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December 19, 2002

Mr. David Childs  
Office of Federal Procurement Policy  
Office of Management and Budget  
725 17<sup>th</sup> Street, NW, Room 9013  
Washington, DC 20503

RE: Performance of Commercial Activities

Dear Mr. Childs:

The U.S. Chamber of Commerce appreciates the opportunity to comment on the proposed revisions to Office of Management and Budget Circular A-76, Performance of Commercial Activities, as published in the *Federal Register* on November 19, 2002 (67 Fed. Reg. 69769). The U.S. Chamber of Commerce is the world's largest business federation, representing more than three million businesses and professional organizations of every size, sector and region of the country.

These comments are offered on behalf of the entire business community, but especially for the Chamber members involved in government contracting and those vying for increased opportunities in the federal market. These businesses, small and large, rely on an efficient, fair competitive process in providing the federal government with goods and services to sustain and grow their businesses.

Chamber members have consistently argued that the A-76 process is costly, time consuming, does not accurately reflect the government's cost of doing business, and gives federal employees an unfair competitive advantage. The Chamber generally supports the revised Circular because it will significantly reduce the time and money required to conduct competitions and infuse increased transparency in the process. It will also allow the federal government the authority to purchase the best value for taxpayers' dollars in a timely

fashion, as it encourages competition, by incorporating key elements of the Federal Acquisition Regulation (FAR).

Competition has proven to provide significant cost savings regardless of who wins, as well as increase innovation, efficiencies and quality of service. An equal, transparent, consistent competitive process is necessary to ensure the performance of commercial activities is conducted as efficiently and cost effectively as possible. Such a process will also encourage businesses to enter and remain in the federal market, particularly small businesses that generally do not have the staff or financial resources to engage in lengthy competitions. The Chamber commends OMB for making much-needed, long overdue changes to this policy. We appreciate the opportunity to provide the comments on the revised Circular as outlined below.

- I. **Inventory Process.** The revised policy letter directs agencies to presume all activities are commercial, unless the agency can sufficiently provide that the function is inherently governmental. This is critical to a fair competitive process and fairly portrays the government's current reality. The Chamber supports the premise that all activities are "presumed to be commercial" as this reinforces and supports the longstanding policy of both Democrat and Republican Administrations to rely on the private sector for goods and services.

The Chamber does have concerns that the Circular no longer restates the policy, in effect for more than 45 years, that the government should not compete with the private sector and that it should utilize business to the maximum extent. We urge you to reinstate the policy in the revised circular that states:

“In the process of governing, the Government should not compete with its citizens. The competitive enterprise system, characterized by individual freedom and initiative, is the primary source of national economic strength. In recognition of this principle, it has been and continues to be the general policy of the Government to rely on commercial sources to supply the products and services the Government needs.”

The Chamber was a leader in securing enactment of the Federal Activities Inventory Reform (FAIR) Act, Public Law 105-270. That law requires Federal agencies to inventory, for public review, all their activities that are commercial in nature. The FAIR Act has found that more than 850,000 Federal employees are engaged in activities that are commercial in nature (out of a total civilian Federal workforce of 1.8 million). Agencies will now be required to inventory and make public not only their commercial activities but their inherently governmental activities as well. We fully support this directive as it will create a more transparent system and allow a better understanding of government functions. However, the inventory lists still lack adequate specificity and clarity to allow meaningful challenges of commercial and governmental classifications, as was intended in the FAIR Act. Additional steps to infuse more transparency into the system are necessary such as allowing the applicability of Reason Codes to be challenged.

- II. **Public-Private Competitions.** In mid-2001, President Bush released his “President’s Management Agenda.” Competitive sourcing was identified as one of the five main initiatives for improving the performance of government and making government more citizen-centered, results-

oriented and market-based. The intent of the revisions to Circular A-76 is to use the competitive sourcing tool – with an emphasis on competition – to do just that. The ultimate measure of success for the revised A-76 process is whether that competition occurs. The Chamber strongly supports that intent.

The revisions state that a "standard competition shall not exceed 12 months." We strongly support this move to ensure that the time frames for conducting public-private competitions are more reasonable, and are in line with standard procurements. It is in the government's best interest to rapidly execute a competition in order to reduce costs and improve efficiencies. Lengthy competitions run counter to good business practices and result in unnecessary costs to the taxpayer, as well as to the private sector. It is estimated that the cost to a company participating in the A-76 process is fifty to one hundred percent higher than that in a traditional government procurement. The shortened timeframe will also facilitate the involvement of small businesses in the process. Currently small businesses, with limited credit line and marketing budgets, can rarely afford to participate in the current A-76 process, which normally takes three to four years to complete.

In traditional procurements, government personnel involved in evaluating the procurement must declare any interest in any of the competing offerors. An employee who is or will be affected by the procurement should not be in a position to influence the award decision. The Chamber is very pleased that the revised circular strengthens and clarifies conflict-of-interest rules by requiring that individuals participating in the process shall comply with procurement integrity, ethics and standards of conduct rules. Incorporating the same rules currently contained in the Federal Acquisition Regulation will enhance the integrity of the A-76 process. However, more specificity can be integrated by making it a standard process for government personnel with access to source selection sensitive information and data to sign Non-Disclosure Agreements.

Under the current process, administrative appeals are often endless, confusing and poorly communicated. The establishment of a single appeals process will help address that problem and do so in a manner that is fully fair to all parties. In addition, the revisions make clear that only the Agency Tender Official may file such appeals. To further improve the appeals process, it should be made clear in the Circular that in the case of such appeals, all parties to the procurement are to be notified by the appeal authority of the issues that the appeal authority has deemed relevant and on which the appeal decision will focus, and then given time to submit their comments on any or all of those issues.

- III. **Direct Conversion Process.** The Chamber supports permitting federal agencies to directly convert work to the private sector. By doing so, agencies are afforded the flexibility needed to ensure they are receiving the best value to meet its mission needs. We recommend that the small activity threshold should be increased to 50 employees. Small activities are those for which small business is most likely to be a prospective contractor. We recommend either the threshold be increased from 10 to 50 employees or the provision should be revised to permit a direct conversion of any activity appropriate for small business performance (regardless of the number of FTEs). A determination similar to a set aside determination under the current Small Business Act and FAR could be utilized.

Additionally, the term “waiver” has meanings and connotations that do not apply to the A-76 process in the procurement community. Therefore, we recommend that the term “Competition Waiver” be changed to “Direct Conversion Authorization” to avoid any confusion or negative implications.

- IV. **Inter-Service Support Agreements (ISSAs).** We support the provisions that eliminate unfair competition under Agency-to-Agency arrangements. These provisions would eliminate the current practice that permits Federal agencies to obtain commercial work non-competitively from other Federal agencies, and for state and local government. Competition is key to ensuring that the government obtains the most innovative, efficient services at a reasonable cost. Work performed by the private sector is subject to recompetition every 3-5 years. This revision simply ensures that all ISSAs are subject to recurring recompetition as well – including both new agreements as well as those originally grandfathered out of any competition requirement. This is a step in the right direction toward ensuring that Federal agencies obtain the best value for the American taxpayer.

Under H.1 in Section D-3, we recommend striking “available to OMB and the public upon request” and insert in lieu thereof “available to OMB and made public in *FedBizOpps*.” There must be increased transparency with the intergovernmental process. Before a Federal agency can provide a service to state and local government, the proposed provision of that service should be made publicly known. Under the current language in the draft, the private sector has no way of knowing that such a transaction is being proposed, thus it would have no way of knowing to exercise its right to request such information from OMB. A notice in *FedBizOpps* will provide for the opportunity for the private sector to make an offer, thus providing a market-based determination that the state or local government has sought but has not been able to identify a satisfactory private sector source.

Similarly, on Page D-4., Section 1.d., a request for services which is forwarded to OMB for approval should require a *FedBizOpps* or *Federal Register* notice requirement so the private sector can comment and respond to help determine whether the request indeed involves a commercially available service that the private sector could provide. Such notice will help provide a market test for the request and prevent abuse of the process.

- V. **Calculating Public-Private Competition Costs.** Fair cost comparisons and preserving the integrity of the procurement process are of the utmost importance. The Chamber strongly urges you to remove inmate labor from the Circular. The private sector is prohibited from utilizing inmate labor under Federal law. Thus, in order to provide a fair and balanced competition, inmate labor should not be included or permitted in an agency tender. If inmate labor remains in the Circular, we urge you to insert language stating that if inmate labor is used all terms and conditions applicable to the private sector, such as those in the Service Contract Act, must be met.

In addition, agency personnel costs must include the cost of obtaining and maintaining professional licenses. In some areas, private sector personnel are subject to professional licensing. Federal employees are not required to meet these standards, particularly with regard to State licensing requirements. These standards include the cost of meeting the prerequisite education and experience requirements to obtain a

professional license, the cost of licensing examinations, the cost of the license, and the cost of continuing education. Since professional licensure is in place to protect public health, welfare and safety, the Circular should be revised to require the Standard Competition to address licensing of personnel on fair and equitable basis for both the government and the private sector, and the cost of licensure should be factored into the agency tender.

Thank you again for the opportunity to submit these comments. We look forward to continuing to work with you to ensure a fair, transparent competitive process is in place that benefits American businesses, government efficiency and the American taxpayer.

Sincerely,

R. Bruce Josten