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12/18/2002 12:46:14 PM

Record Type: Record

To: David C. Childs A-76comments/OMB/EOP@EOP
cc:
Subject: CIRT's A-76 Comments

Dear OFPP/OMB:

Please find below the official comments of the Construction Industry Round Table (CIRT) to the Office of Management and Budget announcement in the Federal Register (67 Fed. Reg. 69769, November 19, 2002) on "Performance of Commercial Activities" which proposed revisions to the OMB Circular No. A-76.

Per the OMB announcement the following information is provided as requested:

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CIRT's comments follow:

December 18, 2002

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

RE: Proposed revision to Office of Management and Budget Circular No. A-76, "Performance of Commercial Activities."
Federal Register/Vol. 67, No. 223 (November 19, 2002), pp. 69769-69774

Dear Mr. Childs:

On behalf of the Construction Industry Round Table (CIRT),¹ I would like to provide comments with respect to the Office of Management and Budget (OMB) proposed major revisions to Circular A-76 to improve the management of commercial activities that are needed to conduct the business of the federal government. (67 Fed.Reg. 69769, Nov. 19, 2002).

We commend the Office of Federal Procurement Policy for undertaking this massive effort to revise, revisit, and reexamine A-76 to insure its continued validity, use, and effectiveness. Management policy that is ignored or circumvented because of its complexity or lack of support is worse than having no policy on the given issue. If nothing else, this effort reinvigorates the role and importance of A-76, and hopefully its application and goals.

Given the nature of the undertaking, there are numerous areas in which to comment and to offer revisions or suggestions. It is CIRT's intent to concentrate on those areas that most impact the overall purpose of the Circular and more precisely on matters that directly relate to the design and construction community.

General Comments

As noted above the Round Table commends OFPP for its efforts and the general philosophy and direction taken in the revisions to A-76. In particular, we are most supportive of expanding the application of private-public competitions to **all activities performed in-house** and to both commercial inter-service support agreements (ISSAs) as well as "work for others." Moreover, incorporation of the Federal Acquisition Regulations (FAR) into the competitive process helps to create uniformity as well as familiarity.

Finally, the Circular's revision is well grounded in viewing **all** government activities as commercial in nature *unless otherwise established as inherently governmental*. **This places the burden in the proper place, namely on the government agencies to establish clear and convincing evidence** as to why certain activities cannot or should not be supplied by the private sector.

To support these general observations, certain matters that warrant clarification and possible modification:

- *Changed Circular Policy:* The shift from the "longstanding policy of the federal government . . . to rely on the private sector for needed commercial services" must be carefully balanced under the new approach with a clear and unambiguous understanding that "all government activities are commercial in nature," and that the burden is on the agencies to establish otherwise. To drive this point home, CIRT would recommend language be added to Attachment A, at A-2, section D.2, first line, to read: "2. Agencies shall use the following reason codes *and must carry the burden of proof* to indicate the rationale for agency performance of a commercial activity." (Added language in *italics*).
- *Application of Circular:* To expand the rationale of the Circular to include federal funds expended by state and local governments, the principles in A-76 should be incorporated in OMB Circular A-102.

¹ *The Round Table is exclusively composed of approximately 100 CEOs from the leading architectural, engineering, and construction firms doing business in the United States. These firms represent a large portion of the approximately 8-10 percent of the United States GDP done annually by the industry, including billions of dollars a year in federal infrastructure projects.*

A&E Statutory Compliance

As proposed, the Circular is currently in conflict with statutory requirements related to Architectural and Engineering (A&E) Services. The statute (40 USC 541 et. seq.) requires contracts for A&E services to be awarded on the basis of demonstrated competence and qualifications, not price competitions. The Circular's standard competition process includes cost/price competitions. Therefore, the Circular must be revised in order to be in compliance with the statute and the use of FAR Part 36. There are two alternatives to address this statutory compliance issue:

- *Direct Conversion*: Given the complexity of integrating A&E services into the Circular the most effective, efficient, and complete means to address the compliance requirement, as we see it, is use of the direct conversion process. To accomplish this, a new provision can be added to Attachment C, page C2, after subsection 33 (research and development) for "Architectural & Engineering Services." Given the A&E procurements are a very small portion of the overall federal contracting it is much more appropriate to simply use direct conversion rather than attempt to convert the A-76 procedures to accommodate the quality based selection process.²
- *Private-Public Competition in Accordance with A-76*: The less desirable and more complex approach is to conform the new Circular's competition process to the qualifications-based procurement requirements of 40 USC 541 et. seq. This process could be limited to A&E activities that exceed \$100,000. To achieve this conformity would include, among other things, the following changes or additions:
 - *Page D.3&4, section H.1.b.3*: Include "architecture and engineering services (including surveying, mapping, and geospatial services)" to the end of the section on "specialized or technical services" to clarify that A&E services are commercial services.
 - *Page B.9, section 3.a.5*: As noted above, for A&E services neither an agency nor a private sector cost estimate is permitted by law to be used during the selection process. Thus, in this section 3, as in all subsequent sections of the Circular, all references to bids, costs, and tenders should include a footnote that states it does not apply to A&E services. [E.g., In section 3, a paragraph on past performance should be inserted for A&E services, such as "Past Performance. The ATO shall develop a Standard Form 254 and 255 submission (or any successor to such form(s) outlining the past performance of the agency. Such submission shall include the agency's past performance with regard to qualifications (including professional licensure) of personnel, agency record on meeting delivery and completion schedules and the agency's record on meeting budget."]
 - *Page E.9&10, section 3.a.5.e*: While insurance, etc. should not be considered a subset of facilities, it is worth noting that the draft proposal does not specifically address professional liability insurance, nor does it take into account continuing and prior education, experience and skills, innovation and technique, nor knowledge of local site conditions as part of the qualifications-based selection process mandated by law. Thus, to have the A-76 private-public competition conform with the statute, it must use these recognized quality and performance measures *for selection before negotiating costs with the winning team*. [NOTE: in the case of professional licenses, it seems inconceivable that the federal government would not take into consideration the significance of such a licensure procedure. The

² The new language in Attachment C could read. "3. **A&E** An activity provides direct professional services of an architect-engineer nature, as defined by state law. Commercial activities providing A&E support would be subject to the qualifications-based selection (QBS) procedures of the FAR Part 36 included in this Circular."

requirements it imposes on the private sector tender with respect to *public health and safety is paramount* – not to give it value and weight when considering it against a non-licensed public tender is paramount to discounting safety and health qualifications].

Fairness and Balance Comments

When reviewing the revisions to A-76, the following specific issues or concerns arise which warrant consideration, clarification and/or modification to further the goals of fairness, balance, and transparency:

- *Agency Price Differential*: It is inherently unfair to give the agency tender a 10% price differential as current policy – this is only compounded and made more exacerbated by increasing it to 12%.
- *Cost Comparisons*: Critical to the success of the new A-76 process is the full and fair accounting of all private **and public** costs. The simplest and most efficient means to achieve this complete comparison is for the agency tender to account for every single cost put forth by the private sector tender. In other words, there should be a side-by-side ledger that has an entry for every cost identified (even if the public side of the ledger reads “N/A” or “No Cost” such as for taxes!)
- *Define “Private Sector Source”*: The “private sector” as used in the Circular should be defined to mean a private, for profit individual, association, partnership, corporation, and/or like entities; but, it does not include state and local government units, universities, and/or other tax exempt or not for profit entities.
- *Expansion of Commercial Activities*: An expansion of commercial activity should be subject to Direct Conversion or Standard Competition when the increase in operating cost is 10% not 30% as proposed. [The lower 10% number is more in line with the traditional differential price break the agencies receive.]
- *Failure to Perform*: Section 5.c, page B.16, should be revised to include in evaluations of agency performance, after an agency wins a standard competition – some recourse or penalty equivalent to that which the private sector firm is subject *if it fails to perform*..
- *Right of First Refusal*: Section D.1, page B-18, should be revised to provide private sector employees the right of first refusal for government positions if an agency is awarded previously out-sourced work, just as the federal agency employee is granted.
- *Notice of Request*: Section H.1, page D.3, should strike the current language that reads “available to OMB and the public upon request” and insert in lieu thereof “*available to OMB and made public in FedBizOpps.*” This is only fair, since as currently written the draft presupposes the private sector would even know of the state or local need in order to request the information from OMB. Most often that is not the case – thus, the notice provision should be included in the final draft.
- *Inmate Labor*: Section 1.1, page E-7, should be removed from the Circular since the private sector is prohibited from utilizing inmate labor under federal law.

Conclusion

The Construction Industry Round Table commends OFPP and OMB for undertaking the rewrite and revitalization of A-76. It is critically important for the management office of the federal government to revisit this important document – given it had lost some of its currency and application.

We applaud the approach of including ISSA and “work for others” within the bounds of the new Circular, and will watch with interest the shift of burden to the agencies to establish why a given activity should be considered inherently governmental.

This change from earlier A-76 policy to rely on the private sector for commercial activity creates a new *two-step process* that must be fair and transparent. To assure that this process is above reproach, **CIRT recommends that consideration be given to the creation of single clearing house to run all private-public sector competitions authorized under A-76.** (Whether that should be housed in OMB, OMP, or even GAO, can best be determined by OMB itself).

Given the Circular must conform with current law regarding A&E service procurements, CIRT strongly supports the application of Attachment C of the draft Circular so as to use the Direct Conversion approach.

Finally, as noted above creation of a level playing field that provides fair, balanced, and transparent application, including the correct and complete accounting of *all applicable government costs* to a given competition is critical to the success of A-76. Moreover, this commitment must withstand the test of time, as administrations change and new personnel arrive to manage the process.

Sincerely,

Mark A. Casso, Esq.
President

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