stearrett.barbara@epamail.epa.gov
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To: David C. Childs A-76comments/OMB/EOP@EOP

cc: Davis.Judy@epamail.epa.gov, bachand.ron@epamail.epa.gov
Subject: Comments on Proposed Circular A-76 Performance of Commercial Activities

Questions may be directed to:

Barbara Stearrett
Office of Acquisition Management
Policy, Training & Oversight Division, Competitive Sourcing (3802R)
1200 Pennsylvania Avenue, NW
Washington, DC 20460
202-564-4496
stearrett.barbara@epa.gov

(See attached file: Comments to A-76 12-19.wpd)

- Comments to A-76 12-19.wpd

GENERAL COMMENTS:

The EPA appreciates the opportunity to provide comments to OMB on the proposed revisions to Circular A-76. OMB's increased focus on potential conflicts of interest, concurrent review of public and private offers, as well as, post award accountability, are noteworthy achievements toward improving the integrity of the competitive sourcing process. Moreover, the revised structure and organization of the document itself will facilitate compliance with its requirements. Notwithstanding these improvements, significant concerns remain which, if not addressed, will adversely affect our ability to implement the requirements of the Circular. Our major areas of concern fall in four areas.

First, we question a policy that presumes that all activities performed by Government agencies are commercial in nature unless justified in writing as inherently governmental by a senior level official. In order to ensure fairness and impartiality in the process, A-76 must be neutral in this regard; the determination regarding the nature of a particular activity should be based on a consideration of relevant factors as is the case under current procedures. Presuming that an activity is commercial reflects a bias that is arguably inconsistent with the FAIR Act itself which contains no such presumption. To require written justifications at the Assistant Secretary level, for internal management decisions, is inconsistent with the President's concept for managerial flexibility and authority outlined in the President's Management Agenda, Fiscal Year 2002.

Second, the prescriptive and detailed nature of the requirements in the Circular is a significant concern because it diminishes an agency's discretion and flexibility to make decisions that could facilitate achievement of competitive sourcing goals. Agencies should be provided with a general framework to work within while maintaining ultimate discretion to structure their programs to meet the required goals established by OMB.

Third, we are deeply concerned about the scope of the proposed ISSA competition requirements. They will result in significant resource issues for this agency and will impact our ability to meet mission responsibilities including the pace of Superfund cleanups.

Finally, the cumulative effect of the proposed requirements will be the need for additional resources both at OMB and within the agencies. We are concerned that the proposed requirements will impact the ability of OMB to provide adequate and timely requests for deviations and approvals. Additionally, EPA will need to devote significant resources, in terms of people and money, beyond those currently available, to meet the proposed requirements within the timeframes specified.

SPECIFIC COMMENTS:

The comments provided are organized by section to follow the organization of the proposed Circular A-76 and its attachments.

CIRCULAR A-76

1. The proposed Circular has the stated purpose of establishing federal policy for the competition of commercial activities; however, given the prescriptive requirements that OMB appears to impose on agencies, it is unclear whether the revised Circular and its attachments are intended to be more than "policy" and amount to a proposed rule or regulatory requirement

under the OFPP Act, 41 USC 418b, or some other law. If so, certain regulatory requirements would apply to it.

2. An effective date of January, 2003 is unrealistic given the probability that OMB will be receiving substantial comments from the public and Government agencies on the revisions, and will need to address the comments and concerns. The effective date should be postponed until the comments can be addressed and any necessary changes are made to the Circular and attachments.

3. While we applaud the goals behind the competitive sourcing initiative and which the proposed revisions are designed to promote, we question a policy that presumes that all activities performed by Government agencies are commercial in nature unless justified in writing as inherently governmental by a senior level official. In order to ensure fairness and impartiality in the process, A-76 should be neutral in this regard; the determination regarding the nature of a particular activity should be based on a consideration of relevant factors as is the case under current procedures. Presuming that an activity is commercial reflects a bias which is arguably inconsistent with the FAIR Act itself, which contains no such presumption. Furthermore, the requirement for an Assistant Secretary level official to make these justifications is inconsistent with the President's initiative for managerial flexibility and authority.

4. The proposed Circular is unclear whether any activities are exempt from its coverage. The current A-76 (Revised 1999) states at paragraph 7.c. certain exceptions to the cost comparison process, but the revision fails to do this. The proposed A-76 only hints at these types of exceptions. For example, in Attachment C, R&D is a subject deemed suitable for direct conversion and paragraph A.3. adds that R&D support shall be subject to competition requirements. It appears to imply that direct R&D is exempt from the competition requirement-- is this correct?

5. Paragraph 4.c. Revise to read: "Use a Competitive or Direct Conversion process..."

6. Paragraph 4.d. Requires compliance with FAR. Since all agencies do not follow the FAR and since some provisions in the FAR are not applicable to A-76, the language of the paragraph should be revised to account for these situations.

ATTACHMENT A - INVENTORY PROCESS

A1. Under Reason code "B," what does "within a specified time" mean?

A2. Modify Reason Code "D" to say that Agency performance is the result of a Business Case Analysis decision or add a reason code to address this situation.

A3. Why will the written rationales for applying Reason Code A to positions be made available to the public (D.3) when they cannot be challenged (F.2.a.1)? Additionally, because it is possible that the Reason Code A and inherently governmental justifications, depending on how they are written, could implicate Freedom of Information Act and/or Privacy Act concerns, the wording in D.3, if the information is to remain publically available, should be revised to indicate

that such documents will be made publically available consistent with the Freedom of Information Act and Privacy Act.

A4. In paragraph E.2., the second sentence does not make a point; it appears to be missing an ending.

A5. The definition of inherently governmental is not entirely consistent with the statutory definition in the FAIR Act. For example, the requirement that it involve the exercise of "substantial" discretion goes beyond what is required in the FAIR Act which focuses on the exercise of "discretion" without the "substantial" qualifier. The word "substantial" should be deleted to harmonize the definition with the FAIR Act.

A6. It appears that OMB is limiting an agency's ability to appoint multiple Inventory Challenge Review Authorities. Each agency 4e official should be allowed to determine what will work best given the agency's structure and approach to the inventory rather than follow an OMB prescribed approach. Agency's have successfully handled the challenge and appeal process for several years and it is not necessary to mandate new procedures if the current ones have worked properly.

A7. It is unclear what is meant by non-FAIR Act commercial activities that are to be inventoried on the annual FAIR Act inventory. It is also questionable if the benefits would justify the costs of creating such an inventory.

A8. Research and Development (R&D) is considered exempt from competition in the current A-76 and therefore has not been considered in the pool of positions upon which the Agency has based its competitive sourcing targets. The proposed Circular lists R&D as a commercial activity that can be directly converted without competition. Although not specifically stated, the Circular implies that any function which can be converted will be included in the inventory on which competitive sourcing targets are derived. Either the agencies will be forced to justify what has long been a recognized difference in R&D sourcing, that quality is far more important than cost in determining the provider, or forced into direct conversion of functions. Recommend that Research and development be exempt from the requirements of A-76, as it is in the current Circular.

ATTACHMENT B - PUBLIC-PRIVATE COMPETITION

B1. The conditions proposed for deviations from the Circular will inhibit innovation and flexibility. Agencies should have the flexibility to utilize procedures other than those prescribed in the Circular, without seeking OMB approval, if they can facilitate meeting the goals of competitive sourcing. OMB's involvement in the management of individual studies is excessive.

B2. The timeframes as stated are unrealistic. The timeframe for a standard competition must be more flexible. Agencies should be able to set milestones within flexible guidelines and ranges, without seeking OMB approval to deviate within the window of acceptable completion dates. If the desire of OMB is to create consequences when the Government delays the process, then the requirement should be for the Government to live by the milestones set forth at the beginning of

the process. A "one size fits all" time standard is not practicable.

B3. Add language under paragraph A stating that standard competitions are generally limited to activities performed by greater than 10 FTE. Any other exceptions, such as R&D, work performed by the military, etc. should also be addressed here rather than implied elsewhere.

B4. OMB should not mandate roles and responsibilities for conducting competitions. Agencies should be allowed to assign responsibilities according to their own organizations and structures, not according to the OMB prescribed roles. For example, within our Agency, the responsibilities assigned the Human Resources Advisor would be handled by several different offices working together as a team. Interfacing with employees and their representatives is done by the Labor Employee Relation staff, while making announcements in FedBizOpps, notifying incumbent service providers, and assessing contract compliance is handled by the Office of Acquisition Management. One solution does not work in every situation and agencies should not need to seek OMB's permission to deviate on these matters.

B5. Agencies should be allowed to manage their own Competitive Sourcing programs within flexible guidelines and ranges set by OMB. In the absence of this management prerogative, define the process for obtaining the Deputy Director for Management, OMB's approval for actions as required throughout the Circular. How quickly will OMB respond to these requests and will the time spent awaiting OMB response be counted against the agency's completion timeframe?

B6. Paragraph A.1.a. allows the 4e official to waive the timeframes required to complete a competition, prior to announcement, with "notification to the Deputy Director for Management, OMB." Paragraph C.1.b(3) requires a deviation, which requires (per A.1.a.), approval from OMB. These appear to conflict.

B7. Paragraph C.1.b(3) states that the 4e official may grant a one-time 6-month extension, if OMB approves. In meetings, David Childs has said that this extension could be granted without OMB approval. What is the intent of OMB? If approval is needed, define the process and timeframe OMB will take to grant its decision.

B8. Paragraph C.1.b.3 - consistent with the FAR there should be no rigid time frames for conducting standard competitions.

B9. Paragraph C.1.b.4 should cite conflict of interest rules and ethics rules per FAR 3.1 and 9.5 since many of the GAO decisions refer to these items.

B10. Can the CO also be the SSA? The FAR allows this.

B11. The role of the SSA as stated in the proposed Circular and attachments contradicts the FAR. The SSEB and CO should be performing the activities specified for the SSA in many cases.

B12. Paragraph B.1 indicates that the ATO is a "directly interested party." Does this mean they

can file a protest with the GAO? Has OMB discussed this with GAO?

B13. In paragraph A(3) delete "or (b) a private sector source" - Under the current A-76 and RSH, Chapter 2, B.4, agencies can, with proper notification, terminate a commercial ISSA and directly convert to private sector sources. Given the limited proposal evaluation strategies available under A-76, agencies should continue to be allowed to directly convert commercial ISSA work to private sector sources without going through an A-76 competition process.

B14. In paragraph D.1, the requirement for contractors and public reimbursable sources to hire adversely affected employees that the HRA has determined are qualified for job openings raises three concerns:

A) FAR 52.207-3 requires revision to enforce this.

B) FAR 52.207-3 does not apply to public reimbursable offerors; however, if it did, it would raise questions since a public reimbursable offeror employs federal employees - one federal agency should not have to bump its own employees to take another agency's people.

C) By demanding the service provider take our employees we imply a warranty of sorts and should performance issues arise they will surely point to us as the reason.

B15. Paragraph C.2.a(1) requires performance based contracting with measurable performance thresholds. This should be re-worded to encourage performance based contracting to the maximum extent practicable. Not all services available commercially, such as construction, A&E, and research, fit within the PBSA framework, and the FAR, OFPP and FPDS recognize this. A-76 should not set an unrealistic standard.

B16. In paragraph C.1.b.(13) add bonds, Service Contract Act, Davis Bacon, and liability insurance as requirements that do not apply to the AT.

B17. In paragraph C.1.b(13) delete references to C.6.b(2) and C.6.d.(2), since they do not exist.

B18. In paragraph C.3.a(4) revise to allow the MEO to utilize a mix of Federal employees and **new** contracts, provided that the new contracts do not serve to convert agency personnel to contract. It would seem appropriate that in re-engineering a process an MEO might seek to automate a process to become more efficient. Binding the MEO to existing contracts provides private sector offerors with an unfair advantage.

B19. Paragraph C.3.c. is unclear. Cost proposals should be prepared in accordance with Attachment **E** and the rest of the package in accordance with paragraph **C.3.a of Attachment B**.

B20. C.4.a.(3)(c)2.a. Phase One. Without knowing the proposed baseline costs, how can the SSA "determine whether any of the proposed performance standards are necessary and within the agency's current budget limitations"?

B21. Paragraph 5.a(2) - "4a" official should read "4e" official.

B22. Paragraph 5.b "Head of Requiring Activity" should be defined-- is this the same as the ATO?

B23. Paragraph C.6.a (1) last sentence is unclear. What does it mean that "while private sector proposals shall not be subject to appeal, questions regarding a private sector offeror's compliance with the scope and technical performance requirements of the solicitation may be appealed"?

B24. There is no discussion of judicial or GAO review of the administrative appeals decision. This has been an area of confusion and should be addressed.

B25. Paragraph D.2.a(1) Last sentence should read "Members of the **PWS** team shall not be members of the SSEB."

B26. Paragraph D.2.b(1) Add: "Members of the MEO Team shall not be members of the SSEB."

B27. Paragraph D.3 references itself.

B28. In paragraph C.4.d. consideration should be given to allowing the 4e official to extend the timeframe for addressing appeals in the event a significant number of appeals are received.

B29. In paragraph C.1.a., "Public announcement" of a Standard Competition is identified as the "start date." A substantial amount of planning must be completed before "public announcement." Is notice to an employee union a "public announcement." May an agency notify a union before completing the identified "preliminary planning." How does that comport with collectively bargained or statutory notice obligations?

B.30. Based on the definition of a "directly interested party," it appears that neither employees nor their representatives can appeal the Performance Decision. Is this correct? The current RSH allows the employees or their representatives to appeal and the proposed Circular is restricting this right.

ATTACHMENT C - DIRECT CONVERSION PROCESS

C1. Research & Development is exempt from the cost comparison process under the current A-76 (Rev. 1999). It is unclear whether it is exempt from the competition requirements under this revision. Please identify in Attachments A and/or B those activities that are not subject to A-76 competition requirements.

C2. Revise the language in paragraph A.1 from "civilian employees" to "FTE" for consistency with the inventory. In addition, if more than an aggregate of 10 employees perform an activity but it is the equivalent of 10 or fewer FTE worth of work (because the activity represents only a fraction of the FTE's time), we presume this would still qualify for direct conversion.

C3. In paragraph A.2., the heading "no employee impact" is misleading and inaccurate. What

about employees who are "directly affected" because a part of their work is included in a competition but who are not reassigned or retired? Can you still direct convert? Consider defining reassigned, permanent appointment, and time limited appointments.

C4. Paragraphs A.3 through A.7 should be addressed as exceptions to Attachment B, as well as addressed here.

C5. The Business Case Analysis should be addressed in its own Attachment to demonstrate that it is a comparison of costs. Inclusion in this section implies a pre-determined outcome of conversion from one source to another. In addition, we favor retaining the Streamlined procedures from the current RSH because they are simpler to follow, easier to implement, and fairer than the Business Case Analysis.

C6. The Business Case Analysis discussion is confusing. Parts of the section imply that the certification is first, the analysis next; other parts and verb tenses suggest that the analysis occurs before the certification. This is a critical distinction given the time constraints.

C7. In paragraph D.1.a. revise "agency civilians" to "FTEs" for consistency with the inventory. Also see comment C2.

C8. In paragraph D.1.b., revise to allow the use of GSA schedule contracts, as well as adjustments for differences in scope as is allowed under the current A-76.

C9. Paragraph D.1.e. The timeframe allowed, 15 days, to sequentially perform the steps outlined: (1) define work requirement (2) develop/certify AT, (3) establish contract or ISSA cost, (4) perform cost realism, and (4) compare cost, is unrealistic.

C10. Paragraph D.1.f. This paragraph needs clarification. The 4e official can only certify, before the analysis is complete, that the source will be selected based upon the results of a cost comparison conducted in accordance with the process defined in the Circular or that a decision to convert will be done only when the price can be determined fair and reasonable based upon the BCA performed in accordance with the procedures defined in the Circular.

C11. Paragraph D.1.g. Replace "Direct Conversion" with "Business Case Analysis."

C12. Paragraph D.1.h. Revise as follows: "An MEO was not created for consideration in a Business Case Analysis for ~~conversion from~~ **comparison of** agency performance to private sector..."

C13. Paragraph D.1.i. Revise "were not" to "will not" if the certification happens prior to the analysis.

C14. Paragraph D.2.a. States the that the ATO shall provide the CO with a description of the workload and the Agency Tender. Does this mean that under a Business Case Analysis the ATO can both define the work and develop the in-house cost estimate? If there is no division between requirements definition and bid preparation, this would appear to be a conflict of interest.

C15. Paragraph D.2.a. Requires the ATO to prepare the Agency Tender in accordance with Attachment B excluding the development of an MEO. Only the cost estimate requirement applies and guidance for this is found in attachment E. This paragraph should be revised to require the ATO to prepare the Agency Cost Estimate in accordance with Attachment E.

C16. Paragraph D.2.b. To streamline the process the Contracting Officer should be allowed to determine the contract or ISSA cost based on the work requirements definition while the ATO is preparing the Agency Tender as is allowed under the current A-76 processes.

C17. Paragraph D.2.b. In the interests of fairness, recommend use of the average of the four contract costs rather than the lowest for comparison purposes. Allow the use of any Federal contract, not just firm fixed priced contracts.

C18. The Business Case Analysis section needs to address all of the possible outcomes of the analysis to include the incumbent provider winning. When the incumbent wins there is no "conversion" but a comparison has taken place.

C19. When the Agency has been performing and is determined to be the most cost effective should a Letter of Obligation be issued? For a small activity such as this, what type of "post award documentation" will be needed? What types of terms and conditions?

C20. Paragraph E.1. requires prior to "public announcement" that we "make public announcements at the local level and in FedBizOpps?" Public announcement before the public announcement? When does the public announcement take place in the FedBizOpps, before or after the Business Case Analysis has been conducted? Or before and after?

C21. Paragraph E.2.a. The development of a PWS would be necessary for conversion of work from one source of performance to another only -- is this correct?

C22. Does the Administrative Appeal process apply to the Business Case Analysis process?

C23. Paragraph G should reference the ethics and conflict of interest rules at FAR 3.1 and 9.5.

C.24. The same criteria required for a competition waiver (Attachment C.2) should be applied to the direct conversion of R&D, an explanation of how direct conversion will result in either a significant financial or significant service quality improvement rather than the certification that "the cost of obtaining the activity from another source is expected to be fair and reasonable" should be required.

C25. We recommend the definition of direct R&D be either simplified, as in the current Circular, or clarified. The intent of "basic research for pure R&D" needs to be provided.

ATTACHMENT D - INTER-SERVICE SUPPORT AGREEMENTS (ISSA)

D1. In paragraph A clarify "revenue generated by the reimbursable rate"-- does this mean the total value of the ISSA or the service fee paid?

D2. We are deeply concerned about the proposed ISSA competition requirements because they will result in significant resource issues for this agency and will impact our ability to meet mission responsibilities including the pace of Superfund cleanups. To mitigate the potential adverse effects of the proposed ISSA changes, we recommend the following:

a. That the ISSA coverage be limited to Economy Act transactions where the servicing agency's own Federal employees perform the work under the ISSA.

b. Paragraph A, exception (4), be revised to read:

> the ISSA is designed to facilitate the use of Federal multiple award schedule contracts (MASs), government-wide acquisition contracts (GWACs), or multi-agency contracts (MACs)

In our opinion, utilizing competitively awarded contract vehicles, regardless of who is paying the contractor or monitoring performance, is consistent with the spirit of A-76.

c. That there be an exception for any ISSAs where the servicing agency's contractor, who was awarded the contract through authorized procurement procedures, does the work under the ISSA as opposed to Federal employees of the servicing agency. Such an exception is consistent with the purposes of competition. Moreover, there is no purpose served by requiring compliance with A-76 procedures in those cases where the servicing agency's contractor, who was awarded the contract per authorized procurement procedures, performs the work, and to require compliance with A-76 in those cases would be meaningless and a drain on limited agency resources.

d. That paragraph A, exemption 3, be revised to exclude those ISSA's that are statutorily authorized or mandated. If an agency otherwise complies with the legal requirements for an ISSA consistent with the legal authority for that ISSA, then additional competition requirements should not be imposed on entering into the ISSA. In legislation, agencies are often authorized, rather than mandated, to utilize cross-agency coordination/support in order to accomplish national or agency needs and the Circular should recognize this. Either a blanket exemption should be written for ISSAs complying with the legal requirements of the authority under which they are issued or an agency official, without OMB approval, should be able to waive the competition requirement.

D3. The $1 Million annual threshold is too low and should be raised to $5 Million annually. We believe the new requirements being imposed will limit inhibit cross-agency coordination in support of key initiatives, such as homeland defense.

D4. Paragraph B.1(b) directs us to Attachment C for Direct Conversions from public reimbursable performance to agency or private sector performance. Based on the requirements set forth in Attachment C, it appears that conversion from ISSA to private sector performance requires a standard competition. This differs from the current procedures under which a direct conversion from ISSA to contract performance is allowed after proper termination notification without an A-76 cost comparison. Given the limitations of A-76 source selections, we suggest

the Circular be revised to allow conversion from ISSA to private sector performance similar to how it can be done under current procedures found at RSH Chapter 2, paragraph B.4.

D5. In paragraph B.3, revise to have the 4e official submit the report rather than the "head of the customer agency," since this is an undefined position.

D6. The current RSH, Chapter 2, paragraph B.5.a, allows a public reimbursable service provider, after competing its entire support workload with the private sector, to provide that service to other agencies without having to compete - this type of provision should be included in the new Circular. At the Federal level, it would not make good fiscal sense to have service providers spending millions of dollars continually marketing themselves when strategically handled "mega-competitions" could be done to demonstrate their efficiency and effectiveness.

D7. The ISSA competition requirements create significant administrative and resource burdens. We suggest narrowing the application as reflected above and creating a longer phase-in period so that Agencies can focus on meeting the competitive sourcing goals before attempting to establish programs for competing ISSAs as well.

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Barbara Stearrett
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Policy, Training & Oversight Division, Competitive Sourcing (3802R)
1200 Pennsylvania Avenue, NW
Washington, DC 20460
202-564-4496
stearrett.barbara@epa.gov