

<b>DEPARTMENTAL REGULATION</b>		Number: 2170-001
SUBJECT: Performance of Commercial Activities	DATE: December 10, 1985	
	OPI: Office of Finance and Management	

1 PURPOSE

This regulation states Department policy to comply with OMB Circular A-76, Performance of Commercial Activities, and directs agencies to submit A-76 reports to OFM. Also, as directed by A-76, this regulation provides appeal procedures for use in this Department.

2 CANCELLATION

DR 2170-1 dated February 16, 1984, is replaced by this regulation.

3 BACKGROUND

In August 1983, OMB Circular A-76 was revised and reissued to clarify a longstanding policy that the Government rely on commercial sources to supply the products and services it needs. This policy has been in effect since 1955, and is designed to achieve economy and enhance productivity.

The revised Circular A-76 and its supplement set forth Federal policy and procedures for determining whether commercial activities should be performed under contract with commercial sources or in-house using Government facilities and personnel.

4 ABBREVIATIONS

OFM	Office of Finance and Management
OIG	Office of the Inspector General
OMB	Office of Management and Budget

## 5 DEFINITIONS

a In this regulation, "agency" means a major line or program unit or staff office of the Department whose head reports to the Secretary, an Under Secretary, or an Assistant Secretary.

b In OMB Circular A-76, "agency" means a department in the executive branch of the Federal Government.

## 6 A-76 IMPLEMENTATION OFFICER

The Assistant Secretary for Administration is responsible for implementation of OMB Circular A-76 and its Supplement. (48 F.R. 50875)

## 7 LIAISON

The Office of Finance and Management is the central contact point in USDA for A-76 activities, and serves as liaison between USDA agencies and OMB and other Federal agencies.

## 8 AGENCY COMMERCIAL ACTIVITIES CONTROL OFFICERS

Each agency head must designate a Commercial Activities Control Officer to serve as the contact with OFM for all A-76 implementation activities. (OMB Circular A-76, section 9b) If the designee is changed, OFM must be notified.

## 9 REVIEWS BY THE OFFICE OF THE INSPECTOR GENERAL

The Office of the Inspector General will perform independent reviews of cost comparisons required by the Supplement to OMB Circular A-76. Agencies must provide a minimum advance notification of 30 days to OIG that are independent review is needed and must allot a minimum of 30 days for completion. Because the time necessary to perform these reviews will vary depending upon the size and complexity of the entity under examination, agencies are encouraged to provide OIG with as much flexibility as practicable. OIG may, at its discretion, elect to contract with a Certified Public Accounting firm to perform the independent review. If this occurs, the requesting agency will be required to reimburse OIG for the cost of the contract. To facilitate the funding process, OIG will notify agencies of its intent to contract within 7 days of receiving the advance notification.

10      REPORTS

Chapter 4, Part 1, of the Supplement to OMB Circular A-76 requires departments to submit an annual report to OMB on the implementation of the Circular.

Agencies must prepare reports, following the Supplement instructions, and submit them to OFM by March 1 of each year. Reports must identify the Agency Commercial Activities Control Officer. Negative reports must be submitted in writing.

OFM will prepare and submit a consolidated USDA report to OMB.

11      APPEAL PROCEDURES

OMB Circular A-76 requires each Department to establish administrative appeal procedures to resolve questions relating to decisions made under A-76. The appeal procedures for USDA are attached as an appendix to this regulation.

The appendix can be reproduced for inclusion in a solicitation package or for other distribution.

## APPENDIX A

## PROCEDURES FOR APPEALING ADMINISTRATIVE

## DECISIONS MADE UNDER A-76

## 1. Objective

These appeal procedures are established to resolve questions from directly affected parties relating to (a) determinations resulting from cost comparisons performed in compliance with OMB Circular A-76 and Part IV of its Supplement, and (b) justifications to convert to contract without a cost comparison in accordance with the criteria in Part I, Chapter 2, paragraph A of the Supplement.

These procedures do not apply to questions concerning (a) award to one contractor instead of another, and (b) Government management decisions. Government management decisions include such actions as determining the most effective and efficient organization; and making awards under mandatory source programs, section 8(a) of the Small Business Act or any other non-competitive preferential procurement program.

## 2. Requirements for Filing an Appeal

To be eligible for review, an appeal must:

(a) be received by the agency contracting officer in writing within 15 working days after the supporting documentation is made available to directly affected parties. The agency may extend the appeal period to a maximum of 30 working days if the cost study is particularly complex.

(b) address specific line items on the Cost Comparison Form and set forth the rationale for questioning those items.

(c) demonstrate that the result of the appeal may change the cost comparison decision.

### 3. Agency Action on Appeals

After receiving an appeal, the contracting officer will endorse it with the date received and forward the appeal, the Cost Comparison Form, and detailed supporting data to the Commercial Activities Control Officer or other designated agency official. These actions will be completed by the close of the next business day. An information copy of the appeal will be sent to the agency head and the Assistance Secretary for Administration.

The agency will establish an Appeals Board composed of at least three members familiar with A-76 procedures and the program requirements of the area under review. All members must be independent of the preparation of the in-house cost estimate and the source selection process for industry proposals. The Board may seek and rely on the advice of an outside independent authority on A-76 costing procedures.

The Appeals Board will promptly notify the appellant and the agency head of any scheduled meetings or other actions.

If two or more appellants submit appeals from the same A-76 decision and these appeals are based on the same or similar allegations, the Appeals Board may consider all such appeals concurrently and dispose of them with a single written decision resolving all allegations.

The Appeals Board may request additional written material from or conduct conferences with all necessary parties. The Appeals Board may also require oral presentations to obtain complaint or cost study documentation.

The administrative appeal is not a judicial proceeding or hearing, but is an informal determination as to the soundness of A-76 decisions. There will be no legal

briefs, sworn statements, interrogations under oath, official transcripts of testimony, or the like.

#### 4. Decisions of the Appeals Board

Within 30 calendar days after an appeal is received by the contracting officer, the Appeals Board will issue a written decision. The Appeals Board decision must be approved by an impartial official at a level organizationally higher than the official who approved the original A-76 decision.

If a decision cannot be made within 30 calendar days, the Appeals Board may extend this period, and will notify all parties of the anticipated decision date.

The agency decision for in-house or contract performance will be based on any cost comparison adjustments required to accommodate the Appeals Board decision.

Copies of the appeal decision and final determination will be sent to the appellant, the agency head, the contracting officer, and the Assistant Secretary for Administration.

#### 5. Finality of Decisions

All decisions made under these procedures are final. There will be no appeals outside the Department of Agriculture, and decisions are not subject to judicial review.

These procedures are intended to protect the rights of all directly affected parties. These persons may be Federal employees and their representative organizations, or bidders or offerors on a solicitation. Accordingly, the procedures and the decision upon appeal may not be subject to negotiation, arbitration, or other agreement.