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

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Subject: Revised A-76

David,

(See attached file: final A-76 Comments DOC - OGC R.wpd)

Thanks for the opportunity to provide comments on the proposed revision to OMB's Circular A-76. Attached are the coordinated comments of the Department of Commerce. If you have questions, please contact Dan Rooney or Bob Kugelman at 202 482 4115. I will also be available to answer questions on January 6, 2003.

Have a wonderful holiday.

Edna Campbell
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- final A-76 Comments DOC - OGC R.wpd

Department of Commerce Comments
Office of Management and Budget Revised Circular A-76 (11/19/02)

GENERAL	COMMENTS
Timeframe for Cost Comparisons	We disagree with the required and rigid 12-month time frame for completion of all A-76 standard competitions. We disagree further with the division of the 12-month period into an 8-month period to develop the PWS and issue a solicitation and 4 months for the source selection evaluation period. We recommend that the Circular require that agencies complete source selection within 12 months from the date of the public announcement (without designating separate periods for the solicitation and source selection phases), but provide agency 4.e officials the discretion to allow for up to a 6-month extension without seeking OMB's approval. We recognize OMB's desire to shorten the often lengthy time it takes to complete A-76 competitions; however, time frames which are mandated in the Circular must be realistic and reflect the fact that procurements under the Circular are often large and complex.
Administrative Burden	We believe that the requirements in the draft Circular would impose significant new administrative burdens on agencies and increase their costs of doing business in a period of shrinking budgets. New requirements specified in the draft Circular include: – centralized oversight offices; – post-competition oversight of public providers who have won competitions, and administration of letters of obligation; – periodic recompetition of functions won by MEOs (every 3 to 5 years); – new competitions for all ISSAs exceeding $1 million annual revenues and then periodic recompetition of those requirements.

Inter-Service Support Agreements	The revised Circular requires competition of all inter- and intra-service support agreements (with few exceptions) and to produce and submit to OMB a Management Plan for these competitions by June 30, 2003. We believe that competing ISSAs would disrupt implementation of other parts of the A-76 process. Agencies are coping with a new process and extensive increases in requirements and it is not a good time to add competition for ISSAs. We recommend that competitions for ISSAs be phased in as a requirement at a later date. The priorities for agencies should be to: (a) work with the new cost comparison process being introduced in the revised Circular; (b) meet the OMB performance goals for FY 2002-2003; and (c) develop strategies for meeting the President's long-range goals for competitive sourcing.
Effective Date of Revised Circular	We recommend that the effective date of the revised circular be no sooner than 90 days after publication in the *Federal Register.* This will allow agencies to complete in-progress cost comparisons under the current rules, if they desire. In addition, it will allow agency personnel to receive adequate training on the new guidelines before their implementation.
Legal Representation	There are government-wide issues to resolve concerning legal representation and conflicts of interest. The intent of the draft Circular appears to be to make the government's ATO an "offeror" on the same plane as private contractors. Several areas of conflict are created for agency counsel: (1) a conflict between representation of the Contracting Officer, representation of the ATO, and providing advice to the SSEB during source selection; (2) a conflict between representation of the ATO and advice to the Administrative Appeal Authority; (3) a conflict between representation of the ATO in any potential GAO protest or Court of Federal Claims proceeding and representation of the CO, SSEB or AAA.
ATTACHMENT and page	COMMENTS
A pg. A-1	Paragraph B.1. We recommend that the requirement to submit an inventory of "commercial activities not subject to the FAIR Act" be reconsidered. This may divert scarce agency resources from compliance with the FAIR Act and the Circular.

A pg. A-2	Paragraph C.1.b. Although foreign nationals and others are exempt from the FAIR Act, the draft Circular now requires a new inventory of government FTEs performing commercial activities not reported on the FAIR Act inventory. There is no reference to these FTEs being exempt from the requirements of A-76 in either the old process or the new. We recommend that the status of this class of employees and their relation to the FAIR Act inventory be clarified.
B pg. B-1	Standard Competition Process Chart: The chart is not clear and some words are cut off. See our comments above concerning the required 8- and 4-month time frames for completion of the procurement process.
B pg. B-2	Paragraph A.1.c. We recommend changing the title from "Government Performance of Private Sector Work " to "Government Performance of Reimbursable Private or Public Sector Work".
B pg. B-2	Paragraph A.2.a. We recommend changing the first sentence as follows: "Agencies shall use the Standard Competition Process outlined on page B-1 to change the source of a commercial activity as follows:..."
B pg. B-3	Paragraph B. The draft states that the ATO, SSA, AAA, and HRA shall be "independent" of each other. It is not clear what "independent" means. For instance, can the SSA be the director of a sub-agency who has ultimate, but not immediate, authority over the contracts or human resources office? It would be helpful if OMB could identify the kind of relationships agencies should avoid.
B pg. B-3	Paragraph B.3.a. We recommend that all *FedBizOpps* announcements be made by the CO, not the HRA, as is the case under the FAR.
B pg. B-4	Paragraph C.1.b(1). The implementing official may not be in the rating chain of the 4.e official, so the 4.e official would not be able to "hold the official accountable" through a performance evaluation. We recommend changing the last sentence to read: "The 4.e. official shall ensure that the annual performance plans of the Competition Officials contain criteria related to the timely and proper conduct of Standard Competitions and that rating and reviewing officials apply those criteria during the rating process."
B pg. B-5	Paragraph C.1.b(5). Centralized oversight will be costly in human resources and dollars. It would be helpful if OMB could elaborate on the organizational structure it would consider adequate, and why this requirement is included given the designation of the 4.e official as the official responsible in each agency for implementation of the Circular.

B pg. B-7	Paragraph C.2.a(13). If certain requirements, such as past performance, will not apply to Agency Tenders, can they apply to private sector offers? How will the private sector sources then be evaluated *vis a vis* the agency tender if different requirements and evaluation criteria are applied to some, but not all the offers? References to C.6 in this section should be to C.5.
B pg. B-8	Paragraph C.3.a(1) We do not understand why only the Agency Tender is released to the other offerors during the administrative appeals process. (See our comments below concerning the appeals process.) A better and more equitable procedure would be to release all proposals to counsel for the interested parties under a protective order process.
B pg. B-8	Paragraph C.3.a(4). It is unclear why new contracts cannot be created as part of an MEO-private sector partnership that could form the Agency Tender. Allowing the MEO the widest possible discretion to propose how to perform the PWS would be advantageous to the government.
B pg. B-9	Paragraph C.3.a(9). If the competition date is extended, it is not necessarily appropriate to return all proposals to the offerors. The CO should be given the option to retain proposals and provide the offerors an opportunity to submit amendments if the due date is extended, as is the usual practice in negotiated procurements.
B pg. B-10	Paragraph C..3.d. We do not agree that an agency should follow a lengthy process to determine if it can make an award to the agency provider if only an agency tender is received. The process set out in the draft appears to presume “bad faith” on the part of the PWS team in putting out an unfair work statement. However, if the private sector so believes, they are free to file bid protests contesting those portions of the solicitation they believe are improper. Protest rights, not failure to make award, are the appropriate safeguard.

B pg. B-11	Paragraph C.4.a(3)(a). We recommend this section be reviewed to ensure that the roles of the SSA and CO are properly set out. Normally, the SSA is responsible for the source selection activities, and the CO is the conduit for all communications with offerors. The draft, however, provides that all discussions and other exchanges with offerors will be the responsibility of the SSA. It is not clear why the draft Circular sets out a unique framework for discussions and exchanges with the ATO that does not follow FAR 15.306. We do not understand why the draft Circular appears to disallow face-to-face negotiations with the ATO; face-to-face discussions are usually much more effective than written communications. We recommend that FAR 15.306 apply to exchanges with all offerors, including the ATO, and that issues and procedures for discussions be the same for private and public offers.
B pg. B-13	Paragraph C.4(3)(c).1. This section states that the integrated evaluation process will be used for "information technology activities" performed by agency personnel. The definition of "information technology" in Attachment F, taken from FAR 2.101, refers to "information technology" as an activity that "provides" equipment or systems. The Circular should make clear that the integrated evaluation process can be used for *services relating to* information technology activities, and does not necessarily involve the provision of IT equipment. The Circular fails to address to what extent the integrated evaluation process can be used if a procurement involves incidental non-IT services, such as clerical support.
B pg. B-14	Paragraph C.4.a(3)(c).1.b. The requirement to provide a "quantifiable rationale" for all performance decisions is unrealistic. For example, one may not always be able to "quantify" the effects of differences in past performance. We recommend deletion of the term "quantifiable."
B pg. B-14	Paragraph C.4.a(3)(c).2.a. The Phase One procedure to amend the solicitation to change offered performance enhancements appears unworkable. For instance, how will the SSA deal with differing enhancements for a single task that are proposed by 2 or more offerors?
B pg. B-15	Paragraph C.4.a(3)(c).2.b. We do not understand why the draft Circular does not allow private sector offerors to update their offers in Phase Two. Are alternate proposals permitted, as is the case under the FAR?

B pg. B-15	Paragraph C.5. Paragraph C.5. The draft Circular states that the 4.e. official "shall issue a Letter of Obligation to the ATO and the head of the requiring organization." It appears that this is nothing more than a unilateral document (issued without execution by the ATO) with no legal effect other than to serve as a record of decision. Currently there is no official documentation (*i.e.* contract, MOU) in place between the agency and the MEO. The procedure for unilaterally terminating the MEO and moving to a direct conversion appears to contemplate that Federal employees will be summarily fired, without following the proper OPM procedures. Agencies must follow proper Reduction-In-Force procedures before removing Federal employees from their jobs.
B pg. B-16	Paragraph C.5.b.(2). We have concerns about the administrative burden being placed on agencies that will be required to perform periodic recompetitions when agency or public reimbursable sources win an A-76 procurement. This adds a very significant burden on procurement resources that does not exist today. Agencies may have to allocate their resources to recompetitions instead of initiating new A-76 procurements. We recommend that OMB consider the additional burden that is being placed on agencies and consider allowing more flexibility to agencies to allow them to continue with successful MEOs without requiring a rigid schedule for recompetitions.
B pg. B-16	Paragraph C.5.(c)(2). The agency provider does not appear to have any appeal rights or any other remedy if a termination of the letter of obligation is threatened or takes place. Very often, terminations for default are converted to terminations for convenience once the facts are investigated. At the least, a private contractor has the recourse of challenging a termination for default through an appeal to the Board of Contract Appeals or the Court of Federal Claims; the ATO/MEO appears to have no available remedies to challenge a termination. We recommend that a procedure be incorporated whereby the ATO may request that the AAA review any notice of termination of a letter of obligation, and that the termination be stayed until completion of the AAA's review and recommendations.
B pg. B-17	Paragraph C.6.a(1). The phrase "While private sector proposals shall not be subject to appeal..." is incorrect. It is not proposals that are appealed, but source selection decisions that are based on proposals.

B pg. B-17	Paragraph C.6.a(4). The appeals process should be revised to allow for a meaningful appeal of the source selection decision. If the agency appeals process is streamlined to the extent proposed, offerors will not believe that it provides them a meaningful review, and they will be more likely to file a subsequent bid protest. Our recommendations are as follows: 1. In all cases, comments should be allowed on all appeals by directly interested parties. 2. Counsel for directly interested parties should have access to unredacted appeals and other documentation under a protective order procedure. In large procurements, parties are represented by counsel, and every appeal tribunal has procedures that allow counsel to review unredacted documents so that they can provide meaningful representation. In addition, the draft does not make clear whether agency counsel would have access to unredacted materials. 3. The Circular should not mandate a maximum 10-day comment period. The AAA should decide the length of the comment period based upon the complexity of the appeals.
B pg. B-19	Paragraph D.2.a. There is a clear statement in the draft that members of the PWS team may not be members of the MEO team. It is not clear, however, if advisors who are not formal team members could advise both teams or to what extent information can be exchanged between the teams.
B pg. B-20	Paragraph D.3. The reference should be to paragraph D.2 rather than D.3.
C pgs. C-3 & C-4	Paragraph D.1.e: The proposed 15 working day time line for completion of the Business Case Analysis appears unrealistically short.
C pg. C-3	Paragraph D.2.b. We recommend allowing a comparison with existing labor hour or time and material contracts in addition to firm fixed price arrangements.
C pg. C-4	Paragraph E.2.b. The required public announcement appears to be unnecessary. It is unclear what is meant by an “announcement at the local level.”

D	How do the procedures for competing ISSAs affect the use of the Economy Act? The FAR requires that contracting officers prepare a Determination and Findings (D&F) certifying that the goods or services being acquired cannot be obtained as cheaply or conveniently elsewhere. The Act itself allows agencies to obtain goods or services from other agencies when it is in the best interest of the government and the goods or services can be obtained more cheaply or conveniently. Given the statutory authority allowing Economy Act agreements, it appears that Economy Act agreements should be exempt from the competition requirement. It would seem to be redundant to require that they be competed when the D&F evidences that a private source is not required (as allowed by law).
E pg. E-2	Paragraph A.10. Change "Standard Cost Comparison Form (SCF)" to read "Standard Competition Form (SCF)".
E pg. E-3	Contract Administration Cost (Line 8 of the SCF). The Revised Circular provides a strict table of contract administration costs by FTE and grade levels based on the MEO staffing. Contract administration staffing allowances seem to be low in both FTE and grade structure for the work and decision-making required. The table does not appear to reflect consideration for work distributed across large geographic distance, and it presumes work is performed locally.
E pg. E-15	Paragraph D.2.a. The reason for the requirement that in new and expanded requirements the private source shall be considered as the incumbent is not clear. Why consider no offeror to be the incumbent?
F	We recommend that a definition for "Source Selection Authority" be added.
F pg. F-5	See our comments above concerning the definition of "information technology" and the need to clarify that A-76 procurements do not necessarily involve the provision of IT equipment.
F pg. F-6	Definition of "Negotiated Acquisition." Under the FAR, the CO, and not the SSA, normally performs negotiations. See our comments above concerning the proper roles of the CO and SSA during the discussion process.
F pg. F-9	Definition of "Specialized or Technical Services." This definition is confusing and appears needlessly complex.