BCFC
Business Coalition for Fair Competition
www.governmentcompetition.org

May 31, 2010

Office of Federal Procurement Policy
ATTN: Mathew Blum
New Executive Office Building, Room 9013
724 17th Street, NW
Washington, DC 20503

RE: Proposed OFPP Policy Letter

Dear Mr. Blum:

The Business Coalition for Fair Competition (BCFC) is a national coalition of businesses, associations, taxpayer organizations and think tanks that are committed to reducing all forms of unfair government created, sponsored and provided competition with the private sector. BCFC believes the free enterprise system is the most productive and efficient provider of goods and services and strongly supports the Federal government utilizing the private sector for commercially available products and services to the maximum extent possible.

We are pleased to provide the following comments on the proposed policy revision on inherently governmental activities.

We respectfully disagree with the premise of this policy. This proposal is a solution in search of a problem. We urge that any further action on implementation of this proposal be held in abeyance until OMB and OFPP can document that there is indeed any imbalance between performance by contractors and performance of inherently governmental activities by Federal employees.

Before implementing a risky and radical revision to longstanding Federal policy, OMB and OFPP should have an unbiased and independent study commissioned to provide empirical answers to the following questions:

1. Has spending on contracting increased (on a % basis) more or less than spending on entitlements, interest, or general discretionary spending in the Federal government in recent years?
2. How many Federal employees were actually terminated from Federal employment as a result of the Bush Administration's competitive sourcing/commercial services management program?
3. What was the savings realized through the implementation of the Bush Administration's competitive sourcing/commercial services management program?
4. Did Federal employment increase or decrease during the Bush Administration? By how much?
5. Since the Obama Administration took office in January, 2009, how many new Federal employees have been added? How does government employment (Federal, state and local government) compare to private sector employment (gain or loss) since January, 2009?

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6. What are the estimates of jobs created by the ARRA/Stimulus Act, in terms of government (Federal, state or local) versus private sector?
7. Is there any empirical evidence that "inherently governmental" functions were transferred from government employees to contractors during the Bush Administration?
8. What is the economic impact of a government job versus a private job, in terms of generation of tax revenues, dollar roll over, etc? What is the economic impact of government performing commercial activities (e.g. impact on business, government revenues, tax base) when government performs activities that compete with or duplicate private sector capabilities?
9. Based on the most recent inventories of commercial activities reported by each agency in conformance with the Federal Activities Inventory Reform (FAIR) Act, PL 105-270, how many Federal employees are engaged in positions that are considered "commercial" in nature?
10. How many of those FAIR Act commercial positions have actually been subject to a full public-private competition (via OMB Circular A-76) under the Bush Administration's competitive sourcing/commercial services management program?
11. Using the estimated per FTE savings (question 3), how much could be saved if each of the remaining commercial positions (question 10) were subject to competition?

We strongly support using the FAIR Act definition of inherently governmental found in the Federal Activities Inventory Reform (FAIR) Act, Public Law 105-270 in this proposed policy. However, we believe many other aspects of the proposal exceed OMB's statutory authority. Congress could have included statutory provisions authorizing OMB to regulate activities "otherwise closely associated with the performance of inherently governmental functions" but chose not to do so. This is an expansion not approved by Congress. The proposal broadens inherently governmental functions and creates a "buffer zone" not authorized in legislation.

The FAIR Act simply authorized OMB to coordinate policy and inventories on commercial and inherently governmental activities. And the law requires agencies to "review" commercial activities for private sector performance. When the FAIR Act was being considered in Congress in 1998, the idea of insourcing, or converting commercial activities from contractor to government employee performance was considered AND REJECTED. The OMB proposal seeks to administratively narrow the definition of commercial activities when Congress denied that authority.

Everything the Federal government does falls into one of two categories: 1) commercial; or 2) inherently governmental. Commercial activities are those found in American businesses, large and small, on Main Street, in the Yellow Pages, not meeting the definition of inherently governmental.

We are deeply concerned that the proposal attempts to "reserve work for performance by Federal government employees". By doing so, OMB will be engaged in a "taking" of property – market share and business opportunities – from private individuals. That is a violation of the Fifth Amendment of the Constitution. Moreover, government performance of commercial activities has not been "delegated to the United States by the Constitution" and is therefore "reserved … to the people". Therefore, the expansion of Federal performance of commercial activities is a violation of the Tenth Amendment to the Constitution.

It should also be noted that the proposed policy violates Executive Order 12615.

Pursuant to the inventories organized by OMB under the FAIR Act, there are more than 850,000 Federal employees performing activities considered "commercial" in nature. The proposed policy fails to recognize the 850,000 commercial activities positions in the government and does nothing to subject those jobs and activities to market competition.

Dr. Allan V. Burman, Administrator of the Office of Federal Procurement Policy in the first Bush Administration, said in testimony before a House Subcommittee in 1990, "As far back as 1932, a Special Committee of the House of Representatives expressed concern over the extent to which the government engaged in activities which might be more appropriately performed by the private sector. The first and second Hoover Commissions expressed similar concern in the 1940's* and recommended legislation to prohibit government competition with private enterprise. However, there was no formal policy until 1955, when the House passed and the Senate Committee reported legislation to require the Executive Branch to increase its reliance on the private sector. Final action was dropped only upon assurance from the Executive Branch that it would implement the policy administratively. Bureau of the Budget Bulletin 55-4 ... was issued in 1955 prohibiting agencies from carrying on any commercial activities which could be provided by the private sector. Exceptions were permitted only when it could be clearly demonstrated in specific cases that the use of the private sector would not be in the public interest." *(The first (1947) and second (1953) Commission on Organization of the Executive Branch of the Government.)

Unfair government-sponsored competition has been a top issue at every White House Conference on Small Business.

In 1980, the first White House Conference on Small Business made unfair competition one of its highest-ranked issues. It said, "The Federal Government shall be required by statute to contract out to small business those supplies and services that the private sector can provide. The government should not compete with the private sector by accomplishing these efforts with its own or non-profit personnel and facilities."

In 1986, the second White House Conference made this one of its top three issues. It said, "Government at all levels has failed to protect small business from damaging levels of unfair competition. At the federal, state and local levels, therefore, laws, regulations and policies should ... prohibit direct, government created competition in which government organizations perform commercial services ... New laws at all levels, particularly at the federal level, should require strict government reliance on the private sector for performance of commercial-type functions. When cost comparisons are necessary to accomplish conversion to private sector performance, laws must include provision for fair and equal cost comparisons. Funds controlled by a government entity must not be used to establish or conduct a commercial activity on U.S. property."

And the 1995 White House Conference again made this a priority issue when its plank read, "Congress should enact legislation that would prohibit government agencies and tax exempt and anti-trust exempt organizations from engaging in commercial activities in direct competition with small businesses." That was among the top 15 vote getters at the 1995 Conference and was number one among all the procurement-related issues in the final balloting.

The SBA Office of Advocacy conducted a series of hearings and issued a report, "Government Competition: A Threat to Small Business", (March 1980), and "Unfair Competition by Nonprofit Organizations With Small Business: An Issue for the 1980s" (June, 1984).

Unfortunately, the proposed policy ignores this important history. In fact, the Federal government's performance of commercial activities is a far more insidious, pervasive, prevalent and dangerous problem than the alleged problem this policy seeks to address. Certainly contractors should not perform inherently governmental activities as defined in the FAIR Act. OMB and OFPP should assure that this statutory requirement is implemented. However, the proposed policy does nothing to address the larger and more critical problem of government employee performance of commercial activities.

Given the long history of government competition with the private sector, the proposed policy is anathema to private enterprise, small business, and economic growth in the United States. Given the current economic slowdown, the burgeoning Federal deficit and the alarming growth of government, this is the wrong proposal in the wrong place at the wrong time.

We strongly urge a policy that reinstates the statement that:

> *"The Federal government will not start or carry on any commercial activity to provide a service or product for its own use if such product or service can be procured from private enterprise through ordinary business channels."* (Bureau of the Budget Bulletin 55-4, January 15, 1955)

We are deeply concerned that adding functions 'closely associated with the performance' will create a "buffer zone" that will result in more Federal employees and more untested government monopolies.

The proposal is titled, "**Work Reserved for Performance by Federal Government Employees".** It actually seeks the "reservation of work for Federal employees" but never uses the term or addresses "commercial activities" or private sector employees. The policy should be fair and balanced. We support government reliance on the private sector to the maximum extent possible. We oppose "insourcing" of commercial activities. We oppose government competing with private enterprise. These issues are not addressed in the policy.

The policy does not provide an illustrative list of commercial activities that should be "reserved for the private sector". Moreover, it proposes that agencies begin to "monitor how contractors are performing contracts, especially those involving work closely associated with inherently governmental functions or **professional and technical services**". Professional and technical services, such as engineering, architecture, surveying, mapping, and information technology, are commercial activities. *We urge the inclusion of an illustrative list of commercial activities that includes professional and technical services.*

Unfair government competition with the private sector is already rampant in many sectors of the economy including architecture, audits, construction, debt and bill collections, engineering, equipment repair and maintenance depots, food service, furniture, information technology, laboratories, landscaping, laundry and dry cleaning, office products, mapping, meeting planning, marketing research, roofing, motorcoaches, printing, public storage, surveying, tax preparation, transit/transportation, utilities, among other important sectors of the U.S. economy. In recent months, the U.S. economy has seen a dangerous trend toward government operations in automaking, car dealerships, banks, student loans; Departments of Agriculture, Defense and Homeland Security insourcing; and the threat of a Federal government-run health entity. This unprecedented government intrusion and competition in the private market is having a detrimental effect on capital investment and job creation.

The proposal is on consistent with the legislative history of the FAIR Act. In debate in the U.S. Senate on the bill that became the FAIR Act, Senator Thomas of Wyoming, the sponsor of S. 314 said,

Certainly government agency officials should have the ability to contract with the private sector for goods and services needed for the conduct of government activities. This bill will not inhibit ability. However, it should not be the practice of the government to carry on commercial activities for months, years, even decades without reviewing whether such activities can be carried out in a more cost effective or efficient manner by the private sector. I believe that the drive to reduce the size and scope of the federal government will be successful only when we force the government to do less and allow the private sector to do more.

During the course of our hearings, it became abundantly clear that there are certain activities that the Federal government has performed in-house which can and should be converted to the private sector. Areas such as architecture, engineering, surveying and mapping, laboratory testing, information technology, and laundry services have no place in government. These activities should be promptly transitioned to the private sector.

There are other activities in which a public-private competition should be conducted to determine which provider can deliver the best value to the taxpayer. This includes base and facility operation, campgrounds, and auctioning.

There are several key provisions in the bill upon which I would like to comment. In particular, section 2(d) requires the head of an agency to review the activities on his or her list of commercial activities `within a reasonable time'. OMB strongly opposed a legislative timetable for conducting these reviews. As a result of the compromise language on this matter, it will be incumbent on OMB to make certain these reviews are indeed conducted in a reasonable time frame. These reviews should be scheduled and completed within months, not years. I will personally monitor progress on this matter, as will the Governmental Affairs Committee. I urge OMB to exercise strong oversight to assure timely implementation of this requirement by the agencies.

This provision also requires that agencies use a `competitive process' to select the source of goods or services. In my view, this term has the same meaning as `competitive procedures' as defined in Federal law (10 U.S.C. 2302(2) and 41 U.S.C. 259 (b)). To the extent that a government agency competes for work under this section of the bill, the government agency will be treated as any other contractor or offeror in order to assure that the competition is conducted on a level playing field.

Another issue that I have been concerned about is the proliferation of Interservice Support Agreement's (ISSA's). Under the `FAIR' Act, consistent with the Economy Act (31 U.S.C. 1535), items on the commercial inventory that have not been reviewed may not be performed for another federal agency. In addition, any item on the inventory cannot be provided to state or local governments unless there is a certification, pursuant to the Intergovernmental Cooperation Act (31 U.S.C. 6505(a)).

Enactment of the `FAIR' Act is a major achievement because it codifies a process to assure government reliance on the private sector to the maximum extent feasible. Further, it will put some teeth into Executive Order 12615 by President Reagan, which is still on the books today."

(Cong. Rec., daily edition, July 28, 1998, page S9105*.)*

It is instructive to review the report of the Senate Committee on Governmental Affairs which explains the intent of the FAIR Act.

> there continues to be activities which are not inherently governmental that the government performs for itself. The purpose of this legislation is to establish a process to evaluate those activities that remain in-house. This legislation does not affect the current Federal procurement system nor does it impair the ability of agencies to contract with the private sector for needed goods and services under that system.
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> to review each activity on the list and, when competing activities, to use a competitive process to select the source to perform the activity. It is the Committee's expectation that OMB will work with Federal agencies to ensure that they proceed in a reasonable time frame with a competitive process for activities that are appropriate for competition. The Committee believes that there are many opportunities for competition and expects agencies to prioritize functions that are most likely to have a high payback from such competition.
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> (S. Rept. 105-269, emphasis added)

Since the Obama Administration has taken office, the private sector has lost more than 4 million jobs, while the Federal government has gained 109,700 jobs (Source: BLS). At a time when our economy is struggling to create private sector jobs and while Federal hiring and insourcing is surging upward, the draft guidance should outline the efficiency standards that will be utilized to determine whether the government or the private sector should be performing an activity, to assure a vibrant private sector tax base, as well as growth and jobs creation in the private sector, including small business.

The deficit and debt are being exacerbated by Federal employees who are performing commercial (not inherently governmental) activities best left to the private sector.

Rather than "reserving work for Federal employees", the policy should promote creating private sector jobs. We urge its withdrawal pending a study to answer the aforementioned questions, the quantification of the real problems that should be addressed, and the promulgation of a policy that is fair and balanced, that is consistent with the law and that provides for an end to government competition with the private sector by assuring the government utilizes the private sector to the maximum extent possible.

Sincerely,

John M. Palatiello, President
Business Coalition for Fair Competition (BCFC)