

What You Always Wanted to Know About the New OMB Circular A-76, but Were Too Confused to Ask. (10/2/03)

I keep hearing about OMB Circular No. A-76. What is it?

OMB Circular No. A-76 sets the policies and procedures that executive branch agencies must use in identifying commercial-type activities and determining whether these activities are best provided by the private sector, by government employees, or by another agency through a fee-for-service agreement. The term typically used to describe this process is “competitive sourcing.” On May 29, 2003, the Office of Management and Budget unveiled long-awaited revisions to OMB Circular A-76, which went into effect immediately. The new revisions made a fundamental policy change to make the circular more friendly to the federal worker by doing away with the longstanding presumption that all commercial-type activities in government belong in the private sector. The new emphasis is simply on getting the best value for the citizen, irrespective of who performs the work.

Why is competitive sourcing such a hot issue?

“Competitive sourcing” is one of five key elements of the President’s Management Agenda. Under competitive sourcing, executive agencies must study some of the commercial activities currently performed by federal employees. Since one possible outcome of these studies is that some government employees may be reassigned or lose their jobs, there is understandably general concern in the federal workforce.

How do people know if their job is going to be studied?

The new Circular requires an agency to make a formal public announcement for each competition. An agency will notify affected employees, and the employees’ unions, that their jobs will be part of the study before the formal announcement. Depending on the particular situation, this advance notice may be weeks or months before the formal announcement.

If my job is going to be studied, what are the odds that I’ll lose my job?

Experience has shown that the government wins the competitions more than half of the time. As agencies gain more experience with competitive sourcing procedures, it is likely that the government will win an even greater percentage of the competitions. Long experience at the state and local government levels has shown that even when the government loses a competition, a relatively small percent of employees actually lose their jobs. Normal attrition, retirements, and transfers are common instead.

Does competitive sourcing do any good for anybody?

The government spends billions of dollars every year for commercial services provided by government employees. Competition can easily result in savings of an average of 30 percent, whether government employees or private sector employees ultimately do the

work. At the Defense Department, a survey of the results of hundreds of competitions done since 1994 showed savings averaging 42 percent. These savings can be re-invested in pursuit of the agency mission. This means there is enormous potential for more productive use of available funding, with no reduction in quality of service. It makes sense to periodically evaluate whether or not any organization is organized in the best possible way to accomplish its mission. This self-examination is fundamentally what public-private competition is intended to achieve.

How long is this competitive sourcing initiative going to continue?

It will continue indefinitely, because agencies will always have a need to explore ways to better accomplish their mission and stretch their budgets.

What's the difference between a commercial function and an inherently governmental function?

An inherently governmental function is defined as an activity that is so intimately related to the public interest as to mandate performance by government personnel. These activities require the exercise of substantial discretion in applying government authority and/or in making decisions for the government. A commercial activity is a service that could be performed by the private sector, because it is **not** so intimately related to the public interest. As a result, commercial activities, unlike inherently governmental activities, can be subject to competition.

How do government employees know whether they are performing commercial or inherently governmental activities?

The **Federal Activities Inventory Reform (FAIR) Act**—requires executive agencies to make an annual accounting of the commercial activities performed by federal employees and submit them to the Office of Management and Budget (OMB). The new Circular requires that agencies also account for inherently governmental activities performed by federal employees. The agency lists that result from this are referred to as “FAIR Act Inventories.” After OMB reviews and approves an agency’s inventory, the agency must post it on its public web site. Keep in mind that the inventory reflects **activities**, which are not the same thing as **positions**. One single employee may perform both inherently governmental and commercial activities.

How is the new Circular different from the previous one?

The new Circular—

- Establishes specific deadlines for completing studies—12 months in most cases for standard competitions, and 90 days for streamlined competitions. Under the old Circular, studies could drag on for years and prolong the uncertainty for both employees and prospective contractors.

- Eliminates direct conversions as an option for agencies to meet their competitive sourcing goals. A direct conversion was when an agency contracted out a function being performed by government employees without determining whether private or public performance of the function was the most cost effective. This could be unfair to employees and also might not be the best result for the taxpayer. Agencies must now use either streamlined or standard competitions, thereby protecting both employees and taxpayers.
- Creates a more flexible streamlined competition process. Under the old process, agencies had to identify four existing federal contracts to estimate the cost for private sector performance. Agencies can now do their studies in a more practical way, with the costs of the study more in line with the size of the activities being studied.
- Requires agencies to appoint competition officials with specific responsibilities. For standard competitions, for example, an agency must appoint a human resources advisor (HRA); an agency tender official (ATO); a performance work statement (PWS) team leader; a source selection authority (SSA); and a contracting officer (CO). This clearer description of roles makes the whole study process more transparent and fairer to all involved.

Once an agency decides it wants to compete a function, what comes next?

An agency needs to decide whether to conduct a streamlined competition or a standard competition. If 65 or fewer FTE are involved, the agency has the option of conducting a streamlined competition. If more than 65 FTE are involved, the agency must conduct a standard competition. The agency then needs to consult with any affected employees and their unions.

What happens in a streamlined competition?

In a streamlined competition, an agency determines an estimated contract price for performing the work by an outside contractor. The agency has a fair amount of latitude in determining the estimated contract price. For example, the agency may solicit proposals from prospective contractors (although this is not required) or may instead conduct more informal market research, including basing the estimate on contractor prices from multiple award schedule contracts.

The agency also determines how much it costs to perform the function in-house, with government employees. The agency can cost either the existing organization or develop a plan to streamline the organization (called a “most efficient organization,” or MEO) and base its in-house cost estimate on that plan. After the costs for both the public and private sectors are compared, the organization that costs the least wins. A streamlined competition must be completed—which means a decision is made to keep the work in-house or contract it out—within 90 days from the date it was publicly announced.

That sounds like a tight time frame. Is there any way an agency can get an extension on the deadline?

Yes. The agency's Competitive Sourcing Official, who is responsible for implementing the Circular within the agency, can grant a time limit extension of 45 days for a streamlined competition that involves a solicitation or development of a MEO, for a maximum of 135 days from the date the competition is announced until a decision is made. The new Circular also allows the Competitive Sourcing official to extend the deadline beyond 135 days with prior written approval from OMB.

How does an agency go about figuring how much it costs to perform the function in-house? Are there any rules?

Yes, there are rules. Attachment C of the Circular spells out the detailed process that agencies must use for both streamlined and standard competitions in estimating the cost of performance by a government agency. Agencies are required to use COMPARE—computer software that incorporates the costing procedures of the Circular—to develop their cost estimates. Agency officials must certify that the cost estimate is accurate and has been calculated in accordance with the Circular.

What is a standard competition?

In a standard competition an agency selects a service provider based on formal offers submitted in response to an agency contract solicitation. The government submits its own offer along with prospective private contractors. In a standard competition, the government organization develops what is called a “most efficient organization” or MEO, where the agency develops the staffing plan that will form the basis for the agency's offer in the competition. The MEO typically involves streamlining of the existing organization and is designed to place the government in the best competitive position against the private sector offerors.

A standard competition must be completed within 12 months of the date that it was publicly announced. The Competitive Sourcing Official can extend this deadline by an additional 6 months, and, as in a streamlined competition, this deadline could be extended even further with OMB's prior written approval.

In a standard competition, unlike a streamlined competition, there is a *conversion differential*, which is added to the costs of the non-incumbent competitors. The conversion differential is the lesser of 10 percent of the MEO's personnel-related costs or \$10 million over all the performance periods stated in the solicitation. This is intended to preclude moving work from one provider to another where estimated savings are marginal and captures non-quantifiable costs related to a conversion, such as disruption and decreased productivity.

Who wins the competition? The lowest-cost bidder?

Not necessarily. The new Circular provides that an agency may choose from several different procedures for determining the winner of a competition, and two of these give an agency leeway to take non-cost factors into account. However, cost will in all cases

continue to be an important factor, often the most important factor, in selection decisions.

The Circular requires the competitive sourcing official to appoint competition officials for every standard competition and, as appropriate, for streamlined competitions. What are the names of the officials and what are their roles?

- The agency competitive sourcing official (CSO), as mentioned above, is responsible for implementation of the new Circular within the agency. This person is typically a senior official in the agency.
- The agency tender official (ATO) is responsible for developing the agency offer (the MEO submitted in response to a solicitation for a standard competition), and represents the government team's offer during source selection.
- The human resources advisor (HRA) is a human resources expert who is responsible for assisting the agency tender official in human resource-related matters related to the agency bid.
- The performance work statement (PWS) team leader develops the performance work statement and quality assurance plan, determines if the government will furnish property, and assists the contracting officer in developing the solicitation;
- The source selection authority (SSA) is responsible for determining the winner.
- The contracting officer (CO) is responsible for issuance of the solicitation and the source selection evaluation, and serves as a member of the performance work statement team.

If the government loses a competition against the private sector, do the affected employees have any chance of being hired by the contractor who won the competition?

Yes. The Circular requires that where the agency is the incumbent provider of the service and a contractor wins the competition, the contractor shall give government employees who have been or will be adversely affected or separated as a result of the award of the contract the right of first refusal for employment openings under the contract in positions for which they are qualified (so long as no post-government employment conflicts of interest are involved).

While this does not require the contractor to hire any government employee, it prohibits the contractor from hiring anyone else without first offering vacant positions to qualified displaced government employees. It is important to understand that the federal government cannot tell a private contractor whom to hire; neither can the government dictate a private contractor's hiring process. The "right of first refusal" is not a job guarantee for displaced government employees.