

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: