

Louis Carrillo <lcarrillo@wcc-corrections.com>
12/18/2002 11:26:08 AM

Record Type: Record

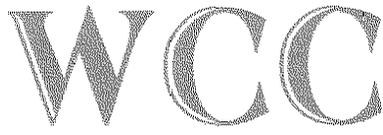
To: David C. Childs A-76comments/OMB/EOP@EOP
cc:
Subject: A-76 Comments

Attached are comments submitted by Wackenhut Corrections Corporation to the recently published proposed revision to the Office of Management and Budget Circular No. A-76, "Performance of Commercial Activities."

If there is any difficulty accessing the attached comments please contact me by return email or at the telephone number listed below.

Louis V. Carrillo
Vice President, Corporate Counsel
Wackenhut Corrections Corporation
(561) 691-6656 Direct
(561) 691-6777 Facsimile
lcarrillo@wcc-corrections.com

- A-76.pdf



CORPORATE OFFICE
4200 Wackenhut Drive • Palm Beach Gardens • Florida 33410-4243
TELEPHONE: 561.622.5656 • 800.666.5640

December 18, 2002

David C. Childs
Office of Federal Procurement Policy
NEOB Room 9013
Office of Management and Budget
725 17th Street, N.W.
Washington, DC 20503

Re: Proposed Revision to Office of Management and Budget
Circular No. A-76, "Performance of Commercial Activities"

Dear Mr. Childs:

This responds to the Office of Management and Budget's (OMB) request for comments in connection with its proposed revision to OMB Circular No. A-76, "Performance of Commercial Activities," as set forth in the Federal Register on November 19, 2002. These comments are submitted on behalf of Wackenhut Corrections Corporation ("WCC"), a leading developer and manager of privatized correctional and detention facilities in the United States.

WCC fully supports OMB's policy that commercial activities performed by federal employees should be subject to the forces of competition and that federal employees should perform inherently governmental activities. We are concerned, however, that the revised circular, as currently written, causes confusion as to whether or not prison and detention services can be performed by a contractor or are required to be performed by federal employees. Accordingly, WCC urges OMB to closely review the impact that the revised circular will have on the government's ability to contract for prison and detention services.

I. Background on Prison and Detention Services

The Department of Justice (DOJ) has long faced a challenge in housing both federal inmates and detainees. According to figures published by the

federal Bureau of Prisons (BOP), the federal inmate population more than doubled during the 1980s, from just over 24,000 to approximately 58,000, and then more than doubled again in the 1990s, reaching almost 136,000 in 1999. Similarly, the Office of the Federal Detention Trustee has reported that between 1994 and 2001, the number of federal detainees under the jurisdiction of the U.S. Marshals Service (**USMS**) increased from 18,231 to 38,950, while the number of federal detainees under the jurisdiction of the Immigration and Naturalization Service (INS) increased from 7,444 to 19,079. As a result of these dramatic increases, the DOJ Inspector General (DOJ IG) has identified detention space and infrastructure as a “material weakness” and one of the top *ten* management challenges facing the DOJ.

To house the ballooning federal inmate and detainee population, the DOJ relies upon three sources for prison and detention space: (1) facilities operated by the DOJ; (2) state and local jails and (3) private facilities owned and/or operated by private vendors like WCC. However, according to DOJ statistics, between 1994 and 2001, the total number of detainees housed in federally owned facilities dropped by 33 percent, while the number of detainees housed in state and local jails increased by 16 percent and the number of detainees housed in private facilities increased by a unprecedented 116 percent. According to reports published by the DOJ IG, the government depends “on private prison contractors to help manage its growing prison population and reduce overcrowding.”

II. inherently Governmental Activities Under the 1999 Revised Circular No. A-76, the 1999 Revised Circular No. A-76 Supplemental Handbook and OFPP Policy Letter 92-1

Pursuant to the 1999 Revised Circular No. A-76, certain activities are “inherently governmental in nature” so as to require that such activities be performed “only by federal employees.” The 1999 revised circular defines the term “inherently governmental” as “the act of governing” and “monetary transactions and entitlements.” The “act of governing” includes discretionary exercises of government authority, such as “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.” Prison or detention services provided to the DOJ by contractors, like WCC, were not intended as “inherently governmental.”

Similarly, the 1999 Revised Circular No. A-76 Supplemental Handbook also excludes prison and detention services from the definition of “inherently governmental activities.” More specifically, the supplement explained that the term “inherently governmental” only includes those activities which are so intimately related to the public interest as to mandate performance by federal employees and are not generally available from commercial sources. Prison and detention services are generally available from commercial services and are not so intimately related to the public interest as to mandate performance by federal employees. For example, the BOP has relied solely on private contractors since 1981 to provide pre-release, community corrections housing. Further, a 2001 DOJ IG report explained that there are at least six private companies, excluding community correction contractors, which currently provide the DOJ with either prison or detention services. Accordingly, prison and detention services are not inherently governmental.

In addition to the 1999 revised circular and the 1999 revised supplement, the Office of Federal Procurement Policy (OFPP) Policy Letter 92-1 provided a list of functions, which OMB considered, as a matter of policy, inherently governmental. This list does not include detention or prison services. OFPP Policy Letter 92-1 also listed those functions which OFPP believed were not inherently governmental, including “special non-law enforcement, security activities that do not directly involve criminal investigations, such as prisoner detention or transport and non-military national security details.” Accordingly, one could again reasonably conclude that detention or prison services are not inherently governmental.

OFPP Policy Letter 92-1 did explain, however, that these lists were not exclusive and advised agencies trying to decide whether a function was inherently governmental, to consider whether that function required either “the exercise of discretion in applying Government authority or the making of value judgments in making decisions for the Government.” Among the factors needed to be examined was whether an “inherently governmental function involve[d], among other things, *the interpretation and execution of the laws of the United*

States so as to . . . significantly affect the life, liberty, or property of private persons.” Emphasis Added. Since providing prison and detention services does not require the interpretation or execution of law, such functions were not inherently governmental,

Finally, according to OFPP Policy Letter 92-1 when agencies are deciding whether the “award of a contract might effect, or the performance of a contract has effected, a transfer of official responsibility,” they should consider “Congressional legislative restrictions or authorizations.” With regard to private prison contracts, several awards made by the BOP were the result of legislation, such as the National Capital Revitalization and Self-Government Improvement Act of 1997, Section 11201, Pub.L.No. 105-33, 111 Stat. 251. Further, Congress has also authorized the Attorney General, pursuant to Section 119 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2001, P.L. 106-553, to enter into contracts and other agreements for detention or incarceration space, facilities and related services.

III. Inherently Governmental Activities Under the Proposed Revised **A-76** Circular

The Revised Proposed Circular No. A-76 maintains that it is still the federal government’s policy that agencies are required to “perform inherently governmental activities with government personnel.” However, the definition of “an inherently governmental activity” as outlined in the 1999 revised circular, the 1999 revised supplement and OFPP Policy Letter 92-1 is no longer applicable, since those resources are now expressly superceded and rescinded. Accordingly, one must now redetermine whether prison and detention services constitute “inherently governmental activity” and therefore must be performed by federal employees.

Pursuant to Paragraph E of Attachment A of the proposed revised circular, an “inherently governmental activity” is defined as “an activity that is so intimately related to the public interest as to mandate performance by government personnel. These activities require the exercise of substantial official discretion in the application of government authority and/or in making decisions for the government. Inherently governmental activities normally fall into two categories: the exercise of sovereign government authority or the establishment of procedures and processes related to the oversight of monetary

transactions or entitlements.” This definition is similar to the previous definitions in the 1999 revised circular and the 1999 revised supplement.

However, the proposed revised circular states: “An inherently governmental activity involves . . . significantly affecting the life, liberty, or property of private persons.” Under the old OFPP Policy Letter 92-1, an “inherently governmental function involve[d], among other things, the interpretation and execution of the laws of the United States so as to . . . significantly affect the life, liberty, or property of private persons.” Emphasis Added. WCC is concerned that the removal of the language “. . . the interpretation and execution of the *laws* of the United States so as to . . .” may cause confusion as to whether prison and detention services are now inherently governmental activities. While prison and detention services do not “interpret or execute the laws of the United States **so** as to significantly affect the life, liberty, or property of private persons,” they arguably do “significantly affect the life, liberty, or property of private persons.”

In addition to the above change in language, the proposed revised circular no longer includes the list of noninherently governmental activities, which accompanies OFPP Policy Letter 92-1--including “special non-law enforcement, security activities that do not directly involve criminal investigations, such as prisoner detention.” WCC believes that the list should be included and **is** important to limit confusion for DOJ officials trying to determine whether federal employees must perform prison and detention services.

Finally, the proposed revised circular alters the factors agencies must consider “to avoid the effect of transferring inherently governmental authority to a contractor.” More specifically, agencies are now required to consider “Congressional legislative restrictions that define an activity as inherently governmental.” As noted above, OFPP Policy Letter 92-1 required agencies to consider “Congressional legislative restrictions *or* authorizations.” Emphasis Added. The removal of Congressional “authorizations” from the factors considered by agencies ignores that Congress may instruct or authorize DOJ to enter into contracts for prison or detention services, as Congress did in Section 11201 of the National Capital Revitalization and Self-Government Improvement Act of 1997 and Section 119 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2001. Again, WCC is concerned that this change will result in confusion as to whether prison and detention services are inherently governmental activities.

IV. Recommendation

In light of our concerns, WCC recommends that OMB revise the Proposed Revision to Office of Management and Budget Circular **No. A-76**, "Performance of Commercial Activities." as follows.

A. Incorporate Lists of Non-Inherently Governmental Activities

WCC recommends that OMB incorporate into Attachment A of the revised circular a list of activities which are -- as a matter of policy -- not inherently governmental, similar to the list provided in Appendix B of OFFP Policy Letter 92-1. Included on this new list of activities which OMB believes are not inherently governmental should be "prison and detention services." WCC believes that incorporation of such a list would alleviate any confusion on the part of DOJ officials as to whether or not prison and detention services are inherently governmental activities, and thus must be performed by federal employees.

B. Modify the Definition of Inherently Governmental Activities

WCC also recommends that OMB modify the revised circular's definition of "inherently governmental activities." In particular, WCC recommends that paragraph "E" of Attachment A to the revised circular state: "1. An inherently governmental activity is an activity that is so intimately related to the public interest as to mandate performance by government personnel. . . . An inherently governmental activity involves: . . . c. The interpretation and execution of the laws of the United States so as to significantly affect the life, liberty, or property of private persons. . ." Such a revision incorporates the language of OFFP Policy Letter 92-1 and would further mitigate any confusion as to whether prison and detention services are inherently governmental activities. As noted above, prison and detention services do not involve the interpretation and execution of the laws of the United States so as to significantly affect the life, liberty, or property of private persons.

C. include Prison and Detention Services in the List of Services Not Proscribed by Attachment A, Paragraph E.3

WCC also recommends that OMB modify E.3.d. of Attachment A to include prison and detention services in the list of services “not proscribed by these policies.” More specifically, Paragraph E.3. of the revised circular allows an agency to contract for inherently governmental activities under limited circumstances. However, to avoid the effect of transferring an inherently governmental activity to a contractor, agencies are first required to consider whether the transfer will result in providing the contractor with “authority to take action that will significantly and directly affect the life, liberty, or property of individual members of the public, including the likelihood of this provider’s need to resort to force in support of a police or judicial activity; whether force, especially deadly force, is more likely to be initiated by this provider or by some other person; and the degree to which force may have to be exercised in public or relatively uncontrolled areas.” Exempted from this requirement are “guard, convoy security, pass and identification, and plant protection services, armed or unarmed.” WCC recommends that “prison and detention services” be added to the list of exceptions. This will clarify that DOJ officials can contract for prison or detention services pursuant to Paragraph E.3 of the revised circular.

D. Modify Attachment A, Paragraph E.3.a

Finally, WCC recommends that OMB modify E.3.a. of Attachment A. As noted above, Paragraph E.3. of the revised circular allows an agency to contract for inherently governmental activities once the agency considers certain factors. One of the factors referenced by the revised circular is “Congressional legislative restrictions that define an activity as inherently governmental.” WCC recommends that OMB modify this subparagraph to read: “Congressional legislative restrictions or authorizations.” By making this modification, OMB will minimize any confusion regarding whether DOJ officials should comply with Congressional instruction and/or authorization to enter into contracts for prison or detention services, as explained above.

In conclusion, WCC urges OMB to modify the Proposed Revision to Office of Management and Budget Circular No. A-76, “Performance of Commercial Activities.” With the continued growth of the federal prisoner and detainee populations, the DOJ will continue to rely heavily upon private contractors, such as WCC, to provide prison and detention services. However,

the revised circular, as currently written, causes confusion as to whether or not such services can be performed by a contractor or are required to be performed by federal employees.

Thank you for your consideration of these comments.

Very truly yours,

A handwritten signature in black ink, appearing to read "Louis V. Carrillo". The signature is fluid and cursive, with a prominent initial "L" and "V".

Louis V. Carrillo
Vice President
Corporate Counsel

cc: Wayne Calabrese, WCC President