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To: David C. Childs A-76comments/OMB/EOP@EOP
cc:
Subject: Comments regarding A-76 Revision

Greetings,

Would be appreciative if the following comments were considered in your review of the proposed revision to Office of Management and budget Circular No. A-76, "Performance of Commercial Activities". Please note that my comments are submitted as an interested individual and may not represent the position of my organization.

1. Requirements of the Circular that directly impact the ability of the Government to compete meaningfully include the following:

a. Division of Labor: With the strict division of labor to prevent conflicts of interest, Government lacks the resources with the technical knowledge to perform PWS develop and solicitation evaluation. The increase in number of staff required to participate in the competition results in personal loss to those participating if they become subject to RIF and rendered ineligible for Right of First Refusal. The assumption that the Activity would be able to obtain sufficient knowledgeable staff to dedicate to the effort is perhaps flawed; it requires the Activity to have many people performing the same, or similar jobs and available to dedicate to the effort.

b. Lack of proposal review by IRO. Is there no longer a requirement for IRO review of the MEO / Agency Tender? I think it is crucial to have people knowledgeable in putting together proposals - who can ensure the Tender meets the letter of solicitation requirements.

c. Page B-1 Table is not clear. It appears to show the start date commences upon public announcement. Further, there does not appear to be flexibility to deviate from time frames without extraordinarily high level approval. If the start date is based on public announcement, then the time is not sufficient.

During routine procurements, delays often occur due to industry requests or protests. During an A-76 competition, delays often occur as well to permit the Government MEO to be completed. Recommend that historical time frames be reviewed to develop a more realistic time frame.

d. Page B-6. Paragraph (9). "When performing Cost/Technical Trade-Off...source selections...the solicitation shall allow proposed offers and tenders, including the Agency Tender, to propose innovative approaches and different performance standards than the requirements of solicitation. In reality, the Government does not have the same ability as commercial industry to propose "innovative approaches" if these approaches include hiring different skills of people (quickly) or implementing changes in equipment or processes that require up-front expenditure ("spend money to save money").

e. Paragraph 3(a)(3), page B-8. This paragraph appears to say that the Agency tender may not be modified after the closing date of the solicitation.

Generally, proposals may be modified under certain circumstances prior to award, including during negotiations. Does this mean that industry can modify proposals but the Government may not?

f. Page B-9, paragraph (4). Recommend that the Agency and Industry have the same ability to subcontract.

g. Paragraph c, Page B-15. The Agency Tender is provided to all interested parties, even if the Agency is not selected. Industry offers are not likewise provided. Recommend that the Agency Tender be treated the same as industry proposals. The Agency Tender official should have a right and the ability

to appeal a private sector decision. Counsel should be provided to support individual employees who may require legal support in filing an appeal. Unlike a commercial offeror, which would have counsel available to prepare any protests or appeals, the Government employees affected by the decision do not have that support. Practically speaking the ATO is likely to have other functions; he /she may not be provided the resources or management support to pursue an appeal.

2. Some of the requirements do not seem realistic:

a. Paragraph B2, page B-3. "The CO shall designate...the PWS team". Normally, the Contracting Officer does not direct the activities of the Programs or requiring offices. The CO does not have authority over the staff that typically makes up the PWS team, nor does she have the knowledge of the appropriate personnel to select.

b. Paragraph C1(B)(1), page B-4. "...Competition Officials accountable for the timely and proper conduct of Standard Competitions through the use of annual performance evaluations." This requirement appears impractical. It would require modification to the employee's performance plan and appraisal form and establishing a very clear line of authority between the 4.e. official and the Competition Officials (ATO, CO, HRA, SSA, AAA) with two evaluation officials - the 4e official and the competition officials' supervisors (who normally evaluate performance). In addition, responsibility for the "timely" conduct of the process is fractured among many players; any one may perform their responsibilities in an outstanding manner yet still not be able to control the timeliness of the competition.

c. Paragraph 9d(2)(a), page B10. If private sectors offers are found to be non-responsive or not responsible, the Agency is required to return the sealed

Agency Tender to the ARO. In the event that offers are received, however, they are the tender are opened at the same time. The offers cannot be found non-responsive without opening and reviewing the proposals. Thus it would only be possible to return the Agency tender resealed.

3. Some questions arising from the proposed revisions include the following:

a. Paragraph B4, page B-3. Can the Contracting Officer be the SSA or are the two functions to be different individuals.

b. Are source selection plans (and Source Selection Authority) required for all A-76 competitions, even those with award based on low price technically acceptable offer with a low dollar value?

c. Paragraph D1, page A2. "Agencies shall presume all activities are commercial in nature..." Does this mean that A-76 competitions shall be accomplished using Part 12 with procedures of Part 15? If so, the ability of the Government to require unilateral changes is lost.

d. Page B-2, paragraph 1C. "Agencies shall not perform work as a contractor or subcontractor..." Does this prohibition extend to work that is not contracted out through a Commercial Activity Study?

e. Paragraph 3(a)(3), page B-8. It is not clear why the Agency Tender Official would negotiate with the SSA. The SSA is responsible for the award determination. Normally, negotiations are conducted by the Contracting Officer, with technical support from appropriate members of the evaluation team.

f. Paragraph 2(a), Page B-14. The SSA cannot know if the proposed performance standards are within the current budget limitations if all he/she may review is the discrete cost or price difference of the proposed performance standard. This is because they will not know the price of the underlying proposal.

g. Paragraph 2.a, page B-14. The statement that "When the SSA and the ATO determine that the agency Tender meets the revised performance standards of the amended solicitation, the SSA shall proceed to Phase 2" implies that the Government Tender will be determined technically acceptable prior to proceeding to Phase 2. Is this correct?

h. With respect to cost realism on the Government Tender. The staff preparing the tender is likely the most knowledgeable in the costs associated with the effort. What resources are available to the Contracting Officer to perform a cost realism analysis?

i. With the 4e official involved in so many steps in the process, delays are probably. How far down can the 4 e responsibilities be delegated?

j. Is WINCOMPARE compatible with the new guidance?

k. In the phased evaluation process, how are decision to be made if two or more performance standards are worth considering? Can only one be implemented? Will there be the time and resources to help analyze and then make the decision? Who makes the decision?

l. Why does the revision not provide the opportunity for best value - trade off process for all acquisitions?

Thank you

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