

December 19, 2002

Mr. David Childs  
Office of Federal Procurement Policy  
Office of Management and Budget  
725 17<sup>th</sup> Street, N.W.  
Room 9013  
New Executive Office Building  
Washington, D.C. 20503

Dear Mr. Childs:

This responds to the November 19, 2002, Federal Register Notice (Federal Register Volume 67, Number 223) regarding the proposed revision to Office of Management and Budget (OMB) Circular No. A-76, "Performance of Commercial Activities." The following comments are offered for your consideration from the U.S. Nuclear Regulatory Commission.

1. Under the current Office of Management and Budget (OMB) guidance regarding the FAIR Act inventories, commercial activities designated under Reason Code A, which are small functions that involve 10 or fewer FTE, are exempt from the cost comparison requirements of Circular A-76. This exemption recognizes that it would not be cost effective for agencies to establish the infrastructure required to conduct commercial activities studies. In addition, it has previously been determined that the 10 or fewer FTE Rule was a breakeven point for purposes of applying agency resources. We recommend that similar logic be applied to agencies that have small numbers of commercial FTE in their inventory. Specifically, for agencies with fewer than 750 total commercial FTE on their FAIR Act inventory, OMB should establish a threshold such that the applicability of the Circular would be within the discretion of the agency regarding 10 or fewer employees performing a commercial function.
2. On Page 1 of the revised circular, paragraph 2 on Supersession, there is no express reference whether the OMB Circular No. A-76 "*Revised Supplemental Handbook*" is also superseded or revoked. We recommend that the revocation of the OMB Circular's *Revised Supplemental Handbook* be expressly noted as well in paragraph 2.
3. Generally in Executive Orders and in prior versions of the OMB Circular A-76, or their Revised Supplement Handbook, there has been a legal disclaimer to the effect that the Circular and their Supplement "*are not intended and should not be construed to create any benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers or any person....*" Due to the potential legal consequences of this omission, we recommend that the final revised version of the Circular include the disclaimer to ensure that the revised Circular does not create unintended benefits, rights, and standing that would otherwise allow persons to bring legal actions against the United States, its agencies, its officers or any person.

4. Attachment A, paragraph D.3, requires the development of written justifications for activities determined to be inherently governmental. In the interest of efficiency, and to minimize the burden on scarce resources, OMB should consider the use of class justifications, possibly by job series or position description, by agencies in achieving this new requirement.
5. Attachment B, paragraph B on Designations and Responsibilities, requires that in the appointment of an Agency Tender Officer (ATO), the Contracting Officer, the Human Resource Advisor, Source Selection Authority, and the Administrative Appeal Authority, that each “shall be independent” of the activity being competed and “independent” of each other. The paragraph B requirements on the organizational independence of designated persons appear to be drafted in the context of or suited for large Federal agencies. It is not clear what is meant by the term “independent” and whether as a practical matter some small Federal agency as currently organized can meet the requirement that all these designated persons would be organizationally “independent” of the activity being competed and “independent” of each other as is currently stated in paragraph B. We recommend that an explanation regarding the requirement for independence be addressed in the context of small Federal agencies where many of these functions as a matter of efficiency and practicality have been organizationally centralized under a common authority or directorate.
6. Under Attachment B, paragraph B, number 3, the Human Resource Advisor (HRA) is responsible for making public announcements at the local level and in FedBizOpps of the competitions. We recommend that the requirement to place the notice in FedBizOpps be assigned to the Contracting Officer, which is traditionally their responsibility.
7. The Administrative Appeal Process is established in Attachment B (Standard Competition Process) and the appeal appears to be provided in Attachment B in the context of the “Standard Competition Process.” In Attachment C, Direct Conversion Process, there is no reference or mention of whether the Administrative Appeal Process contained in Attachment B is also applicable to any of the Attachment C, Direct Conversion Process actions. Are the Attachment B Administrative Appeals Process applicable to any of the Attachment C, paragraph A listed direct conversion criteria? If so, which of the Attachment C listed direct conversion actions would the Administrative Appeal Process apply to and who, other than the Agency Tender Officer, would be eligible as a “directly interested party” to file an agency administrative appeal regarding the Attachment C, Direct Conversion actions?
8. Attachment C, paragraph D.1.c., has as one of the 4 e. official’s findings in authorizing the conduct of a Business Case Analysis, the requirement that, “The activity has no more than \$5,000 in asset purchase requirements....” It is not clear what is intended by the term “asset purchase requirements.” Furthermore, this amount is at an extremely low threshold which will make the use of the Business Case Analysis direct conversion criteria unlikely and, when authorized, may result in allegations and litigation over the method used in costing and determining the value of asset purchases at such a small dollar level. We recommend that this criterion explain what constitutes and what is intended by the term “asset purchase requirements” and that the dollar threshold be increased to reflect at least the simplified acquisition threshold of \$100,000.

9. Attachment C, paragraph D.1.f., requires as part of the 4 e. official's finding in authorizing the conduct of a Business Case Analysis that "The cost of converting the activity to another source is fair and reasonable." However, there is no explanation as to the method and cost elements associated with this determination. On the contrary, the common method in determining such a conversion requires some form of market survey price information which is precluded under paragraph D.1.i. We recommend that paragraph D.1.f. be deleted since it is premature at this stage in a business case analysis to make such a determination and essentially such a determination occurs as part of the proper completion of the Standard Competition Form.
10. There appear to be several incongruities between the Attachment C, paragraph D.2. Business Case Analysis Documentation instructions and the completion of the Standard Competition Form (SCF). For the Business Case Analysis direct conversion action, the ATO is directed to calculate and complete the entries in the SCF up to line 18 which encompasses completing all of the available cost lines on the SCF. The SCF lines that the ATO completes include the entries for private sector contract prices, then the agency tender and the SCF is sealed and provided to the Contracting Officer. Without opening up the sealed agency tender and SCF, the Contracting Officer is required to locate four comparable fixed price contracts of similar size, workload and scope as contained in the agency's tender. What is the process for a Contracting Officer to know what four comparable fixed price Federal contracts to look for that are of similar size, workload and scope as contained in the agency's sealed tender offer, when the Contracting Officer is unable to know or even view the contents of the sealed agency tender? The Contracting Officer must have information and knowledge of what is the size, workload, years of performance, and scope of the agency tender in order to find four comparable fixed price Federal contracts. In addition, after the Contracting Officer finds four comparable fixed price Federal contracts and selects the low contract price, there is no available entry in the SCF for the Contracting Officer to enter and document that finding on the SCF. Since the ATO has completed as instructed the SCF private sector contract price lines 7, 8, 12, 13, 14-18, all that the Contracting Officer can do is simply sign the form. The instructions on the Business Case Analysis Documentation need to be corrected and the ATO should be instructed to complete only up to SCF Cost of Agency Performance line 6.
11. Attachment C, Section E Direct Conversion Process, paragraph 1 Start-Up Phase, should be clarified regarding the timing of the requirement to make a public announcement in FedBizOpps. It appears that the announcement should occur following the agency's decision to perform a direct conversion, but prior to any public announcement required by the Federal Acquisition Regulation, if necessary, that the activity is being converted from the public sector to the private sector.
12. Attachment D, Section A (3), states that commercial inter-service support agreements that are "statutorily mandated" are not subject to competition under the revised Circular. Further guidance on the specific meaning of the term "statutorily mandated" would be helpful.

13. Attachment E, paragraph 3, includes a table to be used in the development of contract administration costs under Line 8 of the SCF. The table only includes grades GS-6, GS-9, GS-11, and GS-12. Are agencies limited to only these grades, or may the actual grades of the individuals who will be performing the contract administration functions be used?
14. There are several instances in the proposed revised Circular that refer to other paragraphs in the Circular that do not exist or are perhaps erroneously cited. For example at Attachment B, page B-20, paragraph D.3 Participation of Directly Affected Employees and Representatives of Employees is brief and ends with the reference "...in accordance with paragraph D.3 above." However, there is no paragraph D.3 above. Another example is at Attachment B, page B-7 there is reference at paragraph C.2 a.(11) in the context to the Cost/Technical Tradeoff (CTTO) source selection to "(see paragraph C.4.a(3)(b) below);" however, the CTTO source selection method is discussed in "C.4.a(3)(c)" not at "C.4.a(3)(b)." Also, at Attachment B, page B-7 there is reference at paragraph C.2 a.(13) to paragraphs "C.6.b.(2)" and "C.6.d.(2) below." However, at paragraph C.6 there are no paragraphs marked as "C.6.b.(2)" or "C.6.d.(2)." We recommend that OMB review all the cross-referenced paragraph cites and ensure that they are correctly cited in the final version of the Circular.

We appreciate the opportunity to provide these comments. Should you have any questions on this matter, please call Ms. Kathryn Greene on (301) 415-7305 or Mr. Mark Flynn on (301) 415-6736.

Sincerely,

**/RA/**

Michael L. Springer, Director  
Office of Administration

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Michael L. Springer, Director  
 Office of Administration

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