

Business Corporation Act the following individuals from any liability asserted against them and expenses reasonably incurred by them in connection with judicial or administrative proceedings to which they are or may become parties by reason of the performance of their official duties: (Check as appropriate) ( ) current officials, ( ) former official, ( ) current employees, ( ) former employees.

(b) The corporate credit union may purchase and maintain insurance on behalf of the individuals indicated in (a) above against any liability asserted against them and expenses reasonably incurred by them in their official capacities and arising out of the performance of their duties to the extent such insurance is permitted by the applicable state law or the Model Business Corporation Act.

(c) The term "official" in this bylaw means a person who is a member of the board of directors, supervisory committee, other volunteer committee (including elected or appointed loan officers or membership officers) established by the board of directors.

*Article XII. Operations Following an Attack on the United States or Catastrophic Occurrence Otherwise Rendering the Corporate Credit Union Inoperable*

*Section 1.* In the event of an attack upon the United States, or other catastrophic occurrence causing a contingency situation, the officers and employees of the corporate credit union will continue to conduct the affairs of the corporate credit union under such guidance from the directors as may be available and subject to conformance with any government directives during the emergency.

*Section 2.* In the event of an attack upon the United States, catastrophic occurrence, or a contingency situation, of sufficient severity to prevent the conduct and management of the affairs and business of the corporate credit union by its regularly elected directors, officers, and properly constituted committees as contemplated by these bylaws, any three available members of the then incumbent board of directors will constitute a quorum of the board of directors for the full conduct and management of the affairs and business of the corporate credit union including the approval of loans to members if the regularly elected credit committee is not available. In the event of the unavailability at such time of three members of the board, the vacancies, in order to provide a quorum of three, will be filled by a succession list established by the board of directors.

*Section 3.* The corporate credit union will maintain and periodically test an organization-wide contingency plan that addresses all reasonable emergency and disaster scenarios.

This bylaw is subject to implementation by resolutions of the board of directors passed from time to time for that purpose, and any provisions of these bylaws (other than this section) and any resolutions which are contrary to the provisions of this section or to the provisions of any such implemented resolutions will be suspended until a regularly constituted board of directors can be obtained.

*Article XIII. Amendments of Bylaws and Charter*

*Section 1.* Amendments of these bylaws may be adopted and amendments of the charter may be requested by the affirmative vote of two-thirds of the authorized number of members of the board at any duly held board meeting, if the members of the board have been given prior written notice of the meeting and the notice has contained a copy of the proposed amendment or amendments. No amendment of the bylaws or charter becomes effective until approved in writing by NCUA.

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**OFFICE OF MANAGEMENT AND BUDGET**

**Performance of Commercial Activities**

**AGENCY:** Office of Management and Budget, Executive Office of the President.

**ACTION:** Revision to Office of Management and Budget Circular No. A-76, "Performance of Commercial Activities."

**SUMMARY:** The Office of Management and Budget (OMB) is making revisions to Circular No. A-76 to improve the management of commercial activities. The revisions: (1) Strengthen application of public-private competition, so agencies may realize improved performance of commercial activities, especially those that are performed by government personnel without competition or converted to contract without consideration of the government's capabilities; (2) incorporate additional principles of the Federal Acquisition Regulation (FAR) into the public-private competition process, including the ability to conduct an expanded best value cost-technical tradeoff source selection process; (3) make agencies accountable to taxpayers for results achieved from public-private competitions, irrespective of the source or sector that performs the work; and (4) provide guidance for the transparent development of inventories of commercial and inherently governmental activities.

The revised Circular replaces the current OMB Circular No. A-76. The revised Circular also supersedes and rescinds the following documents: OMB Circular No. A-76 Revised Supplemental Handbook (Revised 2000), March 1996; OMB Circular No. A-76 Transmittal Memoranda Nos. 1-25; and Office of Federal Procurement Policy (OFPP) Policy Letter 92-1, *Inherently Governmental Functions*, September 23, 1992.

**DATES:** *Effective Date:* This revised Circular is effective May 29, 2003.

*Applicability:* The revised Circular shall apply to inventories required, and streamlined and standard competitions initiated, after the effective date. Direct conversions and cost comparisons, including streamlined cost comparisons, initiated but not completed by the effective date shall be covered by the revised Circular to the following extent. Direct conversions and streamlined cost comparisons shall be converted to streamlined or standard competitions under the revised Circular. Cost comparisons for which solicitations have not been issued before the effective date shall be converted to standard competitions under the revised Circular or, at the agency's discretion if permitted by the revised Circular, to streamlined competitions. The Circular in effect prior to this revision shall govern cost comparisons for which solicitations have been issued, unless agencies, at their discretion, convert such cost comparisons to standard competitions under the revised Circular, or, if permitted by the revised Circular, to streamlined competitions.

**FOR FURTHER INFORMATION CONTACT:** Office of Federal Procurement Policy, NEOB Room 9013, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503 (tel: (202) 395-3501 or 7808).

*Availability:* Copies of OMB Circular A-76, as revised by this notice, may be obtained at the OMB home page at <http://www.whitehouse.gov/OMB/circulars/index.html#numerical>. Paper copies of any of the documents identified above may be obtained by calling OFPP (tel: (202) 395-7579).

**SUPPLEMENTARY INFORMATION:**

**A. Overview**

To improve program performance to citizens and lower costs for taxpayers, OMB is making significant revisions to the processes and practices for determining whether a commercial activity will be performed by a public or private source. The revisions to OMB Circular No. A-76:

- Increase visibility into government management by requiring agencies to develop lists of their commercial and inherently governmental activities;
- Facilitate strategic decision making by ensuring effective agency planning for public-private competitions;
- Promote better service to our citizens by clarifying and simplifying the processes used to make competitive selections between public and private service providers;
- Close loopholes that diminish the return on taxpayer investment by: (i)

eliminating direct conversions and (ii) requiring that commercial activities competed under this Circular be periodically recompeted to ensure that the cost and quality of performance remain reasonable;

- Provide a level playing field for public-private competitions to ensure that commercial activities are performed by the best source at the lowest possible cost;

- Improve public trust by incorporating appropriate mechanisms of transparency, fairness, and integrity into public-private competition; and
- Strengthen accountability by: (i) centralizing agency oversight, (ii) holding public sector service providers to the same performance standards as those imposed on private sector providers, and (iii) requiring that the performance of service providers (both public and private) be tracked so that current experiences may inform and improve future decisions.

In addition to making significant substantive changes, OMB is modifying the organization of the Circular to improve clarity and ease of use. The main body of the Circular describes overarching policy tenets and the scope of agency responsibilities. The procedures for carrying out these policies are set forth in three attachments:

Attachment A, Inventory Process, describes how agencies develop lists of commercial and inherently governmental activities.

Attachment B, Public-Private Competition, identifies the required steps for conducting competitions between the public and private sectors (e.g., planning, soliciting, negotiating), making performance decisions, and tracking implementation.

Attachment C, Calculating Public-Private Competition Costs, defines how agencies determine the cost of public sector performance and compare these costs to a private sector offer.

A fourth attachment, Attachment D, Acronyms, Definitions, and Index provides a detailed glossary and index of key terms used in the Circular and its attachments.

The proposed Circular would have incorporated long-standing limitations imposed on federal agencies regarding the reimbursable services they provide to state and local government. OMB Circular No. A-97, *Provision of Specialized or Technical Services to State and Local Units of Government by Federal Agencies Under Title III of the Intergovernmental Cooperation Act of 1968*, currently implements these requirements. Circular No. A-97 remains in effect as a separate, stand-

alone Circular, and is unchanged by the final revisions to Circular No. A-76.

## B. Background

Federal agencies rely on a mix of public and private sector sources to perform a wide variety of commercial activities. OMB Circular No. A-76 establishes the policies and procedures for identifying commercial activities and determining whether these activities should be provided by a private sector provider through a contract, by government personnel through a letter of obligation, or by a public reimbursable source (another agency) through a fee-for-service agreement.

Before an agency shifts commercial work from one source to another (e.g., to or from performance by government personnel to performance by a contractor or public reimbursable source), Circular No. A-76 historically has required the agency to conduct a public-private competition in which the cost of performance is compared between the public and private sectors. The Circular has traditionally required agencies to perform a “cost comparison” by:

- Developing a performance work statement (PWS);
- Creating a management plan to determine the government’s “most efficient organization” (MEO);
- Establishing an in-house government cost estimate that is certified by an independent reviewing official;
- Issuing a solicitation in accordance with the FAR seeking offers from private sector and public sector sources, except for the in-house source, whose cost estimate is submitted and evaluated independently;
- Identifying the best offer submitted in response to the solicitation and comparing it to the in-house estimate; and
- Making a decision based on the lowest cost alternative, which is subject to review under an administrative appeals process.

The Circular has recognized a variety of circumstances in which agencies are not required to conduct cost comparisons. For example, the Circular has allowed agencies to directly convert work to or from the private sector without cost comparison under certain circumstances, such as where an activity was or would be performed by an aggregate of 10 or fewer “full-time-equivalent” employees (FTEs). For additional discussion regarding the mechanics of Circular No. A-76, see 67 FR 69769, 69770-71 (November 19, 2002).

On November 19, 2002, OMB issued a notice in the **Federal Register** of proposed changes to Circular No. A-76 to significantly improve the procedures used to conduct, and the results achieved from, competitions between public and private sources. The changes OMB proposed were intended to address recurring complaints about the Circular’s effectiveness. More than 700 public comments were submitted to OMB in response to the **Federal Register** notice. For a description of the proposed changes to the Circular and the accompanying Supplemental Handbook (hereinafter collectively referred to as the “prior Circular”), see 67 FR 69769, 69771-74. For copies of the public comments on the proposed revisions, see <http://www.omb.gov>.

The next section of this preamble discusses the new features of the revised Circular, including its relationship to the President’s Management Agenda. The discussion highlights the most significant public comments and explains how these comments are addressed in the revised Circular.

## C. An Improved Framework for Managing the Government’s Commercial Activities

The Administration’s general policy is to rely on competition to select the providers of commercial activities. This policy is supported by published reports and historical data demonstrating that public-private competition generates significant cost savings, efficiency, and innovation.

Despite the benefits that public-private competition generates, many of the government’s 850,000 FTEs that agencies have identified as performing commercial activities (nearly half of all federal employees) remain insulated from the dynamics of competition. To reverse this trend, the President’s Management Agenda called upon agencies to develop plans for opening their commercial activities to the discipline of competition. In response, agencies across government have developed tailored plans that lay the foundation for institutionalizing public-private competitions.

Circular No. A-76 seeks to ensure that competition plans—and the President’s broader vision of a market-based government—are successfully implemented. The revisions to the Circular achieve this result by significantly improving the processes for applying public-private competitions to government-performed commercial activities.

In particular, the revised Circular: (1) Facilitates strategic use of competition as a tool to improve overall agency

performance, (2) ensures fairness, integrity, and transparency in sourcing decisions, and (3) strengthens agency accountability for achieving results.

### 1. *Facilitating Strategic Use of Competition*

The revised Circular seeks to promote strategic decision making by ensuring that application of public-private competition results in performance by the best available source—irrespective of the sector. The revised Circular also aims to make processes clear and accommodate agency needs.

#### a. Competition-based Policy Orientation

The revised Circular, like the prior Circular, relies on competition as the foundation for determining whether government personnel should perform a commercial activity. See ¶ 4.c. of the revised Circular. The revised Circular requires use of either streamlined or standard competitions. The agency's competitive sourcing official (CSO)—*i.e.*, a specific agency official responsible within the agency for implementing the Circular—must justify, in writing, most decisions to exempt a commercial activity performed by government personnel from competition. See ¶ 5.b. of the revised Circular. In addition, deviations from the Circular's policies or the procedures set forth in the attachments must be approved by OMB. See ¶ 5.c. of the revised Circular.

i. *Emphasis on sector neutral competition.* Because OMB seeks to emphasize selection of the best service provider, as determined through competition, the revised Circular deletes a longstanding statement that the government should not compete with its citizens. Various commenters opposed the deletion, arguing that an important message will be lost regarding the significant role the private sector plays in facilitating the effective operation of government. OMB appreciates the critical contributions made by the private sector. Without the private sector, the government would not be able to meet the many needs of our citizenry. Deletion of the "reliance" statement from the revised Circular is not intended to denigrate this contribution. Nor does this action signal a retreat from the Administration's commitment to a market-based government that is unafraid of competition, innovation, and choice. The deletion is simply meant to avoid a presumption that the government should not compete for work to meet its own needs. Such a suggestion conflicts with the Circular's main function of providing policies and procedures to

determine the best service provider—irrespective of the sector the provider represents.

The main policy tenets of the Circular have been refined to ensure that government performance of commercial activities does not result in unfair competition. In particular, a new proviso has been added to make clear that, with rare exception, an agency shall not perform work as a contractor or subcontractor to the private sector. See ¶ 4.l. of the revised Circular. In addition, the Circular will continue to prohibit an agency from reorganizing or restructuring a commercial activity to circumvent the Circular. See ¶ 5.f. of the revised Circular. As a more general matter, the revised Circular is intended to encourage greater trust and more robust participation in public-private competition by both sectors through processes that promote fairness, integrity, and transparency.

ii. *Establishment of competition timeframes.* Timeframe standards have been incorporated into the revised Circular to motivate agencies to complete competitions and to instill greater confidence that agencies will follow through on their plans. Current processes have been criticized for allowing agencies to extend public-private competitions indefinitely. Under the revised Circular, a standard competition must generally be conducted within a 12-month period beginning on the date the competition is publicly announced and ending on the date a performance decision is made. See ¶¶ D.1. & D.6.b. of Attachment B. A standard competition is the general competitive process provided by the revised Circular when an agency selects a provider based on formal offers or tenders submitted in response to an agency solicitation.

While a majority of the commenters supported the concept of time limits, there was considerable disagreement over the appropriate time limits. Several agency commenters requested that the timeframes for a standard competition be lengthened by several months and that greater leeway be given to agencies in need of extensions. Some commenters also complained that the 15-day time limit in the proposed Circular for use of streamlined processes is unrealistic.

The revised Circular continues to impose a 12-month limit as a general rule. In addition to instilling confidence in the process, time limits ensure that the benefits of competition are realized. However, to provide sufficient flexibility to the agencies, the revised Circular provides that the CSO, without delegation, may extend the 12-month

period by 6 months with notification to OMB. The revised Circular does not adopt a provision in the proposed Circular that would have allowed the CSO (referred to as the "4.e. official" in the proposed Circular) to waive the one-year completion requirement at announcement of the competition and set an alternative completion date if the competition was particularly complex and notification was provided to OMB. However, if specified timetables are insufficient, an agency could seek longer completion periods using the Circular's deviation procedures. See ¶ 5.c. of the revised Circular.

As discussed below, the revised Circular significantly refines the framework for using streamlined processes. In doing so, the Circular modifies the proposed timeframes. Specifically, a streamlined competition must be completed within 90 calendar days from public announcement (described below) to performance decision unless the CSO grants a time limit waiver. Time limit waivers may not exceed 45 calendar days, for a maximum of 135 calendar days from public announcement to performance decision. If an agency cannot complete an announced streamlined competition within the time limit, the agency must either convert the streamlined competition to a standard competition or request an extension from OMB using the deviation procedure in paragraph 5.c. of the Circular. See ¶ C.2. of Attachment B.

For added transparency, the revised Circular calls for public announcements of certain key actions taken in connection with either standard or streamlined competitions. In particular, agencies must publicly announce the beginning of competitions, performance decisions made at the end of a competition, and any cancellation of an announced competition. Announcements must be made through FedBizOpps, <http://fedbizopps.gov>, the government-wide point of entry on the Internet for information on federal business opportunities. FedBizOpps is a user-friendly web site that is well known to service providers wishing to help federal agencies meet their missions. Announcements of competition and performance decisions must also be publicized locally. See ¶ B. of Attachment B.

iii. *Elimination of direct conversions and creation of new streamlined competition process.* The revised Circular makes a number of modifications regarding the handling of activities involving 65 or fewer FTEs. These changes seek to instill greater use of public-private competition for small

activities in a highly flexible and minimally burdensome, but fully accountable, manner.

Despite strong policy statements favoring public-private competitions, a number of commenters pointed out that the long-standing practice of permitting "direct conversions" (e.g., typically for work performed by 10 or fewer FTEs) undermines this policy. Until now, under the prior Circular, agencies have been allowed to convert activities from public to private sector performance, or the reverse, under certain circumstances without public-private competition. Commenters asserted that, overall, this authority encourages agencies to go directly to contract as a matter of administrative convenience, even where a more efficient, cost-effective government organization could be the better alternative.

OMB agrees that agencies may be foregoing opportunities to reap savings and make better economic decisions through public-private competitions when they undertake a direct conversion. At the same time, OMB appreciates that the current processes for public-private competition are often time-consuming, costly, and burdensome for use under the conditions in which direct conversions are typically applied. In addition, while the prior Circular provided for a streamlined cost comparison process for evaluating public and private sector performance for commercial activities performed by 65 or fewer FTEs, flexibility has been limited.

The revised Circular builds on the foundation created by the prior Circular's streamlined process, by adding flexibility and accountability. For activities performed by 65 or fewer FTEs, the streamlined process enables agencies to efficiently capture the benefits of public-private competition without the burdens associated with current processes. See ¶¶ A.5.b. and C. of Attachment B.

The new streamlined competition gives agencies considerable latitude to make cost-effective choices. For example, when determining an estimated contract price for performing the activity with a private sector source, an agency may use documented market research or solicit proposals in accordance with the FAR. See ¶ C.1.b. of Attachment B. Agencies are free to use streamlined acquisition tools, such as a Multiple Award Schedules contract (see FAR Subpart 8.4) to obtain proposals from the private sector. In light of the significant efficiencies offered by the new streamlined competition process and the general goal of relying on public-private

competitions, the revised Circular eliminates direct conversions.

The revised Circular incorporates a number of safeguards to ensure that agencies act as responsible stewards when using streamlined procedures. First, unlike the current procedures for streamlined cost comparisons, the revised Circular requires agencies to publicly announce both the start of a streamlined competition and the performance decision made by the agency. See ¶ B. of Attachment B. The notice announcing the initiation of a competition must include, among other things, the activity being competed, incumbent service providers, number of government personnel performing the activity, names of certain competition officials, and the projected end date of the competition. As noted above, agencies will have up to 135 calendar days to conduct a streamlined competition from the date it is publicly announced.

Second, the revised Circular ensures fairness by requiring that separate agency officials document cost estimates—one for agency performance and another for performance by either the private sector or a public reimbursable source. Cost calculations and comparisons must be documented on a standardized streamlined competition form (SLCF). See ¶ C.1. of Attachment B and ¶ A.12. of Attachment C.

Third, although the conversion differential typically used in a public-private competition does not apply to a streamlined competition, agencies must certify that the performance decision, as documented on the SLCF, is cost-effective. See Figure C3. of Attachment C. Agencies must make the certified SLCF available to the public upon request. See ¶ C.3.b. of Attachment B.

Fourth, agencies must track the results of competitions. In addition to reporting quarterly to OMB on the status of in-progress and completed competitions, agencies must monitor results, irrespective of the service provider, after the agency makes a performance decision. Agencies will be expected to implement a quality assurance surveillance plan, record the actual cost of performance, and collect performance information that may be considered in future competitions. See ¶ E.4. of Attachment B.

iv. *Creation of the MEO.* Several agency commenters stressed that effective public-private competition requires that agencies have the flexibility to adjust their in-house team's use of contract support when developing the MEO—i.e., the staffing plan that will form the foundation of the

agency's tender in a standard competition. The commenters noted that an existing mix of government personnel and contractor support may not be optimal given the agency's current needs and, on this basis, objected to language in the proposed Circular prohibiting the creation of new contracts as part of MEO development.

OMB seeks to vest agencies with the managerial authority they need to make sound programmatic decisions and has amended the Circular's coverage on standard competitions to give agencies the flexibility to create the best possible MEO. In developing their MEOs, agencies will be allowed to include contract support through new or potential contracts. However, agencies will not be permitted to include new MEO subcontracts if doing so would result in the direct conversion of work performed by government employees. See ¶ D 4.a.(1)(a). of Attachment B.

While agencies will have greater flexibility in standard competitions, they will be held fully accountable to the taxpayer for their actions. In addition to publicly announcing the start of a competition and performance decisions, the agency must perform and document a comprehensive calculation of costs on a standard competition form (SCF). As part of this effort, agencies must conduct price and cost realism analyses on all cost proposals and estimates, including the agency cost estimate. Directly interested parties may contest performance decisions (see below for additional discussion on contests). Upon resolution of a contest challenging a performance decision, or expiration of the time for filing such a contest, the certified SCF shall be available to the public upon request. Performance decisions under standard competitions, like those made under streamlined competitions, are subject to monitoring to ensure achievement of results. See ¶ E.4. of Attachment B.

#### b. Enhanced Inventories of Government Activities

An accurate inventory identifying an agency's commercial and inherently governmental activities is vital to a federal manager's ability to identify opportunities for which application of public-private competition is likely to yield the best return for the agency. For this reason, the revised Circular refines and expands guidance on the establishment of inventories. See Attachment A of the Circular. The revised Circular builds on existing statutory obligations set forth in the Federal Activities Inventory Reform (FAIR) Act (Pub. L. 105-270; 31 U.S.C. § 501 note) that require agencies to

prepare annual inventories of the commercial activities performed by their employees. These enhancements, many of which incorporate guidance contained in recent OMB memoranda, such as M-03-09 (“Year 2003 Inventories of Commercial and Inherently Governmental Activities”), include the following:

i. *More accurate picture of agencies’ overall activities.* The revised Circular requires agencies to categorize all activities performed by government personnel as either commercial or inherently governmental. Agencies also must submit an annual inventory summary that reasonably equates to their authorized personnel requirements. Thus, in addition to identifying FAIR Act covered commercial activities and inherently governmental activities, agencies must summarize their other commercial inventory—e.g., military personnel, foreign national employees, and “other,” such as activities performed at military depots and by government corporations. Similarly, agencies must include foreign national employees and military personnel employed by the agency in their summarized inherently governmental inventory. See ¶ A.5. of Attachment A.

ii. *Clarified rationales for government performance of a commercial activity.* The revised Circular requires agencies to choose one of six reason codes to explain why their personnel are performing a commercial activity. The reason codes are similar to, but more simplified than, the codes in the proposed Circular. In addition, the CSO must prepare a written justification if the agency concludes that the activity is eligible but not appropriate for private sector performance. See ¶ C.2. of Attachment A. Of particular note, the revised Circular, unlike the proposed Circular, authorizes challenges to an agency’s application of reason codes. See ¶ D.2. of Attachment A. This step responds to calls, as reflected in the public comments, for greater transparency and accountability in the inventory process.

iii. *Consistent identification of inherently governmental activities.* Agencies will be required to submit annual inventories of their inherently governmental positions. As part of this effort, the proposed Circular sought to establish a presumption that all activities are commercial in nature unless an activity is justified as inherently governmental. A large number of commenters supported this change as a mechanism for ensuring that commercial activities are not camouflaged as inherently

governmental. However, others strongly objected, asserting that the policy will pressure agencies to contract for activities that are intimately related to the public interest.

The revised Circular deletes this presumption to reassure the public that there is no intention to outsource inherently governmental activities. Inherently governmental activities must be performed by public employees, and the executive branch will continue to depend on its able workforce to execute these important responsibilities.

At the same time, the revised Circular retains a requirement from OFPP Policy Letter 92-1, Inherently Governmental Functions, and the proposed Circular that there be an exercise of substantial discretion in the application of government authority in order for an activity to be considered inherently governmental. See ¶ B.1.a. of Attachment A. Policy Letter 92-1 defines “inherently governmental” activities to include activities that require the “exercise of discretion” in applying Government authority. While the phrase “substantial discretion” does not appear in the definition, the policy letter provides additional guidance on the meaning of the phrase “exercise of discretion.” This guidance expressly states that “inherently governmental functions necessarily involve the exercise of *substantial* discretion.”

Several commenters asserted that the proposed addition of the word “substantial” to the definition of “inherently governmental” in the revised Circular constitutes a major policy shift. OMB does not agree that this change signifies a major policy shift from Policy Letter 92-1. Although the absence of the adjective “substantial” from the definition in the policy letter may have caused some confusion in the past, OMB does not believe the clarification to require the exercise of substantial discretion will unnecessarily restrict the definition of inherently governmental, as some commenters argued. OMB has concluded that this clarification will enable agencies to make a cleaner delineation between those activities which are appropriately performed only by government personnel and those that are appropriately performed by either the public or private sector. To further assist agencies in identifying inherently governmental activities, the revised Circular provides a more concise definition of “inherently governmental” and rescinds the more complex description contained in OFPP Letter 92-1. See ¶ B.1.a. of Attachment A.

The revised Circular adopts the safeguards that were laid out in the

proposed Circular to ensure that agency designations are rationally based. Specifically, the CSO must justify, in writing, all decisions to designate activities as inherently governmental. In this regard, OMB disagrees with one commenter’s suggestion that the justification requirement imposes an unfair burden on agencies that designate activities as inherently governmental and notes that the revised Circular imposes a similar justification requirement on agencies who believe a commercial activity is unsuitable for competition. Also, the list of inherently governmental activities and the associated justifications will be made available for public review, with limited exception. See ¶¶ A.4. and B.1. of Attachment A. Finally, an agency’s classification of an activity as inherently governmental may be challenged. See ¶ D.2. of Attachment A.

#### c. Better Planning

Many commenters made the point that agencies generally lack experience in planning for and conducting public-private competition. They feared that the results of competition will fall short of expectations—especially in light of the time constraints under which competitions must be conducted—unless agencies make more concerted efforts to properly plan for them.

OMB strongly agrees that effective agency planning is a critical prerequisite for sound sourcing decisions. The revised Circular refines and bolsters the coverage in the proposed Circular on preliminary planning. See ¶ A. of Attachment B. This coverage applies to the two types of competitions authorized by the revised Circular: standard competitions and streamlined competitions.

Before announcing the commencement of a streamlined or standard competition, agencies must complete a series of actions. These actions include:

- Determining the scope (*i.e.*, the activities and positions to be competed);
- Conducting preliminary research to determine the appropriate grouping of activities as business units (*e.g.*, consistent with market and industry structures);
- Assessing the availability of workload data, quantifiable outputs of activities, and agency or industry performance standards; and
- Determining the baseline cost of the activity as performed by the incumbent service provider.

Agencies also must appoint competition officials. For standard competitions, these officials will include:

- An agency tender official (ATO) with decision-making authority who is responsible for the agency tender (*i.e.*, the agency management plan submitted in response to a solicitation for a standard competition) and represents the agency tender during source selection;

- A contracting officer (CO) who is responsible for issuance of the solicitation and the source selection evaluation and participates on the team that develops the performance work statement (PWS);

- A PWS team leader who is responsible for developing the PWS and quality assurance surveillance plan, determines if the government will furnish property, and assists the CO with the solicitation;

- A human resource advisor (HRA) who is responsible for assisting the ATO in human resource-related matters related to the agency tender; and

- A source selection authority (SSA) who is responsible for source selection.

While the revised Circular imposes timeframes to ensure competitions are completed within a reasonable period, these periods will not begin until the agency completes its planning and announces the competition. *See* ¶ B. of Attachment B. This approach will ensure competitions are adequately and properly planned.

The revised Circular, like the proposed Circular, recognizes the talents of the federal workforce, the conditions under which it operates, and the importance of providing the workforce with adequate training and technical support during the competition process to ensure they are able to compete effectively. In this regard, the revised Circular requires that the ATO have access to available resources (*e.g.*, skilled manpower, funding) necessary to develop a competitive agency tender. *See* ¶ A.8.a. of Attachment B. In addition, if material deficiencies are found in an agency tender (*i.e.*, the agency management plan submitted to respond to a solicitation for a standard competition), OMB will expect the agency's CSO to take all necessary steps to identify the source of the problem and allow the ATO the opportunity to correct the deficiency.

#### d. More Manageable and Accommodating Source Selection Processes

As noted above, and discussed more extensively in the preamble to the proposed Circular, the competition processes provided for in the prior Circular have been criticized as time consuming, complex, and difficult to

manage. Many also believe that the prior Circular does not sufficiently accommodate agency needs to consider quality and innovation, especially where these needs may require complex and inter-related services.

The revised Circular's guidance on source selections is designed to be more manageable, more reliant on well-established FAR principles, and more accommodating than that which was developed over the years for the performance of cost comparisons—*i.e.*, the traditional cost-centric process for conducting public-private competitions.

The revised Circular, like the proposed Circular, provides several alternative procedures for conducting source selections, two of which give agencies leeway to take non-cost factors into account. Specifically:

- An agency may use sealed bidding where the award will be made strictly on the basis of price and price-related factors and the agency will not need to negotiate with sources. *See* ¶ D.5.a. of Attachment B.

- An agency may conduct a lowest price technically acceptable source selection where the performance decision is based on the lowest cost offer of all the offers that have been determined to be technically acceptable. This process permits exchanges between the parties. *See* ¶ D.5.b.(1). of Attachment B.

- An agency may conduct a phased evaluation source selection process to have the flexibility of considering alternative performance levels that sources may wish to propose. During the first phase, only technical factors are considered, and all prospective providers (the agency, public reimbursable sources, and private sector offerors) may propose performance standards different from those specified in the solicitation. If the agency determines that a proposed alternative performance standard is appropriate and within the agency's current budget, the agency must issue a formal amendment to the solicitation and request revised submissions. In the second phase, the SSA makes a performance decision after performing price and cost realism analyses to compare offers and tenders that were determined to be technically acceptable at the conclusion of the first phase. *See* ¶ D.5.b.(2). of Attachment B.

- An agency may conduct a tradeoff source selection process with cost-technical tradeoffs similar to those authorized by FAR Part 15, if non-cost factors are likely to play an important role in the selection decision. Like the FAR Part 15 process, all prospective providers (private sector offers, public

reimbursable sources, and the agency) may propose different performance standards than stated in the solicitation. The contracting officer is required to determine if any desired tradeoffs are affordable and document the rationale for these tradeoffs. The Circular limits use of tradeoffs to: (1) Information technology (IT) activities, (2) contracted commercial activities, (3) new requirements, (4) segregable expansions, or (5) activities approved by the CSO before public announcement, with notification to OMB. *See* ¶ D.5.b.(3). of Attachment B.

While the phased evaluation and tradeoff source selection give agencies greater leeway to take non-cost factors into account, OMB anticipates that cost will oftentimes be the most important factor when these processes are used. Either way, the Circular will continue to require the meaningful consideration of cost as a factor in all public-private competitions. For example, in a tradeoff source selection, the specific weight given to cost or price must be at least equal to all other evaluation factors combined unless quantifiable performance measures can be used to assess value and can be independently evaluated. (The solicitation for a tradeoff source selection must identify the specific weight given evaluation factors and sub-factors, including cost or price.) *See* ¶ D.3.a.(3)(b) of Attachment B.

In addition, the revised Circular will continue to require the calculation of a conversion differential for all source selections under standard competitions. The conversion differential is a cost that 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. The conversion differential is added to the cost of performance by a non-incumbent source. If the incumbent provider is a private sector or public reimbursable source, the conversion differential is added to the cost of agency performance. If the agency is the incumbent provider, the conversion differential is added to the cost of private sector or public reimbursable performance. *See* ¶ D.5.c.(4)(c). of Attachment B and ¶ A.5. of Attachment C. For the tradeoff source selection, the conversion differential is added to the cost for a non-incumbent source. Consideration of the conversion differential in the tradeoff process is not intended to discourage agencies from selecting other than the lowest cost provider. Rather, application of the conversion differential is intended to ensure that cost is given meaningful consideration in trading off cost and

non-cost considerations in the final performance decision.

Numerous comments addressed the proposed source selection processes. Most focused either on the tradeoff process (referred to as the "integrated evaluation process" in the proposed Circular) or the application of the Circular to acquisitions of architect and engineering (A&E) services.

*i. Expanded use of tradeoffs.*

Reactions to the proposed coverage on tradeoffs were mixed. Some commenters complained that tradeoffs were inappropriate for competitive sourcing. They asserted that the subjective nature of tradeoffs would invite gaming that, in turn, would discourage robust participation in public-private competitions. Others, by contrast, expressed support for the new option. They pointed out that a more integrated FAR-type competition process, with appropriate elements of Circular A-76, was recommended by the Commercial Activities Panel. (The Panel, which included experts from both the public and private sectors—including Congress, the Executive Branch, industry, and the Federal employee unions—was established by section 832 of the Fiscal Year 2002 Defense Authorization Act to study competitive sourcing. The Panel issued a report with recommendations in May 2002.) Some commenters strongly encouraged OMB to expand use of the tradeoff process and the procedures of FAR Part 15 to activities other than IT to enable agencies to gain broader experiences and insight.

OMB does not agree with those who argue that tradeoffs are inappropriate for public-private competitions. OMB believes that agencies need greater ability to consider non-cost factors if they are to make strategic decisions for the agency. On the other hand, OMB understands that the tradeoff process may not be appropriate in all instances, especially given the special considerations that must be taken into account with any public-private competition, including those involving tradeoffs. See ¶ D.5. of Attachment B. OMB therefore has concluded that the parameters described in the proposed Circular for using tradeoffs are reasonable and has adopted these parameters in the revised Circular. As noted above, these parameters allow the CSO to consider appropriate application of the tradeoff process for non-IT activities on a case-by-case basis.

*ii. Application of the Circular to A&E services.* A number of commenters argued that the procedures in the Circular conflict with statutory requirements in the Brooks Act, 40

U.S.C. 541, *et seq.*, which prescribe a specific process for evaluating quality and cost in proposals for A&E. Some suggested that OMB revise the Circular to reflect the procedures in FAR Subpart 36.6, which implements the requirements of the Brooks Act. Others suggested that direct conversions be authorized to address these needs.

OMB appreciates that the processes statutorily prescribed for acquiring A&E services are different from those in FAR Parts 14 and 15, which are used for most types of purchases other than for A&E services. OMB does not believe that this difference should automatically render the policies and management responsibilities of the Circular inapplicable to A&E services. No clearly commercial activity, whether A&E services or any other type of service, should be sealed off from the forces of competition. However, the revised Circular acknowledges that there may be a need for use of part 36 procedures. See ¶ D.3.a.(2). of Attachment B. OMB believes that additional thought is required regarding the specifics of how the revised Circular would be applied to A&E services and the type of deviation that might be needed. Therefore, OMB encourages agencies that have identified A&E services in their competition plans to consult with OFPP as they prepare to undertake competitions and request deviations as appropriate.

*e. Right of First Refusal*

The proposed Circular would have assigned to the HRA the responsibility for determining, in conjunction with the CO, compliance with right-of-first-refusal requirements when the agency is the incumbent service provider and a performance decision favors private sector performance. One commenter, in particular, strongly objected to this augmentation of responsibilities, asserting that it would effectively force a government official to make hiring decisions for the selected contractor. OMB has concluded that this responsibility should not be assigned to the HRA and the Circular has been revised accordingly. As a result, the contractor will determine who is qualified to work on the contract.

*f. Use of Innovation*

OMB believes the new standard and streamlined competition processes should effectively accommodate agency needs for the vast majority of public-private competitions conducted under the Circular. At the same time, OMB recognizes both the need for flexibility to address unique circumstances and the value in experimentation to improve business management processes as

agencies gain experience with the Circular and greater insight into how its principles are best achieved. For this reason, the revised Circular provides a process by which agencies, with OMB's prior written approval, may deviate from the processes prescribed by the Circular. See ¶ 5.c. of the revised Circular. OMB will carefully consider agency requests for deviations to determine if they are justified and in the government's best interest, taking into consideration the special circumstances that surround a public-private competition, especially those that involve an agency tender. The deviation process may also be considered for pursuit of alternatives to public-private competitions in appropriate circumstances, such as public-private partnerships, public-public partnerships, and high performing organizations.

*g. Focused Implementation*

After considerable deliberation, OMB decided to eliminate the proposed coverage on fee-for-service interagency agreements with public reimbursable sources (referred to in the proposed Circular as interservice support agreements, or ISSAs). The coverage was set forth at Attachment D of the proposed Circular.

OMB believes a more directed management focus, in the short term, should enable agencies to more quickly acclimate themselves to the Circular's improved processes. OMB anticipates that faster agency acclimation to standard and streamlined competitions will translate into successful use of competition for the activities agencies have identified in their competition plans, which, in most cases, are internal activities that have traditionally been shielded from the pressures of the marketplace.

OMB remains committed to finding appropriate incentives for all public and private sources to perform at their best when providing services to the taxpayer. OMB hopes that faster acclimation to the revised Circular, and the institutionalization of competitive sourcing generally, will lay a firm foundation for expanded application of public-private competition to agency-to-agency arrangements over time.

*2. Ensuring Fairness, Integrity, and Transparency*

The revised Circular seeks to improve public trust in sourcing decisions by incorporating appropriate mechanisms of transparency, fairness, and integrity. These mechanisms are critical for ensuring the type of robust participation that will effectively bring market

pressures to bear, as well as the type of even-handed environment that will result in performance by the best source. Mechanisms include the following:

a. Greater Uniformity in the Application of Basic Requirements

Various provisions in the revised Circular are designed to create greater equality in the application of requirements to agencies and private sector offerors. For example:

- The ATO must respond to a solicitation within the same timeframes required of private sector offerors. An agency may extend this timeframe for all offerors if it is in the best interest of the government. *See* ¶ D.4.a.(2). of Attachment B.

- An agency tender may be excluded from a standard competition without cancellation of the competition, if the SSA identifies a material deficiency and the CSO determines that the material deficiency cannot be corrected with a reasonable commitment of resources. *See* ¶ D.5.c.(3). of Attachment B.

- Once work has been competed under the Circular, agencies must re-compete work being performed by government personnel or public reimbursable sources in accordance with the same time limitations imposed by the FAR on contracts with the private sector, unless the CSO grants a specific exemption for a high performing organization. *See* ¶ E.5.b. of Attachment B.

- Before exercising options for additional performance of work that has been competed under the Circular, agencies must determine that performance by the incumbent provider (MEO, public reimbursable source, or private sector provider) meets the requirements of the solicitation and that continued performance is advantageous to the agency. *See* ¶ E.5.a. of Attachment B.

Some commenters felt these changes will undo special considerations in the existing circular that ensure a level playing field between the sectors, especially when the government is the provider. By contrast, others suggested that procedural differences in the handling of agency tenders and private sector offers are still too great, even with the changes described above. For example, some asserted that the latitude given to the government to make a late tender submission is broader than that afforded to the private sector and creates an unfair advantage for the government.

To build confidence in the competitive sourcing process, OMB has minimized differences, wherever possible. At the same time, legitimate special considerations that need to be

addressed to ensure a level playing field have been taken into account. For example, when a material deficiency is discovered in an agency tender and a question arises as to whether the deficiency can be corrected, the agency must take all reasonable steps to enable corrective action. OMB expects the CSO to give consideration to all possibilities for addressing material deficiencies that cannot be easily corrected.

Considerations include the commitment of additional resources and, if necessary, a request to OMB to deviate from the Circular by extending the time for completing a competition—assuming such extension is within reason and the CSO can demonstrate the deficiency will be corrected.

b. Avoiding the Appearance of Conflicts of Interests

The revised Circular establishes new rules to avoid the appearance of a conflict of interest. In particular, the revised Circular separates the PWS team formed to write the PWS from the MEO team formed to develop the agency tender. In addition, the MEO team, directly affected personnel and their representatives, and any individual with knowledge of the MEO or agency cost estimate in the agency tender are not allowed to be advisors to, or members of, the source selection evaluation board. *See* ¶ D.2. of Attachment B.

c. Public Release of Tenders

The revised Circular adds a new provision requiring the release of the agency tender, public reimbursable tenders, and the certified SCF upon the resolution of any contest challenging the performance decision or the expiration of the time for filing such a contest. *See* ¶ D.6.e. of Attachment B. The SCF documents all costs calculated in the competition to make a performance decision. Several agencies asserted that this information should be treated as proprietary and not released—even after a performance decision—just as a private sector offer would not be released under similar circumstances. OMB believes that a tender should not be hidden from the taxpayer to whom we are ultimately accountable. At the same time, the Circular makes clear that proprietary information of private sector providers of subcontracts included in agency or public reimbursable tenders shall not be released.

d. Fairer and More Accurate Cost Estimates

As a general matter, Attachment C is intended to ensure that public-private competitions reflect the full cost of performance by the government so that

competitions are fair. Agencies will be expected to use the costing procedures in Attachment C combined with the COMPARE costing software to calculate and document the costs on the SCF or SLCF for a streamlined or a standard competition. Agencies may not use agency budgetary estimates to develop government cost estimates. *See* ¶ 4.h. of the revised Circular.

The revised Circular also makes adjustments to the handling of certain costs to eliminate unfair results. For example, based on contractor recommendations in the public comments, the revised Circular prohibits the government from including the cost of contractor security clearances as a one-time conversion cost that is added to the contractor's price. By removing this cost from the comparison, a more level playing field is created between the government and the private sector.

e. Improved Process for Contests

One agency commenter with significant experience in using A-76 recommended that the revised Circular rely on the agency protest process set forth in the FAR rather than perpetuating a separate administrative process. The commenter complained that the Circular's administrative process adds little value beyond that offered by relying upon the FAR.

The revised Circular replaces the prior Circular's administrative appeals process with the processes in the FAR at 33.103. As a result, challenges by directly interested parties and resolution of such challenges by the agency are governed by the procedures in FAR 33.103. A directly interested party may challenge any of the following actions taken in connection with a standard competition: (1) A solicitation; (2) the cancellation of a solicitation; (3) a determination to exclude a tender or offer from a standard competition; (4) a performance decision, including, but not limited to, compliance with the costing provisions of the Circular and other elements in an agency's evaluation of offers and tenders; or (5) a termination or cancellation of a contract or letter of obligation if the challenge contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the performance decision. No party may contest a streamlined competition. However, agencies will be held accountable for performance decisions made in connection with such competitions, as addressed in ¶ E. of Attachment B.

Several commenters complained the definition of "interested party" in the proposed Circular was too narrow because it limited a public offeror's access to administrative relief only through the ATO. OMB seeks to ensure equal and fair access to challenge processes and has revised the Circular to broaden the definition of interested party to permit administrative challenge by a single representative appointed by a majority of directly affected employees in addition to the ATO. See the definition of directly interested party in Attachment D.

### 3. Strengthening Accountability for Results

The ultimate success of Circular A-76 in delivering results for the taxpayer requires that public or private sources make good on their promises to the government. To this end, the revised Circular incorporates various accountability protections. For example, as discussed in ¶ C.1.a.ii. of this preamble, competition timeframes have been incorporated into the Circular, among other things, to instill greater confidence by all participants that agencies are committed to the timely and competitive selection of the best provider. Other accountability mechanisms include the following:

#### a. Centralized Oversight Responsibility

Agencies must establish a program office responsible for the daily implementation and enforcement of the Circular. Improved oversight will serve to enhance communications, facilitate sharing of lessons learned, and significantly improve overall compliance with the Circular. See ¶ 4.g. of the revised Circular.

#### b. Letters of Obligation

For a performance decision favoring the agency, the CO will be required to establish an MEO letter of obligation with an official responsible for performance of the MEO. The CO shall incorporate appropriate portions of the solicitation and the agency tender into the MEO letter of obligation and distribute the letter to appropriate individuals including the ATO. (For a performance decision favoring a public reimbursable source, the CO will be required to develop a fee-for-service agreement with the public reimbursable source.)

#### c. Improved Post Competition Oversight

Agencies must track agency execution of streamlined and standard competitions, using a government-wide management information system. Information to be tracked by this system

will include, among other things: Baseline costs, start date, number of directly affected employees performing the activity, solicitation information, type of acquisition and source selection, decisions for tradeoff source selections, number of private sector offers received, performance date and decision, socio-economic information, decisions for tradeoff source selections, and number of directly affected employees that are involuntarily separated. Agencies must review their data to make process improvements, identify streamlining measures, determine trends, and identify savings. Tracking is required irrespective of whether the service provider is from the public or private sector. This system will help to ensure public providers are subjected to the same oversight that private providers routinely face.

Finally, agencies must post lessons learned and best practices on SHARE A-76! See ¶ 4.g. of the revised Circular. In this way, current experiences can routinely be used to inform and improve competition practices and decision making.

**Mitchell E. Daniels, Jr.,**  
Director.

[FR Doc. 03-13457 Filed 5-28-03; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

### Issuer Delisting; Notice of Application To Withdraw From Listing and Registration on the American Stock Exchange LLC (Anworth Mortgage Asset Corporation, Common Stock, \$.01 par Value) File No. 1-13709

May 22, 2003.

Anworth Mortgage Asset Corporation, a Maryland corporation ("Issuer"), has filed an application with the Securities and Exchange Commission ("Commission"), pursuant to section 12(d) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 12d2-2(d) thereunder,<sup>2</sup> to withdraw its Common Stock, \$.01 par value ("Security"), from listing and registration on the American Stock Exchange LLC ("Amex" or "Exchange").

The Issuer stated in its application that it has met the requirements of Amex Rule l8 by complying with all applicable laws in the State of Maryland, in which it is incorporated, and with the Amex's rules governing an

issuer's voluntary withdrawal of a security from listing and registration.

The Issuer states that it is taking such action for the following reasons: the Issuer recently listed its Security on the New York Stock Exchange ("NYSE") stating that doing so should be beneficial to the stockholders, will provide greater liquidity, and will increase the Company's exposure to the European markets.

The Issuer's application relates solely to the withdrawal of the Securities from listing on the Amex and from registration under section 12(b) of the Act<sup>3</sup> shall not affect its obligation to be registered under section 12(g) of the Act.<sup>4</sup>

Any interested person may, on or before June 17, 2003, submit by letter to the Secretary of the Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609, facts bearing upon whether the application has been made in accordance with the rules of the Amex and what terms, if any, should be imposed by the Commission for the protection of investors. The Commission, based on the information submitted to it, will issue an order granting the application after the date mentioned above, unless the Commission determines to order a hearing on the matter.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>5</sup>

**Jonathan G. Katz,**  
Secretary.

[FR Doc. 03-13367 Filed 5-28-03; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

### Sunshine Act Meeting

**FEDERAL REGISTER CITATION OF PREVIOUS ANNOUNCEMENT:** 68 FR 28302, May 23, 2003.

**STATUS:** Closed Meeting/Open Meeting.

**PLACE:** 450 Fifth Street, NW., Washington, DC.

**DATE AND TIME OF PREVIOUSLY ANNOUNCED MEETING:** Tuesday, May 27, 2003 at 2 p.m. and Wednesday, May 28, 2003 at 10 a.m.

**CHANGE IN THE MEETINGS:** Date and Time Changes.

The Closed Meeting scheduled for Tuesday, May 27, 2003 at 2 p.m., has been changed to Wednesday, May 28, 2003 at 3:30 p.m.

<sup>3</sup> 15 U.S.C. 78j(b).

<sup>4</sup> 15 U.S.C. 78j(g).

<sup>5</sup> 17 CFR 200.30-3(a)(1).

<sup>1</sup> 15 U.S.C. 78j(d).

<sup>2</sup> 17 CFR 240.12d2-2(d).