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ACQUISITION,
TECHNOLOGY
AND LOGISTICS

JAN 15 2003

The Honorable Angela B. Styles
Administrator
Office of Federal Procurement Policy
Office of Management and Budget
Washington, DC 20503

Dear Ms. Styles:

The Department of Defense (DoD) applauds the Office of Management and Budget (OMB) for its commitment to improve and revamp OMB Circular A-76, Performance of Commercial Activities. The proposed revision to OMB Circular A-76, published in the Federal Register on November 19, 2002, not only is consistent with the recommendations made by the Commercial Activities Panel in its report to Congress on April 30, 2002, but is a vast improvement to the current Circular. Some of the exceptional administrative improvements are the user-friendly format; consistent use of terms; clearer definitions; and the elimination of redundant, unnecessary, and contradictory wording. These improvements, coupled with the fundamental changes to the policies for performing Public-Private Competitions and the much-needed procedures for conducting Direct Conversions, provide the standardization needed to reduce complexity and cycle time. DoD recognizes the challenge that OMB faced in developing a Circular with such drastic, yet necessary, reforms. We stand ready to support OMB in implementing these improvements to a process that already yields significant benefits to the Department and the American taxpayer.

This letter forwards the Department's comments on the revised Circular. Our fundamental concerns with the revised Circular are provided at Attachment 1. Some of these concerns are supported by the memorandum at Attachment 2 from the OSD Office of the Deputy General Counsel (Acquisition and Logistics). Under separate cover, we will provide a more detailed matrix, which will include proposed, specific changes to the text of the revised Circular. Thank you again for the opportunity to provide our comments to improve this important policy and process.

Sincerely,

Raymond F. DuBois
Deputy Under Secretary of Defense
(Installations and Environment)

Attachments

1. DoD Fundamental Concerns
2. OSD(GC)A&L Memo



DoD FUNDAMENTAL CONCERNS

REGARDING

**THE PROPOSED REVISION TO
OMB CIRCULAR A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES,
NOVEMBER 14, 2002**

1. CONSTRAINTS ON THE MANAGEMENT AUTHORITY OF THE DEPARTMENT OF DEFENSE (DoD).

a. Changes to Secretary of Defense (SECDEF) Authorities. The revised Circular eliminates authorities currently granted to SECDEF which may directly impact National Defense. Specifically, SECDEF no longer has the sole authority to (1) determine compliance with the Circular during times of war and mobilization, and (2) perform Direct Conversions based upon National Defense.

DoD Recommendation: The Office of Management and Budget (OMB) should modify the revised Circular by reinstating the following: (1) Paragraph 7.c.(3) from the current Circular, and (2) Paragraph C.1. from Part I, Chapter 1 of the Revised Supplemental Handbook (RSH).

b. Public Access to Inventory and other DoD Information. The Department is concerned about the requirement in the revised Circular to make the commercial activity inventory available to the public, including written justifications for agency performance of commercial activities. Even though the revised Circular allows for agencies to “. . .consult with OMB to determine the impact of releasing such information to the general public,” this statement arguably impinges on the authorities of the SECDEF to manage classified and sensitive information, as it implies that OMB could direct the release of classified or sensitive information if OMB were to disagree with SECDEF’s assertion that release would have adverse impacts. When law precludes release of DoD’s inventory (or any DoD information), the Department’s primary responsibility is to comply with our statutory obligations.

DoD Recommendation: OMB should include a caveat in the Circular that clarifies that nothing in the Circular is intended to alter any laws, Executive Orders, rules or regulations limiting access to or disclosure of classified or sensitive information, or to restrict SECDEF’s authority to manage classified or sensitive information, including conditions for its release.

c. OMB Oversight. The revised Circular has expanded OMB’s oversight responsibilities beyond matters of policy, to the Department’s management of its resources and processes. The Department supports the six OMB approval requirements that are based on policy oversight; specifically, the process deviations as stated at paragraphs A.1.a. and C.4.a.(3)(c)(1) in Attachment B, and the costing deviations at paragraph C.1.b.(7) in Attachment B and paragraphs A.2., A.5., and B.4.b. in Attachment E. The Department, however, has concerns about the increased number of matters regarding resource or process management that now require a written DoD report to OMB or prior written OMB approval. Considering DoD’s

size and multiple levels of organization, and the hundreds of competitions that DoD performs, a requirement that OMB approve DoD's management decisions would be unduly burdensome. Requests for approval and written reports to OMB would originate at DoD's installations, and would serve as another excuse to slow, or stop, competitions. DoD is also concerned that these requirements regarding resource or process management may infringe on DoD's management authorities, as established in section 125 of title 10 of the United States Code. The Department believes that the 4.e. official within the Office of the Secretary of Defense (OSD) should be responsible for approving (or delegating, as stated in paragraph 2.b., below) these resource or process management decisions, and then notifying the OMB Deputy Director for Management when such decisions are made.

DoD Recommendation: OMB should allow the 4.e. official (vice the OMB Deputy Director for Management) to approve the following six resource or process management decisions: decisions required in Public-Private Competitions, as addressed in paragraphs A.1.c, C.1.b.(3), C.2.a.(14), and C.6.a.(6), in Attachment B; a Direct Conversion that has been authorized by the SECDEF based on national defense, as provided in paragraph A.6., in Attachment C; and actions related to Commercial Interservice Support Agreements (ISSAs), at paragraph B.3. in Attachment D.

2. THE CIRCULAR.

a. Immediate Implementation Upon Publication. The Department has over 300 A-76 initiatives ongoing. These announcements publicly committed DoD to perform specific processes based upon the regulatory procedures in place at the time of announcement (i.e., the current Circular and RSH). The funding to perform these initiatives has been allocated based upon the resources and training requirements necessary to perform the under the current Circular and RSH. To switch processes midstream will require many cancellations of these in-progress initiatives in order to comply with the new procedures of the revised Circular, and to fund, resource, and train personnel to perform their new responsibilities. DoD fully supports OMB's revised Circular and we intend to work closely with OMB to achieve a successful transition and implementation.

DoD Recommendation: OMB should change Paragraph 7 of the Circular as follows: "This Circular is effective upon publication in the *Federal Register* and shall apply to all Standard Competitions and Direct Conversions where public announcement occurs on or after the publication date.

b. Delegation of the 4.e. Official Responsibilities. The Department is concerned about limitations on the authority of OSD's 4.e. official to delegate responsibilities, given DoD's size and complexity. Therefore, it will be necessary for the OSD 4.e. official to delegate some responsibilities to the Secretaries of the Military Departments, Directors of DoD Agencies, or Directors of DoD Field Activities. It is unclear whether a comparable official in a DoD Component, upon receiving a delegation of authority from OSD's 4.e. official, may delegate that authority further. Due to the size of the Military Departments, OSD's 4.e. official intends to allow the Secretaries of the Military Departments to delegate limited responsibilities to a level no lower than Flag Officers in Major Commands.

DoD Recommendation: OMB should change paragraph 4.e. of the Circular to allow for delegation to officials comparable to Assistant Secretaries to include delegation to other senior-level officials dependent upon the specific agency's size or availability of such comparable officials.

c. Realign Policy. Attachment B, paragraph A.1.c., includes the following policy: “Agencies shall not perform work as a contractor or subcontractor to the private sector or a public reimbursable source unless specific statutory authority exists or the 4.e. official receives prior written OMB approval.” This statement of policy is not related to public-private competition and is, therefore, misplaced in Attachment B. The Circular is a more logical location for this overarching policy.

DoD Recommendation: OMB should move paragraph A.1.c. from Attachment B to paragraph 4. in the Circular.

3. THE INVENTORY PROCESS AT ATTACHMENT A.

a. Inventory Data on Military Personnel. The Department is concerned that providing data to OMB on inherently governmental military authorizations would unnecessarily risk public access to a nearly complete picture of the United States military, in terms of location and job function. This would raise significant national security concerns and be detrimental to the national interest.

DoD Recommendation: OMB should eliminate the inventory requirement for inherently governmental military data.

b. Inventory Data on Foreign Nationals. The Department has concerns about providing data to OMB on foreign nationals. With respect to indirect hire foreign nationals, DoD effectively has sole-source arrangements with the host government. Accordingly, such positions could not be competed under OMB Circular A-76. In addition, it would be unrealistic to contract out other foreign national positions, even those occupied by direct hires of the United States. Host country agreements, Status of Forces Agreement (SOFA), and relationships with host countries, create very few opportunities to compete these positions under OMB Circular A-76.

DoD Recommendation: OMB should eliminate the requirement for inventory data on foreign nationals.

c. Burdensome Data Requirements. The purpose of the Federal Activities Inventory Reform (FAIR) Act Inventory is to provide information on authorizations that could be considered for review under OMB Circular A-76. With each subsequent year, the inventory requirements set by OMB have expanded into areas above and beyond the requirements of the FAIR Act. Some of these additional data requirements impose a considerable burden on the 25 DoD Components, are of questionable value, and may not be possible within existing information systems. These include:

(1) **Categorization of Data Based on Budget Categories.** OMB’s February 2002 inventory guidance directed agencies to report their data using the five specific “agency/bureau” designations. The five designations for DoD are, in essence, budget categories (Operations and Maintenance (O&M); Research, Development, Training, and Evaluation (RDT&E); Military Construction (MILCON); Family Housing; and Revolving and Management Funds). DoD does not collect DoD inventory data according to budget categories. Rather, DoD collects inventory data by Military Department, Defense Agency or Field Activity, which, we believe, is in keeping with the wishes of OMB and the intent of the FAIR Act. To collect and

report data based on budget category would be extremely difficult, as it would require that DoD marry separate and distinct personnel and budgeting systems, and would not reflect the number of authorizations associated with a given DoD Component. Furthermore, without activity-based budgeting, manpower data reported by budget categories will be misleading, at best.

DoD Recommendation: OMB should pursue the desired information through budget channels.

(2) **Request for Data on Reimbursables.** OMB's February 2002 inventory guidance added a requirement to include a summary table of reimbursable full-time equivalents (FTE) listed by agency/sub-agency and broken out into commercial activities and inherently governmental activities. The Department cannot comply with this request because we do not gather this information as part of our inventory process. To do so would require substantial additional work from each of the 25 DoD Components and potentially produce a product of questionable quality and value. If such data were to be collected, there would first need to be clear guidance regarding what should be considered "reimbursable." Are authorizations responsible for providing host support functions to tenant units at an installation considered "reimbursable?" What about non-appropriated fund positions? Without clear guidance on what should be included, it would be difficult to comply with this requirement.

DoD Recommendation: OMB should eliminate the inventory requirement to report reimbursable FTE data.

(3) **Written Justifications for Use of Reason Code A.** OMB's February 2002 inventory guidance indicated that agencies may be required to submit supporting documentation for all FTEs coded with OMB reason code A. In the Department's 2001 Inventory, DoD criteria codes I and L (which correspond to OMB reason code A) applied to more than 13,000 records. The Department can fulfill this requirement for supporting documentation, if necessary, by providing the eight DoD criteria codes that correspond to OMB reason code A, and their associated policy guidance.

DoD Recommendation: OMB should accept the DoD policy for DoD Criteria Codes, in satisfaction of OMB's supporting documentation requirement.

4. PUBLIC-PRIVATE COMPETITION AT ATTACHMENT B.

a. **Representation.** The Department believes that the agency tender official's (ATO) representation of the agency tender, during either a source selection or any subsequent administrative or judicial proceeding, is consistent with statute and regulation. Legal representation for the ATO is a much more complicated matter, and one that raises questions of interest to the Department of Justice and the federal government's community of experts in legal ethics. It is not clear how, or whether, attorneys for an agency could represent both sides in such a circumstance, but OMB's revision to the Circular raises serious ethical issues of significance to all lawyers in the Executive Branch, and perhaps to the various bar associations that regulate them. The DoD Office of General Counsel concurs with this recommendation, as reflected in the attached memorandum from the Office of the Deputy General Counsel (Acquisition & Logistics).

DoD Recommendation: OMB should change the definition of the ATO in Attachment F, which currently states that the ATO represents the agency, to be consistent with the policy stated at paragraph B.1. in Attachment B, which states that the ATO represents the agency tender. OMB should consult with the Department of Justice to resolve legal representation for the ATO.

b. Administrative Appeal Process (AAP). Based on the Department's experience and OMB's construction in the revised Circular, we believe that revised AAP adds unnecessary time and provides little value. Given that the competitive procedures in the revised Circular are largely based upon the Federal Acquisition Regulation (FAR) and that an established, well-recognized, dispute process is provided by the FAR, DoD believes that OMB should eliminate the AAP from the revised Circular and consolidate the agency's review under the provisions of FAR Part 33 by authorizing directly interested parties (as defined in the revised Circular) to file protests with an agency regarding Standard Competitions. The DoD Office of General Counsel concurs with this recommendation, as reflected in the attached memorandum from the Office of the Deputy General Counsel (Acquisition & Logistics).

DoD Recommendation: OMB should further streamline the Standard Competition Process by eliminating the AAP from the revised Circular and authorize all directly interested parties to file agency-level protests in accordance with FAR Part 33. OMB also should specify that a directly interested party is required to file a protest with the agency, and that resolution of that protest is a prerequisite to the filing of a protest with the GAO. This will afford the agency an opportunity to take corrective action before an interested party presents the matter to the GAO for review. The Department makes this recommendation with the understanding that OMB would not change the definition for directly interested parties in Attachment F of the revised Circular. If OMB retains the AAP in the revised Circular, OMB should, at a minimum, eliminate paragraph C.6.a.(3)(c) in Attachment B, to preclude appeals of source selection decisions. This requirement places the revised Circular in conflict with the FAR.

c. Feasibility of Competition Time Limits. The Department supports expediting the public-private competition process, but of equal importance is the proper conduct of these competitions to avoid lengthy disputes before the General Accounting Office (GAO) and the courts, and to preempt congressional involvement. DoD is concerned that the time limits imposed by OMB to issue solicitations within 8 months and to reach a decision 4 months later are unrealistic and will encourage small competitive procurements based on sealed bidding, while discouraging more desirable, large, multi-function, best-value competitions. We recognize that OMB's intent is to expedite public-private competition and eliminate the typical tactics of delay, debate, and disruption that so often accompany these competitions. The Department would like OMB to consider the significant historical data that DoD draws upon in making the following recommendation for OMB to revising the policy regarding time limits. Our recent history suggests that a minimum of (1) twelve months is required to develop and issue a solicitation, (2) two months is necessary to allow for offerors to develop their responses to the solicitation, and (3) six months is necessary to complete the source selection process. We believe that the diagram and time limits addressed in Attachment B do not take into account the time necessary for offerors (both private and public) to develop responses to solicitations.

DoD Recommendation: By adding only six months to OMB's current time limits at paragraph C.1.b.(3) in Attachment B, the revised Circular would provide sufficient time for the proper conduct of large, multi-function, best-value competitions. The time limits should be adjusted to allow the following: 10 months to develop and issue solicitations, 2 months for offerors to develop responses to solicitations, and 6 months to perform source selection. If OMB does not concur with this recommendation, OMB should, at a minimum, combine and resolve the conflicting policies in paragraphs A.1.a. and C.1.b.(3) in Attachment B, regarding the respective

authorities of OMB and the OSD 4.e. official to extend time limits. DoD also believes that the OSD 4.e. official (vice the OMB Deputy Director for Management) should have the management authority to approve one 6-month extension but that OSD should notify OMB of such extensions.

d. Special Requirements under The Source Selection Process. The Department is concerned that the Source Selection Special Requirements at paragraph C.4.a.(1) in the revised Circular are misplaced. We recommend that these requirements be moved under Negotiated Acquisitions as they do not apply to Sealed Bid Acquisitions and OMB's placement of these requirements in the revised Circular implies that they also apply to Sealed Bid Acquisitions. Some of these special requirements are restated under the various source selection processes allowed under paragraph C.4.a.(3). It is essential that the Circular provide consistent, succinct and unambiguous guidance for cost realism, evaluations, and exchanges with respect to each type of source selection process because these special requirements are new procedures in public-private competitions.

DoD Recommendation: OMB should relocate the requirements of paragraph C.4.a.(1) under Negotiated Acquisition requirements (paragraph C.4.a.(3) in the revised Circular). These requirements should be revised and limited to reflect only the applicable FAR cite, avoid paraphrasing FAR guidance, identify the exceptions from, or additions to, these FAR requirements, use consistent terminology (i.e., exchanges vs. discussions; offers vs. proposals) already in use in the Circular, and place specific guidance under each of the source selection processes in the revised Circular to preclude any misunderstanding of their applicability to the specific source selection process.

e. Cost/Price Realism in a Sealed Bid Acquisition. Under FAR Part 14, Sealed Bid Acquisitions serve to identify a selected source without any adjustments to bids. The Department is concerned that OMB's requirement to perform "cost realism" of the agency tender is inconsistent with FAR Part 14, which does not permit adjustments to bids either before or after the public opening. The Department believes that the additive costs to a contractor's bid should be validated by the contracting officer when determining responsiveness and responsibility for all bids and tenders. In the interest of retaining a Sealed Bid option in the Circular, DoD believes that no validation of the agency cost estimate (Lines 1-6 of the Standard Competition Form) should be performed. If the agency cost estimate is not in compliance with Attachment E, directly interested parties can appeal or protest the decision.

DoD Recommendation: OMB should eliminate the requirement for cost realism in sealed bid acquisitions in paragraph C.4.a.(2), but include a requirement for the contracting officer to validate Lines 8-18 of the Standard Competition Form when determining responsiveness and responsibility for all bids and tenders.

f. Cost/Price Realism in a Negotiated Acquisition. The Department is concerned with OMB's "Cost/Price Realism" policy as stated in the revised Circular, which is inconsistent with the Price Analysis and Cost Realism requirements in the FAR. The SSA is required by the FAR to perform Price Analysis for all competitive acquisitions; therefore, the revised Circular should require that the SSA include the Agency Tender in this analysis. DoD supports OMB's replacement of the Independent Review Process with Cost Realism as a validation method to determine if costs in the agency tender: (1) are realistic for the work to be performed, (2) reflect

a clear understanding of the requirements, and (3) are consistent with the various elements of the technical proposal in the agency tender. DoD is concerned that the Cost Realism requirements as stated in the revised Circular are (1) inconsistent with the definition of “Cost Realism” in FAR Part 2, and (2) vague regarding the requirement to perform Cost Analysis in accordance with FAR Part 15. DoD supports a policy in the Circular that allows for (1) Cost Realism to be performed in accordance with FAR Part 2 for all Standard Competitions and (2) Cost Analysis to be performed in accordance with FAR Part 15 at the discretion of the SSA. Furthermore, DoD believes that Cost Realism should not be limited to the Agency Tender, but should be performed on all private sector offers and public reimbursable tenders for all Standard Competitions. While the FAR does not require a cost realism analysis of private sector offers for a firm fixed price contract, DoD believes that the sensitive nature of public-private competitions requires a cost realism analysis of all offers and tenders in the interest of fairness.

DoD Recommendation: OMB should modify the Cost/Price Realism policy (at paragraph C.4.a.(1)(b) in the revised Circular) to reflect that Cost Realism (as defined in FAR Part 2) and Price Analysis will be conducted on all private sector offers, public reimbursable tenders and the agency tender, regardless of contract type, for all Standard Competitions; and that Cost Analysis in accordance with FAR Part 15 is not required for all Standard Competitions but may be performed at the discretion of the SSA.

g. Exchanges with Private Sector Offerors, Agency Tenders, and Public Reimbursable Tenders in a Negotiated Acquisition. The Department is concerned with the revised Circular’s lengthy description of exchanges, which paraphrases the requirements of FAR 15.306. The revised Circular should avoid paraphrasing any FAR requirements by referencing the specific FAR cite and including only exceptions or additional requirements to the FAR requirements. Since the exchange between the SSA and agency has been one of the most confusing elements of the current Circular, DoD believes that it is essential that OMB provide clear and succinct policy in the revised Circular for how exchanges are to be conducted between the ATO and the SSA.

DoD Recommendation: OMB should eliminate all but the last sentence in paragraph C.4.a.(3)(a) in the revised Circular which provides sufficient policy by citing that exchanges are conducted in accordance with FAR Part 15.306.

h. The Performance Decision. The Department is concerned that the revised Circular uses a single term, Performance Decision, to represent two distinguishable decisions made on two separate dates in the Standard Competition Process and, therefore, are have two separate definitions. The first Performance Decision (1) occurs on the specific date that an agency renders the initial results of a Standard Competition, (2) signals the end of the Standard Competition Process, (3) is subject to appeal or protest as provided by the revised Circular, and (4) cannot be implemented until the appeal or protest process has been completed. The second Performance Decision (1) occurs either on the specific date that (a) the appeal or protest process is complete, or (b) the time for submission of appeals or protests by interested parties has expired, and none was submitted; (2) may be the same as the first Performance decision or may differ depending on whether appeals or protests were submitted or the outcome of the appeal or protest process; (3) indicates that the agency allowed for appeal or protest of the first Performance Decision; and (4) signals that implementation of the second Performance Decision may begin. These are two separate and distinct decisions made on two different dates

representing two different milestones in public-private competitions in the Department's Commercial Activities Management Information System. Basically, the first decision stops the clock and the second starts implementation. DoD has frequently relied upon the current Circular to distinguish between the first and second Performance Decisions in responding to expressions of congressional interest, and in defending against litigation before the GAO and the federal courts; therefore, DoD's experience indicates that agencies must have clear policy that differentiates between these two specific decision dates in the Standard Competition Process. DoD's recommendation provides an easy solution, consistent with the FAR, and does not alter the Standard Competition diagram in Attachment B.

DoD Recommendation: OMB should modify all references to Performance Decision in the revised Circular to differentiate between the first and second decisions. The Department recommends that OMB consider using the "SSA Decision" to designate the first Performance Decision and leaving the second Performance Decision as the "Performance Decision." OMB should also modify Attachment F to define the SSA Decision and modify the definition for the Performance Decision as provided above.

i. Post Competition Accountability. The Department believes that the requirements under this section in the revised Circular could be significantly improved and streamlined by aligning the policy with the FAR. Specifically, the requirements as provided at paragraph C.5.a. should be modified as provided below.

(1) Implementation of the Performance Decision. A more standardized approach to these requirements can be implemented by simply referring to existing procedures in the FAR, and modifying or expanding those requirements as appropriate. For example, the FAR requirement for retaining and maintaining a contract file could be expanded in the Circular to include Standard Competition documentation; this would provide for a more consistent approach to maintaining the currency of the PWS. The Department believes that the revised Circular also should require compliance with the provisions in FAR Part 42 for monitoring, collecting, and reporting performance information; this would establish a standard approach to the collection of past performance information to be used in future competitions. Accordingly, DoD believes that Letters of Obligation and ISSAs should be issued by the contracting officer, who is skilled at writing contracts, has been involved in the source selection, has an understanding of how to incorporate the appropriate sections of the solicitation, and is familiar with the agency or public reimbursable tender.

DoD Recommendation: OMB should revise paragraph C.5.a. by specifying the agency requirements to implement the Performance Decision and QASP; retain the solicitation and any other documentation used in the Standard Competition as part of the acquisition record; maintain the currency of the contract file in accordance with FAR Part 42; record actual cost of performance annually; monitor, collect and report performance information consistent with FAR Part 42 for purposes of past performance evaluation in a recompetition; record the actual cost of performance for each performance period; and require agencies to adjust actual costs for scope, inflation, and wage rate adjustments made during that performance period, to compare to Line 6 and Line 7 of the SCF used to determine the Final Decision. Furthermore, OMB should revise paragraphs C.5.a.(2) and (3) by requiring the contracting officer to incorporate the appropriate solicitation sections and the Tender into the Letter of Obligation or ISSA (in a similar manner as with awarding a contract under the FAR).

(2) Years of Performance and Follow-on Competition. DoD is concerned that the revised Circular is more complicated than necessary with regard to option years and recompetition. The revised Circular should simply state that determinations regarding the exercise of options and recompetition requirements are to be made by an agency consistent with FAR 17.207, regardless of the source. DoD believes that the revised Circular should not provide different requirements for exercising option years or for recompetitions based upon the source of a service provider (i.e., private sector, public reimbursable, or agency source).

DoD Recommendation: OMB should revise paragraph C.5.b.(1) to reflect “Periods” of Performance (vice “years”) and simply state that the contracting officer should make all determinations regarding the exercise of options, regardless of the identity of the source, consistent with FAR 17.207. Additionally, OMB should revise paragraph C.5.b.(2) by eliminating the different guidance for agency or public reimbursable decisions provided by the first two sentences, and by changing the individual responsible for recompetition in compliance with the FAR from the “head of the requiring organization” to the “contracting officer.”

(3) Failure to Perform. The Department believes that OMB should change the title of this section from “Failure to Perform” to “Terminations” to identify that there are two distinct reasons for terminations: (1) Failure to Perform and (2) Termination Based on Other Reasons. Under “Failure to Perform,” the notification requirements should be consistent with FAR Part 49, and an agency should be required to recode the commercial activity in its inventory to reflect that the activity is no longer performed under an MEO. Under “Termination Based on Other Reasons,” OMB should provide direction that there are reasons agencies terminate contracts, letters of obligation, and ISSAs other than a “failure to perform.” This provides a general statement of policy, consistent with an agency’s authority, as expressed in paragraphs 5.b. in the Circular and D.2. in Attachment A, to exempt a commercial activity from performance by the private sector. Additionally, the Department is concerned with the policy in the revised Circular prohibiting the use of agency sources as a “temporary remedy,” which will add to the difficulty associated with turmoil created by terminations, have a negative impact on mission, and constrain limited resources. Since OMB has placed a one-year time limit for using these temporary sources, agencies should have the discretion to use any source without the approval of the 4.e. official.

DoD Recommendation: OMB should add a paragraph providing for Termination Based on Other Reasons. OMB also should modify the policy at paragraph C.5.(c) by deleting the last sentence and adding “agency” as one of the interim sources permitted for a one-year temporary remedy.

j. Right of First Refusal and HRA Determination on Behalf of the Private Sector.

The Department is concerned with the new requirement in the right of first refusal in paragraph D.1. of Attachment B, that a Government official (the Human Resource Advisor) make hiring determinations for the selected contractor. The following requirement may create a liability for the Government, and is unnecessary: *“When job openings are created by a conversion to contract or public reimbursable performance and the employees on this list are deemed qualified by the HRA for these job openings, the selected source contractor or public reimbursable shall be required to offer employment to these employees before hiring new or transferring existing employees to fill these job openings.”* The Department’s experience is that sources in private

industry hire most of their contract workforce from the pool of remaining government employees. A determination of an individual's qualifications rests with the contractor, and should never be the Government's responsibility. Only a contractor can decide if an individual meets their company's qualifications, which may differ significantly from Government standards. Furthermore, this requirement could create liability on the part of the government in the event that a contractor subsequently fails to perform. The DoD Office of General Counsel concurs with this recommendation, as reflected in the attached memorandum from the Office of the Deputy General Counsel (Acquisition & Logistics).

DoD Recommendation: OMB should eliminate the requirement, in paragraph D.1. of Attachment B, for the HRA to determine which employees are qualified for performance under the contract. OMB should, however, retain the requirement that the HRA identify adversely affected employees.

k. Right of First Refusal and Conflict of Interest. The Department supports extending the right of first refusal to all adversely affected employees, regardless of the extent to which those employees participate in a Standard Competition or Direct Conversion. The right of first refusal is too speculative to create a conflict of interest. Statutory restrictions on post-government employment apply, even if the right of first refusal extends to all adversely affected government employees. The DoD Office of General Counsel concurs with this recommendation, as reflected in the attached memorandum from the Office of the Deputy General Counsel (Acquisition & Logistics).

DoD Recommendation: OMB should eliminate the right of first refusal restrictions placed on employees that participate on the PWS Team, in paragraph D.2.a.(2); the MEO Team, in paragraph D.2.b.(2); and the Source Selection Evaluation Board (SSEB), in paragraph D.2.c.(2).

l. Conflict of Interest and Team Memberships: The Department believes that the revised Circular sets forth policies regarding the composition of the PWS and MEO teams that are unnecessarily rigid, and that eliminate DoD's current authority to waive conflicts of interest in appropriate circumstances. DoD is concerned with OMB's revised policy for PWS and MEO team membership. This more restrictive policy exceeds the scope of GAO's recent line of decisions (IT Facilities, Jones-Hill) in two respects. First, OMB policy absolutely bars joint membership on the PWS and MEO teams, while GAO has declared only that substantial participation gives rise to a conflict of interest. Second, OMB policy requires that agencies submit requests for deviation to OMB for approval, while GAO has stated that agencies may waive conflicts of interest if they have reasonable bases for doing so. DoD could not assign an employee to the PWS and MEO teams, even for purposes of less than substantial participation, without seeking a deviation from OMB. The DoD Office of General Counsel concurs with this recommendation, as reflected in the attached memorandum from the Office of the Deputy General Counsel (Acquisition & Logistics).

DoD Recommendation: OMB should modify the revised Circular's conflict of interest policy to (a) allow some participation of individuals on both the MEO and PWS team (consistent with case law); and (b) reinstate the current Circular's policy permitting agencies to execute waivers of conflicts of interest in circumstances that the agencies deem appropriate.

5. DIRECT CONVERSION PROCESS AT ATTACHMENT C.

Business Case Analysis. The Department is concerned that guidance on the Business Case Analysis is not clear and is incomplete. OMB is not clear that the Business Case Analysis is performed before an agency certifies a Direct Conversion and makes a public announcement of the decision. Additionally, the policy for Business Case Analysis Documentation is incomplete. It addresses only those circumstances in which contracts are not available or cannot be reasonably grouped. Agencies need additional guidance with respect to circumstances in which contracts are available or can be reasonably grouped, which may result in agency, private sector, or public reimbursable performance, based upon the SCF results.

DoD Recommendation: To avoid confusion regarding when Direct Certification is made, OMB should not provide the requirements for Direct Conversion Certification until the requirements for Waivers and Business Case Analysis have been fully described in the revised Circular. OMB should place the Direct Conversion Certification paragraph immediately before Paragraph F, the Direct Conversion Process. OMB should specifically state that the Business Case Analysis is performed prior to an agency's certification and public announcement of the Direct Conversion. OMB should define an "asset purchase requirement," in Attachment F, to preclude any misunderstanding of this specific Business Case Analysis requirement. OMB also needs to provide additional guidance to clarify the necessary actions if the SCF indicates agency, private sector, or public reimbursable performance when contracts are available or can be reasonably grouped. OMB should also define "reasonably grouped" in Attachment F to preclude misinterpretation.

6. COMMERCIAL INTER-SERVICE SUPPORT AGREEMENTS AT ATTACHMENT D.

a. Competing Internal ISSAs. The Department is concerned about (1) OMB's new requirement to compete or report DoD ISSAs between DoD Components, and (2) OMB's definition of an ISSA and a public reimbursable source in Attachment F. The revised Circular's requirement to compete internal ISSAs, and definition of a public reimbursable source, impinge on SECDEF's authority to manage and organize the Department, and contradict the Department's position that Working Capital Funds are necessary to provide DoD with a standard, uniform process for critical administrative support processes such as accounting and finance, logistics, and data centers.

DoD Recommendation: OMB should modify the revised Circular to exclude intra-agency ISSAs from Attachment D and from the definition in Attachment F. OMB should also modify the definition of a public reimbursable source in Attachment F to eliminate "working capital fund" from the definition.

b. Agency Solicitations. The Department is concerned about the applicable procedures for competitions that include private sector sources and public reimbursable sources. Attachment B provides policy that applies equally to private sector, agency, or public reimbursable sources, which indicates to DoD that when the agency source is not in the competition mix, the public reimbursable and private sector requirements in Attachment B still apply. The references and requirements in both Attachment D and Attachment B seem to indicate that the competition process evolves into a public-private competition (the Standard

Competition Process) whenever a public entity (i.e., DoD as the agency source or another agency as the public reimbursable source) participates in competition with the private sector. When DoD issues a solicitation but no DoD agency tender will be included in the competition, the competition is often referred to as a “private-private” competition. If NASA responds to a DoD solicitation, is DoD then required to perform a Standard Competition as required by Attachment B? Since both Attachments D and B would require NASA to submit a tender in accordance with Attachment B, and Attachment D requires DoD to perform post-competition requirements in accordance with Attachment B, does OMB also require DoD to perform one of the specific source selection process stated in Attachment B?

DoD Recommendation: OMB needs to clearly articulate the requirements from Attachment B that are applicable in Attachment D for competitions limited to public reimbursable and private sector sources (i.e., no agency source is included).

c. Personnel Considerations. The Department believes that this paragraph is misleading, as it does not address “Personnel Considerations,” but provides the Circular’s requirements regarding the right of first refusal to employment with public reimbursable sources. DoD is concerned that there may be statutory or regulatory provisions that prohibit a requiring agency from compelling a performing agency to establish a preference in hiring for the employees of the requiring agency. If the performing agency were to contract for all or part of an activity with the private sector, the requiring agency would have no assurance that the performing agency would incorporate the clause at FAR 52.207-3, Right of First Refusal for Employment, in its contract. The DoD Office of General Counsel concurs with this recommendation, as reflected in the attached memorandum from the Office of the Deputy General Counsel (Acquisition & Logistics).

DoD Recommendation: OMB should eliminate this requirement from the Circular until the Office of Personnel Management has been consulted regarding implementation. OMB should propose amendments to the FAR to require a performing agency to incorporate the clause at FAR 52.207-3 in any contract for performance of a function that is the performing agency’s responsibility under an ISSA.

d. Specialized Technical Services to State and Local Governments. The Department is concerned with OMB’s decision to incorporate the provisions of Circular A-97 in Attachment D. The provisions are misleading and confusing, because they do not relate to performance under Commercial ISSAs. Federal agencies will not perform for state and local governments under ISSAs, and the provisions of the Circular will not bind state and local governments.

DoD Recommendation: OMB should either create a separate attachment to address these unique requirements, or reverse its decision to cancel OMB Circular A-97.

7. CALCULATING PUBLIC-PRIVATE COMPETITION COSTS AT ATTACHMENT E.

a. The Standard Competition Form. The Department believes that the SCF should be modified to add a third section for public reimbursable tenders. The public reimbursable tender is required to fill in Lines 1-6, the same lines that apply to the agency tender. It is unclear how an SCF would be completed when an agency tender, public reimbursable tender, and private sector offers are to be included on the SCF (see Low Priced Technically Acceptable Source Selection in Attachment B). Additionally, the SCF certifications should include a certification

statement for a public reimbursable tender; that certification should differ from the certification of an agency tender. It is unclear, in Attachments B and C, whether a public reimbursable source is required to base its tender on an MEO. If not, the public reimbursable tender cannot sign the certification statement as currently reflected on the SCF.

DoD Recommendation: OMB should modify the SCF to add a section for a public reimbursable tender, and include an appropriate certification statement for a public reimbursable tender. OMB should also add to all certifications the statement, “to the best of my knowledge.” Additionally, OMB should use consistent terminology on the SCF to reflect terminology consistent with the Circular (e.g., Phase-in Plan vice Transition Plan).

b. Military Labor. The Department believes that the provision in Attachment E prohibiting the conversion of military positions to civilian positions is an administrative error, since the current Circular allows for military-to-civilian conversions.

DoD Recommendation: OMB should revise the sentence in paragraph B.1.k. in Attachment E to read, “civilian positions cannot be converted to military positions.”



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SUBJECT TO ATTORNEY-CLIENT PRIVILEGE

January 16, 2003

MEMORANDUM FOR THE DIRECTOR, OFFICE OF COMPETITIVE SOURCING
AND PRIVATIZATION

Subj: Office of Management and Budget Circular A-76 (Revised)

This memorandum responds to your request for my views concerning certain aspects of the draft of Circular A-76 (Revised), issued by the Office of Management and Budget (OMB) and published for public comment in the Federal Register on November 19, 2002, 67 Fed. Reg. 69,769.

1. Right of First Refusal.

OMB's draft of the Circular provides that agency personnel who participate personally and substantially in developing the solicitation or agency tender, or are members of the source selection evaluation board, shall not be afforded the right of first refusal to employment with a contractor or publicly reimbursable source. The current Circular does not include such a limitation. Presumably, OMB proposes to restrict the right of first refusal to avoid a conflict of interest, or the appearance thereof, but we have traditionally viewed the right of first refusal, in this context, to be too speculative to give rise to a conflict of interest. Consequently, we believe that OMB may extend the right of first refusal to all adversely affected employees, regardless of the extent to which those employees participate in a competition or direct conversion. In fact, OMB's restriction of the right of first refusal might create an appearance, at least, of a conflict of interest on the part of adversely affected employees who must make decisions during the course of a competition or direct conversion without benefit of the protections associated with the right of first refusal. OMB's draft of the Circular also raises concerns in granting to government employees a right of first refusal to employment with a publicly reimbursable source, and in requiring a contractor or publicly reimbursable source to offer employment to government employees whom the Human Resource Advisor (HRA) determines to be qualified.

Our view has been that the right of first refusal does not create a conflict of interest for affected employees participating in the A-76 process. It is not a guarantee of employment. It is neither a negotiation for, nor an arrangement concerning, prospective employment. Only if an offeror were to win a competition, and were to require a larger workforce in order to perform, might the offeror hire an adversely affected government employee. Because the right of first refusal is speculative, it does not constitute a disqualifying financial interest under section 208 of title 18, United States Code. An employee participating in the A-76 process would not be considered to have made or received an employment contact under section 423 of title 41 (the Procurement Integrity



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Act), or to seek employment under 5 C.F.R. 2635.603, simply because a contracting officer incorporated the right of first refusal in a solicitation.

Statutory restrictions on post-government employment will apply, even if the right of first refusal extends to all adversely affected government employees. Congress has deemed these restrictions, set forth in section 207 of title 18, and in section 423 of title 41, sufficient to protect the interests of the United States.

In restricting the right of first refusal, it seems that OMB intended to avoid the appearance of a conflict of interest and to garner the public's trust in the process used to make critical sourcing decisions. Although this is a worthy objective, particularly in the wake of recent adverse decisions from the General Accounting Office (GAO) concerning organizational conflicts of interest, limitations upon the right of first refusal likely will have the opposite effect. The practical value of the right of first refusal is debatable, but to the extent that affected employees consider it to be a benefit, its elimination arguably provides those employees with an even greater incentive to ensure that work is performed in-house, thereby frustrating the apparent purpose of the proposed change.

As it applies to publicly reimbursable sources, the right of first refusal is problematic. Statutes and regulations regarding civil service may prohibit a requiring agency from compelling a performing agency to establish a preference in hiring for the employees of the requiring agency. If the performing agency were to contract for all or part of a function with a private source, the requiring agency would have no assurance that the performing agency would incorporate the clause at FAR 52.207-3, Right of First Refusal for Employment, in its contract. You may wish to recommend that OMB consult the Office of Personnel Management concerning the significance of civilian personnel laws and regulations, and that OMB propose amendments to the FAR to require a performing agency to incorporate the clause at FAR 52.207-3 in any contract for performance of a function that is the performing agency's responsibility under an inter-service support agreement.

OMB's draft of the Circular, in authorizing the HIRA to establish the qualifications of a government employee, and, thus, to establish a source's obligation to hire that employee, might have unforeseen legal consequences. For example, a contractor might contend that it was not liable for failure to perform, or might file a claim against the United States, based on the Government's requirement that the contractor hire those employees whom the HIRA deemed to be qualified. We propose that you recommend that OMB authorize the HIRA to identify adversely affected employees, but that the revised Circular remain silent with regard to the identification of qualified employees.

2. Team Memberships.

OMB's revised Circular would restrict membership on the performance work statement (PWS) and most efficient organization (MEO) teams in two respects not required by law or regulation. First, OMB would absolutely prohibit joint membership

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on the PWS and MEO teams, although recent decisions issued by GAO foreclose only substantial participation on both teams. Second, OMB would require that an agency request approval from OMB to deviate from those restrictions, although GAO recognizes the right of an agency to waive conflicts of interest in appropriate circumstances.

GAO has ruled that a conflict of interest arises from an employee's or contractor's substantial participation on both the PWS and MEO teams, but has implied that lesser participation on those teams might not pose a conflict. Upon reconsideration of its decision in Jones/Hill Joint Venture, B-286194.4, et al., 2001 CPD ¶ 194 (December 5, 2001), GAO stated that:

“...we would consider a protest alleging that the agency had failed to take steps to avoid or mitigate a conflict in the writing of the in-house plan (for example, ensuring that no individual substantially involved in writing the PWS also plays a substantial role in drafting the in-house plan).”

Department of the Navy – Reconsideration, B-286194.7, 2001 CPD ¶ 76 (May 29, 2002), at 14. Apparently, an agency could avoid or mitigate a conflict by limiting the activities of team members to something less than substantial participation on both teams. In the revised Circular, however, OMB further restricts the composition of the PWS and MEO teams by prohibiting joint membership of any sort. That restriction is not mandated by GAO's decisions in the matter of Jones/Hill. Of course, if OMB were to permit some participation on the PWS and MEO teams, OMB or the Department would have to determine the bounds of permissible activities, and that determination would be subject to GAO's review.

OMB also restricts an agency's right to waive conflicts of interest. In its original decision in Jones/Hill, GAO acknowledged that an agency “may conclude that it has no choice, due to the limited number of people with the requisite knowledge or skills, but to use the same individuals to prepare both a PWS and an in-house plan,” and, if the agency so concludes, that “a written determination to proceed notwithstanding the conflict may be appropriate.” 2001 CPD ¶ 194 at 9, n.13. The revised Circular, however, does not authorize waivers of conflicts of interest. An agency could not assign an employee to the PWS and MEO teams, even for purposes of less than substantial participation, without seeking a deviation from OMB. That restriction, like the absolute prohibition on joint membership, exceeds the scope of GAO's recent decisions.

We believe that OMB's decision to exclude directly affected personnel from the source selection evaluation board is sound, in light of GAO's decision in DZS/Baker LLC; Morrison-Knudsen Corporation, B-281224.2, et al., 99-1 CPD ¶ 19 (January 12, 1999). In that decision, GAO ruled that the Air Force's assignment of fourteen directly affected employees to a team of sixteen evaluators created a conflict of interest that the Air Force could not remedy, except by reconstituting the evaluation team. GAO did not offer guidance concerning the means by which an agency might mitigate a conflict of this sort, as it did later with regard to joint membership on the PWS and MEO teams in the Jones/Hill decisions. In the absence of such guidance, there is a risk that GAO would

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sustain a protest challenging a decision to assign any number of directly affected employees to an evaluation team. The restriction in the revised Circular, therefore, seems reasonable.

3. Representation.

We believe that the agency tender official's (ATO's) representation of the agency tender, during either a source selection or any subsequent administrative or judicial proceeding, is consistent with statute and regulation. Section 205 of title 18, United States Code, prohibits a government employee from prosecuting a claim against the United States, or representing a party in a matter in which the United States is a party or has a direct and substantial interest. That statute, however, includes an exception for an employee who takes such actions in the performance of his or her official duties. The ATO, in representing the agency tender, would fall squarely within that exception. Although we have no legal objection to the ATO's representation of the agency tender, we encourage you to recommend that OMB reconcile that proposition, expressed in Attachment B, paragraph B.1, with its definition of the ATO in Attachment F, which states that the ATO represents the agency.

Legal representation for the ATO is a much more complicated matter, and one that raises questions of interest to the Department of Justice and the federal government's community of experts in legal ethics. It is not clear to me how, or whether, attorneys for an agency could represent both sides in such a circumstance, but OMB's revision to the Circular raises serious ethical issues of significance to all lawyers in the Executive Branch, and perhaps to the various bar associations that regulate them.

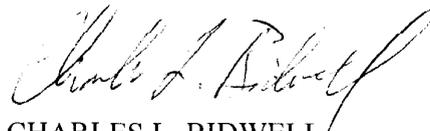
4. Administrative Appeals.

We propose that you recommend to OMB that it delete all references to administrative appeals, and authorize the ATO and directly interested parties, as defined in the draft of the revised Circular, to file protests with an agency. We have reservations concerning OMB's decision to cast the Circular as a vehicle for competitive procurement, rather than as a tool for use in the exercise of good management. Given OMB's construction, however, we believe that administrative appeals have little value, and much potential for mischief. The revised Circular is silent concerning the relationship between administrative appeals and protests, either to the agency or to GAO. Does an appeal toll the period for filing a protest? Must a party file an administrative appeal and protest concurrently? How would an agency implement conflicting decisions from the Administrative Appeal Authority and contracting officer? These are a few of the questions that OMB would put to rest by consolidating the agency's review under the provisions for consideration of protests to the agency in Executive Order 12979 and Part 33 of the Federal Acquisition Regulation. Those documents are familiar to acquisition officials, and describe clearly the procedures for protest and the scope of review. It is particularly appropriate to provide for protests to the agency in connection with actions taken pursuant to the revised Circular, given that the competitive procedures outlined in OMB's draft are largely based upon the Federal Acquisition Regulation. We believe that

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a consolidated review would be most effective if the Circular were to require resolution of a protest to the agency prior to the filing of a protest with GAO. A requirement to exhaust agency-level remedies before proceeding to GAO would permit agencies to take appropriate, corrective action, and to resolve protests in direct and prompt fashion.

If you have questions or wish to discuss this matter further, please call me at (703) 697-9309.



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