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cc:
Subject: Comments on the Proposed Revision of Circular A-76

Comments on the November 19th Proposed Revision to OMB Circular A-76

Submitted by:

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December 19, 2002

(See attached file: Union Comments on Revised A-76.doc)

- Union Comments on Revised A-76.doc

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While not a part of the proposed revision, OMB's "requirement" of direct-to-contract and budget cutting actions as a consequence of agencies failing to meet study time frames is wrong. Direct-to-contract actions do not insure the lowest cost and do not address the interests of employees, the agencies, or the taxpayers. If OMB is to pursue punitive actions, it should direct them against those officials who fail, not employees who have no control over the studies, and not taxpayers who may likely pay more as a consequence of punitive direct-to-contract actions and/or receive diminished services if budgets are reduced. Those officials responsible for studies, including agency heads, should be held responsible and should face performance actions for unexcused failures. Employees and agency customers should not suffer for the failures of agency managers, while those very same managers are not held responsible at all.

The proposed circular specifies nearly 40 tasks for the 4.e official, many of which cannot be delegated. It is unreasonable to think that an individual can accomplish these tasks for a large agency like the USDA. For example, the 4.e official is required to certify that a function meets the requirements of conducting a Business Case Analysis, page C-3. A more practical approach would dictate that certification would be the responsibility of the person conducting the analysis.

When employees represented by an exclusive representative (union) are involved in, or affected by, any A-76 study, the exclusive representative shall be defined as a "Directly Interested Party" and shall be eligible to file appeals. This change will not only protect the interests of federal employees, but it will also protect the mission of the agency and the interests of taxpayers to insure equity, as well as adherence to the process.

When the appeal is of a procedural matter, the appeal process for the exclusive representative should include the option of using the collective bargaining agreement grievance process.

Few agencies can dedicate resources and staff to conduct studies, yet the time frames proposed do not recognize this. Generally, those doing studies perform them as collateral

duties and other priorities interfere. Even with proper staffing and resources, many functions are complex and the short time frames are not realistic. Either the time frames must be extended, or provisions have to be made to allow an agency to simply cancel a study. Another alternative is to provide new, specific funding for competitive sourcing. Federal managers must be provided the flexibility to manage, and unfunded mandates such as competitive sourcing are counterproductive to wise management.

Targets for competitive sourcing, especially when established from outside of the agencies, make the time frames for completing studies particularly troublesome. If an agency voluntarily decided to do competitive sourcing, it would have the opportunity to dedicate resources and establish a plan of work to meet the time frames. While the setting of targets for competitive sourcing is not a component of the proposed revision of Circular A-76, the combination of imposed targets and short time frames will cause agencies to fail – failure either to complete studies or failure to do them well. In either case, mission and low cost will be jeopardized. Targets reduce flexibility to effectively manage the agencies.

The proposed Business Case Analysis is likely to provide little utility for most agencies and should be revised to reflect much more closely the current A-76 streamlined study. Competing against the lowest comparable government contract is a downward spiraling goal and will be successively more and more difficult to reach. As such, the existence of the BCA is superfluous, as it will seldom be used. Further, if the "competition" decision is to go to solicitation, the contracting-out cost to the taxpayer could be greater than the existing cost of having the government do the work. This is contrary to any effort to decrease costs and must be remedied. This is particularly problematical if economic conditions have rendered the comparison of contracts out of step with actual bids.

The purpose of the proposed business case analysis should be to justify going direct to contract. As proposed, this may not save the government any money. Since conducting full studies is expensive, the business case analysis should be used to identify the functions for which a contract will likely save the government a significant amount. In the case where savings are predicted, a cost comparison should be done to assure that these saving are realized to ensure that contracted work is not more expensive than the current government cost.

"Best value" selections could create inequities and could severely limit the ability of employees and agencies to retain work. This provision should be deleted. If not, minimally, agencies should be allowed to offer two tenders: one low cost, the other best value.

Additional, specific comments:

PUBLIC-PRIVATE COMPETITION

Under A. LIMITATIONS AND CRITERIA.

1. Limitations When Performing a Standard Competition.

b. Reorganization. Once an activity is announced for Standard Competition, agencies shall not reorganize or restructure a commercial activity to circumvent the competition requirements of this Circular.

Rationale: As originally written, it gives the impression that agency CANNOT make attempts to perform an activity in a more efficient or cost effective manner. The addition should make it clear that reorganizing CAN occur prior to an announcement.

Under C. STANDARD COMPETITION PROCEDURES.

1. Preliminary Planning for Public Announcement.

a. Preliminary Planning

Prior to public announcement (start date) of a Standard Competition, agencies shall: (1) determine the activities (#1) ~~and positions~~ to be competed, (2) conduct preliminary research to determine the appropriate grouping of activities (#2) ~~as business units consistent with market and industry structures~~

Rationale for changes:

Change #1: As stated in 1. Purpose, "This Circular establishes federal policy for the competition of commercial activities." The competition is about competing for work, not positions.

Change #2: Research should be done to determine groupings, but why should they necessarily be consistent with "market and industry structures"? Just leave it as appropriate groupings and allow agencies to develop the groupings; some consistent, some not consistent.

Under C. STANDARD COMPETITION PROCEDURES.

1. Preliminary Planning for Public Announcement.

b. Competition Preparation Considerations (8) Personnel Considerations.

Agencies shall provide assistance to adversely affected Federal civilian employees in accordance with 5 CFR Part 351 and follow procedures in collective bargaining agreements in accordance with 5 USC 7114 as appropriate.

Rationale for change: Agencies have an obligation to follow collective bargaining agreements they have entered into with labor organizations and a reminder is appropriate.

Under C. STANDARD COMPETITION PROCEDURES.

6. The Administrative Appeal Process.

a. The Administrative Appeal Process. (1) General, (last sentence)

While private sector or agency proposals shall not be subject to appeal, questions regarding a private sector or agency offeror's compliance with the scope and technical performance requirements of the solicitation may be appealed.

Rationale for change: If whole process is supposed to provide a level playing field, then the appeal process must be the same for both the private sector and government. The way this is stated in the proposal gives the impression, hopefully a false one, that agency proposals MAY be appealed.

Under D. SPECIAL CONSIDERATIONS.

3. Participation of Directly Affected Employees and Representatives of Employees.

Directly affected employees and their representatives may participate in the Standard Competition Process in accordance with paragraph D.3. above.

What does this mean? This is paragraph D.3. Does this have the wrong reference? What does it mean when it says that employees and their reps can participate in the Standard Competition Process?

DIRECT CONVERSION PROCESS

Under A. CRITERIA.

1. Small Activity. An activity is or will be performed by an aggregate of 10 or fewer civilian employees in the agency.

Needs better definition. Does this mean an agency-wide activity with fewer than 10 employees? Or could a large and complex agency decide to use this process to package all activites such that the activity is performed by 10 or fewer employees?