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To: David C. Childs A-76comments/OMB/EOP@EOP
cc:
Subject: Proposed Revision of Circular A-76, Performance of Commercial Activities



December 19, 2002

Ms. Angela Styles
Administrator
Office of Federal Procurement Policy
Eisenhower Executive Office Building
Room 352
Washington, D.C 20503

RE: Performance of Commercial Activities

Dear Ms. Styles:

The Contract Services Association of America (CSA) appreciates this opportunity to provide comments on the *“proposed revision to Office of Management and Budget Circular No. A-76, Performance of Commercial Activities”* (67 Fed. Reg. 69769-69774).

CSA is the premier industry representative for private sector companies that provide a wide array of services to federal, state and local governments. CSA members are involved in everything from maintenance contracts at military bases and within civilian agencies to high technology services, such as scientific research and engineering studies. Many of our members are small businesses, including 8(a) certified companies, small disadvantaged businesses and women-owned and Native American owned firms. The goal of CSA is to put the private sector to work for the public good.

CSA is interested in fairness and best value. More and more of our companies have walked away from A-76 competitions with the government because of an inherent unfairness in the system. These revisions take a big step forward by improving the process of public-private competition. If properly implemented they can put us back on course and should encourage companies to re-enter the A-76 process, increasing competition and benefiting the taxpayers.

While we have several recommendations for further improvements and a few lingering questions, we strongly support the overall goal of the revisions. In the attached document (with a summary

addendum), we outline our comments on particular aspects of the policy letter and the related attachments, and recommend modifications where appropriate. If you have any additional questions, please contact me, or Cathy Garman, Vice President for Public Policy, at 703-243-2020.

Sincerely,

A handwritten signature in black ink, appearing to read "Gary Engebretson". The signature is fluid and cursive, with a large initial "G" and "E".

Gary Engebretson
President
Contract Services Association of America

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Comments of the Contract Services Association of America on
*Proposed Revision to Office of Management and Budget
Circular A-76, Performance of Commercial Activities*

Background – Private Sector View of Current A-76 Process

Private sector executives increasingly have concluded that the current A-76 process is so flawed, intrinsically unfair and biased toward the government that it is not prudent business to devote marketing resources to public-private competitions. While A-76 procurements represent an important potential source of new business, companies must be persuaded that the competition will be reasonably fair before they will aggressively pursue A-76 opportunities; and they will only do so on a highly selective basis. However, participation by qualified companies has declined since the competitions continue to be perceived as biased toward the government. That is unfortunate because it deprives the government of valuable competition and because many of those companies have excellent business practices that could contribute significantly to improved infrastructure efficiency. Unfortunately, the real loser here is the taxpayer, because the perceived A-76 gamesmanship results in limited competition and ultimately potentially higher costs to the government.

Members of the Contract Services Association of America (CSA) have consistently cited five areas in the current A-76 process that needed to be addressed and improved:

- **Fairness:** Companies need to know the competition will be fair from the outset. If the rules are different for in-house bids, and companies are greeted by bias and hostility from the leadership overseeing the competition, most companies will decline the opportunity. As the saying goes, “If you want competition, then you invite and attract competition.”
- **Timing:** As commercial activity studies stretch out and procurements are delayed, uncertainty plays havoc with individual contractor’s ability to schedule bid and proposal resources. Delayed competitions are costly. Setting a schedule and meeting schedule milestones are important.
- **Cost Comparison:** Nothing is more important than a fair cost comparison and fair cost comparison procedures. If either is seen as unfair and the government is continually accused of “gaming” the system, then contractors will not bid on future procurements. Nothing is more important than the integrity of the procurement process and, unfortunately, a number of GAO A-76 protests have focused on whether fair cost comparisons were conducted.
- **Unlimited Attempts for the MEO:** Under the current process the in-house team is provided unlimited attempts to correct a flawed proposal and make it technically acceptable. This is not only unfair but adds process delay. Most importantly, it allows the MEO to game the system. By “low-balling” or submitting technically unacceptable proposals, the evaluating team (either the IRO or SSA) will continue to send back to the MEO its proposal to fix whatever is unacceptable. This fixing or “pulling up” process must continue until the in-house team submits the very least technically acceptable proposal. When such a proposal is priced, by definition it should result in the lowest priced proposal possible, in a cost comparison. Even if a contractor submitted a proposal that also just met the bare minimum threshold of technical acceptability, it would be unlikely that the contractor could overcome the 10% conversion factor, which advantages the MEO. The result is a process under which the contractor loses every time.

- **Accountability:** A winning MEO must be held to performance standards and costs as proposed. Anything short of full accountability for the winning entity deprives the government of getting the best proposal and destroys the integrity of the process.

CSA has never advocated that all government services be contracted to the private sector. But as we continue to reinvent government we must focus on competition. And that focus requires a balanced, responsible and unyielding commitment to exploring new ideas, challenging old prejudices and looking carefully at what services the government must provide. It also requires a careful examination of who, inside or outside of government, is best positioned to provide each service in the most efficient and effective way. This means, too, that the government should adopt from the best of private enterprise those tools that foster the necessary incentives and rewards for high performance. And it must follow a fair process designed to protect the interests of the taxpayer and address the legitimate concerns of the current government workforce while, at the same time, ensuring that the government operates in a maximally efficient manner.

In April 2002, the congressionally-mandated Commercial Activities Panel specifically noted that the current A-76 “*process may no longer be an effective tool for conducting competitions to identify the most efficient and effective service provider.*” The panel’s membership consisted of a broad cross section of public and private representatives including public sector employee unions, think tanks and academia, the private sector and the Administration. The panel identified 10 guiding principles for making sourcing decisions and developed a series of recommendations for improving the competitive sourcing process. We are pleased to see that many of these recommendations are detailed in the revisions released by the Office of Management and Budget (OMB).

Proposed Revision to Office of Management and Budget Circular A-76, Performance of Commercial Activities

I. Policy Letter:

In general, the organization of the revised Circular is very easy to follow, with major components of the process being listed as separate attachments.

The implementation date of 1 January 2003 demonstrates the desire of the Office of Management and Budget (OMB) and the President to quickly execute changes that will foster fair competition and reduce the amount of time it takes to accomplish the process. This implementation date is reasonable and CSA members welcome the opportunity to comply with the new streamlined process.

“The longstanding policy of the federal government has been to rely on the private sector for needed commercial services. The competitive enterprise system, characterized by individual freedom and initiative, is the primary source of national economic growth.”

The revised policy letter simplifies and clarifies this fundamental premise (in existence since 1954 – and supported by both Democratic and Republican Administrations) that the government should not compete with its citizens. For that reason, the revised policy letter’s presumption that “all activities are commercial in nature” is particularly important and critical to a process based on fair competition.

Recommendation: To highlight this presumption further, we recommend a reordering of the paragraphs (a-g) under Paragraph 4 – with “*presume all activities are commercial in nature unless an activity is justified as inherently governmental*” being made paragraph “a.” Therefore, the revised order would be “b, a, c, d, e, f, g.” And, we recommend an additional statement be added, “*Pursue a commercial performance-based business methodology across the federal government which delivers an affordable and sustainable capability.*”

II. Attachment A – Inventory Process

This attachment outlines the procedures (including development of the inventories and the challenge process) related to federal agencies annual inventory as required by the Federal Activities Inventory Reform (FAIR) Act. And it requires agencies to inventory not only their commercial activities, but to include inherently governmental activities as well. Indeed, nothing in the FAIR Act ever prohibited the inclusion of inherently governmental activities on the inventory. Again, in this attachment, the presumption is for activities to be presumed commercial in nature, unless the agency can justify otherwise.

The Commercial Activities Panel did note that there “*is widespread consensus that federal employees should perform certain types of work.*” And, the FAIR Act does provide a definition of what could be considered “inherently governmental” for the purposes of developing the agency inventory. The November 2002 A-76 revisions correctly clarify and strengthen that definition. The written justification for an agency designating an activity as inherently governmental would be available upon request. This is important since it sheds additional sunshine on the government’s activities.

The one area that CSA continues to find fault is the process for coding the functions (including the Reason Codes) in the agencies’ FAIR Act inventories. Challenges can be made to the inclusion or exclusion of a commercial activity but not to the application of a specific Reason Code. Our concern is that an agency could identify functions as commercial and, using the Reason Codes, protect the functions from competition.

Recommendation: To ensure that implementation of the FAIR Act lives up to the Congressional intent to allow a challenge process, the applicability of Reason Codes should be subject to challenges. To argue that Congress never authorized challenges to Reason Codes is specious because Congress did not create Reason Codes, they are a creation of the Executive Branch in developing an implementation process for the FAIR Act.

III. Attachment B – Public-Private Competitions

A. Competition

In mid-2001, President George W. Bush released his “President’s Management Agenda.” Competitive sourcing was identified as one of the five main initiatives for improving the performance of government and making government more citizen-centered, results-oriented and market-based. The revisions to Circular A-76, released on November 19, 2002, are intended to use the competitive sourcing tool – with an emphasis on competition – to do just that. The ultimate measure of success for the revised A-76 process is whether competition occurs. CSA strongly supports that intent.

Outlined below are additional areas where the Circular could be further improved.

1. **The Standard Competition Process chart.** The chart is clearly a well-conceived idea and will be quite valuable. It could be refined, however, in order to make it easier to understand what must

happen within the 12-month timeline. Also, development of flow charts in Attachment A & C will further illustrate the inventory and direct conversion processes respectively.

2. **Deviations.** Under this section, the timeframe of 12 months can only be extended for certain complex requirements. It would be useful for the Circular to articulate the parameters of what is a “complex requirement” – and develop a set of guidelines with definitions based on mission, technical expertise, skills sets, classified matters, etc.
3. **New Requirements and Expansions.** The revised Circular (at § B.A.2.b(3)) states that “*A Standard Competition is not required for private sector performance of a new requirement competed in accordance with the Federal Acquisition Regulation.*” Presumably this means that agency or public reimbursable performance of a new requirement is neither required nor expected and that an agency can use the existing FAR guidance (e.g., Parts 37 and 15) for competitions among private sector contractors – as is currently done for new service contract requirements. The policy that for all new requirements the government can go straight to a private-private competition using the FAR, as is the case today, should be strengthened and clarified. Otherwise, there is a possibility that it could be read that all service contracts (including new requirements) must follow the Standard Competition processes outlined in the Circular.

Recommendation: This Section of the proposed Circular should be revised. We suggest that the first sentence be deleted. We also suggest a new sentence appear at the end which states: “*All competitions for new service requirements will be conducted under FAR Parts 15 and 37.*” We believe this highlights the FAR basis for competing new requirements.

Regarding “Expansion,” we again recommend that the first sentence be deleted. The next sentence, which defines “Expansion” needs to be reassessed because it assumes that the agency knows what its operating costs are – which may not be appropriate given the Chief Financial Officers Act and the goals of the CFO Council (*see* www.cfoc.gov). We recommend that the definition read, “An ‘expansion’ is (1) when any type of modernization, replacement, or upgrade is scheduled to occur at an agency, or (2) when the increased workload of an existing agency-performed commercial activity is projected to increase by 20 percent or more within a 12 month period.” The value of this recommended definition is twofold. First, “modernizations, replacements and upgrades” coincide with the definition of Information Technology in the Attachment F (Definitions) as well as the normal use of the terms. Second, if workload is projected to increase 20 percent within the coming year, then the year long Standard Competition process will better coincide with agency Standard Competition planning (as stated below).

4. **Time Frame.** The revision states that a “standard competition shall not exceed 12 months.” We strongly support shortening the time frames for conducting public-private competitions. This is definitely more reflective of a FAR-based process. In addition, predictable timeframes will facilitate the involvement of small businesses in the Standard Competition process because small businesses (with their limited credit line and marketing budgets) can rarely afford to participate in the current A-76 process, which drags out 2-4 years.

An October 30, 2002 revision to the Department of Defense (DOD) 5000 series mandates a reduction in acquisition cycle times noting, that “*advanced technology shall be integrated into producible systems and deployed in the shortest time practicable.*” If DOD is moving in the direction of shorter cycle times for its procurements, it is logical to expect that this trend could be supported for all government procurements, including acquisition of service.

In the commercial service sector time is money. When companies decide to execute a particular strategy supported by a business case, then the execution of that strategy is done quickly. To not move boldly and swiftly potentially detracts from bottom line profits and top line growth. Commercial companies also have the flexibility to make mid-course corrections or changes if they encounter unforeseen problems and they leverage that knowledge to quickly solicit, evaluate and award contracts. Typically commercial subcontracts are let in a matter of weeks once the rationale of the business case is accepted by the company's leadership. The time from solicitation to contract performance is significantly faster than the government's contracting out process.

For the government, the business case for outsourcing through the A-76 process has been made. Accordingly, it is in the government's best interest to rapidly execute a competition in order to quickly reduce costs and improve efficiencies. Lengthy competitions run counter to good business practices and end up costing the tax payer unnecessary budget dollars.

Recommendation: Federal agencies should develop teams which can provide consistent advice and training on preparing proposals for in-house competitions. OMB should establish a public-private Community of Practice (CoP) modeled after efforts by the Defense Acquisition University at Ft. Belvoir, VA, which focuses on outsourcing. This CoP exchange can capture lessons learned and provide examples of best practices for both government and the commercial sector. For example: commercial service contracts executed within 30 days, TSA contract for screener uniforms, etc.

5. **Methodologies.** We are concerned about the methods outlined in proposed Section C. 4, which appear to mingle elements elements for FAR Part 14 on sealed bidding, FAR Part 15 on negotiated contracting while ignoring FAR Part 37 on service contracting. Each of the source selection processes described in the revision share some positive as well as negative aspects; but there are also a number of important, sometimes subtle, differences that limit the ability to achieve the vision of a fair, accountable, transparent and effective process. These differences will almost certainly create confusion and could sub-optimize the source selection process.

Recommendation: The proposed methodologies should be aligned in some logical manner by creating a source selection process that is consistent with the "best value continuum" approach set forth in FAR 15.101.

We recommend the following:

- a. Section C.4.a(2) Sealed Bid Acquisition should be deleted. It is not clear how a sealed bid could ever be conducted under a Standard Competition when the PWS is required to be based on "performance based contracting." See ¶ C.2.a (1). Moreover, FAR 37.602-3 states "Agencies shall use competitive negotiations when appropriate to ensure selection of services that offer the best value to the government, cost and other factors considered (*see* 15.304)." The statement of work for PBSC contracting requires an agency to identify the "desired degree of performance flexibility." FAR 37.602-1(a). Sealed bidding procedures do not permit performance flexibility comparisons – only price comparison. See FAR 6.401; 14.1.

b. Section C.4.(3)(b). The LPTA source selection should be redrafted or deleted. FAR 15.101-2, the LPTA source selection process, refers to the lowest *evaluated* price of proposals meeting *or exceeding* the acceptability standards for non-cost factors. In other words, LPTA procurements are best value selections, not a lowest price, technically acceptable offer, which is found in FAR 14.5, Two-Step Sealed Bidding. According to the FAR, the proposed LPTA method is in fact a two-step sealed bid process.

c. Section C.4.(3)(c). The CTTO source selection process should be redrafted or deleted. As proposed, it paraphrases the FAR 15.101-1 trade off source selection process that implements the “best value continuum” policy in FAR 15.101. The proposed CTTO process builds upon the current FAR Part 15 process. It is common for agencies to inform all offerors of the existence of limited appropriations that are obligated for a given solicitation and award. If budgetary limitations are relevant, then the solicitation for a Standard Competition should disclose the agency’s budget limitation. If budget limitations are not disclosed, then the Agency Tender obviously has an unfair competitive advantage because the Agency Tender can be drafted to accommodate the agency budget.

A final note for Section C.4.(3)(c) is that the reference to FAR 15.406 is incorrect. That reference is for the documentation of the pre-negotiation objectives and the actual negotiations. We believe the correct reference is FAR 15.308 – the documentation of the source selection decision. Whether it be a “low cost decision” or a “other than low cost decision,” FAR 15.308 requires that the decision be documented.

d. Section C.4.(3)(c)1 is in effect the same as FAR Part 15.304, 305, and 306. Therefore, we would recommend it be deleted or be redrafted to refer to FAR Part 15.3, Source Selection and clearly state that Agency Tenders are subject to FAR Part 15.3. As a result, an Agency Tender can be eliminated from the competitive range – following “exchanges” or “communications” under FAR 15.306(a) or (b).

e. Section C.4.(3)(c)2.a sets for the “Phased Evaluation Process.” It appears to mix the LPTA process with the Two-Step Sealed Bid Process. As with the above methodologies, we recommend this Section be redrafted or eliminated.

We prefer it be eliminated for several reasons. First, an Agency Tender cannot be deleted from the competitive range for technical deficiencies. See Section C.4.(3)(c)2.b. There is no reason why the Agency Tender should have such protection.

Another reason for deleting the “phased evaluation process” is the requirement (under proposed Section C.4.a.(1)) that all offers be evaluated *concurrently*. This approach is too risky for the private sector and for the integrity of the A-76 process because it assumes there will be no “technical transfer” or “technical transfusion” from the SSA to the ATO. This Section will resurrect allegations of “gaming the system” – contrary to OMB’s stated intent. See 67 Fed. Reg. 69771. As proposed, the *parenthetical* admonition is only against “conveying proprietary information about technical approaches or solutions for meeting the *new* performance standard.” There should be a stated prohibition against technical transfers or transfusion by the SSA to the ATO to bring the Agency Tender up to technical acceptability when no “revised performance standards” are issued by amendment.

In sum, all of the proposed methodologies can be deleted and replaced with a few sentences referencing the FAR Part 15 best value methods and procedures.

B. Treatment of Workers

Taking care of government workers who are impacted by outsourcing decisions is an issue the private sector takes very seriously. Former government workers affected by a conversion of their jobs to contract are typically offered a “right of first refusal,” under which the workers are given first priority for employment for those jobs for which they are qualified. In many instances, persons previously stymied in their desire for promotion find that working for a contractor provides upward mobility they did not previously enjoy. Contractors are not typically strictly bound by seniority in making employment decisions. As a result, dramatic improvements in a workforce can be achieved just by selecting highly qualified personnel for supervisory and/or key technical positions. This infusion of fresh enthusiasm can invigorate a workforce even when the workforce as a whole remains relatively unchanged due to “right of first refusal” protections. Another positive aspect of conversion to contract that is almost always overlooked is that former government employees become far more employable in a variety of private industry jobs after working in a “transition” environment on a government services contract, thus helping with future career advancement. Responsible contractors understand that satisfied customers depend, to a considerable degree, upon satisfied employees. All responsible contractors treat benefits management as an important element of good labor relations.

Recommendation: *There should be early engagement with federal employees to both keep them informed and answer their questions regarding the uncertainty of the process.*

C. Performance Based Services Acquisition

The revision clearly states that a Performance Work Statement (PWS) “*that is developed in a Standard Competition shall be performance-based with measurable performance thresholds and may encourage innovation.*”

Increasingly, contractors are being asked to enter into performance based contracts where the desired results are specified but it is left largely up to the contractor to determine the best way to achieve the desired results.

Performance-Based Services Acquisition (PBSA) is not a new concept. The idea briefly resurfaced in the 1960s but got more attention in 1991 when the Office of Federal Procurement Policy (OFPP) issued a policy letter to emphasize the use of performance requirements and quality standards in defining contract requirements, source selection and quality assurance. And, the Department of Defense has decreed that 50% of all service contracts would be performance based by the year 2005. Furthermore, section 821 of the Fiscal Year 2001 National Defense Authorization bill established an order of precedence for acquiring services, with a decided preference for performance-based contracts or task orders. Finally, the revisions to the DOD 5000 series recognize performance-based acquisition. The policy states: *“In order to maximize competition, innovation, and interoperability, and to enable greater flexibility in capitalizing on commercial technologies to reduce costs, performance-based strategies for the acquisition and sustainment of products and services shall be considered and used whenever practical.”*

However, allowing the government to always be considered technically competent (under the phased evaluation process) is antithesis to achieving that goal. As noted above, PBSA invites all solutions – from those involving low technology solutions to those which are more sophisticated. The government then determines which solution meets its budget and performance requirements. However, IF the government itself (the Agency Tender) does not have the technical capabilities to propose a more sophisticated approach, there will be little incentive for companies to propose high performance solutions. Instead, if the government is always guaranteed a seat at the finalists’ table (under the phased evaluation process), then a likely outcome is that the performance requirements will be tied to the government’s existing, documented capabilities, rather than any new, more innovative solutions. Under that scenario, companies that have invested in innovation and excellence would not have any incentive to propose top-quality, contemporary solutions since they would have little or no chance of winning.

Recommendation: The “*may*” should be deleted (“... *and may encourage innovations*) – the very intent of PBSA is to promote innovation – to incentivize contractors to improve performance, and introduced innovations that meet or exceed requirements at the least cost. And PBSA solutions must be part of the Agency Tender’s MEO.

Furthermore, training remains the number one stumbling block to full and successful implementation of performance-based contracting. It must be enhanced if PBSA is to become successfully implemented. PBSA

requires new evaluation techniques, new management approaches (involving the entire acquisition team) and improved contract relationships:

- Acquisition teams, including contracting officers, need to understand how to write performance work statements (or, a better term would be a *statement of objective* for performance based solicitations).
- Proper evaluation methods for performance-based bids need to be developed. This includes conducting specific market research on what capabilities are available in the commercial marketplace. Performance-based services acquisition means going after innovative solutions.
- Those who will manage and “own” the contracts once awarded must have buy-in on the new approach, understand how performance-based metrics were developed, and learn how to properly measure outcomes under a performance-based contract. In other words, during contract execution, those involved in contract oversight need to avoid falling back onto the old ways of doing business. Ultimately, it involves a changed mindset – both within the government (which is more comfortable with mandating how something should be done) and with industry (which now must understand the government’s expectations).

D. Exceptions for Agency Tender

Certain exceptions are outlined for the agency tender, which must be detailed in the solicitation. We have serious concerns as to the validity of these exceptions, as addressed below.

1. **Past Performance.** Meaningful performance and service levels must be incorporated into the overall performance requirements. This is in addition to the utilization of performance-based work statements in all cases, as well as the incorporation of performance penalties, which have equivalent impact on both public and private sector performers. Currently the government is not being held to the same procurement disciplines and risks as industry offerors.

In developing the Agency Tender, the revised Circular states that solicitation requirements related to past performance are not applicable (but will be factored in for all subsequent future competitions). We are concerned that initially this means the MEO would not be held to the same past performance standards as the contractor. However, the revised Circular is clear that when a MEO has won an initial Standard Competition, subsequent competitions will consider the past performance of the MEO. On the other hand, it is unclear as to whether the past performance of the MEO will be considered when the MEO has won recent competitions under the current A-76 process.

Recommendation: The revised Circular should make it clear that MEOs operating under recent wins under the current A-76 process should have their past performance included as a solicitation requirement for subsequent competitions under the new revised Standard Competition. Under the current process, the MEO does submit its performance standards and a cost proposal under which past performance can and should be evaluated. And, as with contractors, a past performance database should be developed and maintained for all MEO performances.

2. **Subcontracting Plans, etc.** The Agency Tender is not required to comply with the subcontracting plans required of contractors. This is inherently unfair because it can cost a contractor more to subcontract work, both in administrative costs and additional costs and mark-ups charged by small business subcontractors. It is interesting to note that when a competing private sector offer subcontracts to an Indian Tribe, the SSA shall include the 5% incentive fee allowed by the program

on Line 9 of the SCF. Apparently, this is to level out any advantage the contractor may be afforded. Certainly, we would not suggest that the government should back off on subcontracting initiatives. Nor is it likely that the MEO will be required to subcontract. However, the playing field could be made more level when requiring the private sector to subcontract a certain percentage of work.

Recommendation: The revised circular should contain a cost factor (percentage) that is added to tender offers not required to have subcontracting plans which reflects that added cost to contractor bids for subcontracting requirements. The added cost factor should be a sliding scale. In other words, the higher the subcontracting requirement under the solicitation, the higher the added cost factor should be made.

E. Integrated Evaluation Process

As noted in the report of the Commercial Activities Panel, *“the government has an established mechanism that has been shown to work as a means to identify high-value service providers: the negotiated procurement process of the Federal Acquisition Regulation (FAR.)”* The panel specifically recommends conducting public-private competitions using the FAR.

We believe that once the Panel had agreed upon the 10 sourcing principles, the next logical step was to look at moving AWAY from A-76 to a Federal Acquisition Regulation (FAR) based system. The FAR, a “tried and true” system, focuses on best value and past performance and today governs the vast majority of government contracting competitions. Replacing A-76 with a FAR based system (which covers 95% of all service contracts) certainly should address many of the problems industry, and the government itself, encounters under A-76 competitions.

Acting upon that recommendation, the November 2002 Circular A-76 revisions would establish an “integrated evaluation process” for certain procurements.

1. **Information Technology Services.** CSA believes that there are many other services that would benefit from the integrated process and that it should not be limited to information technology or new services contracts.

Recommendation: The definition of functions that are authorized to use the Integrated Cost Technical Trade Off process should be expanded beyond Information Technology and new or already contracted work. Requiring prior approval for other functions will only serve to limit the use of the process. If OFPP wants to track the success of this process, it should merely require that agencies report when the Integrated CTTO is used, rather than requiring prior approval.

2. **Best Value.** As defined in FAR 2.101, best value *“...means the expected outcome of an acquisition that, in the government’s estimation, provides the greatest overall benefit in response to the requirement.”*

A major shortcoming of the current process is a focus on lowest cost between the government and private sector bidder, while ignoring the most important factor in government procurement: best value. Creating the situation where government organizations are ultimately competing with the private sector on a cost rather than a quality-dominated basis is in sharp contrast with the quality/best value principals that were strongly enunciated in the National Performance Review. Ironically, as government acquisition policy has significantly moved away from price as a key factor and toward best value, the current A-76 process for public-private competitions continues to require simplistic cost comparisons.

The importance of “best value” procurements also was highlighted in the House Armed Services Committee Report on the 1994 Federal Acquisition Streamlining Act. The report states, *“The committee notes that, over the past decade, the acquisition system has become more complex and sophisticated. This has made it increasingly important to balance quality discriminators, such as technical capabilities, against price and other considerations in the source selection process. Therefore, the committee believes that the use of value-based contracting or ‘best value’ is long overdue and that this will cause contractors to perform better and to produce better products.”*

The Federal Register notice accompanying the Circular A-76 revisions states *“Current processes do not give agencies sufficient flexibility to make best value decisions.”* We strongly agree with this statement – and support the emphasis underlined throughout the revisions for “best value” procurements. This assures the government that it will receive the highest level of service. And, “best value” also will allow the government MEO to provide its own innovative solutions – which they are not encouraged to do under the current low cost comparison process.

Some have argued that “best value” is, by its very nature, subjective. We do not agree. Best value may not mean the same thing in every instance, but there is no reason why the government should not be able to define, with reasonable precision, what best value means on a specific solicitation. Best value should give the government the flexibility to buy precisely what it needs, with a responsible balance between price and features. Consideration of best value should always include past performance because best value is unlikely to be provided by a contractor with a poor record of prior performance. Best value should not be used to protect popular incumbents or to eliminate competent but lower priced offers from an A-76 competition. By spending time to think through what is really important, and then assigning an appropriate number of points to each factor and subfactor, the government achieves considerable clarity in communicating to all offerors the relative importance of each factor. In order to achieve these goals, award criteria should be clearly and unambiguously set forth in the solicitation, and should be specifically tailored to the requirements of that mission, system, or

installation. A numerical scoring system, coupled with a best value calculation that relate proposal score to price, and with an “affordable” limit established could achieve these goals.

Recommendation: Many believe that Congress must modify existing language (10 USC 2462) that currently requires the Department of Defense to examine cost during competitions. In order to be consistent with “best value” procurement, the Administration should seek to modify the current statute to allow evaluation for cost or performance. [Note: It is arguable that the statute is intended to focus solely on cost. Indeed, the statute, to date, has been an excellent tool for forcing competition.]

F. Phased Evaluation Process

Contemporary A-76 cost comparisons typically allow the practice of a “second bite at the apple,” which occurs when the government conducts a best-value competition among the contractors, and then allows the in-house organization to adjust their offer to “match” the best-value contractor’s performance features. The only reason the in-house team was given this “second bite” was to ensure that the performance standards upon which the government’s MEO was based were at least equal to that of the best-value contractor’s proposal. Contractors unanimously feel that this is illogical and blatantly unfair. Acceptable Performance Levels (APLs) are typically far more stringent in contemporary A-76 RFPs than the in-house government workforce has historically been able to achieve. Yet, typical MEOs reduce staffing by up to 40% of authorized staffing. Contractors ask themselves how the MEO will be able to achieve the new APLs with 40% less staffing when they did not meet those standards in the past. Then, adding insult to injury, the government MEO is given this “second bite at the apple” in order to ensure that the MEO can meet the same, higher performance standards as those proposed by the “best value” contractor. Again, illogically, the MEO is permitted to change its bid to meet higher performance standards. Understandably, contractor confidence in the process is badly eroded by this practice.

Public-private competitions must be based upon best value principles, subjecting both the government and the contractors to evaluation of past performance, quality, innovation, workforce flexibility, organizational capabilities, problem-solving approaches, management and key personnel, special scientific and technical capabilities, and other applicable non-cost/price factors.

While we agree that the “phrased evaluation process” in the November 2002 Circular A-76 revisions is an improvement over the current system, we do have some questions as to its proper implementation.

1. **Agency Tender Guarantees.** The proposed revisions are unclear, and contradictory, as to when an Agency Tender offer may be eliminated from competition. The revisions indicate that if a tender is not submitted on time it may be eliminated from competition. However, under the phased evaluation process, the source selection authority is prohibited from moving to the cost phase of the competition until the tender offer has been deemed to be technically qualified. This will only serve to encourage “low-balling” by the in-house team to force the source selection authorities to pull the tender offer up to the bare threshold of technical acceptability and, therefore, their lowest cost possible.

Recommendation: Eliminate guarantees for Agency Tender offers to become technically acceptable. Rather, the Agency Tender Official should be told of any deficiencies and be given a chance to correct those deficiencies. Multiple or unlimited opportunities to correct deficiencies should be prohibited.

Furthermore, the Phased Cost/Technical Trade-Off process should be sunset. This approach is basically the same as the Negotiated Low Price/Technically Acceptable process, except that the Phased CTTO process prohibits the source selection process from moving forward until the agency tender is found to be technically acceptable. This unlimited guarantee is unfair and will cause delays.

2. **Changes to Agency Tender Offers.** Changes are allowed to the Agency Tender Offers under certain circumstances. For example, *“If the Agency Tender is materially deficient upon the SSA’s initial review and prior to the determination of the competitive range, the SSA shall afford the ATO an opportunity to correct material deficiencies by responding to deficiency notices issued by the SSA and revisiting the Agency Tender.”* However, it is not fair and reasonable to allow a variable that benefits the MEO.

Recommendation: The solution should be to have an independent agency evaluate the MEO and contractor bids. The evaluators should not come from the same organization that produces the MEO document for the government.

3. **Delayed Delivery.** The revised Circular indicates that if the ATO does not submit the agency tender on time they may provide the 4.e. official with a written rationale for not submitting on time.

Recommendation: The revised Circular should provide guidance or examples to the 4.e. official as to what might or might not constitute a reasonable rationale for allowing additional time. For example, a military base under emergency mobilization orders for warfighting purposes would be a reasonable rationale. But if the MEO’s consulting contractor was unable to complete an assigned task on time resulting in a missed deadline that would not be a reasonable rationale.

G. Accountability

As noted in the Federal Register notice accompanying the revisions, *“When public employees compete and win work, government managers are often not held accountable for making good on the projected savings and improved performance identified in the agency’s offer.”* The revisions are intended to strengthen the overall accountability of the process. This is a goal that we applaud, and has long been needed to ensure a fair and equitable process.

1. **Audits.** Currently, awards that are retained by the government MEO are not audited as the Circular stated they would be after one year. At issue here is who should perform the audit. If the government activity that did the award does the audit, there is an inherent conflict of interest. There will be a reluctance to admit the award has not achieved desired results because that would mean that the source selection may not have been the best value.

Recommendation: The revised circular should require a pre-award cost audit of the Agency Tender, not unlike those conducted on private sector firms. And, the revised Circular should require a post-award cost and performance audit of the MEOs actual cost and performance. In both cases, this would ensure cost realism.

2. **Administrative Appeals.** Under the current process, administrative appeals are often endless, confusing and poorly communicated. The establishment of a single appeals process will help address that problem and do so in a manner that is fair to all parties. In addition, the revisions make clear that only the Agency Tender Official may file such appeals. This is a clarification that recognizes that only an official of a company or government activity who has cognizance over and responsibility for both the proposal and subsequent performance, can ever be deemed to be a party of “standing,” be it for appeals or protests.

Recommendation: It should be made clear that in the case of such appeals, all parties to the procurement are to be notified by the appeal authority of the issues that the appeal authority has deemed relevant and on which the appeal decision will focus, and then given time to submit their comments on any or all of those issues.

3. **Conflict of Interest Standards.** In non-A-76 procurements, the government personnel involved in evaluating the procurement must declare any interest in any of the competing offerors. An employee who is or will be affected by the procurement personally should not be in a position to influence the award decision. We are very pleased that the revised Circular requires that individuals participating in the process shall comply with procurement integrity, ethics and standards of conduct rules. However, it could be more specific.

Recommendation: Make it a standard process for government personnel with access to source selection sensitive information and data to sign Non-Disclosure Agreements.

H. Small Business Considerations

We remain hopeful that the one voice that has not been widely heard in the debate over A-76 – small business – would receive a fairer hearing under the FAR-based process. Few, if any, small businesses today can afford to compete on an A-76 competition. The 2-4 year time lag alone (in the current A-76 process) makes the current process prohibitively expensive for small businesses. Will a FAR-based process ensure fairness for small businesses? We believe it will.

But there are certain issues that must be considered that were not specifically addressed. These deal with small business set-asides, minority business preference programs (e.g., 8a or small disadvantaged businesses set-asides), and HUBZones, as well as Native American preferences, and disabled-veteran and women-owned small business preferences. CSA membership includes many small companies that fall within these categories – and we want to ensure that the FAR programs and protections currently in place will be continued.

IV. ATTACHMENT C – Direct Conversion

We support the ability of agencies to directly convert work to the private sector. This increases agency flexibility to ensure it is receiving the best value to meet its mission needs. It would also help agencies in meeting their small business goals.

Recommendation: The small activity threshold should be increased from 10 FTEs to 100 FTEs. This will increase the flexibility for agencies wishing to pursue different options under A-76. [Note: Current statutes (e.g., the annual Defense appropriations acts) allow for direct conversion to Native American-owned businesses; we presume that nothing in the revised Circular is counter to those statutory requirements.]

V. ATTACHMENT D – ISSAs

We welcome the proposed revisions related to Inter-Service Support Agreements (ISSAs). Competition is key to ensuring that the government obtains the most innovative, efficient services at reasonable cost. Indeed, work performed by the private sector is subject to recompetition every 3-5 years. This revision simply ensures that all ISSAs are subject to recurring recompetition as well – including both new agreements as well as those originally grandfathered out of any competition requirement. This is a step in the right direction toward ensuring that federal agencies obtain the best value for the American taxpayer.

CSA, along with its industry counterparts, has long been concerned that interservicing agreements among federal agencies, as well as the military services, are used as a means to avoid outsourcing and privatization. We do not believe that ISSAs should be exempt from competition. Requiring the use of competitive procedures for all ISSAs is consistent with the Economy Act (31 U.S.C. 1535), the Intergovernmental Cooperation Act (31 U.S.C. 6505), and the intent of the Federal Activities Inventory Reform (FAIR) Act (P.L. 105-270) and the Government Management and Reform Act of 1994 (103 U.S.C. 356).

VI. ATTACHMENT E – Calculating Costs

As we noted earlier, nothing is more important than a fair cost comparison and the integrity of the procurement process. At the end of the day if the cost comparisons and the process itself are seen as unfair and the government is continually accused of gaming the system, then contractors will decline to bid on future procurements.

1. **Defining Costs.** The government needs to do a better job defining costs up-front and providing improved insight in setting up a better base line by improving its systems for collecting the data to back up its costs. Certainly, agencies should have this information available since it is generally necessary for developing agency budgets. Unfortunately, most data is not provided in a uniform manner by the agencies; it might be there, but it's too hard to track down.

For example, in an October 2002 GAO Report (GAO-03-16) on depot maintenance and the “50-50” funding limitation, GAO stated “Our audits of DOD’s financial management operations have routinely identified pervasive weaknesses in financial systems, operations, and internal controls that impede its ability to provide useful, reliable, and timely financial information for day-to-day management and decision making. GAO-03-16 at 7. *See also*, Testimony, Implications of Financial Management Issues, Department of Defense, GAO/T-AIMD/NSIAD-00-264.

2. **Cost Realism.** The proposed revisions to the Department of Defense 5000 series addresses “cost realism.” It states: “*The DOD Component shall strive for cost realism and to identify cost risks before contract award. They shall require cost realism and continue to monitor risks after contract award. Cost proposals shall be evaluated to ensure cost-realism in accordance with the Federal Acquisition Regulation (reference (c))..... Costs shall be evaluated to ensure cost-realism (based on knowledge gained during the acquisition process).*”

The foundation of the cost realism analysis should be a confirmation that the agency’s actual costs are true and have been properly recorded for financial accounting and cost accounting purposes. Put simply, a cost realism analysis is only as good as the cost data that is analyzed. In the A-76 process, an agency cannot accurately price its MEO if it does not know what its costs are.

While the proposed revisions repeatedly address the issue of cost realism, additional guidance is needed to ensure that such cost realism is indeed “real.” Guidance should be provided that would require either a pre-award cost audit of the Agency Tender (such as those conducted on private sector companies) or that the activity have a certified Activity Based Costing (ABC) capability (similar to a company having an approved financial and/or purchasing system). While the definitions of ABC vary across government, a credible, widely accepted standard should be established immediately against which agency ABC efforts can be measured. This is similar to the standard cost accounting requirements government contractors must meet and could go a long way toward ensuring both the transparency and accountability of the process.

3. **Fringe Benefits.** The fringe benefits rates listed needs to be prefaced with the advisory note that these rates are subject to annual adjustment and that the current year rates are available on OMB’s web site under A-76, or other appropriate government website (e.g., DOL or OPM). Although these rates have not changed in over three years (even though the DOL fringe benefit rates have changed four times during those same three years), it is critical that ATOs know that the fringe rates are subject to change, and where to find those changes. For example, the cost of government employee health care has increased considerably over past three years but the revised Circular’s “Insurance and Health Benefit Cost Factor” rate of 6.15% (total) has not been increased.
4. **Overhead Costs.** The revisions outline the specific components that will be included in the agency tender overhead rate. The 12% overhead rate of 12% has not changed since 1996. Nor is there an explanation of the methodology used or the cost factors identified that comprise this 12% overhead rate.

For example, in one known study of a government operated service business, Navy Ordnance, the composite overhead rate for establishing its sales price was 14% in 1996. *See* Navy Ordnance, GAO/AIMD-97-74, at 6. (The Navy ordnance business area provides various services, including ammunition storage and distribution as well as the maintenance of missiles, to customers who consist primarily of Defense organizations.) Over the three year period of the study (1994-96) actual reported

overhead costs were 29% over estimated budget. *See* Navy Ordnance, GAO/AIMD-97-74, at 29. GAO's report concluded that due to the unfamiliarity with its new operations, Navy Ordnance could not realistically forecast its estimates. Therefore, it might be considerably more accurate if the overhead rates were staggered for each year of scheduled contract performance. For example, for a three year contract, the base year rate could be 30%, the second year could be 24% and the final year OH rate could be 18%.

5. **Costs of Subcontracting Plans, etc.** The revised Circular should contain a cost factor (percentage) that is added to tender offers not required to have subcontracting plans which reflects that added cost to contractor bids for subcontracting requirements. The added cost factor should be a sliding scale. In other words, the higher the subcontracting requirement under the solicitation, the higher the added cost factor should be made.
6. **Indian Incentive Program.** When a competing private sector offer subcontracts to an Indian Tribe, the SSA shall include the 5% incentive fee allowed by the program on Line 9 of the SCF. Is the intent to level out any advantage the contractor may be afforded?
7. **Conversion Costs.** There are conversion costs when a contract is in-sourced. The revisions read as going only one way (from government to private sector) and do not recognize the hidden costs related to in-sourcing. For example, the costs of hiring, training, licensing and obtaining security clearances. Also, there are issues related as to how the MEO gets the government slots to hire people when there are hiring ceilings as well as how to meet required grade structures, portability of pensions, etc.
8. **Minimum Conversion Differential.** The revisions retain the requirement for a "minimum cost differential" (10% or 10 million) to non-incumbent sources in a standard competition. While the Commercial Activities Panel recommended retaining the cost differential, we believe that is counter to government initiatives aimed at best value, reliance on commercial practices and moving toward a performance-based services acquisition strategy.

Much of the time, federal agencies contract for services to get new capabilities, process improvements and technical expertise, not to achieve a specific cost saving. Further, some of that contracting is intended to create the opportunity to achieve downstream cost savings, the benefit of which is not reflected in the immediate cost savings required in the 10% computation. A somewhat colloquial example but very apt analogy is: would you rather spend \$10 on a pair of cheap pants that fall apart within one year, or spend \$50 on quality pants that last ten years?

9. **Agency Personnel Costs.** The revisions should include the cost of obtaining and maintaining professional licenses, recurring training and meeting increasing qualification standards. Federal employees are not required to meet these standards, particularly with regard to state licensing requirements. The cost of meeting the prerequisite education and experience requirements to obtain a professional license, the cost of licensing examinations, documenting actual experience, the cost of the initial license, and the cost of continuing education, etc. are equally applicable for both the agency tender and the private sector. Since professional licensure is in place to protect public health, welfare and safety, the Circular should be revised to require the Standard Competition to address licensing of personnel on a fair and equitable basis for both the government and the private sector, and the cost of licensure should be factored into the agency tender.
10. **Other Factors.** The private sector must comply with a host of business related costs, some of which are imposed by statute and regulation by federal, state and local agencies. For example, environmental

permits, compliance with OSHA standards, waste water treatment, etc. These costs should be factored in on a case-by-case basis and should be applied to the agency tender as well.

VII. Attachment F – Definitions

As noted at the beginning of this attachment, *“the acronyms and terms used in this Circular are unique to the inventory, public-private competition, and direct conversion processes.”* We agree that it is essential that agencies, therefore, use the definitions as prescribed in the attachment in order to avoid any confusion.

ADDENDUM TO COMMENTS ON DRAFT OMB CIRCULAR A-76

Attachment A – Inventory Process

No additional comments

Attachment B – Public-Private Competition

Comments:

- 1) Section B.3.a [page B-3]. Human Resource Advisor (HRA), Employee and Labor-relations Requirements states that the HRA, working in conjunction with the contracting officer (CO) shall determine compliance with the Right-of-First Refusal. If the contractor is awarded the work, and determines that a civilian employee does not meet their labor qualifications or employment criteria, will the contractor have the ultimate decision-making authority on whether the individual is hired? This statement makes it appear that the HRA and CO will have the ultimate decision-making authority in this scenario.
- 2) Section B.3.b [age B-3]. HRA MEO Team Requirement, under the listing of activities that the HRA will assist the MEO team with, it should be added after item (c) that the HRA will provide assistance in conjunction with the contracting officer with determining the applicability of the Service Contract Act Wage Determination labor categories if subject to an economic price adjustment (EPA) and mapping based on job descriptions to the SCA Directory of Occupations
- 3) Section C.1.b.(1) [B-4]. Add to the last sentence before the comma “and, if circumstances warrant, the sanctions outlined in FAR Part 3.” This ensures that the Competition Officials cannot escape the sanctions established in the Procurement Integrity Act and FAR Part 3 via an entry in an annual performance evaluation.
- 4) Section C.1.b.(3) [page B-5]. The timeframes do not clearly state what will happen if the timelines are not met and if no deviation is granted.
- 5) Section C.1.b.(4) [page B-5 should make a specific reference to the Procurement Integrity Act and to the protection of intellectual property.
- 6) Section C.2.a.(4) [page B-6]. The references for procurement procedures are incorrect – instead of references to Section B.4, should reference Section C.4. Section C.2.a.(13) Solicitation Exceptions for the Agency Tender – references in the last sentence where the Agency Tender’s MEO past performance will be included in the evaluation requirement, except as provided in paragraphs C.6.b.(2) and C.6.d.(2) – these references cannot be found.
- 7) Section C.2.a.(14) [page B-7]. Reference the second sentence starting “When a Performance Decision . . .” FAR Subpart 15.206 does not seem to fit this situation. When a Performance Decision results in the selection of a private sector source and then the agency cancels the solicitation then the agency should be required to pay the private source bidders their bid and proposal costs. Reference the last sentence following (4). If the agency determines at any time in

the Standard Competition process that the agency no longer has a requirement for the services the process should be stopped and a report sent to the Director for Management, OMB. There is no reason for any of the parties to accrue costs once the requirement is cancelled any time *prior to* the Performance Decision.

- 8) Section C.3.a.(9) [page B-9]. Delayed Delivery gives the ATO the ability to either extend the due date for the proposal or proceed without the Agency Tender; however, this can be done as late as the actual due date. Recommend rewording so that the ATO has to notify the CO at least three days (or reasonable timeframe) in advance if the Agency Tender will be delayed and request an extension with justification, so that the deadline decision can be made in advance of the actual deadline date, which is also the current process applicable to the private sector. The private sector is not allowed to wait until the actual due date to request an extension.
- 9) Section C.4.a.(3)(a)3 [page B-12]. Deficiencies. Whenever an Agency Tender is materially deficient and the ATO is given an opportunity to correct the material deficiency that fact should be included in a report to the Director for Management, OMB. It is very important for the integrity of the process that the opportunity to correct Agency Tenders does not become the standard practice.
- 10) Sections C.4.a.(2)(b) [page B-11], C.4.a.(3)(b) [page B-13], and C.4.a.(3)(c)1.b [page B-14] say “the SCF is certified in accordance with paragraph C.4.b.” Please correct as no paragraph with number is in Section C.
- 11) Section C.4.a.(3)(c)1 [page B-13]. Integrated Evaluation Process – there has been some discussion indicating that the Department of Defense (DOD) cannot use the integrated process, yet it is not indicated in the wording in this section. Please add this information, along with the statute/regulation cited, which exempts DOD from this process.
- 12) Section C.4.a.(3).(c).1 [page B-13], in the 14th line cites C.4.a.(1)(c). The correct reference appears to be C.4.a.(3).(a).3.
- 13) Section C.4.a.(3).(c).1.b [page B-14]. Other Than Low Cost Decision, last sentence, cites paragraph C.4.a.(3). This does not appear to be the correct citation.
- 14) Section C.4.a.(3).(c).2.a [page B-14]. Phase One 4th line from bottom cites paragraph C.4.a.(1). Believe this should cite paragraph C.4.a.(3).
- 15) Section C.5.a [page B-15]. Post Competition Accountability – gives the requiring organization the ability to update the PWS at the end of each performance period to reflect requirements and scope changes made during that period. In addition the agency can adjust actual costs to compare to estimated costs submitted in the Agency Tender to allow for scope, inflation and wage rate adjustments. There does not appear to be a control factor, or system of checks and balances here which would prevent the requiring organization from changing its mind about the originally proposed MEO plan, and deciding it wants to increase manpower if the staffing was underbid to win the effort. Who would approve the organization’s change in scope and determine if it was a real need, or just a way to increase staffing, and how would you assure that this approver is objective?
- 16) Section C.5.a.(2) [page B-15] says “with a copy to the 4.a. official. Is this supposed to be the 4.e official?”
- 17) Section C.5.a.(4) [page B-15]. Requirements for the Letter of Obligation – this does not address how existing in-house work awarded in the past few years under previous A-76 competitions will be impacted – only those issued after 1 January 03. Activities that have been kept in-house under previous A-76 competitions should be documented, and also issued a Letter of Obligation, which would clearly identify the timeframe for completion and recompetition.
- 18) Section C.5.a.(4) [page B-16]. The references to C.7.(a) should read C.5.(a) and the reference to C.7.b.(2) should read C.5.b.(2).
- 19) Section C.5.c [page B-16]. The Failure to Perform section must be revised to provide to evaluations of agency performance, after an agency wins a standard competition, or if an agency

is awarded work through a direct conversion. Some recourse or penalty, equivalent to that to which a private firm is subjected, must be conferred upon the agency performance in order for the Circular to be fair and balanced.

- 20) Section C.5.b.(1) [page B-16], last sentence. Restate to show that the recompetition shall have been completed by the end of the last year of performance as is shown in the following paragraph. As currently structured, this could be read as saying the competition has to start by the end of the last year of performance.
- 21) Section 6.a.(4)(d) [page B-18]. Single Administrative Appeal Process Decision Document – allows 30 to 45 working days for completion and issuance of the decision document. For example, a CSA member cited its experience under one particular A-76 competition a situation where the government issued four 30 –day extensions to their timeframe for issuance of the decision document. Since the interested parties are not granted any provision for extensions to the 10–15 working days to submit their appeal, the Appeal Authority should in turn not be given a provision for extending their timeframe for issuance of the decision document.
- 22) Section C.6.a.(4).(d) [page 18], 7th line cites paragraph C.4.a.(1) above. This is too broad. For clarity request that a more specific paragraph reference be included.
- 23) Section D.1 [page B-18]. Right of First Refusal – gives the HRA the authority to determine whether the employees on the Right of First Refusal list are deemed qualified, and the contractor shall be required to offer employment to these employees before hiring new employees or transfer existing employees. If the Contractor and the HRA disagree on whether the employees are qualified, this statement gives the HRA final authority. Contractors will feel strongly that they should have the final authority in who is hired for their awarded contract.
- 24) Section D.2.a.(1) and b.(1) [page B-19]. Conflict of Interest and Standards of Conduct. Both sections should include a statement that if the PWS Team and MEO Team use contractor support, then the same contractor shall not support both teams.

Attachment C – Direct Conversion Process

Comments:

- 1) Section A [page C-2] the criteria for direct conversions should include a new subsection that would read: “**A&E.** An activity provides direct professional services of an architect- engineer nature, as defined by state law. (A&E) (See Attachment F.) Commercial activities providing A&E support would be subject to the qualifications-based selection (QBS) procedures of the FAR included in this Circular.”
- 2) Section D.2.b [page C-3/4]. Business Case Analysis Documentation – the four comparable, existing, fixed price, federal contracts of similar size, workload and scope are identified by the Contracting Officer to determine the basis of comparison to the agency tender; one additional criteria that should be considered is geographic location. If contracts selected are in areas with much higher cost of living that the area being studied, the comparison may not be accurate.
- 3) Section E.2.c [page C-4]. This section cites paragraph C.6. Believe this should read C.5.b.
- 4) Section F [page C-5]. This section cites paragraph D.2. Believe this should read D.1.

Attachment D – Inter-Service Support Agreements (ISSA)

Comments:

- 1) The attachment should clarify that for ISSA work performed by a multi-agency contract with the private sector and the revenue generated is less than \$1 million annually, the competition requirements do not apply.
- 2) Section A [page D-1], first sentence. Please restructure to clarify the intent. Read literally this says each Commercial ISSA exceeding \$1M million annually must be competed each year.

Given that the competition could take a year this becomes a continuous competition requirement (Or is that is the intent?).

- 3) Section H.1 [page D.3]. In this section, strike “available to OMB and the public upon request” and insert in lieu thereof “available to OMB and made public in *FedBizOpps*”. There must be sunshine and transparency to the intergovernmental process. Before a federal agency can provide a service to state and local government, the proposed provision of that service should be made publicly known. Under the current language in the draft, the private sector has no way of knowing that such a transaction is being proposed, thus it would have no way of knowing to exercise its right to request such information from OMB. A notice in *FedBizOpps* will provide for the opportunity for the private sector to make an offer, thus providing a market-based determination that the state or local government has sought but has not been able to identify a satisfactory private sector source.
- 4) Section H.1.d [page D-4]. A request for services which is forwarded to OMB for approval should require a *FedBizOpps* or *Federal Register* notice requirement so the private sector can comment and respond in order to help determine whether the request indeed involves a commercially available service that the private sector could provide. Such sunshine and transparency will help provide a market test to the request and prevent abuse of the process.

Attachment E – Calculating Public-Private Competitions Costs

Comments:

- 1) There was no reference to the A-76 Costing Manual issued under Interim Guidance dated 14 March 2001 to be used by all DOD components for A-76 pricing.
- 2) Section A.5 [page E-1]. Inflation – gives agencies the ability to use agency unique inflation factors with prior written OMB approval rather than the annual inflation rates developed for the President’s Budget. If agency unique inflation factors are approved, this should be stated in the solicitation.
- 3) Section B.1.i [page E-6]. Administration and Inspection for MEO Subcontracts – add guidance on how this cost will be calculated by using the chart under Section C.3
- 4) Section 1.1 [page E-7]. Inmate labor should be removed from the Circular. The private sector is prohibited from utilizing inmate labor under federal law. Thus, in order to provide a fair and balanced competition, inmate labor should not be included or permitted in an agency tender.
- 5) Section 3.a.5.e [page E-9/10]. (note the alpha-numeric system breaks down in this section of the draft – insurance, etc. should not be considered a subset of facilities) The draft does not specifically address professional liability that would apply to certain professional services contracts.
- 6) Section B.3.g.(2) [page E-10]. New MEO Subcontract. This paragraph discusses high level policy, not Other Specifically Attributable Costs. Recommend this paragraph be moved to Appendix B, Section D, Special Considerations.
- 7) Section B.5.b. [page E-11]. Phase-In Costs – should add the comment that the agency tender is not exempt from phase-in costs due to a misconception that they are the incumbent, and will not require recruiting, hiring or training costs.
- 8) Section B.5.c [page E-11], starting at “Government facilities . . .” is a statement of policy, not the treatment of a cost item. Recommend this language be moved to Appendix B, Section D, Special Considerations.

Attachment F – Glossary of Acronyms and Definition of Terms

Comments:

- 1) Quality Assurance Surveillance Plan (QASP). Second sentence needs to be restructured for clarity.



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