

§ 169a.12 New requirements.

(a) In cases where a new requirement for a commercial product or service is anticipated, a review shall be conducted to determine if performance by DoD personnel is authorized for national defense reasons, because no commercial source is available, or because it is in the best interest of direct patient care. If performance by DoD personnel is not justified under these criteria, then the new requirement normally shall be performed by contract.

(b) If there is reason to believe that commercial prices may be unreasonable, a preliminary cost analysis shall be conducted to determine whether it is likely that the work can be performed in-house at a cost that is less than anticipated for contract performance. If in-house performance appears to be more economical, a cost comparison shall be scheduled. The appropriate conversion differentials will be added to the preliminary in-house cost before it is determined that in-house performance is likely to be more economical.

(c) Government facilities and equipment normally will not be expanded to accommodate new requirements if adequate and cost-effective contractor facilities are available. The requirement for Government ownership of facilities does not obviate the possibility of contract operation. If justification for in-house operation is dependent on relative cost, the cost comparison may be delayed to accommodate the lead time necessary for acquiring the facilities.

(d) Approval or disapproval of in-house performance of new requirements involving a capital investment of \$500,000 or more will not be redelegated below the level of DAS or equivalent.

(e) Approval to budget for a major capital investment associated with a new requirement will not constitute OSD approval to perform the new requirement with DoD personnel. Government performance shall be determined in accordance with this part.

§ 169a.13 CAs involving forty-five or fewer DoD civilian employees.

(a) When adequately justified under the criteria required in Appendix C to this part, CAs involving 11 to 45 DoD civilian employees may be competed

based on simplified cost comparison procedures and 10 or fewer DoD civilian employees may be directly converted to contract without the use of a simplified cost comparison. Such conversion shall be approved by the DoD Component's central point of contact office having the responsibility for implementation of this part. Part IV of the Supplement to OMB Circular A-76 and Appendix C to this part shall be utilized to define the specific elements of costs to be estimated in the simplified cost comparison.

(b) In no case shall any CA involving more than forty-five employees be modified, reorganized, divided, or in any way changed for the purpose of circumventing the requirement to perform a full cost comparison.

(c) The decision to perform a simplified cost comparison on a CA involving military personnel and 11 to 45 DoD Civilian employees reflects a management decision that the work need not be performed in-house. Therefore, all direct military personnel costs will be estimated in the simplified cost comparison (see Appendix C to this part) on the basis of civilian performance.

(d) A most efficient and cost-effective organization analysis certification is required for studies involving 11 to 45 DoD civilian employees (see Appendix C to this part).

[57 FR 29208, July 1, 1992]

§ 169a.14 Military personnel commercial activity.

Commercial activities performed exclusively by military personnel not subject to deployment in a combat, combat support, or combat service support role may be converted to contract without a cost comparison, when adequate competition is available and reasonable prices can be obtained from qualified commercial sources.

§ 169a.15 Special considerations.

(a) Signals Intelligence, Telecommunications (SIGINT) and Automated Information System (AIS) security.

(1) Before making a determination that an activity involving SIGINT as prescribed in Executive Order 12333, and AIS, security should be subjected

to a cost comparison, the DoD Component shall specifically identify the risk to national security and complete a risk assessment to determine if the use of commercial resources poses a potential threat to national security. Information copies of the risk assessment and a decision memorandum containing data on the acceptable and/or unacceptable risk will be maintained within the requesting DoD Component's contracting office.

(2) The National Security Agency (NSA) considers the polygraph program an effective means to enhance security protection for special access type information. The risk to national security is of an acceptable level if contractor personnel assigned to the maintenance and operation of SIGINT, Computer Security (COMPUSEC) and Communications Security (COMSEC) equipment agree to an aperiodic counter-intelligence scope polygraph examination. The following clause should be included in every potential contract involving SIGINT, Telecommunications, and AIS systems:

Contract personnel engaged in operation or maintaining SIGINT, COMSEC or COMPUSEC equipment or having access to classified documents or key material must consent to an aperiodic counter-intelligence scope polygraph examination administered by the Government. Contract personnel who refuse to take the polygraph examination shall not be considered for selection.

(b) *National intelligence.* Before making a determination that an activity involving the collection/processing/production/dissemination of national intelligence as prescribed in Executive Order 12333 should be subjected to a cost comparison, the DoD Component must specifically identify the risk to national intelligence of using commercial sources. Except as noted in paragraph (a) of this section, the DoD Component shall provide its assessment of the risk to national intelligence of using commercial sources to the Director, DIA, who shall make the determination if the risk to national intelligence is unacceptable. DIA shall consult with other organizations as deemed necessary and shall provide the decision to the DoD Component. (De-

tailed documentation shall be maintained to support the decision).

(c) *Accountable Officer.* (1) The functions and responsibilities of the Accountable Officer are defined by DoD 7200.10-M.⁹ Those functions of the Accountable Officer that involve the exercise of substantive discretionary authority in determining the Government's requirements and controlling Government assets cannot be performed by a contractor and must be retained in-house. The responsibilities of the Accountable Officer as an individual and the position of the Accountable Officer are not contractable.

(2) Contractors can perform functions in support of the Accountable Officer and functions where they are performing in accordance with criteria defined by the Government. For instance, contractors can process requisitions, maintain stock control records, perform storage and warehousing, and make local procurements of items specified as deliverables in the contract.

(3) The responsibility for administrative fund control must be retained in-house. The contractor can process all required paperwork up to funds obligation which must be done by the Government employee designated as responsible for funds control. The contractor can also process such documents as reports of survey and adjustments to stockage levels, but approval must rest with the Accountable Officer. In all cases, the administrative control of funds must be retained by the Government since contractors or their employees cannot be held responsible for violations of the United States Code.

(d) *Cost Comparison Process.* If performance of a commercial activity by DoD personnel cannot be justified under national defense, non-availability of commercial source, or patient care criteria, than a full cost comparison shall be conducted in accordance with part II of the Supplement to OMB Circular No. A-76, part III of the Supplement to OMB Circular No. A-76, and part IV of the Supplement to OMB Circular A-76, to determine if performance by DoD employees

⁹ See footnote 1 to § 169a.1(a).

is justified on the basis of lower cost (unless the criteria of §169a. and §169a. are met). The conclusion that a commercial activity will be cost compared reflects a management decision that the work need not be accomplished by military personnel. Therefore, all direct personnel costs shall be estimated on the basis of civilian performance. Funds shall be budgeted to cover either the cost of the appropriate in-house operation required to accomplish the work or the estimated cost of the contract. Neither funds nor manpower authorizations shall be removed from the activity's budget in anticipation of the outcome of a study.

(1) *Notification*—(i) *Congressional notification*. DoD Components shall notify Congress of the intention to do a cost comparison involving 46 or more DoD civilian personnel. DoD Components shall annotate the notification when a cost comparison is planned at an activity listed in the report to Congress on core logistics (see section 169a.9(a)(1)(ii)). The DoD Component shall notify the ADS(P&L) of any such intent at least 5 working days before the Congressional notification. The cost comparison process begins on the date of Congressional notification.

(ii) *DoD employee notification*. DoD Components shall, in accordance with 10 U.S.C. 2467(b), at least monthly during the development and preparation of the performance work statement (PWS) and management study, consult with DoD civilian employees who will be affected by the cost comparison and consider the views of such employees on the development and preparation of the PWS and management study. DoD Components may consult with such employees more frequently and on other matters relating to the cost comparison. In the case of DoD employees represented by a labor organization accorded exclusive recognition under 5 U.S.C. 7111, consultation with representatives of the labor organization satisfies the consultation requirement. Consultation with nonunion DoD civilian employees may be through such means as group meetings. Alternatively, DoD civilian employees may be invited to designate one or more representatives to speak for them. Other methods may be implemented if

adequate notice is provided to the non-union DOD civilian employees and the right to be represented during the consultations is ensured.

(iii) *Local notification*. It is suggested that upon starting the cost comparison process, the installation make an announcement of the cost comparison, including a brief explanation of the cost-comparison process to the employees of the activity and the community. The installations' labor relations specialist also should be apprised to ensure appropriate notification to employees and their representatives in accordance with applicable collective bargaining agreements. Local Interservice Support Coordinators (ISCs) and the Chair of the appropriate Joint Interservice Regional Support Group (JIRSG) also should be notified of a pending cost comparison.

(2) *Performance Work Statement (PWS)*. (i) The PWS and its Quality Assurance Plan shall be prepared in accordance with part II of the Supplement to OMB Circular No. A-76 5 for full cost comparison, simplified cost comparisons, and direct conversions of DoD personnel commercial activities. The PWS shall include reasonable performance standards that can be used to ensure a comparable level of performance for both Government and contractor and a common basis for evaluation. Employees and/or their bargaining unit representatives should be encouraged to participate in preparing or reviewing the PWS.

(ii) Each DoD Component shall:

(A) Prepare PWSs that are based on accurate and timely historical or projected workload data and that provide measurable and verifiable performance standards.

(B) Monitor the development and use of prototype PWSs.

(C) Review and initiate action to correct disagreements on PWS discrepancies.

(D) Approve prototype PWSs for Component-wide use.

(E) Coordinate these efforts with the other DoD Components to avoid duplication and to provide mutual assistance.

(iii) Guidance on Government Property:

(A) For the purposes of this instruction, Government property is defined in accordance with the 48 CFR part 45.

(B) The decision to offer or not to offer Government property to a contractor shall be determined by a cost-benefit analysis justifying that the decision is in the government's best interest. The determination on Government property must be supported by current, accurate, complete information and be readily available for the independent reviewing activity. The design of this analysis shall not give a decided advantage or disadvantage to either in-house or contract competitors. The management of Government property offered to the contractor shall also be in compliance with 48 CFR part 45.

(iv) If a commercial activity provides critical or sensitive services, the PWS shall include sufficient data for the in-house organization and commercial sources to prepare a plan for expansion in emergency situations.

(v) DoD Components that provide interservice support to other DoD Components or Federal agencies through interservice support agreements or other arrangements shall ensure that the PWS includes this work load and is coordinated with all affected DoD Components and Federal Agencies.

(vi) If there is a requirement for the commercial source to have access to classified information in order to provide the product or service, the commercial source shall be processed for a facility security clearance under the Defense Industrial Security Program in accordance with DoD Directive 5220.22¹⁰ and DoD Regulation 5220.22-R.¹¹ However, if no *bona fide* requirement for access to classified information exists, no action shall be taken to obtain security clearance for the commercial source.

(vii) Employees of commercial sources who do not require access to classified information for work performance, but require entry into restricted areas of the installation, may be authorized unescorted entry only

when the provisions of DoD Regulation 5200.2-R¹² apply.

(3) *Management Study.* A management study shall be performed to analyze completely the method of operation necessary to establish the most efficient and cost-effective in-house organization (MEO) needed to accomplish the requirements in the PWS. The MEO must reflect only approved resources for which the commercial activity has been authorized. As a part of the management study, installations should determine if specific requirements can be met through an Inter/Intraservice Support Agreement (ISA) with other activities or Government Agencies which have excess capacity or capability.

(i) The commercial activity management study is mandatory. Part III of the Supplement to OMB Circular No. A-76 provides guidance on how to conduct the management study. The study shall identify essential functions to be performed, determine performance factors, organization structure, staffing, and operating procedures for the most efficient and cost effective in-house performance of the commercial activity. The MEO becomes the basis of the Government estimate for the cost comparison with potential contractors. In this context, "efficient" (or cost-effective) means that the required level of workload (output, as described in the performance work statement) is accomplished with as little resource consumption (input) as possible without degradation in the required quality level of products or services.

(ii) DoD Components have formal programs and training for the performance of management studies, and those programs are appropriate for teaching how to conduct commercial activity management studies. Part III of the Supplement to OMB Circular No. A-76 does not purport to replace the DoD Component's own management techniques, but merely to establish the basic criteria and the interrelationship between the management study and the PWS.

(iii) If a commercial activity provides critical or sensitive services, the management study shall include a plan for expansion in emergency situations.

¹⁰ See footnote 1 to § 169a.1(a).

¹¹ See footnote 1 to § 169a.1(a).

¹² See footnote 1 to § 169a.1(a).

(iv) Early in the management study, management will solicit the views of the employees in the commercial activity under review, and/or their representatives for their recommendations as to the MEO or ways to improve the method of operation.

(v) The management study will be the basis on which the DoD Component certifies that the Government cost estimate is based on the most efficient and cost effective organization practicable.

(vi) Implementation of the MEO shall be initiated no later than 1 month after cancellation of the solicitation and completed within 6 months. DoD Components shall take action, within 1 month, to schedule and conduct a subsequent cost comparison when the MEO is not initiated and completed as prescribed above. Subsequent cost comparisons may be delayed by the DoD Component's central point of contact office, when situations outside the control of the DoD Component prevent timely or full implementation of the MEO. This authority may not be re-delegated.

(vii) DoD Components shall establish procedures to ensure that the in-house operation, as specified in the MEO, is capable of performing in accordance with the requirements of the PWS. The procedures also shall ensure that the resources (facilities, equipment, and personnel) specified in the MEO are available to the in-house operation and that in-house performance remains within the requirements and resources specified in the PWS and MEO for the period of the cost comparison, unless documentation to support changes in workload/scope is available.

(viii) A management study is not required for simplified cost comparisons however, a MEO analysis and certification is required.

(4) *Cost Comparisons.* Cost comparisons shall include all significant costs of both Government and contract performance. Common costs; that is, costs that would be the same for either in-house or contract operation, need not be computed, but the basis of those common costs must be identified and included in the cost comparison documentation. Part IV of the Supplement to OMB Circular A-76 (Cost Compari-

son Handbook) provides the basic guidance for conducting full cost comparisons. Appendix D provides guidance for conducting simplified cost comparisons. The supplemental guidance contained below is intended to establish uniformity and to ensure all factors are considered when making cost comparisons. Deviation from the guidance contained in part IV of the Supplement to OMB Circular A-76, will not be allowed, except as provided in the following subparagraphs.

(i) *In-house Cost Estimate.* (A) The in-house cost estimate shall be based on the most efficient and cost-effective in-house organization needed to accomplish the requirements in the PWS.

(B) Heads of DoD Components or their designees shall certify that the in-house cost estimate is based on the most efficient and cost-effective operation practicable. Such certification shall be made before the bid opening or the date for receipt of initial proposals.

(C) The ASD(P&L) shall provide inflation factors for adjusting costs for the first and subsequent performance periods. These factors shall be the only acceptable factors for use in cost comparisons. Inflation factors for outyear (second and subsequent) performance periods will not be applied to portions of the in-house estimate that are comparable with those portions of the contract estimate subject to economic price adjustment clauses.

(D) Military positions in the organization under cost comparison shall be converted to civilian positions for costing purposes. Civilian grades and series shall be based on the work described in the PWS and the MEO, determined by the management study rather than on the current organization structure.

(E) DoD Components shall not use the DLA Wholesale Stock Fund Rate and/or the DLA Direct Delivery rate for supplies and materials as reflected in paragraph 3.a. (1) and (2) of part IV of the Supplement to OMB Circular No. A-76. The current standard and pricing formula includes full cost under the Defense Business Operations Fund (DBOF). No further mark-up is required.

(F) DoD Components shall assume for the purpose of depreciation computations that residual value is equal to the

disposal values listed in Appendix C of part IV of the Supplemental to OMB Circular No. 76 (Cost Comparison Handbook) if more precise figures are not available from the official accounting records or other knowledgeable authority. Therefore, the basis for depreciation shall be the original cost plus the cost of capital improvements (if any) less the residual value. The original cost plus the cost of capital improvements less the residual value shall be divided by the useful life (as projected for the commercial activity cost comparison) to determine the annual depreciation.

(G) Purchased services which augment the current in-house work effort and that are included in the PWS should be included in line 3 (other specifically attributable costs). When these purchased services are long-term and contain labor costs subject to economic price adjustment clauses, then the applicable labor portion will not be escalated by outyear inflation factors. In addition, purchased services shall be offset for potential Federal income tax revenue by applying the appropriate rate in Appendix D of part IV of the Supplement to OMB Circular A-76 (Cost Comparison Handbook) to total cost of purchased services.

(H) Overhead costs shall be computed only when such costs will not continue in the event of contract performance. This includes the cost of any position (full time, part time, or intermittent) that is dedicated to providing support to the activity(ies) under cost comparison regardless of the support organization's location. Military positions provided overhead support shall be costed using current military composite standard rates that include PCS costs multiplied by the appropriate support factor.

(ii) *Cost of Contract Performance.* (A) The contract cost estimate shall be based on firm bids or negotiated proposals solicited in accordance with the FAR and the DoD FAR Supplement (DFARS) for full cost comparisons. Existing contract prices (such as those from GSA Supply Schedules) will not be used in a cost comparison. For simplified cost comparisons, the guidance in Appendix C of this part applies.

(B) Standby costs are costs incurred for the upkeep of property in standby status. Such costs neither add to the value of the property nor prolong its life, but keep it in efficient operating condition or available for use. When an in-house activity is terminated in favor of contract performance and an agency elects to hold Government equipment and facilities on standby solely to maintain performance capability, this is a management decision, and such standby costs will not be charged to the cost of contracting.

(C) A specific waiver is required to use contract administration factors that exceed the limits established in Table 3-1 of part IV of the Supplement to OMB Circular No. A-76 (Cost Comparison Handbook). The reason for the deviation from the limits, the supporting alternative computation, and documentation supporting the alternative method, shall be provided to the DoD Component's central point of contact office for advance approval on a case-by-case basis. The authority may not be redelegated. ASD(A&L) shall be notified within 30 days of any such decisions.

(D) The following guidance pertains to one-time conversion costs:

(1) *Material Related Costs.* The cost factors below shall be used, if more precise costs are not known, to estimate the cost associated with disposal/transfer of excess government material which result from a conversion to contract performance:

	Percentage of current replacement cost
Packing, crating , and handling (PCH)	3.5
Transportation	3.75

(2) *Labor-Related Costs.* If unique circumstances prevail when a strict application of the 2 percent factor for computation of severance pay results in a substantial overstatement or understatement of this cost, an alternative methodology may be employed. The reason for the deviation from this standard, the alternative computation, and documentation supporting the alternative method shall be provided to the appropriate DoD Component's central point of contact office for advance

approval on a case-by-case basis. This authority may not be redelegated.

(3) *Other Transition Costs.* Normally, government personnel assistance after the contract start date (to assist in transition from in-house performance to contract performance) should not be necessary. When transition assistance will not be made available, this condition should be stated clearly in the solicitation so that contractors will be informed that they will be expected to meet full performance requirements from the first date of the contract. Also, when circumstances require full performance on the contract start date, the solicitation shall state that time will be made available for contractor indoctrination prior to the start date of the contract. The inclusion of personnel transition costs in a cost comparison requires advance approval of the DoD Component's central point of contact office. This authority may not be redelegated.

(E) *Gain or Loss on Disposal/Transfer of Assets.* If more precise costs are not available from the Defense Reutilization and Marketing Office or appropriate authority, then:

(1) The same factors for PCH and transportation costs as prescribed in §169a.12E(ii)(D)(1) for the costs associated with disposal/transfer of materials may be used.

(2) The estimated disposal value may be calculated from the net book value as derived from the table in Appendix C of part IV of the Supplement to OMB Circular No. A-76 (Cost Comparison Handbook), minus the disposal/transfer costs. This figure shall be entered as a gain or loss on line 11 or line 13 of the cost comparison form as appropriate.

NOTE: If a cost-benefit analysis, as prescribed in §169a.12(B)(iii), indicates that the retention of Government-owned facilities, equipment, or real property for use elsewhere in the Government is cost advantageous to the Government, then the cost comparison form shall reflect a gain to the Government and therefore a decrease to the cost of contracting on line 11 or line 13 of the cost comparison form as appropriate.

[50 FR 40805, Oct. 7, 1985, as amended at 57 FR 29209, July 1, 1992]

§ 169a.16 Independent review.

(a) The estimates of in-house and contracting costs that can be computed before the cost comparison shall be reviewed by a qualified activity, independent of the Task Group preparing the cost comparison. This review shall be completed far enough in advance of the bid or initial proposal opening date to allow the DoD Component to correct any discrepancies found before sealing the in-house cost estimate.

(b) The independent review shall substantiate the currency, reasonableness, accuracy, and completeness of the inhouse estimate. The review shall ensure that the in-house cost estimate is based on the same required services, performance standards, and workload contained in the solicitation. The reviewer shall scrutinize and attest to the adequacy and authenticity of the supporting documentation. Supporting documentation shall be sufficient to require no additional interpretation.

(c) The purpose of the independent review is to ensure costs have been estimated and supported in accordance with provisions of this Instruction. If no (or only minor) discrepancies are noted during this review, the reviewer indicates the minor discrepancies, signs, dates, and returns the CCF to the preparer. If significant discrepancies are noted during the review, the discrepancies shall be reported to the preparer for recommended correction and resubmission.

(d) The independent review is not required for simplified cost comparisons.

[50 FR 40805, Oct. 7, 1985, as amended at 57 FR 29210, July 1, 1992]

§ 169a.17 Solicitation considerations.

(a) Every effort must be made to avoid postponement or cancellation of CA solicitations even if there are significant changes, omissions, or defects in the Government's in-house cost estimate. Such corrections shall be made before the expiration of bids or proposals and may require the extensions of bids or proposals. When there is no alternative, contracting officers must clearly document the reason(s).

(b) Bidders or offerers shall be informed that an in-house cost estimate