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

cc:
Subject: Comments on the OMB Circular Revisions

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Accountants and
Management Consultants

Grant Thornton LLP
The US Member Firm of
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Grant Thornton

December 19, 2002

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

SUBJECT: Proposed Revision to Office of Management and Budget (OMB) Circular No. A-76, "Performance of Commercial Activities"

Dear Mr. Childs:

We are pleased to present the attached Grant Thornton LLP comments on the proposed revisions to OMB Circular A-76.

We believed proposed revision is an improvement over the 1983 version of the OMB Circular A-76 and the 1996 revised Supplemental Handbook. Should comments from industry and government be given serious consideration, the resulting circular should become a benchmark for conducting a more fair, timely and accountable public-private competitions.

Enclosed are our narrative comments and requests for clarification or recommended process improvements. Should you require any additional information, please contact me at (703) 637-2770 or Ramon Contreras at (703) 637-2735.

Sincerely,
GRANT THORNTON LLP

Diane H. Shute

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Principal

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Submitted by
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DRAFT OMB CIRCULAR A-76 (NOVEMBER 14, 2002)
REVIEW COMMENTS AND QUESTIONS

Introduction:

Grant Thornton is pleased to provide the following comments on the proposed revisions to Office of Management and Budget (OMB) Circular A-76, Performance of Commercial Activities, published in the Federal register on November 19, 2002 (67 FR 69769). Please consider our comments as part of OMB's deliberations to finalize the revisions to OMB Circular A-76.

Grant Thornton is a truly diverse firm, delivering excellence and value to clients in more than 100 countries worldwide. With net global revenue of nearly $1.8 billion last year, we have 22,000 partners and employees serving our clients throughout the world. In the United States, some 3,000 partners and staff serve clients through 44 offices, collectively offering experience, creativity, and insight. Grant Thornton Global Public Sector Practice is centralized in the Washington, DC area. The Global Public Sector Practice (GPS) provides general management consulting services, including competitive sourcing support, to federal government clients across the country. GPS has 50 knowledgeable competitive sourcing professionals, comprehensive organizational experience and relevant past performance references. Having completed 50 Competitive Sourcing Studies, more than 60 Independent Reviews (IR) and 17 Post-Most Efficient Organization (MEO) reviews, Grant Thornton is a recognized leader in the competitive sourcing arena.

General Comments:

OMB's proposed revisions to Circular A-76 attempt to comprehensively address a number of issues that were presented during the General Accounting Office (GAO) Panel investigation process. Principles delineated in the GAO Panels report are reflected in the revisions as written. In particular, the principles of accountability, fairness, and timeliness are clearly represented in the proposed revisions. The emphasis on quality control and quality assurance and the requirement for a letter of obligation will help agencies instill accountability into the process. The effort to require a Federal Acquisition Regulation (FAR) type source selection process will help agencies make decisions following a consistent process. Finally, establishing a shorter timeframe to conduct full cost comparisons is a benefit to the parties involved. The twelve-month timeframe is achievable for simple competitions if accurate data and sufficient resources are available. However, the detailed changes in the process do not always achieve these goals and at times are at odds with the same principles. That said OMB Circular A-76 was in need of revision. Therefore, the following comments discuss policy and process improvements that Grant Thornton believes should be retained in the final Circular A-76 along with other comments, which highlight opportunities to clarify or improve the process going forward.

Policy and Process Improvements:

I. Federal Activities Inventory Reform (FAIR) Act Inventory Reporting Requirements

Proposed revisions, contained in Attachment A, requiring the submission of FAIR Act inventories, to include Commercial, Non-FAIR Act Commercial, and Inherently Governmental activities, will provide a more accurate assessment of the activities and associated resources that make up the entire agency. Historically, Inherently Governmental and Non-FAIR Act activities have been ignored as agencies focus their efforts to drive efficiency and effectiveness on Commercial Activities. Encouraging agencies to submit full inventories provides a clearer picture of the activities that are being performed. Additionally, government mangers will have the ability to more readily devise

inter-relationships between Commercially coded, Inherently governmental, and Non-FAIR Act activities across organizations. These data points will allow government managers to make better decisions in devising their competitive sourcing programs by selecting the most appropriate activities for competition.

Note: In order to meet the goals of the revised circular it will be helpful to consider additional reporting requirements that identify existing commercial contract services and ISSAs. The revisions discuss the conduct of standard competitions on Inter-Service Support Agreements (ISSAs) and existing contract activities. It will be extremely difficult to devise a plan of action to conduct standard competitions on ISSAs and existing contracts if agencies do not have baseline information describing the resources associated with these activities.

II. Emphasis on Preliminary Planning

The proposed revisions, contained in Attachment B, Section C, place additional emphasis on the "Preliminary Planning for Public Announcement" in the standard competition process. It is increasingly important, in light of the revised timeframes, for agencies to spend time and invest resources planning their competitive sourcing efforts. Making a public announcement before performing preliminary planning is irresponsible and has historically resulted in prolonging the competition process. Scoping the activities that will be included in the competition, assessing the availability of workload and performance metrics, establishing systems to capture missing data, identifying competition officials and the roles and responsibilities of relevant parties, and developing a process schedule are recommended actions for competitive sourcing efforts. In order to accomplish competitive sourcing activities within the shorter timeframes proscribed in the revisions, it is important to emphasize the preliminary planning component of the process. The addition of this language clearly establishes the preliminary planning component as integral to the standard competition process and should be retained.

III. Clarification of the Conflicts of Interest Issues

The proposed revisions also include language clarifying the conflicts of interest issues in Attachment B, Section C. Conflict of interest issues have resulted in a number of bid protests in recent years. These bid protests coupled with the general perception that the competitive sourcing process was unfair have led to the convening of the GAO Commercial Activities Panel and have been a driving force behind the effort to revise the circular. Incorporating language in the revisions that reference FAR provisions on conflicts of interest provides a consistent source for conflict of interest rules and clarifies the importance of adhering to ethical and standard codes of conduct while conducting an acquisition. Additionally, language identifying specific roles and responsibilities including the Contracting Officer (CO), the Agency Tender Official (ATO), and the Source Selection Authority (SSA) as independent positions will reinforce the need for a division among those working on the acquisition and those working on the agency tender. This is a marked improvement and should be retained in the final version.

Note: In practice issues arise as to the clarity of the relationships and authority of the positions identified in the revision. Specific concerns with the relationships among the 4e designees are discussed in further detail below in the Clarifications and Process Improvement Opportunities section.

IV. Requirement for Quality Control Plan (QCP)

The requirement for a Quality Control Plan and the additional emphasis on the Quality Assurance Surveillance Plan (QASP), contained in Attachment B, Section C is an improvement over previous references to quality assurance requirements. To achieve accountability in the competitive sourcing process it is important that every competition be founded on measurable performance outcomes. It is incumbent on government managers to identify performance metrics and to devise methods of surveillance that reflect the agency priorities or customer requirements. Requiring a QCP from every offeror, including the Agency Tender, will increase the probability of achieving satisfactory performance levels. Additionally, the 4e official will assign individuals to perform quality assurance as captured in the QASP. These provisions will help instill more accountability into the competitive sourcing process and should be retained.

Note: In the past, competitive sourcing guidance included a discussion of the Residual Efficient Organization (REO) or the Continuing Government Activity (CGA). The CGA typically included quality assurance activities in addition to the inherently governmental or core activities associated with the activities subject to the competition. We recommend the inclusion of some reference to the CGA and a short description of the CGA's responsibilities including quality assurance.

Clarifications and Process Improvement Opportunities:

I. Roles and Responsibilities – Agency Tender Official (ATO) and Human Resource Advisor (HRA)

The proposed revision identifies specific roles and responsibilities of designees in the standard competition process in Attachment B, Section B. The Designees include the ATO and the HRA among others. The ATO and the HRA will have significant responsibilities with regard to the development of the agency tender in the standard competition process. The ATO will be primarily responsible for the agency tender, but will require support form the HRA to develop position descriptions and to maintain communication with the affected workforce. How will disputes be resolved among the designees, ATO and HRA, as these positions are designated by the 4e official and have independent responsibilities? As an example, in performing "labor market analysis to validate the feasibility of the MEO staffing" (Attachment B, Section B, para. 3.b.), if the HRA believes that MEO staffing may not be feasible, is the ATO required to revise the agency tender? It is critical that one designee is given final decision making authority with regard to the development of the agency tender. Clarifying the roles and responsibilities of the ATO and HRA will help agencies to execute a standard competition process by establishing clear lines of authority.

Additionally, the proposed revisions attribute the ATO and HRA with such a wide and diverse range of responsibilities that it will be difficult to assign only a single position to execute them. The ATO's responsibilities to represent the agency tender through source selection, appeals and protests, and finally implementation place a great burden on a single individual. The ATO takes on many of the responsibilities that were previously attributed to the Most Efficient Organization (MEO) certifying official. In the past, the MEO certifying official was a high level individual, at least two levels above the affected workforce, and had little hands-on experience in the development of the MEO. It is presumed that the designated ATO will similarly be a high level government official. In order for the ATO to carry out his or her duties they will have to be more intimately involved in the agency tender development. This has not historically been the practice of the MEO certifying official. Further clarification on the level of ATO participation in MEO development is recommended. Additionally, guidance should clarify how an agency will resolve changes of personnel within the position. In our Department of Defense (DoD) experience, the MEO certifying official was typically a high level

military officer. Military officers rotate frequently from position to position and would therefore be unlikely to see the entire process through. How will the change of the individual filling the role of the ATO effect the "directly interested party" status and how will the change effect the accountability issue since the ATO will sign the letter of obligation?

The HRA, on the other hand, has been given responsibilities that were previously carried out by other positions. Public affairs organizations or contracting officers have typically handled the responsibilities for making public announcements and for implementing the Right of First refusal. Agencies should have the flexibility to make a determination as to where these responsibilities should reside. Elimination of these specific roles and responsibilities from the HRA role should be considered. As an alternative these specific roles and responsibilities could be mentioned as part of the process, but not specifically attributed to any one 4e designee.

II. Agency Tender Proprietary Information

The proposed revision states that the agency tender "shall be considered a procurement sensitive document, until a Performance Decision is reached." (Attachment B, Section C, para. 3.a.(1)) While this is a significant improvement over previous language, the provision does not afford the agency tender the same protection that private sector offers are afforded under the FAR. This issue is compounded when considering that after the performance decision is rendered the proposed revision states, " an agency shall not consider any part of the Agency Tender to be procurement sensitive and shall release the Agency Tender to interested parties in the administrative appeals process." (Attachment B, Section C, para. 3.a.(1)) Private sector offers will still be considered procurement sensitive for purposes of the administrative appeal in accordance with the FAR. This will allow private sector offerors to file administrative appeals based on significantly more information while hampering the ability of the ATO to file an administrative appeal. Furthermore, the agency tender will be made a matter of public record for subsequent competitions and may ultimately impair the ability of an agency to continue to conduct fair standard competitions. The proposed revision does not consider that the same agency tender will be up for re-competition within five years and that an agency may be conducting several standard competitions on similar activities. As an example, if an agency is conducting several standard competitions on information technology activities performed at various locations, the provision of one agency tender to the private sector will have a profound effect on the ability any subsequent agency tender's ability to compete. It would be easy for a private sector offeror to use information gathered from one agency tender to develop a more competitive proposal on the subsequent standard competition. The result would be an unfair competition, which runs contrary to one of the guiding principals behind the proposed revisions. Agencies may be encouraged to conduct larger competitions, which may prohibit small business interests from competing as well. For these reasons the final revisions should consider providing FAR type procurement protections for the agency tender as well as for industry offerors.

III. Government Furnished Property and Equipment

The proposed revision states that, "the PWS team shall determine if government property is to be provided. The determination to provide government furnished property shall be justified, in writing, and approved by the 4e official." (Attachment B, Section C, para. 2.a.(6)) Historically the onus has been on the PWS team to justify why government property was not going to be furnished. The presumption was that relevant government property, equipment, and supplies would be provided to both public and private competitors. The presumption was based on the fact that taxpayers had already paid for these items so why should they be priced again through the source selection process. Offerors were not necessarily required to utilize government furnished property, but could if they included the cost associated with the provision in their contract or In-House Cost Estimate (IHCE).

While it is appropriate that these decisions not be made on the basis of influencing a specific outcome, eliminating the presumption that government furnished property will be provided creates an additional burden on the PWS team and could potentially result in additional costs of performance and transition. The final revision should consider reinserting the presumption to accompany references to the FAR provisions 45.102 and 45.3.

IV. Roles and Responsibilities – Source Selection Authority (SSA), ATO, and the 4e Resolution Designee

The proposed revision outlines a source selection process in step with generally accepted FAR acquisition practices, including designated responsibilities for the SSA and ATO. (Attachment B, Section C, para. 4) However, the proposed revision includes the designation of "an individual (who has not been involved in the source selection process) to resolve the disagreement," between the ATO and the SSA during a negotiated procurement source selection. (Attachment B, Section C, para. 4.a.(3)(a)3.) The language outlines a process in which the 4e official will designate an "individual" to resolve any disagreement between the ATO and the SSA. The "individual" in the Lowest Price Technically Acceptable (LPTA) Source Selection would have the additional responsibility of "authorizing exclusion of the Agency Tender from the competitive range." (Attachment B, Section C, para. 4.a.(3)(b)1.) According to the proposed revision the designated "individual" has a great deal of responsibility. These responsibilities will curb the authority of both the ATO and the SSA in the process. In the final revision, further clarification is required on who can serve in this capacity, what roles and responsibilities are attributed to the individual, and how the "individuals" role will relate with the ATO and the SSA.

V. Elimination of the Independent Review Official

By eliminating the roles and responsibilities of Independent Review Official (IRO), the proposed revisions make it more difficult to validate accountability - thereby eliminating the existing mechanism to institute accountability in the competitive sourcing process. Previous guidance required that an IRO conduct an independent audit on the MEO to certify that the MEO was developed in accordance with OMB Circular A-76 guidance and that the MEO staffing levels could reasonably be expected to meet the requirements as captured in the Performance Work Statement (PWS). This internal audit process required an MEO to be founded on supporting documentation and validated the analysis. Additionally, the IRO was brought in to conduct Post-MEO reviews one year after MEO implementation. The Post-MEO reviews required agencies to monitor cost and performance related to implementation of the MEO. Finally, the IRO process helped to support post-decision actions such as appeals and protests. If the final revisions do not include an IRO process, they should at a minimum emphasize the need for development of an auditable Agency Tender and consider which parties are responsible for conducting audit type reviews. Vesting the audit responsibilities in the ATO or SSA positions will go a long way toward achieving the goal of accountability throughout the competitive sourcing process.

VI. Agency Tender Sub-contracts

The proposed revisions can be interpreted to eliminate the flexibility of an agency to partner or team with private industry in developing the Agency Tender. (Attachment B, Section C, para. 3.a.(4)) The proposed revision states, " an MEO may be comprised of either (1) Federal employees or (2) a mix of Federal employees and existing contracts (referred to as MEO subcontracts in this circular). New contracts shall not be created as part of MEO development." This language effectively inhibits the MEO or agency tender from utilizing innovative techniques to achieve the most efficient means of performing the requirements stated in the PWS. Private sector offerors typically use sub-contracting

and teaming agreements with other industry providers in developing the most efficient and effective offer. MEO or agency tenders should be allowed similar flexibilities in developing the agency's offer. The flexibility can be measured by setting parameters that include a ceiling on the number of Full-Time-Equivalents (FTE) that can be affected, or requiring the procuring activity to place affected employees, or guidance setting limitations on expanding existing contracts. Inclusion of this flexibility in the final revision will result in more innovative MEOs and therefore more cost savings to the taxpayer as well as fairer competitions between the public and private sector.