

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