

Colleen Kelley <CMK@nteu.org>
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To: David C. Childs A-76comments/OMB/EOP@EOP
cc:
Subject: NTEU Comments to A-76 Circular Rewrite

NTEU comments to A-76 Circular rewrite. I look forward to their full consideration and incorporation into the final document.

Thank you.

(Also sent via e-mail, mail, and courier.)

- a76rew.doc

December 19, 2002

The Honorable Angela Styles
Administrator
Office of Federal Procurement Policy
Office of Management and Budget
Eisenhower Executive Office Building
Washington, DC 20503

Re: Federal Register Notice Announcing Proposed Revisions to OMB Circular
A-76

Dear Administrator Styles:

I am writing on behalf of the more than 150,000 federal employees represented by the National Treasury Employees Union (NTEU) to express our views on OMB's revised Circular A-76. Thank you for the opportunity to submit these comments.

At the outset, let me be clear that federal employees would welcome the opportunity to compete for their jobs on equal footing with the private contractors who seek to take over their work. Federal employees recognize that competition for work that is not inherently governmental may be in the best interests of the taxpaying public that they serve. And, the ultimate goal of the federal employees I represent, indeed of all federal employees, is to serve the taxpayers as best they can. Moreover, federal employees strongly believe that, if given the opportunity to compete, and if the competitions occur on a level playing field, they will win these competitions because nobody does a better job than the federal employees when given the tools and resources they need. Federal employees are capable, reliable, adaptable, and efficient, and they eagerly await the day when they can demonstrate their abilities through fair public-private competitions. Unfortunately, that day seems farther off now than ever.

I welcomed the Administration's effort to revise the OMB Circular A-76 as an excellent opportunity to increase competition for performance of commercial activities and create a truly level playing field for those competing. To my dismay, however, the drafted product--a complete overhaul of the Circular--does nothing to advance the principles of increasing taxpayer value and leveling the playing field. Not only would federal employees suffer as a result of the revisions, but the taxpayers would as well. I therefore urge you to revise the Circular to address the concerns discussed below.

OMB's efforts at overhauling Circular A-76 go awry in six primary areas.

- The proposed Circular contains troubling provisions that would risk putting inherently governmental functions in the hands of unaccountable private sector companies by making it more difficult for an agency to classify a function as inherently governmental. See, Part 1, at 3-4.
- The proposed Circular would broaden the current Circular's exemptions from the competitive process, allowing agencies greater flexibility to convert work directly to the private sector without competition. Moreover, it would require that competitions that cannot be completed within 12 months be short-circuited, with the work directly converted to the private sector. These provisions open the door to millions of taxpayer dollars being handed over to private contractors without any evidence that they can perform the work better and cheaper for the taxpayers than federal employees can. See, Part II, at 4-6.
- In those instances when public-private competitions are to occur, the proposed Circular would stack the deck against federal employees. The federal bidder would be required to include some very speculative costs in its bid, whereas the private sector bidders would benefit from several cost exclusion provisions that have no reasonable basis. These provisions would deprive the taxpayers of the benefit of a true competition used to determine the best option for performing the work. See, Part III, at 7-9.
- Federal employee rights following a decision to contract out work to the private sector would be unfairly and unreasonably limited under the proposed Circular. The employees' role in the competitive process would be seriously limited or, in the case of the administrative appeals process, entirely eliminated. In addition, the soft-landing provisions contained in the current Circular would be unfairly circumscribed. See, Part IV, at 9-12.
- The proposed Circular contains no new provisions for tracking contractor performance. Because the current requirements are not sufficient, the taxpayers would continue to be robbed of critical information about how their tax dollars are being spent. See, Part V, at 12-14.
- By proposing that the Circular govern all solicitations issued after January 1, 2003, OMB has failed to provide the public sufficient opportunity to consider fully these drastic changes and has not built in enough time to modify the revised Circular in response to any concerns raised by the public. See, Part VI, at 14.

Each of these shortcomings is discussed in more detail below.

I. COMMERCIAL VS. INHERENTLY GOVERNMENTAL FUNCTIONS

Preserving inherently governmental functions for performance by federal employees only is one of the cornerstones of federal procurement policy. Some work is just too “intimately related to the public interest” (see FAIR Act, § 5(2), codified as a note to 31 U.S.C. § 501) to permit performance by anyone other than a federal employee. For good reason, contractors historically have been trusted to perform only those functions that are truly “commercial” in nature. The proposed revisions to the Circular would undermine this important policy.

Currently, there are roughly 850,000 federal jobs listed on agencies’ FAIR Act inventories as “commercial in nature” and therefore subject to being contracted out. Under the Administration’s proposed revisions, that number would inevitably grow due to the presumption in the revised Circular that all government activities performed by federal employees would be considered “commercial in nature.” Agencies would only be able to overcome this presumption by satisfying some undefined burden of formally justifying in writing that the jobs are inherently governmental.

The presumption is unreasonable. For many years, agencies have simply been asked to apply the definition of inherently governmental functions contained in the current Circular (and now codified in Section 5(2) of the FAIR Act, 31 U.S.C. § 501 note, and 48 C.F.R. § 2.101) to determine whether a particular function should be subject to contracting out. The agency’s application of that definition can then be checked through the FAIR Act challenge mechanism. Creating a presumption that all government functions are commercial is flawed and unsupported. Moreover, the presumption is contrary to the public interest because it would increase the likelihood that inherently governmental functions would be exposed to contracting out. Accordingly, the current practice of agencies applying the statutory definition to determine whether a function is inherently governmental should be maintained.

In addition to creating an improper presumption, the revised Circular also adopts a definition of inherently governmental functions that is at odds with the now-codified definition in the current Circular. It would raise the bar on what functions can be classified as inherently governmental by requiring that such functions involve “substantial official discretion,” rather than the mere discretion required in the codified definition of the current version. OMB, however, lacks the authority to modify the codified definition of inherently governmental functions through issuance of a new Circular. Accordingly, the revised Circular should incorporate the current version’s now-codified definition of inherently governmental functions.

A further flaw in the proposed process for designating a function as inherently governmental concerns the requirement that agencies draft written justifications for any such designations. Private contractors would then have an unfair advantage in attacking the agency’s rationale through the FAIR Act appeals process, for federal employee unions would not have a comparable target when challenging agency designations of an activity as commercial. Justifications should only be required under the opposite

scenario, when an agency re-designates an inherently governmental activity as commercial. Such a radical about-face on a function previously deemed to be so intimately related to the operations of the government as to require federal employee performance should be fully explained to the public.

The revised Circular also would require inherently governmental activities to be included on the annual FAIR Act lists that agencies submit to OMB. In enacting the FAIR Act--a comprehensive scheme instructing agencies on the information they must report to OMB--Congress, of course, chose not to require inherently governmental activities to be included on these lists. OMB, therefore, oversteps its bounds by using the revisions to Circular A-76 to attempt to extend the FAIR Act requirements in this manner. If Congress had wanted inherently governmental functions to be included in the FAIR Act lists, it would have required that they be included when it enacted that statute.

OMB has further exacerbated the potential problems it would create with the revised Circular by failing to “grandfather” any of its provisions. If the revised Circular were to apply, as planned, to all solicitations issued on or after January 1, 2003, agencies would have insufficient time to evaluate their inventories under this new policy. FAIR lists, after all, are due to OMB by June 1, 2003. Because agency personnel must get the FAIR lists to their Department representatives well in advance of that date, work has likely already begun on this task. Asking agencies at this late stage in the process to identify, for the first time, all inherently governmental functions they perform is unreasonable. Accordingly, if this new standard is ultimately adopted, agencies should have until creation of the 2005 FAIR inventories to satisfy it.

The revised Circular also falls short of providing clarification for the agencies on which commercial inventory they should be using when identifying functions to be studied. Agencies are instructed to conduct competitions using functions that have been identified as commercial in nature. The problem under the current version of the Circular has been in determining from which of the agencies’ “commercial in nature” list the functions should be drawn in defining the studies. Agencies have used inventories from prior years, while ignoring any exemption coding on current year inventories. A revised Circular A-76 should require agencies to secure inventories for current studies from the most current, published FAIR lists.

II. EXEMPTIONS THAT KEEP FEDERAL EMPLOYEES OUT OF THE COMPETITIVE PROCESS

A stated goal of the revised Circular is to subject all commercial activities to the forces of competition. See ¶ 4. I was, therefore, quite surprised to see that the Administration’s revisions to the Circular would expand the circumstances under which work can be directly converted to the private sector without any competition whatsoever. Examples of this expansion are discussed below.

A. DIRECT CONVERSION RULES

The revised Circular would maintain the anti-competitive direct conversion regime of its predecessor. It adopts no measures aimed at ensuring that work is not contracted out to a contractor that will charge the agency more for the services. As long as the agency “believes” that it can receive a “fair and reasonable price” for the service, the work can be contracted out without competition. These contracting out decisions are made before a solicitation is even issued. Allowing for work to be contracted out when it can be performed at a better price and value by the federal workforce is an injustice. To protect the interests of the taxpayers, the revised Circular should require that some form of costing and analysis be performed before shipping work to the private sector.

B. NEW AND EXPANDING REQUIREMENTS

The revised Circular would also maintain the unfair prohibition on federal employee bids for new work (defined as a newly required need that is not being performed by federal employees). Any new work that is not inherently governmental, therefore, would be required to be performed by private contractors, whether or not federal employees could do a better job. This rule does a disservice to taxpayers. The federal workforce should be provided the opportunity to compete for this work to ensure that the taxpayers are getting the best deal.

The federal workforce should also not be precluded from competing for expansions of work (defined as a modernization, replacement, upgrade, or increase in workload of an existing agency performed activity that increases operating cost of the activity by 30 percent.) If a contractor is currently performing the work being considered for expansion, the revised Circular would not require the agency to allow the federal workforce to compete for that work. If, however, federal employees are performing the existing work, the entire function, or just the expansion if it can be segregated, would have to be re-competed. This disparate treatment is fundamentally unfair and serves no rational purpose. Federal employees should be shielded from competition at the expansion stage in the same manner as the private sector bidders are to be shielded, or they should be allowed to compete for expansions of work performed by the private sector.

C. 12-MONTH TIMEFRAME

The proposed revisions to the Circular would unfairly punish federal employees for their managers’ failure to complete a competition within 12 months by requiring the work that was subject to the competition to be directly converted to the private sector. These unrealistic time constraints send the message to agencies that speed in privatizing federal jobs is more important than making sure that the taxpayer is getting the best quality at the lowest cost. Historically, even the most efficiently run A-76 studies have routinely taken 18 months or more to complete. No explanation is provided in the revised Circular for how agencies would now be able to complete the competitions in two-thirds the time.

The apparent rationale for this strict deadline is OMB's belief, as voiced recently by one of its officials, that an agency is not equipped to perform the work that was the subject of the competition if it cannot complete the competition within 12 months. There is no basis, however, for comparing the time it takes to conduct a competition to the agency's ability to carry out its core mission.

To the extent competitions take longer than is reasonable, the solution is not to punish the front-line employees who have nothing to do with the delay. Rather, OMB should address those situations on a case-by-case basis. Its proposed approach would result in studies that are based upon little or no preplanning, solicitations based upon poorly written Performance Work Statements, bids that give no consideration to innovation and creativity, source selections riddled with costing and procedural errors, and the issuance of contracts that do not meet the needs of the agency, regardless of who wins. Ultimately, it is the taxpayers who would suffer from this unreasonably strict deadline, as agencies would be stuck with contracts that do not serve their needs.

It is further unreasonable for the revised Circular not to include any phase-in opportunity for the implementation of the 12-month timeframe. Under its terms, the revised Circular would apply to any new solicitations issued on or after January 1, 2003. This means that the new rules would apply retroactively to competition studies that are already underway, but for which no solicitation has been issued. Applying the new 12-month rule to those studies that are already underway would have a devastating effect on the studies themselves. Those studies that began under one set of rules and standards (with an 18-month to 36-month completion timeframe) would now be subjected to a new standard. Those competitions would probably not be completed within the 12-month timeframe for the simple reason that the agencies would not be able to adjust their milestones mid-study. The penalty for such non-compliance--direct conversion--would once again rob the taxpayers of the benefits of a competition and the federal employees of a fair opportunity to compete for their jobs.

OMB should eliminate all arbitrary timeframes from its revisions to the Circular (i.e., the 8-month timeframe from announcement to solicitation, the 4-month timeframe from solicitation and announcement of award, and the 15-day timeframe in direct conversion to do a business case study). If a timeframe is established, it should be advisory, based upon sustainable evidence, and it should only apply to new studies (those that are in the pre-planning stages or earlier, which have not already been announced to the public). Any evidence of failure to proceed through a study efficiently and effectively should be addressed on a case-by-case basis, and at no time should the frontline employees or the taxpayers be punished for delays in the procurement or study process.

III. STACKING THE DECK IN FAVOR OF PRIVATE CONTRACTORS

A. CONTRACTOR-FAVORED PROVISIONS

There are many provisions in the revisions to the Circular that are obviously one-sided in favor of private contractors. An example appears at B-4, where agencies are instructed to conduct research to determine how activities should be grouped “consistent with market and industry structure.” Government needs, apparently, do not rate when it comes to such considerations.

Moreover, in several places in the revised Circular, agencies are instructed to identify savings that arise from the competition. See e.g., B-5. Nowhere are they instructed to keep track of losses or cost overruns. The head of the agency is merely required to “monitor” actual cost of performance. See B-15.

Another one-sided provision concerns new steps an agency would have to take when no private sector bidder comes forward in response to a solicitation. See B-10. The presumption is that the agency erred in the solicitation process and needs to consult with private sector companies to explore ways to revise the solicitation so that the private companies will bid for the work. In reality, the work may simply be undesirable to the private sector. This requirement would put pressure on the agencies to revise their solicitations to reflect private business needs, rather than the agency’s needs.

Yet another example of contractor bias is the latitude given to the contracting officer to question whether sufficient resources have been included in the MEO to perform the work. See B-11. No parallel provision exists for scrutinizing private sector bid to ensure that they have included appropriate costs for all needed resources.

When a contract is terminated, the work still needs to be performed until the next service provider is selected. Amazingly and without explanation, the revised Circular would expressly prohibit federal employees from performing the work in the interim. See id.

There are also several provisions that would stack the deck in favor of the private contractor in the cost comparison process prescribed by the revised Circular. For example, the cost of a performance bond, if required, would not be included in the private contractors’ bids. See B-7. Costs associated with obtaining security clearances would also not be included in the private contractors’ bids. See id. Also excluded from the private contractors’ bids would be the “one-time conversion costs,” such as Separation Incentive Pay and the cost of performing an Environmental Baseline Survey. See E-14. These are all extra costs of doing business with private contractors; it is a disservice to taxpayers to exclude them from the private sector bids.

A further unreasonable benefit given to the private sector bidder is that they would get a credit to account for increased tax revenue that the government may realize as a result of privatizing the function. See E-15. This credit would be entirely

speculative, especially in light of the fact that many companies that do business with the federal government incorporate in tax-haven countries to avoid domestic taxation.

On the other hand, every potential and assumed cost of agency performance of the work is meticulously outlined in the revised Circular. See E-4 to E-11, E-14 to E-15. These would include some dubious costs that appear to be aimed not at fairness, but at ratcheting up the federal employee's bottom-line. For instance, the revised Circular (at E-14) would require the Agency Tender to include in its bid the one-time costs incurred when the government transfers work from federal employees to the private sector. This is a cost of doing work with the contractor, and should be included in the contractor's bid only.

The Agency Tender would also have to include as a cost the potential amount of money the government could gain in selling assets in connection with the work being taken over by a private contractor. See id. This "gain" would be entirely speculative and is also not related at all to the costs of the agency employees performing the work.

When competing for new requirements or expansion of existing requirements, the private sector bidders would be treated as the "incumbent." See E-15. This means that the federal employees would have to show a savings of 10% of personnel costs or \$10 million in order to perform the work in-house. Since this is new work, and by definition, there is no incumbent, placing the burden of exceeding the minimal differential on the federal employees is entirely nonsensical.

In short, rather than creating a level playing field on which federal employees and private sector bidders can compete, the revised Circular would rig competitions in favor of private sector bidders by shifting to federal employees costs not related to their performance of the work while excluding from the private sector bid some very legitimate costs of doing business with a contractor.

B. NO STANDARDS OR ACTUAL COSTS USED FOR THE 50 AND UNDER PROCEDURE

The proposed procedure applicable to functions involving 50 or fewer employees borrows much from the "Streamlined" studies permitted under the current Circular. This process, however, still fails to provide any clarity on some very difficult issues. Under the revisions, the Contracting Officer would be tasked with searching for and finding "comparable contracts," though no guidance is provided as to where to find those contracts. Under the streamlined approach in the current Circular, agencies have struggled to find comparable contracts, especially when the function being considered is not one that is typically contracted out across the federal government. Thus, they have been left with comparing the existing agency costs with contracts that are not comparable (e.g., from other geographic areas or old contacts).

This process rests on the flawed assumption that past contracts are accurate predictors for future costs. The amount the agency actually pays to a contractor,

however, is often much higher than that indicated by a contract comparison. Indeed, the “comparable contract” that is used to justify contracting out the work may not even bid on the actual solicitation. Furthermore, the winning bidder may in fact charge more for the services than the federal workforce, resulting in a higher cost of the services for the taxpayer. Before any federal employee is displaced, OMB should require cost comparisons to be performed using actual costs and real bidders for the work.

C. INHERENT FLAWS IN THE NEW BEST VALUE PROCESS

The revisions to the Circular would, for the first time, allow contracting officers to use subjective “best value” determinations in public-private competitions for commercial activities to award contracts through the so-called “integrated process.” This would allow contracting officers to award contracts to a bidder that comes in above other bidders, but promises to perform work in addition to that requested by the agency. Introducing this best value concept into public-private competitions would make fair comparisons between bids more difficult. It undermines the agency’s ability to conduct an “apples-to-apples” comparison, an important aspect of any procurement decision.

OMB claims that the integrated process would be implemented on a limited basis only. While not all competitions would be subject to the integrated process, a substantial number would. Under the proposed revisions, agencies would use this untested process on competitive sourcing studies involving Information Technology (IT) functions. There are a disproportionately large number of IT functions listed on the FAIR Act lists. It is likely, therefore, that a larger number of FTEs under study under the revised Circular would be subject to this integrated process. Before embarking on this new approach in a broad-based manner, OMB should require that a limited OMB-approved and controlled study be conducted using the integrated process. Not until this process has been tested and proven effective should the study be approved for government-wide use by the agencies, even on IT jobs.

The integrated process should also be revised to account for the inequity inherent in the past practice component. The federal employees bidding on the work would be considered a new organization (i.e., the MEO), and would not have any past practice to be considered. This gives the private vendor an unfair advantage. In order to ensure fairness and consistency in the process, past practice should be a component only of comparisons among private sector bids; it should not be used to disadvantage the federal employee bid.

IV. CIRCUMSCRIBED FEDERAL EMPLOYEE RIGHTS

A. ELIMINATION OF THE EMPLOYEES’ RIGHT TO BE INFORMED AND MEANINGFULLY INVOLVED

Under the current Circular, agencies are required to provide affected employees a meaningful opportunity to participate fully in the competition, including development of the PWS, the Management Plan (including the MEO), and the in-house and contractor

cost estimates. This requirement would be eliminated under the revised Circular. While the revised Circular would not rule out employee participation, it would not ensure it. The revised Circular would only require the agency to include “technical and functional” experts on these teams. The frontline employees would presumably qualify as functional experts, but others will too, and the agencies would not be required under the new language to include the frontline employees among their experts. This change could have a devastating effect on the outcome of the process. If frontline employees are excluded from the process, the level of distrust and contempt for the process will obviously elevate. Additionally, the quality and efficiency of the study will be diminished.

The current Circular recognizes the importance of involving and supporting the frontline employees most affected by the competition. No persuasive reason exists for eliminating this recognition. The frontline employees know the most about the work they perform, and they should be involved in the process at every step. That is, they should have an opportunity to participate fully on the PWS team, the Management Plan team, and Costing teams. Moreover, the agencies should continue to be required to provide the frontline employees with A-76 training so that the employees can continue to be effective members of these teams. Finally, the agencies should be required to keep the frontline employees informed at every major milestone in the study. This should include a requirement that agencies brief all affected employees on a regular basis (i.e., monthly and at every major milestone). Anything short of full and meaningful involvement of the frontline employees in this process shortchanges the taxpayers who would benefit from their expertise.

B. ADMINISTRATIVE APPEAL PROCESS

The administrative appeals process in the revised Circular would be available only to “directly interested parties.” The revised Circular would exclude federal employees and their unions from this definition, vesting exclusive authority for filing appeals on behalf of the agency bidder in the hands of the “Agency Tender Officer” (ATO). The ATO would be, by definition, an inherently governmental position. Accordingly, the ATO would lack the incentive to take a close look at the agency’s actions that the frontline employees who stand to lose their jobs have. Assigning appeal authority to this single, disinterested entity would undermine the important purposes of the appeals process.

The administrative appeal process is the agency’s last opportunity to correct any wrongdoings before GAO or the courts get involved in the contracting decision, a time-consuming and costly process. Indeed, since these other avenues are not available to federal employees, it is the one chance under the current regime where those with the most knowledge about the work being competed can point out flaws that rob the taxpayers of the true benefit of the competition. It would, therefore, be bad policy to eliminate this avenue of review for federal employees.

The revised Circular’s further limitations on the appeals process are also unwise. It would shorten the time period for filing an appeal from 20 days to 10 days. This is not

enough time to allow for a full consideration of the issues likely to be addressed in an appeal. Rather than shrinking the timeframe, the new Circular should increase it to 30 days.

The revised Circular would also require that all interested parties file whatever appeals they may think they have by this 10-day deadline. Thus, it would require all interested parties to anticipate all possible outcomes from all possible challenges, and be able to raise concerns about those possible outcomes (within 10 days) before they are even submitted by other parties, considered by the agency, and decided by the agency. This one-shot appeals approach is unrealistic and unfair, and it would unnecessarily complicate the appeals process, delaying ultimate resolution of every competitive sourcing decision.

A final problem with the revised Circular's revised appeals process concerns implementation of agency decisions while appeals are still pending. Following completion of the administrative appeal process, the A-76 study may still be subject to additional scrutiny from outside of the agency. "Interested parties" can challenge the study decisions through the bid protest process. Such a protest could result in a re-competition or even a different winner. With so many possible outcomes, implementation of any tentative study results should be held in abeyance, pending resolution of all legal challenges. Frontline employees should not be displaced, agency work and systems should not undergo transition, and expenditures should not be made until all decisions are final and binding. Any other approach would risk wasting substantial amounts of taxpayer dollars.

C. STANDING

The revised Circular takes no steps to ensure that federal employees and their unions have standing to protest agency decisions before GAO and the courts. Unfairness in the competitive process not only disserves the employees who suffer from it, but also the taxpayers, who will only reap savings if a competition is fair and legal. Accordingly, the revised Circular should do as much as possible to guarantee that those with the most interest in the outcome of the competition--the frontline federal employees--have sufficient avenues for bringing unfairness to light.

D. AGENCIES NO LONGER REQUIRED TO PROVIDE SOFT LANDINGS FOR THE ADVERSELY AFFECTED EMPLOYEES

The current Circular requires agencies to "exert maximum effort to find available positions for federal employees adversely affected by conversion decisions." The revised Circular would eliminate this requirement. There is no question that federal employees will lose their jobs as a result of public-private competitions conducted under the revised Circular as written. Eliminating the agencies' obligation to take into consideration the needs of those who have devoted their lives to federal service would be a slap in the face to these hard-working men and women. OMB should reinstate the requirement that agencies provide these adversely impacted public servants with more than just a RIF

notice. OMB should recognize that, to the extent reasonably possible, the agencies should find these employees other federal positions, provide retraining and job placement assistance, and offer all of the other soft landing provisions that are included in the current Circular.

E. RIGHT OF FIRST REFUSAL

The revisions to the Circular would unreasonably limit the “right-of-first refusal” for federal employees who are displaced as a result of a competition. First, the revised Circular would eliminate the right entirely when a contract is taken away from an agency operating under an interservice support agreement (ISSA). Employees working for ISSAs are federal employees from one agency who are providing services to another agency. The cost of their service is reimbursed to their home agency.

Because employees working under ISSAs are federal employees who stand to lose their jobs as a result of a competition, they should receive the same rights and benefits as other federal government employees. It is unreasonable to exempt these employees from the right of first refusal simply because their home agency had historically received a fee from the customer for their service.

The revisions to the Circular would also limit the positions with the private sector bidder for which affected employees would be eligible to exercise their first-refusal rights. Under the current Circular, if an adversely affected employee qualifies for a vacancy created by the new contractor, the employee would have a right to that position. The proposed revisions to the Circular would limit that right to non-managerial positions only. There is no reason to eliminate available vacancies if the federal employee meets the vendor’s qualifications. OMB should ensure that all available jobs remain accessible to the displaced federal employee.

V. TRACKING CONTRACTOR PERFORMANCE

A. NO OVERSIGHT OF CONTRACTORS

The revisions to the Circular would not make a single change to improve oversight of contractors. Oversight is particularly important now, as the Administration requires that more and more functions be opened to competition. Inadequate measures are in place to determine how much the contractors’ work costs the taxpayers, how the actual costs of the contract compare to what the contractors originally promised, whether the contractors delivering the services they promised to deliver within the timeframes they promised, and whether the services are being delivered at an acceptable level of quality. Agencies and the taxpayers did not know this information before the revised A-76 was released, and they would still be in the dark under the new A-76.

If the revised Circular is to require agencies to redouble their time and resources to produce inventories of the size and makeup of the entire federal workforce, including those performing both commercial and inherently governmental functions, then agencies

should also be required to publish inventories of the contractor workforce that is performing the work of the agency. Agencies should be required to implement systems to track whether current contracting efforts are saving money, whether contractors are delivering services on-time, at the quality and efficiency levels that the agency requires, and at the cost that the contractor promised. When a contractor is not living up to its end of the deal, the government must have the realistic capability to bring the work back in-house. All of this information should be reported on an annual basis, along with the agency's annual inventories. The government owes this accountability to the taxpayers who fund it.

Once a contractor gets a contract, that work is out the door and rarely--if ever--scrutinized again. For example, Mellon Bank, a contractor hired by the Internal Revenue Service, lost, shredded, or removed 70,000 taxpayer checks worth \$1.2 billion in revenues for the U.S. Treasury. If agencies had had better tracking systems and more contract oversight staff, the losses to the taxpayers resulting from the Mellon contracting fiasco could have been halted much sooner. Taxpayers and federal employees deserve, at a minimum, the same level of transparency and accountability from contractors as there is of the federal workforce.

B. BUSINESS AS USUAL FOR CONTRACTORS

OMB's revised Circular would continue to permit contracting for government work with unreliable private companies that violate federal laws. Nothing in the revised Circular would prevent agencies from contracting with companies that repeatedly violate criminal or civil laws. Under the revisions, contractors guilty of antitrust violations, embezzlement, or bribery would still be able to win lucrative federal contracts. As the amount of money spent on contracts increases under the Administration's new initiative, contractors that violate environmental, safety and health, labor, civil rights or other laws will get a bigger share of taxpayer dollars each year. This miscarriage of justice should be remedied in the revised Circular.

The revisions would also do nothing to address the issue of agencies awarding contracts to companies that turn their backs on our nation and reincorporate in Bermuda and other tax haven countries to avoid paying taxes in the United States. The General Accounting Office estimates that in fiscal year 2001 nearly \$3 billion worth of contracts for U.S. government services were awarded to four government contractors that are incorporated overseas in tax haven countries. With more government work up for grabs for contractors, more taxpayer dollars will go to these and other expatriates.

Similarly, nothing in the revisions concerns the untenable situation some agencies find themselves in when entering into contracts with bankrupt companies such as WorldCom. Despite the fact that in July 2002 WorldCom filed the largest bankruptcy in U.S. history, the General Services Administration recently renewed an estimated \$11 billion contract with WorldCom. OMB has included nothing that would prevent agencies from rolling the dice with billions of taxpayer dollars in contract awards to companies like WorldCom, which are barely here today, and could be out of business tomorrow.

Under OMB's revisions, it would be business as usual, and then some, for contractors. They could continue to collect their inflated contract payments from the government, even if they move overseas, file for bankruptcy, illegally shut out union workforces, pollute our environment, or break other laws. A-76 should be revised so that unpatriotic, unreliable, and lawbreaking contractors are prohibited from being awarded lucrative government contracts.

VI. IMPLEMENTATION OF REVISED PROCESS

As evidenced by these extensive comments, the changes to the procurement policy announced by OMB in its revisions to the Circular are far-reaching. Thus, I am disappointed that OMB has proposed to make the new Circular effective for all solicitations issued as of January 1, 2003. OMB has allowed a mere 30 days for federal employees, unions, and other members of the public to comment on these drastic revisions to the Circular, and left itself almost no time to consider the public's comments. This disregard for input by federal employees and the public leaves the impression that this Administration cares more about rushing to privatize the government workforce than developing a procurement process that is fair and effective in delivering high quality services to the taxpayers. To allow for a full consideration of the many issues raised in the revised Circular and in the public's response to those changes, OMB should delay the Circular's implementation date by at least 6 months.

As written, the revised Circular would have an extremely adverse impact on studies that are currently underway. OMB has specified that the revised Circular would apply to all studies that have not already reached the stage where a solicitation has been posted for bid. Those studies would be expected to abide by the new rules, even though they are well underway under the current regime. This would have a disastrous impact on these studies, particularly when the Circular's rigid 12-month limit on competitions is applied. Under the current A-76 rules, agencies were given 18 to 36 months to complete those studies, taking into consideration planning time, market research, and bidder comment periods. Those same responsibly planned competitions would be short-circuited by retroactive implementation of the revised Circular, resulting in direct conversion of the work to the private sector without determining whether private sector performance will save any money. The studies that have already begun and are operating under the current Circular should be allowed to continue under its rules. The revisions should only apply to new studies, defined as those that are in the pre-planning stages or earlier that have not already been announced to the public.

CONCLUSION

OMB's revisions to the Circular represent an important moment in federal procurement history. Unfortunately, OMB has chosen to propose a system whose only goal appears to be to help private contractors land lucrative government contracts at the expense of federal employees. The revisions represent a missed opportunity to fix a broken system. I hope that OMB will seriously consider the comments set forth herein

and delay implementation of any new Circular until it can adjust the rules along the lines I have suggested. I fear that implementing the Circular as revised will have grave consequences for American taxpayers and the federal employees who do so much every day to serve their country honorably. I would be happy to discuss these comments with you further.

Sincerely,

Colleen M. Kelley
National President