

Didier Trinh <didier@fedmanagers.org>
12/19/2002 04:57:52 PM

Record Type: Record

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

cc:

Subject: Federal Managers Association Comments on OMB Circular A-76

Michael B. Styles
National President
Federal Managers Association
1641 Prince Street
Alexandria, VA22304

Didier Trinh
Director
Government and Public Affairs
Federal Managers Association
V: (703) 683-8700
F: (703) 683-8707
E: didier@fedmanagers.org
www.fedmanagers.org

- FMA Comments on OMB Circular A-76.doc

FMA

Federal Managers Association

Public Comments

Submitted to the Office of Management and Budget

Executive Office of the President

For Delivery On:

December 19, 2002

Proposed Revisions to
OMB Circular A-76

Statement of
The Federal Managers Association





INTRODUCTION

Established in 1913, FMA is the largest and oldest Association of managers and supervisors in the Federal Government. Our Association has representation in more than 30 Federal departments and agencies. We are a non-profit advocacy organization dedicated to promoting excellence in government. As those who are responsible for the daily management and supervision of government programs and personnel, our members have a broad depth of experience with the government's practice of contracting-out for services.

In response to the recent release of proposed revisions to the Office of Management and Budget's Circular A-76, we would like to submit the following comments for your consideration.

The overarching question that we are presented with is: How do we improve the current outsourcing framework in a manner that reflects a balance among taxpayer interests, government needs, employee rights, and contractor concerns? We at FMA have long prioritized mission analysis and continue to seek out ways to not merely cut federal jobs, but to focus agency attention on how to carry out missions more effectively and efficiently. Performance measurements, goal tracking, and insertion of new technology and business practices are vital to success in today's fast-paced market. These cultural changes within the government can only be accomplished through thoughtful interaction between government and industry.

FLAWED PREMISE

Before we get into the substance of the proposed revisions, we at FMA would like to note the manner in which the accompanying memorandum to the heads of executive





departments was written. Under the section entitled “Policy,” it states, “For the American people to receive maximum value for their tax dollars, all commercial activities performed by government personnel should be subject to the forces of competition, as provided by this Circular.” In the very next sentence it states, “...agencies shall...presume all activities are commercial in nature unless an activity is justified as inherently governmental.” The former in no way justifies the latter. In fact, why qualify that *commercial* activities should be subject to competition, only to follow with the assertion that in actuality *all* activities are now commercial in nature until proven otherwise?

The Federal Activities Inventory Reform (FAIR) Act of 1998 mandates agencies to annually publish lists of government positions that are “commercial in nature” and therefore could be performed by contractors. The first statement above is not dissimilar to FAIR Act requirements. However, the second statement completely subverts the intent of the law by now making the presumption that all Federal jobs are commercial in nature. While we speculate that this is meant to open all Federal activities to competition, we do not feel that the means justifies the end. What then is the purpose of requiring agencies to publish these inventories? Aside from very serious concerns regarding this philosophy, we at FMA believe this new premise directly undermines the FAIR Act.

FMA CONCERNS

We will lay out our concerns in sequential order as they appear in the proposed revisions to OMB Circular A-76.





Timeframes

The first objection we have pertains to the recommendation that a standard public-private competition “shall not exceed 12 months from public announcement (start date) to Performance Decision (end date), unless a deviation is granted.” The Commercial Activities Panel (CAP) – convened by Congress to examine the policies and procedures governing the transfer of commercial activities for the Federal government from government personnel to a Federal contractor – found that the Department of Defense (DOD), which has the most experience conducting public-private competitions, takes an average of 29 months to complete a competition. While we support the goal of streamlining the competition process, we find that this drastically reduced timeframe is unrealistic and could adversely affect the aim of providing the best return on taxpayer dollars.

While the proposed revisions allow for an extension, it is not clear how this waiver will be granted and for what length of time. On page B-2 under A. 1. (a) *Deviations*, it states, “the 4.e. official may waive the timeframes required to complete a competition, if the competition is particularly complex, and issue a revised completion date, with notification to the Deputy Director for Management, OMB.” On page B-5 under C. 1. (b) (3) *Timeframes*, the revised circular then states, “the 4.e. official may grant a one-time six-month extension if approved by the Deputy Director of Management of OMB.” If the extension is not granted, it is our understanding that OMB could decide to outsource the work without competition. According to the revised circular, there are no defined standards for justification of such conversion. We believe that safeguards need to be included in order to ensure fairness in competition. Again, there needs to be further clarification on the length of the extension and, in fact, we at FMA would like to propose that the length of extension be determined on a case-by-case basis.





Bid Evaluation

Current A-76 regulations guarantee that the public-sector bid is matched up against the best private-sector offer. This was done to account for the institutional expertise and experience of the Federal workforce in performing Federal activities. The proposed revisions, however, seek to include the in-house MEO with all other bids so that the source selection authority “can evaluate all offers concurrently.” This has the potential effect of dismissing the public-sector bid early in the process, which defeats the premise of providing Federal employees the opportunity to compete for the work from beginning to end.

It is also worth noting that, in many cases, the public sector is the only competitor to the Original Manufacturer and as a result the cost is reasonable. Without the public-sector bid, the cost would go up.

Right of First Refusal

Under the revised A-76 circular, the Right of First Refusal must be vacated by agency personnel who are “personally and substantially participating in developing the solicitation,” including those participating on the Performance Work Statement (PWS) Team, Most Efficient Organization (MEO) Team, and the Source Selection Evaluation Board (SSEB). Under the current A-76 Circular, all Federal employees adversely affected by a conversion of agency-performed work to a contract or public reimbursable performance are afforded the Right of First Refusal:





“Considerations

1. Adversely affected Federal employees are employees identified for release from their competitive level by an agency, in accordance with 5 CFR Part 351 and Chapter 35 of Title 5, United States Code, as a direct result of a decision to convert to contract, ISSA performance or the agency's Most Efficient Organization (MEO).
2. Federal employees and existing Federal support contract employees adversely affected by a decision to convert to contract or ISSA performance have the Right-of-First-Refusal for jobs for which they are qualified that are created by the award of the conversion.”

Moreover, Federal managers who are adversely affected by a contract will not have the Right of First Refusal to management job vacancies existing in the contractor's workforce, as it is only non-management positions that will be available to adversely affected Federal employees and managers under the new rules. This change unfairly targets Federal managers and places them at a distinct disadvantage vis-à-vis other employees.

We at FMA are troubled by this change in current policy and unclear as to the reasoning behind it, or the benefit that it will provide to the public-private competition process. We believe that there is no reason to alter the current Right of First Refusal policy and to do so would only decrease Federal employee morale.

Facilitating the Expansion of Direct Conversions

The original OMB Circular A-76 did not address direct conversions; it wasn't until an A-76 Supplement in the mid-1990s that direct conversions were even mentioned. Now we have a new Circular that refers to direct conversions in its policy statement, ironically, shortly after the statement “all commercial activities performed by government personnel should be subject to the forces of competition.” The question that must be addressed is





how does direct conversion, which waives full and fair competition, meet the intent of the A-76 Circular?

Any reference to direct conversion should be eliminated from this Circular. Competition is competition, and the number of employees performing the activity should not be a consideration.

On that note, we at FMA have concerns about the section entitled “Business Case Analysis.” This, on the surface, appears to be an extrapolation and enhancement of the direct conversion process. By allowing an activity to be moved to the private sector that is “performed in aggregate by 50 or fewer agency civilians” as the revised circular states, the overriding principle of competition has been further undercut. While other approval requirements exist for such a business case analysis, many of them are based on subjective and, at best, ambiguous language. Examples of this vagueness are italicized below:

- “The activity is *commonly provided* by the private sector to the Federal government by contracts of *comparable size, workload, and scope*”;
- “The business case can be made on a *limited analysis* of labor cost, material cost, and level of performance”;
- “The cost of converting the activity to another source is *fair and reasonable*.”

In addition to bypassing competition and expanding the use of direct conversion, this “Business Case Analysis” model offers no counterpart for bringing work back in-house to be performed by Federal employees if it could be done more effectively and efficiently. If we are to afford the private sector increased opportunities for assuming Federal activities – and if we are serious about providing a “level playing field” – then it is only fair that Federal workers be offered a chance to compete for new work or work that has





been contracted out. In fact, 10 USC 129(a) requires DOD to shift work among its civilian, military, and contractor workforces, depending on what is best for the taxpayer.

The proposed revisions include no mention of alternatives to competition. There are many successful and innovative business decisions that have been implemented over the past decade that address alternatives to direct conversion and/or the costly competitive process. Models such as private-public partnerships, high-performance organizations, and in-sourcing should be incorporated into the final revision to accomplish the goal of innovation that the Administration has set forth in its President's Management Agenda.

CONTRADICTORY NOTIONS TO “STREAMLINING THE PROCESS”

Although OMB seeks through these proposed revisions to streamline the public-private competition process, the proposal includes adding a number of unwarranted steps if no responses are received to an agency solicitation. Under the proposed revisions, if no responses to a solicitation are received, the contracting official must determine why no bids were received or no responsible bids were received. Specifically, the agency must do so by documenting, in writing:

- “(1) restrictive, vague, confusing, or misleading portions of the solicitation;
- (b) possible revisions to the solicitation to encourage participation;
- (2) the reasons provided by sources for not submitting responses; and,
- (3) the reasons offers or tenders were either not responsive or not responsible.”

Upon determining and then documenting the reason(s) thereof, the contracting official and Source Selection Authority (SSA) must propose a course of action in a written document to the 4.e. official, who will in turn make another written determination to either (a) revise the solicitation, or (2) implement the Agency tender.





These additional steps do not support the ideal of streamlining the process. It is our belief that if no responses to an agency solicitation are received, the work should simply stay in-house. It is not as though the in-house workforce is incapable of performing the very function it has now been arbitrarily forced to compete. Contracting officials and agencies should not be required to jump through hoops in order to receive contractor solicitations.

RECOMMENDATIONS

True Accountability

A major concern to FMA is the Federal government's inability to track costs and inventory of the contractor workforce and the functions it assumes once work is outsourced. FMA has consistently urged that the FAIR Act be amended to require an inventory of the Federal contractor workforce. If Federal agencies are to annually publish their inventories, and the agreed-upon goal is to provide a "level playing field" between the public and private sectors, then why should private contractors be exempt from publishing their workforce inventories? Instead, the Administration proposes to further scrutinize Federal agencies by requiring them to publish both "inherently governmental" and "commercial" activities as part of their FAIR Act inventories, while remaining silent on private-sector obligations.

Moreover, forcing agencies to analyze and then publish these inventories every year is excessive and time-consuming, diverting critical resources from the accomplishing the mission of the agency. We at FMA propose making the inventory process a biennial process. Performing such administrative tasks every year commands significant increases in the costs of doing business. Each Federal activity needs to have in place a





reliable data warehouse to store historical information concerning business operations and to perform trend analysis.

There is still no information available regarding the size of this “shadow government workforce” of contractors, despite attempts to fully and accurately gather this data. The Army had, in fact, already begun collecting labor data on its contractor workforce, until an “indefinite stay” on the final rule for the project was instituted last year because OMB concluded that the effort violated Federal rulemaking procedures. But before the project was stopped, the Army collected information on more than \$9.2 billion in service contracts from 1,200 contractors. Of the completed part of the study, preliminary results showed that Army service contract dollars supported fewer contractor employees than previous estimates had figured – thus making the contractor workforce more expensive to taxpayers. At the same time that OMB is promoting increased accountability of the public sector, it is impeding efforts to truly analyze the data. Only with an accurate count of contractor jobs and costs can we even begin to assess cost-effectiveness and have the information at hand to consider whether or not it is in the best interest of an agency’s mission to outsource a function.

Along those same lines FMA continues to advocate the implementation of a cost-tracking system for work that is awarded to the private sector. As Comptroller General and Commercial Activities Panel Chair David M. Walker stated in recent testimony regarding the Panel’s final recommendations to Congress, “Improved accountability extends to better monitoring of performance and results after competitions are completed – regardless of the winner.” Yet, such cost-accounting standards still do not exist today. A provision in the “Truthfulness, Responsibility and Accountability in Contracting (TRAC) Act” legislation before Congress would require agencies to track costs and savings from contracting-out.





GAO recently stated in a report entitled, “Contract Management – No DOD Proposal to Improve Contract Services Costs Reporting” (GAO-01-295), that DOD has not kept its commitment to Congress to improve its system for reporting the costs of contract services:

“The Department of Defense (DOD) spends tens of billions annually on contract services – ranging from services for repairing and maintaining equipment; to services for medical care; to advisory and assistance services such as providing management and technical support, performing studies, and providing technical assistance. In fiscal year 1999, DOD reportedly spent \$96.5 billion for contract services – more than it spent on supplies and equipment. Nevertheless there have been longstanding concerns regarding the accuracy and reliability of DOD’s reporting on the costs related to contract services – particularly that expenditures were being improperly justified and classified and accounting systems used to track expenditures were inadequate...

“DOD has not developed a proposal to revise and improve the accuracy of the reporting of contract service costs. DOD officials told us that various internal options were under consideration; however, these officials did not provide any details on these options. DOD officials stated that the momentum to develop a proposal to improve the reporting of contract services costs had subsided. Without improving the situation, DOD’s report on the costs of contract services will still be inaccurate and likely understate what DOD is paying for certain types of services.”

GAO’s findings clearly underscore the need to institute an effective and accurate cost-accounting system to ensure true accountability.

Training and Funding Needs

As a result of these proposed revisions, contracting officials would be forced to face shorter deadlines and tougher requirements, above and beyond having to grasp and manipulate an entirely new baseline policy for the public-private competition process. Yet despite these increased demands and rigors, there is no mention of additional training





or funding for training to ensure that existing contracting officials can fully and properly administer the new processes. Furthermore, more funds may be necessary to hire additional contracting officials to accomplish these goals. The proposed revisions consistently demand more of agency and contracting officials, but make no declarations to ease the transition into the new system. Simply put, OMB is instituting its own unfunded mandate to Federal agencies with a new, overhauled, and untested competition process.

Full Consultation and Participation

With such an expansive change to current competitive-sourcing policy governing what work will be done by either the public or private sector, we believe that the administration would greatly benefit from additional Congressional input. To this end, it would be prudent to allow Congress to conduct hearings on the proposed A-76 revisions. This would also afford interested and affected parties to have a constructive dialogue with Congress in a public forum on these changes.

Testing Before Full Implementation

Regardless of what the final revisions to OMB Circular A-76 will call for, we at FMA recommend that a one-year pilot program be put in place prior to government-wide application and implementation. This would ensure that the administration has an opportunity to correct and improve any deficiencies that might exist in the revamped public-private competition process. As we continue to tackle such a complex and sensitive issue, the Federal government and the American taxpayer would be best served by having a sourcing system that works – one that achieves the goal of providing the best value on services.





CONCLUSION

It is FMA's hope that the A-76 process will be changed to precisely define what "commercial activity" is and what is "inherently governmental." The process should allow agencies to measure the entire workforce –both public and private – and associated costs in order to truly gauge performance and determine the best mix of public and private employees. True competition must be fair, cost-effective, and based upon financial transparency by all parties. Most importantly, Federal managers must be given the authority to maintain responsibility for their individual agency mission and the costs associated with performing that work.

As we have witnessed over the past decade, arbitrary reductions without mission analysis serve to undermine the efficiency and cost-effectiveness of government. It is imperative that an analysis of the core missions of agencies be conducted to determine the most efficient – and effective – organization and ensure that essential skills are retained in the Federal workforce.

Congress and the administration must have the benefit of unbiased input from those affected by contracting-out. They must understand that excessive contracting-out can threaten the ability of Federal agencies to fulfill their core missions. More importantly, they must realize that government can compete with the private sector on cost, service, and quality. The Federal workforce has proven that it can perform more efficiently and effectively than private industry in a wide range of areas.

Despite some positive steps, there is still much work to be done in the way of reversing the damage caused by a decade of arbitrary civil service reductions. We must take the time to fully examine how we can reach an optimal size and shape for the Federal workforce. FMA would like to serve as a sounding board in an effort to ensure that policy decisions are made rationally and provide the greatest return for the American





taxpayer, while recognizing the importance and value of our nation's civil servants. It is in the best interest of policy-makers, taxpayers, and the future well-being of our country that any rightsizing effort be executed in an objective and cost-effective manner that does not simply shift resources from in-house operations to a shadow government of contractors.

Thank you for considering our views. We at FMA look forward to working with you on this important issue.

