

12th Annual Government Ethics Conference  
March 12, 2003

Other Ethics Issues (Cats and Dogs)

A-76

**I. Summary of Ethics Issues.** See attached outline: *Ethics Aspects of Outsourcing and Privatization*, dated November 21, 2001, prepared by Ms. Elizabeth Buchanan, Office of the General Counsel, Department of Defense, for a detailed discussion of these issues.

A. Conflicts of Interest (CoI)

1. Employee's Salary (5 C.F.R. 2640.203(d))
2. Right of First Refusal (RoFR)
3. Outside Employment

B. Post Employment

1. 18 U.S.C. 207
2. 41 U.S.C. 423 (Procurement Integrity Act)

D. Basic Fairness

1. FAR 9.5 (Organizational CoI)
2. GAO Decisions

**II. Proposed Revisions to OMB Circular A-76.** See 67 Fed. Reg. 69769, dated November 19, 2002. Significant changes to the A-76 process have been proposed to:

A. Reduce Conflicts of Interest (Organizational?)

1. Elimination of RoFR for employees personally and substantially participating on the PWS, MEO, or SSEB
2. Segregate PWS, MEO, and SSEB teams

B. Expand Definition of Commercial Activities, i.e., creates presumption that all activities are commercial in nature and subject to being contracted out unless justified as inherently Governmental (ethics counselors?).

**III. Office of Government Ethics (OGE) Comments on Proposed Revision to OMB Circular A-76.** OGE General Counsel letter to OMB dated December 19, 2002.

A. Conflicts of Interest

1. OMB Cir. A-76 needs to recognize/clarify distinction between organizational conflicts of interest (FAR concept) and conflicting financial interests under 18 U.S.C. § 208 and 5 C.F.R. 2635.402 (ethics concept). Concern about the potential for creating "competing, contradictory, and multiple ethics systems" for executive branch employees.

2. OMB Cir. A-76 needs to clarify that "personal and substantial participation," as that term is used in the Circular and FAR 3.104, is not binding for the purposes of determining "personal and substantial participation" under 18 U.S.C. §§ 207 and 208 and their implementing regulations.

B. Inherently Governmental Functions

1. DAEOs and alternates perform inherently Governmental functions

2. Some functions of ethics counselors may be appropriate for contracting out, e.g., training and drafting of ethics advice for ultimate review by DAEO

**IV. Department of Defense (DOD) Comments on Proposed Revisions to OMB Circular A-76.** Deputy Under Secretary of Defense (Installations and Environment) letter to OMB dated January 15, 2003.

A. RoFR. Eliminate proposed restrictions as being (1) unnecessary (too speculative to create disqualifying financial interest and existing post-employment restrictions adequately protect the Government) and (2) unwise (create incentive to favor in-house performance).

B. Team Memberships. Eliminate absolute prohibition on joint membership. Allow agencies to decide what constitutes "substantial participation" giving rise to a conflict of interest.