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☐ Eight states — Georgia, Hawaii, Iowa, Michigan, North Dakota, South Dakota, Vermont and Wisconsin— operate under state procurement laws. No state leaves the acquisition of architectural and engineering design contracts unregulated.

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December 19, 2002

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ATTN: David C. Childs

**RE: Revision to Office of Management and Budget Circular A-76
Performance of Commercial Activities
67 Fed. Reg. 69,769 (2002)**

INTRODUCTION

The American Society of Civil Engineers (ASCE) is pleased to offer these comments on the proposed revisions to the Office of Management and Budget Circular A-76, Performance of Commercial Activities, 67 Fed. Reg. 69,769 (Nov. 19, 2002).

ASCE was founded in 1852 and is the country's oldest national civil engineering organization. It represents more than 130,000 civil engineers individually in private practice, government, industry and academia who are dedicated to the advancement of the science and profession of civil engineering. ASCE is a non-profit educational and professional society organized under Part 1.501(c)(3) of the Internal Revenue Service rules.

EXECUTIVE SUMMARY

ASCE believes it is desirable that civil engineers employed in the public and private sectors perform engineering functions for government agencies. It is in the best public interest for federal, state and local government agencies performing engineering to maintain expertise within their organizations by employing civil engineers and providing for their professional development. It is also in the best public interest for publicly supported institutions and agencies not to compete with engineers in private practice. Public sector engineering projects that can be accomplished more efficiently by private engineering firms should be contracted out with proper

oversight by the public agency. The resulting ratio of in-house to contracted engineering services should be based upon the agency's on-going project and policy requirements rather than rigid rules or percentages fixed by legislation or regulation.

Moreover, ASCE believes that the selection of professional engineers as prime consultants and subconsultants should result from competition based on the qualifications best suited to complete the work successfully. Qualifications — including the training, registration, experience, skills and availability of the proposed project personnel — are paramount in engaging engineering services. The cost of engineering services, while important and meriting careful negotiations and performance accountability, is related to work to be performed which often is not clearly defined at the time the engineer is selected. Therefore, cost should be secondary to professional qualifications. Architectural and engineering design services should never be acquired under a low-bid method.

For these reasons, ASCE strongly encourages the OFPP to amend the proposed revision to OMB Circular A-76 to clarify that the use of the qualifications-based selection (QBS) procedures required of all federal agencies under title IX of the Federal Property and Administrative Services Act of 1949 is the only method to be employed by the federal government in the acquisition of architectural and engineering services.

THE PROPOSED REVISIONS TO OMB CIRCULAR NO. A-76

The OFPP has proposed to revise significantly OMB Circular A-76, the Performance of Commercial Activities, in an effort “to improve the management of commercial activities that are needed to conduct the business of government.” *Id.* at 69,770. A primary goal of the revision, according to OFPP, is “[t]o lower costs for taxpayers and improve program performance to citizens.” *Id.*

In addition, the Circular allows agencies to directly convert work to or from the private sector without cost comparison under certain circumstances. Work may be directly converted where an activity is or will be performed by an aggregate of 10 or fewer “full-time-equivalent” employees (FTEs), or where conversion will result in no employee impact — e.g., because they are reassigned to comparable federal positions or voluntarily retire. *Id.* at 69,771.

QUALIFICATIONS-BASED SELECTION PROCEDURES UNDER THE BROOKS ARCHITECT-ENGINEERS ACT

Title IX, commonly referred to as the Brooks Architect-Engineers Act of 1972, 40 U.S.C.A. §§ 541-544 (West 2002), has withstood the test of time.

Traditionally, federal government procurement procedures properly have emphasized awarding contracts to the lowest bidder, or using price as a dominant factor. For many goods that the government purchases — paper, office equipment, desks, military aircraft — this process serves the government and the taxpayer well. Specifications can be written, products can be inspected and tested, and safeguards can be built in to assure saving money.

Sometimes, however, agencies mistakenly assume professional architecture, engineering, surveying and mapping services fall into this category. Unfortunately, the assumption ignores the increase in costs to administer the preparation of detailed scopes of work and bid specifications, to evaluate numerous bids, and to remedy serious consequences of unprofessional A/E related services.

Quality, therefore, should always be the primary focus in the competition for architectural, engineering and surveying and mapping procurement. Only after high-quality performance is ensured should the focus turn to the contract price. That is exactly what QBS provides. The Brooks A/E Act ensures that specialized skills and technologies are evaluated properly and are not overlooked. At the same time, the Act also ensures that small businesses are able to compete on an even basis with large A/E design firms. In this manner, the government benefits from direct control of both the quality of the services and the project's development.

The Brooks A/E Act applies to the acquisition of all architectural and engineering services, including services of an architectural or an engineering nature that are logically and justifiably to be performed by architects or engineers. The language of the Brooks Act governs the broadest range of A/E design services, i.e., any that are performed by architects or engineers and those that may be. Nothing in the Act limits or restricts the application of QBS procedures to some architectural or engineering services while exempting others.

The use of negotiated procedures directs the focus of procurement activity where it should be, on the quality of the professional A/E services specifically suited to a given contract.

All competitors must submit their qualifications to the procuring agency; the agency assesses the relative expertise of the competing firms; and the one most qualified firm is selected for the particular procurement. Such procedures produce a more cost effective design, map and related professional service than can be achieved under price bidding procedures.

The qualifications-based selection law was codified to protect the interest of taxpayers. It is federal law because over the life of a project, engineering-related services account for less than one-half of one percent of total costs. Yet these important services play a major role in determining the other 99.5 percent on the project's "life cycle costs," such as construction, operation, and maintenance.

This process has been so successful at the federal level that it is recommended by the American Bar Association in its model procurement code for state and local government. At the present time, 42 states have enacted their own qualifications-based selection laws for architecture, engineering, surveying and mapping services based on the federal model. Others use it as a standard procedure. Today, no state has a specific law requiring bidding of these services.¹

¹ Eight states — Georgia, Hawaii, Iowa, Michigan, North Dakota, South Dakota, Vermont and Wisconsin — operate under state procurement laws. No state leaves the acquisition of architectural and engineering design contracts unregulated.

Since 1972, moreover, Congress has clarified and extended the application of the QBS process to the awarding of architectural and engineering services contracts for:

- Aviation programs project grant application (49 U.S.C.A. § 47107 (West 2002)).
- Mass transportation contract requirements, management and architectural engineering (49 U.S.C.A. § 5325 (West 2002)).
- Military construction projects (10 U.S.C.A. § 2855 (West 2002)).
- Engineering services as competitive procedures for procurement purposes (10 U.S.C.A. § 2302; 41 U.S.C.A. § 259 (West 2002)).
- River and harbor improvements (33 U.S.C.A. § 569b (West 2002)).
- Surveying, mapping, charting and geodesy contracts of the National Imagery and Mapping Agency (NIMA), (144. CONG. REC. H8718 (daily ed. Sept. 25, 1998)).

ASCE therefore strongly encourages the OFPP to amend the proposed revision to OMB Circular A-76 to clarify that the use of the qualifications-based selection (QBS) procedures required of all federal agencies under title IX of the Federal Property and Administrative Services Act of 1949 is the only method to be employed by the federal government in the acquisition of architectural and engineering services.

**OMB SHOULD REVISE THE CIRCULAR TO ALLOW FOR DIRECT CONVERSION
OF ARCHITECTURAL AND ENGINEERING CONTRACTS UNDER THE A-76
PROCESS**

OMB Circular A-76 should be revised to provide for direct conversion to the private sector of architectural and engineering services (other than those inherently governmental core competency activities). Due to their unique nature, architectural and engineering design services should be designated for direct conversion and exempted from the public-private competition requirements of the Circular.

Thank you for your attention to ASCE's comments. If you have additional questions, please contact Michael Charles of our Washington Office at (202) 789-2200.

Respectfully submitted,

Thomas L. Jackson, P.E.
President