

Implementation of the Federal Activities Inventory Reform Act of 1998

OFFICE OF MANAGEMENT AND BUDGET

Implementation of the Federal Activities Inventory Reform Act of 1998, (Public Law 105-270) ("the FAIR Act")

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

ACTION: Proposed Guidance on the Implementation of the FAIR Act Through Revisions to the Supplemental Handbook to OMB Circular A-76.

SUMMARY: The Office of Management and Budget (OMB) requests agency and public comments on its proposed guidance to implement the recently-enacted "Federal Activities Inventory Reform Act of 1998" (Public Law 105-270) (the "FAIR Act"). The FAIR Act directs agencies to develop inventories of their commercial activities and to conduct cost comparisons to determine whether a commercial activity that is performed by a governmental source should instead be performed by a private-sector source. The FAIR Act requires that Federal agencies must submit to OMB, each fiscal year, a list of all their activities that are not inherently governmental ("commercial activities") and that are performed by Federal employees, with their associated Full-Time-Equivalents (FTE). (FAIR Act, Section 2(a)). OMB will review each agency's list for the fiscal year and consult with the agency regarding its content. (FAIR Act, Section 2(b)). Upon the completion of this review and consultation, the agency must transmit a copy of the list to Congress and make the list available to the public. (FAIR Act, Section 2(c)). An interested party, as defined by FAIR, may then challenge the omission or inclusion of a particular activity on the list (FAIR Act, Section 3) and the agency must then notify Congress of any changes to the list that result from this process and make the changes available to the public. (FAIR Act, Section 2(c)(2)). Finally, the Fair Act requires agencies, within a reasonable time after making final decisions to include or exclude activities on the list, to review the activities on the list for possible performance by the private sector. When an agency considers contracting with a private-sector source for the performance of a commercial activity, the agency must use a competitive process to select the source (except as may otherwise be provided in a law, Executive order, regulation, or executive branch circular), in accordance with OMB guidance. In conducting cost comparisons, agencies must ensure that all costs are considered (including certain specified costs) and that these costs are realistic and fair. (FAIR Act, Section 2(d)-(e))

In complying with the FAIR Act, agencies will implement the OMB Circular A-76, "Performance of Commercial Activities," which establishes Federal policy for the performance of recurring commercial

activities. The Circular distinguishes between those agency activities that are commercial in nature and those that are inherently governmental. See Circular A-76, Sections 6a and 6e (definitions of "commercial activity" and "governmental function"); Office of Federal Procurement Policy Letter 92-1, "Inherently Governmental Functions," 57 FR 45096 (September 30, 1992). Guidance for implementing the Circular's general policies is contained in a Supplemental Handbook for Circular A-76, which OMB revised in 1996. See 61 FR 14338 (April 1, 1996). Under the Circular and its Supplemental Handbook, agencies must develop and maintain annual inventories of their commercial activities. When deciding whether to have an activity performed by a governmental or private-sector source, agencies must also conduct cost comparisons according to specified criteria and procedures. The proposed revisions to the Handbook would inform agencies of the Act's requirements and conform the Handbook to those requirements. The revisions also would revise the Handbook to clarify that agencies must rely on the Handbook's guidance with respect to the cost-comparison competition requirements of the FAIR Act. These requirements establish a competitive source-selection process which compares costs in a complete, fair, and reasonable manner.

DATES: Written comments on the proposed revisions must be filed on or before April 15 to be considered.

ADDRESSES: Address all comments to the Budget Analysis and Systems Division, NEOB Room 6002, Office of Management and Budget, 725 17th Street, N.W., Washington, D.C. 20503, FAX Number (202) 395-7230.

FOR FURTHER INFORMATION CONTACT: Mr. David Childs, (202) 395-6104.

AVAILABILITY: Copies of the FAIR Act, the current OMB Circular A-76 and its Supplemental Handbook may be obtained by contacting the Executive Office of the President, Office of Administration, Publications Office, Washington, D.C. 20503, at (202) 395-7332. These documents are also accessible on the OMB Home page. The online OMB Home page address (URL) is whitehouse.gov/OMB.

SUPPLEMENTARY INFORMATION: On October 12, 1998, President Clinton signed into law the "Federal Activities Inventory Reform Act of 1998" (Public Law 105-270) (the "FAIR Act"). The FAIR Act directs agencies to develop inventories of their commercial activities and to conduct cost comparisons to determine whether a commercial activity that is performed by a governmental source should instead be performed by a private-sector source.

To facilitate agency implementation of the FAIR Act, OMB proposes to revise the Supplemental Handbook (particularly Appendix 2, which addresses the commercial-activity inventory). These proposed revisions would inform agencies of the FAIR Act's requirements and, to avoid duplication, conform Handbook provisions so that they cross-reference and parallel relevant FAIR Act provisions.

The changes would incorporate the statutory deadline of June 30th for agency submissions to OMB of annual commercial-activity inventories and would add two data elements to the inventory's description of each activity.

Under the FAIR Act, when an agency considers contracting with a private-sector source for the performance of an activity on the inventory, it must use a competitive process to select the source and must ensure that all costs are considered (including certain specified costs) and that the costs considered are realistic and fair. See FAIR Act, Section 2(d)-(e). This proposal would revise the Supplemental Handbook (in Part I, Chapter 1, Paragraph A, and in Part II, Chapter 1, Paragraph A) to clarify that agencies conducting such cost-comparisons must rely on the guidance in Circular A-76 and the Supplemental Handbook. They require that all competitive costs of in-house and contract performance be included in the cost comparison, including all costs of quality assurance, technical monitoring, liability insurance, retirement benefits, disability benefits, and overhead that may be allocated to the function under study or may otherwise be expected to change as a result of changing the method of performance. Since the Supplemental Handbook's guidance on cost comparisons has been recently revised and is fully consistent with the FAIR Act, OMB does not propose to revise that guidance at this time.

OMB requests comments on its proposed guidance for implementing the FAIR Act through revisions to the Supplemental Handbook for Circular A-76.

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Deputy Director for Management

To implement the FAIR Act, OMB proposes to make the following revisions to the Supplemental Handbook for OMB Circular A-76:

1. Part I, Chapter 1, Paragraph A of the Supplemental Handbook (p. 3) is revised by adding a reference to the FAIR Act in the first sentence. As revised, Paragraph A would read as follows:

"A. General

"This Part sets forth the principles and procedures for managing the Government's acquisition of recurring commercial supporting activities, implementing the "Federal Activities Inventory Reform Act of 1998" (FAIR Act, P.L. 105-270) and Circular A-76. Exhibit 1 summarizes the conditions that permit conversion to or from in-house, contract or interservice support agreement (ISSA) performance."

2. Part II, Chapter 1, Paragraph A.1 of the Supplemental Handbook (p. 17) is revised by adding a reference to the FAIR Act in the first sentence. No revisions are proposed to Paragraph A.2-4. As revised, Paragraph A.1 would read as follows:

"1. Part II provides generic and streamlined cost comparison guidance to comply with the provisions of the "Federal Activities Inventory Reform Act of 1998" (P.L. 105-270)(the "FAIR Act"), Circular A-76 and this Supplement. This includes guidance for developing in-house costs based upon the Government's Most Efficient Organization (MEO) and other adjustments to the contract and interservice support agreement (ISSA) price. It also sets out the principles for development of cost-based performance standards or other measures that are comparable to those used by commercial sources. Appendices 6 and 7 provide sector-specific cost comparison guidance."

3. The title of Appendix 2 of the Supplemental Handbook (p. 38) is revised from "OMB Circular No. A-76 Inventory" to "Commercial Activity Inventory". This inventory is now required by the FAIR Act as well as by Circular A-76.

4. Paragraph A of Appendix 2 of the Supplemental Handbook (p. 38) is revised in several ways. The introductory sentences now refer to the FAIR Act's requirements and incorporate its due date (June 30th) for submission to OMB of an agency's commercial-activity inventory. Two data elements are added to the inventory's description of an activity. These additional data elements (k and l, below) correspond to the data elements required under Section 2(a)(1) and (3) of the FAIR Act (the Handbook already requests the full-time employee data under Section 2(a)(2)). In addition, the existing data element for "Location/organization unit" is being separated out into two elements ("Location" and "Organization Unit"). Finally, a concluding sentence is added to clarify that agencies have the flexibility to automate and structure the inventory so long as all data elements are included. As revised, Paragraph A would read as follows:

"A. Preface

"Agencies must implement and manage cost comparisons in accordance with the "Federal Activities Inventory Reform Act of 1998" (P.L. 105-270)(the "FAIR Act"), Circular A-76 and this Supplement. In this regard, by June 30 of each year, each agency must submit to OMB a report that contains an inventory of the agency's commercial activities. These reports must identify those commercial activities that are exempt from cost comparison requirements and must describe the status of activities that are subject to cost comparison. Each agency must maintain an annual inventory of all commercial activities performed by in-house FTE, including, at a minimum, the following data elements:

- a. State.
- b. Location.
- c. Organization unit.
- d. FTE.
- e. Activity function code.
- f. Reason code.

- g. Year of cost comparison or conversion.
- h. CIV/FTE savings.
- i. Annual dollar savings.
- j. Date of completed Post-MEO Performance Review.
- k. Year the activity first appeared on the agency inventory, under FAIR.
- l. Name of a Federal employee responsible for the activity from whom additional information about the activity may be obtained.

Agencies have the discretion to automate and to structure this detailed inventory as they believe most appropriate, so long as the inventory includes each of these data elements."

5. Appendix 2 of the Supplemental Handbook (p. 38) is revised by adding two new paragraphs that reflect the requirements of the FAIR Act. New Paragraph G describes the review and publication of the agency commercial-activity inventories and the challenge-and-appeals process pertaining to their development. New Paragraph H requires agencies to review the activities on their inventories of commercial activities and to use a competitive process, with established cost comparison procedures, when the agency considers contracting with a private-sector source for the performance of an activity on the inventory. The new Paragraphs G and H would read as follows:

"G. FAIR Act review and publication of inventories; challenges and appeals regarding such inventories

"In accordance with Section 2 of the FAIR Act, OMB will review the agency's inventory of commercial activities and consult with the agency regarding its content. (Section 4 of the FAIR Act specifies the agencies that are subject to the Act, and exceptions from the Act's coverage.) Upon completion of this review and consultation, the agency must transmit a copy of the inventory to Congress and make the inventory available to the public. OMB will publish a notice in the *Federal Register* that the inventories are available to the public.

"Under Section 3 of the FAIR Act, an agency's decision to include or exclude a particular activity from the inventory is subject to administrative challenge and appeal by an "interested party." Section 3(b) of the FAIR Act defines "interested party"as:

1. A private sector source that (A) is an actual or prospective offeror for any contract or other form of agreement to perform the activity; and (B) has a direct economic interest in performing the activity that would be adversely affected by a determination not to procure the performance of the activity from a private sector source.
2. A representative of any business or professional association that includes within its membership private sector sources referred to in 1. above.

3. An officer or employee of an organization within an executive agency that is an actual or prospective offeror to perform the activity.

4. The head of any labor organization referred to in section 7103(a) (4) of title, 5 United States Code, that includes within its membership officers or employees of an organization referred to in 3. above.

An interested party may submit an initial challenge, to the inclusion or exclusion of an activity, within 30 calendar days after publication of the notice of availability in the *Federal Register*. The challenge must set forth the reasons for the interested party's belief that the particular activity should be reclassified as inherently governmental (and therefore be deleted from the inventory) or as commercial (and therefore be added to the inventory), in accordance with OFPP Policy Letter 92-1 (see Appendix 5). Each agency must designate the agency official who has the responsibility for receiving and deciding such challenges (that official may be the official identified in paragraph 9.a of the Circular, or that official's designee). The deciding official must decide the initial challenge and transmit to the interested party a written notification of the decision within 28 calendar days of receiving the challenge. The notification must include a discussion of the rationale for the decision and, if the decision is adverse, an explanation of the party's right to file an appeal. An interested party may appeal an adverse decision to the head of the agency within 10 working days after receiving the written notification of the decision. Within 10 working days of receipt of the appeal, the agency head must decide the appeal and transmit to the interested party a written notification of the decision together with a discussion of the rationale for the decision."

"H. FAIR Act competitions

"Section 2(d) of the FAIR Act requires each agency, within a reasonable time after the publication of its commercial-activity inventory, to review the activities on the inventory. In addition, Section 2(d)-(e) of the FAIR Act provides that, when an agency considers contracting with a private-sector source for the performance of an activity on the inventory, the agency must use a competitive process to select the source and must ensure that, for the comparison of costs, all costs are considered (including certain specified costs) and the costs considered are realistic and fair. In carrying out these requirements, agencies must rely on the guidance contained in Circular A-76 and this Supplemental Handbook. All competitive costs of in-house and contract performance are included in the cost comparison, including the costs of quality assurance, technical monitoring, liability insurance, retirement benefits, disability benefits and overhead that may be allocated to the function under study or may otherwise be expected to change as a result of changing the method of performance."