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To: David C. Childs A-76comments/OMB/EOP@EOP

cc:
Subject: FW: Comments to the Proposed Revisions to OMB Circular A-76

For reasons that are unclear to me my attempt to transmit these yesterday failed. I am attempting to retransmit them this morning. If you have any questions you may contact me by E-mail or by calling 415-977-8211.

-----Original Message-----
From: Dykstra, Daniel J SPD
Sent: Thursday, December 19, 2002 2:46 PM
To: 'A76comments@omb.eop.gov'
Subject: Comments to the Proposed Revisions to OMB Circular A-76

Attached herewith are my comments to the proposed revisions to the A-76 circular.

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18 December 2002

Office of Management and Budget
Attn: Mr. David C. Childs
Office of Federal Procurement Policy
NEOB Room 9013
725 17th Street, NW
Washington, DC 20503

Sent Via Facsimile

Subject: Comments of the Proposed Revision to Office of Management and Budget Circular No. A-76, "Performance of Commercial Activities;" 67 Federal Register 69769-04

Dear Mr. Childs:

This is in response to OMB's request for comments pertaining to the above reference proposed revisions to the OMB Circular A-76. In submitting these comments it is taken at face value that the proposed revisions to the Circular may affect as many as 850,000 employees, or as the Federal Register notice reports, "nearly half of all federal employees." It is also taken at face value that the principle goals of the proposed revisions are to "lower costs for the taxpayer and improve program performance." Although the notice does not explicitly say so, one assumes that this translates in to an attempt to do what is best for the citizens of the United States. Therefore, it shall be presumed that these comments are premised on achieving that fundamental standard of "what is best for the citizens of the United States."

From this perspective it is suggested that any attempt to implement the Circular on the massive scale suggested in the notice is too much, too soon, and too big. The twelve-month study time frame anticipated in the revision to the Circular is wildly optimistic. It is common knowledge that current studies have taken from two to four years to complete. Assuming that these are realistic efforts, one can anticipate that an expedited twelve-month effort would produce a study that would be at the 25 to 50 percent design completion stage after 12 months. In terms of realistic cost growth after award, such studies if competed at that level of completion are fatally flawed. Although it is understandable, if not necessarily supportable that OMB should wish to implement this initiative as quickly as possible, prudence must dictate that in order to achieve success a realistic two to three year schedule must be adopted.

A second reason why the proposed revision is fundamentally flawed is that it embarks in to new and previously untested areas of providing government services to the citizens of the United States. Again referring to the Federal Register notice, it suggests that the "commercial activities" range from "custodial services to data collection, computer services and research, testing and maintenance of equipment." I believe this statement is disingenuous in that the Federal workforce provides many more services than merely those described in the notice. In other words, there are not 850,000 maintenance workers, custodians and computer service providers in Federal service. For example, if an expedited twelve-month approach is implemented to commercially compete the jobs of those civil servants who insure that monthly social security benefits are processed and issued, and this fails, many senior citizens will be harmed. The assessment and knowledge of the intricacies of the social security regulations, the determination of benefits, and the timely processing of applications for those benefits are all activities which are now, apparently presumed to be commercial. Nevertheless, the provision of the benefits is a critical service which is needed by a segment of our citizens. If the rush to implement twelve month studies on a massive scale results in a diminution of services, the goal of successfully achieving what is best for the citizens of the United States will not have been met. Therefore, realistic business judgment would dictate a go-slow approach in which limited discrete agency segments are tested first. This would permit an evaluation of the merits of expanding the commercial activities program.

Similarly, the notice claims that competition has consistently generated cost savings "exceeding 30 percent." I suggest that this statement is not supportable over the long run. For example the GAO Report on *DOD Competitive Sourcing* dated June 28th 2001, stated that :

> Savings became more difficult to assess over time as work load requirements changed, affecting program costs and the base line from which savings were initially calculated."

An accelerated twelve month study time frame will exacerbate the need for contract modifications and the cost growth which will result from those changes. The revised notice should explicitly note this.

Finally, the twelve month study time frame is unrealistic because Federal agencies do not have the resources to conduct the A-76 competition on a massive scale. It is common knowledge that under the previous administration the size of the Federal workforce was significantly, (if not necessarily well planned) reduced. There are simply no significant numbers of knowledgeable and available Federal employees who are capable of doing the studies within the time frame and the scale suggest by the proposed revision to the Circular. Thus again prudence would dictate that the time frame be scaled back.

With respect to the proposed revision to the Circular itself, it is suggested that in Attachment A, under paragraph C, agencies should also be required to periodically identify all activities which have been contracted out. Moreover, in doing so, they should be required to report on cost growth from the estimated base line at the time of award. Best management practices simply require that the success of the program be monitored.

In paragraph D. of appendix A it would seem more reasonable that if an activity is exempt by the 4e official that rather than require that to be annually reviewed or reported that the exemption should stay in effect until the activity as materially changed.

In paragraph E. of Attachment A, it is unclear if to be inherently governmental one must performing 1 a. *and* 1 b. *and* 1c.*,* or whether it is sufficient to merely be performing one of those activities. There is an "or" between 1 c. and 1d. which would lead one to conclude that at least as between those two they are in the disjunctive.

It is also unclear whether in paragraph E one would be performing an inherently governmental function if one is engaged in field regulatory adjudication. For example, if an EPA biologist makes a determination that a property owner's lands are wetlands, thereby subjecting that land to a whole host of Federal environmental statutes and processes, is that determination inherently governmental? Revised Circular A-76 may suggest that it is not, however, the property owner would view that determination as governmental in nature. I suggested that you refine "inherently governmental" to include such activities. To this end it is recommended that you add a paragraph E. 3. g. Which would contain language similar to the following:

> *Whether the activity, if performed by the private sector, would undermine the public trust in the impartiality and fairness of the decision maker.*

Finally, with respect to the predicate on which Attachment is A founded, that being the presumption that activities are presumed to be commercial, its too overly broad and will prevent the Executive Branch from accomplishing its fundamental mission of providing adequate services to the citizens. In making this statement it is presumed that there is a correlation, at least outside of Washington, between Grades and a function which qualifies as "inherently governmental." For purposes of this discussion, let us assume that a Grade of GS 14 performs inherently governmental functions. Let us also assume (however distasteful the current administration may view it) that it is incumbent upon the Executive Branch to provide for a well run Executive Branch capable of performing the duties of the Executive. Moreover, it is suggested that in order to successfully accomplish this mission the individuals performing the inherently governmental functions require both experience and training. Heretofore, GS-14's and above were not hired directly off the street. Typically they spent years in their respective agencies learning the regulations and the administrative duties incumbent upon the effective administration of that agency. Thus if all duties below the grade of GS –14 are presumed to be commercial in nature and thereby contracted out, how is the Executive Branch going to train the next generation of employees capable of performing inherently governmental functions? It is suggested that in order to meet its obligation to effectively train future leaders and provide for continuity of agency operations, that the Circular be revised to provide that a minimum of **35 percent** of agency work remain in house.[1] The effective returns of such a policy in terms of being able to provide essential services to our citizens would significantly outweigh any projected cost savings. It must be remembered that the goal of providing effective service to the citizen must offset the goal of providing ineffective services. Further, maintaining a capable Federal workforce would provide an additional incentive for the best and brightest Federal works to stay in public service. To suggest that every three to five years the work force would have to subject itself to the rigors of private / public competition acts as a disincentive to remain in Federal service.

In considering Attachment B, the biggest impediment to accomplishing the goal is that the playing field is not level. As mentioned above, agencies do not have the resources or the staffing to accomplish the competition in the timeframes established in the revised circular. It is recommend that the implementation of Attachment B be delayed until such time as Congress provides additional agency resources to effectively allow for the implementation of the process provided for in this section.

In Attachment B, at paragraph B, various individuals are identified as being "an inherently governmental official." The defect in the draft circular which occurs here, and in various other areas, is that there is insufficient descriptive data to ascertain whether those individuals which support the ATO, or the Contracting Officer, etc. are also performing inherently governmental functions in their support capacity. For example, are the individuals which comprise the Source Selection Evaluation Board (SSEB) performing inherently governmental functions? Similarly, is the Counsel to the ATO performing inherently governmental functions? Likewise, as the circular

[1] Allowing for a 35 percent contingency would provide the necessary back up for the agency to provide for continuity of operations in the event the private sector employees go on strike or the contractor is terminated for ineffective performance.

requires that these individuals act independently, it would follow that each individual would require independent counsel because it would be unethical for the same attorney to represent more than one of these identified players. Therefore, are all of these attorneys performing inherently governmental functions?[2] It is suggested that the introductory discussion to the implementation of the Circular needs to be expanded to address the scope of coverage of support to those individuals which are identified in the circular as "inherently governmental.". See also my comments on the 4 e. official below.

Also in Paragraph B, with the exception of the Contracting Officer, whose qualifications are established by the FAR, the minimum qualifications and experience levels of theses officials is not discussed. The revised circular should set forth the minimum standards. See also Paragraph C.1.b.(1) which identifies the ATO,HRA,SSA, AAA.

At paragraph C. 1. b. (2), the circular empowers the 4.e. official to cancel a "standard competition." Similarly at various other places in the circular, the 4.e. official is empowered to take certain action. One of the most significant flaws in the draft circular is the abject failure of the circular to establish any criteria upon which the 4.e. officials discretion is to be judged. She or he apparently has unfettered discretion to take any action relative to the role of the 4.e. official irrespective of whether that decision is considered capricious. It is suggested that the preamble to the circular be expanded to discuss the context in which the 4.e. official may exercise his or her authority. In other words, the gravity of the decisions which this individual is empowered to make demands some over arching precepts in which to guide the 4.e. official's decisions.[3]

It should also be noted that that there is a deep distrust amongst Federal employees that the President's Management initiative to compete Federal jobs is politically motivated. In order to insure that the process is free from taint Appendix B must insure that the decision making process is totally free from political influence. Paragraph C.1.b.(4) addresses conflict of interest as regulated by the particular standards of conduct and procurement ethics. This section must go further and protect the process from political influence.

Also in paragraph C.1.b.(6) it requires the 4.e. official to identify savings resulting from the Standard Competition. This must be expanded so that the savings and or cost growth overtime is also monitored. Also with respect to costs, this Attachment appears to excuse some costs from consideration and evaluation. See for example paragraphs C. 2. a. (10) and (12). It is suggested that in order to effectively evaluate and compare costs, all costs must be included in the evaluation.

In my opinion the most troubling aspect of the revised circular is the introduction of the best value procurement process. The A-76 process is presented, marketed if you will, as a cost savings mechanism. However, best value procurement is not designed to save costs. At paragraph C. 4. a. (3) (c) 1. the draft circular provides that the best value procurement process may be used for "any other commercial activities where the 4.e. official receives written approval from OMB." In other words, if I read this correctly, any public-private competition can become a best value procurement. As a minimum, the circular must identify the criteria by which OMB would make a decision to go best value. Moreover, fundamental honesty demands that the potential for cost growth resulting from best value procurement of governmental services be highlighted in the revised circular and its preamble.

Finally, in Attachment B at C.5.c. the Circular address a contractor's failure to perform. This discussion has several flaws. First, it fails to acknowledge that in those situations where the private sector was selected to perform, and correspondingly, the agency is no longer able to perform, the citizens and the United States have lost an internal asset. This section is premised on the ability of the private sector to provide for additional services at competitive prices. This may not necessarily be so, in which case the agency, and the citizenry have no effective recourse. Similarly, in many situations it is conceivable that in follow on contracts, the in-place mobilized contractor will have a significant advantage. In many locations that contractor may be the sole source bidder with

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[2] Assuming each of these officials require a separate lawyer and assuming in its wisdom OMB decides that agency attorney advisors do not perform inherently governmental functions, then it is problematic under the Cannons of Ethics whether the same law firm could represent more than individual.

[3] See for example Attachment B at paragraph C. 3. a. (2) where the 4.e. official is to make a written determination to revise a solicitation or implement the Agency tender. There are NO guidelines or criteria upon which the decision is to be based!

correspondingly non-competitive prices. In such circumstances, the agency is without recourse because it has lost its capability to perform. Finally, although Federal employees are prohibited, by law, from striking, this prohibition does not apply to contractor employees. This section must identify the agency recourse in such situations. It is precisely for these reasons that an in-house agency capacity to perform a minimum of 35 percent of its work must be retained.

With respect to Attachment C, Direct Conversion, it is suggested that an agency's ability to utilize this process be limited to a certain percentage or location to avoid balkanization of the agencies work. For example, the Park Service should not be able to contract out through direct conversion the functions it performs at many of our National Parks. Those resources are too precious to subject them to vagaries of the competitive market place.

Finally, with respect to Attachment F, it is urged that all costs be computed in determining cost comparisons. For example the study GAO study cited above notes that the average study cost per individual ranged from $364.00 to $9000.00. In attempting to effectively compare contractor costs to agency performance costs, the cost of performing the A-76 competition must be computed and allocated to the contractor. Similarly, the sunk costs of recruiting, and training the agency's Federal work force must be reflected in any decision to let this work force go. It is a lost asset and the cost of that lost and the good will engendered by its performance must be captured in developing the total cost of the A-76 conversion.

Finally, I would close with two final observations. Has OMB considered fully the ramifications of its proposed action? Executive Branch Federal employees have a typical hierarchy that they follow. After considering the laws and regulations, a Federal employee's order of allegiance is to the President, Congress and then the citizens. I suggest that contractor officials have a vastly different hierarchical sense. First, their allegiance is to the shareholders; secondly, their allegiance would be to the terms and conditions of the contract; and thirdly, if at all, to the government. A massive approach to contracting out services will result in a loss of loyalty and a sense of commitment to the process of good government which is irreplaceable. This loss will ultimately and irreversibly impact the Executive Branch's ability to provide the best possible services to its citizens.

My final observation is that the vast majority of Federal employees are honest hard working loyal Americans who have tried to answer President Kennedy's call to ask what they can do for their country. They did not join Federal service to get rich. It would be unconscionable for these patriotic citizens to be replaced by a contractor who has relocated its business operations off shore for tax purposes. Therefore, I urge you in the strongest terms possible to revise the circular to specifically state that firms that are not incorporated in the United States must be found to be non-responsible bidders, and therefore, ineligible for award.

In closing, I suggest that if OMB is determined to go forward with the Circular as revised without modification that, as an example of its benefits, OMB start by applying the process by itself.

Please note that these comments are submitted in my capacity as a private citizen and do not necessarily reflect the views of the agency I work for.

Sincerely;

Daniel J. Dykstra, Jr.
Deputy Division Counsel
U. S. Army Corps of Engineers
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415-977-8211