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12/19/2002 10:45:26 AM

Record Type:Record

To: David C. Childs A-76comments/OMB/EOP@EOP
cc: "Van Rees, Steven" <STVANREE@opm.gov>, "Chatterton, Fred" <AFCHATTE@opm.gov>
Subject: U.S. Office of Personnel Management's Circular A-76 Comments

Mr. David C. Childs

Attached are OPM's comments pertaining to the revised Circular A-76, Performance of Commercial Activities that will be forwarded in hard-copy to Mr. Daniels.

Thanks!

Tom

Required Information:
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UNITED STATES
OFFICE OF PERSONNEL MANAGEMENT
WASHINGTON, D.C. 20415

OFFICE OF THE DIRECTOR

The Honorable Mitchell E. Daniels, Jr.
Director
Office of Management and Budget
Washington, DC 20503

Dear Mr. Daniels:

This letter forwards the Office of Personnel Management's comments on the revised Circular **A-76**, Performance of Commercial Activities in response to your office's request contained in the Federal Register notice dated November 19, 2002.

Sincerely,

A handwritten signature in black ink, appearing to read "Kay Coles James", with a long horizontal flourish extending to the right.

Kay Coles James
Director

Enclosure

U.S. Office of Personnel Management
Comments on Revised OMB Circular A-76, Performance of Commercial Activities

The following are the Office of Personnel Management's comments related to the Office of Management and Budget's proposed revisions to Circular A-76:

1. Government competition for a "new" requirement

It is unclear if the Government can compete in a Federal Acquisition Regulation procurement of a "new" requirement. We recommend that the Circular be revised to indicate the Government may compete, along with private sector companies, for "new" requirements. Reference: Page B-2, Section A.2.(b).(3).

2. Human Resource Advisor (HRA) Responsibilities

There presently is no requirement for agencies to consult with OPM to establish Reemployment Priority Lists. Agencies currently have delegated authority to determine priority considerations for vacant positions. We recommend replacing "(g) consult with the Office of Personnel Management (OPM) to determine agency priority considerations for vacant positions and establish a reemployment priority list" with "(g) determine agency priority considerations for vacant positions and establish reemployment priority list(s) in accordance with 5 CFR Part 330." Reference: Page B-3, Section B, 3.a.(g).

3. Human Resource Advisor (HRA) Responsibilities

The requirement for the HRA to determine employee qualifications for contractor or public job openings offered as a result of Right-of-First Refusal might place an unwanted liability on the Government since it could present an opportunity for the acquiring service provider to allege the Government made an erroneous employment determination. We recommend stating, "If the contractor or ISSA provider determines an employee is not qualified, the written justification must be provided to the HRA. Should the HRA not agree with the contractor or ISSA provider's determination, the written justification from both the contractor or ISSA provider and the HRA will be elevated to the Agency Tender Official for final determination." Reference: Page B-3, B.3.a. and b.

4. Various regulatory citations

Please review the following citations and take appropriate action:

- The citation 5 USC Part 351 (Reduction-in-Force) should read 5 CFR Part 351 (Reduction-in-Force). Reference: Page B-3, Section B, 3(a) and (b).
- The citation, 5 CFR Part 351 (Reduction-in-Force), is incorrect in the stated context and should be replaced with 5 CFR Part 330, which contains programs for displaced employees. Reference: Page B-5, Section C.1.b.(8), and Page C-5, Section E.2.F.

U.S. Office of Personnel Management
Comments on Revised OMB Circular A-76, Performance of Commercial Activities

5. Phase-In and Phase-Out Plans

It is important to ensure that employees receive notification about their rights under a Reduction-in-Force during phase-in and phase-out plan execution. We recommend augmenting the sentence “The length and requirements of the phase-in must consider hiring, training, recruiting, security limitations, and any other special considerations to reflect a realistic phase-in plan.” to read “The length and requirements of the phase-in must consider hiring, training, recruiting, security limitations, regulatory notification requirements, and any other special considerations to reflect a realistic phase-in plan.” Reference: Page B-6, Section 2.a.(6).

6. Right of First Refusal

Employees receive Right of First Refusal when a sourcing decision results in conversion from public (agency) to ISSA; however, there exists no immediate appointing authority to accommodate employees accepting employment with an ISSA provider between competitive and excepted service employment. Recommend that OMB staff consult with OPM to determine needed relevant appointing authority(ies). Reference: Page **D-2**, Section **E**.

7. Reimbursable Agreements with State and Local Governments

The requirement in the proposed revision that a State or local government must “demonstrate” no satisfactory private source exists when purchasing work from the Federal Government through the Intergovernmental Cooperation Act (Act), and that OMB must determine Federal agencies have a special competence to provide such work, are more stringent than what is currently required. Neither the Act nor current Circular A-97 requires such a demonstration by a State or local government, nor do they require an OMB determination of special competence. Imposing the more stringent requirements will entail considerable Federal agency time, expense, and personnel resources in obtaining the OMB determination—Currently agencies determine for themselves whether they may perform the work under the Act. Moreover it is unclear who, the agency to perform the work or OMB, would have to determine whether the State or local government’s “demonstration” is adequate. It is questionable whether any Federal agency has the authority to make a determination of the needs of a State or local government or the ability of private sources to satisfy those needs. Recommend OMB retain the current Circular A-97 language that the State or local government must certify that it cannot reasonably and quickly have the work performed by a private source. Reference: Page D-3, H (all).

8. Representative Rates

The designation of the General Schedule (GS) step 5 and Federal Wage System (FWS) step 4 as representative rates is incorrect. Recommend revising this statement to reflect the Governmentwide representative rate as step 4 for the **GS** and step 2 for the FWS (as stated in 5 CFR Part **532.401**, Prevailing Rate Systems; 5 CFR Part **536.102**, Grade and Pay Retention; and 5 CFR Part 550.703, Subpart G—Severance Pay. Reference: Page **E-4**, Section B.1.d.