



Issue Brief: A-76, “Commercial Sourcing,” and the NIH October 27, 2003

Background: OMB Circular A-76 establishes Federal policy regarding the performance of federal activities by commercial firms. The Circular details procedures for cost comparisons to determine whether federal functions determined to be commercial activities should be performed under contract with commercial sources or performed in-house using Federal resources and personnel. OMB Circular A-76 was first issued in 1966. The Circular was previously revised in 1967, 1979, 1983, 1992, 1996, and 1999. The OMB proposed a major revision of Circular A-76 on November 14, 2002¹ and issued a final revision on May 29, 2003.²

Circular A-76 states the government’s policy as being, “To ensure that the American people receive maximum value for their tax dollars, commercial activities should be subject to the forces of competition.”³ The Circular requires all Federal agencies to undertake the following tasks, among others⁴:

- Identify all activities performed by government personnel as either commercial or inherently governmental.
- Perform inherently governmental activities with government personnel.
- Use a streamlined or standard competition to determine if government personnel should perform a commercial activity.
- Require full accountability of agency officials designated to implement and comply with this circular by establishing performance standards in annual performance evaluations.

The Circular establishes a rigid and ambitious schedule for completing an inventory of all federal positions to determine if they are *inherently governmental* or a *commercial activity*. The definitions of these terms are critical. The Circular provides a detailed definition of *inherently governmental*. In part:

“An inherently governmental activity is 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. Inherently governmental activities normally fall into two categories: the exercise of sovereign government authority or the

¹ 67 FR 69769–69774 (November 19, 2002)

² 68 FR 32134–32142 (May 29, 2003)

³ OMB Circular A-76 (Revised 2003), Page 1

⁴ Ibid, Pages 1 and 2

establishment of procedures and processes related to the oversight of monetary transactions or entitlements.”⁵

The Circular provides the following definition of *commercial activity*:

“A commercial activity is a recurring service that could be performed by the private sector and is resourced, performed, and controlled by the agency through performance by government personnel, a contract, or a fee-for-service agreement. A commercial activity is not so intimately related to the public interest as to mandate performance by government personnel. Commercial activities may be found within, or throughout, organizations that perform inherently governmental activities or classified work.”⁶

The definitions promulgated by OMB are controversial. On June 19, 2003, the National Treasury Employees Union sued, accusing the OMB of violating the Fair Activities Inventory Reform Act.⁷ According to an NTEU press release, “The FAIR Act, the suit says, requires the exercise of ‘discretion’ for a function to be deemed inherently governmental. The revised Circular A-76, on the other hand, rules out as inherently governmental all functions that do not require the exercise of ‘substantial’ discretion—a significant difference in language. Moreover, functions involving the collection, control or disbursement of federal funds, which have routinely been deemed inherently governmental under the FAIR Act, may obtain that designation under the new circular only if they include the authority ‘to establish policies and procedures’.”⁸

The Federal Activities Inventory Reform (FAIR) Act of 1998⁹ serves as the basis for Circular A-76’s process of reviewing whether positions and functions are inherently governmental or a commercial activity. Under Circular A-76, all functions are assumed to be commercial in nature unless an agency can prove the function is inherently government. Once a function has been reviewed, the Circular requires the function to be reviewed again within 5 years.

The Circular also provides detailed rules for conducting competitions between federal agencies and commercial vendors. Generally, agencies must use a standard competition if a commercial activity is performed by more than 65 FTEs. An agency may use either a streamlined or standard competition if 65 or fewer FTEs and/or any number of military personnel perform a commercial activity.

Current Activity: NIH is actively engaged in inventorying positions and functions and determining whether they should be classified as inherently governmental or a commercial activity. In fiscal year 2003, NIH determined it would review functions in “Real Property Management and Installation

⁵ OMB Circular A-76 (Revised 2003), Pages A-2-3

⁶ OMB Circular A-76 (Revised 2003), Page A-3

⁷ 31 U.S.C. 501

⁸ NTEU Press Release, June 19, 2003, <http://www.nteu.org/pressindex.qry?function=detail&press_release_id=455&_UserReference=A759AD345CCC5E483EF2ED3B> (accessed June 20, 2003)

⁹ 31 U.S.C. 501

Services,” and “Grant Support.”¹⁰ Charles E. Leasure, Jr., Deputy Director for Management, informed NIH staff that, “By September 30, 2004, the President's plan to streamline government requires us to complete cost comparison studies on about 13 percent of the jobs at the NIH (about 2,300).”¹¹ The functions to be reviewed in fiscal year 2004 are reported to include the Intramural Research Fellows Program and Category 2 Senior Scientists.¹²

The two competitions at NIH in fiscal year 2003 were:

- “NIH Extramural Activities Support” (solicitation no. 263-03-P(GK)-0059): To “provide all management, supervision, administration, and labor to support the Grants Management, Program Support, and Review Support services in accordance with OMB Circular A-76.” The solicitation was for a fixed-price contract with a performance period of twelve (12) months with four 12-month options.¹³ The specific listed functions contained in the solicitation involved meeting logistics, data management, and administrative support. Since this is a performance-based contract, the government refused to state how many FTEs or the level of effort it expected to be covered by the solicitation.¹⁴ On September 24, 2003, NIH announced that it had received only one bid from an outside firm and that it was rejected because it failed to meet the requirements of the solicitation. As a result, NIH employees were deemed the winner of the competition.¹⁵
- “A-76 Property Management Services” (solicitation no. 263-03-P(BC)-0044): To provide property management services in existing buildings, animal facilities, laboratories, and support facilities, located on the NIH Campus and at other facilities in Maryland, North Carolina, and Montana. The solicitation was for a “firm fixed-price, cost-reimbursement and time-and-materials and labor-hours type contract.” The period of performance anticipated under the contract was for a base period of 24-months with three 12-month option periods.¹⁶ On October 22, 2002, NIH announced that it had won the competition when the NIH proposal “was found to be effective at less cost than the proposal from a private contractor. As a result, the employee-developed bid has prevailed.”¹⁷

Both solicitations carried the warning that under A-76, “The Secretary of HHS has promised that no one will ‘lose a job.’ This may have a substantive effect on the ability of offerors to hire existing NIH employees.”

¹⁰ NIH FAQ, Page 1

¹¹ Memorandum to NIH Employees, September 27, 2002

¹² *Chemical and Engineering News*, July 28, 2003, Page 11

¹³ The solicitation and amendments are available at <<http://www.nih.gov/od/olao/oa/contracts/A-76.html>> (accessed on June 18, 2003)

¹⁴ Solicitation No. 263-03-P(GK)-0059, Amendment Three(3) Dated 6/11/03, Page 4

¹⁵ NIH Press Release, September 25, 2003, available at <<http://www.nih.gov/news/pr/sep2003/od-24.htm>> (accessed on September 23, 2003)

¹⁶ The solicitation and amendments are available at <<http://www.nih.gov/od/olao/oa/contracts/A-76.html>> (accessed on June 18, 2003)

¹⁷ NIH press release available at <<http://www.nih.gov/news/pr/oct2003/od-22.htm>> (accessed on October 27, 2003)

There was fear that if NIH was not awarded the outsourcing contracts, significant funds may have been committed to commercial sources with no reduction in NIH staff (at least in the short run). This may have required a major reprogramming of funds, which may have adversely affected the availability of research funds. In addition, NIH staff are expending a tremendous amount of effort developing these solicitations and NIH's bids.

It is important to note that certain functions of NIH employees may be judged to be inherently governmental, but not the person. Most individuals have assignments that are made up from both inherently governmental and commercial functions. According to NIH, it "has the authority to restructure the functions that make up an individual's assignments to meet the mission regardless of whether they are commercial or IG [inherently governmental]. Just because an individual has been designated as IG for the...inventory because the preponderance of their duties are currently considered IG, does not mean the function is exempt from review and restructuring. It is entirely possible that a given individual's responsibilities, both IG and commercial could be reorganized to support a more efficient and effective structure."¹⁸

The AAMC has received private assurances from a senior NIH leader that, "NIH has determined that the scientific administrative positions are inherently governmental (e.g., Health Scientist Administrators (HSAs), Scientific Review Administrators (SRAs))." However, others believe that this determination may not be final and could be overturned by HHS or OMB.

On September 9, 2003, the House approved an amendment by a vote of 220-198¹⁹ offered by Congressman Chris Van Hollen (D-MD), to the fiscal year 2004 appropriations bill for the Departments of Transportation and Treasury, and independent agencies stating that "None of the funds made available by this Act may be used to implement the revision to Office of Management and Budget Circular A-76 made on May 29, 2003." However, enactment of this provision is considered unlikely. The Administration issued a "Statement of Administration Policy" regarding the bill on September 4, 2004 and said, "The Administration understands that an amendment may be offered on the House Floor that would effectively shut down the Administration's Competitive Sourcing initiative to fundamentally improve the performance of the government's many commercial activities...If the final version of the bill contained such a provision, the President's senior advisers would recommend that he veto the bill."²⁰

On September 23, 2003, the Senate defeated by a vote of 51-44 a similar amendment²¹, offered by Senator Harry Reid (D-NV), to legislation making appropriations for the Department of the Interior and related agencies for the fiscal year ending September 30, 2004.

¹⁸ NIH FAQ, Page 5

¹⁹ H.R. 2989, House Roll Call 487

²⁰ Statement of Administration Policy, H.R. 2989, September 4, 2003

<<http://www.whitehouse.gov/omb/legislative/sap/108-1/hr2989sap-h.pdf>> (accessed September 11, 2003)

²¹ Amendment 1731 to H.R. 2691, Senate Roll Call 361

On October 20, 2003, Congressman Henry Waxman (D-CA) and others sent a letter²² to DHHS Secretary Tommy Thompson and OMB Director Josh Bolton, asking that the A-76 process at NIH be suspended.

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²² Available at <http://www.house.gov/reform/min/pdfs_108/pdf_inves/pdf_admin_hhs_a76_oct_20_let.PDF> (accessed on October 27, 2003)