

The following are SBA's comments to the Revised OMB Circular A-76. Please contact Linda Wilson at 205-6890 if there are any questions.

- **The changes could cause severe disruption to activities under the Small Business Act that may or may not be inherently governmental.** The draft's presumption in favor of all activities' being commercial "unless an activity is justified as inherently governmental" has serious implications for the Agency's ability to assist small businesses. Among the functions that could be considered commercial under such a presumption, but where governmental decisionmaking may suffer if performance is contracted to a private entity are:
 - Gathering information and preparing reports for size determinations, certificates of competency, and size appeals;
 - Analyzing SDB and 8(a) certification applications; and
 - Procurement center representative (PCR) duties. (Breakout PCR duties must be performed by SBA employees, under § 15(1)(5)(A) & (A)(i) of the Small Business Act).

Each of these functions requires management by SBA and continuity from year to year and from person to person. We believe that the first two may be transformed from inherently governmental into commercial function only (if at all) by splitting off the analytical portions from the final decisionmaking process. However, because of the presumption in the draft that all functions are commercial, a challenge by the private sector may succeed if the Agency designates any of the above functions as inherently governmental.

- **The policy behind more aggressive outsourcing contradicts policies of the Bush administration.**
 - The actual duration of "permanent" federal employment will become so uncertain that people may be reluctant to apply for government jobs. This is problematic because the President is attempting to attract employees both to fill national security positions and to replace baby boomer employees who are nearing retirement age.
 - Bump and retreat rights protect the more senior employees, therefore the workforce's average age will increase at an even faster rate than it is increasing now. See 5 C.F.R. §§ 351.502(a), 351.701.
 - The presumption that functions are commercial and the requirement to re-compete every five years where the agency itself has been selected for performance means that federal employment in all but the most obviously inherently governmental positions will be *de facto* term appointments. Att. E, ¶ A-1. In fact, the personnel regulations specifically that a reason for making a term appointment (up to four years) is that the function is expected to be contracted out. See 5 C.F.R. § 316.301(a).
 - The Circular creates the necessity for extra bureaucracy in each agency, a

significant burden in a small agency such as SBA. There are stringent requirements to monitor performance even if the government wins the competition. As a result, a significant increase in the number of SBA's contracting personnel will surely be necessary. Furthermore, SBA will almost definitely have to increase its number of mid-level managers, because there are numerous people who must be involved in developing requirements and preparing tenders; the Circular contains strict conflict of interest provisions. The large number of competitions will require many of these positions to be full-time, whereas, in the past, similar duties occupied only a part of a manager's time.

- It is easier to keep track of governmental employees and to perform security checks on them than on contractor employees. Dramatically increasing the number of contractors at a time when security is of prime concern seems unwise. Furthermore, federal employees must usually be U.S. citizens, whereas contractor employees need not. Therefore, an additional piece of protection would be lost if the Circular were to be adopted as written. See 5 C.F.R. § 7.4(b).

- **The definition of “inherently governmental” in the Circular does not match the one in the Federal Activities Inventory Reform (FAIR) Act, Pub. L. 105-270 (October 19, 1998) (codified at 31 U.S.C. § 501 note).** The Circular and the FAIR Act intersect in crucial ways. FAIR calls for an inventory of commercial functions, with each agency considering whether to contract them out, while retaining inherently governmental functions. § 2(a). The following table compares the definition in § 5(2)(B) & (C) of FAIR, phrase by phrase, with the definition in Att. A, ¶ E.1 of the A-76 draft:

FAIR, § 5(2)	A-76, Att. A, ¶ E.1
(B) The term includes activities that require either <i>the exercise of discretion</i> in applying Federal Government authority <i>or the making of value judgments in making decisions for the Federal Government</i> ,	These activities require <i>the exercise of substantial official discretion</i> in the application of government authority <i>and/or in making decisions for the government</i> .
<i>including</i> judgments relating to monetary transactions and entitlements.	<i>Inherently governmental activities normally fall into two categories: the exercise of sovereign government authority or the establishment of procedures and processes related to the oversight of monetary transactions or entitlements.</i>
An inherently governmental function <i>involves, among other things, the interpretation and execution of the laws of the United States so as --</i>	An inherently governmental activity <i>involves:</i>
(i) to bind the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;	a. Binding 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;	b. Determining, protecting, and advancing economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise;
(iii) to significantly affect the life, liberty, or property of private persons;	c. Significantly affecting the life, liberty, or property of private persons; or
(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, <i>including the collection, control, or disbursement</i> of appropriated and other Federal funds.	d. Exerting ultimate control over the acquisition, use, or disposition of property, real or personal, tangible or intangible, of the United States, <i>including the establishment of policies or procedures for the collection, control, or disbursement</i> of appropriated and other federal funds.
(C) FUNCTIONS EXCLUDED.--The term does not normally include--	
(i) gathering information for or providing advice, opinions, recommendations, or ideas to Federal Government officials; or	

<p>(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).</p>	
--	--

The draft Circular contains additional detail explaining the kinds of factors one should consider when looking at whether a function is inherently governmental. It also contains the following guidance:

While inherently governmental activities require the exercise of substantial agency discretion, not every exercise of discretion is evidence that an inherently governmental activity is involved. Rather, the use of discretion shall have the effect of committing the government to a course of action when two or more alternative courses of action exist and decision making is not already limited or guided by existing policies, procedures, directions, orders or other guidance that: (a) identify specified ranges of acceptable decisions or conduct; and (b) subject the discretionary authority to final approval or regular oversight by agency officials.

Att. A, ¶ E.2.

Aside from shifting the presumption, the Circular clearly restricts the FAIR Act’s definition of “inherently governmental function” in subtle, but crucial ways. Among other things, it requires substantial discretion, instead of discretion; it eliminates “interpretation and execution of the laws” that result in various occurrences, and substitutes only the execution, *i.e.*, the occurrences themselves; and it removes collection and control of federal funds, substituting establishment of procedures. (Presumably, under the draft Circular, IRS contractors would be free to forgive or insist upon payment for tax indebtedness, while under FAIR, they would not.)

- **The draft conflicts with the Federal Acquisition Regulation (FAR).** There appear to be several potential areas of conflict with the FAR. One specific example is that the Circular permits award if the government’s offer is late, but the FAR requires the contracting officer to extend the due date if the government needs more time for its tender. Compare FAR 7.304(b)(3) with Att. B, ¶ C.3.(9).
- **The competition procedure favors the private sector offerors.** There are numerous inequalities between the rules applicable to the government’s offer and the private sector’s offers. Some examples include:
 - The agencies’ offers are subject to cost realism analyses, see Att. B, ¶

4.a.(1)(b), but these are not required for all private sector offers under the FAR.

- The agency looks at its past performance in follow-on competitions. This is unfair because a federal agency does not control its own destiny, in terms of staffing, equipment, and budget. See Att. B, ¶ 5.b.(2). Similarly, terminating a government agency's contract for default is a ludicrous action, but the Circular permits it. ¶ 5.c.(2).
- The agency is not permitted to submit a tender that includes contractors for work currently being performed in-house. Instead, it must convince the contracting office to split off the portion of the requirement that it would use as part of its tender. If the contracting officer refuses, then the agency may be put into a position where it cannot reasonably compete.

1) Changes in the definition of the nature of the Agency's activities and in the presumption of such a nature may require an increase in the amount of resources allocated to the annual inventory of activities:

- a) The definition of "Inherently Governmental Functions" has been changed. Originally these functions were defined as follows:

Office of Federal Procurement Policy (OFPP) Policy Letter 92-1, "Inherently Governmental Functions", September 23, 1992

5. Definition. As a matter of policy, an "inherently governmental function" is a function that is so intimately related to the public interest as to mandate performance by Government employees. These functions include those activities that require either the exercise of discretion in applying Government authority or the making of value judgements [sic] in making decisions for the Government.

The revised version of Circular A-76 shall supersede Policy Letter 92-1. According to this revision, the exercise of discretion must be substantial for an activity to be considered inherently governmental.:

The qualifying term "substantial" is not defined, and this could create ambiguity affecting performance of the inventory of activities. As a consequence, more challenges to the inventory could be raised, which could result in requiring a larger application of resources to this process than has previously been necessary.

A possible definition for "exercise of substantial official discretion" would be "official activities where government personnel choices or judgments are of consequence." This definition could be included in the Attachment F, "Glossary of Acronyms and Definitions of Terms"

The revised version of Circular A-76 provides no guidance about which activities could be considered governmental. Appendix A to OFFP Policy Letter 92-1

provided “illustrative” lists of functions that were either considered to be inherently governmental, or that in certain situations could be considered governmental.

These lists were to be used as guidance when performing the annual inventory of activities. The lack of this guidance in the A-76 revision could compound the ambiguity created from using the adjective “substantial”, which in turn could increase the resources that may have to be devoted to the inventory process. If no guidance is given in the final version of the revised Circular A-76, it is important to be as precise as possible in the definitions.

- b) The presumption of the nature of the activities of the Agency has changed. In the current version of A-76, there was no assumption about the nature of the activities being inventoried.

The revised version of Circular A-76 presumes all activities to be commercial. This presumption shifts the burden of proof of the nature of the activity to the agency, and possibly raises the threshold for the agency’s justification of a given activity as inherently governmental. This change could once again increase the amount of resources that the Agency must devote to the annual inventory.

- c) The amount of supporting documentation required to be submitted by the Agency together with the inventory may have increased. In the current Circular A-76, OMB has the right to request supplemental information. In the proposed Circular, the Agency has to prepare and may have to submit the justification for any activity that wants OMB to consider inherently governmental or for commercial activities to be performed by the Agency. This information would also have to be made available to the public.

Since all activities performed by the Agency would be presumed to be commercial this new requirement could mean a large increase in the amount of work needed to prepare the inventory. Also, since the new Circular offers no guidance on activities that should or could be considered inherently governmental writing the justifications will be more complicated. Additionally, the lack of guidance could mean a more difficult review process by OMB, at least during the first year.

- 2) The revised version of Circular A-76 changes the scope of the Federal Activities Inventory Reform Act of 1988 (FAIR Act)
 - a) The amount of information to be submitted and published has increased. The FAIR Act requires of executive agencies the yearly publication of their list of activities that are not inherently governmental, i.e. commercial activities: The current Circular A-76 follows the FAIR Act very closely.

The revised version of Circular A-76 requires the compilation and submission of three separate lists, plus a composite summary. Two of these lists -- commercial activities not subject to the FAIR Act, and inherently governmental activities -- plus the summary, are not required under the FAIR Act.

These additional requirements may have a dual effect. They may promote more accountability by requiring full disclosure of all activities being performed by an agency, which may allow for a better assessment by OMB or by other interested parties of how good a job an agency has done in their inventory. They also may require the SBA to use more resources, since the amount of information to be submitted has increased. Although preparing an inventory of inherently governmental activities was already required by OMB in its "Memorandum for Heads of Executive Departments and Agencies" (M-01-16) of April 3, 2001, this revision would institutionalize it. Also, the proposed revision would require the publication of the inventory. Other agencies may already be publicly reporting inherently governmental activities; for example, the Department of Commerce already does.

Additionally, "commercial activities not subject to the FAIR Act" are not defined in the revised Circular A-76. The FAIR Act only defines inherently governmental activities, with commercial activities being defined by exclusion. The Act also defines areas of the government that are not covered by the it, without defining the nature of the activities in those areas. In consequence, it would seem that all commercial activities are FAIR Act commercial activities. The revised circular should explicitly define what activities are considered to be "commercial activities not subject to the FAIR Act".

- b) Under the revised Circular A-76 it may be possible for a private source to supervise Federal employees. The FAIR Act and the current circular make the control of Federal employees an inherently governmental function:

The revised Circular A-76 does not include this provision among the conditions defined under what constitutes an inherently governmental activity.

To have a contractor supervising a government employee could pose some issues. For example, if the employee is performing governmental and commercial functions, should it be assumed that such employee would have two supervisors: a contractor for the commercial functions, and a government supervisor for the governmental ones? And so doing, wouldn't create confusion about who is responsible for the governmental function, at least in appearance even if not in fact?

Preserving the original inclusion of commissioning, appointing, directing or controlling a government officer or employee, within the definition of what constitutes an inherently governmental function would not affect the nature of the

activities performed by that employee, and in consequence, it would not affect the number or type of commercial activities being performed by the Agency.

- 3) The revised version of Circular A-76 will require that all contracts with options, including those with agency sources, shall be consistent with the Federal Acquisition Regulation (FAR 17.204) which establishes that the total length of contracts should not exceed 5 years. In addition, it is required that as a norm the Agency uses the Standard Competition process, including when using an Inter-service Support Agreements (ISSA).

The effect of this requirement would vary depending on the service or good covered by the contract. In some cases, such as a computer support desk, competition of such contracts may cause a minimum disruption of Agency's activities, at the same time that allowing the Agency to continuously get the best possible service at the least possible cost. In other cases, such as payroll, the disruption could be major due to the size and complexity of the system, and its relationship to other systems within the Agency. For example, if SBA's payroll provider was changed, the interface with the accounting system would have to be reprogrammed. It would take around two years (if not more) to for the whole process to be completed; this would include the planning, competition, phase out, and phase in processes. An alternative could be a longer period between Standard Competitions for the main systems, with a modified requirement for competition every five years. For example, ISSAs executed under the authority of the Economy Act (*31 U.S.C. 1535*) require that no commercial source can provide the services or goods.

Under the current Circular A-76, as modified by Transmittal Memorandum #20 (06/14/1999), "Implementation of the Federal Activities Inventory Reform Act of 1998 (Public Law 105-270)", the government does not have to go through a Standard Competition to comply with the requirement that no commercial source is available to provide the goods or services. Instead, the Memorandum establishes the following procedure:

8. Government Performance of a Commercial Activity. *Government performance of a commercial activity is authorized under any of the following conditions:*

a. No Satisfactory Commercial Source Available. *Either no commercial source is capable of providing the needed product or service, or use of such a source would cause unacceptable delay or disruption of an essential program. Findings shall be supported as follows:*

(1) If the finding is that no commercial source is capable of providing the needed product or service, the efforts made to find commercial sources must be documented and made available to the public upon request. These efforts shall include, in addition to consideration of preferential procurement programs (see Part I, Chapter 1, paragraph C of the Supplement) at least three notices describing the requirement in the Commerce Business Daily over a 90-day period or, in cases of bona fide urgency, two notices over a 30-day period.

A similar process could be used for re-certification at shorter performance periods that no commercial source is available, with full fledged Standard Competitions at longer intervals. If a commercial source is identified during the re-certification process, a Standard Competition could then be performed. This type of change may be possible under the proposed Circular A-76, since it permits modifications to the process with OMB approval. This would allow the Agency to reap the benefits of changes in the market or advancements in technology, at the same time that minimizing the disruption to the performance of the Agency's mission.