally, positions directly supporting the organization's mission can be assigned reason code A based on the following:

- The positions typically directly support inherently governmental positions to the extent that there is an employer-employee relationship that would not be allowable under contract (i.e. personal services). An employer-employee relationship involves close, continual supervision of an individual by government employees, as distinguished from general oversight and direction. However, severable in-house commercial activities in support of the mission are normally subject to the Circular A-76 and its Supplement.

For this year's inventory it is suggested that, to the extent practicable, positions that have been coded as inherently governmental in past inventories solely because of the "personal services" relationship described above be coded using reason code A.

- If you determine a position is commercial in nature, you must next determine and assign a reason code (see next section, "Coding Positions" for more detail).

Bureaus/Offices will review Jefferson Consulting inventory report findings to ensure that all the issues and questions raised are fully considered as part of this year's inventory preparation.

The assignment of a function code does not directly determine or influence whether or not a position is inherently governmental.

TIP: When determining whether a position should be inherently governmental, be prepared to provide a reasonable justification. Make comparisons across your inventory to determine if the various justifications you have provided are sound.

Coding positions

REASON CODES

OMB-Specific Guidance (from Circular No. A-76 (Revised) May 29, 2003, which provides new definitions for inherently governmental activities and commercial activities).

The revised A-76 Circular has provided the following definitions for what is considered inherently governmental and commercial work. Bureaus/Offices will use this general

definition as the basis for their justifications. Brief accompanying narratives (suggest one paragraph per narrative, written in Word) will cite the general, applicable definition and will then provide sufficient detail to show how the function fits the definition. In addition, Bureaus/Offices may use the FAIR Act definitions as added justification for their coding (see next section for detail).

Categorizing Activities Performed By Government Personnel

1. An activity that is so intimately related to the public interest that it mandates performance by government personnel. These activities require the exercise of substantial discretion in applying government authority and/or in making decisions for the government. Inherently governmental activities normally fall into two categories: the exercise of sovereign government authority or the establishment of procedures and processes related to the oversight of monetary transactions or entitlements. An inherently governmental activity involves:
 - a. Binding the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise.
 - b. Determining, protecting, and advancing economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise.
 - c. Significantly affecting the life, liberty, or property of private persons.
 - d. Exerting ultimate control over the acquisition, use, or disposition of United States property (real or personal, tangible or intangible), including establishing policies or procedures for the collection, control, or disbursement of appropriated and other federal funds.
2. While inherently governmental activities require the exercise of substantial discretion, not every exercise of discretion is evidence that an activity is inherently governmental. Rather, the use of discretion shall be deemed inherently governmental if it commits the government to a course of action when two or more alternative courses of action exist and decision making is not already limited or guided by existing policies, procedures, directions, orders, and other guidance that: (a) identify specified ranges of acceptable decisions or conduct and (b) subject the discretionary authority to final approval or regular oversight by agency officials.
3. An activity may be provided by contract support (i.e., a private sector source or a public reimbursable source using contract support) where the contractor does not have the authority to decide on the course of action, but is tasked to develop options or implement a course of action, with agency oversight. An agency shall consider the following to avoid transferring inherently governmental authority to a contractor:

- a. Statutory restrictions that define an activity as inherently governmental.
- b. The degree to which official discretion is or would be limited, i.e., whether involvement of the private sector or public reimbursable provider is or would be so extensive that the ability of senior agency management to develop and consider options is or would be inappropriately restricted.
- c. In claims or entitlement adjudication and related services, (1) the finality of any action affecting individual claimants or applicants, and whether or not review of the provider's action is de novo on appeal of the decision to an agency official; (2) the degree to which a provider may be involved in wide-ranging interpretations of complex, ambiguous case law and other legal authorities, as opposed to being circumscribed by detailed laws, regulations, and procedures; (3) the degree to which matters for decisions may involve recurring fact patterns or unique fact patterns; and (4) the discretion to determine an appropriate award or penalty.
- d. The provider's authority to take action that will significantly and directly affect the life, liberty, or property of individual members of the public, including the likelihood of the provider's need to resort to force in support of a police or judicial activity and whether the provider is more likely to use force, especially deadly force, and the degree to which the provider may have to exercise force in public or relatively uncontrolled areas. These policies do not prohibit contracting for guard services, convoy security services, pass and identification services, plant protection services, or the operation of prison or detention facilities, without regard to whether the providers of these services are armed or unarmed.
- e. The availability of special agency authorities and the appropriateness of their application to the situation at hand, such as the power to deputize private persons.
- f. Whether the activity in question is already being performed by the private sector.

Coding Commercial Activities

4. A commercial activity is one which is operated by a federal executive agency and which provides a product or service that could be obtained from a commercial source. Services or products in support of inherently governmental functions are commercial activities and normally are subject to

this circular. A commercial activity also may be part of an organization or a type of work that is separable from other functions or activities and is suitable for performance by contract.

Annual Procedures. An agency shall use reason codes A-F, identified in Figure A2 (from Revised Circular) below, to indicate the rationale for government performance of a commercial activity. Annual supplemental procedures for the use of these reason codes may be found at the OMB web site.

REASON CODES AND DEFINITIONS FOR COMMERCIAL ACTIVITIES INVENTORY	
Codes	DEFINITIONS
A	The commercial activity is not appropriate for private sector performance pursuant to a written determination by the CSO.
B	The commercial activity is suitable for a streamlined or standard competition.
C	The commercial activity is the subject of an in-progress streamlined or standard competition.
D	The commercial activity is performed by government personnel as the result of a standard or streamlined competition (or a cost comparison, streamlined cost comparison, or direct conversion) within the past five years.
E	The commercial activity is pending an agency approved restructuring decision (e.g., closure, realignment).
F	The commercial activity is performed by government personnel due to a statutory prohibition against private sector performance.

Figure A2.

FAIR Act-Specific Guidance

The designation of an inherently governmental function may not be justified for in-house performance solely on the basis that the activity involves or supports a classified program or the activity is required to perform an agency's basic mission.

- A. Definition -- The term "inherently governmental function" means a function that is so intimately related to the public interest as to require performance by federal government employees.
- B. Functions included -- The term includes activities that require either the exercise of discretion in applying federal government authority or the making of value judgments in making decisions for the federal government, including judgments relating to monetary transactions. An inherently governmental function involves, among other things, the interpretation and execution of the laws of the United States that:
 1. Bind the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise.
 2. Determine, protect, and advance United States economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise.
 3. Significantly affect the life, liberty, or property of private persons.

4. Commission, appoint, direct, or control officers or employees of the United States.
 5. Exert ultimate control over the acquisition, use, or disposition of the property, real or personal, tangible or intangible, of the United States, including the collection, control, or disbursement of appropriated and other federal funds.
- C. Functions excluded. The term does not normally include:
1. Gathering information for or providing advice, opinions, recommendations, or ideas to federal government officials.
 2. Any function that is primarily ministerial and internal in nature (such as building security, mail operations, operation of cafeterias, housekeeping, facilities operations and maintenance, warehouse operations, motor vehicle fleet management operations, or other routine electrical or mechanical services).

Following are examples of potentially inherently governmental activities:

- The direct execution or oversight of contracts, agreements, leases, or federal property by warranted officers, Contracting Officer Technical Representative (COR's), (Alternate Contracting Officer Technical Representative, Task Managers or Task Monitor), or accountable property officers responsible for disposing of federal property. Only active COR's on current contracts with delegated roles and responsibilities are inherently governmental. This must be a significant part of the work in the position.
- Personnel appointing authority or adjudicatory approval and/or position description and performance standards approval for federal employees.
- The collection, control or disbursement of federal funds.
- The determination of agency policy, such as determining the content and application of regulations and internal controls.
- The determination of budget policy, guidance and strategy (Headquarters and Regional level).
- The approval of agency responses to Freedom of Information Act requests (Headquarters level).
- The control of the Census Bureau treasury accounts (Headquarters level)
- Management and oversight of Government programs requiring value judgments" and "selection of program priorities

Following are activities that are typically not considered Inherently Governmental:

- Facility Maintenance
- Information Technology Support (2210 and other)
- Administrative Support

Function Codes

When coding your positions for the inventory, you should:

Assign each position to an OMB function Code. The definition for each function describes the type of work performed. The functional definition does not reflect: (a) whether the function is inherently governmental or commercial; (b) whether the function is subject to or exempt from competition; (c) how functions or activities are packaged for competitive sourcing; or, (d) how FAIR Act challenges and appeals are handled.

When coding for the inventory, FTEs are grouped by function and coded to indicate the type of work performed. In some cases, this may not correspond to job titles. The type of work (function) and not type of position (job series or occupational specialty) is coded.

When a Full Time Equivalent (FTE) involves two or more functions, it should be coded based on the type of work performed the most. There is one exception:

- If the type or work in one functional group directly supports and cannot be separated from operations in a second functional group, the FTE is coded with the function code from the second functional group. However, if the support work is separately identifiable and **severable**, it is coded with the appropriate support function code. For example, drafting correspondence dealing with statistical operations and proofreading documents for content are administrative support services that require comprehensive knowledge of the daily operations and responsibilities of the program for their proper execution. In this example, the administrative support services (e.g., drafting and proof reading correspondence, Y820) cannot be separated from the functions they support (statistical studies). To code them as administrative support services (D000) would inappropriately imply that the work could be performed as a separate activity.

An example of a **severable** service would be the purchasing function in support of statistical research which would be coded to the procurement and contracting function (F400) and not the statistical research function (D000).

- Typically, **nonseverable** support includes tasks that require close supervision

(as distinguished from general oversight), comprehensive knowledge of the daily operations, or in some sense involves a part of the operation supported. In all cases, nonseverable support is coded with the function code it supports, since it is an inherent part of that function. It is not coded as a separate function based on the type of position.

An example of a **nonseverable** service could be the secretarial position. A division chief's secretary directly supports an inherently governmental position that, in most cases, requires continual supervision and direction. In this case, there would be an employer-employee relationship that would not be allowed under a contract.

SUMMARY

1. Develop the inventory using the NFC Codes and organizational breakdown. FTE totals should match the numbers provided by OMB or an explanation for the discrepancy must be provided.
2. Identify FTEs as inherently governmental or commercial
3. Provide justification for the inherently governmental FTEs
4. Assign reason codes to all commercial FTEs
5. Provide justification for the commercial FTEs identified with codes other than reason code "B"
6. Provide additional narrative as requested for cover memo

ATTACHMENT A

2004 Inventory Guide Overview

March 2004

INTRODUCTION

The Office of Management and Budget has developed this Inventory Guide to help agencies and the public understand the inventories of commercial and inherently governmental activities that agencies have developed in accordance with the Federal Activities Inventory Reform (FAIR) Act (P.L. 105-270), OMB Circular A-76, Performance of Commercial Activities, and other guidance.

To view the inventories for any specific agency, please visit that agency's website. OMB requires all agencies to post their inventories on their websites so that interested members of the public can have quick and easy access to the inventories. For those who do not have internet access, an agency's inventory may also be obtained by contacting that agency's point of contact (who is identified in the OMB *Federal Register* Notifications of Availability for that year's inventories).

If you need a paper copy of the FAIR Act, this User Guide, the OMB Circular A-76 or other related guidance, contact the Office of Federal Procurement Policy, NEOB Room 9013, Office of Management and Budget, 725 17th Street, N.W. Washington, DC 20503; call (202) 395-7579; or e-mail your request to mchristi@omb.eop.gov.

BACKGROUND

The FAIR Act directs federal agencies to issue each year an inventory of all commercial activities performed by federal employees. OMB reviews each agency's commercial activities inventory and consults with the agency regarding content. Upon the completion of this review and consultation, the agency is required to transmit a copy of the FAIR Act Inventory of Commercial Activities to the Congress and make it available to the public. The FAIR Act then establishes a limited administrative challenge and appeals process under which an interested party may challenge the omission or the inclusion of a particular activity on the inventory as a commercial activity. (See below for a discussion of the challenge and appeals process.)

In addition to meeting the FAIR Act requirements, agencies are also required by OMB Circular A-76 to issue each year an inventory of their inherently governmental activities performed by federal employees. Attachment A of

Circular A-76 provides instructions to agencies on preparing inventories of both commercial and inherently governmental activities. The full text of the Circular can be found on:

www.whitehouse.gov/omb/circulars/a076/a76_incl_tech_correction.html.

INVENTORY SCOPE

The FAIR Act applies to the following executive agencies: (1) an executive department named in 5 U.S.C. Sec. 101, (2) a military department named in 5 U.S.C. Sec. 102, and (3) an independent establishment as defined in 5 U.S.C. Sec. 104. The FAIR Act does not apply to: (1) the General Accounting Office, (2) a government corporation or a government controlled corporation as defined in 5 U.S.C. Sec. 103, (3) a non-appropriated funds instrumentality if all of its employees are referred to in 5 U.S.C. Sec. 2105(c), or (4) depot-level maintenance and repair of the Department of Defense as defined in 10 U.S.C. Sec. 2460.

For purposes of the FAIR Act, there are two kinds of activities that are performed by federal employees: those activities that are "commercial" in nature (and are, therefore, included on an agency's FAIR Act inventory) and those that are "inherently governmental." The FAIR Act requires each agency to prepare an inventory of activities that "are not inherently governmental functions" (i.e., "commercial"), and the FAIR Act defines an "inherently governmental function" as one "that is so intimately related to the public interest as to require performance by Federal Government employees." For additional information on categorizing activities, see Attachment A, paragraph B, of OMB Circular A-76.

INVENTORY FORMAT

In accordance with the FAIR Act and with OMB policy, each agency is required to submit to OMB, by June 30 of each year, inventories of their commercial and inherently governmental functions. The inventories must be provided in the spreadsheet format provided on the website shown below. Other formats are incompatible with OMB's inventory management information system and will not be accepted. The spreadsheet and related guidance are found on www.whitehouse.gov/omb/procurement/fair-index.html.

If an agency identifies no commercial activities that are performed by federal employees, the agency is still required to submit an inventory of inherently governmental activities to OMB in the required spreadsheet format.

THE FAIR ACT CHALLENGE AND APPEALS PROCESS

Section 3 of the FAIR Act established a two-tiered administrative challenge and possible appeals process that permits interested parties to challenge the inclusion or the omission of an activity from the FAIR Act Commercial Activities Inventory. Under OMB Circular A-76, interested parties may also challenge the application of reason codes. Refer to Attachment A, paragraph

D, of the Circular for a discussion of the challenge process.

Section 3(b) of the FAIR Act defines "interested party" as:

- a. A private sector source that (1) is an actual or prospective offeror for any contract or other form of agreement to perform the activity; and (2) has a direct economic interest in performing the activity that would be adversely affected by a determination not to procure the performance of the activity from a private sector source.
- b. A representative of any business or professional association that includes within its membership private sector sources referred to in "a." above.
- c. An officer or employee of an organization within an executive agency that is an actual or prospective offeror to perform the activity.
- d. The head of any labor organization referred to in section 7103(a) (4) of title 5, United States Code that includes within its membership officers or employees of an organization referred to in "c." above.

If an interested party has any questions about the agency's inventories or the agency's FAIR Act challenge and appeals process (e.g., to which agency official should the interested party address its challenge), the party should contact the agency FAIR Act point of contact provided in the OMB *Federal Register* Notifications of Availability that an agency's inventory is publicly available.

After publication of OMB's *Federal Register* notice stating that an agency's inventories are available, an interested party shall have 30 working days to submit a written inventory challenge. The inventory challenge shall be limited to (a) the classification of an activity as inherently governmental or commercial, or (b) the application of reason codes. Function codes shall not be subject to the inventory challenge process. A written inventory challenge shall be submitted to agency inventory challenge authorities and shall specify the agency, agency component, agency organization, function(s), and location(s) for the activities being challenged. To be considered valid for purposes of the FAIR Act, a challenge must be:

- submitted in writing;
- submitted by an interested party, as defined in the FAIR Act;
- received by the agency challenge authority within 30 working days of the date that of the OMB *Federal Register* notice of availability and web site access;
- clear as to the activity being challenged for omission or inclusion on the inventory as specifically as possible by providing sufficient description of the activity in question to enable the agency to reasonably identify the activity being challenged;
- clear as to the activity being challenged for the reason code by providing sufficient description of the activity in question to enable the agency to reasonably identify the activity being challenged; and

- justified by providing the basis for the challenge.

Inventory challenge authorities are agency officials at the same level as, or a higher level than, the individual who prepared the inventory. Inventory challenge authorities review and respond to challenges of agency inventory decisions. Inventory appeal authorities are agency officials who are independent and at a higher level in the agency than inventory challenge authorities, and review and respond to appeals of inventory challenge decisions made by inventory challenge authorities.

Within 28 working days of receiving the inventory challenge, inventory challenge authorities shall (a) validate the commercial or inherently governmental categorization or reason code designation of the activity, in a written inventory challenge decision; and (b) transmit the inventory challenge decision, including the rationale for the decision, to the interested party. Inventory challenge authorities shall include an explanation of the interested party's right to file an appeal in any adverse challenge decision.

Upon receipt of an adverse inventory challenge decision, an interested party shall have 10 working days to submit a written appeal of this decision to inventory appeal authorities.

Within 10 working days of receipt of the appeal, inventory appeal authorities shall issue and transmit a written inventory appeal decision to the interested party. This inventory appeal decision shall include the rationale for the decision.

When the inventory challenge process results in a change to an agency inventory, the agency shall (a) transmit a copy of the change to OMB and Congress; (b) make these changes available to the public; and (c) publish a notice of public availability in the *Federal Register*.

ATTACHMENT B

**ANALYSIS OF PROPOSED
FY 2003 DOC FAIR ACT INVENTORIES**

Overview

FY 2003 FAIR Act inventories have been received from 13 Department of Commerce (DOC) bureaus/offices. Table 1 summarizes the submissions by total FTE, inherently governmental FTE and commercial FTE. As indicated, 10 of the 13 bureaus/offices have designated over 60% of their FTE as inherently governmental. The three largest bureaus in DOC (Census, NIST and NOAA) account for 82% of DOC FTE and have collectively designated 70% of their FTE as inherently governmental. The only large Bureau that is under the 60% IG rate is ITA with 53.2%. If the DOC FAIR Act inventory were submitted as proposed, 68.3% of its total FTE would be designated inherently governmental.

DOC's proposed FY 2003 IG to commercial ratios should be compared with other US Government agencies. For example, published FY 2002 FAIR inventories that disclosed both IG and commercial FTE included:

<u>Agency</u>	<u>%Inherently Governmental</u>	<u>% Commercial</u>
National Science Foundation	59.1%	40.9%
NASA	61.0%	39.0%
National Institutes of Health	47.9%	52.1%

Table 1: Inherently Governmental (IG) vs. Commercial FTE

BUREAU	TOTAL FTE	IG FTE	IG AS % OF TOTAL	COMMERCIAL FTE	COMMERCIAL AS % OF TOTAL
BEA	468	426	91.0	42	9.0
BIS	404	307	75.9	97	24.1
Census	7,835	5,464	69.7	2,371	30.3
EDA	277	172	62.1	105	37.9
ESA	65	29	44.6	36	55.4
ITA	2,297	1,223	53.2	1,074	46.8
MBDA	96	70	72.9	26	27.1
NIST	3,064	2,050	66.9	1,014	33.1
NOAA	12,376	8,325	67.3	4,051	32.7
NTIA	280	197	70.4	83	29.6
NTIS	187	0	0	187	100
OSEC	971	599	61.7	372	38.3
TA	44	32	72.8	12	27.2
Totals	28,364	18,894		9,470	

DOC's proposed submission ranges from 7-20% higher than these agencies, all of which are characterized by scientific and technical missions.

Table 2 below compares the DOC FY 2002 inventory with the proposed FY 2003 submission in terms of the percentage of each that has been designated commercial. As indicated, the bureaus/offices have been remarkably consistent in making that determination. As a result, the proposed commercial % is only 0.2 lower than in FY 2002.

**Table 2: Commercial %
FY 2002 vs. FY 2003 Proposed**

Bureau	Total FTE 02	IG FTE 02	Com. FTE 02	% Com.	Total FTE 03	IG FTE 03	Com. FTE 03	% Commercial
BEA	499	412	87	17.4%	468	426	42	9%
BIS	416	294	122	29.3%	404	306	98	24.3%
Census	6,136	4,387	1,749	28.5%	7,835	5,454	2,381	30.4%
EDA	277	181	96	34.7%	277	179	98	35.4%
ESA	73	28	45	61.6%	65	29	36	55.4%
ITA	2,315	1,191	1,124	48.6%	2,297	1,223	1,074	46.8%
MBDA	96	70	26	27.1%	95	69	26	27.4%
NIST	3,112	2,027	1,085	34.9%	3,064	2,050	1,014	33.1%
NOAA	11,932	8,487	3,445	28.9%	12,218	8,684	3,534	28.9%
NTIA	286	261	25	8.7%	280	197	83	29.6%
NTIS	188	0	188	100%	187	0	187	100%
OSEC	968	564	404	41.7%	971	599	372	38.3%
TA	44	32	12	27.2	44	32	12	27.2
Totals	26,436	18,030	8,406		28,299	19,344	8,955	

Classification of a function as inherently governmental removes it from consideration as a competitive sourcing possibility. However, classifying it as commercial does not necessarily mean it will be subject to competition. Under the new OMB Circular A-76, which became effective May 29, 2003, Reason Code A may be assigned to a commercial function if: "The Commercial Activity is not appropriate for private sector performance pursuant to a written determination by the CSO." Reason Code B should be assigned if: "The Commercial Activity is suitable for a streamlined or standard competition." Table 2 below summarizes the proposed use of Reason Codes for the 13 bureaus/ offices. As indicated, use of Reason Code A (intended as an exception) was assigned 53.2% of the time versus 34.5% for Reason B.

Table 3: Commercial FTE by Reason Code

Bureau	Total Commercial FTE	Reason Code A FTE	Reason Code A %	Reason Code B FTE	Reason Code B %	Reason Code C FTE	Reason Code C %	Other Reason Code FTE	Other Reason Code %
BEA	42	0	0	36	85.7	6	14.3	0	0
BIS	97	5	5.2	92	94.8	0	0	0	0
Census	2,371	2,032	85.7	177	7.5	162	6.8	0	0
EDA	105	9	8.6	55	52.4	2	2.1	39	37.1
ESA	36	1	2.8	35	97.2	0	0	0	0
ITA	1,074	0	0	1,016	94.6	58	5.4	0	0
MBDA	26	26	100	0	0	0	0	0	0
NIST	1,014	175	17.2	532	52.5	307	30.3	0	0
NOAA	4,051	2,802	69.2	914	22.6	324	7.9	11	.3
NTIA	83	83	100	0	0	0	0	0	0
NTIS	187	0	0	0	0	0	0	187	100
OSEC	372	41	11.0	324	87.1	7	1.3	0	0
TA	12	10	83.3	0	0	2	16.7	0	0
Totals	8,955	4,761		3,089		871		234	

This is not just about appearance. If the proposed inventories are accepted, only 31.6% of the total FTE will be considered commercial, and only 34.5% of those (coded as Reason Code B) will be available for streamlined or standard competitions under the new Circular. The effect of these separate determinations is depicted in Table 4 below. The Table compares the FY 2002 inventory with the 2003 proposal in terms of the % of the total inventory that is available for competition.

As indicated, only 10.9% of DOC's FTE will be subject to competition under the proposal. Census (at 2.4%) and NOAA (at 6.6%) had a significant impact on this result. Although there is a slight improvement (in percentage terms) over FY 2002, in fact the situation will be more difficult now. In FY 2002, direct conversions (assigned Reason Code C under the previous Circular) could be counted for competitive sourcing purposes. Direct conversions have been eliminated under the new Circular, and only standard or streamlined competitions (Reason Code B) can be counted.

**Table 4: % of Total Inventory Available for Competition
FY 2002 vs. FY 2003 Proposed**

Bureau	Total FTE FY 02	Reason Code B FTE FY 02	% of Total Inventory Available for Competition FY 02	Total FTE FY 03	Reason Code B FTE FY 03	% of Total Inventory Available for Competition FY 03
BEA	499	42	8.4	468	36	7.7
BIS	416	83	19.9	404	82	20.3
Census	6,136	142	2.3	7,835	191	2.4
EDA	277	95	34.3	277	55	19.9
ESA	73	0	0	65	35	53.9
ITA	2,315	23	1.0	2,297	1,016	44.2
MBDA	96	0	0	95	0	0
NIST	3,112	751	24.1	3,064	532	17.4
NOAA	11,932	934	7.8	12,218	810	6.6
NTIA	286	0	0	280	0	0
NTIS	188	0	0	187	0	0
OSEC	968	317	32.7	971	324	33.4
TA	44	0	0	44	0	0
Totals	26,436	2,395		28,299	3,089	

Summary and Recommendations

It is critical that the bureaus/offices take steps to reduce their application of inherently governmental and Reason Code A designations. Because of their size and their frequent use of these designations, Census, NIST and NOAA should be challenged to make significant improvements in this regard. For these agencies, Table 5 below highlights specific FCT codes that have been assigned large concentrations of FTE that are either inherently governmental or Reason Code A, as well as the number of FTE coded Reason Code B. As indicated, there are few patterns that emerge among the agencies. Only NOAA and NIST seem to share high concentrations of inherently governmental and Reason Code A FTE with respect to certain Research FCT codes.

Attached are separate analyses for all of the 13 DOC bureaus/offices. In most cases there are specific comments and questions concerning how the bureau/office has coded certain areas of their inventory. Issues from Table 5 are specifically addressed in the analyses prepared for Census, NOAA and NIST.

Table 5: Major FTE Allocations by Fct Code for Census, NIST and NOAA

Inventory Function Code	Census		NOAA		NIST	
	FTE IG Or Reason Code A	FTE Reason Code B	FTE IG Or Reason Code A	FTE Reason Code B	FTE IG Or Reason Code A	FTE Reason Code B
D200 Data Collection and Analysis	1,458	0	0	0	0	0
D300 Statistical Analysis	1,788	0	0	0	3	2
<i>Research and Development, Test and Evaluation</i>						
R000 Administrative Support	33	0	64	7	0	152
R120 Science and Technology	0	0	1,882	1	1490	0
R140 Management and Support to R&D	12	0	248	4	134	0
<i>Communications, Computing and Other Information Services</i>						
W000 Administrative Support	130	0	141	38	0	0
W440 Meteorological & Geophysical Services	0	0	2,840	0	0	0
W601 Information Technology Management	1	0	261	20	7	0
W824 Data Processing Services	650	0	15	3	0	0
W826 System Design, Development and Programming Services	650	0	46	13	0	0
W827 Software Services	152	0	18	33	0	0
W999 Other ADP Functions	219	0	2	10	0	0
<i>Force Management and General Support</i>						
Y000 Administrative Support	266	0	132	58	0	50
Y105 Management Headquarters	68	0	248	1	52	0
Y210 Mgt. Headquarters-Operation Planning and Control	5	0	1,061	0	104	0
Y999 Other Functions	280	0	13	3	0	1

Analyses of DOC 2003
FAIR Act Submissions

**Analysis of FY 2003 Proposed FAIR Act Inventory
Office of the Secretary (OSEC)**

Overview

With an inventory comprised of 16 separate organizations and 971 FTE, OSEC has the fifth largest FAIR Act submission. Table 1 below compares OSEC's FY 2002 inventory with that proposed for FY 2003. As indicated, there was a slight increase in the inherently governmental (IG) to commercial ratio from 62.6%/37.4% in FY 2002 to 64.6%/35.4% in the proposed inventory. Offices with increases in ratios of 10% or more are OCIO, OHRM, and OMO.

**Table 1: Comparison of OSEC Inventories
FY 2002 vs. Proposed FY 2003
Inherently Governmental (IG)/Commercial Ratios**

OSEC Office	Total FTE 02	IG FTE 02	Comm. FTE 02	IG/Comm. Ratio 02	Total FTE 03	IG FTE 03	Comm. FTE 03	IG/Comm. Ratio 03
O/Sec	78	48	30	62%/38%	77	48	29	62%/38%
OGC	230	172	58	75%/25%	242	183	59	76%/24%
OCIO	76	26	50	34%/66%	89	43	46	48%/52%
A/S Leg.	11	8	3	73%/27%	11	8	3	73%/27%
CFO/ASA	2	2	0	100%/0%	3	2	1	67%/33%
OHRM	69	28	41	41%/59%	67	43	24	64%/36%
OCR	46	19	27	41%/59%	31	8	23	26%/74%
OFM	58	23	35	40%/60%	58	21	37	36%/64%
OSY	148	124	24	84%/16%	148	125	23	84%/16%
OEBAM	43	15	28	31%/69%	39	14	25	36%/64%
OAS	117	30	87	26%/74%	116	24	92	21%/79%
OAM	47	32	15	68%/32%	47	34	13	72%/28%
OB	23	23	0	100%/0%	24	23	1	96%/4%
OMO	15	11	4	73%/27%	14	12	2	86%/14%
OSDBU	5	3	2	60%/40%	5	3	2	60%/40%
OIG	138	128	10	93%/7%	131	121	10	92%/8%
Totals	1106	692	414	62.6%/37.4%	1102	712	390	64.6%/35.4%

OSEC's proposed FY 2003 IG to commercial ratios should be compared with other US Government agencies. For example, published FY 2002 FAIR inventories that disclosed both IG and commercial FTE included:

<u>Agency</u>	<u>%Inherently Governmental</u>	<u>% Commercial</u>
National Science Foundation	59.1%	40.9%
NASA	61.0%	39.0%
National Institutes of Health	47.9%	52.1%

Given that OSEC is comprised of the Department's leadership and a heavy concentration of policy-making positions, the proposed IG/commercial ratio is consistent with those of other agencies.

Table 2 below compares the FY 2002 and proposed FY 2003 inventories with respect to the use of Reason Codes A¹ and B.² As indicated, the use of Reason Code A decreased from FY 2002 to the FY 2003 proposed inventory. The % of FTE coded Reason Code B increased from 78.9% to 87.4%. The most notable changes were in OGC's inventory (an increase from 17% Reason B coding in FY 2002 to 100% in the proposed inventory for FY 2003) and OEBAM's inventory (18% Reason B coding in FY 2002 to 100% in the proposed inventory for FY 2003).

**Table 2: Comparison of OSEC Inventories
FY 2002 vs. Proposed FY 2003
Use of Reason Codes A and B**

OSEC Office	Comm. FTE 02	Reason Code A FTE 02	Reason Code B 02	Reason Code B% of Comm. 02	Comm. FTE 03	Reason Code A FTE 03	Reason Code B FTE 03	Reason Code B% of Comm. 03
O/Sec	30	1	29	97%	29	29	0	0%
OGC	58	48	10	17%	59	0	59	100%
OCIO	50	0	50	100%	46	0	46	100%
A/S Leg.	3	3	0	0%	3	3	0	0%
CFO/ASA	0	0	0	0%	1	1	0	0%
OHRM	41	0	41	100%	24	0	24	100%
OCR	27	0	27	100%	23	0	23	100%
OFM	35	0	35	100%	37	0	37	100%
OSY	24	0	24	100%	23	0	23	100%
OEBAM	28	0	5	18%	25	0	25	100%
OAS	87	0	87	100%	92	0	92	100%
OAM	15	8	7	47%	13	6	0	0%
OB	0	0	0	0%	1	1	0	0%
OMO	4	0	0	0%	2	2	0	0%
OSDBU	2	0	2	100%	2	0	2	100%
OIG	10	0	10	100%	10	0	10	100%
Totals	414	60	327	78.9%	390	42	341	87.4%

¹ A="The Commercial Activity is not appropriate for private sector performance.

² B="The Commercial Activity is suitable for a streamlined or standard competition.

The combination of deciding the FTEs that are inherently governmental or commercial and deciding the portion of the commercial inventory to be coded as Reason Code B, determines the number of FTE that are available for competitive sourcing. Table 3 below compares the results of that determination for FY 2002 with the proposed OSEC inventory for FY 2003. As indicated, there was a slight increase in the % of FTE available for competition from FY 2002 to the proposed inventory. The result is that 30.9% of OSEC's inventory is available for competitive sourcing in FY 2003. Offices with decreases of 10% or more are O/Sec, OCIO, and OHRM.

**Table 3: Comparison of OSEC Inventories
FY 2002 vs. Proposed FY 2003**

FTE Available for Competition

OSEC Office	Total. FTE 02	Reason Code B FTE 02	% of Total Inventory Available for Competition 02	Total. FTE 03	Reason Code B FTE 03	% of Total Inventory Available for Competition 03
O/Sec	78	29	37.2%	77	0	0%
OGC	230	10	4.3%	242	59	24.4%
OCIO	76	50	65.8%	89	46	51.7%
A/S Leg.	11	0	0%	11	0	0%
CFO/ASA-IO	2	0	0%	3	0	0%
OHRM	69	41	59.4%	67	24	35.8%
OCR	46	27	58.7%	31	23	74.2%
OFM	58	35	60.3%	58	37	63.8%
OSY	148	24	16.2%	148	23	15.5%
OEBAM	43	5	11.6%	39	25	64.1%
OAS	117	87	74.4%	116	92	79.3%
OAM	47	7	14.9%	47	0	0%
OB	23	0	0%	24	0	0%
OMO	15	0	0%	14	0	0%
OSDBU	5	2	40%	5	2	40%
OIG	138	10	7.2%	131	10	7.6%
Totals	1106	327	29.6%	1102	341	30.9%

Specific Comments

OSEC Office	Comments
OSEC	An explanation should be provided as to why there are no FTE coded with Reason Code B for the FCT code Y105 (Management Headquarters) while 33 are coded as inherently governmental.
<i>OSY</i>	An explanation should be provided as to why there are no FTE coded with Reason Code B for the FCT code S753 (Facility Security Management) while 33 are coded as inherently governmental.
OAM	Some of the reason codes applied to the FY 2003 inventory have been changed from the FY 2002 requirements. OAM should review its submission and verify that coding instructions for the new OMB Circular have been followed. For example, in FY 2002 Reason Code C meant: "Indicates that the activity is performed by Federal employees, but it has been specifically made exempt from the provisions of the Circular and this Supplement by Congress, Executive Order of OMB." The new OMB Circular requires coding of Reason Code C when: "The Commercial Activity is the subject of an in-progress streamlined or standard competition." There are 7 FTE in the proposed OAM inventory coded with Reason Code C.

**Analysis of Proposed FY 2003 FAIR Act Inventory
Bureau: BEA**

Overview

The Table below compares BEA's FY 2002 inventory with that proposed for FY 2003. As indicated, the FY 2002 ratio of inherently governmental (IG) to commercial FTE (82.6% / 17.4%) increased (91% / 9%) in the proposed FY 2003 inventory. The result is a proposed inventory for FY 2003 that makes available 7.7% of the total Bureau FTE for competitive sourcing purposes.

Comparison of BEA FY 2002 and Proposed FY 2003 Inventories

	<i>FY 2002</i>	<i>FY 2003 Proposed</i>
<i>Total FTE</i>	499	468
<i>Inherently Governmental (IG) FTE</i>	412	426
<i>% IG</i>	82.6%	91%
<i>Commercial FTE</i>	87	42
<i>% Commercial</i>	17.4%	9%
<i>Reason Code A</i>	0	0
<i>Reason Code A as % of Commercial Inventory</i>	0	0
<i>Reason Code B</i>	42	36
<i>Reason Code B as a % of Commercial Inventory</i>	48.3%	85.7%
<i>% of Total Inventory Available for Competition=Total Inventory/Reason Code B FTE</i>	8.4%	7.7%

BEA's proposed FY 2003 IG to commercial ratios should be compared with other US Government agencies. For example, published FY 2002 FAIR inventories that disclosed both IG and commercial FTE included:

<u>Agency</u>	<u>% Inherently Governmental</u>	<u>% Commercial</u>
National Science Foundation	59.1%	40.9%
NASA	61.0%	39.0%
National Institutes of Health	47.9%	52.1%

Specific Comments:

- ❑ BEA should revisit the proposed inventory coding with a view toward significantly reducing the number of FTE designated as inherently governmental and increasing the number of commercial FTE that are available for competition.
- ❑ The reason codes that have been added to the revised inventory are simply references to all 4 sections of OMB Circular A-76 (Rev.) that address what an inherently governmental activity involves. There is no basis for determining the specific basis for the determination or how (or if) the other guidance in the Circular related to

making the determination has been applied. For example, the Circular makes it clear that:

- Commercial activities “may be found within, or throughout, organizations that perform inherently governmental activities or classified work,”
- That not every exercise of discretion is evidence that an activity is inherently governmental; and
- That an activity may be provided by contract where the contractor does not have authority to decide on the course of action “ but is tasked to develop options or implement a course of action, with agency oversight.”
At the very least, these and other interpretive sections of the revised Circular would call into question any determination that all of a large group of FTE under a specific FCT code were inherently governmental.

- Therefore, BEA should provide a detailed explanation for the following questions:
 - In the area of “Research, Development, Test and Evaluation,” why are **all 337 FTE** under FCT code R120 (Science and Technology) coded as inherently governmental?³
 - In the area of “Communications, Computing and Other Information Services,” why are **all 49 FTE** under FCT code W601 (Data Center Operations) coded as inherently governmental.

³ The previous OMB Circular A-76 indicated that “This Circular and its Supplement shall not apply to the conduct of research and development. However, severable in-house commercial activities in support of research and development, such as those listed in Attachment A, are normally subject to this Circular and its Supplement.” The new Circular contains no exemption for research and development.

Analysis of Proposed FY 2003 FAIR Act Inventory
Bureau: BIS

Overview

The Table below compares the BIS FY 2002 inventory with that proposed for FY 2003. As indicated, the already high FY 2002 ratio of inherently governmental (IG) to commercial FTE (70.7%/29.3%) increased (75.9% / 24.1%) in the proposed FY 2003 inventory. That increase was partially offset by the decrease (from 32% to 5.2%) in the use of reason Code A, and the increased use of Reason Code B. The result is a proposed inventory for FY 2003 that makes available 22.8% of the total Bureau FTE for competitive sourcing purposes.

Comparison of BIS FY 2002 and Proposed FY 2003 Inventories

	<i>FY 2002</i>	<i>FY 2003 Proposed</i>
<i>Total FTE</i>	416	404
<i>Inherently Governmental (IG) FTE</i>	294	307
<i>% IG</i>	70.7	75.9%
<i>Commercial FTE</i>	122	97
<i>% Commercial</i>	29.3	24.1
<i>Reason Code A</i>	39	5
<i>Reason Code A as % of Commercial Inventory</i>	32%	5.2%
<i>Reason Code B</i>	83	92
<i>Reason Code B as a % of Commercial Inventory</i>	68%	94.8%
<i>% of Total Inventory Available for Competition=Total Inventory/Reason Code B FTE</i>	19.9%	22.8%

The BIS proposed FY 2003 IG to commercial ratios should be compared with other US Government agencies. For example, published FY 2002 FAIR inventories that disclosed both IG and commercial FTE included:

<u>Agency</u>	<u>% Inherently Governmental</u>	<u>% Commercial</u>
National Science Foundation	59.1%	40.9%
NASA	61.0%	39.0%
National Institutes of Health	47.9%	52.1%

Specific Comments:

- ❑ Column J (Status) of the proposed inventory is completely blank. Either I (inherently governmental) or C (commercial) should be inserted. The breakdown for the above table is based upon the presence of an abbreviated reason code for inherently governmental in Column L or a commercial reason code in Column K.
- ❑ The breakdown by codes at the bottom of the inventory is inaccurate.
- ❑ BIS should revisit the proposed inventory coding with a view toward significantly reducing the number of FTE designated as inherently governmental.

- All of the IG positions on the BIS inventory are assigned the abbreviated reason of “binds US by contract,” “binds US by policy,” or “binds US by regulation.” These relate to the OMB Circular A-76 designation of a function as inherently governmental if it involves: “Binding the United States to take or not to take some action by contract, policy, regulation, authorization, order or otherwise.” Without additional explanation, there is no basis for determining the specific reasons for the determination or how (or if) the other guidance in the Circular related to making the determination has been applied. For example, the Circular makes it clear that:
 - Commercial activities “may be found within, or throughout, organizations that perform inherently governmental activities or classified work,”
 - That not every exercise of discretion is evidence that an activity is inherently governmental; and
 - That an activity may be provided by contract where the contractor does not have authority to decide on the course of action “ but is tasked to develop options or implement a course of action, with agency oversight.”
At the very least, these and other interpretive sections of the revised Circular would call into question any determination that all of a large group of FTE under a specific FCT code were inherently governmental.
- BIS should provide a detailed response to the following questions:
 - In the area of “Regulatory and Program Management Support Services,” why are **all 76 FTE** under FCT code D411 (Compliance Assessments) coded inherently governmental? How does this functional area “bind the US by regulation,” or “bind the US by policy,” as the assigned abbreviated reasons indicate?
 - In the same area, why are **31 of the 32 FTE** under FCT code D704 (Program Monitoring and Evaluation) coded as inherently governmental? How does this functional area “bind the US by policy,” as the assigned abbreviated reason indicates for 28 of the FTE?

**Analysis of Proposed FY 2003 FAIR Act Inventory
Bureau: Census**

Overview

The Table below compares the Bureau's FY 2002 inventory with that proposed for FY 2003. As indicated, the remarkably high ratio of inherently governmental (IG) to commercial FTE in FY 2002 (71.5% / 28.5%) dropped slightly (69.7% /30.3%) in the proposed FY 2003 inventory. However, the (already extensive) use of Reason Code A to exempt commercial FTE from cost comparisons rose from 80.4% to 85.7%. The result is a proposed inventory for FY 2003 that makes available only **2.3%** of the total Bureau FTE for competitive sourcing purposes.

Comparison of Census FY 2002 and Proposed FY 2003 Inventories

	<i>FY 2002</i>	<i>FY 2003 Proposed</i>
<i>Total FTE</i>	6,136	7,835
<i>Inherently Governmental (IG) FTE</i>	4,387	5,464
<i>% IG</i>	71.5%	69.7%
<i>Commercial FTE</i>	1,749	2,371
<i>% Commercial</i>	28.5%	30.3%
<i>Reason Code A</i>	1,407	2,032
<i>Reason Code A as % of Commercial Inventory</i>	80.4%	85.7%
<i>Reason Code B</i>	142	177
<i>Reason Code B as a % of Commercial Inventory</i>	8.1%	7.5%
<i>% of Total Inventory Available for Competition=Total Inventory/Reason Code B FTE</i>	2.3%	2.3%

The Bureau's proposed FY 2003 IG to commercial ratios should be compared with other US Government agencies. For example, published FY 2002 FAIR inventories that disclosed both IG and commercial FTE included:

<u>Agency</u>	<u>% Inherently Governmental</u>	<u>% Commercial</u>
National Science Foundation	59.1%	40.9%
NASA	61.0%	39.0%
National Institutes of Health	47.9%	52.1%

Specific Comments:

- ❑ Census should revisit the proposed inventory coding with a view toward significantly reducing the number of FTE designated as inherently governmental as well as those assigned Reason Code A. Written justifications should be prepared for all those FTE that remain coded with those designations.
- ❑ Nearly all of the IG positions in the Census inventory are assigned the abbreviated reason of "binds US by contract," "binds US by authorization," or "binds US by regulation." These relate to the OMB Circular A-76 designation of a function as

inherently governmental if it involves: “Binding the United States to take or not to take some action by contract, policy, regulation, authorization, order or otherwise.” Without additional explanation, there is no basis for determining the specific reasons for the determination or how (or if) the other guidance in the Circular related to making the determination has been applied. For example, the Circular makes it clear that:

- Commercial activities “may be found within, or throughout, organizations that perform inherently governmental activities or classified work,”
 - That not every exercise of discretion is evidence that an activity is inherently governmental; and
 - That an activity may be provided by contract where the contractor does not have authority to decide on the course of action “ but is tasked to develop options or implement a course of action, with agency oversight.”
At the very least, these and other interpretive sections of the revised Circular would call into question any determination that all of a large group of FTE under a specific FCT code were inherently governmental.
- Accordingly, Census should provide detailed explanations for the following questions:
- In the area of “Regulatory and Program Management Support Services,” **all 453 FTE** under FCT Code D000 (Administrative Support) are coded as inherently governmental. “Binds US by regulation” is the abbreviated reason assigned to 434 of these FTE and “Ultimate control/people,” to the remaining 19 FTE. How do these reasons relate to a support services area? In any case, why are all of the FTE for this FCT code designated as inherently governmental?
 - In the same area, why are **all 1,458 FTE** under FCT Code D200 (Data Collection and Analysis) coded as inherently governmental? How does this functional area “bind the US by regulation,” as the assigned abbreviated reason suggests?
 - In the same area, why are **all 1,788 FTE** under FCT Code D300 (Statistical Analysis) coded as inherently governmental? How does this functional area “bind the US by regulation,” as the assigned abbreviated reason indicates for 1,772 of the FTE?
 - In the area of “Communications, Computing and Other Information Services,” why are **all 130 FTE** coded with Reason Code A for FCT code W000 (Administrative Support)?
 - In the same area, why are **all 650 FTE** coded with Reason Code A for FCT code W824 (Data Processing Services) ?
 - In the same area, why are **all 619 FTE** coded with Reason Code A for FCT code W826 (System Design, Development and Programming Services) ?
 - In the same area, why are **all 152 FTE** coded with Reason Code A for FCT code W827 (Software Services) ?
 - In the same area, why are **all 219 FTE** coded with Reason Code A for FCT code W999 (Other ADP Functions) ?
 - In the area of “Force Management and General Support,” why are **all 266 FTE** under FCT code Y000 (Administrative Support) coded as inherently governmental? How does this functional area “bind the US by regulation,” as the assigned abbreviated reason indicates?
 - In the same area, why are **all 370 FTE** under FCT code Y899 (Other Administrative Support Activities) coded as inherently governmental? How does

this functional area “bind the US by regulation,” as the assigned abbreviated reason indicates?

- In the same area, why are **all 280 FTE** under FCT code Y999 (Other Functions) coded as inherently governmental? How does this functional area “bind the US by regulation,” as the assigned abbreviated reason indicates for 267 of the FTE?

**Analysis of Proposed FY 2003 FAIR Act Inventory
Bureau: EDA**

Overview

As indicated, the FY 2002 ratio of inherently governmental (IG) to commercial FTE (65.3% / 34.7%) decreased slightly (62.1% / 37.9%) in the proposed FY 2003 inventory. In FY2002, all but one of the commercial FTE were coded with Reason Code B. In the proposed inventory, 39 commercial FTE have been assigned Reason Code E: “the Commercial Activity is pending an agency approved restructuring decision (e.g., closure, realignment.)” The result is a proposed inventory for FY 2003 that makes available 19.9% of the total Bureau FTE for competitive sourcing purposes.

Comparison of EDA FY 2002 and Proposed FY 2003 Inventories

	<i>FY 2002</i>	<i>FY 2003 Proposed</i>
<i>Total FTE</i>	277	277
<i>Inherently Governmental (IG) FTE</i>	181	172
<i>% IG</i>	65.3%	62.1%
<i>Commercial FTE</i>	96	105
<i>% Commercial</i>	34.7%	37.9%
<i>Reason Code A</i>	0	9
<i>Reason Code A as % of Commercial Inventory</i>	0	8.6%
<i>Reason Code B</i>	95	55
<i>Reason Code B as a % of Commercial Inventory</i>	99%	52.4%
<i>% of Total Inventory Available for Competition=Total Inventory/Reason Code B FTE</i>	34.3%	19.9%

EDA’s proposed FY 2003 IG to commercial ratios should be compared with other US Government agencies. For example, published FY 2002 FAIR inventories that disclosed both IG and commercial FTE included:

<u>Agency</u>	<u>% Inherently Governmental</u>	<u>% Commercial</u>
National Science Foundation	59.1%	40.9%
NASA	61.0%	39.0%
National Institutes of Health	47.9%	52.1%

Specific Comments:

- ❑ EDA should revisit the proposed inventory coding with a view toward reducing the number of FTE designated as inherently governmental. Written justifications should be prepared for all those FTE that remain coded with that designation.
- ❑ EDA should provide details concerning the pending workforce restructuring decision that served as the basis for assigning Reason Code E to 39 FTE.
- ❑ EDA should provide a detailed explanation for the following questions:

- In area of Grants Management, under FCT code L101 (Application Reviews and Evaluations) all 85 FTE are coded as inherently governmental with the abbreviated reason of “contract management.” This relates to the OMB Circular A-76 designation of a function as inherently governmental if it involves: “Determining, protecting, and advancing economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise.” EDA should explain how “Application Reviews and Evaluations” relate to this exception and why **all 85 of the FTE** are classified IG.
- In the same area, under FCT code L200 (Grants Monitoring and Evaluation) all 14 FTE are coded as inherently governmental with the abbreviated reason of “contract management.” For the reasons indicated above, EDA should explain why **all 14 of the FTE** are classified as IG.
- In the area of “Other Non-Manufacturing Operations,” under FCT code T833 (Civil Engineering and Analysis Service) all 30 FTE are coded as inherently governmental with the abbreviated reason of “significant affect/people.” This relates to the Circular designation of a function as IG if it involves: “Significantly affecting the life, liberty, or property of private persons.” EDA should explain how activities under this FCT code relate to that designation and why **all 30 of the FTE** are classified as IG.

**Analysis of Proposed FY 2003 FAIR Act Inventory
Bureau: ESA**

Overview

The Table below compares ESA's FY 2002 inventory with that proposed for FY 2003. As indicated, the FY 2002 ratio of inherently governmental (IG) to commercial FTE (38.4%/61.6%) increased (44.6% / 55.4%) in the proposed FY 2003 inventory. However in the proposed FY 2003 inventory, all of the commercial FTE were coded with Reason Code B (all were coded C in FY 2002. The result is a proposed inventory for FY 2003 that makes available 53.9% of the total Bureau FTE for competitive sourcing purposes.

Comparison of ESA FY 2002 and Proposed FY 2003 Inventories

	<i>FY 2002</i>	<i>FY 2003 Proposed</i>
<i>Total FTE</i>	73	65
<i>Inherently Governmental (IG) FTE</i>	28	29
<i>% IG</i>	38.4%	44.6%
<i>Commercial FTE</i>	45	36
<i>% Commercial</i>	61.6%	55.4%
<i>Reason Code A</i>	0	1
<i>Reason Code A as % of Commercial Inventory</i>	0%	2.8%
<i>Reason Code B</i>	0	35
<i>Reason Code B as a % of Commercial Inventory</i>	0%	97.2%
<i>% of Total Inventory Available for Competition=Total Inventory/Reason Code B FTE</i>	0%	53.9%

ESA's proposed FY 2003 IG to commercial ratio compares favorably with other US Government agencies. For example, published FY 2002 FAIR inventories that disclosed both IG and commercial FTE included:

<u>Agency</u>	<u>% Inherently Governmental</u>	<u>% Commercial</u>
National Science Foundation	59.1%	40.9%
NASA	61.0%	39.0%
National Institutes of Health	47.9%	52.1%

Specific Comments:

None.

**Analysis of Proposed FY 2003 FAIR Act Inventory
Bureau: ITA**

Overview

The Table below compares ITA's FY 2002 inventory with that proposed for FY 2003. As indicated, the FY 2002 ratio of inherently governmental (IG) to commercial FTE (51.4% / 48.6%) increased slightly (53.2% /46.8%) in the proposed FY 2003 inventory. Numerous clusters of functions with less than 10 FTE typify ITA's inventory. In FY 2002, these were correctly coded under Reason Code C. With that Reason Code no longer available, these positions have been coded as B. The result is a proposed inventory for FY 2003 that makes available 44.2% of the total Bureau FTE for competitive sourcing purposes.

Comparison of ITA FY 2002 and Proposed FY 2003 Inventories

	<i>FY 2002</i>	<i>FY 2003 Proposed</i>
<i>Total FTE</i>	2,315	2,297
<i>Inherently Governmental (IG) FTE</i>	1,191	1,223
<i>% IG</i>	51.4%	53.2%
<i>Commercial FTE</i>	1,124*	1,074
<i>% Commercial</i>	48.6%	46.8%
<i>Reason Code A</i>	0	0
<i>Reason Code A as % of Commercial Inventory</i>	0	0
<i>Reason Code B</i>	23	1,016
<i>Reason Code B as a % of Commercial Inventory</i>	1.9%	94.6%
<i>% of Total Inventory Available for Competition=Total Inventory/Reason Code B FTE</i>	1%	44.2%

*1,095 positions were coded as C for less than 10 FTE.

ITA's proposed FY 2003 IG to commercial ratio is comparable to other US Government agencies. For example, published FY 2002 FAIR inventories that disclosed both IG and commercial FTE included:

<u>Agency</u>	<u>% Inherently Governmental</u>	<u>% Commercial</u>
National Science Foundation	59.1%	40.9%
NASA	61.0%	39.0%
National Institutes of Health	47.9%	52.1%

Specific Comments:

None.

**Analysis of Proposed FY 2003 FAIR Act Inventory
Bureau: MBDA**

Overview

The Table below compares MBDA's FY 2002 inventory with that proposed for FY 2003. As indicated, the breakdowns for the two years are identical. All of the commercial FTE were coded with Reason Code A. The result is a proposed inventory for FY 2003 that makes available **none** of MBDA's total FTE for competitive sourcing purposes.

Comparison of MBDA FY 2002 and Proposed FY 2003 Inventories

	<i>FY 2002</i>	<i>FY 2003 Proposed</i>
<i>Total FTE</i>	96	96
<i>Inherently Governmental (IG) FTE</i>	70	70
<i>% IG</i>	72.9	72.9%
<i>Commercial FTE</i>	26	26
<i>% Commercial</i>	27.1	27.1%
<i>Reason Code A</i>	26	26
<i>Reason Code A as % of Commercial Inventory</i>	100	100
<i>Reason Code B</i>	0	0
<i>Reason Code B as a % of Commercial Inventory</i>	0	0
<i>% of Total Inventory Available for Competition=Total Inventory/Reason Code B FTE</i>	0	0

MBDA's proposed FY 2003 IG to commercial ratios should be compared with other US Government agencies. For example, published FY 2002 FAIR inventories that disclosed both IG and commercial FTE included:

<u>Agency</u>	<u>% Inherently Governmental</u>	<u>% Commercial</u>
National Science Foundation	59.1%	40.9%
NASA	61.0%	39.0%
National Institutes of Health	47.9%	52.1%

Specific Comments:

- MBDA should revisit the proposed inventory coding with a view toward significantly reducing the number of FTE designated as inherently governmental or Reason Code A.
- All of the IG positions on the MBDA inventory are assigned the abbreviated reason of "binds US by contract." This relates to the OMB Circular A-76 designation of a function as inherently governmental if it involves: "Binding the United States to take or not to take some action by contract, policy, regulation, authorization, order or otherwise." There is no basis for determining the specific basis for the determination or how (or if) the other guidance in the Circular related to making the determination has been applied. For example, the Circular makes it clear that:

- Commercial activities “may be found within, or throughout, organizations that perform inherently governmental activities or classified work,”
- That not every exercise of discretion is evidence that an activity is inherently governmental; and
- That an activity may be provided by contract where the contractor does not have authority to decide on the course of action “ but is tasked to develop options or implement a course of action, with agency oversight.”

At the very least, these and other interpretive sections of the revised Circular would call into question any determination that all of a large group of FTE under a specific FCT code were inherently governmental.

- MBDA should provide a detailed explanation for the following questions:
 - In the area of “Grants Management,” why are **all 20 FTE** under FCT code L200 (Application Reviews and Evaluations) coded as inherently governmental? ? How does this functional area “bind the US by contract,” as the assigned abbreviated reason indicates?
 - In the area of “Force Management and General Support,” why are **all 15 FTE** under FCT code Y000 (Administrative Support) coded as inherently governmental (1 FTE) or Reason Code A (14 FTE)?
 - In the same area, why are **all 24 FTE** under FCT code Y105 (Management Headquarters-Policy Interpretation) coded as inherently governmental? How does this functional area “bind the US by contract,” as the assigned abbreviated reason indicates?

**Analysis of Proposed FY 2003 FAIR Act Inventory
Bureau: NIST**

Overview

The Table below compares the Bureau's FY 2002 inventory with that proposed for FY 2003. As indicated, the already high ratio of inherently governmental (IG) to commercial FTE (65.1% / 34.9%) increased slightly (66.9% / 33.1%) in the proposed FY 2003 inventory. NIST use of Reason Code A to exempt commercial FTE from cost comparisons dropped from 30.8% to 17.2%. However, the use of Reason Code B also dropped from 69.2% to 52.5%. This was due to coding 307 FTE as Reason Code C ("The commercial activity is the subject on an in-progress streamlined or standard competition.") The result is a proposed inventory for FY 2003 that makes available 17.4% of the total Bureau FTE for future competitive sourcing purposes.

Comparison of NIST FY 2002 and Proposed FY 2003 Inventories

	<i>FY 2002</i>	<i>FY 2003 Proposed</i>
<i>Total FTE</i>	3,112	3,064
<i>Inherently Governmental (IG) FTE</i>	2,027	2,050
<i>% IG</i>	65.1%	66.9%
<i>Commercial FTE</i>	1,085	1,014
<i>% Commercial</i>	34.9%	33.1
<i>Reason Code A</i>	334	175
<i>Reason Code A as % of Commercial Inventory</i>	30.8%	17.2%
<i>Reason Code B</i>	751	532
<i>Reason Code B as a % of Commercial Inventory</i>	69.2%	52.5%
<i>% of Total Inventory Available for Competition=Total Inventory/Reason Code B FTE</i>	24.1%	17.4%

The Bureau's proposed FY 2003 IG to commercial ratios should be compared with other US Government agencies with scientific/technical missions. For example, published FY 2002 FAIR inventories that disclosed both IG and commercial FTE included:

<u>Agency</u>	<u>% Inherently Governmental</u>	<u>% Commercial</u>
National Science Foundation	59.1%	40.9%
NASA	61.0%	39.0%
National Institutes of Health	47.9%	52.1%

Specific Comments:

- NIST should revisit the proposed inventory coding with a view toward significantly reducing the number of FTE designated as inherently governmental as well as those assigned Reason Code A. Written justifications are required for all those FTE that remain coded with those designations.
- NIST should provide detailed explanations for the following questions:

- In the area of “Research, Development, Test and Evaluation,”⁴ **all 1,477 FTE** under FCT code R120 (Science and Technology) are coded as inherently governmental or Reason Code A? The IG positions (1,452 FTE) have the following abbreviated reasons:

“1.a.1 bind US by policy; 1.a.2 ensuring fair commerce; 1.a.3 significantly affecting the safety and property of private persons; 1.c.6 the development of primary/fundamental standards is a nonrecurring service not performed by the private sector.”

Although most of these track to paragraphs in the revised Circular, the Circular also makes it clear that:

- Commercial activities “may be found within, or throughout, organizations that perform inherently governmental activities or classified work,”
- That not every exercise of discretion is evidence that an activity is inherently governmental; and
- That an activity may be provided by contract where the contractor does not have authority to decide on the course of action “ but is tasked to develop options or implement a course of action, with agency oversight.”

At the very least, these and other interpretive sections of the revised Circular would call into question any determination that all of a large group of FTE under a specific FCT code were inherently governmental. Accordingly, NIST should provide a detailed rationale for the determinations that 1,452 FTE were inherently governmental and the remaining 25 FTE that were Reason Code A.

⁴ The previous OMB Circular A-76 indicated that “This Circular and its Supplement shall not apply to the conduct of research and development. However, severable in-house commercial activities in support of research and development, such as those listed in Attachment A, are normally subject to this Circular and its Supplement.” The new Circular contains no exemption for research and development

**Analysis of Proposed FY 2003 FAIR Act Inventory
Bureau: NOAA**

Overview

The Table below compares NOAA's FY 2002 inventory with that proposed for FY 2003. As indicated, the FY 2002 remarkably high ratio of inherently governmental (IG) to commercial FTE (71.1% / 28.9%) has been lowered somewhat (67.3%/32.7%) in the proposed FY 2003 submission. However, the use of Reason Code A to exempt commercial FTE from cost comparisons has more than tripled (22.3% to 69.2%). The result is a proposed inventory for FY 2003 that makes available only 7.4% of the total Bureau FTE for competitive sourcing purposes.

Comparison of NOAA FY 2002 and Proposed FY 2003 Inventories

	<i>FY 2002</i>	<i>FY 2003 Proposed</i>
<i>Total FTE</i>	11,932	12,376
<i>Inherently Governmental (IG) FTE</i>	8,487	8,325
<i>% IG</i>	71.1%	67.3%
<i>Commercial FTE</i>	3,445	4,051
<i>% Commercial</i>	28.9%	32.7%
<i>Reason Code A</i>	768	2,802
<i>Reason Code A as % of Commercial Inventory</i>	22.3	69.2%
<i>Reason Code B</i>	934	914
<i>Reason Code B as a % of Commercial Inventory</i>	27.1%	22.6%
<i>% of Total Inventory Available for Competition=Total Inventory/Reason Code B FTE</i>	7.8%	7.4%

NOAA's proposed FY 2003 IG to commercial ratios should be compared with other US Government agencies that have scientific/technical missions. For example, published FY 2002 FAIR inventories that disclosed both IG and commercial FTE included:

<u>Agency</u>	<u>% Inherently Governmental</u>	<u>% Commercial</u>
National Science Foundation	59.1%	40.9%
NASA	61.0%	39.0%
National Institutes of Health	47.9%	52.1%

Specific Comments:

- ❑ NOAA should revisit the proposed inventory coding with a view toward significantly reducing the number of FTE designated as inherently governmental as well as those assigned Reason Code A. Written justifications are required for all those FTE that remain coded with those designations.
- ❑ The abbreviated reasons that have been added to the NOAA revised inventory are simply references to one of 4 paragraphs of OMB Circular A-76 (Rev.) that address what an inherently governmental activity involves. There is no basis for determining

the specific reasons for the determination or how (or if) the other guidance in the Circular related to making the determination has been applied. For example, the Circular makes it clear that:

- Commercial activities “may be found within, or throughout, organizations that perform inherently governmental activities or classified work,”
- That not every exercise of discretion is evidence that an activity is inherently governmental; and
- That an activity may be provided by contract where the contractor does not have authority to decide on the course of action “ but is tasked to develop options or implement a course of action, with agency oversight.”

At the very least, these and other interpretive sections of the revised Circular would call into question any determination that all of a large group of FTE under a specific FCT code were inherently governmental. Accordingly, NOAA should provide detailed explanations for the following questions:

- In the area of “Regulatory and Program Management Support Services,” why are **137 of 140 FTE** under the FCT Code D100 (Regulatory Activities Support) coded as inherently governmental?
- In the area of “Environment,” why are **751 of 763 FTE** under the FCT code E120 (Environmental and Natural Resource Services) coded as inherently governmental or Reason Code A?
- In the same area, why are **all 131 FTE** under the FCT code E600 (Environmental Planning/NEPA) coded as inherently governmental?
- In the area of “Intermediate, Direct or General Repair and Maintenance of Equipment,” why are **322 of 366 FTE** under FCT code J507 (Electronic and Communications Equipment) coded as inherently governmental or Reason Code A?
- In the area of “Research, Development, Test and Evaluation,”⁵ why are **1,198 of 1,199 FTE** under FCT code R120 (Science and Technology) coded as inherently governmental or Reason Code A?
- In the same area, why are **248 of 252 FTE** under FCT code R140 (Management and Support to R&D) coded as inherently governmental or Reason Code A?
- In the same area, why are **291 of 297 FTE** under FCT code R600 (Applied Research) coded as inherently governmental or Reason Code A?
- In the area of “ Communications, Computing and Other Information Services,” why are **857 of 901 FTE** under FCT Code W000 (Administrative Support) are coded as inherently governmental or Reason Code A.?
- In the same area, why are all **1,434 FTE** under FCT code W440 (Meteorological and Geophysical Services) coded as inherently governmental or Reason Code A?
- In the same area, why are **796 of 846 FTE** under FCT code W601 (Information Technology Management) coded as inherently governmental or Reason Code A?
- In the area of “Force Management and General Support,” why are **all 807 FTE** under FCT code Y210 (Management Headquarters-Operation Planning and Control) coded as inherently governmental or Reason Code A?

⁵ The previous OMB Circular A-76 indicated that “This Circular and its Supplement shall not apply to the conduct of research and development. However, severable in-house commercial activities in support of research and development, such as those listed in Attachment A, are normally subject to this Circular and its Supplement.” The new Circular contains no exemption for research and development.

- In the same area, why are **all 519 FTE** under FCT code Y215 (Operation Planning and Control) coded as inherently governmental or Reason Code A?

**Analysis of Proposed FY 2003 FAIR Act Inventory
Bureau: NTIA**

Overview

With only 280 FTE, NTIA is one of the smaller Departmental bureaus. The Table below compares NTIA's FY 2002 inventory with that proposed for FY 2003. As indicated, the Departmental highest FY 2002 ratio of inherently governmental (IG) to commercial FTE (91.3%/8.7%) decreased (70.4% / 29.6%) in the proposed FY 2003 inventory. In the proposed FY 2003 inventory, all of the commercial FTE were coded with Reason Code A. The result is a proposed inventory for FY 2003 that makes available **none** of the total Bureau FTE for competitive sourcing purposes.

Comparison of NTIA FY 2002 and Proposed FY 2003 Inventories

	<i>FY 2002</i>	<i>FY 2003 Proposed</i>
<i>Total FTE</i>	286	280
<i>Inherently Governmental (IG) FTE</i>	261	197
<i>% IG</i>	91.3%	70.4%
<i>Commercial FTE</i>	25	83
<i>% Commercial</i>	8.7%	29.6%
<i>Reason Code A</i>	0	83
<i>Reason Code A as % of Commercial Inventory</i>	0	100%
<i>Reason Code B</i>	0	0
<i>Reason Code B as a % of Commercial Inventory</i>	0	0
<i>% of Total Inventory Available for Competition=Total Inventory/Reason Code B FTE</i>	0	0

NTIA's proposed FY 2003 IG to commercial ratios should be compared with other US Government agencies. For example, published FY 2002 FAIR inventories that disclosed both IG and commercial FTE included:

<u>Agency</u>	<u>% Inherently Governmental</u>	<u>% Commercial</u>
National Science Foundation	59.1%	40.9%
NASA	61.0%	39.0%
National Institutes of Health	47.9%	52.1%

Specific Comments:

- NTIA should revisit the proposed inventory coding with a view toward significantly reducing the number of FTE designated as inherently governmental or Reason Code A. Written justifications are required for all those FTE that remain coded with those designations.

- NTIA should provide a detailed explanation for the following questions:
- In the area of “ Research, Development, Test and Evaluation,” **why are all 83 FTE** under FCT code R300 (Developmental) coded with Reason Code A?⁶
- In the area of “Force Management and General Support,” all 145 **FTE** under FCT code Y999 (Other Functions) are coded as inherently governmental with the abbreviated reasons of “binds US by policy,” or “binds US by policy/spectrum management.” This relates to the OMB Circular A-76 designation of a function as inherently governmental if it involves: “Binding the United States to take or not to take some action by contract, policy, regulation, authorization, order or otherwise.” There is no basis for determining the specific reasons for the determination or how (or if) the other guidance in the Circular related to making the determination has been applied. For example, the Circular makes it clear that:
 - Commercial activities “may be found within, or throughout, organizations that perform inherently governmental activities or classified work,”
 - That not every exercise of discretion is evidence that an activity is inherently governmental; and
 - That an activity may be provided by contract where the contractor does not have authority to decide on the course of action “ but is tasked to develop options or implement a course of action, with agency oversight.”

At the very least, these and other interpretive sections of the revised Circular would call into question any determination that all of a large group of FTE under a specific FCT code were inherently governmental. Accordingly, NTIA should provide a detailed rationale for the determination that all 145 FTE were inherently governmental.

⁶ The previous OMB Circular A-76 indicated that “This Circular and its Supplement shall not apply to the conduct of research and development. However, severable in-house commercial activities in support of research and development, such as those listed in Attachment A, are normally subject to this Circular and its Supplement.” The new Circular contains no exemption for research and development.

Proposed FY 2003 FAIR Act Inventory
Bureau: NTIS

All 187 FTE are coded as Reason Code F on the basis of a statutory exemption. No analysis was performed.

**Analysis of Proposed FY 2003 FAIR Act Inventory
Technology Administration (TA)**

Overview

TA's proposed FAIR Act Inventory that was submitted for analysis is **identical** to the FY 2002 inventory. Of the 44 FTE, 32 were determined to be inherently governmental and none were assigned Reason Code B. The result is a proposed inventory for FY 2003 that makes available none of TA's total FTE for competitive sourcing purposes.

Comparison of OIG FY 2002 and Proposed FY 2003 Inventories

	<i>FY 2002</i>	<i>FY 2003 Proposed</i>
<i>Total FTE</i>	44	44
<i>Inherently Governmental (IG) FTE</i>	32	32
<i>% IG</i>	72.8	72.8
<i>Commercial FTE</i>	12	12
<i>% Commercial</i>	27.2	27.2
<i>Reason Code A</i>	10	10
<i>Reason Code A as % of Commercial Inventory</i>	83.3%	83.3%
<i>Reason Code B</i>	0	0
<i>Reason Code B as a % of Commercial Inventory</i>	0%	0%
<i>% of Total Inventory Available for Competition=Total Inventory/Reason Code B FTE</i>	0%	0%

Specific Comments:

None.