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To: David C. Childs A-76comments/OMB/EOP@EOP
cc: russell_feingold@feingold.senate.gov, senator_kohl@kohl.senate.gov
Subject: Revised A-76 comments

Sirs:

I appreciate the opportunity to comment on the proposed revisions to the A-76 Circular. My comments are incomplete because of the short turnaround time. I would like to add my voice to that of Don Gordon, associate director of the general counsel's office at the GAO and a member of Commercial Activities Panel upon whose work the revised Circular is based. Mr. Gordon stated, and I understand his statement was applauded by the knowledgeable attendees of the Council for Public-Private Partnership's Dec. 2 Perspectives on the New A-76 Circular conference, that a 30-day public comment period was much too short. I could not agree more. The issues involved are too complex to rush the implementation of procedural changes that may well prove to be radical in their effect. The potential consequences are too dangerous, especially in light of the President's mandate to perform public-private competitions of an unprecedented number of governmental functions by agencies ill-trained and ill-equipped to do so even under the existing rules with which they, and the consultants and training organizations to which they must turn for help, are relatively familiar. Hasty implementation of a hastily crafted Circular on such a large scale could well prove disastrous not only for hundreds of thousands of dedicated, knowledgeable, and highly efficient federal employees, but also for the citizens who depend on and fund the services they provide. The Circular in its present state describes an untested experimental procedure. It would be far more prudent to examine its effects on a test population before implementing it on such a massive scale. To implement it without allowing time for sufficient review and discussion is highly irresponsible. A flawed process will produce flawed results on an enormous scale, results that the American people will have to endure for many years to come.

The revised A-76 Circular in its present form is quite clearly a substantially flawed document. To give a few examples of language that is either self-contradictory or simply incorrect:

- In Attachment A, Section E, the Circular states, "agency personnel designated as performing inherently governmental activities shall be justified, in writing by the 4.e. official..." In Section F.1, the 4..e. official designates an Inventory Challenge Review Authority to respond to challenges and a Inventory Challenge Appeal Authority to respond to appeals of the designation of inherently governmental. These officials are to be at an equal and higher level than that of the official making the original determination. The 4.e. official is thus placed in the rather awkward position of having to assign work to his superior in the organization.

- In Attachment B, Section A.2, the Circular requires without exception that a standard competition be performed to change a source. In Attachment C, changing a source without a standard competition is discussed at length.

- In Attachment B, Section C.1.a., the Circular states, "agencies shall determine the... positions to be competed." This is simply incorrect.. How does a firm bid on a position? One competes the work to be performed.

- In Attachment C, Section D.2.b., the Circular states, "if the CO determines that the selected contracts (or ISSAs) cannot not be reasonable grouped..." Such slips of the pen in a policy document of this magnitude can have devastating implications, and underscore the need for a careful review process.

The new procedures of the revised Circular are profoundly disturbing as well. To touch on only two:

- The multitude of duties assigned to the 4.e. official is extremely problematic. Many of the procedures described in the Circular will be taking place in units far removed from Washington. The 4.e. official is an assistant secretary or equivalent level official, but is asked to make judgements on a multitude of details, potentially concerning a large number of field units, about which s/he can have no direct knowledge. Reasoned judgements cannot be made in the absence of knowledge. Rather, local managers should be held accountable for the efficiency of their operations.

- The BCA process is fatally flawed as written. Among the problems are:

- It is essential that the A-76 process include analytical procedures for small activities for which Standard Competitions (SCs) would be excessively expensive relative to potential savings. However, by limiting the comparisons to only existing federal contract of similar size, workload and scope, the revised Circular makes BCA subject to failure because of a lack of appropriate comparables. In this event, BCA mandates that a full study be performed. This mandate ignores the logic of performing a BCA in the first place, that full SCs would be unjustifiably expensive relative to potential cost savings.

- The existing A-76 Circular's Streamlined Study process gives local management the option to contract out or to retain the work in-house if the government's cost is within the range of four comparables. A strictly scientific approach would be to take the median value of the four samples as representative of the entire population. However, the more conservative approach is justified by the fact that descriptions of work and the resulting cost calculations are fraught with error on the government's side, as is the assumption that a sampling of only four provides an accurate assessment of the outcome a potential solicitation. Because of this uncertainty, gray outcomes are left to the discretion of those best equipped to make the final decision: local management. In contrast, the revised Circular mandates that the activity be contracted out if the government's cost is greater than the lowest of four comparables. This removes any discretion on the part of local management from the picture, and biases the outcome in favor of the uncertainty of the unknown over that of the known. It is absolutely contrary to the concept of efficiency to profoundly disrupt the organization in order to increase operational uncertainties at an almost certainly greater cost. To give an example of how this process could play out: Assume the government's cost is \$1,000,000. A BCA is performed, and the four comparables range from \$998,000 to \$1,635,000 (the range could be wider, "reasonably grouped" is not defined). A rational business choice would be to keep the work in-house. However, BCA mandates that it be contracted out. The agency therefore proceeds to the next step and solicits bids. The bids range from \$1,820,000 to \$2,235,000. The agency accepts the lowest bid. The result is an 82% increase in cost, along with the uncertainties associated with a new

workforce and potential shortcomings in the contract language that could results in still further cost increases. Transition costs could also be significant. There is nothing in the BCA process to prevent such an outcome.

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