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12/23/2002 04:31:37 PM

Record Type: Record

To: David C. Childs A-76comments/OMB/EOP@EOP
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Subject: Memo to OMB re A-76_v1.DOC

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Please accept the attached comments since they address a very significant issue that will determine whether or not future A-76 competitions conducted by DOD activities will be fair or result in litigation.

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- Memo to OMB re A-76_v1.DOC

m e m o r a n d u m

TO: Federal Procurement Policy, Office of Management and Budget
FROM: Lars E. Anderson, Esquire
DATE: December 23, 2002
RE: *Comments on Proposed Revisions to OMB Circular A-76*

The proposed revisions to the Office of Management and Budget's ("OMB") Circular A-76 will significantly improve the procedures to provide for fairer competitions between public and private entities. However, there is one major unresolved problem that will effectively undermine all the work to create a fair and competitive system. The utilization of Non-Appropriated Fund Instrumentality Personnel ("NAFI"), usually through Morale, Welfare and Recreation activities ("MWR") by Department of Defense ("DoD") agencies to staff MEOs will make it impossible for private companies to compete fairly.

As detailed in General Accounting Office ("GAO") Protest B-28960.2 by Sodexho Management, Inc., July 8, 2002, which was forwarded to OMB by the GAO, the Navy developed an MEO consisting of 82% NAFI labor force to use in an A-76 competition for the Pensacola Naval Regional Complex support services. The majority of the NAFI personnel receive no fringe benefits and are paid compensation well below the compensation paid to either GS or FWS Federal employees. The NAFI employees also receive substantially less compensation than private companies performing Government contracts are required to pay their employees, pursuant to the Service Contract Act of 1965, and applicable Department of Labor wage determinations. As the GAO noted in its decision (at pages 19-20):

“one of the few points of agreement evident in these proceedings, the Navy agrees that Sodexho ‘simply could not compete with the wage structure for NAFI personnel as reflected in the wages that were being paid to the Navy’s ongoing NAFI workforce,’ and ‘the use of NAFI personnel results in significant cost savings to the Navy over any cost savings that might be gained by issuing a private sector contract that must comply with the Service Contract Act.’”

The Navy and other DoD activities have indicated that they intend to expand the use of NAFI employees as significant components of MEOs for future A-76 competitions. Obviously,

private contractors required to pay Service Contract Act wages and fringe benefits cannot be cost-competitive with an MEO comprised of significant numbers of NAFI employees. It is also noted that if Federal civilian employee billets are changed to NAFI billets under an MEO, the incumbent Federal civilian employees must take a substantial reduction in compensation and are, in effect, denied a meaningful right of first refusal. Unless, and until, OMB Circular A-76 is revised to specifically prohibit the use of NAFI employees in an MEO, if they are paid compensation less than required for GS and FWS Federal employees, the process will not be fair and there will be litigation.

It is recommended that, to the extent it is appropriate to have some service functions on a military base be performed by NAFI personnel, such as traditional MWR activities, the NAFI personnel should be made available as a component of both the MEO and private parties' proposals. This would provide the Government the cost savings inherent in the legitimate use of low-paid NAFI personnel, while ensuring fair and open competition for work otherwise performed by military or GS, or FWS Federal civilian employees.