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cc:
Subject: MAPPS comments on A-76 revision

The Management Association for Private Photogrammetric Surveyors (MAPPS) is a national trade association of more than 170 member firms engaged in a variety of surveying, mapping, imaging, and other geographic information and geospatial data and services.

Our member firms are often contractors to a variety of Federal agencies, and to state and local government and commercial clients. Surveying, mapping and geospatial activities are "commercial activities" and are included in the definition of architect engineer services in 40 USC 541-544 and FAR part 36.

Mapping and related activities were target for A-76 in the last budget sent to Congress by President Reagan (proposed FY 1990 budget submitted in January, 1989). However, that initiative notwithstanding, no Federal agency has ever conducted a start-to-finish A-76 on a surveying or mapping activity..

We believe such activities should be subject to direct conversion. Mapping, surveying and geospatial activities is an example not only of government performance of a commercial activity (more than 70% of the Federal government's requirements are performed in-house), but one in which the government is in direct competition with the private sector by making its maps and mapping data, and its production services available for free or for sale outside the Federal government.

MAPPS supports many aspects of the Circular and we commend OMB for its effort on the revison. We particularly applaud the provisions limiting ISSA work for other Federal agencies and intergovernmental work for state and local government.

While we strongly support the intent of the Circular, to improve A-76, we offer the following suggestions:

· Page 1, paragraph 4. The policy addresses "needed commercial services' of the government. It does not address "provided commercial services" of the government. These are services (and products) produced by the government that are available to the public (for free or for a fee) which places the government in competition with the private sector. The Circular does not address this and should either address it or make reference to a separate Circular which does address this issue.
· The Circular no longer restates the policy, in effect for more than 45 years, that the government should not compete, that it should reply on the private sector, etc. This policy should be reinserted in the Circular.
· Page 2, section 5. The Federal government provides billions of dollars annually to state and local government in grants, cooperative agreements, aid and assistance and other means. Whether taxpayers dollars are spent by Federal agencies or by state and local agencies, the taxpayers have the right to be assured such dollars are being spent economically and efficiently, and that the taxpayers are getting the best value for each dollar spent by the government. Therefore, it is imperative that the provisions of this Circular apply to all governmental units that expend Federal tax dollars.. Consequently, this Circular should either be revised to apply to commercial activities of state and local and other units of government that receive grants, cooperative agreements, aid and assistance and other means of transferring Federal funds, or there should be such a requirement in OMB Circular A-102.
· Page A-3, section D.3. A new reason code "G" should be added "Agency is not performing, activity is performed by contractor". This will provided a more transparent view of agency operations. Currently, there are agency activities that appear on neither the commercial activities inventory nor the inherently governmental activities inventory, because, for example, the activity is a GoCo. It is difficult, if not impossible, for a private sector

interested party to file a FAIR Act challenge if it is not provided information on how the activity is being performed. The addition of this category should mean that the addition of the dollar value of the commercial activities inventory and the inherently governmental activities inventory should equal the appropriated budget of the agency.

· Page B.2., section A.2.a.2. The term "private sector source" is first used in this section. This term is not defined in the Circular. Other terms referring to the private sector are also used throughout the Circular. The "private sector" as used in this Circular, should be defined to mean a private, for profit individual, association, partnership or corporation. The Circular should not permit state and local government units, universities, or other tax exempt or not for profit entities to compete for commercial activities of the Federal government. These organizations are the beneficiaries of a host of government-provided advantages and exemptions, including those regarding unemployment insurance, minimum wage, securities regulation, bankruptcy, antitrust restrictions, copyright, workplace safety and health, zoning, as well as an exemption from the Federal Trade Commission Act, all of which apply to private, for-profit companies. These are advantages that A-76 has never considered. Moreover, by their very nature, these organizations are tax exempt. It is instructive to review the history of tax exempt organizations in the Internal Revenue Service Code. During consideration of the Revenue At of 1938, the House Committee on Ways and Means provided in its report that "the exemption from taxation of money or property devoted to charitable and other purposes is based on the theory that government is compensated for the loss of revenue by its relief from financial burden which would otherwise have to be met by appropriations from public funds and by the benefits resulting from promotion of the general welfare." (See: Bennett, James T. and DiLorenzo, Thomas J., Unfair Competition: The Profits of Nonprofits, (Lanham, MD: Hamilton Press, 1989), p. 25-26.). Thus, the tax exemption of tax-exempt and non-profit organizations is predicated on the assumption that they perform inherently governmental, not commercial, activities. The performance of commercial activities by these organizations further deprives the Government of tax revenue from the performance of their activities, which undermines why the exemption was granted in the first place.

· Page B-2&B.3., section A.2.b.4. An expansion of a commercial activity should be subject to Direct Conversion or Standard Competition when the increase in operating cost is 10%, not 30% as proposed. A 30% expansion is too high, leads itself to incremental expansion to avoid competition, and denies the government the benefits of competition.

· Page B.5., section C.1.b.6. As proposed, the language on relationship to the budget provides an incentive for agencies NOT to perform competitions. The savings from direct conversations or standard competitions are calculated in OMB Circular A-11 budget estimates, only when standard competitions are conducted. In order to enforce Circular A-76, this section should be changed to either (a) strike "completing standard competitions" and insert in lieu thereof "implementing Circular A-76 for all activities on the agency's FAIR Act inventory" or inserting after "standard competitions" the words "or Direct Conversions". Agencies should be entitled to account for savings achieved through direct conversions in the same manner as savings from standard competitions.

· Page B.6., section 2.a.3&4. The Circular is currently in conflict with the Statute with regard to Architecture-Engineering and Related Services (A&E). The statute (40 USC 541 et. seq.) requires contracts for A&E services to be awarded on the basis of demonstrated competence and qualifications, not price competition. The Circular's standard competition process includes cost/price competition. Therefore, the Circular must be revised in order to be in compliance with the Statute. (Note: this provision in the Statute is implemented in the FAR in Part 36, including a definition of A&E services.) section B.2.3&4 should be revised to provide for the use of the FAR Part 36 process for A&E services, or such services should be subject to the direct conversion process.

· Page B.9, section 3.a.5. As noted above, for A&E services, an agency cost estimate, nor a private sector cost estimate, is permitted by Statute. In this section, and all subsequent sections of the Circular, all references to bids, costs and tenders should include a note that it does not apply to A&E services. In this section, a paragraph on past performance should be inserted for A&E services, such as "Past Performance. The ATO shall develop a Standard Form 254 and 255 submission (or any successor to such form(s)) outlining the past performance of the agency. Such submission shall include the agency's past performance with regard to qualification (including professional licensure) of personnel, agency record on meeting delivery and completion schedules and agency record on meeting budgets.

· Page B.16, section 5.c.. The Failure to Perform section must be revised to provide to evaluations of agency performance, after an agency wins a standard competition, or if an agency is awarded work through a direct conversion. Some recourse or penalty, equivalent to that to which a private firm is subjected, must be conferred upon the agency performance in order for the Circular to be fair and balanced.

· Page B-18, section D.1. The Right of First Refusal provision must be revised to provide private sector employees the right of first refusal for government positions if an agency is awarded previously outsourced work through a direct conversion. Some protection must be conferred upon the private sector employees who are directly affected by a conversion to in-house government performance in order for the Circular to be fair and balanced.
· Page C-1, section A.1. The small activity threshold should be increased to 50 employees. Small activities are those for which small business is most likely to be a prospective contractor. The ability of an agency to make a direct conversion, particularly to a small business. Either the threshold should be increased from 10 to 50 employees, or this provision should be revised to permit a direct conversion of any activity for which a small business is likely to perform (regardless of the number of FTEs). A determination, similar to a set aside determination under the current Small Business Act and FAR, could be utilized.
· Page C.2., after section 3 (research and development, R&D). A provision should be added that permits direct conversion of A&E services, as required by and defined in 40 USC 541 et. seq. and FAR part 36, provided such competition for the conversion is carried out in accordance with 40 USC 541 et. seq. and FAR part 36.
· Page C.2., section C. The term "Competition Waiver". In the procurement community, the term "waiver" has meanings and connotations that doe not apply to A-76. The term "Direct Conversion Authorization" should be used.
· Page D.1. The attachment should clarify that for ISSA work performed by a multi-agency contract with the private sector and the revenue generated is less that $1 million annually, the competition requirements do not apply.
· Page D.3., section H.1. In this section, strike "available to OMB and the public upon request" and insert in lieu thereof "available to OMB and made public in FedBizOpps". There must be sunshine and transparency to the intergovernmental process. Before a Federal agency can provide a service to state and local government, the proposed provision of that service should be made publicly known. Under the current language in the draft, the private sector has no way of knowing that such a transaction is being proposed, thus it would have no way of knowing to exercise its right to request such information from OMB. A notice in FedBizOpps will provide for the opportunity for the private sector to make an offer, thus providing a market-based determination that the state or local government has sought but has not been able to identify a satisfactory private sector source.
· Page D.3&4, section H.1.b.3. At the end of that section, the list of what "specialized or technical services" does not include should specify "architecture and engineering services (including surveying, mapping and geospatial services) to clarify that these are commercial services that can and should be performed by the private sector.
· Page D.4., section 1.d. A request for services which is forwarded to OMB for approval should require a FedBizOpps or Federal Register notice requirement so the private sector can comment and respond in order to help determine whether the request indeed involves a commercially available service that the private sector cold provide. Such sunshine and transparency will help provide a market test to the request and prevent abuse of the process.
· Page E.4., section 1. Agency personnel costs must include the cost of obtaining and maintaining professional licenses. In some areas, private sector personnel are subject to professional licensing. Federal employees are not required to meet these standards, particularly with regard to State licensing requirements. The cost of meeting the prerequisite education and experience requirements to obtain a professional license, the cost of licensing examinations, the cost of the license, and the cost of continuing education, etc. should be a level playing field cost for both the agency tender and the private sector. Since professional licensure is in place to protect public health, welfare and safety, the Circular should be revised to require the Standard Competition to address licensing of personnel on fair and equitable basis for both the government and the private sector, and the cost of licensure should be factored into the agency tender.
· Page E.7., section 1.l. Inmate labor should be removed from the Circular. The private sector is prohibited from utilizing inmate labor under Federal law. Thus, in order to provide a fair and balanced competition, inmate labor should not be included or permitted in an agency tender.
· Page E.9&10, section 3.a.5.e. (note the alpha-numeric system breaks down in this section of the draft - insurance, etc. should not be considered a subset of facilities). The draft does not specifically address professional liability that would apply to certain professional services contracts. If, for example, A&E services are not exempt from the Standard Competition provisions, attachment E must be revised to provide for equality in the cost of professional liability insurance of a private sector firm and the cost of self insurance of the government to assure an apples to apples comparison.

Finally, we oppose the "bundling" of any A/E services, including surveying, mapping and geospatial services, with non-A/E services. A provision in A-76 should prohibit such bundling, consistent with the Brooks Act for A&E services, and consistent with the President's recent initiative on contract bundling.

We urge the adoption of these recommendations in the final A-76.

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