

## **USDA Labor Relations Guidance on Implementing the Revised OMB Circular A-76 (8-4-03)**

On May 29, 2003, the revised Office of Management and Budget (OMB) Circular No. A-76, "Performance of Commercial Activities" was issued. The revised circular contains significant revisions to the processes and practices for determining whether a commercial activity will be performed by a public or private source, along with instructions that the revisions were to take effect immediately. There is no doubt that the effects of competitive sourcing when implemented within an organized work unit, impacts conditions of employment of bargaining unit employees. However, competitive sourcing under A-76 has existed for many years. The questions addressed in this document center on whether management has a duty to bargain under 5 USC Chapter 71 prior to implementing the revised Circular, as well as suggested strategies for minimizing labor-management disputes that may arise over its implementation.

### **1. Is there a duty to bargain associated with implementing the revised OMB Circular A-76?**

It depends. A duty to bargain is incurred if in implementing the revised Circular, the agency changes conditions of employment that affect bargaining unit employees. This includes:

- ❑ Discretionary provisions of the Circular that directly affect conditions of employment, the substance of which would be negotiable, and
- ❑ Non-discretionary provisions of the Circular that affect conditions of employment for which the procedures and arrangements would be negotiable.

Thus, in order to determine whether there is a duty to bargain, the Circular needs to be examined to determine if it contains provisions which when implemented, would change existing conditions of employment for bargaining unit employees. In conducting this examination, a comparison should be made between the previous A-76 Circular and the Revised Circular in order to determine if such changes are evident. It is also important to examine the Revised Circular in light of current contract language and agency practice to determine whether a change in the Circular will require an actual change in agency practice. If no change is required or made, there would be no duty to bargain.

In making a preliminary review of the revised Circular, there appears to be a very limited number of changes that would affect conditions of employment. For example, in Attachment B, Section D 2. a. and b., directly affected government personnel and their representatives may be permitted to participate in the PWS and MEO teams. Since this represents a discretionary change (i.e. the agency is given the authority to decide whether or not to do something), the issue of whether or not unions may be represented on the PWS or MEO teams would be negotiable. Thus, there would be duty to bargain, and the actual substance of the change would be negotiable. However, if the agency by virtue of its contract or current policy already permits

union representation on its teams, the Circular's new language does not represent a change. Therefore, there would be no duty to bargain on this issue for that agency.

There are also a number of other changes contained in Circular, which require agencies to take certain actions (i.e. non-discretionary requirements), that when made, may affect conditions of employment for unit employees. In such situations, the substance of the change would not be negotiable, but a duty to bargain **would** be incurred if the change affects conditions of employment. However, the scope of bargaining would be limited to only the procedures and arrangements to mitigate any adverse affects caused by the change. An examples includes, provisions in Attachment B, Section E pertaining to post-competition accountability. Establishing new tracking and accountability systems or policies, as required in the Circular, may result in significant duty changes to bargaining unit employees. If so, these changes would trigger a duty to bargain and an obligation to negotiate procedures and arrangements prior to implementing those changes. Such changes would likely occur subsequent to initial implementation of the Circular, and would come only when management proposes to implement those changes.

**2. Does management commit a ULP if it implements the revised Circular without first notifying the Union and redeeming its bargaining obligation?**

It depends. If there is a duty to bargain and the agency unilaterally implements changes to conditions of employment, they would have committed a ULP. However, case law issued under the FSLMRS recognizes OMB Circulars to have the same standing as Government wide regulations. Therefore, agencies are not bound to negotiate the substance of non-discretionary provisions of the Circular. The duty to bargain would only be on the substance of discretionary provisions of the Circular that affect conditions of employment, and on procedures and arrangements associated implementing the non-discretionary provisions as discussed in Question 1. For a ULP to be found, there would need to be sufficient evidence showing that an agency actually implemented a change affecting conditions of employment, verses merely announcing its decision to implement the revised Circular.

**3. How can existing contract language pertaining to A-76 and/or contracting out impact management's obligation to bargain and/or affect its ability to implement the revised Circular?**

Under FSLMRS-based case law, pre-existing contract language takes precedent over Government wide regulations, such as OMB Circulars. Thus, management would be bound to follow existing contract provisions, even those that may conflict with the revised Circular, until the contract expires.

Another potential impact of having a contract with provisions that address A-76 and/or contracting out, is on management's obligation to bargain those otherwise negotiable provisions of the revised Circular. Under the Federal Labor Relations Authority's (FLRA) "covered by" doctrine, if the agency can show that the matter to which the Union proposes to negotiate is "expressly contained", "inseparably bound up with", or that the parties "should have reasonably contemplated" negotiating the matter – it need not bargain.

**4. Can the Union initiate mid term bargaining proposals related how management will implement the A-76 Circular?**

Yes. Even though management incurs a duty to bargain over changes it plans to make affecting discretionary provisions of the Circular affecting conditions of employment, nothing precludes the Union from initiating proposals. As with any Union proposal, management should determine whether such proposals are bargainable and "covered by" current contract language.

**5. How can agencies avoid or minimize disputes with their Unions related implementing the revised A-76 Circular?**

Although the nature of the relationship and existing labor relations strategy will affect the feasibility and effectiveness of dispute avoidance techniques, it is suggested that the following measures be considered:

- ❑ Information sharing with the Union on how management plans to implement the revised Circular in the agency – sharing what short and long term changes are contemplated
- ❑ Training or orientation of Union officials on the revised Circular – consider joint training/orientation sessions
- ❑ Provide the Union notice and opportunity to bargain sooner than later so bargainable issues can be resolved early
- ❑ Use collaborative labor-management forums to talk about and pre-decisionally involve the Union in management's implementation planning process and to discuss Union issues related to the Circular