

WAIVERS TO THE A-76 COST COMPARISON PROCESS

The OMB Circular A-76 Revised Supplemental Handbook, *Performance of Commercial Activities*, March 1996, permits waivers to the A-76 cost comparison process; therefore, it is an additional procedure to DoD Instruction 4100.33, *Performance of Commercial Activities Procedures*, September 9, 1985.

A-76 cost comparison waivers can be a useful supplement to the Competitive Sourcing Program, when appropriate. As permitted by the OMB Circular A-76 Revised Supplemental Handbook, DoD supports this approach given sufficient justification. An A-76 cost comparison waiver permits conversion to or from in-house or contract performance without performing the A-76 cost comparison process. The waiver analysis shall apply to the decision not to conduct an A-76 cost comparison rather than whether a particular proposal is consistent with overall Component goals or objectives or is one a Component wishes to investigate. During the analytical process leading to a decision of whether to request a cost comparison waiver, Components should solicit the views, comments, and recommendations of the incumbents [i.e., government employees and their representatives or the private sector contractor(s)]. However, the decision to submit a waiver request is a management determination. Additionally, an A-76 cost comparison waiver shall apply to the entire A-76 cost comparison process and may not be used to waive specific provisions or cost factors within the A-76 cost comparison process itself.

Cost Comparison Process Waivers: DoD procedures for waiving a specific cost comparison in accordance with the waiver procedures of OMB Circular A-76 Revised Supplemental Handbook follow:

1. In accordance with the OMB Circular A-76 Revised Supplemental Handbook, Chapter 1, Paragraph E.(3)(a)(1) and (2), waivers of A-76 cost comparisons shall be permitted for conversions from or to in-house or contract/ISSA performance only when:

(a) The conversion will result in a significant financial or service quality improvement and will not reduce significantly the level or quality of competition in the future award or performance of the work, or

(b) The in-house or contract offer has no reasonable expectation of winning a competition under the A-76 cost comparison process.

2. An A-76 cost comparison waiver does not constitute a waiver of applicable statutes. A-76 cost comparison waivers may not be used to circumvent statutory requirements. Before converting an in-house commercial activity to contract performance, DoD Components shall comply with applicable statutory requirements such as 10 U.S.C. § 2461 (provides general cost comparison notifications and inventory provisions), 10 USC § 2462 (requires private sector source to be more cost effective), 10 U.S.C. § 2467 (provides cost comparison requirements with respect to retirement costs and

consultation with Government employees and congressional notification of cost comparison waivers), P.L. 106-79 § 8014 and successor Appropriations Act provisions (provides MEO requirement provisions), and any other pertinent laws.

3. A-76 cost comparison waivers are granted to DoD for Federal installations scheduled for closure or in cases where functions are designated for termination on specific dates. Such waivers are not required to meet the requirements in Paragraph 1 above. DoD Components may elect to grant these waivers on a case-by-case basis.

4. The A-76 cost comparison waiver approval authority is delegated to the official that a DoD Component has designated to comply with Paragraph 9.a. of OMB Circular A-76, *Performance of Commercial Activities*.

5. A-76 cost comparison waiver requests shall be submitted in writing to the A-76 cost comparison waiver approval authority (see Paragraph 4. above) and include the following information: (1) the commercial activity(s), location(s), and full-time equivalents (military and civilian) impacted by the waiver request (for multiple locations a breakout by location is required); (2) sufficient justification, supporting analysis, and data; (3) plans for compliance with statutory requirements; and (4) a public affairs plan of action. The A-76 cost comparison waiver request and approval document serve as the administrative record. The public affairs plan shall include the timing of appropriate notifications for adversely affected civilian and military employees, union representatives, incumbent contractors, etc., as well as outline how the appropriate DoD, legislative, and local community notifications will be made.

(a) If the A-76 cost comparison waiver is based on Paragraph 1.(a) above, the request shall clearly indicate why the conversion will result in a significant financial or service quality improvement to the Department. The term "significant" shall be supported by data analysis. The request also shall describe "how" the level or quality of competition in future award or performance of the work will not be reduced.

(b) If the A-76 cost comparison waiver is based on Paragraph 1.(b) above, the request shall include detailed analysis documenting why the incumbent (in-house or contractor) will have no reasonable expectation of winning a competition under the A-76 cost comparison process.

(c) A-76 cost comparison waiver requests for a conversion from in-house to contract shall include a statement that maximum efforts will be made to assist adversely affected civilian employees in accordance with 5 CFR Part 330 and Part 351, that they will be offered the Right of First Refusal as required by FAR Part 52.207-3, and explain provisions for how these employees will be allowed to appeal the A-76 cost comparison waiver decision (see Paragraph 7. below).

(d) A Component's decision to waive the A-76 cost comparison process shall be based solely upon whether the activity proposed for conversion strictly meets the requirements in Paragraph 1 [i.e., OMB Circular A-76 Revised Supplemental Handbook,

Chapter 1, Paragraph E.(3)(a)(1) and (2)], and not whether the proposal in general is consistent with overall Component policies, goals, or objectives, or whether the proposal should be pursued by the Component as a matter of overall sound business judgement.

6. Before a public announcement is made of the A-76 cost comparison waiver approval, DoD Components shall make the following announcements in the following order:

(a) DUSD(I). A copy of the A-76 cost comparison waiver request and approval document shall be provided with the notification to DUSD(I) five work days prior to Paragraphs (b) and (c) below.

(b) Concurrently notify Congress (per 10 U.S.C. § 2461) and directly affected civilian employees and their union representatives as well as any affected military or incumbent contractors. A copy of the A-76 cost comparison waiver request and the approval document shall be provided to these individuals upon notification and they shall be informed of the appeal process at the same time.

(c) Local community. An official press release is recommended.

7. A-76 cost comparison waivers shall be appealable. The following guidance is provided for addressing these appeals:

(a) Eligible appellants shall be limited to the Federal employees and their representatives and existing Federal contractors affected by a decision to waive the A-76 cost comparison process.

(b) Eligible appellants shall file an appeal during the Public Review Period that begins on the date a copy of the A-76 cost comparison waiver request and the approval document were made available to the appellants and ends within 20 calendar days (see Paragraph 6. above).

(c) Appeals shall be submitted to the official who signed the A-76 cost comparison waiver approval document. This official then provides them to the Administrative Appeal Authority who shall determine the outcome of the appeal.

(d) DoD Components shall appoint an Administrative Appeal Authority for the A-76 cost comparison waiver appeal, who shall be two organizational levels above the official who signs the A-76 cost comparison waiver approval document (see Paragraph 4 above).

(e) In accordance with the Revised Supplemental Handbook, Part I, Chapter 3, Paragraph K., A-76 cost comparison waiver Appeal must:

(1) Address specific questions regarding agency compliance with requirements and procedures of OMB Circular A-76 and the Revised Supplemental Handbook.

(2) Address factual questions regarding the A-76 cost comparison waiver justification.

(3) Identify specific instances of agency denials of information not otherwise protected by law or regulation.

(f) The Administrative Appeal Authority for the A-76 cost comparison waiver appeal should make a final decision within 30 calendar days from the date of the end of the Public Review Period and provide a copy of the written decision to the appellant. This decision should provide an explanation of why the appeal is sustained, does not meet the appeal criteria or why the appeal is denied. The A-76 cost comparison waiver appeal decision made by the Administrative Appeal Authority is to be final and not subject to further review as provided by the Revised Supplemental Handbook, Part I, Chapter 3, Paragraph K.7.