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

Please find attached our comments on the Proposed revision of Management and Budget Circular No. A-76, "Performance of Commercial Activities."

(See attached file: a-76-ltrhead.wpd)

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202-566-2604

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

December 19, 2002

**OFFICE OF
THE INSPECTOR GENERAL**

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

Dear Sir:

We have reviewed the subject document and offer the following comments:

While the Federal Government is attempting to improve cost-efficiency by making more of its services competitive, we are concerned that the basic premise of the proposed revision of OMB Circular A-76 is critically flawed. We recognize that many Federal functions and services can be performed less expensively by competitive contract, and agree that those functions and

services should be contracted out. However, we believe that making a blanket generalization that agencies shall presume all activities are commercial in nature unless justified as inherently governmental is inconsistent with the very purpose of establishing a dedicated workforce of public servants whose commitment to good government transcends the mere expectation of immediate corporate profits. In our opinion, the following issues need to be addressed as part of the competitive evaluation process of product quality, risk/security exposure, cost, and personal commitment to performance.

A stable Federal workforce has an established and known performance, education, and experience record, while a transitory contract workforce doesn't. Further, the Federal Government is often at the mercy of contractors' own self-promotion. For example, contractors frequently bid on specifications, with the promise of delivery, often contingent upon their ability to find a promised skill later or to further subcontract. This creates a huge business risk.

- Federal employees have a long-term commitment to "public service," while contract employees are motivated primarily by profit. The nature of contractor employees, who attempt to maximize their own income, is more transitory, which imperils the continuity of many Federal services.
- Federal employees are subject to specific and rigorous standards of conduct, which are unmatched by the private sector, under any circumstances. Federal employees undergo rigorous conflict-of-interest training and are subject to review of their personal assets and outside income. An environment motivated by fierce competition, marginal profits, or even loss avoidance is highly susceptible to abuse, conflict-of-interest, improper charges, gratuities, and reciprocal arrangements that could undermine the integrity of Federal property, programs, and data. Also, the ethical treatment and working conditions of contractor employees is not ensured.

We also have serious reservations about the following provisions of the proposed revision:

- Section 4, Policy. We are concerned with the definition of the 4.e. official, "an assistant secretary or equivalent level official with responsibility for implementing this Circular. . . ." who . . . "may delegate . . . responsibilities to comparable officials in the agency or agency components."

Specifically, Section E of Attachment A requires the 4.e. official to designate agency personnel performing inherently governmental activities, on the basis of certain criteria. In our opinion, this would interfere with the independence of the Inspectors General (IGs) since they would be placed under the authority of an official at the assistant secretary level (i.e., their own level) rather than, as the IG Act requires, under the Agency head or Deputy, for these purposes. The IG Act prohibits the Agency head or official next below in rank from preventing or prohibiting the IG from initiating, carrying out, or completing any audit or investigation, or issuing a subpoena. If an official below the Administrator or Deputy could theoretically direct

the IG to contract out certain OIG activities because they are not inherently governmental, or expose the IG to public challenge from commercial activities because the Agency decreed them commercial, then that official could certainly interfere with any OIG function or activity and obstruct IG independence.

Moreover, the IG Act provides the IG may, "select, appoint, and employ such officers and employees as may be necessary in carrying out the Act," and gives the IG independent authority to contract. The proposed revised Circular would impinge upon those authorities by permitting another Agency official to determine which OIG activities should be performed by Federal employees and which should be contracted out because that official, not the IG, deems them not inherently governmental. Even if the Agency head were to delegate this responsibility to the IG, she could take it back, and thus interfere with IG independence.

In our opinion, a better approach would be to provide in the Circular that IG's are "4.e. officials" for their own offices, thus allowing them to determine which, if any, OIG activities are inherently governmental and which are liable to be contracted out.

- Attachment A - Inventory Process. Under paragraph F.1, the 4.e. official shall designate an Inventory Challenge Review Authority, who reviews and responds to challenges to agency inventory decisions, and an Inventory Challenge Appeal Authority, who reviews and responds to appeals of decisions made by the Inventory Challenge Review Authority. We believe the Circular should explicitly state whether these positions are inherently governmental, as it does in Attachment B, paragraph B, for the Agency Tender Official, Contracting Officer, Human Resource Advisor, Source Selection Authority, and Administrative Appeal Authority.

- Attachment B - Public-Private Competition.
 1. Paragraph C .1.a. requires preliminary planning prior to public announcement of a Standard Competition, but imposes no time limit on this process. We are concerned that an agency could escape the goal of timely competition by delaying or dragging out the preliminary research. Since a goal of the Circular is to "impose competition time frames" (67 FR 69774), we believe the Circular should clarify how long an agency can take to complete preliminary research.
 2. Paragraph C.5.a.(2) provides that if a public reimbursable source is selected, the head of the requiring organization shall issue an Inter-Service Support Agreement, with a copy to the 4.a. (probably a typo; it should be 4.e.) official. It is unclear to us whether the "requiring organization" is the agency or a subordinate office within the agency. We believe the Circular should clarify this issue and whether this authority can be redelegated or not.
 3. Paragraph C.5.b.(2) states that for agency or public reimbursable sources, the "head of the requiring organization" shall exercise option years, while the "head of the requiring activity" shall provide a written recommendation to approve another

year of agency or public reimbursable performance. Again, the Circular does not clarify who the “head of the requiring organization” and “head of the requiring activity” are, or whether they can redelegate their authorities to others.

4. The reference in paragraph D.3. to “paragraph D.3. above,” appears to be incorrect since this **is** paragraph D.3.

Should your staff have any questions, please have them contact me at 202-566-2604.

Sincerely yours,

/s/

Elissa R. Karpf
Assistant Inspector General for Planning,
Analysis, and Results