

MS 738 PERFORMANCE OF COMMERCIAL ACTIVITY

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1.0 PURPOSE

This Manual Section establishes the responsibilities and procedures for implementing OMB circular A-76 (Revised), "Performance of Commercial Activities" - August 1983.

2.0 BACKGROUND

It has been, and continues to be, the general policy of the Government to rely on competitive private enterprise to supply the products and services it needs. To ensure that agencies actively support this premise, the Office of Management and Budget (OMB) has issued OMB Circular No. A-76 (Revised; August 4, 1983). This circular establishes policies, responsibilities, and procedure to determine whether needed commercial activity should be done by contract with private sources or in-house using government facilities and personnel.

3.0 SCOPE

This order applies to all activities of the Peace Corps.

4.0 POLICY

It is the policy of the Peace Corps to rely on the private sector for commercial products and services whenever available, unless the functions are inherently governmental in nature, the procurement is prohibited by law, or in-house performance is demonstrable more economical.

4.1 Exceptions

The following activities are not subject to the provisions of this Manual Section:
Automated Data Processing (ADP) hardware systems are covered by OMB Circular A-109 "Major System Acquisitions," and are not subject to the provisions of A-76.
contracts awarded under authorized minority set-aside programs are exempt from the provisions of A-76.

When in-house performance to meet a new requirement (new start) is not feasible or when contract performance would be by a commercial or mandatory source under a preferential procurement program, a contract can be awarded without conducting a comparative cost analysis.

Commercial activities involving 10 or fewer FTEs may be converted to contract without conducting cost comparisons if fair and reasonable prices can be obtained from qualified commercial sources. If there is reason to believe the activity could be performed more economically in-house, it shall be added to the inventory and scheduled for review (see paragraph 7, "Procedures").

5.0 DEFINITIONS

5.1 "Governmental Function"

A function which is so intimately related to the public interest as to mandate performance by Government employees. These functions include those activities, which require either the exercise of discretion in applying Government authority or the use of value judgment in making decisions for the government. Services or products in support of Governmental functions, such as those listed in Attachment A, are commercial activities and are normally subject to this Circular. Governmental functions normally fall into two categories:

- The act of governing i.e., the discretionary exercise of Government authority. Examples include criminal investigations, prosecutions and other judicial functions; management of Government programs requiring value judgments, as in direction of the national defense; management and direction of the Armed Services; activities performed exclusively by military personnel who are subject to deployment in a combat, combat support or combat service support role; conduct of foreign relations; selection of program priorities; direction of Federal employees; regulation of the use of space, oceans, navigable rivers and other natural resources; direction of intelligence and counter-intelligence operations; and regulation of industry and commerce, including food and drugs.
- Monetary transactions and entitlements, such as tax collection and revenue disbursements; control of the treasury accounts and money supply; and the administration of public trusts.

5.2 "Commercial Activity"

An activity which is operated by a Federal executive Agency and which provides a product or service which could be obtained from a commercial source. A commercial activity is not a Governmental function. A representative list of such activities is provided in Attachment A. A commercial activity also may be part of an organization or a type of work that is separable from other functions or activities and is suitable for performance by contract.

5.3 "Commercial Source"

A business or other non-Federal activity located in the United States, its territories and possessions, the District of Columbia or the Commonwealth of Puerto Rico, which provides a commercial product or service.

5.4 "Conversion to Contract"

This is the changeover of an activity from Government performance to performance under contract by a commercial source.

5.5 "Conversion to In-house"

This is the changeover of an activity from performance under contract to Government performance.

5.6 “Approving Authority”

An official of the organization in which the activity reviewed is or would be located with the responsibility for determining whether the activity should be performed commercially or in-house.

5.7 “Directly Affected Parties”

These are Federal employees and their representative organization and bidder or offerers on a solicitation.

5.8 “Expansion”

The modernization, replacement, upgrading or enlargement of a Government commercial activity involving a cost increase exceeding either 30 percent of the total capital investment or 30 percent of the annual personnel and material costs. A consolidation of two or more activities is not an “expansion” unless the proposed total capital investment or annual personnel and material costs of consolidation exceeds the total of the individual activities by 30 percent or more.

5.9 “New Requirements”

A newly-established need for a commercial product or service.

5.10 “Cost Comparison”

This is the process of developing an estimate of the cost of Government performance of a commercial activity and comparing it, in accordance with the requirements in Parts II, III, and IV of the Supplement, to the cost to the Government for contract performance of the activity.

5.11 “Cost Comparison Handbook”

Part IV of Supplement to OMB Circular A-76 which provides detailed instructions for developing a comprehensive and valid comparison of the cost of in-house vs. contract acquisition of needed products and services. Copies are available from OMB through the Office of Planning, Assessment and Management Information (PAMI).

5.12 “Writing and Administering Performance Work Statements”

Part II of Supplement to OMB Circular A-76 which describes how to write work statements for services and quality assurance plans. Copies are available from OMB through PAMI.

6.0 RESPONSIBILITIES

6.1 Peace Corps Director

The Peace Corps Director conducts administrative reviews of Peace Corps contracts and activities to determine which fall within the guidelines of the circular, and issues final written justification whenever an appeal is filed (see paragraph 8, “Appeals”).

6.2 Associate Director for Management

The Associate Director for Management is responsible for:

- The implementation of OMB Circular A-76;
- Serving as a liaison with OMB on all matters relating to Circular A-76;
- Approving the inventory of contracts and government commercial activities in Peace Corps subject to A-76 review.

- Submitting, no later than March 15 of each year, a summary report on the implementation of OMB Circular A-76 (see Attachments B, C, and D).

6.3 Director of Contracts

The Director of the Contracts Division, (M/FM/C) is responsible for:

- Coordinating all activities, including pre-award surveys, leading to firm bids or quotations from vendors to be used in computing the contract cost estimates for cost comparison; and,
- Completing Item 7 on the Cost Comparison Form (Attachment E) needed to support the determination to perform in-house or under contract.

6.4 Director of Planning, Assessment and Management Information (M/PAMI)

The Director of M/PAMI is responsible for:

- Developing and updating annually inventories of contracts and government commercial activities subject to A-76 review (listing separately activities of 10 FTEs or less and activities of more than 10 FTEs);
- Scheduling reviews in coordination with the Contracts Division and affected offices;
- Ensuring accomplishment of thorough management studies of schedules activities;
- Overseeing the preparation of Performance Work Statements (PWS) and Quality Assurance (QA) Plans;
- Providing technical guidance on the preparation of cost estimates;
- Identifying a Cost Comparison Coordinator (CCC) in-house or through a contract; and
- Ensuring conformance with the circular and the “Cost Comparison Handbook” of all cost comparisons.

6.5 Director of Compliance

The Director of Compliance (M/C) is responsible for independent review and audit certification of all cost comparisons in order to ensure conformance to the instructions in the “Cost Comparison Handbook.”

6.6 Office Directors

The Director of each Peace Corps office is responsible for:

- Assisting the Office of Planning, Assessment and Management Information in developing the inventories of contracts and government commercial or industrial activities;
- Determining the availability of excess property and services to be used in preference to new starts or contracts for commercial or industrial activities within that office;
- Preparing Performance Work Statements (PWS) and Quality Assurance (QA) Plans for those commercial activities scheduled for review; and;
- Preparing cost estimates for in-house performance of those activities.

6.7 General Council

The General Counsel (D/GCLL) is responsible for:

- Advising the Associate Director for Management on statutory or regulatory provisions affecting a determination between in-house or contractual performance of a commercial activity; and;
- Representing Peace Corps in appeals filed under paragraph 8 of this Manual Section.

7.0 PROCEDURES

7.1 Inventories and Review Schedules

Within 90 days of the issuance of this order, the Office of Planning, Assessment and Management Information, in cooperation with affected offices, will compile the following:

- An inventory of contracts and an inventory of government commercial activities, including known expansions and new requirements, subject to A-76 review; and;
- Schedules for the review of inventoried contracts and activities.

7.1.1 Expansions

When a proposed action involves an expansion, it will be reviewed as though it were a scheduled review of an existing activity.

7.1.2 New Starts

New starts shall be scheduled for review in time for the results to be incorporated in budget planning.

7.1.3 Public Notification

Review schedules will be provided to the employee union representatives through the Employee Relations and Management Division (M/PM/ERM), and published for notice in the Federal Register and Commerce Business Daily.

7.2 Contract Review

At least twelve (12) months before the scheduled contract review date, the affected office will review the contract cost and determine whether it is likely that the work can be performed in-house with savings that meet the criteria established by A-76. When this is determined to be likely, a cost comparison will be conducted.

All work statements and quality assurance plans for existing service contracts subject to Circular A-76 will be rewritten using the Supplement to the circular before reprocurement, even when a cost comparison will not be performed. This requirement does not apply to contracts obtained under small purchase procedures or in those cases where it is stated in writing, by the Associate Director responsible for the activity, that application of the Supplement would not be in the best interest of mission accomplishment.

7.3 In-House Activity Review

A-76 reviews of contractual, versus government, performance will normally begin at least twelve (12) months before the scheduled review date in order to allow time for a thorough review. Procedures for such reviews will include the following:

7.3.1 Notification

Before beginning review of an in-house activity, the Office of Planning, Assessment and Management Information will notify the concerned office and the employee union representatives, through the Employee Relations and Management Division (M/PM/ERM), of the scheduled review.

7.3.2 Management Review

In order to assure that Peace Corps operations are organized and staffed for the most efficient and effective performance, the Associated Director, under whose directorship the scheduled activity falls, will ensure that an internal management review of the activity is conducted. This review will include an analysis of the resources, organization, and operations currently pertaining to the activity, and may result in reorganization for accomplishing the work more efficiently and effectively.

7.3.3 Performance Work Statement and Quality Assurance Plan

The affected office will prepare a Performance Work Statement (PWS) of that activity and a Quality Assurance (QA) Plan in accordance with the Supplement. This PWS will describe the actual work being performed by the activity, as modified subsequent to the management review. Since both government and commercial cost figures must be based on the same scope of work and the same level of performance, the PWS must be sufficiently precise, with performance standards that can be monitored for either mode of performance.

7.3.4 Solicitation of Bids

The Contracts Division will solicit bids or proposals, based on the statement of work, and conduct a pre-award survey as required.

7.3.5 Cost Comparison

The cost comparison procedure will include the following steps:

- The affected office will prepare an estimate of the cost of in-house performance, based on the procedures provided in the "Cost Comparison Handbook," and submit it on the Cost Comparison Form (Attachment E) to the Cost Comparison Coordinator (CCC).
- The CCC will review the in-house estimate and forward it in a sealed envelope to the Contracts Division (M/FM/C) before the scheduled "request for proposal" closing date where it will be held until completion of the contract negotiations.
- After completion of contract negotiations, the Contracting Officer will enter the dollar amount of the lowest responsible contract price on line 7 on the Cost Comparison Form and return it to the CCC for completion in accordance with the Handbook.
- Once the comparison is completed and the form signed, the CCC will submit it to the Office of Compliance (M/C) for independent audit and verification that the Government's estimated costs have been prepared in accordance with the Handbook. Upon review, and after any necessary corrections are made, it will be approved and returned to the CCC.
- The CCC will then complete the Cost Comparison form including the recommendations to award a contract or to perform the work in-house. The Cost Comparison Form will be forwarded to the approving authority for review and approval.
- The approving authority will send the approved forms to the Contracting Officer who will announce the results of the cost study and make available the detailed analysis to any interested parties: bidders, affected employees, and unions representing affected employees.

7.3.6 Excess Property and Services

Excess property or services available from other Federal agencies should be used in preference to new starts or contracts, pursuant to procedures established in A-76.

8.0 APPEALS

8.1 Right of Appeal

Any parties directly affected by a determination to contract out or to perform in-house a commercial or industrial activity have the right to appeal that determination within 5 days of receipt of the determination.

8.2 Appeal Process

The following procedures must be followed when filing an appeal:

- The appeal must be in writing to the Director of Peace Corps, and must provide a reason why the initial determination should be changed. Appeals may only concern the question of in-house versus contract performance of the function in question.
- Once the deadline for appeals has been reached, all parties notified of the original determination will be notified of the nature of any appeals and given the opportunity to comment in writing within 15 days.
- Upon the receipt of any appeals and comments, the Director, or his or her designee, may hold a conference to hear evidence regarding the appeal, to which all parties filing or commenting on appeals must be invited.
- The Director will issue a final written determination within 15 days of the deadline for comments. All parties filing or commenting on an appeal will be notified of the final determination.
- Since the appeals procedure is designed to protect the rights of all parties, neither the appeals procedures, nor initial or final determinations are subject to negotiations, arbitration, or agreements with any one of the parties.

9.0 Effective Date

This Manual Section shall take effect on the date of issuance.