

# FAIR Act Inventory Challenge and Appeal Process

## Annual Report on Department of Transportations (DOT) Commercial Activities

The Department of Transportation (DOT) submits an annual inventory of commercial activities to the Office of Management (OMB) in accordance with the Federal Activities Inventory Reform (FAIR) Act and OMB Circular A-76 policy. The content of the report varies depending upon the progress made by each Operating Administration (OA) in reviewing their inventory and through inventory submissions, review, challenges, and appeals mandated by the FAIR Act. OMB issues subsequent guidance if it determines that supplemental reports or other information is needed for future inventory submissions each year to assure all agencies correctly implement all of the provisions of the FAIR Act and take advantage of the management information inherent in the detailed Commercial Activities Inventory.

## Inventory Review and Publication; Challenges and Appeals

1. **Review and Publication:** In accordance with Section 2 of the FAIR Act, OMB will review the agency's Commercial Activities Inventory and consult with the DOT regarding its content. After this review is completed, OMB will publish a notice in the *Federal Register* stating that the inventory is available to the public. Once the notice is published, the DOT will transmit a copy of the detailed Commercial Activities Inventory to Congress and make the materials available to the public through this Website:  
<http://www.dot.gov/mission/administrations/administration/senior-procurement-executive/commercial-services-management>
2. **Challenges and Appeals:** Under Section 3 of the FAIR Act, an "interested party" may administratively challenge DOT's decision to include or exclude a particular activity from the Commercial Activities Inventory. If OST or an Operating Administration issues an adverse decision on the initial challenge, an interested party may also administratively appeal this adverse decision. Section 3(b) of the FAIR Act defines "interested party" as:
  - a. A **private sector source** that (A) is an actual or prospective offeror for any contract or other form of agreement to perform the activity; and (B) has a direct economic interest in performing the activity that would be adversely affected by a determination not to procure the performance of the activity from a private sector source.
  - b. A **representative of any business or professional association** that includes within its membership private sector sources referred to in a. above.
  - c. An **officer or employee** of an organization within an executive agency that is an actual or prospective offeror to perform the activity.
  - d. The **head of any labor organization** referred to in section 7103(a) (4) of title 5, United States Code that includes within its membership officers or employees of an organization referred to in c. above.

3. An interested party may submit to DOT or an Operating Administration an initial challenge to the inclusion or exclusion of an activity within 30 working days after publication of OMB's *Federal Register* Notice. The inventory challenge shall be limited to (a) the reclassification of an activity as inherently governmental or commercial, or (b) the application of reason codes. Function codes shall not be subject to the inventory challenge process. A written inventory challenge shall be submitted to agency inventory challenge authorities and shall specify the agency, agency component, agency organization, function(s), and location(s) for the activities being challenged. (Source: OMB Circular A-76, May 29, 2003, A-4)
4. The Secretary of DOT may delegate the responsibility to designate the appropriate official(s) to receive and decide the initial challenges. As mandated by the FAIR Act, the deciding official must decide the initial challenge and transmit to the interested party a written notification of the decision within 28 working days after receiving the challenge. The notification must include a discussion of the rationale for the decision and, if the decision is adverse, an explanation of the party's right to file an appeal.
5. An interested party may appeal an adverse decision to an initial challenge within 10 working days after receiving the written notification of the decision. The Secretary of DOT may delegate the responsibility to receive and decide appeals to an Appeal Official who is at the same level as, or a higher level than, the individual who prepared the inventory. Within 10 working days of receipt of the appeal, the Department's Competitive Sourcing Officer (CSO) shall issue a written inventory appeal decision and the rationale for the decision to the interested party. DOT's CSO must then transmit to OMB and the Congress a copy of any changes to the inventory that result from this process, make the changes available to the public and publish a notice of public availability in the *Federal Register*.

**Challenges** - Parties interested in challenging a Department of Transportation (DOT) or Operating Administration's (OA) inventory must deliver the written challenge directly to the appropriate address located at: <http://www.dot.gov/mission/administrations/administration/senior-procurement-executive/commercial-services-management> for each OA or DOT separately. Please note that a separate challenge is required for each OA or the DOT inventory that is being challenged. By law, challenges must be filed within 30 working days of the date of the Federal Register notice indicating that DOT's inventory is available on DOT's website.

**Appeals** - If an interested party appeals an unsuccessful challenge, the appeal must be delivered, in writing, to the DOT Appeals Authority Address identified at: <http://www.dot.gov/mission/administrations/administration/senior-procurement-executive/commercial-services-management> within ten working days after receipt of the DOT or OA's challenge decision. In addition to providing rationale about why the challenge decision is being appealed, the appeal package must include:

- A copy of the Challenge document, and
- A copy of the OA or DOT's decision.