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DRAFT OMB CIRCULAR A-76 (NOVEMBER 14, 2002)

REVIEW COMMENTS AND RECOMMENDATIONS

GENERAL COMMENTS:

The Department of Energy (DOE) supports- the overarching goal of OMB Circular A-76 that agencies should obtain "the best deal to the Taxpayer." We also support revisions to the Circular that "Keep the Process Moving" with the end result being: Faster/Cheaper Competitions; Improved Performance and Measures; Enhanced/Expanded Competition; Fairness; Realizing Significant Savings; and the Redirection of Resources to Mission Critical Requirements.

Upon review of the draft Circular, the Department believes the proposed changes to Circular reflect a general improvement over the current version. The Department does, however, have some comments and recommendations that may, if incorporated, improve the new Circular, enhance competitions, and foster achievement of the Administration's goals and objectives. ..

As with other OMB Circulars, A-76 should provide agencies with a general framework for implementing public-private competitions while maintaining agency-heads' normal discretion to make advantageous and situation-specific business decisions that meet the needs of their respective agencies. Additionally, there were several instances where the draft Circular requires agency heads to obtain OMB approvals for decisions that normally fall within a cabinet officer's purview.

The Circular could also be more performance based, stating desired outcomes instead of providing requirements that specify in great detail whom should do what. Federal agencies have very different missions and therefore have widely varying organizational structures and staff resources to perform competitive sourcing.

While the Circular makes the playing field more level between public and private offerors for a commercial activity, there are instances where the playing field could be made more uniform in the Circular. For example, the draft requires that public tender awards be subject to routine public-private re-competition. It

does not, however, require that awards made to private vendors be subjected to private-public re-competition.

To execute competitions in a more expeditious manner, agencies may need more flexibility (not less). Agencies will also require additional resources for dedicating full-time staff to the process; additional funding to train A-76 participants and agency leadership; consultant support to assist Federal bidders who do not normally operate or think as competitors; and the tools necessary to devise and implement innovative business practices that compliment the competition process.

It is essential that A-76 studies be funded as a necessary expense in support of the Administration's policy that commercial activities be routinely competed. OMB support in obtaining the additional funding (plus-ups) needed to implement standard competitions, direct conversions, and ISSA's requirements is critical and must come from both the management and the budget entities at OMB. In that vein, the Circular should require agencies to identify and track all costs associated with the competition of commercial activities, to include the base-lining of studies. Such historical trends/figures should be used as the basis for developing agency-specific competitive sourcing related budget estimates.

Although the draft Circular calls for centralized management of the program within an agency, the "4e official" is tasked with a large number of responsibilities. With the "4e official" being mandated to be the equivalent of an Assistant Secretary, this person may not have sufficient time to be actively engaged in the execution of the program. This is another reason agencies need flexibility to execute their A-76 programs. In this case, agencies should be given discretion to determine the rank of the official(s) who will serve as the 4.e. Official.

It is unlikely that the proposed timelines of 12 months for a Standard Competition and 15 working days to prepare a business case analysis for a Direct Conversion can be routinely met without additional fundamental changes to the A-76 process. The government does not operate in the same context as the private sector, which is in the business of exploring new work opportunities and responding to bid proposals. Additionally, the government does not typically baseline all of its work requirements down to the staff level -- which is essentially required in an A-76 competition. Developing each scope of work (Performance Work Statement) for activities currently performed by Federal employees takes significant time and must be crafted in such a manner that all permanent and many ad-hoc functions are fully captured. An incomplete PWS or an accelerated procurement could potentially jeopardize mission critical operations that the pre-competed agency commercial activities and associated employees support. Also, each competition is unique and should be carried out to ensure that the public good is achieved. There may also be circumstances where alternative time frames are required as a result of delays beyond an agency's control. We could not identify any other type of acquisition that has such rigid time frames.

The Department requests that a compromise of 18 months for a Standard Competition and 3 months for a Direct Conversion be considered. These timeframes will greatly speed up the process, while also allowing the government to make sound business decisions within existing operational constraints. As civilian agencies gain more experience with public-private competitions, the opportunity to reduce these timeframes could be further evaluated. Alternatively, agencies should be given authorization to internally extend their timeframes for up to six months, with sufficient written justification, prior to the one-time six-month extension contingent upon OMB approval.

OMB may want to conduct additional study and analysis to identify refined policies and practices that would, as compared to the proposed draft, be aimed at streamlining the A-76 processes from pre-announcement to award. Future revisions should continue to instill fairness and equity into the program for all interested and affected parties.

The draft circular repeatedly refers to the Federal Acquisition Regulations (FAR). The Circular should recognize that some agencies are not subject to and do not follow the FAR. We recommend that language be included acknowledging that those agencies not subject to the FAR will conduct their A-76 reviews pursuant to their own procurement policies and the applicable provisions of the Circular.

While the Draft Circular is certainly more succinct than previous versions, and the consolidation of all A-76 processes/procedures into a single source document facilitates execution of the program, the revised Circular is complex and may be difficult to understand. As an example, the explanation and references to the acquisition strategies and procedures seem to be over-simplified.

The one significant constraint that the Circular does not address in its attempt to level the playing field is the difference between the government's and the private sector's personnel management systems. Private sector entities have significant flexibility to hire, fire, pay, promote, move, retain, and reward employees. Other than pursuing reductions-in-force (RIF), government agencies are limited in their ability to make personnel decisions that help to maximize effectiveness and reduce operating costs. Reductions-in-Force actions, which are expensive both in terms of financial impacts as well as mission impacts - are not a strategic management tool that allows agencies to place the right people in the right jobs. In order to truly compete with the private sector on an equal footing, the public sector will need human capital asset management flexibilities that foster/encourage performance management and facilitate rightsizing. We strongly request that OMB and OPM champion these necessary changes through legislative action (authorities).

The Department of Energy's detailed section-by-section comments and recommendations follow.

DEPARTMENT OF ENERGY REVIEW COMMENTS BY CIRCULAR SECTION:

THE CIRCULAR

1. Purpose.

[Page 1, 1.] The proposed statement of purpose is subject to wide interpretation and application. Is it not clear whether it is to require that all commercial activities performed by federal employee (this includes ISSAs) and all commercial activities performed by contractors will be subject to on-going public-private competition or to establish the rules for public-private competition? We recommend that OMB clarify the scope of this Circular by stating one clear purpose and ensuring that the remaining supporting policy and procedures are consistent with and support such purpose.

4. Policy.

[Page 1, 4.b.] The Circular proposes a broad presumption that "all activities are commercial in nature unless an activity is justified as inherently governmental." Such a presumption would appear to shift the balance of the Circular toward the private sector and is difficult to understand inasmuch as there are numerous

government activities that are purely, on their face, inherently governmental in nature. Furthermore, this "presumption" does not address the fact that many agencies enjoy legislative prescription that the implementation of mission requirements is to be accomplished by Federal employees. For example, Public Law 107-71, Aviation and Transportation Security Act, in SEC. 106., IMPROVED AIRPORT PERIMETER ACCESS SECURITY, specifically provides "Deployment of federal law enforcement personnel. - The Secretary may enter into a memorandum of understanding or other agreement with the Attorney General or the head of any other appropriate Federal law enforcement agency to deploy Federal law enforcement personnel at an airport in order to meet aviation safety and security concerns." Such legislative preclusion should make a written justification unnecessary. Since one of the Circular's precepts rest on "fairness" it may be more appropriate that it remain neutral or silent on the nature of the work. We agree that inherently governmental functions, not clearly prescribed in law, can and should be justified, however, we believe no presumptions or assumptions about the commercial or inherently governmental nature of the government's activities are necessary to achieve this end.

[Page 1, 4.c.] In keeping with the expanded scope of the Draft Circular, we recommend simplifying the sentence to read: "Use a competitive process to determine the providers of commercial activities." Or if the intent is to mandate use of Attachments A and B only, reword "Use the Standard Competition or Direct Conversion process to determine the providers of commercial activities."

[Page 1, 4.e.] The current Circular, "9a official" is an unofficial shorthand term that came into existence because there was no specific title assigned to this official. We recommend that the 4.e. Official be given a proper title (e.g., Agency A-76 Competition Official) and referenced by that title throughout the document.

[Page 1, 4.f.] The identified policy seems somewhat contradictory, "centralize in one or more offices." We recommend deleting or rewording this provision for clarity as to the intent.

7. Effective Date. [Page 2, 7.] The application of this Circular to competitions that are in-progress is subject to wide interpretation, and is unclear. For example, is the "solicitation date" the "issue date" or the "due date"? For solicitations that are issued on or after January 1, 2003, how does the timeline requirement affect them? Will they need to make an announcement in *FedBizOpps* per the policy; how do they address the timeline? Will they need to officially appoint the competition officials at this time? Do they need to amend the solicitation and release the QASP? The impact of the new circular's timeframes on existing studies needs to be recognized, especially for studies that have already been publicly announced, schedules approved by senior officials and support contracts implemented. We recommend clearer transition guidance here or in a transmittal memorandum to eliminate a wide variety of interpretations and to establish standardized implementation across federal agencies. In particular we strongly recommend that the new Circular timeframes only apply to studies that have not been publicly announced. Agencies should be able to accommodate the other provisions of the Circular into their ongoing studies upon its signature. _

CIRCULAR ATTACHMENTS

Attachment A: Inventory Process

A. INVENTORY REQUIREMENTS

1. Agencies

[Page A-1, A. 1.] The second sentence should be reworded for clarity and indicate that "commercial activities may be part of an organization that performs inherently governmental or classified work where such recurring work is separable from other functions or activities being performed and where such work may suitable for performance by contract."

C. TYPES OF INVENTORIES

Although, the three separate inventories required in this section, when combined, add up to the total amount of federal employees that belong to the agency, the approach taken in the Circular does not present a complete "picture" of the agency's activities. For example, the inventory/list of commercial ISSAs required in Attachment D.B.4 should be included, as well as an inventory of commercial activities that are already contracted out with the contractor support equivalent personnel (Non-Appropriated Fund Instrumentality personnel should also be included). For determining activities, or groupings of activities for competition, these separate inventories give a disjointed view of the activity, and it is difficult to match them up in their current form. On many occasions, an activity is chosen from the FAIR Act inventory, announced for competition, only to find out during the PWS development that many of the functions imbedded in the activity are inherently governmental and/or that part of the work is being performed by a contractor; determining how to handle this situation is one reason why PWS development may take longer than expected.

We recommend requiring both an inventory of commercial ISSAs and contractor activities in addition to the three inventories already required. We also recommend that these separate inventories be combined into one comprehensive, consolidated inventory for the agency. This inventory would meet all the requirements of the FAIR Act, but would also include the additional inventories' information. A more comprehensive set of reason codes and more flexible function codes should be established to make this inventory easy to understand. This comprehensive inventory would give OMB, the private sector, and the public more visibility into the agency. Additionally, this holistic view of the agency's activities and who is performing them would facilitate better decision making when choosing activities to compete, saving considerable time in the competition processes.

D. COMMERCIAL ACTIVITIES

[Page A-2, D.] The definition of a commercial activity should include the terms "complete" and "separable" which is consistent with the longstanding approach in the current Circular. Consequently "a commercial activity is a complete, separable recurring function or service that could be performed by the private sector and is resourced, performed, and controlled by the agency through contract, Commercial Inter-Service Support Agreement (ISSA), or agency Federal employee performance. A commercial activity is not so intimately related to the public interest as to mandate performance by government personnel."

E. INHERENTLY GOVERNMENTAL ACTIVITIES

It is not clear why the Circular proposes a different and narrower definition of "Inherently Governmental" than the definition codified into law by the Federal Inventory Reform Act of 1998, Public Law 105-270 (October 1998), (FAIR Act), a cited authority for the Circular and the very basis for conducting FAIR Act Inventories. Specifically, the Act states, at Section 5(2):

An inherently governmental function involves, *among other things, the interpretation and execution of the laws of the United States* so as - (i) to bind the United States

(Emphasis supplied)

While the FAIR Act includes the types of activities listed under E.1. a - d. of the draft Circular, the Act, by the inclusion of the phrase "among other things," does not characterize these activities as an exclusive list as does the draft Circular; moreover, the Act recognizes that such functions, in all cases, include "the interpretation and execution of the laws of the United States," a key phrase missing from the draft Circular. Moreover, the Act includes in its list of inherently governmental functions one function completely missing from the draft Circular, specifically, ". . . the interpretation and execution of the laws of the United States so as - . . . (iv) to commission, appoint, direct, or control officers or employees of the United States. . . ." OMB's explicit exclusion of these functions from the definition appears to imply that it is now permissible for contractors to manage/direct the actions of Federal employees.

Fundamentally, there is a core set of activities, functions, and services that citizens and Congress want and expect to be performed by government employees vice the private sector - (e.g., regulatory enforcement, oversight, etc) even where there are no legislative restrictions prescribed. We are concerned that the application of the definition proposed in the Circular would result in the classification of almost all activities now performed by the government as commercial. The result being that vast majority of the work now performed by the government would be subject to competition and potentially provided by contractors with limited exceptions, provided by the Circular, primarily for agency CORs/COTRs and final agency decision makers. The Department of Energy is already highly leveraged with a 10-1 contractor to Federal employee ratio. The restrictive definition proposed in the Circular would potentially have contractors doing oversight of contractors. OMB's inclusion of the term "substantial agency discretion" seems to presume that all final government decision makers are always in a position to know whether a private sector provider has identified the full range of potential options when suggesting a course of action for the decision maker to approve. Since the current language essentially precludes intermediary decision makers/reviewers from being considered inherently governmental, the government may unintentionally suffer if there are no Federal resources, below the level of the final decision maker, to conduct the necessary analysis, validation, and oversight of a contractors work product. And in cases where only one course of action is viable, it is conceivable that the public may hold that action to be suspect if a contractor played a significant role in devising that course of action on behalf of the government. This is magnified whenever there is a perception that the private sector could directly or indirectly benefit from an action taken by the government or where a decision to take no action may benefit a private sector party.

Consequently, the Department recommends that the Circular's definition of Inherently Governmental be in full conformance with FAIR Act definition which is as follows:

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.

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 and entitlements. An inherently governmental function involves, among other things, the interpretation and execution of the laws of the United States so as--

(i) to bind the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;

(ii) to 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;

(iii) to significantly affect the life, liberty, or property of private persons;

(iv) to commission, appoint, direct, or control officers or employees of the United States; or

(v) to 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.

Functions excluded.--The term does not normally include--

(i) gathering information for or providing advice, opinions, recommendations, or ideas to Federal Government officials; or

(ii) 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).

F. FAIR ACT CHALLENGE AND APPEAL PROCESS

2. The FAIR Act Inventory Challenge and Appeal Process

Editorial Comments:

[Page A-1, C.1.a.] For consistency, replace "work" with "activities."

Attachment B: Public Private Competition

The chart depicting the Standard Competition Process is straight forward and simple which should aid in understanding the process; however the flow chart starting with "Type of acquisition " under Source Selection and Performance Decision is confusing because in reality, while all these "decisions" are made during the solicitation step, they are executed in the source selection step. We recommend that the five-step process be further simplified by removing this material from the flow chart. This flow chart should be revised for clarity and inserted in the appropriate section to show a higher level of detail. The "start date" and "end date" circles should be moved up to the timeline where it is relevant and easier to see.

B. DESIGNATIONS AND RESPONSIBILITIES

The designation of competition officials that will be held accountable in their performance appraisals is an important step in improving the effectiveness and the timeliness of competitions. In practice, the most successful studies occur where Senior Leadership has taken an active role in the process, where competitive sourcing is a priority, and where decision makers in the PWS, MEO, and acquisition processes are encouraged to innovate.

Additionally, the effective participation of the Contracting Office and Human Resources (HR) Office is key to successful competitions. The PWS Team can write clear requirements in the PWS, but that is only one part of the solicitation (Section C), the CO must develop an acquisition strategy that encourages competition and innovation and facilitates source selection. In conducting performance-based acquisitions, the source selection process becomes more significant. The MEO Team can design a winning MEO, but if HR cannot recruit, staff and retain staff, then the MEO may be unable to perform. If the private sector wins the competition, HR must effectively transition the displaced federal employees.

In our view, the specific designation of procurement and human resources staff as A-76 participants may help facilitate the process. However, we have some concerns with the specific responsibilities assigned to the CO and HRA as proposed (see below).

2. Contracting Officer

[Page B-3, B.2.] The Contracting Officer (CO) is clearly accountable for the solicitation including the PWS, but we strongly believe that agencies should have flexibility in assigning staff to designate or otherwise lead the PWS Team. While we would certainly agree that procurement staff (e.g., contract specialists) actively participate in the PWS development process, we would not necessarily want the CO to "designate" or "directly assist" the PWS Team. In reality, the CO is not usually familiar with the function or the personnel in the function, so Senior Leadership and perhaps even the ATO, would make recommendations as to who should be on the PWS Team. If the CO is actively participating in the development of the PWS, they may lose their objectivity as part of the checks and balances that help ensure a level playing field. The CO is the facilitator of the acquisition process. We see the CO's primary responsibilities being to ensure the source selection strategy or acquisition plan creates a level playing field for the competition, encourages competitors to come to the table, and ensures the responsiveness and cost realism of both the private sector offers and the agency tender. . Thus the designation of the CO as the PWS Lead may negatively impact the public-private competition process. We recommend that "The CO shall designate and assist the PWS Team.," be replaced with " CO's shall work with the PWS Team and SSA to develop and execute the acquisition plan consistent with FAR Subpart 7.1."

Additionally, we believe that requiring an acquisition plan that is approved by the 4.e. Official prior to the issuance of the solicitation will ensure that the CO considers all aspects of the acquisition early in the process and can mitigate problems that might hinder meeting the timeline.

3. Human Resource Advisor (HRA)

[Page B-3, B.3.] The designated responsibility of Human Resources (HR) in this process is an important addition. However, we feel that the responsibilities to (c) "inform the incumbent service providers of the competition," and to (d) "make public announcement at the local level and in *FedBizOpps* and include in

these announcements the agency, location, resources being competed and agency officials responsible for its completion," should be stated as general requirements in Section C.1., Preliminary Planning for Public Announcement. We agree that these activities need to be accomplished, but not by the HRA; Senior Leadership should be responsible for (c), and (d) which could be accomplished by a wide-range of agency personnel. With respect to the provision of "post-employment restrictions to employees" and the determination of "compliance with the Right-of-First Refusal," such responsibility is appropriately placed at the Department of Energy with the Office of General Counsel, not the Director of Human Resources Management. In practice, HR works as facilitators between employees and management-in the competitive sourcing environment it will be even more important to maintain HR in this neutral role so that Federal employees feel comfortable working with HR on sensitive employment issues. Putting (c) and (d) in this general section will allow agencies flexibility to designate whom should perform these tasks. It is recommended that the responsibilities identified herein be described as suggested, not mandated.

Editorial Comments:

**[Page B-3, B.2.] For consistency, Contracting Officer should have the acronym after the title, i.e., Contracting Officer (CO)

**[Page B-3, B.] For clarity, it might be helpful to title this section "B. DESIGNATION OF COMPETITION OFFICIALS," then "1. Designation and Appointment" with language that tells the reader that the "4.e. official, shall appoint, in writing, competition officials...etc. Also consider revising the listing order to: SSA, CO, ATO, HRA, and AAA

**[Page B-3, B.3.b.] In title of section, replace colon with period.

C. STANDARD COMPETITION PROCEDURES

1. Preliminary Planning For Public Announcement

b. Competition Preparation Considerations

[Page B-4, General Comment] The page and a half of Special Considerations listed at the back of this Attachment in section D. should be moved in its entirety to this section. It can be reordered to fit nicely here. Moreover, the conflict of interest concepts are so fundamental to the process that they must be considered at this point in the Competition Procedures. Having these considerations listed earlier in Attachment B will help the reader better understand the process.

[Page B-4, C.1.a] As part of the preliminary planning phase, a cost-benefit analysis should be incorporated into the process to determine if and when the cost of conducting the study will be recouped by the agency.

[Page B-4, C.1.b] The Circular should include all pertinent requirements for public announcement. Presently, two are listed in the duties of the HRA, but they would be better placed in this section.

(1) Designation and Responsibilities of Competition Officials

[Page B-5, C.1.b.(6)] There is a great deal of controversy about the computation of savings resulting from A-76 studies. Both GAO and the Center for Naval Analysis have written reports questioning the amount of

savings. This paragraph should provide some criteria for computing savings such as identifying the difference between the winning proposal and the current operating expenses.

[Page B-5, C.1.b.(3)] The net effect of the 12 month cap on announcing a Standard Competition and issuing a solicitation within 8 months of announcement would create an optimistic 4 month timeframe for making a source selection decision. There are many legitimate reasons why an award cannot and should not be made hastily. There should be internal (agency) flexibility in extending the source selection process timeframe beyond the 4 months provided in the draft revision.

Editorial Comments:

[Page B-4, C.1.b.(1)] Last sentence should end with a period, not a comma.

2. The Solicitation and Quality Assurance Surveillance Plan (QASP)

[Page B-5, C.2.a.] For areas critical to national or economic security, public health, information technology security, or other areas that could potentially impact the public well-being in the event of an emergency situation, consideration should be given to the inclusion of a "no strike" clause in contracts. Government employees in an Agency Tender do not have the capability to strike as compared to private sector employees whose threat to strike or whose actual strike actions could jeopardize the public well-being in certain circumstances.

[Page B-5, C.2.a.(1)] In most cases the QASP is considered to be an internal document and not released; typically the method of surveilling the contractor is revealed to them in the Performance Requirements Summary, but the details of government staffing and exact surveillance methodology contained in the QASP is an internal document.

[Page B-6, C.2.a.(7)] Someone in authority should make the determination if the government will provide Government Furnished Equipment, but not necessarily the "4.e. Official." Perhaps the SSA should have this responsibility? This is another example of where providing flexibility would benefit the A-76 regime. Also, this paragraph should be expanded to include "Government Furnished Property and Services." This change would cover decisions to offer utilities (i.e., electricity, water, telephone), facilities maintenance, grounds maintenance, security (and other services already provided by blanket contracts), network access, etc.

[Page B-7, C.2.a.(12)] While the standard costs for issuing a security clearance should not be included, the cost of expediting clearances should be considered inasmuch as such cost is significantly higher and may notably alter the cost of providing the required goods or services as well as the timeframe in which the provider is able to perform the work.

[Page B-8, C.2.a.(13)] Performance bond and phase out plan are not included in this list because they are mentioned in their own categories, but the paragraph requires that the "solicitation must explicitly state which requirements will not be applied to the Agency Tender" and these will not.

[Page B-8, C.2.a.(13)] The exclusion of past performance criteria for all bidders because the MEO has no past performance should be reconsidered inasmuch as there is significant danger that this practice may result in the selection of a private sector provider who cannot perform the work requirements. It would be much easier to establish past performance for the government than to omit it entirely as a consideration. Private

sector organizations create new organizations to bid on government work all the time and they must establish past performance qualifications. The fact that an MEO is new carries some risk, mitigated by the fact that many of the employees have significant experience performing the required functions/activities and it would be appropriate to evaluate their experience accordingly. The Office of Federal Procurement Policy in consultation with the Procurement Executive Council should identify a methodology for weighting the Government's past performance in an A-76 competition.

[Page B-8, C.2.a.(15)] This paragraph alludes to a residual organization (RO) but offers no explanation for determining how many FTE are required and how they are selected.

Editorial Comments:

[Page B-8, C.2.a.(6)] For consistency and clarity, in the last sentence in the paragraph, "calculated" should read "included."

[Page B-8, C.2.a.(9)] "(C TTO)" has an unnecessary space.

[Page B-8, C.2.a.(11)] In the first sentence, "selections" should not have an "s", and the word "include" should be replaced with "require."

3. The Agency Tender, Private Sector Offers, and Public Reimbursable Tenders

[Page B-9, C.3.a.(2) and (8)]

In the requirements for the Agency Tender, it is not clear what is required in "(1) an MEO." In the definitions an MEO is described as a staffing plan for the government's Most Efficient Organization, but a staffing plan is typically a requirement in section L and would be provided in the government's proposal. In current practice, the MEO is essentially the Concept of Operations that documents the existing organization and the rationale supporting the new organization. Under the current Circular, the Independent Review and the MEO Certifying Officials use this document to substantiate that the government's MEO is viable.

The Circular requires the Agency Tender to undergo certain activities and to produce certain documentation beyond what is required by private sector offerors. To streamline the process, reduce paperwork, and even the proposal requirements for all participants, we recommend that the Agency Tender be required only to prepare its cost proposal in accordance with OMB Circular A-76, Attachment E.

[Page B-9, C.3.a.(4)] This paragraph states that new contracts shall not be created as part of the MEO. Although the intent is to preclude government jobs from being transferred to the private sector without competition, the government should be allowed to team with the private sector, to consolidate existing contracts, or to seek entirely new contracts. If the ultimate objective is to "get the best deal for the taxpayer," then there should be no limitations on competition as this proposed restriction would otherwise create. Additionally, if a supporting goal is to "ensure fairness," then the MEO should have the same ability to partner as private sector offerors have. The intent of this recommendation on subcontracting is to allow the ATO the maximum flexibility in developing the MEO with the full understanding that Federal employees are not placed in a "lose-lose" situation. If the best mix for the MEO is to cancel, change or develop new contracts without a transfer of Federal function then the ATO should have that option.

4. The Source Selection Process and Performance Decision

(1) Special Requirements

[Page B-11, C.4.a(1)(a)] This paragraph addresses the SSA and CO responsibilities in the evaluation of public tenders. As currently written, the Circular may create the appearance of an organizational conflict of interest inasmuch as the Circular implies that the CO is involved in the development of the PWS. If the CO participates in the development of the PWS, and he or she subsequently evaluates the Agency Tender, then the CO would appear to be directly or indirectly influencing both the PWS and the MEO, and potentially the outcome of the competition.

OMB has eliminated the Independent Review Official (IRO) function and moved some of the functions previously performed by the IRO to the Contracting Officer and the Source Selection Authority. We believe it is in the taxpayers best interest to have a neutral/independent source, involved in no other aspect of the study process, validate that the resources commitment proposed in the agency's bid is sufficient to satisfy the solicitation requirements. Should an MEO win the competition and the MEO be understaffed, the requiring (customer) organizations would be placed in significant mission risk. While corrective measures are more readily available when a private sector award has been made, substantially more time, effort, and resources would be required to mitigate the ramifications of an understaffed Agency Tender. Consequently, we recommend that an independent review of the government's MEO, to ensure that the bid is fair, reasonable, and appropriately staffed be retained in some fashion in the revised Circular.

(2) Sealed Bid Acquisition

[Page B-11, 4.a.(2)] It seems that the CO should be evaluating the private sector bids and the Agency Tender for responsiveness and responsibility prior to entering the lowest cost bid on Line 7 of the SCF. We recommend reordering the sentences to more logically reflect the actions that must be taken.

[Page B-12, 4.a.(3)(b)] The Source Selection Authority (SSA) does not conduct discussions with offerors. Only the CO can authorize contacts with offerors.

[Page B-13, 4.a.(3)(c)] An Agency may accept an offer that is not lowest price if it is within present budget limitations. There is no budget until it is approved (one year at a time) by the Congress/President. The Circular is unclear as to how a 5-year award can be within current budget limitations.

[Page B-13, 4.a.(3)(c)1] The CO not the SSA conducts negotiations.

2. Phased Evaluation Process

[Page B-14, C.4.a(3)(c)2.a] This paragraph states "In consultation with the requiring organization, the SSA shall determine whether any of the proposed performance standards are necessary and within the agency's current budget limitations." We believe that the Agency Tender, regardless of the Source Selection process used, should be reviewed by the CFO (or his designee) to ensure that funding is available to implement the proposed Tender Offer. We do not believe that this "funds availability" review would be appropriately charged to the SSA, the CO, or even the requiring organization as multiple organizations may be involved and only the CFO's office (or an equivalent entity) would have the corporate knowledge to make this determination.

5. Post Competition Accountability

[Page B-16, C.5.b(2)] This paragraph indicates that re-competitions are required by the end of the last year of the period of performance when an Agency or Public Reimbursable Source Decision is made. In most instances, the re-competition would occur in the 4th year of the letter of obligation. Planning for the competition would begin in the 3rd or possibly 2nd year. To reduce strain on the government and to provide a more stable work environment which fosters employee retention and progression, and the development of necessary historical knowledge base, re-competitions should be staggered and based on an a thorough analysis that such re-competition is in the best interest of the government. For example, use of a modified business case analysis to justify the extent and scope of a re-competition, which is less resource intensive, time consuming, and expensive may prove that retaining the MEO provider continues to be a prudent business decision or alternatively that a more extensive standard competition would lead to further innovation and/or reduced costs.

Editorial comments:

Second sentence, 8th line of paragraph, contains an unnecessary "an"

Fourth sentence, use of "public-private Competition" should be "Standard Competition" for consistency?

Editorial comments:

Section title has period missing... "Failure to Perform."

Subsection (3), first sentence has two periods

[Page B-19, D.2.b] This paragraph should include giving the MEO Team responsibility for developing the Residual Organization (RO) and determining how it will interface with the MEO or the contractor.

D. SPECIAL CONSIDERATIONS

This section contains several legal inaccuracies and goes beyond statutory prohibitions to restrict unnecessarily the ability of Federal employees to exercise a right of first refusal.

D.1. The citation for the right of first refusal in the second line "FAR 52.203" is incorrect. It should be "FAR 52.207-3" which appears later in the paragraph. FAR 52.207-3 provides that a contractor will provide Government employees affected adversely by the award of a contract the right of first refusal "for employment openings under the contract in positions for which they are qualified, if that employment is consistent with post-Government employment conflict-of-interest standards."

D.2.a.(2) and D.2.b.(2). It appears that the statutory citation, "41 U.S.C. 253" is incorrect. If the intent is to parallel the regulatory citation to the statutory procurement integrity provisions, the citation should be "41 U.S.C. § 423" (the Procurement Integrity Act). In this regard, the restrictions stated in these paragraphs do not accurately reflect statutory/regulatory post-employment restrictions and requirements regarding employment negotiations.

Specifically, the draft circular states that agency personnel who personally and substantially participate in the development of the solicitation or Agency Tender will not be afforded the Right-of-First-Refusal. This provision would not only prohibit the employee from exercising a Right of First Refusal but would forbid

even the offer of employment; moreover, the provision seems to assume that the identified participation in these matters would always foreclose an employment opportunity with the contractor as a violation of standards of conduct.

The Procurement Integrity Act (41 U.S.C. § 423) requires agency officials who participate personally and substantially in procurements in excess of the "simplified acquisition threshold contracts" to report any contacts by the contractor concerning employment offers and to either reject the offer or disqualify himself/herself from the procurement process. Thus, even if the threshold dollar amount of the contract is met, this restriction would not preclude receipt of an offer of employment and would provide the employee with a means to consider the offer. The Act does prohibit certain employees from receiving compensation from a successful contractor. This restriction however applies only to contract awards in excess of \$10 million dollars. Employees subject to this restriction are limited and specifically identified (e.g., the procuring contracting officer, the source selection authority, a member of the source selection evaluation board etc.). Thus, even if the dollar threshold is met, not all employees who participate personally and substantially in the development of a solicitation or even the Agency Tender would be subject to this restriction. Further, while 18 U.S.C. § 207 provides post-employment restrictions with respect to employees who have participated personally and substantially in matters such as the development of a solicitation or the Agency Tender, the statute would not prohibit such employees from working for, or receiving compensation from, the contractor. The statute prohibits the former employee from ever representing the contractor before the Government; not all positions with a contractor would require such representational activities.

To the extent that the restrictions in the draft circular go beyond statutory/regulatory limitations, if that is the intent, there is no mechanism for enforcing them (e.g., processes described in FAR 3.104-10, criminal penalties.) These restrictions are likely to hamper agency work since they may dissuade employees from participating in solicitation development and Agency Tender activities.

It is recommended that these provisions be deleted and that a broad statement, similar to that used elsewhere in the draft document be inserted. (See, for example, Attachment C, Paragraph G.) At the Department of Energy, we are currently proposing the following guidelines on the Right of First Refusal:

"A Federal employee who is adversely affected or separated as a result of an award under A-76 may be provided a Right of First Refusal. FAR 7.305(c) requires a contractor to provide Government employees the Right of First Refusal for employment openings under the contract in positions for which they are qualified, if that employment is consistent with post-Government employment restrictions. Whether such employees can assert those rights will depend on what functions they perform with respect to the A-76 program. An employee's Right of First Refusal may be affected by conflict of interest restrictions placed on employees who participate in A-76 related acquisition processes (e.g., source evaluation or selection). These restrictions may affect the employees' ability to seek outside employment opportunities, to serve as the winning contractor's representative, and/or to receive compensation from a winning contractor. However, merely providing information for, or participation in, the development of a PWS or MEO may not in-and-of itself affect an employees' ability to exercise a Right of First Refusal. Each situation is fact specific and will depend, in part, on the extent of the employee's involvement in the decision-making processes."

ATTACHMENT C: DIRECT CONVERSION PROCESS

[Page C-3, D.2.a.] The Business Case Analysis (BCA) process proposed by OMB is clearly different from the current Direct Conversion process and is important enough to warrant its own Attachment in the Circular. One significant difference from a 10 or fewer Direct Conversion process is that a BCA could lead to retention of the government provider. Additionally, commingling the BCA process with the Direct Conversion process may unintentionally send the message to all parties that outsourcing is the predetermined outcome.

[Page C-3, D.2.a.] The fifteen working day time constraint to conduct a Business Case Analysis is very optimistic. It will likely take three to four weeks to document a description of the workload, and prepare the Agency Cost Estimate (ACE). Time will also be needed by the CO to identify comparable contracts and adjust them for comparison to the ACE. We recommend a 3-month time frame for conducting the business case analysis for a Direct Conversion.

[Page C-3, D.2.b.] We strongly recommend that the selection decision be based on a comparison of the government price to the average of the four selected contracts instead of the lowest priced contract.

[Page C-4, E.] It should be clarified whether any or all of the identified provisions under Part E. apply to BCA Direct Conversions.

ATTACHMENT D: COMMERCIAL INTER-SERVICE SUPPORT AGREEMENTS

A. Applicability

We strongly recommend that OMB expand on, clarify, and possibly rename the term Inter-Service Support Agreement (ISSA). The proposed revisions do not clearly define the parameters of an ISSA. The current Circular defines ISSAs as *"The provision of a commercial activity, in accordance with an interservice support agreement, on a reimbursable bases. This includes franchise funds, revolving funds and working capital funds."* The definition proposed in the A-76 revision (see page F-3) alludes to one "agency" as a customer and another "agency" as a supplier, and the FAIR Act addresses "agency" in its coverage as executive departments, implying that the A-76 competition policy only covers inter-agency rather than intra-agency transactions. Also, the proposed definitions in Attachment F are circular: the definition of ISSA refers to a "public reimbursable source" but the definition (page F-8) of "public reimbursable source" refers back to the existence of an ISSA.

It appears that the removal of the previous definition will broaden the scope of the ISSA definition to include any commercial activity, support, or partnership which transfers funds from one agency or part of an agency to another for the purpose of obtaining supplies or services. This could include franchise funds, revolving funds, working capital funds, cooperative agreements, other statutorily authorized agency-to-agency partnering arrangements, and intra-departmental transactions. We believe that without clarification and justification, such an expansion would be inefficient and administratively cumbersome with no parallel benefit. In addition, the new requirements would undermine and negate the efficiencies established by Congress through the Economy Act whereby agencies may acquire supplies or services that cannot be obtained as conveniently or economically by contracting directly with a private source. More critical is that agencies continue to have the essential tools necessary to conduct cross-servicing activities when they are in the best interests of the Government and, when necessary, to support emergencies (as experienced in the 9/11 tragedy).

If it is the intent of OMB to apply the new ISSA requirements to intra-agency transactions, we strongly suggest that OMB consider the cumulative effects of forcing two forms of competition on intra-departmental ISSA provider employees. With few exceptions, these employees are already covered by the FAIR Act and by internal competitive sourcing studies conducted by their agencies pursuant to the President's Management Agenda. At DOE, for example, we are studying all logistics functions throughout the complex. A number of the logistics functions are reimbursed through the Department's Working Capital Fund. Under OMB's ISSA guidelines, the logistics functions would be subjected to more than one study for the same ultimate purpose - deciding the best provider(s) of a reimbursable service. And in subsequent years, even if the Most Efficient Organization won the A-76 competition/re-competition, it would be subjected to additional subsequent competition as an intra-departmental ISSA provider. Under this construct, intra-departmental ISSA employees would be routinely subjected to Double Jeopardy.

Based on our experience, the Department recommends that the term Inter-Service Support Agreements apply only to arrangements between, rather than within, Federal cabinet departments and independent agencies. Changing the term to "Inter-Agency Support Agreement" may be an appropriate first step in this important clarification.

We also recommend that the Applicability provisions in Attachment D, Section A be clarified to remedy several ambiguities as follows:

The revenue threshold, which DOE believes should be raised to \$5 million, should be clarified to ensure that the dollar threshold refers to the annual value of a single bilateral transaction, rather than to the cumulative effect of an entire class of transactions. A customer entity has no basis for knowing whether its individual transaction would cause the class of transactions to exceed the threshold. Example: The Department of Commerce sponsors an interagency Performance Consortium, collecting funds from participating Federal agencies and contracting with the National Academy of Public Administration to run the Consortium. Individual participants know the amounts they contribute, but not the aggregate of all contributions.

We also maintain that Economy Act transactions/Cross-servicing agreements that provide support for "core" as well as "inherently governmental activities" should not be subject to a competition requirement. An example would be interagency agreements for contract audit services. Federal regulations require agencies to use a cognizant auditor to perform analyses of contractor financial and accounting records. The Defense Contract Audit Agency (DCAA) provides this service for federal agencies that conduct business with the same contractors. Also, the Environmental Protection Agency and the Department of Health and Human Services have been designated as "cognizant audit agencies" for certain classes of contractors. This process provides for efficient and effective application of resources to provide consistent auditing practices across the federal contractor complex.

Additionally, the exemption for statutorily mandated ISSA's should be extended to those mandated by the President or other Executive authorities, and the resulting list of exemptions should be documented (and updated) in A-76 Handbook materials or in the Circular itself. Example: The Office of Personnel Management is causing the consolidation of Federal payroll providers, selecting continuing providers, and assigning customer agencies to those providers. This may be statutorily authorized, but it is clearly not statutorily mandated. We would expect the advent of government-wide information architecture and other e-government initiatives to stimulate other similar non-statutory mandates for interagency transactions. The

following is a partial list of some of the current interagency transactions that could be addressed in a Handbook clarification of intended coverage of A-76, rather than requiring each customer agency to research and document the statutory or regulatory basis for the Federal decisions to standardize provision of certain services:

- i. Printing: Government Printing Office
- ii. Records Storage: National Archives and Record Administration
- iii. Radio frequency assignments
- iv. Occupancy of Federally-owned buildings (see below)
- v. Mail sanitization/Center for Disease Control
- vi. Telecommunications services
- vii. Aircraft usage
- viii. Contract audits by the various cognizant audit agencies
- ix. Contributions to joint e-government initiatives

Exemption (5) ["the ISSA facilitates leases or grant agreements"] likewise needs to be expanded and clarified. Specifically, many Federal agency headquarters are in GSA-owned buildings that are effectively "leased" to the agencies, though other space is leased by GSA and then, in effect, sublet to the agencies, all through the Public Building Fund. If Exemption (5) is intended to cover the entirety of this real estate function, it should be reworded accordingly.

If an agency has already competed a contract for supplies and services and another agency wishes to use the existing vehicle, for example for economical or emergency situations such as in 9/11, it serves no purpose to require the "requiring agency" to enter into a competition for supplies or services that have already been competed. This would be analogous to exclusion #4 under paragraph A, Applicability (GSA multiple award schedule contracts, government-wide contracts, etc.), however, the exclusion should be expanded to include all other types of awards that were previously competed.

We also recommend that OMB review the relationship between its new requirements regarding ISSA competition and the "Determination and Findings" requirements in FAR 17.503. Specifically, under the Economy Act and the FAR, the customer agency already has to make a formal finding that each order placed with another agency is (i) in the best interest of the government and (ii) is more convenient or economical than having the customer contract for the service. Setting aside the question of the definition of "convenient", it appears that a new A-76 requirement for competition is duplicating the underlying purpose of FAR 17.503. If OMB believes that agencies have not been rigorous in their FAR 17.503 analyses, it may be better to deal directly with that problem than create a new, expensive, lengthy, and burdensome process.

OMB should consider amending the Federal Acquisition Regulation related Economy Act rules (FAR 17.5) to require that prior to an Economy Act transactions, servicing agencies must provide either a determination that: (1) the service has been determined to be inherently governmental in accordance with A-76 FAIR Act requirements, (2) the services have been previously competed and is currently being performed by a contractor, or (3) the agency is planning to compete the requirement in the future consistent with A-76 guidelines.

The term "Local Government" should be in concert with the definition of local governments as contained in 31 U.S.C. 6302(3) and thus excludes foreign countries and Federally recognized Indian Tribes.

B. Competition Requirements

[Page D-1, B.3.] The decision to retain or terminate an ISSA should reside with an official in the agency receiving the support. That decision should be based upon mission requirements.

[Page D-2, B.4.] The development of the first annual plan to compete ISSAs and submission of that plan to OMB by June 30, 2003 is significant workload for the civilian agencies that are in the early stages of conducting their first A-76 studies. It is recommended that the ISSA plan submission date for 2003 be changed to September 30, 2003.

[Page D-2, C.2.a.] ISSA's should be allowed to respond to a notice or solicitation only if their agency leadership approves. It should be a higher authority than a Reimbursable Tender Official making the decision to submit an offer. This is the same philosophy about having a principal or partner approving bid/no bid decisions. It would be chaos if every ISSA were allowed to submit and offer without their leadership's knowledge and approval.

ATTACHMENT E: CALCULATING PUBLIC-PRIVATE COMPETITION COSTS

Special Provisions

1. Proration of Performance Periods. The paragraph does not deal with prorating performance periods, therefore the title would be clearer if simply, "Period of Performance." The first sentence would be clearer if stated in the positive, "Agencies shall conduct Standard Competitions using three or more performance periods of proposal cost data, excluding a phase-in period." Additionally, the Standard Competition Form (SCF), which provides for four performance periods, needs to be corrected to adhere to the provision that the 4.e. Official may permit a performance period beyond five years, or an alternative SCF should be provided by the Circular specifically for such circumstances.

3. Common Costs. The last sentence should be reworded for clarification as follows: "Examples include costs for conducting joint inventories and government furnished property and services"

4. Minimum Conversion Differential. Application of the minimum conversion differential should be uniform. The last sentence, "Agencies shall not include the minimum conversion differential for Standard Competitions conducted between private sector and public reimbursable sources." seems to be unfair to federal employees that are public reimbursable sources.

5. Inflation. The second sentence in this paragraph is confusing; it is assumed that the "increases" are referring to inflation, but the references to the first performance periods and proration are confusing when discussing application of inflation factors.

The third sentence is also confusing changes in scope of work with inflation; as presently worded, it does not deal with inflation at all and should be deleted.

The last sentence in this paragraph, "Agencies shall then apply the inflation factors for pay and non-pay categories through the end of the first performance period," is not consistent with standard cost estimating

practices for pay and non-pay categories. Pay categories that are not subject to an economic price adjustment as stipulated in the solicitation should be inflated through all performance periods. Non-pay categories that are not subject to an economic price adjustment as stipulated in the solicitation should be inflated through all performance periods."

Recommend: "Agencies shall apply the annual inflation rates issued by OMB for conducting Standard Competitions. These inflation rates are developed for the President's Budget to represent the best estimate of inflation for both pay and non-pay categories. Agencies may use agency unique inflation factors (e.g., military inflation) with prior written OMB approval. Inflation factors should be applied to both pay and non-pay categories for all performance periods. Those pay and non-pay categories that are subject to an economic price adjustment per the terms of the solicitation will only be inflated through the first performance period; inflation will not be applied to the remaining performance periods.

6. Phase-in and Phase-out Costs. What is more difficult to determine, and has not been effectively addressed in making a "fair" competition, is the treatment of the cost of government personnel in the Phase-in Period.

Standard Competition Form

To facilitate the provisions of paragraph "1," "5," and "6," the Standard Competition Form (SCF) should include a Phase-in Period and five performance periods as part of its template. These changes would be simple to make (even in WIN.COMPARE²). The addition of the Phase-in Period to the SCF would eliminate confusion between the phase-in period and the first performance period in the text when discussing inflation and application of the economic price adjustments per the requirements of the solicitation

Block 19. The term "Transition Plan" should read Phase-in Plan to be consistent with Attachment B, Paragraph C.3.a.(7).

Editorial Comments:

Block 21 should not use the possessive form to be consistent with Blocks 19, 20, and 22; should read "Contracting Officer Signature"

Block 22 is labeled "20" and has an extraneous parenthesis

Blocks 21 and 22 should repeat the competition official's title under the signature line to be consistent with Blocks 19 and 20.

B. THE COST OF AGENCY PERFORMANCE (LINES 1-6 OF THE SCF)

1. Personnel Costs (Line 1 of the SCF)

b(2). Indirect Costs.

As currently written, this requirement would appear to require double counting of costs that should largely be captured in the 12% Overhead Factor applied to the Government's in-house bid. If the identified functions are not captured in OMB's Overhead Factor, perhaps OMB could be more specific about what it does (functions/activities/services) include in the 12% factor.

c. Full-Time Equivalents.

[Page E-4, B.1.c.] Please clarify what training is included in calculating the productive hours. Is this agency-wide required training? For years this has been open to interpretation as to whether this includes training specific to meet the requirement of the MEO or agency wide training.

B.3. The draft Circular calls for using a depreciation value of \$5000. The Circular should be revised to allow an agency to use its own established depreciation level. At a minimum, the value should be revised to \$10,000.

B.3.h.(2). Other Costs.

The Government's MEO can now win an award fee just like the private sector, however, it is unclear what the MEO can and cannot do with that award fee (e.g., can some or all of the award fee be passed on to the employees in the form of bonuses) should it be earned by the Government Tender.

D.2.a. Expansions, New Requirements, or Conversions From Contract to Agency Performance.

We do not believe a cost differential should be applied to expansions, new requirements, or conversions from contract to agency performance. Furthermore, there should be no assumption that the private sector is the incumbent source for agency work expansions or new requirements inasmuch as this is a false assumption and this approach would clearly provide an unequal/unfair advantage to the private sector. In cases of expansions, new requirements, or conversions from contract to agency performance, the competition should be based on cost and/or best value and the considerations applied in these circumstances should be vendor neutral.

Editorial Comments.

[Page E-8, B.3.a.(5)] Since the entire paragraph refers to facilities, the seventh sentence would be clearer if "If an asset (such as a facility)..." were reworded as: "If a facility..."

[Page E-10, 3.h.] For consistency, adjust spacing for heading to the left.

[Page E-12, C.1.(d)] The last sentence would be clearer reworded as: "The solicitation bid structure should facilitate the exclusion of this cost for purposes of the competition."

[Page E-12, C.3.(d)] The numbering sequence skips number 2. Delete reference to win.COMPARE²

[Page E-14, C.5.(a)] Delete extra period in paragraph title.

ATTACHMENT F: GLOSSARY OF ACRONYMS AND DEFINITION OF TERMS

A. Glossary of Acronyms

[Page F-1] Need to add the following acronyms to the list:

DBA - Davis Bacon Act
IG - Inherently Governmental,

QA - Quality Assurance,
RO - Residual Organization

Editorial Comments:

To be in alphabetical order, CO should come before COLA

B. Definition of Terms

Agencies should have the discretion to decide if any or all of its "competition officials" need to be inherently governmental.

[Page F-2] The 4e. Official should have a title name such as "Agency Competition Official."

Need to add uniform definitions for the "Head of Requiring Organization," "Head of Organization," "Procurement Sensitive Information," "Source Selection Authority," and "Technical Proposal."

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