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AMERICAN COUNCIL OF ENGINEERING COMPANIES

December 19, 2002

Mr. David C. Childs
Office of Federal Procurement Policy
Office of Management and Budget
725 17th Street, NW
New Executive Office Building-Room 9013
Washington, D.C. 20503

Re: Circular A-76 Revisions 11/02
67 Fed. Reg. 69769

Dear Mr. Childs:

The American Council of Engineering Companies (ACEC) is pleased to submit the attached comments with respect to the proposed Revisions to OMB Circular A-76.

ACEC believes that the revisions will strengthen the fundamental principle that the American taxpayer is best served when the Federal government relies on private sector sources for commercial services. However, it is of critical importance that these revisions also incorporate the qualifications-based selection (QBS) process for obtaining architectural and engineering (A/E) services as provided for in FAR Part 36.

If you need additional information, please do not hesitate to contact Camille Fleenor at (202) 682-4343.

Thank you for the opportunity to comment on the proposed revisions to OMB Circular A-76.

Sincerely,

David A. Raymond
President

Attachments

ACEC Comments on Revisions to OMB Circular A-76

The American Council of Engineering Companies (ACEC) is pleased to submit these comments on the revisions to Circular A-76 on behalf of 6,000 independent engineering companies throughout the United States. Our members are engaged in the development of America's transportation, environmental, industrial, and other vital infrastructure.

Founded in 1910 and headquartered in Washington, D.C., ACEC is a national federation of 51 state and regional organizations. Our members include small, medium and large companies whose technical skills and experience support a wide range of projects to meet the needs of private sector organizations and public requirements at the Federal, state and local government levels. The Council provides timely information to member firms, government officials and opinion leaders on business issues of vital importance to the engineering profession.

ACEC applauds OMB for reconfirming the Federal policy to rely on the private sector for needed commercial services. The new rules create a presumption that "all activities are commercial in nature" unless the agency can show otherwise. The revisions also establish a firm policy for competing commercial activities performed by government personnel. The comprehensive restructuring of Circular A-76 will align it more closely with the Federal Acquisition Regulation (FAR) and will facilitate a more consistent and comprehensive process for the review of commercial activities currently performed by government personnel across all Federal agencies. By requiring competition to determine the appropriate organization to perform commercial services needed by the Federal government, Federal agencies will obtain the maximum benefit for the taxpayers dollar.

ACEC's comments will first identify five areas in which ACEC fully supports the revised Circular. The remainder of the comments will indicate areas in which ACEC believes clarification and additional guidance are necessary. Specifically, the changes proposed are necessary to fully accommodate the qualifications-based selection (QBS) process of FAR Part 36 that has been successfully utilized by the Federal government for over 30 years to obtain the commercial services of professional architects and engineers. The legislative and regulatory foundation of QBS focuses on qualifications including professional licensure of potential competitors, essential to protect public health, safety and welfare. Accordingly, it follows that the revisions to A-76 must provide for this selection process.

REVISED CIRCULAR A-76 IMPOSES NEW DISCIPLINE AND CONSISTENCY TO COMPETITION

Timetables for Inventories Bring Discipline To Agency Action

ACEC has identified five key areas in which the Circular revisions signal significant improvements over the prior competitive process. First, the new A-76 lays out required timetables for the preparation of a solicitation to compete commercial services currently performed by government employees. In situations where standard competitions are utilized, Federal employees and private sector companies are measured against each other under appropriate standards, tailored to the nature of the commercial services needed. If an agency does not prepare a solicitation for commercial services within 8 months of a determination that such services should be competed, OMB will issue a solicitation with or without a government proposal. Moreover, to avoid past tactics used by agencies to delay the completion of cost comparisons for 5-7 years, the new Circular requires no more than 12 months from the announcement of the need for a competition to completion of the agency proposal.

By instituting order and rigorous timetables for the execution of the A-76 review process, the proposed revisions establish a discipline that will assure that the agencies comply with this program in earnest or foreclose the option of participation. The Circular correctly establishes severe consequences for an agency's failure to follow the required timetables for competing its commercial activities. If OMB enforces this discipline, the results for the American taxpayer will be significant.

Equitable Treatment Results from FAR Application to Standard Competitions

Second, in standard competitions the incorporation of the FAR in the development of the solicitation and in the source selection process will require the agency proposal to be submitted to the source selection authority for review on the same basis as the private sector proposals. The government's offer (ATO) must now respond to the solicitation at the same time as private offerors and be bound by the same evaluation criteria (Sections L & M for example). The ATO will be evaluated by the same criteria as private offerors. Submission of the agency proposal to cost realism analysis will assure that all cost proposals are consistent with the Circular. The references throughout the revised Circular to the FAR are clearly aimed at making the commercial services competition both transparent and consistent.

Expanded Pool of Work Opened to Private Sector

Third, the expansion of the competition requirement beyond direct agency commercial activities to now include agency services provided under commercial interservice support agreements (ISSA) recognizes an important area of prior abuse by Federal agencies. OMB experts believe that more than \$100 billion in interagency commercial services to other Federal agencies, state and local governments, and other governmental entities have never before been subject to competition. In the past, several types of arrangements such as Memoranda of Understanding (MOU), public reimbursable source agreements, and revolving funds both internal and external

to an agency have served to facilitate the absence of competition in the performance of a wide-range of commercial services. The A-76 revision now subjects all commercial ISSAs to competition, thereby expanding the pool of work available to the private sector.

Furthermore, ACEC members continually report instances where Federal agencies displace private sector firms by aggressively marketing services to state and local governments. The inclusion on Circular A-97 into the A-76 revisions will help to eliminate unfair competition from Federal agencies.

Agency Procedures Restructured to Mirror Private Sector

Fourth, the creation of an ATO provides a clear focus and designates a leader for the preparation and defense of the Agency proposal. This individual is an inherently governmental agency official with decision-making authority, *independent of* the contracting officer, the source selection authority, and the administrative appeal authority. The ATO is responsible for establishing the responsibility for the ATO to comply with the Circular, designate the MEO team, develop and certify the Agency's proposal, represent the Agency's proposal during source selection and during any appeal. The ATO is also considered the interested party for the purpose of a GAO protest. The establishment of one person with the authority to lead and defend the agency's proposal will provide a consistent, informed voice for the agency and avoid the conflict of interests issues that often arose in earlier competitions.

FAR Application to Standard Competitions Provides for Level Playing Field

Fifth, in standard competitions the structured competition process established in the Revised Circular eclipses past guidance and provides for equity and transparency in that the same procedures and standards apply to the private sector and the government agency. Utilization of standard competition procedures and timeframes using the acquisition planning process of FAR Part 7 and the appointment of a Source Selection Authority (SSA) consistent with FAR 15.303 is an effective process for most goods and services. Instead of a selection decision being driven solely by cost comparisons, it will now focus on the substantive differences in the competitive proposals—each analyzed on the same “best value” standard. While cost remains as an important factor, non-cost factors such as quality and innovations may now affect the source selection process. It is possible, therefore, that the agency proposal may be excluded for failure to make the competitive range and the performance decision may be based on factors other than cost.

It is anticipated that recompetition will occur every 3-5 years. Under this scenario, the use of the past performance will not apply to the initial Government competition, as there will be none. At the time an activity is recompeted, however, then past performance will apply to the agency employees and the private sector alike--in the event that the Government had been the winner of the initial competition.

In recognition of the constraints imposed on Defense Department competitions by 10 USC 2461, the revised A-76 makes available the phased evaluation process under which an agency determines technical capability in Phase One and evaluates cost in Phase Two. The

distinguishing characteristic of this process is that the performance decision is based on the lowest cost of all “technically acceptable offers.” Thus, the Source Selection Authority (SSA) cannot end Phase One and move to Phase Two with both a private sector and a government offer unless the SSA determines that both the agency offer and the private sector are technically acceptable. Failure of the agency offer to pass the Phase One technical evaluation precludes its participation in Phase Two.

REVISED CIRCULAR A-76 FAILS TO ADDRESS THE QUALIFICATIONS-BASED SELECTION COMPETITIONS FOR ARCHITECT-ENGINEER SERVICES

For many years there has been a conflict between the OMB Circular A-76 procedures and the statutory procedures that establish a qualifications-based selection (QBS) process for architectural and engineering services (40 USC § 541 et seq.). OMB has never addressed this conflict and does not address it in the current revisions to A-76. These revisions provide an opportunity for OMB to address this situation both in the context of direct sourcing and of an A/E public private competition as more fully detailed below. ACEC is not aware of any prior cost comparisons performed by Federal agencies for A/E services. However, Federal agencies follow the QBS direct sourcing procurement policy for A/E services, as defined in FAR Part 36.

Direct Sourcing of A/E Services Will Avoid Continuing Conflicts with A-76

FAR Part 36 already establishes a clear procedure that has been validated in the private and the public sectors over the last 30 years. Under FAR 36.602, the qualifications of potential private sector contractors for each particular job are reviewed by an expert selection authority. The most qualified contractors for the job are selected from among all the applicants identified, based on the evaluation criteria of FAR 36.603 that focuses on qualifications and past experience in performing contracts with requirements similar to the one under consideration. The source selection authority then reviews the technical approach and fee estimates of the highest ranked of qualifiers and negotiates a reasonable price. Thus, QBS assures the Government that the selected private sector company will bring the best qualifications available in the private sector to meet the Government’s needs at the fairest price. As the proposed A-76 revisions are intended to track the FAR, inclusion of an exemption for direct conversion of A/E services would be in keeping with the fundamental refocusing of the other changes in the Circular, namely to align the A-76 process more closely with FAR Part 36.

Future considerations arising out of the Homeland Security mandate and enormous private and public efforts to stop terrorism suggest a heightened understanding of the need for the Government to emphasize the quality of A/E services provided to government agencies. It would appear prudent, therefore, to specify a direct conversion process for A/E services procured under FAR Part 36 in the current A-76 revisions. Suggested language to implement the necessary changes in Attachment C- Direct Conversion Process and Attachment F-Glossary of Acronyms and Definitions of Terms are submitted for your consideration. (See Exhibits I and II).

Public Private A/E Competition Requires Special Guidance

The revised Circular also does not address circumstances where there is a hybrid statement of work for both A/E and non- A/E services or where the scope of work could be performed by an A/E services firm or a non-A/E firm. ACEC believes that pure A/E services should continue to be procured on a QBS basis through a direct conversion process (see discussion, supra.). The legislative history and subsequent amendments to the “Brooks Bill” specifically require that government agencies select the most qualified private firms to perform A/E services in order to protect public health, safety and welfare. By analogy, the emphasis on the qualifications and experience of a selected A/E offeror should apply equally whether a public agency or private sector firm is performing the work.

Under circumstances where an A/E competition is appropriate, ACEC recommends that any government agency team be subject to the same qualification analysis (FAR 36.602) and the same standards as the private sector team (FAR 36.602-1). If the government agency were selected under a QBS process as the most qualified team, its price negotiations would have to be based on the agency’s budgetary authorization. It could not low-ball the offer on the theory that it was not required to pay taxes, overhead, or any other cost generally absorbed by the government. Instead, it would have to use the agency’s anticipated project cost contained in the budget estimate, to preserve the cost realism of the government offer.

In addition, ACEC believes that it is necessary to make amendments to the language of Attachment B to provide appropriate process consistent with the FAR Part 36 for A/E competitions. To the extent that a public-private A/E competition goes forward, it should be a QBS process rather than the traditional price driven standard competitions of Part 15 in situations where the Statement of Work calls for both A/E and non-A/E services. Highlighting the need to differentiate between standard competitions and A/E competitions based on the existing provisions of the FAR will enhance the focus of the Circular’s revisions. Suggested language to amend Attachment B- Public-Private Competitions is attached for OMB’s consideration (see Exhibit III).

For example, situations often arise where a statement of work combines both A/E services with non-A/E services or where an A/E firm seeks to participate in a procurement that could be performed by either an A/E firm or a non-A/E firm. In either case, amendments to Attachment B should anticipate such competitions. Several measures are available for determining whether Part 36 or Part 15 should apply to a particular statement of work. An agency might select the percentage of the total project work effort or the level of funding required for the A/E services in determining the appropriate selection procedures to follow in an A/E competition. ACEC strongly recommends that language be included in the revised Circular to permit the determination for the use of Part 36 if the A/E work effort exceeds 35% of the total project work effort or \$100,000. Language to implement this recommended addition to Attachment B is attached (See Exhibit III).

ACEC recognizes that there may be solicitations that require significant A/E involvement but, on balance, have greater requirements for other purposes, e.g., operations and maintenance. Under such circumstances an agency must determine whether to use FAR Part 36 or FAR Part 15 as

appropriate guidance for a particular procurement. Negotiation with a Two- Phased Evaluation process such as found in Part 15 and referenced in Attachment B.b.4.b(b)(2) may be appropriate in some cases. In others, the critical nature of the A/E aspects of a procurement may dictate the use of Part 36. These are the considerations that drive the recommended changes to Attachment B in Exhibit III.

Finally, ACEC fully supports the procedures in Attachment D to capture the indirect efforts of agencies to avoid competition for commercial services provided to other Federal agencies, state or local governments or other governmental entities. However, we recommend clarification of the scope of the competitive procedures of Attachment D to assure that the reference to local governments includes “Indian tribes” (See Exhibit IV). We believe this change is necessary to remove the current practices of many Federal agencies that use the MOU, ISSA, or revolving funds strategy to provide services directly to Indian nations and tribes without any competition. The clarification simply amends the reference in Attachment D to “local government” to link it to the most recent definition of that term in the bill to provide for a Homeland Security Department which appropriately includes “Indian tribes” within the meaning of that term (Pub. L. 107-296 (November 26, 2002)).

ACEC supports transparency in 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. (See Exhibit IV). Under the draft language, 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.

ACEC commends OMP and OFPP for the extraordinary care and clarity with which these revisions to Circular A-76 were developed and appreciates the opportunity to submit these comments.

EXHIBIT I

Proposed changes to Attachment C-Direct Conversion

p.C-2,

insert the following new subsection at the top of the page and renumber the following subsections:

3. **A&E** An activity provides direct professional services of an architect-engineer nature, as defined by state law. (A&E) (See Attachment F.) Commercial activities providing A&E support would be subject to the qualifications-based selection(QBS) procedures of the FAR included in this Circular.

EXHIBIT II

Proposed changes to Attachment F-Glossary

p. F-3,

insert after the definition of “agency source” the following definition:

Direct Architect-Engineer Services. Activities of professional architects-engineers, as defined by applicable state law, which requires their work to be performed or approved by a registered architect or engineer and whose selection for Federal work is based on the competence and qualifications of the prospective contractors. A&E includes other professional services of an architectural or engineering nature or services incidental thereto (including studies, investigations, surveying and mapping, tests, evaluations, consultations, comprehensive planning, program management of design execution, conceptual designs, plans and specifications, value engineering, construction phase services, soils engineering, drawing reviews, preparation of operating and maintenance manuals, and other related services) that logically or justifiably require performance by registered architects or engineers or their employees.

p. F-3,

insert the following definition for "A/E competition" following the definition for "agency source":

A/E Competition. An A/E competition is a formal competitive process that is required by this Circular and FAR Part 36 when an agency selects a provider of architecture-engineering services upon formal offers or tenders submitted in response to an agency solicitation by (1) private sector, public reimbursable and agency sources or (2) private sector and public reimbursable sources.

EXHIBIT III

Proposed Changes to Attachment B-Public Private Competition

On page B-2, A..1.a. line two, following “timeframes required”, insert the following:

unless the FAR specifically provides an alternative competitive procedure, such as the qualifications-based selection process of FAR 36.6.

On page B-4, B.4 line two, following “FAR 15.303” , insert the following

or FAR 36.602,

On page B-18,D.1. line three, following “Direct Conversions” insert the following:

if any non-management job vacancies are anticipated.

On page B-6, C.2.a.(3), line six, following “FAR 52.207-2.”, insert the following:

Absent Direct Conversion, for procurements for Architect-Engineer services, the CO shall announce all requirements and negotiate contracts for those services pursuant to FAR 36.601-609.

On page B-6, C.2.a.(3), line eight, following “FAR. 52.207-3”, insert the following:

if the conversion will result in one or more non-management job vacancies .

On page B-6, C.2.a.(4), line one, insert (a) before “When a Standard Competition....”

On page B-6, C.2.a.(4), line ten, following “of this Attachment;” insert the following:

(b)When an A/E competition is performed, the CO shall state that the agency is using qualifications-based source selection procedures to select the organization with which subsequent discussions of cost will occur in accordance with this Circular and FAR Part 36. Any Government offer in an A/E competition shall be subject to the following requirements:

- 1. Members of the MEO must possess a Professional Engineers (P.E.) license no later than the date of submission of the MEO proposal.**
 - 2. Past performance shall be evaluated for both the MEO and the private sector teams. Past performance should include, at a minimum, history of performing on schedule, within budget and reducing life-cycle costs.**
 - 3. The cost of Errors and Omission insurance should be accounted for.**
 - 4. Local knowledge (building codes, conditions, zoning) should be considered.**
 - 5. A failure to perform clause should be included in a contract awarded to either a private firm or the MEO.**
 - 6. The 12% price differential should include DCAA audited overhead rates(or equivalent data) for the MEO.**
- c. In the event that a statement of work requires procurement of both A/E and non-A/E services, the CO will determine whether the procedures of a Standard Competition or an A/E Competition should apply. If the percentage of the total project work effort that the A/E services represents exceeds 35% or the estimated fees for the A/E services exceed \$100,000 , then the CO should conduct an A/E competition. If neither of these measures are present, then the CO should conduct a standard competition.**

On page B-20, D.2. c.(2), line 12 following “of-First Refusal.”, insert the following new subsection:

- d. Source Selection Authority (SSA) and A-E Evaluation Boards (AEEB). The SSA appoints one or more AEEBs in accordance with FAR 36.602 when a negotiated QBS procurement is used. The AEEB shall comply with the requirements of FAR 36.602-1 to 602-3 in preparing its recommendation of the three most qualified private sector firms, in order of preference, for a procurement.**

EXHIBIT IV

Comments on Attachment D- Commercial Interservice Support Agreements (ISSA)

On page D-3, section 1.a. line 4, following “and local governments” insert before the comma:

(including Indian tribes, as provided in Pub. Law 107-296, Sec. 2 (10)(November 26, 2002),

On page D.3, section H.1 strike “available to OMB and the public upon request” and insert

in lieu thereof “available to OMB and made public in *FedBizOpps*”.