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To: David C. Childs A-76comments/OMB/EOP@EOP, John Breiling <breiling@worldstar.com>

cc:
Subject: Comments on 11/19/02 A-76 proposed changes

Dear Mr. David C. Childs of OMB, 4690 NW Columbia, Portland, Oregon 97229
(A-76comment@omb.eop.gov) 12/18/2002

Re: 11/19/02 Federal Register A-76 proposed changes by OMB

1. THESE ARE THE PERSONAL COMMENTS OF A 37-YEAR FEDERAL MILITARY AND CIVILIAN PROFESSIONAL EMPLOYEE WHOSE SERVICE HAS BEEN LARGELY IN THE FIELD

These comments are the personal comments of one who has been eligible for retirement for over 4 years, but prefers to continue to serve the people of the United States as an engineer and lawyer, as I have for the last 37 plus years as a Navy reservist, Vietnam and Korean combat veteran, and civilian federal employee.

Unfortunately due to press of emergency work and many other crisis matters, news of the 11/19/02 proposed changes to A-76 only arrived at my desk today, the day before the end of the comment period. Thus my comments are somewhat more hurried than they would be if I had more time to gather data.

I trust you all have heard of the "Law of Unintended Consequences" – the principle that changes often have very bad and unintended consequences because the persons making the changes are unaware of the consequences and ramifications of their proposed changes.

2. THE OMB A-76 PROPOSAL TO ELIMINATE THE EXEMPTION FOR SOLE SOURCE AGREEMENTS BETWEEN AND AMONG FEDERAL AGENCIES WILL HAVE DISASTROUS UNINTENDED CONSEQUENCES AND SHOULD NOT BE ADOPTED.

The proposal TO ELIMINATE THE "EXCEPTIONS THAT HAVE PERMITTED FEDERAL AGENCIES TO PROVIDE SERVICES TO ONE ANOTHER ON A SOLE-SOURCE BASIS UNDER REIMBURSABLE FEE-FOR-SERVICE AGREEMENTS (I.E. COMMERCIAL ISSAs" and to require "PERIODIC RECOMPETITIONS OF COMMERCIAL ACTIVITIES PERFORMED FOR THE GOVERNMENT" for such commercial ISSA's WOULD BE A FOLLY OF WORLD-CLASS PROPORTIONS because OMB does not understand all of the purposes, uses, and impacts of the such interagency agreements.

OMB, like many other Washington, DC and other senior federal government officials, sits at the top of the federal government pyramid, and consequently is rather remote from the day-to-day practicalities of those field folks charged with carrying out federal government missions and responsibilities.

3. THE UNITED STATES IS DIVIDED INTO TWO HALVES WHEN IT COMES TO OWNERSHIP AND MANAGEMENT OF LARGE TRACTS OF FEDERAL LANDS – MOST FEDERAL LAND HOLDINGS ARE IN THE WESTERN UNITED STATES.

This is particularly true of federal officials outside the Western United States, because the United States is really divided into two halves when it comes to federal government services. Due to our Nation's history, most of the land east of the Mississippi River was developed and owned by private citizens and corporate entities. There are very few large federal land holdings east of the Mississippi River.

In contrast, partly because the geography of the lands west of the Mississippi River did not lend themselves to the same level of Homestead Act settlement (much of the Western United States is mountain and desert terrain),

partly because the timing of the settlement of the West occurred during and after the Industrial Revolution swept the East, partly because of federal natural resource management laws and changes initiated in the Post-Civil -War United States, and for many other reasons, the Western United States is largely owned and managed by the Federal Government. The actual percentages vary from state to state, from as high as 80% in Nevada to a more typical 40-60% in most western states.

4. THE COMMON GOAL OF FEDERAL PROGRAMS IS TO PROVIDE FOR THE COMMON GOOD AND WELFARE OF THE AMERICAN PEOPLE AND SUCH ALLIES AS CONGRESS SEEKS TO PROTECT AND BENEFIT

As most students of political science know, politics is, in the final end, a science of practical accommodations of theory and science to real-world people and situations. The number one challenge and mission of governmental services, at all levels, from Washington, DC, to the smallest political precinct in the most remote area of US jurisdiction, is to serve the local political situation as well and as efficiently as possible. As the Preamble of the US Constitution states, and the Declaration of Independence, the purpose of governments is to serve the governed and provide for the common good and welfare.

5. THE GOVERNMENT OPERATES PRINCIPALLY THROUGH AGREEMENTS. THESE AGREEMENTS FALL INTO 3 CLASSES: (A) PROCUREMENT CONTRACTS; (B) ASSISTANCE AGREEMENTS; AND (C) OTHER.

Having said this, government agreements fall into several classes as defined in Title 31 USC and elsewhere:
(1) procurement contracts (31 USC 6303) – the sole purpose of procurement contracts is to procure goods, services, and construction for the use of the government – at the best prices possible considering all of the other statutory and policy requirements imposed on the federal acquisition system (FAR, DFARS, and other agency supplements to the FAR);

(2) assistance agreements including grants (31 USC 3104) and cooperative agreements (31 USC 3105); and

(3) a huge assortment of other forms of government largess (e.g. welfare payments, federal insurance programs, federal loan programs, other forms of government agreement programs (Medicare intermediary contracts), real estate transactions, etc.)

6. THE PRIMARY DISTINCTION BETWEEN PROCUREMENT CONTRACTS AND ASSISTANCE AGREEMENTS IS THE EXISTENCE OF OVERRIDING OTHER FEDERAL GOALS AND PURPOSES WHEN USING ASSISTANCE AGREEMENTS –BESIDE THE SIMPLE GOAL OF ACQUIRING NEEDED SUPPLIES AND SERVICES.

The primary distinction between procurement contracts and assistance agreements is the presence of OTHER CRITICAL GOVERNMENT PURPOSES AND GOALS in assistance agreements. Both procurement contracts and assistance agreements often both provide goods and services to the government, but in the case of assistance agreements, there are OTHER, OVERRIDING FEDERAL PURPOSES AND GOALS BEHIND THE TRANSACTIONS. These other purposes and goals are as broad as the scope of federal programs and agencies, which is to say that the only practical limit is the imagination and will of the Congress under Article 1 of the US Constitution when Congress enacts laws. If there is one thing that I have learned in 37 years of federal service, it is that there is no practical boundary to the desires and will of Congress other than the practical limits of impossibility.

It is the challenge of trying to do the impossible, as directed by Congress for the benefit of the American people and other allies and friends around the world, that makes federal service so challenging and rewarding. You folks at the top of the government pyramid in Washington, DC, routinely ask those of us in the field where “the rubber meets the pavement” to do the impossible. And as the old World War 2 Navy slogan says, “The difficult is done immediately. The impossible takes a little longer!”

The way we do the seeming impossible is by being creative within the constraints of resources, money, law, and policy that you folks in Washington, DC, set for us in the field.

7. DESPITE THE HUGE VARIETY OF ASSISTANCE AGREEMENTS AUTHORIZED BY LAW, THERE IS A COMMON THREAD WITH REGARD TO COOPERATIVE AGREEMENTS AND OTHER SIMILAR ASSISTANCE ARRANGEMENTS: THE PARTIES' PRINCIPLE MOTIVES INCLUDE ENTERING INTO A PARTNERING RELATIONSHIP TO ACCOMPLISH A COMMON TASK OR ENTERPRISE OR GOAL.

In merely purchasing supplies or services, the only purpose of the contract relationship is to transfer goods and services from party A to party B. In assistance relationships that fit the statutory definition of a cooperative agreement, the primary goal of the parties A and B is to achieve a common purpose, mission, or task. Goods and services are exchanged, but the partnering aspect of the relationship is the dominant characteristic of the relationship. The difference is similar to the difference between a one night date and a marriage. The procurement contract relationship needs no dominant partnering relationship to work. On the other hand, the cooperative agreement will fail its ultimate purpose if the parties do not enter into a real partnering relationship.

8. ECONOMY ACT ORDERS AMONG FEDERAL AGENCIES CAN BE EITHER FOR PROCUREMENT PURPOSES OR FOR ASSISTANCE PURPOSES.

Unlike procurement contracts and assistance agreements (grants and cooperative agreements) as defined in 31 USC 6303-6305, Economy Act orders under 31 USC 1535 (and other similar interagency agreements under a wide variety of other federal statutes) can be either for procurement purposes or for assistance purposes. When Congress first authorized Economy Act orders among military departments in 1915 and later among all federal agencies in 1920 (and successive amendments to the Economy Act), Congress did not distinguish between merely procurement motives and partnering motives. The result is that today Economy Act orders can and do serve two entirely distinctive purposes: (1) procurement and (2) partnering relationships. Both relationships are legal and valid.

9. THE PROPOSED DELETION OF THE A-76 EXEMPTION FOR SOLE SOURCE INTER-AGENCY ECONOMY ACT ORDERS AND SIMILAR AGREEMENTS UNDER OTHER STATUTES WOULD HAVE DEVASTING CONSEQUENCES ON THE EFFICIENCY AND ECONOMY OF GOVERNMENT OPERATIONS -- AND THE LEGAL COMPLIANCE OF FEDERAL AGENCIES WITH A HOST OF FEDERAL STATUTES.

A. THE DOMINANT FACT OF GOVERNMENT TODAY IS THAT WE ARE UNDER-RESOURCED FOR OUR MISSIONS. The Congressional appropriations committees acknowledge this every year in their committee reports that accompany appropriations acts.

As a result, every smart federal employee looks for and pursues the easiest, most economical and efficient way to perform his or her tasks, to the best of his or her ability. We all have to be very good at pinching pennies. When we don't, it is because some statute or policy is blocking such efficiency. And there are a lot of such statutes and policies.

B. THE ECONOMY ACT AS A SOLE SOURCE PROCUREMENT AUTHORITY IS THE MOST EFFICIENT, ECONOMICAL , AND COMMON SENSE METHOD OF PROCUREMENT WHEN PROPERLY USED.

When the Economy Act is used for procurement purposes, it is because it is the most efficient and economical way to proceed – all circumstances considered. <u>However, price is NOT the only measure of economy and efficiency. The true cost of any procurement is the sum total of all costs involved in the procurement, including the resources put into its processing and administration</u>.

One of the largest costs of procurement is the process itself. Drafting and executing adequate plans and specifications for procurement contracts is an expensive process. It requires a significant amount of product or service technical knowledge, marketplace knowledge, and customer and customer use knowledge. With the shrinking of the federal government, fewer and fewer federal agencies have the in-house expertise to procure technical product and services. The economical solution is to procure such services and goods through other federal agencies who have the necessary technical expertise. This was and is the purpose of the 1920 Economy Act (31 USC 1535).

Whether the servicing agency provides the goods or services from in-house resources (less and less the case these days) or from its own contract sources, it is still cheaper, more efficient, and common sense for the less experienced

and expert agency to use the more experienced and expert agency. This is properly a sole-source decision and properly exempted from any other statutory or policy constraint or limitation.

In fact, the contrary position is the one that should be questioned for the best use of government resources. The principle of "Not Reinventing the Wheel" is a common sense principle – and one that the government should follow in using the Economy Act – and one that the A-76 process should leave alone. It is stupid to try to do something yourself, if you have another federal agency with a lot more expertise available to assist you.

C. WHEN THE ECONOMY ACT ORDER IS USED AS AN ASSISTANCE AGREEMENT, IT MAKES EVEN LESS SENSE TO DENY SOLE SOURCE TREATMENT UNDER ANY PROCURMENT POLICY OR STATUTE

It is a common characteristic of government entities at all levels that their missions and purposes are limited and described by constitutional, treaty, and statutory provisions. With the exception of the federal government where mission overlap is a common occurrence, most state, local, and tribal governmental entities have more clearly defined roles and missions. But even in the federal government, an agency's allies are defined by statutory missions. Agencies partner with other agencies because statutes direct their missions and activities and force such partnerships. THE SOLE SOURCE RELATIONSHIPS FLOW FROM THE REQUIREMENTS OF STATUTES. THESE ARE NOT DISCRETIONARY BUT MANDATORY RELATIONSHIPS.

Even if the statutes don't compel partnering, real world realities do. Two or more federal agencies can't do the same or related missions, in the same place and at the same time, without partnering and cooperating to at least some extent with each other. Since most federal agencies have equal standing, they either partner or collide and fight. Real world politics dictates partnering. Even if the President or his aids do not step in, Congress will intervene and stop colliding and fighting among agencies, particularly in the local Congressional district level.

The Portland region of INS has demonstrated this. INS in Portland decided to jail with criminals all lawful Asian entrants who had any problems with their entrance documentation until such problems could be resolved. After jailing a significant number of friendly country professional entrants, the public outcry forced the local Congressional delegation to intervene and have the offending INS supervisors removed. INS's incredible stupidity was contrary to and extremely disruptive of State Dept, Defense Dept., Commerce Dept., and many other federal agencies' relationships with friendly Asian countries and with the foreign trade relationships of the United States in general with our allies around the world.

D. IN REALITY, IN RESPONSE TO INCREDIBLY COMPLEX ISSUES, MULTIPLE POLITICAL INTERESTS AND DRIVERS, AND ACUTE SHORTAGES OF RESOURCES, FEDERAL, STATE, LOCAL, AND TRIBAL AGENCIES IN OREGON AND WASHINGTON PARTNER EVERYTHING WE CAN.

From the field perspective of myself and my federal, state, tribal, and local government colleagues – and the thousands of private citizens and entities we deal with – PARTNERING IS THE ONLY WAY TO DO BUSINESS EFFICIENTLY, ECONOMICALLY, AND COMMON SENSABLY.

(1) WE HAVE TO PARTNER IN ORDER TO WORK TOGETHER – AND NOT AGAINST ONE ANOTHER. Order and harmony achieve progress. Chaos – the failure to work together – breeds only more chaos. This is common sense.

(2) THE COMMON SCARCITY OF RESOURCES FORCES US TO PARTNER. Governments at all levels have more missions than resources. Only by pooling our resources through Economy Act orders (only federal agencies in the agreements) and Cooperative agreements (federal and non-federal partners) can we meet statutory missions and goals as efficiently and economically as possible.

A few examples will demonstrate my point.

REMOTE GAS STATION SERVICES

About a decade ago, federal law required the removal of most old underground storage tanks (UST). As a result, several of us federal agencies in Oregon examined our needs for UST's and pooled our resources. Since the Forest

Service had the most intense need for UST in the remote back woods and desert lands that comprise 95% of Oregon, it was agreed that the Forest Service would keep a few remaining UST and serve the rest of us federal partners in these remote areas.

In answer to the question about why we didn't go to a private sector contract card-lock operation, the answer is a combination of practical circumstances and limitations of Oregon state law on such commercial operations. Oregon generally bans self-service gas stations, and consequently severely restricts commercial card-lock private gas operations. After considering all of the circumstances, including huge variations in the need for such services (Forest Service field operations vary from winter lows to summer forest-fire-fighting peaks), it was decided that having the Forest Service provide the services with its own resources made the most sense for all concerned.

In contrast, in Washington, where the laws are different, we supplied our gas needs for the Mt. St. Helens' 1980-1982 field operations from the local gas station in our remote site. This was sole source due to market forces – and more expensive than the Forest Service operation in Oregon. However, our Mt. St. Helens' operations were short-term construction operations that did not warrant a permanent UST arrangement, like our remote, long-term operations and management field operations in Oregon at remote dam sites. Consequently, higher gas prices in the short term were more economical than setting up cheaper-priced government-operated facilities for a short term.

However, in both cases, the proper place to make the decision of how to proceed was in the field – where the work is done and all of the conditions and circumstances are known.

FISHERY RESEARCH ACTIVITIES

Under the Endangered Species Act (ESA), all federal agencies must manage their actions in a way to benefit and not hurt listed species. Congress has, to protect salmon species in general and endangered salmon species in particular, authorized ESA measures by a large number of federal agencies in the Pacific Northwest under a large collection of federal laws, including:

NMFS and USFWS – the 2 agencies charged with administering ESA and carrying out a wide range of related fishery enhancement programs; aided and assisted by delegated state agencies;

BPA, the Corps, and BOR –charged as hydropower managers with protecting salmon and carrying out fishery enhancement and protection programs;

USFS, BLM, and BIA – charged as federal land managers with protecting ESA fisheries and fishery habitat;

EPA and delegated state agencies – charged with protecting fisheries as part of Clean Water Act and related federal environmental statutory responsibilities;

various other Dept. of Energy (DOE) entities charged with fisheries' missions;

USCG – charged with emergency response and water pollution control enforcement tasks; and

state agencies like Oregon Water Resources Dept. (OWRD), Washington Dept. of Ecology (WDOE) charged with federal responsibilities by federal law (e.g. McCarran Act, 43 USC 666).

Congress, seeing the large mass of agencies involved in fisheries, has explicitly directed us to partner together in various statutes, committee reports, and other ways. The fact is that, despite the wide variety of players and interests – and a constant background noise of dissenters, we have learned to play fairly well together – and we are getting better and better at it.

Over 25 Pacific NW tribes have off-reservation fishing rights under 1855 treaties and they too are partners in the effort – after several decades of federal and state litigation have persuaded the non-believers to recognize tribal treaty rights.

I'm not going to say it's a perfect world, but you will find us working together, using Economy Act orders among federal agencies – on a sole source basis due to legal and practical constraints – including over 50 court suits and decisions – and cooperative agreements among federal and non-federal partners.

To do anything but partner together – on a sole source basis under the Economy Act and Cooperative Agreement Act – would put us in instant violation of a host of court orders, biological opinions under ESA, and many other legal and practical constraints.

By the way, you don't have to take my word for it. Our ESA litigation has achieved such an intensity and frequency that we have our own de facto private litigation section in the Justice Department in Washington, DC. This is because over 90% of all ESA litigation has and is occurring in the 9th Circuit Court of Appeals jurisdiction in the Western United States. We are so notorious in the Justice Dept. that they have their own politically-inappropriate nicknames for us that they joke with us about. We seem to share a similar notoriety in other executive agencies as well, as we seem to have most of the Nation's major water and fish disputes in states on the Mississippi River or further west.

You may not appreciate this, but most of us cope with the intense stresses of these suits and conflicts with a lot of humor. Bad jokes are better than no jokes. I like to compare our region of the country, with its fish and water wars, as akin to the public stocks and pillory of historic Williamsburg, Va. The Nation's press, including the Washington Post, beats up on us daily. As a deceased friend and colleague put it so eloquently 22 years ago, "Good government doesn't sell newspapers.!" So the Nation's press serves as the public pillory for civil servants.

So why do we persevere and not quit or retire? Because we are making progress – significant progress – in solving problems, working together, and improving the Nation's fisheries and water supply. This progress may not be reported, but it is real and backed up by actual testing and measurements.

However, we still have much to do, and envision continuing to partner using Economy Act orders and cooperative agreements as long as Congress will continue to authorize and fund our fish restoration activities. Consequently, we are very much against OMB outlawing the type of partnering agreements that we have found necessary to accomplish these statutory and court-ordered programs.

DROUGHT MANAGEMENT

In 2001, we experienced in Oregon the 1st or 2nd worst drought in the last 60 years. While there was no possible way for us to take care of recreational interests adequately in the emergency due to the severe lack of water, we did manage to meet other, statutory, critical water needs through an intensive, daily, on-going, informal partnership among all of the key governmental parties, with input from all of the affected public and private sectors. At our field level, we micro-managed our daily dam operations to adaptively manage our water releases from our dams to protect fish, public water supply, water pollution needs, irrigation, hydropower, fire fighting, and other authorized purposes. I'm proud of what we accomplished working together because it demonstrated the way governments at all levels should work together – as a coherent whole, serving the common public need, including the essential needs of all of the various public and private sectors, except some recreation needs. We did this despite competing ESA species needs and despite the competing political pressures on the various governmental bodies, federal and state. When it was all over, most water users recognized that we had worked some real-world practical miracles by this extraordinary cooperation and collaboration.

BOTTOM LINE

We need this continued A-76 exemption to sole source agreements among federal agencies and among mixes of federal, state, local, and tribal governments and other entities in order to carry out our daily federal missions in the most efficient, economical, and common sense methodology of proceeding.

The proposal to do away with this exemption will have severe, unintended, disastrous consequences for the federal government, including probably putting us in contempt of court on a large number of outstanding ESA, environmental, and tribal rights' court orders and injunctions – and violating hundreds of other ESA biological opinions and incidental taking permits.

Sincerely yours,
John Breiling

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