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cc:
Subject: A-76 Federal Register Comments

Comments to A-76. General, Specific and Summary Comments.

General comments: The proposed policy appears to be OMB's solution to fixing Government's inefficiencies. Outsourcing of some work functions makes sense. However, the ambitious 'assumptions' in this policy will more likely result in 1) more burdensome tasks to the dwindling procurement community, 2) increased spending without corresponding savings gains, and 3) lack of a dedicated and skilled federal workforce. OMB's disregard for addressing the antiquated personnel system is irresponsible. Outsourcing should be an agency's management decision and is not properly solved by the procurement community; which is in practicality, where many of the responsibilities will fall or OMB.

No hard data exists to support what the actual savings from A-76 are. GAO reports issued in 2000 and 2001 and, the Commercial Activities Panel Report, issued, March 2002, regarding A-76 within DoD, emphasize the lack of precision in cost saving estimations. The magnitude of cost savings has not been determined. There were wide ranges in cost saving estimates per each

military service in addition to how positions were classified. Cost savings were greatly underestimated. No verifiable cost savings statistics with any certainty, exist. The president's budget in 2001, indicated that from 1997 to 2001, DoD spent $1 Billion in transition costs to implement A-76. Yet we have no comparable cost savings documentation. Congressional testimony supports that national security continues to be undermined as we continue to contract out services where profits are primary concern.

Thus, it seems more appropriate that the administration seriously consider overhauling its current personnel / human capital system. Revamping the government's personnel system would result in greater efficiency, cost savings, and effectively result in curing many of the 'ailments' inherent in the federal system. The government's antiquated system is the root cause for many of government's inefficiency ails and high costs. It is in this arena that government should become more commercial-like. We take months to get employees on board, years to get them fired, assuming someone has the tenacity to devote 110% of their time to meticulously documenting performance failures. Many of the basic laws, EEO, etc., protect employee / employer relationships. Remedies exist in law to protect workers. The federal personnel system protects the abusers and costs taxpayer dollars. The ability to hire, recruit, retain and fire employees like commercial industries is where our focus should be - with that comes efficiency, quality, and sound business practices that will improve the government's services and save taxpayer dollars.

Specific Comments by page and paragraph:

General: Define "reimbursable provider" and "public reimbursable source." State what they are in clear language. E.g., "public reimbursable" is a federal, state or local government agency or other entity other than a private sector company. This circular is in direct conflict with 10 USC 2462 for DoD. Therefore, the assumption is that DoD is exempt until the statute is changed. If so, what procedure do they follow if the previous A-76 is rescinded? If not, is DoD required to follow the circular with the exception of applying best value, thus only awarding to the 'lowest

technically acceptable proposal'?

Page A-1, Paragraph B.1, last sentence: Why is OMB maintaining control over classified and national security data ? OMB does not have under many instances, a need-to-know (e.g. staffing levels in certain locations). DoD has no obligation or mandate to "consult" with OMB prior to releasing information to the general public. Delete this sentence.

Page A-2, Paragraph D-1. Agencies should NOT presume that all activities are commercial in nature. Stating that assumes that all government functions are inefficient and must be justified to remain inherently governmental. Current language includes almost every position within lower management positions. However, some of these positions can indirectly affect public policy. How do you recruit, retain, train, 'grow' senior leaders, if lower tiers are assumed inefficient? What is the accession plan? Some governmental functions are already critically devoid of 'next generation' such as procurement.

Page A-2, Paragraph E-1. Inherently governmental activities -state clearly that "contractor" personnel are prohibited from 'supervising' government personnel. Reeks of conflict of interest.

Page A-2, Paragraph E-2. Second sentence makes no sense. It implies that all circumstances of decision making carry 'authority' to bind. Only contracting officers have authority to legally bind. Clarify when and what use of discretion is…e.g., "Use of discretion shall be defined as having 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 by existing regulations, policies, procedures, orders, or other guidance."

Page A-3, Paragraph E-1: Clarify that contractors are prohibited in supervising federal/government employees.

Page A-4, Paragraph E-3. "An activity may be provided by contract support… ..but is tasked to develop options or implement a course of action with agency oversight." Delete "implement and 'with agency oversight' as it implies contractors can implement actions without proper approval or authority. This paragraph needs a caveat in the last sentence of that paragraph to state that these 'circumstances are the exceptions to contracting out' not merely situations to 'avoid.' Claims and entitlement adjudication, and authority of Contracting Officers are some of the few that are inherently governmental tasks and must be clearly set forth.

Page A-5, Paragraph2(a)(1). Who is an "interested party" and who defines what constitutes an interested party and who determines the merits of 'their' challenge and what are the 'criteria' for challenges. Employees, agencies, contractors, is this synomous with 'directly interested party' which is used in the appeals section. Contrary to GAO ruling that employees or unions have standing to protest. Is OMB suggesting "both" have protest standing?

Page A-5, Paragraph2(b)(1). Who defines "interested parties?"

Page B-2, Paragraph A-1(a) Deviations - what is required to "waive" the timeframe required to complete a competition? Why and under what specific circumstances need to be clarified. The objective was fairness and openness and a level playing field - was it not?

Page B-2, Paragraph A-(1)(b): Who decides why a reorganization is taking place? No agency should not give up it's right to manage and realign its own resources. The reference to "shall not" reorganize needs to be somewhat clarified or reworded. Agencies are continually streamlining and reorganizing its assets to operate more efficiently, based on budgets; which does not circumvent the law.

Page B-2, Paragraph A-1.c: OMB is suggesting "how" to structure business arrangements. OMB should not be telling agencies how to structure business arrangements.

Page B-2, paragraph. A-2 (b)(3) and (4). New Requirement - the implication here is that subsequent to an A-76 decision to contract out - any new requirement can be added without any scrutiny - including that which was taken out before the competition. This is not clear and is a cause for concern. Same theory for expansion - the last sentence appears to leave a loophole allowing for expansion of that which is already under private sector performance. Make this part very clear.

Page B-3, Paragraph A-2.b.(5): What if there isn't another provider?

Page B-3, Paragraph B.3.: The HR advisor has no authority or business making public / contractual announcements - that is the responsibility of a warranted contracting officer. Workforce should learn of outsourcing by management.

Page B-3, Paragraph B-3(a)(d) - Human resource advisor -Who is the HRA? A personnel specialist or a labor-relations attorney? Only CO/KO can make announcements regarding competitions in FebBizOpps - that is reserved for authorized officials such as contracting officers. Delete that sentence. Suggest the last sentence read the "…HRA coordinates with the CO on matters regarding…." Indicates OMB's lack of understanding of federal procurements.

Page B-3, Paragraph B.4. What is meant by "independent of" the activity being competed and Administrative Appeal Authority? same general question concerning the Administrative Appeal Authority in paragraph B.5.

Page B-4 - General comment to all subsections - For DoD, circular is in direct conflict with 10 USC §§ 2462, 2462 that states:

Sec. 2462. - Contracting for certain supplies and services required when cost is lower

(a) In General. -
Except as otherwise provided by law, the Secretary of Defense shall procure each supply or service necessary for or beneficial to the accomplishment of the authorized functions of the Department of Defense (other than functions which the Secretary of Defense determines must be performed by military or Government personnel) from a source in the private sector if such a source can provide such supply or service to the Department at a cost that is lower (after including any cost differential required by law, Executive order, or regulation) than the cost at which the Department can provide the same supply or service.

Page B-4, Paragraph C.1.a. Who determines the "start date" of the competition? It is not clear. Does the 4.e.official make that decision? Can affect protests as dates are critical for timliness.

Page B-4, Paragraph C-1(a) & (3) preliminary planning and timeframe (12 mos) &
Page b-5, Paragraph C-2(a)(2) & (2)(2) (delayed issuance). Time dates in contracting are critical - (RFP release, award date, etc…) the start date is not clearly defined. The time for a solicitation shall be issued within 8 mos - this may be inadequate based on the situation. Applying arbitrary timelines are as meaningless as setting arbitrary goals (10% in 2003). Absent "logical" associations between the complexity of services being contracted out and the time frames, PWS's could be 'thrown together'. Change the "shall" to a "should not exceed. " Applying an artificial timeline could cause further delay since a justification and corrective action plan will, in practicality, be drafted by those conducting the competition.

Page B-5, Paragraph C-1(b)(6) relationship to budget. There are no hard proven statistics that this process saves money over the long term. Unless there is some guidance outlining what costs are to be included / considered the baseline is flawed and the actual amount of savings realized is undeterminable and varies per agency.

Page B-6, paragraph 2-a(3) - FAR provisions. The "agency shall determine… sealed bid or negotiated acquisition." Is this a CO/KO decision or will OMB make that determination also.

Page B-6, Paragraph 2(6), last sentence: Phase-out costs should be recognized if there is to be a change in incumbent. Were considerations regarding hiring, training, recruiting, etc…. included? was this included in the budget estimate?

Page B-6, Paragraph 2.a(7) Why is the 4.e official approving use of government property? This is a requiring activity and acquisition team determination. Requiring a CO to get senior level approval is burdensome and unnecessary.

Page B-6, paragraph 2.a(9) Innovation - this paragraph should not be part of this A-76 provision. Incentives are structured by the acquisition team, depending on the procurement, industry / sources available and the service required, etc. Source selection / evaluation criteria is set forth in the solicitation depending on the service required. A properly structured PWS allows offerors to propose innovative approaches and identify alternative performance standards. Do not limit the CO's flexibility.

Page B-6, Paragraph 2.a(9): Does this mean procurements must consider offers of service levels in excess of agency needs? Needs clarification.

Page B-8, Paragraph 3.a.(1): Why subject to one and not the other?

Page B-9, Paragraph (4), second sentence: The MEO may in fact be represented by the current organization. Can an MEO subcontract too?

Page B-9, 3.a(5) Agency estimate. This is an area that needs guidance - as to what costs must be included to reflect an accurate and complete cost estimate. Without guidance on preparing what is to be included in that cost estimate, the results could be misleading. What is each certifying to? It states the ATO has discretion to make changes to the estimate prior to submission of the agency tender; however, how much discretion and must he justify any changes in writing? Phase in-out costs have historically not been calculated when undergoing an A-76 study or when calculating the cost saving when contracted out. In order for the government to recognize a true savings ALL costs must be considered (phase in / out, changing requirements / modifications, cost of preparing an MEO, etc.)

Page B-11, Paragraph 4.a.(1)(a): Is this technical leveling? Do all have 2 bites at the apple?

Pages B-11, 4.a(1)(a) evaluation of the agency and public reimbursable. BOTH should be subject to the same principles under FAR 15 (or FAR 14 if necessary) and source selection if fairness and openness are real objectives for all.

Page B-11, Paragraph 4.a.(b)(1): Prohibition on "assessing monetary values for non-quantifiable elements" of the offers. Selecting other than the low offer requires discussion on where the additional value comes from. GAO requirement. Appears to be a conflict.

Pages B-11-B-16 - all paragraphs. The FAR is clear, concise, and much more flexible than this circular.

Page B-12, Paragraph C.4.a(3)(a) (3) Deficiencies. In the resolution process for materiel deficiencies in the agency tender, what constitutes a "reasonable timeframe?" Technical leveling in a FAR-LIKE area??

Page B-13, Paragraph C.4.a. Who determines the "agency current budgetary limitation" for a particular competition? Does this represent the total budget for the agency? Or only for this particular competition? See also C.4.a.3.(c).2.a.

Page B-15, Paragraph C.5.a - Burdensome. Post award functions, in reality, will fall on the overburdened procurement community. It is not clear that after the PD is rendered, that which ever entity wins shall be subject to monitoring of actual cost performance. Clarify that all are subject to this requirement. "Whom" is responsible for monitoring this? If the agency wins - who in the agency is responsible for monitoring this data and to whom do they report it? If costs far exceed the cost savings estimate in one year - then what? If a private sector wins - is the monitoring of costs to be placed on the contractor (at an additional cost) or are government contracting personnel responsible?

Page B-15, Paragraph C.5.a.(3). "Letter of Obligation" = MEO offer? Implies that an MEO is subject to 'recompetitions'? Who monitors performance of an MEO? Its performance costs? Taking all this to a logical conclusion - the CO/KO can terminate the MEO - and, therefore, the MEO can file a claim and sue the government? The government can sue the government? This is nonsense.

Page B-15, Paragraph C.5(b) - years of performance & follow on competition. "options" are not clear -this assumes the old standard - one base year plus 4 option years. This is the age of acquisition reform - where do award term fit in? Requiring the standard use of 'options' limits the government's flexibility. This exemplifies OMB's lack of understanding of the complexity of the federal procurement process.

Page B-16, Paragraph 5.c.(1) Notification - the terms of the contract to a private sector will have provisions for non-performance IAW FAR. Notice to an MEO - it states the agency head will notify the MEO or other public entity? Who is doing the monitoring? Again, this will fall on the procurement community. What are the criteria for non-performance? What are the remedies? What are the consequences of 'non-performance'? What laws / regulations govern ? Under a contract there is a disputes clause? See comment to B-15, Para C.5.a.(3). Consistency and fairness are lacking.

5.c(2) and (3): Termination. Does a “termination for convenience” apply to an MEO or is only a “default” termination applicable. Can an MEO file a claim? Who represents the MEO? Who pays? As with any adverse action particularly a default termination – the process allows for final decision and appeal, as per FAR Part 33. The legal standard for properly terminating for default is quite high; therefore, if FAR is not applicable to an MEO, what is the standard to meet for terminating an agency? Who determines this? Are there timelines – chances to “cure” before terminating.
Page B-17, para 6(a)(1) BOTH should be subject to appeal for consistency and fairness. However, no policy can trump statute, e.g., private sectors inherent right to appeal / protest. See above comments.

Page B-17, C.6.a.(1). Define "directly interested parties?" This suggests that an MEO can protest. Is this a GAO / OMB battle deferment – and agency employees are the subject guinea-pigs? Suggest using the GAO definition of 'directly interested party'. But who represents, who pays?

Page B-17- para. 6(a)(2) - Clarify the date for appeals - suggest it be similar to a protest. "interested or directly interested party" are not defined. A 15 day extension may be arbitrary depending on the complexity of the procurement.

Page B-17, Paragraph 6.a.(2): Appeal period should be extendable depending on complexity.

Page B-17, Paragraph 6.a.(3): Define directly interested parties? If GAO definition is used- then an MEO can protest - but GAO ruled against this. Why the ambiguity? Who is to decide this issue, GAO or OMB or Congress? If this is a CTTO source selection, ALL appeals should also be allowed based on whether the agency followed it's stated evaluation criteria - consistency and fairness.

Page B-17, 6.a(3) - define "directly interested parties" Is the "review period" the same time-period as the "appeal submission period in paragraph C.6.a.(2)? This must be defined upfront and not left for GAO to decide after the policy is in effect – that is shortsighted and unfair to those that this process applies to – all of government.

Page B-20, D-2.c(1) conflict of interest. Circular is riddled with COI issues. What about support contractors - different business entities within a corporate structure. No amount of firewalls are, in reality, truly effective. Industry today, particularly those competing for DoD work, continue to merge and form 'large' businesses making COI's and support contractor participation that much more difficult. Consider keeping the SSEB totally independent of the organization. Many of these could potentially be long time co-workers and personal friends making objectivity much more difficult.

Page C-1, Paragraph A.2 - define "time limited appointment" - are these 'temporary' or term or both or any 'conditional' employment categories. Coordinate with personnel.

Page C-2, paragraph A.3 R&D - this is too broad and can potentially include most of R&D today. The definition at Appendix F does not appear to be consistent with the implication under criteria where a direct conversion can take place! IT appears to include actual conduct of R& D technology - under the supervision of inherently governmental personnel ?

Page C-2, Paragraph A.6 - National Security and defense. National security and defense should be under the control of the appropriate agency's and subject only to "direct conversion" by that agency and consistent with national security goals. OMB should not be the agent to authorize this. Page C-3, paragraph D-1 implies that intelligence and national security are done on a commercial basis. Only guard services are available on a commercial basis NOT analysts with very different skill sets than ‘protective services.’ In DoD – security can be contracted out BUT only without weapons. One should ask why are why are airport screeners and security fast becoming federal employees – under different personnel laws.

Page C-2, paragraph B - certification. What are the criteria for determining what constitutes 'fair and reasonable cost.' There should be some guidelines. Who reviews this? Is this subject to any review at all? Where is the check and balance? Sanity check?

SUMMARY: Decisions to outsource / contract out should be individual management decisions based on mission function, budgets, manpower, etc.. Agencies, already hit by budget cuts and Performance Based Budgeting mandates, are already realigning and arranging more and more like business segments than ever before. DoD Army depots and AF facilities are implementing LEAN initiatives to deal with all the issues facing DoD; which will continue to result in cost savings and smarter business processes. Shortening the times to conduct an A-76 survey is the only area that has any real merit; however, its deadline is arbitrary. Further, OMB’s agenda is extremely shortsighted. It ignores the “human capital” “crises” facing government and all recommendations to tackle restructuring the federal personnel system. If any area needs to be more business-like it is this area. It is here that real cost savings and efficiencies will be gained. IN addition, OMB has deferred the very important decisions by deliberately not clarifying many key provisions and terms in this circular; which in itself is very unfair. OMB assumes that outsourcing to private industry is the answer to a lean, mean, government machine. One has to wonder if Enron, WorldCom, US Technologies, Arthur

Anderson, Imclone, Adelphia Communications, AOL, Qwest, or mismanaged entities such as US Air, Sunbeam or United could do any better than the federal government.

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