Colleens@del-jen.com
12/18/2002 04:54:37 PM

Record Type:Record

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

cc:
Subject: DEL-JEN Comments to the proposed Revision OMB Circular No. A-76

Please find DEL-JEN, INC.'s comments to the proposed revision of OMB Circular No. A-76.

<<DEL-JEN INC Comments to New Guidance.doc>>

- DEL-JEN INC Comments to New Guidance.doc

December 18, 2002

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

Dear Mr. Childs:

The purpose of this letter is to comment on the proposed revision of OMB Circular No. A-76, Performance of Commercial Activities. DEL-JEN, INC. (DJI) has extensive history working with your office as well as participating in the A-76 cost comparison process. While we believe the A-76 is an important tool to compete commercial functions, the current Circular is outdated and requires revision. The proposed revision is an important step in that direction.

DJI is pleased and honored to serve the Federal Government on Department of Defense service, construction and Department of Labor Job Corps contracts. Founded in 1977, the company operates in 33 states performing building and housing maintenance; fleet operations; supply and warehousing; utilities plant operations; environment management; a broad range of construction services; and full education and training. DEL-JEN is a large business with 1,300 employees and subcontracts to more than 250 different small businesses.

Our review of the November 14, 2002 revision is based on the testimony I provided to the Commercial Activities Panel on August 15, 2001 in San Antonio, Texas. While this latest revision contains some positive changes, I do not believe that it goes far enough to solve all of the problems with the current process. It is my hope that this is just the first step, and the revision process will continue.

First, I would like to commend OMB on some achievements of the revision. The alignment of the solicitation documents, application of conflict-of-interest and ethics rules, streamlining of the technical evaluation and source selection procedures, and delegation of a single source selection authority that oversees both public and private bids are critical to ensure that the process is fair, transparent and accountable.

In addition, the greater responsibility and role proposed for contracting officers will bring more discipline and knowledge to the process and instill confidence that the A-76 is being conducted in an appropriate manner. This change also responds to one of the historic criticisms of the A-76 that too few people involved are adequately

trained. The contracting workforce typically receives ongoing training in the acquisition process, so the addition of A-76 responsibility is not a significant leap for them. This training, combined with the new requirement that A-76 contracting officers must be independent of the function being competed, will create a scenario where a greater number of detached professionals are conducting A-76s than is currently the case.

While the revised process will make an agency's tender offer more accountable in many respects, the revision fails to adequately improve upon the government's ability to develop in-house cost estimates. While the process to evaluate proposals is changing somewhat, the methodology used to develop the agency tender offer is nearly identical to the current A-76 process. This is inconsistent with the direction many federal agencies are taking toward full cost budgeting or activity based costing. If agencies have the ability to capture their full cost of performance, some accommodation should be made to enable them to use that methodology in developing their A-76 tender offers.

This revision does include some important steps to improve transparency and fairness, such as the application of conflict-of-interest and ethics rules, but further steps should be taken to prevent improper influence. A process that spells out a greater degree of responsibility by all involved is meaningless if it that oversight is ignored. For example, there have been more than 10 GAO bid protest decisions favoring the private sector in an A-76 cost comparison, but in only two cases that I'm aware have those decisions been implemented. The procuring activity must respond positively to GAO's direction and implement the changes GAO has taken exhaustive measures to develop. There should be no gap between what GAO recommends and the final outcome, either in time or in changing to contractor work performance.

Another important change for the agency tender is the post-competition implementation. The newly required Letter of Obligation and specified length of the agreement are improvements. An agency even has the ability to terminate in-house performance if there is a failure to perform. However, it is unclear as to whether there is any reporting of in-house costs following a successful agency tender. The current process requires 20 percent of all MEO's to be audited, but very few audits actually ever occur, and those that do occur are often not made public giving a low degree of credibility to in-house performance in the eyes of industry. The revision does not specifically require auditing or public reporting of in-house costs following an in-house win. The ongoing and total value of the agreement should be public information just like the value of a contract. The lack of audit and cost-reporting provisions will undermine confidence in the entire process.

On a positive note, the revision makes an important change with respect to the identification and performance of core functions. While it has always been the federal government's policy that commercial functions be performed by the private sector, this tenet has not been successfully implemented within government. This revision fundamentally alters the process by now treating all positions as commercially competitive unless justified otherwise.

There are several specific issues I would like to raise concerning this revision that I did not address in my testimony to the CAP:

(1) The revision failed to craft a workable source selection process that utilizes cost technical tradeoff. The phased approach, in which the agency tender must be modified to be found technically acceptable, is no different than technical leveling in the current process. Agencies have been unable to successfully use technical leveling, and there is nothing in the phased process to change that. Given the historic failures of the current A-76, there is no reason why the phased approach should even be proposed. At a minimum, a future date should be established in which the phased approach is abolished and all public-private competitions in which the source selection uses cost technical tradeoff use the integrated process.

(2) We support the revision of the administrative appeals process so that all information is heard concurrently and a single decision is rendered. This new process ensures that all appeals can be heard and resolved in a timely fashion using all available information. DEL-JEN has been involved in A-76 cost comparisons where appeal decisions have triggered appeals. This new process should close the open-ended nature of the current process.

(3) The Minimum Conversion Differential of 10% of agency personnel-related costs or $10 million, limits A-76's potential benefit to the Government and the taxpayer, is arbitrary and should be abolished. The best value for the Government should be selected in every case as all savings are important. Eliminating this clause will set the tone for a more level playing field, encouraging true fairness and competition.

(4) The inclusion of Indian Incentive Program fees as Additional Costs added to Line 9 of the SCF, is contrary to the intent of the program. The Indian Incentive Program sets aside monies outside the contract itself, that the procuring activity does not directly pay for, in order to incentivize private firms to include Indian Owned enterprises as part of their team (FAR 52.226-1 and DFFARS 252.226-7001). By including the cost of the incentive in the comparison, contractors are in effect penalized for using Indian-Owned firms and will be less likely to include them, given that it counts against them in the cost comparison with the MEO.

If the objective is that the incentive represents a true cost to Government and needs to be included, it should be included in the contract price but not the cost comparison, so that the integrity and intent of the Indian Incentive program is maintained.

In conclusion, thank you for giving us this opportunity to submit these comments. If you have any questions concerning this letter or if there is anything we can do to be of assistance I hope you will not hesitate to contact me.

Sincerely,

John E. Delane
President & CEO
DEL-JEN, INC.