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ENERGY AND MINERALS
DIVISION

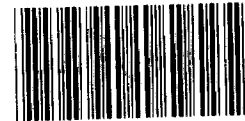
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B-204698

RELEASED

The Honorable James A. McClure, Chairman
Committee on Energy and Natural Resources
United States Senate

Subject: The Department of Energy's Use of
Support Service Contractors to
Perform Basic Management Functions
(EMD-81-144)



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Dear Mr. Chairman:

On October 29, 1980, the Chairman, Senate Committee on Energy and Natural Resources requested that we examine the Department of Energy's (DOE's) use of contractors to perform work involving basic governmental management functions. A previous GAO report ^{1/} indicated that some DOE contracts were written so that contractors could be performing these types of functions. At the time of that review, however, we could not determine if contractors were, in fact, performing basic management functions. Therefore, following the change in the Committee chairmanship and discussions with your staff, we directed this review effort toward identifying cases where such performance was actually taking place.

The problem of contractors performing basic management functions for Federal agencies is not new. GAO has published several reports concerning this issue during the past 20 years, particularly in the area of consultant contracts. Most recently, we issued a report entitled, "Civil Servants and Contract Employees: Who Should Do What For The Federal Government?" (FPCD-81-43, 6/19/81) which discusses the problem of contractors performing basic management functions from a Government-wide perspective; findings which closely parallel what we found at DOE. OMB is responding to that report by requiring additional management controls to assure Government contractors do not perform basic management functions.

During this review we were able to identify several conditions which give DOE contractors sufficient latitude to perform basic management functions. Specifically, we found that:

^{1/} "The Department of Energy's Practices for Awarding and Administering Contracts Need to be Improved," EMD-80-2, November 2, 1979.

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- While OMB guidance to Federal agencies prohibits contractors from performing governmental management functions, contractors are permitted to assist the agency in performing such functions. No criteria exists to determine what constitutes performance versus assistance by contractors.
- DOE officials have stated that there are not enough people available within the agency to perform all the required work. While contractors are hired to assist DOE in performing program functions, they may actually perform the work as extensions to the agency staff, thus giving the appearance of circumventing personnel ceilings.
- DOE contract statements of work are often written to allow for considerable flexibility in the actual work performed. This gives contractors an opportunity to perform basic management functions.

We found it extremely difficult to determine when contractors were actually performing basic management functions. The primary "roadblock" was the need for criteria to determine where contractor assistance ends and performance begins in carrying out a basic management function.

OBJECTIVES, SCOPE, AND METHODOLOGY

As your staff requested, our objective in this work was to identify and document cases where contractors were performing basic management functions in DOE. Initially, we intended to examine the contracts of both the Assistant Secretary for Conservation and Renewable Energy and the Assistant Secretary for Fossil Energy. However, as agreed with your staff, we later limited our review to only Conservation and Renewable Energy in the interest of meeting Committee time constraints. Your staff felt that this Office (because of budget increases over the last few years) might be susceptible to this type of problem and consequently would be a good place to look for contractors performing basic management functions. We performed work at DOE headquarters in Washington, D.C., at the DOE Chicago Operations and Regional Office, and at the DOE Albuquerque Operations Office. The two field locations were chosen because each had management responsibility for several Conservation and Renewable Energy projects. Because of time constraints, we did not examine all divisions under the Assistant Secretary; however, we reviewed some sections of three of the four Deputy Assistant Secretaries.

The Committee originally requested that we examine only consultant-type contracts. We decided, however, to review a broader class of contracts known as "support service" which includes consultant as well as other types of management and technical assistance contracts. These contracts provide DOE with a variety of services and have a high potential for allowing contractors to perform basic management functions.

We could not obtain accurate, complete information from DOE concerning the number and size of its existing and recently terminated support service contracts. While DOE identifies consultant contracts in its procurement information systems, it does not identify the broader category of contracts we chose to review. Therefore, we identified these contracts by requesting lists of all Conservation and Renewable Energy contracts from DOE's procurement information systems and by asking DOE program personnel to identify those which were for support services. We have no assurance, however, that we found all support service contracts at the locations we reviewed. Because of this, we do not know how extensively DOE is using support service contractors to perform basic management functions.

At each of the three locations, we reviewed numerous contracts for evidence of contractor performance of basic management functions. We then selected 22 contracts for detailed review which, in our opinion, appeared to allow such performance: 14 from DOE headquarters, 7 from the Chicago Operations and Regional Office, and 1 from the Albuquerque Operations Office. In carrying out the review, we (1) examined official contract files, material kept by the responsible program official, and contractor products when they were available; (2) discussed the contractors' work with DOE program officials and with the contractors; and (3) interviewed officials and obtained information in DOE's procurement policy office and the Office of the Assistant Secretary for Administration. To assure that our review reflected current DOE practices in this area, we looked only at contracts which were active in fiscal years 1980 and 1981.

In an attempt to obtain more definitive criteria for our review, we requested that our General Counsel answer several questions concerning Government-wide policies on contractor performance of basic management functions and using contractors to circumvent personnel ceilings. Enclosure I is the resulting GAO legal opinion which cites our official responses to these questions. The legal opinion, where applicable, is referred to throughout this report.

CRITERIA NEEDED TO DISTINGUISH
ASSISTANCE FROM PERFORMANCE OF
BASIC MANAGEMENT FUNCTIONS

Federal directives concerning the use of contractors prohibit them from performing basic Government management functions (what we refer to as basic management functions). These directives, however, allow contractors to assist Federal agencies in carrying out such functions. We found no clear distinction between assistance and performance; thus, we could not determine if contractors' actions were improper.

The Office of Management and Budget (OMB) has specifically prohibited Federal agencies from using contractors to perform basic management functions. OMB Circular A-76, for instance, states that certain agency functions are so intimately related to the public interest that they must be performed by Federal employees. Such functions, according to the Circular, would include the direct management of Federal employees, the selection of program priorities, the technical analysis and evaluation of research and development activities, and the control of Federal monetary transactions. In addition, OMB Circular A-120, which provides guidance to Federal agencies on the use of consulting services, prohibits consultants or other contractors from performing work which is the direct responsibility of Federal officials.

Although this criteria is specific and leaves little room for doubt, DOE and other agencies still use consulting or management contractors for what appears to be basic management functions. This happens because OMB guidance allows Federal agencies to hire contractors to assist or advise them in performing their administrative or management activities. OMB, however, does not define assistance or describe at what point contractor assistance ends and performance of management functions begins. Thus, during this review, we found it difficult to clearly document instances where DOE contractors were improperly performing basic management functions. 1/

For example, we found several cases where contractors were deeply involved in the management of DOE programs and projects. In many instances, these contractors had responsibility for monitoring other DOE contractors. In one of those cases, the contractor reviewed other contractor proposals, recommended to DOE which proposals should be funded, and had responsibility for writing procurement requests for DOE.

1/See enclosure I for a legal discussion of contractor assistance versus performance.

In every case, however, agency officials said that these contractors were only assisting DOE and were not making management or policymaking decisions. Clearly, these officials believed that contractors could become involved in the management of the agency programs as long as DOE employees maintained sufficient oversight and control of the contractors and their work products.

In this context, DOE officials were aware of OMB guidelines and said that they usually (1) discussed and agreed to the contracts' scope before the work began, (2) monitored the contractors' performance during the work, and (3) reviewed both drafts and final reports in detail before accepting and using them to make decisions. This was enough, they thought, to meet OMB guidelines and ensure that the Government's interests were protected. We found, however, that the degree of DOE oversight varied considerably from contract to contract. Some program managers kept almost continuous oversight of the contractors' performance and had major input to the final reports. Others relied on brief phone calls or short progress reports from the contractors and only provided editorial-type comments on draft and final reports. Thus, it is uncertain that, in all cases, contractors are only assisting DOE in the performance of basic management functions. Some are in a position to significantly contribute to the program and influence DOE decisions.

This situation is consistent with information we have developed in previous reviews of DOE and other agencies. In a recent report 1/, for instance, we found this problem in several agencies and recommended that OMB prepare written guidelines that will better distinguish between contractors' advice on Government functions and the performance of such functions. OMB agreed with this recommendation and is preparing changes to circular A-120 that will, among other things, require additional management controls to ensure that Government functions are not performed by contractors.

NO LEGAL CRITERIA TO DETERMINE IF
DOE IS CIRCUMVENTING PERSONNEL CEILINGS

DOE officials cited the unavailability of in-house personnel as the most common reason for using contractors for management assistance. The size of DOE's work force is controlled primarily through congressional appropriations and OMB personnel ceilings. These limitations, according

1/"Civil Servants and Contract Employees: Who Should Do What For the Federal Government?", FPCD-81-43, June 19, 1981.

to DOE, prevent the agency from hiring the people it needs to do the work. Consequently, officials turn to contracts with private firms, or grants to nonprofit institutions, to accomplish the missions of the various programs. Although contract employees providing such services are not included in personnel ceilings or counted as part of the Federal work force, they are paid with Federal funds and are generally doing the same type of work as Federal employees. No legal criteria exists, however, to determine if DOE (in these situations) is circumventing the personnel ceilings established by OMB and Congress.

Many of the support service contracts we reviewed appear to provide staff extensions to DOE program offices. In most cases, the contractor was performing work which DOE did not have the in-house resources to perform. Agency officials frequently stated that the contractor's work satisfied a program need which was expected to continue for at least one year, and could be performed by in-house personnel (i.e., no special expertise was required) but that personnel ceilings and hiring freezes prevented the hiring of needed staff.

During our review of DOE's Chicago Operations and Regional Office, for instance, we found that one contractor was so intimately involved in the day-to-day operation of the DOE program offices that an employer-employee relationship may have existed. Federal Personnel Regulations prohibit such a relationship and list conditions for determining whether a contractor is in violation. These conditions include (1) contractor performance takes place at a Government site, (2) contractor services are in furtherance of the agency's function or mission, (3) the need for the services is expected to last beyond one year, and (4) the inherent nature of the service reasonably requires direct or indirect Government supervision to protect the Government's interest. The Chicago contractor appeared to satisfy these conditions.

Another contractor at DOE's Albuquerque Operations Office performed nearly all the work for a DOE program office. In that instance, the program was funded for \$24 million, but was assigned only one part-time DOE program manager. Although DOE has remedied this situation by adding more headquarters and Albuquerque staff to the program, the contractor was, at one time, responsible for carrying out all the program responsibilities under the part-time direction of one DOE employee.

Contracting out solely to circumvent personnel ceilings is forbidden by OMB Circular A-76. Unfortunately, however, we could not find any legal criteria to determine when a personnel ceiling has been violated. The closest situation relates to a court case where the circumvention of personnel ceilings was discussed. In

that case, the court ruled that circumvention could take place only when (1) it could be proven that a personnel ceiling was established and (2) using Government employees (rather than contractor personnel) to perform the work would have exceeded that personnel ceiling. Because personnel ceilings are imposed by OMB only for the whole agency (not individual offices or programs), this could mean that circumvention on legal grounds would occur only when the contract effort, if performed in-house, would have made DOE exceed its entire personnel ceiling. Thus, while the OMB criteria is specific and DOE often uses contract personnel as extensions of its own staff, we found it impossible to determine if DOE, in these instances, was violating its personnel ceilings.

Despite the lack of legal criteria to determine if personnel ceilings are being circumvented, we do not believe such ceilings are an effective means of controlling the Federal work force. In a recent report 1/, we questioned the value of personnel ceilings and noted their adverse effect on the performance and distribution of the Federal workload. Personnel ceilings are not based on detailed analyses of workload or work force requirements and are generally lower than the positions requested by the agencies in the budget review process. Furthermore, the use of personnel ceilings reinforces the misconception that containing the staffing level of the direct Federal work force controls the cost of Government. For these reasons, we opposed the use of arbitrarily set personnel ceilings and favored a system where the work force is based on an analysis of the agencies' workload.

CONTRACT STATEMENTS OF WORK BROADLY WRITTEN

Many of the contracts we reviewed had statements of work so broadly written that they could easily encompass basic management functions. DOE appears to frequently use "task order" contracts for support service work. This type of contract is particularly susceptible to allowing contractors to perform basic management functions.

A task order contract establishes a relationship between the Government and a contractor for a specific amount of time. This time is normally stipulated in terms of direct staffdays or hours and is usually associated with a very general scope of work. Once established, DOE awards task orders to the contractor for specific assignments, and deducts the assignment costs from the ceiling value of the contract. This happens until the contract's total value is reached.

1/"Improving the Credibility and Management of the Federal Work Force Through Better Planning and Budgetary Controls," FPCD-81-54, July 17, 1981.

In some of the cases we reviewed, the task orders were written, reviewed, and approved by DOE program and procurement personnel before being given to the contractor. In most of these, the costs were also estimated by the program office, then negotiated between procurement personnel and the contractor. In others, however, the controls were not nearly as good. For instance, some program staff members simply discussed what needed to be done with the contractor before the work began. Procurement personnel were not involved in any type of formal negotiations for the individual tasks. One program official, in particular, said that he does not consider costs when he asks the contractor to perform a task. He said that the contractor bills DOE monthly for costs incurred for the various tasks under the contract. While he was aware of the rate at which the contractor was using time on the contract, he did not know the contract charges for each task.

In our opinion, when the contract scope of work is not clearly stated, such as in a task order contract, DOE managers lose some control over the contractor. Depending on the pressures placed on the DOE staff to carry out the program functions, and their commitment to Federal contracting policy, they may or may not allow contractors to perform basic management functions. Therefore, as we have stated in a previous report 1/, it is important that specific contract terms be established to guide the contractors' work and ensure that they are not put into a position to unduly influence governmental decisions.

Following the issuance of that report, DOE agreed to examine its policies and practices concerning support service contracts to assure that work performed by contractors would not violate Federal policies regarding management functions. Two directives have since been issued which clearly express DOE's policy of not allowing contractors to perform basic management functions. Most of the contracts we examined were awarded prior to or soon after the issuance of these policy directives. Therefore, we could not determine what effect the policies have had on DOE's contracting activities.

CONCLUSIONS AND OBSERVATIONS

Contractors are forbidden by OMB Circular A-76 from performing functions which are inherently governmental in nature-- what we refer to as basic management functions. In reviewing several support service contracts at DOE, we found that there is a great possibility that contractors are performing these

1/"The Department of Energy's Practices for Awarding and Administering Contracts Need to be Improved," EMD-81-2, November 2, 1979.

kinds of functions for the agency. However, DOE officials believe the contractors are only assisting them in carrying out basic management functions, which is permitted by OMB circular A-76. Because there is no criteria for determining where "assistance" ends and "performance" begins, we are unable to make a definitive statement about how far the DOE contractors are going. The only conclusions we can draw from this part of our work is that, in each case, it is a matter of judgment to decide whether a contractor is violating the restrictions of A-76.

Nevertheless, DOE officials recognize the danger in support service contractors performing basic management functions. Program personnel are generally knowledgeable of the restrictions in this area. They maintain varying degrees of control over the contractor's work to assure that it is consistent with agency missions. Contractor reports are often reviewed in draft by several DOE officials and comments are made so that the final work product is considered a DOE effort.

Despite these efforts, however, we believe contractors could be performing basic management functions for DOE. Many are deeply involved in program or project management and are the only or primary source of information used by DOE officials to determine the future course of specific agency programs or missions. The opportunity for influence in this situation is much greater than if DOE personnel gathered the information and analyzed the data before making program decisions.

We found two major reasons for this situation. First, DOE officials believe there are not enough qualified people within the agency to do the work, and personnel ceilings and hiring freezes have prevented the agency from adding the needed staff. Thus, contractors are hired for work that would normally be done by Government employees. Secondly, the statements of work--particularly for task order contracts--are written so broadly that the contract could easily allow the performance of basic management functions. Lack of controls over the individual contract tasks and the weak procedures used to assign tasks to contractors may further encourage contractor performance of basic management functions.

The extensive use of contractors throughout DOE is related to the enormous growth of program missions and corresponding budgets since the agency came into being in 1977. Personnel levels did not keep up with these increases, and DOE turned to contractors to carry out the program missions. Now, however, DOE is experiencing a reversal of this trend. The agency's fiscal year 1981 budget was reduced after President Reagan took office in January. The agency's funding for 1982 will be dramatically cut back from 1980 levels. These reductions may reduce contractor involvement in basic management functions

without specific DOE action. However, until criteria are established to differentiate assistance from performance of management functions and to determine if agencies are circumventing personnel ceilings, and until statements of work are written so that contractors may not perform management functions, we believe the problem may surface again in the future. We support, therefore, our previous recommendations dealing with these problem areas. If implemented, these recommendations could help eliminate the situations where contractors are allowed to perform agency management functions.

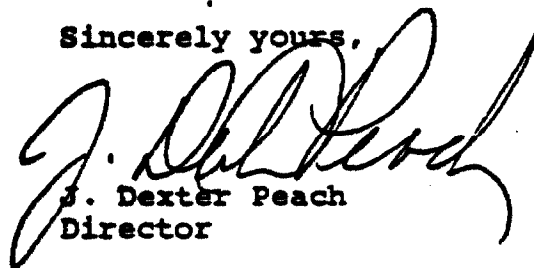
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As agreed with your staff, we will provide you with summaries of the various contracts reviewed during this assignment. These summaries should illustrate the points brought up in this letter, as well as provide more detailed information on the circumstances surrounding each case. Also in the interest of meeting your deadlines, and as your staff requested, we have not asked DOE to comment on this report.

As arranged with your office, unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days from the date of the report. At that time, we will send copies to the Department of Energy, the Office of Management and Budget, to interested congressional committees, and others upon request.

If you have any questions, or if we can be of any further assistance, please let us know.

Sincerely yours,



J. Dexter Peach
Director

Memorandum

July 28, 1981

TO : Director, EMD - J. Dexter Peach

FROM : Acting General Counsel - *Harry R. Van Cleve*
Harry R. Van Cleve

SUBJECT: Request for legal opinion concerning the appropriateness of allowing contractors to assist Federal agencies in performing basic management functions - B-202776-O.M.

This memorandum responds to your request, dated April 3, 1981, for an opinion on the appropriateness and legality of allowing contractors to provide assistance to management as stated in OMB Circular A-76, section 6d(5). You also ask that we determine the appropriateness and legality of allowing contractors to edit materials prepared by DOE, to draft correspondence, or to prepare responses to inquiries from the Congress, the public, and others. Finally you presented five specific questions concerning contractor participation in the performance of basic management functions, the possibility of outside contractors being used to circumvent agency personnel ceilings, and the extent to which OMB Circular A-76, actually controls agency actions in acquiring support services through outside contracting.

Before addressing your questions, we believe it is necessary to focus upon the distinction between the "appropriateness" of agency contracting actions under the terms of OMB Circular A-76, and the "legality" of those actions. The Circular is a statement of Executive branch policy to be used to determine whether a particular activity should be contracted out or performed in-house. It is not to be used to determine the legality of an agency's action.

Since 1955 the Executive branch's policy has been to rely on contractors in the private sector to provide the goods and services it needs. This policy was expressed in temporary bulletins issued as early as 1955 and was made more permanent when Circular A-76, was issued in 1966. The current revision of A-76, dated March 29, 1979, reaffirms

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the general policy of reliance on the private sector for goods and services. Also, A-76, provides a basis to determine whether in-house performance is more cost effective than contracting out and requires that functions which are inherently governmental in nature be performed by Government employees.

It is the express purpose of OMB Circular A-76, to establish "the policies and procedures used to determine whether needed commercial or industrial type work should be done by contract with private sources or in-house using Government facilities and personnel." The circular defines a "Government commercial or industrial activity" in paragraph 5(a) as follows:

"a. A 'Government commercial or industrial activity' is one which is operated and managed by a Federal executive agency and which provides a product or service that could be obtained from a private source. A representative, but not comprehensive, listing of such activities is provided in Attachment A. An activity can be identified with an organization or a type of work, but must be (1) separable from other functions so as to be suitable for performance either in-house or by contract; and (2) a regularly needed activity of an operational nature, not a one-time activity of short duration associated with support of a particular project."

In contrast to the Circular's policy of reliance on private sources for commercial or industrial goods and services, paragraph 4b, provides that certain functions are inherently governmental in nature and must be performed in-house. As defined in paragraph 5f, governmental functions can fall into the three following categories:

"(1) Discretionary application of Government authority, as in investigations, prosecutions and other judicial functions; in management of Government programs requiring value judgments, as in directing the national defense; management and direction of the Armed Services; conduct of foreign relations; selection of program priorities; direction of Federal employees; regulation of the use of space, oceans, navigable rivers and

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other natural resources; direction of intelligence and counter-intelligence operations; and regulation of industry and commerce, including food and drugs.

"(2) Monetary transactions and entitlements, as in Government benefit programs; tax collection and revenue disbursements by the Government; control of the public treasury, accounts, and money supply; and the administration of public trusts.

"(3) In-house core capabilities in the area of research, development, and testing, needed for technical analysis and evaluation and technology base management and maintenance. However, requirements for such services beyond the core capability which has been established and justified by the agency are not considered governmental functions."

Paragraph 6(d)(5), however, permits the use of consulting services for purposes of providing advisory assistance in the performance of governmental functions. Paragraph 6(d)(5) states as follows:

"(5) This Circular does not apply to consulting services of a purely advisory nature relating to the governmental functions of agency administration and management and program management. Assistance in the management area may be provided either by Government staff organizations or from private sources, as deemed appropriate by executive agencies, in accordance with executive branch guidance on the use of consulting services."

Executive branch guidance on the appropriate use of consulting services is provided by OMB Circular A-120, April 14, 1980. The circular defines consulting services as "those services of a purely advisory nature relating to the governmental functions of agency administration and management and agency program management." The circular states that consulting services may be used, when essential to the mission of the agency, to get:

--Specialized opinions or professional or technical advice which does not exist or is not available within the agency or another agency.

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- Outside points of view to avoid too limited judgment on critical issues.
- Advice regarding developments in industry, university, or foundation research.
- Opinions of noted experts whose national or international prestige can contribute to the success of important projects.
- Citizen advisory participation in developing or implementing Government programs that, by their nature or by statutory provision, call for such participation.

Even with this extensive procedural guidance, there is no clearly stated criteria or precise definition to establish when "advice on" a governmental function becomes "performance of" that function. Our decision in the matter of Consultant Services - T.C. Associates, B-193035, April 12, 1979, illustrates the problem. In that decision we found that as an ancillary issue a contractor was required to perform a management function that was the direct responsibility of agency officials. The National Center for Productivity and Quality of Working Life awarded a contract requiring contractor personnel to "negotiate final contract prices prior to award." We held that this requirement contravened the OMB policy that work of a policy or managerial nature be performed by Federal employees. We held this despite the fact that a Center employee continued to function as the Government's contracting officer and retained final signature authority for contract awards. The authority to negotiate final prices was so integrally related to the contracting officer's authority that we considered it a basic function which management must perform in order to retain essential control over the conduct of agency programs.

As indicated above, OMB Circular A-76, is not a regulation having the force and effect of law. It is a policy statement of the Executive branch, and an agency's failure to comply with it would not render the agency's action illegal. Thus, our Office has generally declined to consider bid protests based on complaints regarding OMB Circular A-76. See for example: Texas Aerospace Services, B-198890, June 5, 1980; General Telephone Company of California, B-189430, July 6, 1978, and decisions cited therein; and, Pacific

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Architects and Engineers Incorporated, B-190183, June 19, 1978.

The courts have similarly regarded the circular as a statement of Executive branch policy. In Local 2855, AFGE (AFL-CIO) v. United States, 602 F2d 574 (1979), affected employees and their union brought a class action to contest a decision of the Department of the Army to contract out to a private concern stevedoring and terminal services previously performed by government employees. The United States District Court for the District of New Jersey, dismissed the suit, and plaintiffs appealed. The Court of Appeals (Third Circuit) affirmed the judgment finding in part that the Army's decision to contract out was a decision "committed to agency discretion by law" and thus was not subject to judicial review. Plaintiffs contended in part that the cost-analysis studies were faulty on a number of grounds, and that had the available options and their costs been properly evaluated, the use of civil service labor would have been found to be less costly to the government than contracting out. In rejecting this contention the court noted that courts have been especially inclined to regard as unreviewable those aspects of agency decisions that involve a considerable degree of expertise or experience, or that are based upon economic projections and cost analyses, at least when the agency has broad leeway to devise the formula to be applied in any particular situation and when there are no discernible guidelines against which the agency decision may be measured. Thus, the court concluded in part that statutory and regulatory provisions do not provide rules or specifications that would permit a court to adjudicate plaintiffs' disagreements with the formula factors, and cost projections relied upon by the Army. In so holding the court incorporated the reasoning that, inasmuch as OMB Circular A-76, and the applicable Department of Defense Directive and Army Regulation are merely internal operating procedures, rather than regulations officially promulgated under the Administrative Procedure Act or otherwise, they do not prescribe any rule of law binding on the agency. See also Independent Meat Packers Association v. Butz, 526 F2d 228, 236 (8th Cir. 1979), where the court held that the challenged Executive order was intended primarily as a managerial tool for implementing the President's personal economic policies and not as a legal framework enforceable by private civil action.

Moreover, in an order dated March 20, 1979, in the case of ADVO-System, Inc. v. Juanita M. Kreps, et. al.,

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Civil Action No. 79-0257, which preliminarily enjoined the Department of Commerce from proceeding with certain work pertaining to the 1980 census, the United States District Court for the District of Columbia (Gesell, J.) requested our Office--

"* * * to inquire into and determine whether or not the Department of Commerce, through the Bureau of the Census, has complied with all applicable statutes and regulations in its rejection of plaintiff's proposal governing an APOC (Advanced Post Office Check) for the 1980 Census and in its subsequent decision to perform all or part of the APOC itself or in combination with the United States Postal Service."

In our decision, 58 Comp. Gen. 451 (1979), in response to the court's request, we concluded in part that OMB Circular A-76, was a statement of Executive Branch policy which does not have the force and effect of law and does not create a right of action in a disappointed bidder to sue in Federal Courts to enforce its provisions. We added that to our knowledge, the Federal courts have not explicitly held that OMB Circular A-76, is enforceable in a private civil action filed by a disappointed bidder or offeror. Similarly, with respect to the rights of Federal employees whose jobs are affected by agency decisions to contract out in contravention of the requirement of OMB Circular A-76, see American Federation of Government Employees v. Hoffman, 427 F. Supp. 1048, 1088 (1976), wherein the court stated as follows:

"In short plaintiffs have pointed to no concrete, readily identifiable source for their property interest. The essence of their argument is that the court should combine all the civil regulations and statutes and create the interest for them, that they should, therefore they do have a property interest. The court simply does not have the power to create the property interest for plaintiffs in that fashion. A property interest in continued employment during the existence of contracts which violate regulations could be created. However, the Army, the Civil Service Commission or the Congress must create it. The court cannot."

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To reiterate, OMB Circular A-76, and OMB Circular A-120, constitute managerial and policy tools to aid in the procurement of supplies and services for the Federal Government. They provide no legal right of action in any party to enforce their provisions. See sections 3 and 11 of Circular A-76.

With this conceptual background in mind, we proceed to your questions.

- "1. OMB Circular A-76 section 4b says that certain functions are inherently governmental in nature, being so intimately related to the public interest as to mandate performance by Federal employees. It is [sic] illegal to award Federal funds for contractors to perform work that should be performed by Federal employees?"

Response: An independent evaluation of a specific contracting action may conclude that the procurement in question does not - in our opinion - conform to the standards and procedures set forth in OMB Circular A-76, or OMB Circular A-120. However, since these circulars are Executive Branch policy statements they provide no basis for making determinations in regard to the legality or illegality of the specific contracting action.

- "2. Is it illegal to award Federal funds for contractors to assist Federal employees in performing functions that should only be performed by Federal employees? If not, to the extent that a Federal agency lacks the in-house capabilities (employees and equipment, etc.) to perform certain responsibilities, where should the line be drawn between assistance and performance by contractors, when awarding contracts to meet these responsibilities?"
- "3. How should assistance be defined?"

Response: It is not illegal, although in certain circumstances it may be improper under the standards and procedures of OMB Circular A-76, to contract out for assistance in the performance of governmental functions. Paragraph 6(d)(5) of OMB Circular A-76, specifically authorizes obtaining consulting, services of an advisory nature relating to the governmental functions of agency administration and management and program management.

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OMB Circular A-76, does not define or otherwise instruct readers regarding when "assistance" in the performance of a governmental function becomes actual performance of that function. The distinction between assistance and actual performance is primarily a matter of opinion in the individual case. Given the policy nature of these Circulars, "assistance" must be defined - if at all - by the Office of Management and Budget, the President, or by the Congress. In our report, "Civil Servants and Contract Employees: Who Should Do What For The Federal Government" (FPCD-81-453, June 19, 1981), we recommended that the Office of Management and Budget should prepare written guidelines that will better distinguish between contractors advice on government functions and their performance of such functions. OMB agreed with this recommendation and is proposing changes to Circular A-120, that will, among other things, require additional management controls to insure that Government functions are not performed by contractors.

- "4. Section 10e(2) of OMB Circular A-76 states that contracts awarded under authorized set-aside programs (P.L. 95-507) will not be reviewed for possible in-house performance. Additionally, new requirements which would be suitable for award under a set-aside program should be satisfied by such a contract without a comparative cost analysis. Are these preferences necessary to accomplish the intent of Public Law 95-507? Can Federal agencies misuse these preferences to circumvent the broader intent of Circular A-76, i.e., not to allow contractors to perform basic management functions which should only be performed by Government personnel?"

Response: In terms of the mandate that Government functions be performed in-house, section 10e(2) does not apply a lesser standard or permit that policy to be circumvented on behalf of small businesses. The statement that contracts awarded under small business set aside programs will not be reviewed for possible in-house performance is not intended as an across the-board exemption from the A-76, standards governing whether a particular function should or should not be contracted out. It is only intended to except existing small business contracts from the review requirements otherwise imposed by section 10c(2). The review contemplated by that

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subsection is a cost comparison to determine whether it is likely that the work can be performed more economically in-house. As in the case of a "new start" suitable for small business set aside, it dispenses with the requirement to perform a cost comparison.

Given the circular's otherwise strong policy requirement for comparative cost analysis, the section 10e "preference" is evidence of the Executive branch's determination that the purpose of the Small Business Act will be furthered by excepting small business contracts from such review. We are not in a position to question that determination.

- "5. If a DOE office has functions to be performed that are neither basic management functions nor functions that are inherently governmental in nature, is it proper and legal to contract for these functions if they would circumvent personnel ceilings?"

Response: While it is clearly specified in paragraph 6(d)(3) of Circular A-76, that agencies will not use the Circular to contract out solely to meet personnel ceilings, it is equally clear that agencies may contract out when justified under the Circular regardless of the relationship between personnel levels and authorized ceilings. Conversely, contracts for activities that are shown to be justified for in-house performance will be terminated as quickly as in-house capability can be established. When the additional spaces required cannot be accommodated within the agency's personnel ceiling, a request for adjustment will be submitted to OMB in conjunction with the annual budget review process.

OMB Circular A-76, provides that when private performance of commercial or industrial activities is feasible and no overriding factors require in-house performance, a rigorous comparison of contract costs versus in-house costs will be made, using the Circular's Cost Comparison Handbook, to determine whether the work will continue to be performed by in-house personnel or converted to a contract operation. The Circular contains several provisions that give appropriate consideration to affected Federal employees. Among the more significant ones are that:

- Existing in-house activities will not be converted to contract performance on the basis of economy

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unless it will result in a savings of a least 10 percent of the estimated Government personnel costs for the period of the comparative analysis; and

--Federal employees displaced as a result of the conversion to contract performance will be given the right of first refusal for employment openings in the contract operation.

In addition, acknowledging that there appears to be some confusion regarding the relationship between OMB Circular A-76, and other instructions that limit Federal civilian employment, OMB Bulletin 81-15, April 8, 1981 (Subject: Implementation of OMB Circular A-76) states that both the Circular and these instructions are complementary. The instructions preclude the use of contracts with firms and institutions outside the Government solely to circumvent personnel ceilings. Agencies that contract out for goods and services under the structured and deliberate process prescribed by OMB Circular A-76, are to do so because it is cost effective and reduces the growth in Government spending.

As a result, as OMB acknowledges, contracting out only for the purpose of circumventing personnel ceilings would contravene the Executive Branch policy set forth in OMB Circular A-76.

"6. What criteria exists to determine whether a personnel ceiling has been circumvented?"

Response: We are not aware of any specific criteria to make such a determination. However, this issue was discussed in American Federation of Government Employees v. Hoffman, 427 F. Supp. 1048, 1069 (1976). The court said that to succeed in the argument that the contracts were let to avoid applicable Government personnel limitations there must be a showing that such limitations existed and that performing the contract efforts with Government employees would have caused these limitations to be exceeded. It must be demonstrated that the purpose in letting the contracts was to avoid the personnel limitations. If the decision to contract was not made to avoid such limitations but rather to be consistent with and carry out the A-76, policy in favor of promoting private enterprise the decision will withstand a challenge to its correctness as far as the personnel ceiling issue is concerned.