April 14, 1999

Mr. David Childs
Budget Analysis and Systems Division
NEOB Room 60002
Office of Management and Budget
725 17th Street, N.W.
Washington, D.C. 20503


Dear Mr. Childs:

These comments are submitted on behalf of the Section of Public Contract Law of the American Bar Association (“the Section”) on the above-referenced matter. The Section consists of attorneys and associated professionals in private practice, industry and Government service. The Section's governing Council and substantive committees contain a balance of members representing these three segments, to ensure that all points of view are considered. In this manner, the Section seeks to improve the process of public contracting for needed supplies, services and public works.

The views expressed herein are presented on behalf of the Section of Public Contract Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing policy of the Association.

The Section has several concerns about the proposed guidance on implementation of the Federal Activities Inventory Reform Act ("FAIR").

First, the Section believes that, by simply amending OMB Circular A-76 rather than issuing separate regulatory guidelines, OMB has missed an opportunity to strengthen the government’s decisionmaking process for determining whether to contract out for commercial services. In passing the FAIR Act, Congress required agencies to (1) create a uniform inventory of non-inherently governmental activities (i.e. "commercial activities"); (2) establish procedures for the challenge of the selection or non-selection of an activity; and (3) use a competitive process to select a source to perform commercial activities on the inventory list. Because OMB Circular A-76 does not have statutory force behind it, amending the Circular simply does not compel agencies to take the actions specified. Therefore, individual agency implementation is likely to be inconsistent. The Section believes that the Act requires separate implementing guidelines in the Federal Acquisition Regulation (FAR) or other appropriate agency regulations to assure that agencies use consistent procedures and respond uniformly in achieving the goals of the Act.

Second, the Section believes that OMB should provide more detailed instructions to agencies on several key aspects of the FAIR Act. For example, implementing regulations should provide detailed instructions as to what constitutes "inherently governmental" activity. Although the FAR, Subpart 7.5, already includes some guidance on inherently governmental functions, Circular A-76 references OFPP Policy Letter 92-1. That policy letter has not been revised in several years, and further guidance is
necessary to address the current array of activities performed by government employees. Further, OFPP Policy Letter 92-1 indicates that there is no judicial review of the government’s decisionmaking -- a conclusion that clearly is incorrect after the passage of the FAIR Act.

Additionally, the regulations should ensure that inventories will be timely submitted and will provide useful information to the public. Specifically, we recommend that the inventories include a brief rationale as to why the activity has been classified as commercial or inherently governmental, to allow meaningful evaluation by interested parties.

Finally, we believe guidelines are needed to set forth clearly the procedures for challenging the inclusion or exclusion of an activity in the inventory under Section 3 of the Act. The Congressionally mandated appeal process cannot be appropriately implemented within the confines of OMB Circular A-76. Rather, the appeals process needs implementing regulations that have the force and effect of law. In order for the FAIR Act to achieve its goals, interested parties must have procedural safeguards that will ensure that agencies will undertake a substantive review of each challenge raised. Likewise, officials tasked with reviewing such challenges need regulatory guidance on how they are to carry out their duties under the Act.

We appreciate the opportunity to have our views considered. Please feel free to call me if you have any questions about these comments.

Sincerely,

David A. Churchill

cc: Rand L. Allen
Gregory A. Smith
Norman R. Thorpe
Patricia A. Meagher
Marcia G. Madsen
Agnes P. Dover
Council Members
Chair and Vice Chairs, Privatization and Outsourcing Committee
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