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## **Circular A-76 Revision 2003: Selected Issues**

**Updated January 7, 2005**

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# Circular A-76 Revision 2003: Selected Issues

## Summary

Office of Management and Budget (OMB) Circular A-76 provides guidance for federal agencies on how to conduct public-private competitions. The outcome of a competition determines who — government agency or private business — will perform commercial activities. (A commercial activity is a service that could be performed by the private sector.) OMB Circular A-76 was issued initially in 1966; the *Circular No. A-76 Revised Supplemental Handbook* was first issued in 1979. The handbook provided guidance for implementing Circular A-76 policy and included procedures for conducting A-76 cost comparisons. In 1999, the Federal Activities Inventory Reform (FAIR) Act of 1998 (P.L. 105-270) was incorporated into the circular and the handbook.

The most recent A-76 revision, which was issued in 2003, is arguably the most significant change to the circular and its supplement in the document's history. The revision is one of several steps the Bush Administration has taken to further its competitive sourcing initiative, which is one of the components of the President's Management Agenda (PMA). Other activities include the promotion of competitive sourcing goals and the requirement that agencies submit lists of their inherently governmental activities to OMB. (An inherently governmental activity is a function that is so intimately related to the public interest that it must be performed by federal government employees, according to OMB's *Circular No. A-76 (Revised)*, May 29, 2003, p. A-2.) Combining the circular and the *Circular No. A-76 Revised Supplemental Handbook* into one document, OMB modified the definition of "inherently governmental," established the concept of an agency tender (which is the government's response to a solicitation), and eliminated the direct conversion option. Under this option, and as long as certain conditions were met, agencies were allowed to convert a function from in-house performance to private-sector performance without conducting a cost comparison.

Several of the latest changes to Circular A-76 have generated a significant amount of interest. Requirements for the preparation of commercial activities and inherently governmental inventories have changed, and the latter inventories now are subject to challenge and appeal processes. The deadline for what are now called standard competitions has been shortened, with the expectation that agencies will complete a host of planning activities prior to beginning a competition. These and other changes have raised questions about the ability of agencies to comply with the revised circular and other competitive sourcing requirements. Possible implications for the civil service system and federal employees is another area that has garnered attention. This report will be updated if there are further changes to the circular or information about implementation of the circular becomes available.

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# Circular A-76 Revision 2003: Selected Issues

## Introduction

Office of Management and Budget (OMB) Circular A-76,<sup>1</sup> which was first issued in 1966, provides guidance for federal agencies to use in determining who — government agency or private business — will perform commercial activities.<sup>2</sup> Circular A-76 and the *Circular No. A-76 Revised Supplemental Handbook* have been modified over the years. The handbook expanded upon Circular A-76 policy and provided guidance for conducting cost comparisons. Key changes include the initial publication of the handbook in 1979; the incorporation of the language of government reinvention in 1996; and the implementation of the Federal Activities Inventory Reform Act (FAIR) of 1998 in 1999.<sup>3</sup>

In spring 2001, the Comptroller General convened a panel of experts, identified as the Commercial Activities Panel (CAP), to examine Circular A-76 and FAIR. The panel was established at the direction of Section 832 of P.L. 106-398.<sup>4</sup> Having noted the concerns of federal employee unions and private industry about Circular A-76, Senator John Warner proposed the amendment that became Section 832. After a year-long study, CAP released its report, *Improving the Sourcing Decisions of the Government*, on April 30, 2002. The panel recommended that government adopt a set of 10 sourcing principles, promote the development of high-performing organizations (HPOs), make limited changes to Circular A-76, and create an integrated competition process that would draw from both the *Federal Acquisition Regulation* (FAR)<sup>5</sup> and Circular A-76.<sup>6</sup>

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<sup>1</sup> See CRS Report RL31024, *The Federal Activities Inventory Reform Act and Circular A-76*, by L. Elaine Halchin; CRS Report RS21489, *OMB Circular A-76: Legal Reach and Proposed Modifications*, by John R. Luckey.

<sup>2</sup> A commercial activity is “a recurring service that could be performed by the private sector.” An inherently governmental activity “is an activity that is so intimately related to the public interest as to mandate performance by government personnel.” (U.S. Office of Management and Budget, *Circular No. A-76 (Revised)*, May 29, 2003, available at [[http://www.whitehouse.gov/omb/circulars/a076/a76\\_incl\\_tech\\_correction.pdf](http://www.whitehouse.gov/omb/circulars/a076/a76_incl_tech_correction.pdf)], visited Jan. 3, 2005, pp. D-2, A-2.)

<sup>3</sup> P.L. 105-270; 112 Stat. 2382; 31 U.S.C. 501 note. Circular A-76 also was revised in 1967, 1979, and 1983. Additional revisions to the *Revised Supplemental Handbook* were made in 1983 and 1996.

<sup>4</sup> Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001; 114 Stat. 1654A-1, at 1654A-221.

<sup>5</sup> The *Federal Acquisition Regulation* includes regulations concerning government  
(continued...)

OMB released a proposed revision of Circular A-76 and the *Revised Supplemental Handbook* on November 14, 2002,<sup>7</sup> which was followed by a notice in the *Federal Register* on November 19, 2002.<sup>8</sup> The *Federal Register* notice marked the beginning of a 30-day public comment period. The agency received, by e-mail and facsimile, 694 comments about the proposed revision.<sup>9</sup> However, any comments that were submitted via the U.S. Postal Service were not listed on the OMB website. For example, a letter submitted by the Comptroller General to the Director of OMB concerning the proposed revision was not listed on the OMB website.<sup>10</sup>

The final revised version of the circular<sup>11</sup> was released on May 29, 2003, the same date that OMB published a notice in the *Federal Register*.<sup>12</sup> In addition to replacing the 1999 circular, the 2003 version

supersedes and rescinds ... OMB Circular No. A-76 Revised Supplemental Handbook (Revised 2000), March 1996; OMB Circular No. A-76 Transmittal Memoranda Nos. 1-25; and Office of Federal Procurement Policy (OFPP) Policy Letter 92-1, *Inherently Governmental Functions*, September 23, 1992.<sup>13</sup>

The three-page circular, which addresses, among other things, the purpose, authority, and scope of Circular A-76, includes four attachments on the following topics: the inventory process, public-private competition, calculating public-private competition costs, and acronyms and definitions. Effective May 29, 2003, the circular applies to competitions initiated, and inventories required, after the effective date. Transition procedures for direct conversions and cost comparisons in progress, but not completed, on May 29 are included in the circular. As with the proposed revision, an individual may obtain the 2003 circular from OMB's website or by

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<sup>5</sup> (...continued)

procurement. The FAR is Parts 1 through 53 of Title 48 of the *Code of Federal Regulations*.

<sup>6</sup> Commercial Activities Panel, *Improving the Sourcing Decisions of the Government* (Washington: U.S. General Accounting Office, 2002), pp. 46-53.

<sup>7</sup> U.S. Office of Management and Budget, *Circular No. A-76 (Revised)*, Nov. 14, 2002, available at [<http://www.whitehouse.gov/omb/circulars/index.html>], visited Jan. 3, 2005.

<sup>8</sup> U.S. Office of Management and Budget, "Performance of Commercial Activities," *Federal Register*, Nov. 19, 2002, vol. 67, no. 223, p. 69769.

<sup>9</sup> The faxes and e-mail messages are listed on OMB's website at [<http://www.whitehouse.gov/omb/circulars/index.html>], visited Jan. 3, 2005.

<sup>10</sup> Letter from David M. Walker, Comptroller General, to Mitchell E. Daniels, Jr., Director, U.S. Office of Management and Budget, GAO-03-391R, Jan. 16, 2003.

<sup>11</sup> U.S. Office of Management and Budget, *Circular No. A-76 (Revised)*, May 29, 2003, available at [[http://www.whitehouse.gov/omb/circulars/a076/a76\\_incl\\_tech\\_correction.pdf](http://www.whitehouse.gov/omb/circulars/a076/a76_incl_tech_correction.pdf)], visited Jan. 3, 2005.

<sup>12</sup> U.S. Office of Management and Budget, "Performance of Commercial Activities," *Federal Register*, vol. 68, no. 103, May 29, 2003, pp. 32134-32142.

<sup>13</sup> *Ibid.*, p. 32134.

telephoning the Office of Federal Procurement Policy (OFPP) (the *Federal Register* notice includes contact information).

The 2003 revision accompanies other competitive sourcing initiatives implemented by the Bush Administration. In 2001, OMB notified agencies and departments that they were required to compete (that is, public-private competition) or directly convert<sup>14</sup> a minimum of 5% of the full-time equivalents (FTEs)<sup>15</sup> listed on their FAIR inventories by the end of FY2002 and compete or convert an additional 10% by the end of FY2003.<sup>16</sup> The combined goal of 15% equated to 127,500 FTEs.<sup>17</sup> Subsequently, in spring 2003, the target date for 15% was shifted to July 1, 2004, the 15% target was presented as a governmentwide goal, and agencies learned they would receive credit not only for studies they had completed, but also for studies they had initiated.<sup>18</sup> A report released by OMB on July 24, 2003, *Competitive Sourcing: Conducting Public-Private Competition in a Reasoned and Responsible Manner*, stated that OMB “recognized its initial numerically-based directions were inadequate.” OMB also determined that customized competitive sourcing plans, which are based on agencies’ research and analyses, would be more appropriate.<sup>19</sup> In congressional testimony provided the same day that the OMB report was issued, the OFPP Administrator emphasized that

OMB has moved away from mandated numerical goals and uniform baselines that were introduced at the beginning of the [competitive sourcing] initiative to ensure a level of commitment that would institutionalize use of the tool within

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<sup>14</sup> A cost comparison study is not performed before an agency function is converted from one sector to another. The conditions under which a direct conversion was permissible are described in U.S. Office of Management Budget, *Circular No. A-76 Revised Supplemental Handbook, Performance of Commercial Activities*, March 1996 (updated June 1999), pp. 3-4. The direct conversion option is not included in the 2003 circular.

<sup>15</sup> A full-time equivalent (FTE) is “[t]he staffing of Federal civilian employee positions, expressed in terms of annual productive work hours (1,776 [hours]) rather than annual available hours that includes non-productive hours (2,080 hours).” (U.S. Office of Management and Budget, *Circular No. A-76 (Revised)*, May 29, 2003, p. D-5.)

<sup>16</sup> The 5% target was announced in an OMB memorandum: “Performance Goals and Management Initiatives for the FY 2002 Budget,” Memorandum M-01-15, March 9, 2001. The 10% target was communicated to agencies, by OMB correspondence, in June 2001. (Information provided electronically by the Office of Federal Procurement Policy, Jan. 14, 2003.)

<sup>17</sup> U.S. Congress, House Committee on Government Reform, Subcommittee on Technology and Procurement Policy, *Oversight Hearing to Review the Findings of the Commercial Activities Panel*, hearing, 107<sup>th</sup> Cong., 2<sup>nd</sup> sess., Sept. 27, 2002 (Washington: GPO, 2003), p. 43.

<sup>18</sup> “OMB ‘Proud to Be’ Assessment for Competitive Sourcing,” *Government Executive*, Daily Briefing, May 22, 2003, available at [<http://www.govexec.com/dailyfed/0503/0503p1a.htm>], visited Jan. 3, 2005.

<sup>19</sup> U.S. Office of Management and Budget, *Competitive Sourcing: Conducting Public-Private Competition in a Reasoned and Responsible Manner*, July 2003, pp. 1, 4-5, available at [<http://www.whitehouse.gov/omb/procurement/index.html>], visited Jan. 3, 2005.

each agency. Instead, we have negotiated tailored baselines based on mission needs and conditions unique to the agency.<sup>20</sup>

A second report issued by OMB, in fall 2003, *Competitive Sourcing: Reasoned and Responsible Public-Private Competition, Agency Activities*, described agency competitive sourcing efforts, explained how agency progress is measured, outlined benefits associated with the 2003 revision to the circular, and explained additional initiatives necessary for achieving success in competitive sourcing. Also included in this report was information about the 24 agencies and departments that OMB tracks.<sup>21</sup>

Following OMB's disavowal of externally imposed targets, it issued guidance for agencies seeking to achieve a rating of green for competitive sourcing on the PMA scorecard that requires the development and implementation of a long-range competition plan.<sup>22</sup> An essential component of such a plan is identifying, by fiscal year, through FY2008, which commercial activities the agency plans to announce for competition. (Only those commercial activities already identified as eligible for competition are to be included in long-range competition plans.) Agencies are required to update their competition plans by August 1 each year.<sup>23</sup>

The Bush Administration also established a requirement, effective in 2001, that agencies and departments compile lists of their inherently governmental functions and submit them to OMB together with annual inventories of their commercial activities each year.<sup>24</sup>

After a brief review of several key features of the revised circular, this report examines the new guidance for agency inventories, the 12-month deadline for standard competitions, agency compliance issues, and possible implications for the civil service system and federal employees.

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<sup>20</sup> U.S. Congress, Senate Committee on Governmental Affairs, Subcommittee on Oversight of Government Management, the Federal Workforce and the District of Columbia, statement of Angela B. Styles, Administrator, Office of Federal Procurement Policy, unpublished hearing, 108<sup>th</sup> Cong., 1<sup>st</sup> sess., July 24, 2003, available at [<http://www.whitehouse.gov/omb/legislative/testimony/index.html>], visited Jan. 3, 2005, p. 5.

<sup>21</sup> U.S. Office of Management and Budget, *Competitive Sourcing: Reasoned and Responsible Public-Private Competition, Agency Activities*, Sept. 2003, available at [[http://www.whitehouse.gov/omb/procurement/comp\\_sourc\\_addendum.pdf](http://www.whitehouse.gov/omb/procurement/comp_sourc_addendum.pdf)], visited Jan. 3, 2005.

<sup>22</sup> Clay Johnson III, Deputy Director for Management, U.S. Office of Management and Budget, "Development of 'Green' Plans for Competitive Sourcing," memorandum, Dec. 22, 2003, available at [[http://www.whitehouse.gov/omb/procurement/comp\\_sourc-green\\_plans122203.pdf](http://www.whitehouse.gov/omb/procurement/comp_sourc-green_plans122203.pdf)], visited Jan. 3, 2005.

<sup>23</sup> For a more-detailed discussion of competitive sourcing targets, see CRS Report RL32079, *Federal Contracting of Commercial Activities: Competitive Sourcing Targets*, by L. Elaine Halchin.

<sup>24</sup> U.S. Office of Management and Budget, "Year 2001 Inventory of Commercial Activities," Memorandum M-01-16, April 3, 2001, p. 1.

## Background

The 2003 revision of A-76 is, arguably, the most significant change to the circular and its supplement in the document's history. Previously, the circular stated that it was the policy of the federal government to rely on the private sector for the provision of commercial activities.<sup>25</sup> With the publication of the 2003 circular, this policy has been replaced by one that focuses on subjecting commercial activities performed by the government to competition.<sup>26</sup> Under the 2003 revision:

- Agencies designate an assistant secretary, or equivalent level official, as the competitive sourcing official (CSO).
- The government's response to a solicitation is identified as an agency tender, which is the equivalent of a bid or a proposal submitted by a contractor.
- Two types of competition, standard and streamlined, are still allowed, but some features have changed. A standard competition may be used for a work center of any size, but a most efficient organization (MEO) is required, and a conversion differential is used.<sup>27</sup> A streamlined competition may be used only for functions that have 65 or fewer FTEs, an MEO is optional, and a conversion differential is not used.
- Contracting officers use the same source selection criteria or procedure to evaluate both the agency tender and private businesses' bids or proposals. An agency may use sealed bidding, lowest price technically acceptable, phased evaluation, or tradeoff criteria to evaluate tenders and proposals.
- Where the performance decision<sup>28</sup> favors the agency tender, the agency issues a letter of obligation to the MEO.

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<sup>25</sup> U.S. Office of Management and Budget, "Implementation of the Federal Activities Inventory Reform Act of 1998 (Public Law 105-270) ('FAIR Act')," *Federal Register*, vol. 64, no. 121, June 24, 1999, p. 33931.

<sup>26</sup> U.S. Office of Management and Budget, *Circular No. A-76 (Revised)*, May 29, 2003, p. 1.

<sup>27</sup> The MEO is the staffing plan of the agency tender. It is the entity that would perform the work where the government wins the competition. The conversion differential is either 10% of line 1 (personnel costs) on the standard competition form or \$10 million over all performance periods, whichever is less. It is added to the non-incumbent's price or cost of performance. (U.S. Office of Management and Budget, *Circular No. A-76 (Revised)*, May 29, 2003, p. C-2.) For example, in a competition where a federal agency is the current provider, the differential would be added to the contractor's costs.

<sup>28</sup> The performance decision, which is accomplished by completing the standard competition form or streamlined competition form, determines which provider, a government agency or a private business, will perform the work. The forms may be found on pp. C-5 and C-6, respectively, of the 2003 circular.



- The definition of “inherently governmental” is more concise. Among other changes, the word “substantial” was inserted in this sentence: Inherently governmental “activities require the exercise of substantial discretion in applying government authority and/or in making decisions for the government.”<sup>29</sup>
- All businesses and federal agencies<sup>30</sup> are treated as offerors.<sup>31</sup>
- There is no guarantee that the agency tender will still be under consideration when the performance decision is made.
- Agencies establish performance standards for agency officials who have been designated to implement and comply with Circular A-76. Apparently, the standards would concern performance on Circular A-76 activities.
- The direct conversion option no longer exists. This alternative allowed agencies to convert a function from government performance to contractor performance without having to conduct a cost comparison. Direct conversions were allowed only under certain circumstances.
- References to inter-service support agreements (ISSAs) have been eliminated. Unlike the proposed revision, the 2003 circular does not address the competition or re-competition of ISSAs.

The 2003 circular could have a significant impact on public-private competitions, federal agencies, and the allocation of government work between government agencies and private sector sources.

## Selected Issues

### Agency Inventories

**Background.** The compilation of commercial activities inventories by federal agencies has been required by Circular A-76, or the accompanying *Revised*

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<sup>29</sup> U.S. Office of Management and Budget, *Circular No. A-76 (Revised)*, May 29, 2003, p. A-2. In June 2003, the National Treasury Employees Union (NTEU) filed a lawsuit, in the U.S. District Court for the District of Columbia, against OMB, alleging, among other things, that the definition of “inherently governmental” found in Circular A-76 is contrary to the definition included in FAIR. See Jason Peckenpaugh, “Union Sues Bush Administration over Job Competition Rules,” *Government Executive*, Daily Briefing, June 19, 2003, available at [<http://www.govexec.com/dailyfed/0603/061903p1.htm>], visited Jan. 3, 2005.

<sup>30</sup> The federal agency that is conducting a competition may not be the only agency competing for the work. Other agencies, referred to as public reimbursable sources in the circular, also can submit agency tenders.

<sup>31</sup> “Offeror” is another term for a contractor that has submitted a bid or a proposal.

*Supplemental Handbook*, since at least 1979.<sup>32</sup> With the enactment of FAIR in 1998, the responsibility to compile commercial activities inventories annually, and submit them to OMB, became a statutory requirement. The first set of inventories prepared under FAIR was submitted to OMB in 1999.

Two years later, in April 2001, OMB established a requirement for agencies to prepare and submit inventories of their inherently governmental activities along with lists of their commercial functions. It is, and has been, federal policy under Circular A-76 that inherently governmental activities are to be performed by federal government employees.<sup>33</sup> Commercial functions may be performed by government employees or contractor employees.

Each commercial activity listed on a FAIR inventory is assigned a reason code. The reason code identifies the status of that activity with regard to competitive sourcing. The reason codes for inventories are:

A — The Commercial Activity is not appropriate for private sector performance pursuant to a written determination.

B — The Commercial Activity is suitable for a Cost Comparison or a Direct Conversion. [The 2003 circular does not include the direct conversion option and, instead of “cost comparison,” uses the term “competition.”]

C — The Commercial Activity is the subject of an in-progress Cost Comparison or Direct Conversion.

D — The Commercial Activity is performed by a Most Efficient Organization (MEO) resulting from a Cost Comparison decision made within the past five years.

E — The Commercial Activity is pending an agency approved restructuring decision (e.g., closure, realignment).

F — Performance of the commercial activity by government personnel is required due to a statutory prohibition against private sector performance.<sup>34</sup>

### **OMB Guidance on Inherently Governmental Activities Inventories.**

Since the inception of the requirement to submit lists of inherently governmental activities, OMB has changed its approach to these inventories. Initially, inherently governmental inventories were not made available to the public, and agency

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<sup>32</sup> U.S. Office of Management and Budget, “Acquiring of Commercial of [sic] Industrial Products and Services Needed by the Government; Policy Revision,” *Federal Register*, vol. 44, no. 67, April 5, 1979, p. 20560. Confirmation that this requirement existed prior to 1979, or continuously thereafter, is not possible, because early editions of the supplemental handbook are not available.

<sup>33</sup> U.S. Office of Management and Budget, *Circular No. A-76 (Revised)*, May 29, 2003, p. 1.

<sup>34</sup> U.S. Office of Management and Budget, “Year 2003 Inventories of Commercial and Inherently Governmental Activities,” Memorandum M-03-09, March 14, 2003, p. 3.

justifications, written or otherwise, were not required for activities bearing this designation. Two years after the initial directive was issued, language in Circular A-76 states that inherently governmental inventories are to be made available to the public; interested parties are allowed to challenge activities that are included on, or omitted from, an inherently governmental inventory; and written justifications must be provided, upon request, by agencies.

The following chronology demonstrates how OMB has changed its treatment of inherently governmental inventories. Its initial guidance of April 3, 2001, stated:

[A]gencies are requested to submit, with their FAIR Act inventories, a separate report that lists the agency's civilian inherently governmental positions. Military positions and other civilian employees that are exempt, as a class of employee, from the FAIR Act inventory of commercial functions should not be reported. This report should be in the same format and level of detail used for the 2001 FAIR Act inventory of commercial functions. The information will be used as a part of OMB's statutory review and consultation process, but will not be released as a part of the FAIR Act inventory nor will it be subject to the FAIR Act's administrative challenge and appeal process.<sup>35</sup>

Guidance for the 2002 inventories alerted agencies to the possibility that inventories of inherently governmental activities could be released to the public.

For 2002, agencies will provide to OMB a single inventory submission that reflects both the agency's civilian inherently governmental FTE[s] and civilian commercial FTE[s], by location and function. Upon completion of OMB's review and consultation with the agency regarding the content of this submission, each agency shall provide a separate report listing only the agency's commercial civilian FTE[s] to the Congress and the public in accordance with the requirements of the FAIR Act. Agencies should anticipate the possibility that after review and consultation, OMB may request the release of inherently governmental inventories.... As a result of this [memorandum], OMB expects to conduct a more thorough review of agency inventory submissions and will seek improved consistency within and among agencies in the determination of what is commercial or inherently governmental.<sup>36</sup>

Shortly after the release of this memorandum, the Administrator of the OFPP, testifying before the Senate Committee on Governmental Affairs, stated that the FAIR challenge process would not apply to inherently governmental activities.

Again this year, agencies will be requested to submit a separate report that lists the agency's civilian inherently governmental positions. OMB will analyze this data as part of its overall management responsibilities, but it will not be subject to the FAIR Act's administrative challenge and appeal process.<sup>37</sup>

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<sup>35</sup> U.S. Office of Management and Budget, "Year 2001 Inventory of Commercial Activities," p. 1.

<sup>36</sup> Angela Styles, Administrator, Office of Federal Procurement Policy, "Year 2002 Inventory of Commercial Activities," Memorandum M-02-04, Feb. 27, 2002, p. 2.

<sup>37</sup> U.S. Congress, Senate Committee on Governmental Affairs, "Who's Doing Work for the (continued...)

OMB guidance for the 2003 inventories was provided initially by a memorandum dated March 14, 2003.<sup>38</sup> The document stated that it provided guidance for the preparation and submission of FAIR inventories and inherently governmental activities inventories. No explicit statement was made about the disposition of inherently governmental activities inventories, such as whether they would be made available to the public or subjected to the FAIR challenge and appeal process.

The requirement for agencies to submit inventories of their inherently governmental activities was incorporated into the 2003 circular. OMB's role did not change: it reviews the inventories and consults with agencies. Then, agencies are required to make their commercial and inherently governmental inventories available to Congress and the public, except information that is classified or "otherwise protected for national security reasons."<sup>39</sup>

Two major changes in the treatment of inherently governmental inventories were effected by the circular. Agencies must prepare written justifications for activities classified as inherently governmental.

The CSO [the agency's competitive sourcing officer] shall justify, in writing, any designation of government personnel performing inherently governmental activities. The justification shall be made available to OMB and the public upon request. An agency shall base inherently governmental justifications on the [circular's revised definition of "inherently governmental."]<sup>40</sup>

Similar to the challenge and appeal processes under FAIR that apply to commercial activities inventories, the circular allows interested parties to challenge the contents of inherently governmental inventories.

It appears that additional guidance may be necessary to address questions concerning detailed instructions for preparing justifications, how agency-OMB disputes might be resolved, and the frequency of justification submissions.

**Challenge and Appeal Processes.** In effect, the 2003 circular modified the challenge and appeal process that was established by FAIR. In addition to altering time frames from "days" to "working days," and providing direction on who should serve as agency challenge authorities and appeal authorities, the circular allows for challenges to reason codes and the classification of activities as inherently governmental.

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<sup>37</sup> (...continued)

Government?: Monitoring, Accountability and Competition in the Federal and Service Contract Workforce," hearing, 107<sup>th</sup> Cong., 2<sup>nd</sup> sess., March 6, 2002 (Washington: GPO, 2002), p. 55.

<sup>38</sup> U.S. Office of Management and Budget, "Year 2003 Inventories of Commercial and Inherently Governmental Activities."

<sup>39</sup> U.S. Office of Management and Budget, *Circular No. A-76 (Revised)*, May 29, 2003, p. A-1.

<sup>40</sup> *Ibid.*, p. A-2.

**Table 1. Comparison of Inventory Challenge  
and Appeal Processes**

FAIR (P.L. 105-270)	Circular A-76 Attachment A
<p><b>Sec. 2.(c)(2)(A)</b> Any changes made to an inventory as a result of a challenge shall be made available to the public. A copy of the changes shall be sent to Congress, and a notice shall be published in the <i>Federal Register</i>.</p>	<p><b>Para. D.6.</b> A copy of the change shall also be provided to OMB.</p>
<p><b>Sec. 3.(a)</b> An interested party may challenge the inclusion of an activity on, or the omission of an activity from, a commercial activity inventory.</p>	<p><b>Para. D.2.</b> An interested party may challenge the application of reason codes and the reclassification of an activity as inherently governmental or commercial.</p>
<p><b>Sec. 3.(c)</b> A challenge must be submitted, in writing, to an agency within 30 days after notice has been published in the <i>Federal Register</i> that an agency's inventory is available.</p>	<p><b>Para. D.2.</b> A challenge must be submitted within 30 working days.</p>
<p><b>Sec. 3.(d)</b> An agency head shall designate an official to handle challenges.</p>	<p><b>Para. D.1.a.</b> Inventory challenge authorities shall be at the same level, or higher, than the individual who prepared the inventory.</p>
<p><b>Sec. 3.(d)</b> The designated official shall make a determination and respond within 28 days after receiving the challenge.</p>	<p><b>Para. D.3.</b> Inventory challenge authorities must make a determination and respond within 28 working days.</p>
<p><b>Sec. 3.(e)</b> The head of an agency shall handle appeals.</p>	<p><b>Para. D.1.b.</b> Agency heads shall appoint inventory appeal authorities. They shall be independent and at a higher level in the agency than inventory challenge authorities.</p>
<p><b>Sec. 3.(e)(1)</b> An interested party shall have 10 days after receipt of an adverse decision to file a written appeal.</p>	<p><b>Para. D.4.</b> An interested party shall have 10 working days.</p>
<p><b>Sec. 3.(e)(2)</b> The agency head shall decide the appeal and respond, in writing, within 10 days after receipt of the appeal.</p>	<p><b>Para. D.5.</b> An inventory appeal authority shall respond within 10 working days.</p>

Only individuals or entities that qualify as an interested party may submit challenges and appeals. The circular and FAIR share the same definition of “interested party”:

For purposes of challenging the contents of an agency’s commercial activities inventory pursuant to the Federal Activities Inventory Reform Act, an interested party is (1) a private sector source that is an actual or prospective offeror for a contract or other form of agreement to perform the activity and has a direct economic interest in performing the activity that would be adversely affected by a determination not to procure the performance of the activity from a private sector source; (2) a representative of any business or professional association that includes within its membership private sector sources referred to in (1) above; (3) an officer or employee of an organizations within an executive agency that is an actual or prospective offeror to perform the activity; (4) the head of any labor organization referred to in section 7103(a)(4) of title 5, United States Code, that includes within its membership officers or employees of an organization referred to in paragraph (3).<sup>41</sup>

Several questions or issues may arise with the revised challenge and appeal process.

- The text at the beginning of the circular’s definition of “interested party” indicates that the purpose of the definition is to identify who may challenge the contents of commercial activities inventories. However, Paragraph D.2 of Attachment A of the circular suggests that interested parties may challenge the classification of inherently governmental activities. Has this apparent discrepancy been resolved? If so, how?
- Assuming that individuals and organizations are allowed to file challenges on the classification of inherently governmental activities, how many have been filed? What kind of burden will they place on agencies? Do agencies have the capability to respond, within the circular’s timelines, to challenges and appeals?
- Does the new approach toward inherently governmental activities affect how agency personnel classify activities?
- Are there any implications of using an executive directive (Circular A-76) to broaden the application of FAIR to inherently governmental activities?<sup>42</sup>

**Rationale for Inherently Governmental Inventories.** The 2001 memorandum that initially established a requirement for agencies to compile inventories of inherently governmental activities noted that the information would

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<sup>41</sup> U.S. Office of Management and Budget, *Circular No. A-76 (Revised)*, May 29, 2003, p. D-6.

<sup>42</sup> CRS Report RS21489, *OMB Circular A-76: Legal Reach and Proposed Modifications*, by John R. Luckey, p. 2.

be “used as a part of OMB’s statutory review and consultation process ....”<sup>43</sup> While OMB’s 2002 inventory guidance did not provide a rationale for requesting inherently governmental inventories,<sup>44</sup> the Administrator of OFPP, testifying at a congressional hearing on March 6, 2002, stated that OMB would analyze this information “as part of its overall management responsibilities.”<sup>45</sup> OMB’s guidance for the 2003 inventories did not state why information about inherently governmental activities needs to be collected. However, in testimony presented on March 25, 2003, the OFPP Administrator indicated why OMB wants agencies to compile and submit inherently governmental activities inventories:

[Inherently governmental] functions must be performed by public employees and we will continue to depend on our able workforce to execute these important responsibilities on behalf of our citizenry. This notwithstanding, we will still require agencies to identify their inherently governmental functions to ensure activities are properly characterized. By doing so, commercial functions that should be considered for competition will not remain insulated from the savings that a fair competition can yield.<sup>46</sup>

The May 29, 2003 *Federal Register* notice stated that the circular would “increase visibility into government management by requiring agencies to develop lists of their commercial and inherently governmental activities.”<sup>47</sup> Another excerpt from the *Federal Register* notice stated:

An accurate inventory identifying an agency’s commercial and inherently governmental activities is vital to a federal manager’s ability to identify opportunities for which application of public-private competition is likely to yield the best return for the agency. For this reason, the revised Circular refines and expands guidance on the establishment of inventories .... The revised Circular builds on existing statutory obligations set forth in ... FAIR ... that require agencies to prepare annual inventories of the commercial activities performed by their employees. These enhancements ... include a *more accurate picture of agencies’ overall activities*. The revised Circular requires agencies to categorize all activities performed by government personnel as either commercial or inherently governmental.<sup>48</sup>

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<sup>43</sup> U.S. Office of Management and Budget, “Year 2001 Inventory of Commercial Activities,” p. 1.

<sup>44</sup> U.S. Office of Management and Budget, “Year 2002 Inventory of Commercial Activities.”

<sup>45</sup> U.S. Congress, Senate Committee on Governmental Affairs, “Who’s Doing Work for the Government?: Monitoring, Accountability and Competition in the Federal and Service Contract Workforce,” p. 55.

<sup>46</sup> U.S. Congress, House Committee on the Armed Services, Subcommittee on Readiness, statement of Angela B. Styles, Administrator, Office of Federal Procurement Policy, unpublished hearing, 108<sup>th</sup> Cong., 1<sup>st</sup> sess., March 25, 2003, available at [<http://armedservices.house.gov/schedules/2003.html#mar03>], visited Jan. 3, 2005.

<sup>47</sup> U.S. Office of Management and Budget, “Performance of Commercial Activities,” May 29, 2003, p. 32134.

<sup>48</sup> *Ibid.*, pp. 32137-32138. (*italics in original*)

**Implementation.** Agency implementation of this portion of the circular (attachment A, inventory process) might create additional work for agencies. In addition to preparing written justifications for activities designated as inherently governmental or designated as commercial and assigned reason code A, agency personnel might be called upon to respond to challenges and appeals concerning reason codes or the contents of inherently governmental activities inventories.

In light of OMB's emphasis on competitive sourcing, one possible outcome of changing, and expanding the applicability of, the inventory procedures could be the establishment of an environment conducive to erroneous classification of activities. Activities that are arguably inherently governmental, or that are commercial but should be exempt from competition (reason code A), might be misclassified as commercial and eligible for competition (reason code B). Less work is required for placing activities on the FAIR inventory and assigning reason code B. Written justifications are not required for these activities, but they are required for inherently governmental activities and commercial activities assigned reason code A.

This potential problem may be mitigated by the visibility of agency inventories and the accountability mechanisms established by FAIR and enhanced by Circular A-76. Requiring commercial activities inventories and inherently governmental inventories to be made available to the public allows for scrutiny of both types of activities. Union and private sector reviews of inventories could be particularly useful in guarding against potential misclassification of activities as commercial when they are not, or vice versa. Additionally, the release of inherently governmental inventories could aid in examining the belief, held by some commenters, that some commercial activities are placed on inherently governmental inventories in order to shield them from competition. One issue that might arise is how to balance an agency's determinations, based upon familiarity with its own work, and, for example, its exercise of discretionary authority in applying reason code A, against the assessments of outside organizations concerning the proper classification of agency activities. In the absence of a disclosure process akin to the one used for inventories of commercial and inherently governmental activities, it is difficult to gauge whether, and how, outside organizations use the opportunities available to them under the revised challenge and appeal process.

Useful information can be gleaned from inherently governmental and commercial inventories, such as the variety of functions performed by an agency and the number of FTEs associated with each activity. However, the utility of this information is somewhat limited. The inventories are based on a dichotomy between commercial and inherently governmental, which makes them useful for competitive sourcing, but they appear not to capture the complexities and interdependence of government work and government organizations.

Changes to the definition of "inherently governmental" might not end with the revised definition that appears in the 2003 circular. Various factors, such as the production and publication of lists of inherently governmental and commercial activities, the increasing number of competitions, or the revised definition itself, could act as a catalyst for an open, informed, and thoughtful discussion on the concept of inherently governmental and its validity.



Some policy issues and questions that might arise as agencies attempt to comply with the circular and OMB inventory guidance include the following:

- The circular states that agency personnel shall use the circular’s definition of “inherently governmental” in preparing their justifications for inherently governmental activities. No other guidance is provided to indicate what type and scope of information constitutes sufficient justification.
- What happens if OMB disagrees with an agency’s justifications for inherently governmental activities? Who — the agency, OMB, a third party — has final authority over the agency’s list of inherently governmental activities and accompanying justification?
- Does an initial justification remain valid until, for example, an agency elects to change its inherently governmental activity inventory and/or justifications? If not, how frequently does OMB require agencies to prepare justification statements for their inherently governmental activities?
- How has OMB encouraged compliance? What happens if an agency does not comply with OMB’s directives?
- There is no statutory requirement for agencies to submit lists of inherently governmental activities. Do all agencies that submit FAIR inventories also submit inventories of inherently governmental activities?
- Have OMB-agency consultations resulted in shifting activities from an inherently governmental list to a commercial inventory and vice versa? If so, how many functions and FTEs have been shifted, for each agency and each year, from one list to another? What has been the net result governmentwide?

## **Deadline for Completing Standard Competitions**

Under the 1999 circular, agencies were allowed 18 months to complete a standard cost comparison for a single function and 36 months for a multifunction study. The cost comparison start date was the date a study team had been identified and the public or the union had been notified of the study.<sup>49</sup>

The 2003 revision imposes a shorter timeframe for study completion and does not make a distinction between single function and multifunction studies. The 2003 circular requires an agency to complete a competition (that is, reach a performance

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<sup>49</sup> U.S. Office of Management and Budget, *Circular No. A-76 Revised Supplemental Handbook, Performance of Commercial Activities*, p. 10.

decision) within 12 months of the public announcement of the competition.<sup>50</sup> The *Federal Register* notice that announced the release of the 2003 circular stated OMB's rationale for the 12-month deadline:

Timeframe standards have been incorporated into the revised Circular to motivate agencies to complete competitions and to instill greater confidence that agencies will follow through on their plans. Current processes have been criticized for allowing agencies to extend public-private competitions indefinitely.... In addition to instilling confidence in the process, time limits ensure that the benefits of competition are realized.<sup>51</sup>

A time limit waiver of up to six months may be granted by the agency competitive sourcing official (CSO). A waiver applies only to a competition that is particularly complex and must be signed by the CSO before the public announcement of the competition. The CSO is to provide a copy of the waiver to the Deputy Director for Management, OMB. If an agency exceeds the time limit (whether 12 or 18 months) for a study, the CSO is to notify OMB in writing.<sup>52</sup> The 2003 circular does not indicate whether there will be any consequences for an agency that fails to meet the deadline.

In practice, agencies have more than 12 (or 18) months to complete competitions. In establishing a timeframe, what OMB did was identify a set of activities an agency must accomplish between a study's start date and the end date. All other necessary tasks can occur before or after the 12- or 18-month timeframe. At a minimum, agencies are expected to perform these tasks within the allotted time:

- Issue a public announcement.
- Appoint agency personnel to the performance work statement (PWS) team, the most efficient organization (MEO) team, and the source selection evaluation board (SSEB).
- Prepare the PWS.
- Develop and issue a solicitation.
- Create a plan for establishing an MEO.
- Develop a quality assurance surveillance plan (QASP).<sup>53</sup>
- Prepare an agency tender, which includes, in addition to an MEO, a certified agency cost estimate, the MEO's quality control plan, the MEO's phase-in plan, and copies of any existing, awarded MEO subcontracts.
- Receive and evaluate all tenders and offers.

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<sup>50</sup> U.S. Office of Management and Budget, *Circular No. A-76 (Revised)*, May 29, 2003, p. B-6.

<sup>51</sup> U.S. Office of Management and Budget, "Performance of Commercial Activities," May 29, 2003, p. 32136.

<sup>52</sup> U.S. Office of Management and Budget, *Circular No. A-76 (Revised)*, May 29, 2003, p. B-6.

<sup>53</sup> A QASP "identifies the methods the government will use to measure the performance of the service provider against the requirements of the PWS." (U.S. Office of Management and Budget, *Circular No. A-76 (Revised)*, May 29, 2003, p. B-10.)

- Perform price analysis and cost realism on all private sector cost proposals and agency cost estimates.<sup>54</sup>
- Make the performance decision.<sup>55</sup>

The imposition of a 12-month deadline, when combined with a list of tasks that need to be accomplished prior to the start date, alerts agencies to the importance of planning for a competition. In the May 29, 2003 *Federal Register* notice, OMB stated that many commenters on the proposed revision noted that agency personnel “lack experience planning for and conducting public-private competitions.” OMB agreed with these commenters, responding that it had refined and bolstered its coverage of this area in the 2003 circular.<sup>56</sup> Prior to the start date of a competition, agencies are to:

- Determine what function(s) are to be competed and identify the associated FTEs.
- Carry out preliminary research to determine how to group activities as business units.
- Review workload data, quantifiable outputs of activities or processes, and other similar data. If necessary, establish workload data collection systems.
- Determine the activity’s baseline costs.
- Determine whether to conduct a streamlined or a standard competition.
- Develop schedules for completing the study.
- Determine the roles and responsibilities of agency participants in the competition.
- Appoint competition officials: agency tender official, contracting officer, PWS team leader, human resource advisor (HRA), and source selection authority (SSA).
- Notify incumbent service providers when the public announcement will be made.<sup>57</sup>

While this list might aid agency personnel who are trying to determine what resources and skills are needed to conduct rigorous planning for competitions, neither the circular nor the *Federal Register* notice addressed the matter of training personnel

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<sup>54</sup> Price analysis is used to determine that “the proposed price is reasonable in comparison with current or recent prices for the same or similar items, adjusted to reflect changes in market conditions, economic conditions, quantities, or terms and conditions under contracts that resulted from adequate price competition.” (48 CFR 15.403-1(c)(1)(B)(III).) Cost realism is a process used to ensure that the costs in an offeror’s proposal are realistic, reflect a thorough understanding of the requirements, and are consistent with the technical proposal. (48 CFR 2.1.)

<sup>55</sup> U.S. Office of Management and Budget, *Circular No. A-76 (Revised)*, May 29, 2003, pp. B-6-B-16.

<sup>56</sup> U.S. Office of Management and Budget, “Performance of Commercial Activities,” May 29, 2003, p. 32138.

<sup>57</sup> U.S. Office of Management and Budget, *Circular No. A-76 (Revised)*, May 29, 2003, pp. B-1-B-3.

to plan and conduct competitions. Training for agency personnel was addressed in OMB's May 2004 report on competitive sourcing, which identified the Federal Acquisition Council, senior managers governmentwide, the Defense Acquisition University, and the Federal Acquisition Institute as key participants in the effort to plan for, develop, and offer training tailored to meet the needs of agency personnel conducting public-private competitions.

Successful application of competitive sourcing requires that our workforce be the best it can be in identifying activities that are suitable for competition, applying streamlined and standard competition techniques in a strategic manner, running a fair and transparent selection process, and properly managing the resulting contract or letter of obligation established with a winning government provider. The Federal Acquisition Council has been inventorying agency resources, skill sets and training needs. OMB will work closely with the Council and ask senior agency management to give priority attention to developing plans that address identified skills gaps. The Defense Acquisition University and Federal Acquisition Institute will be asked to play a lead role in providing training materials geared to skills such as market analysis, cost analysis, and contract administration.<sup>58</sup>

Whereas OMB has imposed requirements on agencies regarding, for example, the inclusion of inherently governmental activities in their inventories, it remains to be seen whether OMB issues any directives or requirements regarding training.

A shorter timeframe was incorporated into the 2003 circular in an effort to alleviate problems caused, or aggravated, by time-consuming studies. Studies that take a long time to complete, some argue, create problems for federal agencies, government employees, and businesses. Michael Wynne, Deputy Undersecretary of Defense for Acquisition, Technology, and Logistics, summarized this perspective:

The entire process is frustrating for all concerned: government employees who are in limbo about their jobs, contractors who have tied up considerable bid and proposal investments and the government activity that is managing the process while simultaneously performing their day-to-day mission.<sup>59</sup>

Additionally, it is possible that the emphasis on rigorous planning prior to the public announcement will decrease the likelihood that an agency announces, then cancels, a competition.

Implementation of the new deadline might not alter the amount of time agencies take to plan and conduct competitions, however. A-76 studies for which figures are available have taken considerably longer than 12 or 18 months. Information from, for example, the Department of Defense (DOD), shows that the average time for

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<sup>58</sup> Executive Office of the President, U.S. Office of Management and Budget, "Competitive Sourcing: Report on Competitive Sourcing Results, Fiscal Year 2003," May 2004, available at [[http://www.whitehouse.gov/omb/pubpress/fy2004/cs\\_omb\\_647\\_report.pdf](http://www.whitehouse.gov/omb/pubpress/fy2004/cs_omb_647_report.pdf)], visited Jan. 3, 2005, pp. 18-19.

<sup>59</sup> Richard W. Walker, "Rebuilding," *Government Computer News*, July 22, 2002 available at [[http://www.gcn.com/21\\_20/mgmt\\_edition/19325-1.html](http://www.gcn.com/21_20/mgmt_edition/19325-1.html)], visited Jan. 3, 2005.

completing studies has varied. For the period October 1, 1978, through December 31, 1986, the average time was 24 months. Between 1987 and 1990, the average was 51 months. In FY1990, the average was 56 months for 53 studies.<sup>60</sup> In correspondence dated January 16, 2003, the Comptroller General reported that, over the past five years, the average time to complete cost studies in DOD was 25 months.<sup>61</sup> Presumably, these figures include the time necessary for planning the studies. If so, and if OMB does not impose a deadline for the planning phase, then it is unclear how the 12-month deadline will result in shorter studies.

Furthermore, the requirement to establish a workload data collection system (which an agency apparently must do during the planning phase if a system is not already in place)<sup>62</sup> might impede an agency's efforts to complete a study quickly. The circular does not address the issue of the amount of time for data collection. Apparently, agencies will determine how many weeks or months of data they will need to collect prior to starting a competition.

Documentation that shows why studies take as long as they do, or that indicates what amount of time is reasonable for producing quality competitions, is lacking.<sup>63</sup> In the *Federal Register* notice for the 2002 proposed revision to the circular, OMB suggested that agencies have a great deal of control over the duration of competitions and that "managers often ... unnecessarily draw out competitions without consequence."<sup>64</sup> If reluctance on the part of agencies is a primary reason why A-76 studies take as long to complete as they do, then the tightened deadlines may be realistic. However, other factors might play a role, too. GAO has found that, in addition to the failure of agencies to place "a sufficiently high priority" on cost studies, "the absence of ... skills needed to prepare the statement of work, and ... work load data needed to define work requirements in the function being studied" contributed to delays in completing cost studies.<sup>65</sup>

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<sup>60</sup> U.S. General Accounting Office, *OMB Circular A-76: Legislation Has Curbed Many Cost Studies in the Military Services*, GAO/GGD-91-10 (Washington: GAO, 1991), p. 3.

<sup>61</sup> Letter from David M. Walker, Comptroller General, to Mitchell E. Daniels, Jr., Director, U.S. Office of Management and Budget, GAO-03-391R, Jan. 16, 2003, p. 3.

<sup>62</sup> U.S. Office of Management and Budget, *Circular No. A-76 (Revised)*, May 29, 2003, p. B-1.

<sup>63</sup> A provision in the 1999 circular required agencies "to provide an annual report to OMB on all cost comparisons that exceed [the 18-month timeframe for single function studies and the 36-month timeframe for multifunction studies], including a description of the problems encountered, remedial actions, status and expected completion date." (U.S. Office of Management and Budget, *Circular No. A-76 Revised Supplemental Handbook, Performance of Commercial Activities*, p. 10.) It is not known whether agencies submitted reports to OMB.

<sup>64</sup> U.S. Office of Management and Budget, "Performance of Commercial Activities," Nov. 19, 2002, p. 69771.

<sup>65</sup> U.S. General Accounting Office, *OMB Circular A-76: Legislation Has Curbed Many Cost Studies in the Military Services*, p. 4.

In its initial report on competitive sourcing results, dated May 2004, OMB stated:

The timeframes in the new Circular are motivating agencies to carry out their commitments in a timely manner. For example, the Department of Health and Human Services (HHS) reports that it completed streamlined competitions within three-month timeframes and standard competitions within a year.... Equally important, these timeframes are not causing agencies to sacrifice quality decision making. Competitive sourcing efforts by HHS have generated savings or cost avoidances.<sup>66</sup>

HHS completed 44 streamlined and 8 standard competitions in FY2003.<sup>67</sup> The duration of competitions in other departments, such as Agriculture (398 streamlined and 2 standard completed in FY2003) and Defense (7 streamlined and 71 standard), is not known. Turning briefly to OMB's comment that HHS decision making was not impaired by meeting the respective deadlines, only one criterion — cost — is presented as evidence of the quality of decision making. Focusing on a single factor excludes other dimensions or criteria that also might contribute to a quality decision making process. For example, the accuracy and thoroughness of a performance work statement, or the performance of the organization that won the competition, might be viewed by some as an indicator of a quality competition.

## Agency Compliance

**Burden on Agency Resources.** The 2003 circular levies a series of new requirements on agencies and expands or alters some existing competitive sourcing requirements. These requirements include the following:

- Complete standard competitions within 12 months (18 months, if a time limit waiver has been issued).<sup>68</sup>
- Complete streamlined competitions within 90 calendar days (135 days, if a time limit waiver has been issued).<sup>69</sup>
- Using the circular, subject all work that is being performed by the agency as a result of a performance decision to follow-on competition at the end of the last performance period. For a performance decision that resulted in contractor performance, apply the *Federal Acquisition Regulation* for any follow-on competition.<sup>70</sup>

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<sup>66</sup> Executive Office of the President, U.S. Office of Management and Budget, "Competitive Sourcing: Report on Competitive Sourcing Results, Fiscal Year 2003," pp. 8-9.

<sup>67</sup> *Ibid.*, p. A-1.

<sup>68</sup> U.S. Office of Management and Budget, *Circular No. A-76 (Revised)*, May 29, 2003, p. B-6.

<sup>69</sup> *Ibid.*, p. B-5.

<sup>70</sup> U.S. Office of Management and Budget, *Circular No. A-76 (Revised)*, May 29, 2003, p. B-19-B-20.

- Prepare written justifications for activities designated as inherently governmental.<sup>71</sup>
- Prepare written justifications for commercial activities that have been assigned reason code A.<sup>72</sup>
- Respond to challenges and appeals on the classification of activities as inherently governmental.<sup>73</sup>
- Respond to challenges and appeals on the application of reason codes to commercial activities.<sup>74</sup>
- Post best practices and lessons learned to the DOD website SHARE A-76.<sup>75</sup>
- Maintain a database for tracking streamlined and standard competitions.<sup>76</sup>
- Prepare and submit a competitive sourcing quarterly report to OMB.<sup>77</sup>
- Monitor the performance of all service providers (MEOs and contractors).<sup>78</sup>

The resulting increase in the number of competitions and the pace at which they are to be completed presumably will increase the number of contracts agencies must monitor. The issuance of letters of obligation where the government wins the competition will likely add to an agency's contract monitoring workload.<sup>79</sup>

Whether agencies have sufficient resources to fulfill competitive sourcing and Circular A-76 requirements in a timely manner is unknown. Two senior government officials have expressed their concerns on this issue. At the Department of Justice, Paul Corts, Assistant Attorney General for Administration, reportedly said: "We do not have the resources to prepare the justifications and particularly for the number of criticisms this process would invite from contractors."<sup>80</sup> According to the *Washington Post*, the Director of the National Park Service (NPS) stated, in a memorandum dated April 4, 2003: "[W]e do not have a fund source to cover the cost of completing these [A-76] studies .... The costs are too significant to be covered by the affected parts, as some in the [Interior] Department have suggested." NPS anticipated that the cost of consultants needed to conduct studies would reach

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<sup>71</sup> Ibid., p. A-2.

<sup>72</sup> Ibid., p. A-3.

<sup>73</sup> Ibid., p. A-4.

<sup>74</sup> Ibid.

<sup>75</sup> Ibid, p. B-19.

<sup>76</sup> Ibid.

<sup>77</sup> Ibid.

<sup>78</sup> Ibid.

<sup>79</sup> U.S. Office of Management and Budget, *Circular No. A-76 (Revised)*, May 29, 2003, p. B-18.

<sup>80</sup> Chet Dembeck, "Managers Pan Administration's Outsourcing Push," *Federal Times*, Jan. 13, 2003, p. 4.

\$2.5 to \$3 million, and that, as a result, there would be “serious consequences for visitor services and seasonal operations.”<sup>81</sup>

The list of needed resources could include agency employees who have Circular A-76 experience or experience preparing bids and proposals, funding to hire contractors to conduct A-76 studies, and sufficient numbers of agency personnel qualified to monitor contracts. Also unknown is whether additional resources will be provided to agencies to help them meet these requirements. A lack of sufficient resources could affect the quality of A-76 studies and the effectiveness of contract monitoring efforts. A possible implication of insufficient resources could be a preference on the part of agencies for streamlined competitions, under which MEOs are not required, over standard competitions. If an agency elected to handle the increased competitive sourcing workload by diverting greater numbers of employees to A-76 studies, the normal work these employees perform might have to be deferred. Robert Kugelman, head of the Commerce Department’s Office of Executive Budgeting and Management, in a comment in *Federal Times*, acknowledged this problem: “The bottom line is really about finding ways to do things more effectively, but doing that while still performing your job can be daunting.”<sup>82</sup> Finally, there is no indication of how OMB might respond to agencies that are unable, because of inadequate resources, to meet all of the competitive sourcing requirements.

**Resources Needed to Prepare Competitive Offers.** Designing an MEO is one of the steps in the public-private competition process.<sup>83</sup> Designing an MEO that is competitive<sup>84</sup> might help to ensure that competition between a government agency and private sector sources is carried out on a level playing field. In its recommendation for developing an integrated competition process, a process that would combine elements of Circular A-76 and the *Federal Acquisition Regulation*, the Commercial Activities Panel noted:

As with “most efficient organizations” under A-76, federal employees should be able to propose process improvements and efficiencies and be supported in that effort. Federal employees involved in submission of an in-house offer also should receive assistance in planning for a competition, preparing a proposal, conducting discussions, attending a debriefing, and filing a protest.

In-house teams [should] receive reasonable consideration and support from management in their efforts to participate in competitions: Where there is an in-house workforce currently performing, it would be expected that management generally will authorize in-house submission of a proposal, which includes

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<sup>81</sup> Christopher Lee, “Park Service Plans Outsourcing,” *Washington Post*, April 19, 2003, p. A4.

<sup>82</sup> David Phinney, “Officials Struggle at the Starting Line in Outsourcing Efforts,” *Federal Times*, Feb. 10, 2003, p. 4.

<sup>83</sup> Under a standard competition, an MEO is required. It is optional in a streamlined competition. ( U.S. Office of Management and Budget, *Circular No. A-76 (Revised)*, May 29, 2003, pp. B-4, B-7.)

<sup>84</sup> A competitive MEO (or agency tender) is one that has a reasonable chance of being selected to perform the work.



commitment of resources for a proposal with a reasonable prospect of award (which may include increasing staff or making capital investments).<sup>85</sup>

In addition to the knowledge necessary to perform their jobs, employees may need the assistance of management experts to redesign the workspace, reengineer processes, and identify capital improvements. The 2003 circular acknowledges the types of studies and analyses which can be used to develop an MEO:

The MEO is an agency's staffing plan as identified in the agency tender. The MEO is not usually a representation of the incumbent organization, but is the product of management analyses that include, but are not limited to, activity based costing, business case analysis, consolidation, functionality assessment, industrial engineering, market research, productivity assessment, reengineering, reinvention, utilization studies, and value engineering.<sup>86</sup>

The *Federal Register* notice acknowledged the need for technical assistance to be provided to the agency tender official, but it does not require the agency to provide the necessary support, through either agency personnel or outside sources.

The revised Circular, like the proposed Circular, recognizes the talents of the federal workforce, the conditions under which it operates, and the importance of providing the workforce with adequate training and technical support during the competition process to ensure it is able to compete effectively. In this regard, the revised Circular requires that the ATO [agency tender official] have access to available resources (e.g., skilled manpower, funding) necessary to develop a competitive agency tender.<sup>87</sup>

In his or her role as the agency tender official (ATO), this individual shall, among other things, "provide the necessary resources and training to prepare a competitive agency tender."<sup>88</sup> Most likely, resources and training are necessary to prepare, and aid, agency personnel responsible for developing an agency tender (including an MEO). Immediately following the list of ATO responsibilities, the circular states: "An agency shall ensure that the ATO has access to available resources (e.g., skilled manpower, funding) necessary to develop a competitive agency tender."<sup>89</sup> The circular does not identify who within the agency, whether a particular office or official, should be responsible for ensuring that the ATO receives needed resources. In Appendix B of the revision, under the heading "Competition Officials," no one is identified as having this responsibility.<sup>90</sup> What kind of, or how much, authority an ATO might have in order to obtain the resources necessary to

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<sup>85</sup> Commercial Activities Panel, *Improving the Sourcing Decisions of the Government*, p. 51.

<sup>86</sup> U.S. Office of Management and Budget, *Circular No. A-76 (Revised)*, May 29, 2003, p. B-10.

<sup>87</sup> U.S. Office of Management and Budget, "Performance of Commercial Activities," May 29, 2003, p. 32139.

<sup>88</sup> U.S. Office of Management and Budget, *Circular No. A-76 (Revised)*, May 29, 2003, p. B-2.

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.*, pp. B-1-B-3.

develop a competitive agency tender is unknown. The lack of specificity and the absence of a requirement for agencies to provide sufficient resources as determined by the ATO could affect implementation. Some questions that might arise include:

- Given that an agency's competitive sourcing official is responsible for implementing the circular, why was this official not identified as the responsible party for providing resources to the ATO?
- What might happen if an ATO believes the agency is not providing sufficient resources? What recourse, if any, might the ATO have? Who in the agency would be held responsible?
- Could a claim that the circular levels the playing field be sustained if preparation for, and development of, agency tenders were underfunded?
- How might a dispute over the type, quality, or quantity of agency resources provided to the agency tender effort affect the legitimacy of a competition?
- What costs might an agency incur for preparing inventories, conducting competitions, and establishing MEOs (where the government has won the competition)?

In its May 2004 report on competitive sourcing results, OMB stated that the success of most efficient organizations in winning public-private competitions in FY2003 suggests that "agencies are taking steps envisioned by the revised Circular to ensure government providers have a fair opportunity to demonstrate their capability to serve the taxpayer."<sup>91</sup> "Requir[ing] agencies to ensure that their in-house providers have access to available resources (e.g., skilled, manpower, funding) necessary to develop competitive agency tenders" is one of the steps credited to the 2003 circular. Other steps, or factors, cited by OMB, and included in the 2003 circular, were eliminating direct conversions, encouraging federal agencies to develop MEOs for streamlined competitions, and allowing agencies to use a source selection method that involves a trade-off between cost and other, non-cost factors.<sup>92</sup> Attributing the success of in-house efforts to, in part, the provision of resources by agencies might not accurately reflect the extent of in-house support for MEOs. Other, possibly more accurate measures of agency support might include the amount

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<sup>91</sup> Executive Office of the President, U.S. Office of Management and Budget, "Competitive Sourcing: Report on Competitive Sourcing Results, Fiscal Year 2003," p. 9. The percentage of competitions won by in-house providers in FY2003 for agencies that conducted at least five competitions or competitions that cumulatively involved 50 or more FTEs was: Dept. of Agriculture, 100%; Dept. of Defense, 81%; Dept. of Energy, 96%; Dept. of Health and Human Services, 99%; Dept. of the Interior, 99%; Dept. of Justice, 100%; Dept. of Transportation, 100%; Dept. of the Treasury, 91%; Dept. of Veterans Affairs, 0%; General Services Administration, 100%; Office of Personnel Management, 100%; and Small Business Administration, 58% (ibid., p. 10).

<sup>92</sup> Ibid., pp. 9-10.

of funds expended on training, the number of agency personnel who have been trained, documentation of services (for example, reorganization, workload analysis, or reengineering) provided to the MEO, or the type and extent of support requested by the ATO compared to what was provided by the agency. Generally, unless a cost-technical tradeoff (a tradeoff between cost and non-cost factors) source selection method has been used, the prospective provider (that is, a government agency or a contractor) whose offer promises to yield greater savings will be awarded a contract (private business) or a letter of obligation (MEO). OMB has noted “that savings were largely attributable to reductions in federal labor costs,” but they also “may be derived in other ways.” One interpretation of this statement is that savings resulted mostly from a reduction in the number of an agency’s FTEs as a result of an A-76 competition.<sup>93</sup> If this is an accurate statement, then it might be helpful to ask how an agency determined that a smaller number of FTEs could perform the work. A related issue is the question of whether fewer FTEs are required by the MEO because the scope of work, as documented in the performance work statement (PWS), has been decreased. In short, it is not clear that OMB’s suggestion that agency-provided resources are a factor in successful competitions accurately portrays what has occurred, or is occurring. Other factors may need to be taken into account, and it appears there are other, possibly more accurate ways, to measure the amount of agency support provided to MEOs.

## **Possible Implications for the Civil Service System**

**Disposition of Federal Employees and Positions.** Throughout the competition process, and even after a performance decision has been made, there are various milestones where circumstances or decisions could affect federal employees and/or their positions.

For instance, when an agency cannot complete a streamlined or a standard competition within the allotted time (a maximum of 135 days and 18 months, respectively, if the CSO has granted a time limit waiver), the circular provides guidance on what the agency should do. In the former case, the agency has the option of converting the streamlined competition to a standard competition or requesting an additional extension from OMB using the circular’s deviation procedure.<sup>94</sup> If an agency exceeds the time limit for a standard competition, the CSO is to notify OMB’s Deputy Director for Management in writing.<sup>95</sup> The circular mentions no possible consequences for the failure to meet the 12- or 18-month time limit. However, the OFPP Administrator reportedly suggested that

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<sup>93</sup> When a contractor wins a competition, the FTEs associated with a government function or activity are eliminated. When a government agency wins a competition, the number of FTEs associated with a particular function or activity might be decreased. A decrease would occur if the MEO’s staffing plan includes fewer FTEs than the number employed prior to the implementation of the MEO.

<sup>94</sup> U.S. Office of Management and Budget, *Circular No. A-76 (Revised)*, May 29, 2003, p. B-5.

<sup>95</sup> *Ibid.*, p. B-6.

Agencies that fall behind in their competitions will undergo sharp scrutiny by OMB, and if in-house employees fail to submit a proposal on time, their jobs could be directly outsourced to the private sector ....<sup>96</sup>

If this sequence of events were to occur, it is unclear what would happen to the employees who otherwise would have staffed the MEO included in the agency tender.

One of the changes effected by the 2003 revision is the establishment of an evaluation process that applies the same criteria to contractor offers and agency tenders and generally treats sources from both sectors the same. Coupled with this change is a move to use, in addition to sealed bidding, source selection processes that allow offerors, under certain conditions, to correct deficiencies in, and resubmit, their offers.<sup>97</sup> Because of this package of changes, an agency tender could be dropped from further consideration before a performance decision is made. Previously, under the 1999 circular, an agency's in-house cost estimate was included in the performance decision calculation. As for private sector contractors, there has been no change in how their offers are treated. Their offers have been, and continue to be, susceptible to elimination for failure to correct deficiencies. The applicable provision of the 2003 circular states:

If the CO [contracting officer] perceives that a private sector offer, public reimbursable tender, or agency tender is materially deficient, the CO shall ensure that the ATO, private sector offer, or the public reimbursable tender official receives a deficiency notice. The CO shall afford the ATO, the private sector offeror, or the public reimbursable tender official a specific number of days to address the material deficiency and, if necessary, to revise and recertify the tender or offer. If the ATO is unable to correct the material deficiency, the CSO shall determine if a commitment of additional resources will enable the ATO to correct the material deficiency within the specified number of days. If the CSO determines that the ATO cannot correct the material deficiency with a reasonable commitment of additional resources, the CSO may advise the SSA to exclude the agency tender from the standard competition. If the CO determines that a private sector offeror or public reimbursable tender official has not corrected a material deficiency, the SSA may exclude the private sector offer or public reimbursable tender from the standard competition.<sup>98</sup>

In cases where a performance decision results in the awarding of a contract to a private sector offeror, federal employees have a right of first refusal for positions with the successful offeror. The following clause must be inserted in solicitations that might result in the conversion of work from the government to a contractor and

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<sup>96</sup> Jason Peckenpaugh, "OMB Outlines New Federal Outsourcing Rules," *Government Executive*, Nov. 14, 2002, available at [<http://www.govexec.com/dailyfed/1102/111402p2.htm>], visited Jan. 3, 2005.

<sup>97</sup> The source selection processes include lowest price technically acceptable, tradeoff, and variations of these methods developed by OMB for use in A-76 competitions. (U.S. Office of Management and Budget, *Circular No. A-76 (Revised)*, May 29, 2003, pp. B-13-B-15.)

<sup>98</sup> U.S. Office of Management and Budget, *Circular No. A-76 (Revised)*, May 29, 2003, pp. B-15-B-16.

must be inserted in contracts that result from solicitations, whether or not a cost comparison was conducted. According to 48 CFR 52.207-3:

(a) The Contractor shall give Government employees who have been or will be adversely affected or separated as a result of award of this contract the right of first refusal for employment openings under the contract in positions for which they are qualified, if that employment is consistent with post-Government employment conflict of interest standards. (b) Within 10 days after contract award, the Contracting Officer will provide to the Contractor a list of all Government employees who have been or will be adversely affected or separated as a result of award of this contract. (c) The Contractor shall report to the Contracting Officer the names of individuals identified on the list who are hired within 90 days after contract performance begins. This report shall be forwarded within 120 days after contract performance begins.

As with the 1999 circular, the contractor determines who is qualified.<sup>99</sup> It is possible, then, that an individual who is qualified as far as the agency is concerned might not meet a contractor's qualifications, and thus would not be offered a job. Under the 2002 proposed revision, the government would have been allowed to tell a contractor whom to hire. The agency's human resource adviser would have determined which government employees were qualified, and the contractor would have been required to offer these individuals employment before hiring new employees or transferring existing employees.<sup>100</sup> In effect, the right of first refusal clause is a limited safeguard in that it does not guarantee that all federal employees will be offered jobs with the contractor. On the other hand, it is unclear under what authority (aside from the 2002 proposed revision to the circular) the government would have to dictate to contractors whom they should hire.

Consider, for example, a competition that the government wins. The MEO is established and begins performing the work as described in the PWS. The prospect of recompetition at the end of the letter of obligation's performance period could affect employees' decisions to leave or remain with their agencies. The question is whether attrition would occur less frequently, more frequently, or remain the same. Regardless of the pace of attrition, as it occurs, the agency would need to hire new employees to staff the MEO. Also, as implementation of the circular proceeds, and more competitions are conducted, agencies have to decide whether, how, and when to inform prospective employees that they are being recruited for an office or a work center that is an MEO. Prospective employees might want to know about the MEO, the letter of obligation, and the recompetition requirement. How might these individuals respond to this information? The Assistant Secretary for Administration at the Department of Transportation comments, from the agency's perspective:

By mandating competitions every three to five years regardless of who wins a competition, the draft circular will hinder an agency's ability to develop a long-

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<sup>99</sup> U.S. Office of Management and Budget, "Performance of Commercial Activities," May 29, 2003, p. 32140.

<sup>100</sup> U.S. Office of Management and Budget, *Circular No. A-76 (Revised)*, Nov. 14, 2002, p. B-19.

term work force strategy for recruiting and retaining top-notch people for government service.<sup>101</sup>

Under another scenario where the agency tender is selected and the MEO is established, it is possible the MEO could be terminated for failure to perform.<sup>102</sup> The circular states:

Upon terminating an MEO letter of obligation, an agency shall change the inventory coding to reflect that the activity is no longer performed by an MEO and shall perform either a streamlined competition or standard competition.<sup>103</sup>

Under the “temporary remedies” for failure to perform, the circular states:

If the CO terminates a contract, fee-for-service agreement, or MEO letter of obligation for the service provider’s failure to perform, an agency may use interim contracts, public reimbursable sources, or government personnel on an emergency basis. An agency shall not allow these temporary remedies to be used for longer than one year from the date of termination.<sup>104</sup>

In the event that the agency opts for a temporary remedy or terminates a letter of obligation, it is unclear what might happen to the employees in the MEO.

**Performance Standards.** Publicly, when the issue of compliance with the competitive sourcing initiative is broached, it is presented as an agency, or institutional, responsibility. Agencies are held accountable for meeting competitive sourcing targets and producing inventories. Under the 2003 circular, certain agency personnel — individuals — also bear responsibility for competitive sourcing. The circular states that agencies shall

Require full accountability of agency officials designated to implement and comply with this circular by establishing performance standards in annual performance evaluations.<sup>105</sup>

Presumably, the performance standards will concern compliance with Circular A-76. The circular is not clear about the breadth of this mandate. Possibly, the requirement could apply to everyone who works on a competition and any other officials who are charged with complying with the circular. Or, the circular might apply only to individuals who serve in positions identified in the circular as having to comply with A-76. The list of these positions includes:

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<sup>101</sup> Steve Watkins, “Plans for Job Competitions Ill-Advised, Managers Warn,” *Federal Times*, Dec. 30, 2002, p. 1.

<sup>102</sup> The same consequences would apply to contractors and public reimbursable tenders, too.

<sup>103</sup> U.S. Office of Management and Budget, *Circular No. A-76 (Revised)*, May 29, 2003, p. B-20.

<sup>104</sup> *Ibid.*, p. B-20.

<sup>105</sup> U.S. Office of Management and Budget, *Circular No. A-76 (Revised)*, May 29, 2003, p. 1.

- Competitive sourcing official,
- Agency tender official,
- Contracting officer,
- PWS team leader,
- Human resource advisor,
- Source selection authority,
- PWS team,
- MEO team, and
- Source selection evaluation board.<sup>106</sup>

Other questions concern the contents of the performance standards and the precedent, if any exists, for developing standards for management programs.

Apparently, separate and distinct from the circular's requirement, the National Institutes of Health (NIH) developed and issued, in mid-2003, an addendum to employee performance standards. The top portion of the one-page form lists five department-wide program objectives, all of which relate to health care or science and medical research. The second section consists of 10 department-wide management objectives, one of which is: "Complete the FY2003 Competitive Sourcing Program."<sup>107</sup>

**Civil Service as an Institution.** Since the inception of the competitive sourcing initiative in early 2001, the Administration has remained focused on public-private competition and the anticipated benefits of competition. This commitment is accompanied by a recognition that, in the words of the Administrator of the Office of Federal Procurement Policy, "[f]ederal employees are some of the Nation's most highly trained and dedicated employees."<sup>108</sup> The Administrator also acknowledged that:

Competitive sourcing asks agencies to make some difficult choices. These choices affect real jobs, held by dedicated and loyal career civil servants. In many respects, this initiative comes down to one simple reality: very few people, whether they are working in the private sector or the public sector, like to work under the pressure of knowing that their work is on the line if they do not figure out how to perform it more efficiently and effectively. But, the fact that this initiative requires hard choices and a lot of hard work makes it an initiative that can bring about fundamental and lasting improvements to the way the federal government is managed.<sup>109</sup>

Some commentators have a different perspective on competitive sourcing and the civil service, noting that it might have significant implications for the civil service

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<sup>106</sup> Ibid., pp. 1, B-2-B-3, B-6-B-7.

<sup>107</sup> Information provided electronically by the Office of Communications and Public Liaison, Office of the Director, National Institutes of Health, June 18, 2003.

<sup>108</sup> U.S. Congress, House Committee on Government Reform, Subcommittee on Technology and Procurement Policy, *Oversight Hearing to Review the Findings of the Commercial Activities Panel*, p. 46.

<sup>109</sup> Ibid., p. 42.

as an institution. Donald Kettl, a professor of public affairs and political science at the University of Wisconsin-Madison, said:

The bedrock of the civil service has long been neutral competence and strong expertise, grounded in a career service .... Staging regular competitions ... would undermine the commitment to a career service, especially if the scope of services and the standards for competition shift over time and, in the process, put more federal workers at risk.<sup>110</sup>

As more competitions are carried out, which, presumably could result in more government work going to contractors, it is unclear how the “neutral competence and strong expertise” of the civil service might be affected. Yet another scholar, Dan Guttman, who is a fellow with the National Academy of Public Administration, raises a different issue:

Both the Clinton/Gore reinventing government [initiative] and the Bush management agenda aim to render civil servants more ‘contractor like,’ but do so with little or no reflection on the fact that our longstanding laws do not now provide for the blurring of the boundaries between official and contractor status.<sup>111</sup>

**Diversity.** Another unanswered question about the Administration’s competitive sourcing program is how the implementation of the 2003 circular, coupled with agencies’ efforts to meet their targets, might affect the diversity of the federal workforce. Some agency managers reportedly have voiced concerns about this issue. The Assistant Secretary of Planning and Evaluation for the Department of Veterans Affairs (VA) reportedly stated that, within the VA, “there are numerous occupations such as maintenance, laundry [and] food service that could be competitively bid .... However, these occupations have the highest proportions of women and minorities and any significant effort to outsource these jobs will have huge diversity implications.”<sup>112</sup> A news article reported that the National Park Service Director, in an April 4, 2003 memorandum, said that job competitions in Washington and San Francisco “may affect the diversity of our workforce.”<sup>113</sup> It is difficult to know how competitive sourcing policy has, or might, affect the diversity of the federal workforce since it appears that historical information on this issue is not available.

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<sup>110</sup> Jason Peckenpaugh, “New Rules Should Make Competition Routine in Government, Says OMB,” *Government Executive*, Daily Briefing, May 29, 2003, available at [<http://www.govexec.com/dailyfed/0503/052903p1.htm>], visited Jan. 3, 2005.

<sup>111</sup> *Ibid.*

<sup>112</sup> Chet Dembeck, “Managers Pan Administration’s Outsourcing Push,” *Federal Times*, Jan. 13, 2003, p. 1.

<sup>113</sup> Jason Peckenpaugh, “Democrats Say Job Competitions Could Hurt Diversity at Park Service,” *Government Executive*, Daily Briefing, June 6, 2003, available at [<http://www.govexec.com/dailyfed/0603/060603p1.htm>], visited Feb. 10, 2004.



## **Conclusion**

The 2003 revision to Circular A-76 is the latest effort to improve public-private competitions. The circular makes major changes to some of the procedures and underlying concepts of the circular and the accompanying handbook. These changes could have significant implications. Ongoing monitoring of the implementation of the revised circular could be helpful in gauging the utility of the changes.

## Selected Glossary of Circular A-76 Terms<sup>114</sup>

**Agency tender** — The agency management plan submitted in response to a solicitation for a standard competition. The agency tender includes an MEO, agency cost estimate, MEO quality control plan, MEO phase-in plan, and copies of any MEO subcontracts (with the private sector providers' proprietary information redacted).

**Agency tender official (ATO)** — An inherently governmental agency official with decision-making authority who is responsible for the agency tender and represents the agency tender during source selection.

**Commercial activity** — A recurring service that could be performed by the private sector. This recurring service is an agency requirement that is funded and controlled through a contract, fee-for-service agreement, or performance by government personnel. Commercial activities may be found within, or throughout, organizations that perform inherently governmental activities or classified work.

**Competition** — A formal evaluation of sources to provide a commercial activity that uses pre-established rules (e.g., the FAR [*Federal Acquisition Regulation*], [Circular A-76]). Competitions between private sector sources are performed in accordance with the FAR. Competitions between agency, private sector, and public reimbursable sources are performance in accordance with the FAR and [Circular A-76].

**Competitive sourcing official (CSO)** — An inherently governmental agency official responsible for the implementation of Circular A-76 within an agency.

**Contracting officer (CO)** — An inherently governmental agency official who participates on the PWS team, and is responsible for the issuance of the solicitation and the source selection evaluation methodology. The CO awards the contract and issues the MEO letter of obligation or fee-for-service agreement resulting from a streamlined or standard competition. The CO and the SSA [source selection authority] may be the same individual.

**Directly interested party** — The agency tender official who submitted the agency tender; a single individual appointed by a majority of directly affected employees as their agent; a private sector offeror; or the official who certifies the public reimbursable tender.

**Fee-for-service agreement** — A formal agreement between agencies, in which one agency provides a service (a commercial activity) for a fee paid by another agency. The agency providing the service is referred to in [the] circular as a public reimbursable source.

**Inherently governmental activity** — An activity that is so intimately related to the public interest as to mandate performance by government personnel.

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<sup>114</sup> Quoted directly from U.S. Office of Management and Budget, *Circular No. A-76 (Revised)*, May 29, 2003, pp. D-2-D-9.

**MEO letter of obligation** — A formal agreement that an agency implements when a standard or streamlined competition results in agency performance (e.g., MEO).

**MEO team** — A group of individuals, comprised of [*sic*] technical and functional experts, formed to assist the ATO in developing the agency tender.

**Most efficient organization (MEO)** — The staffing plan of the agency tender, developed to represent the agency's most efficient and cost-effective organization. An MEO is required for a standard competition and may include a mix of government personnel and MEO subcontracts.

**Offer** — A private sector source's formal response to a request for proposals or invitation for bid. The term "offeror" refers to the specific source rather than the response.

**Performance work statement (PWS)** — A statement in the solicitation that identifies the technical, functional, and performance characteristics of the agency's requirements. The PWS is performance-based and describes the agency's needs (the "what"), not specific methods for meeting those needs (the "how"). The PWS identifies essential outcomes to be achieved, specifies the agency's required performance standards, and specifies the location, units, quality and timeliness of the work.

**Public reimbursable source** — A service provider from a federal agency that could perform a commercial activity for another federal agency on a fee-for-service or reimbursable basis by using either civilian employees or federal contracts with the private sector.

**Public reimbursable tender** — A federal agency's formal response to another federal agency's solicitation for offers or tenders. The public reimbursable tender ... includes a cost estimate ....

**Source selection authority (SSA)** — A competition official with decision-making authority who is responsible for source selection as required by the FAR and [Circular A-76]. The SSA and CO may be the same individual.

**Source selection evaluation board (SSEB)** — The team or board appointed by the SSA to assist in a negotiated acquisition.