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Comments on the Draft Revised Circular A-76

Introduction to Enhanced Competition and the Employee Conversion Organization

ESOP Advisor's, Inc. recommends that the Administration expand and enhance the Competitive Sourcing process for the competition of commercial activities that is contemplated under the Draft A-76 circular issued November 14, 2002 by including the ability for an Employee Conversion Organization (ECO) to compete.

The ECO was developed by the Performance Institute and the Reason Foundation, and was recommended to the Administration in their October, 2002 report "Designing a Performance Based Competitive Sourcing Process for the Federal Government", and builds upon the successful experience of the US government with ESOP approaches to privatization, base closure, and commercial activities competitions.

The Performance Institute and the Reason Foundation recommended to the Administration that OMB create, in the proposed revisions to the A-76 commercial activities process:

"three paths to Competition through an Employee Conversion organization (ECO): OMB should create a general competitive sourcing framework that allows for three different modes for competition to be pursued with maximum flexibility by an agency. These three paths are: direct conversion, streamlined competition using employee conversion organization (ECO) vehicles, and Standard public-private competition.

The ECO vehicle provides a “compromise” approach to federal employee vendor competition using the FAR (federal acquisition regulations). However, the ECO offers no guarantee that the employee vehicle will win the competition and will subject employees to a firm contract should it win.”

ECO approaches to commercial activities are good for the federal government and the taxpayer. They demonstrate good employer relations by providing a more employee friendly alternative to future commercial activities practices, and they promote efficiencies and cost reductions.

ECO’s will provide new career growth opportunities for federal employees, and the economic incentives and future retirement security provided by employee ownership and non-profit approaches can provide a new mechanism for redirecting federal career paths.

The use of ECO vehicles, successfully implemented in the context of competitive sourcing, will provide the mechanism and the incentive for thousands of current federal employees to voluntarily leave federal service, provide direct cost savings through competition, and also provide substantial federal cost savings through reduced pension costs and revenues from tax payments from the ECO private sector competitors that succeed in the FAR based competitive process. The current, ongoing ECO conversion of the EEOC investigations unit of the United States Postal Service (USPS) will [when implemented in 2003] produce the voluntary resignation from the civil service system of nearly 100 FTEs, as well as substantial current and future cost savings based on the lower cost of the ECO EEOC investigative services relative to those that are available under the current GSA GWAC for EEOC services.

ECO approaches will directly reduce the size of the federal government through voluntary departures from federal employment. ECO approaches can lead to improved quality through the ability to improve the licensing and certification of employees providing future required commercial activities, and can improve quality control and assurance. ECO/ESOP approaches, when properly communicated to federal employees, have proven to reduce employee resistance to commercial activities competitions, as they must be undertaken on a voluntary basis by the affected employees. They also provide for a seamless transition to contractor performance and minimize the loss of required institutional knowledge about the federal operation, as well as providing more potential for “surge” capacity that may be required in the future. The ECO vehicle can be implemented using ESOP approaches [see “ESOP Privatization” guidance issued by the Executive Office of the Vice President with the concurrence of OMB in 1995 at <http://www.esopadvisors.com>].

ECO/ESOP approaches are good for the federal employee because they provide a “soft landing” and minimize the potential adverse impacts of the revised A-76 process. They reduce the future employment risk inherent in contemplated A-76 procedures and reduce job losses, as the ECO/ ESOP private sector competitor have the incentive to expand to serve additional markets beyond the workload being privatized or competed under A-76.

The success of an ESOP company directly promotes and leads to increased equity ownership and capital wealth. This has been recognized by the US Congress which has provided incentives to broaden equity ownership in the US economy and strengthen US international competitiveness through encouraging the adoption of ESOP plans in the private sector.

Implementation of ECO Approaches to Commercial Activities

ESOP Advisors, Inc. believes that an ECO approach that will maximize the potential for competition and the benefits that competition will bring to the Federal government. ECO's, and the specific vehicles involved in the implementation of an ECO such as the ESOP approach should be able to participate in the commercial activities process whether an agency decides to rationalize commercial activities through privatization or other approaches that do not involve public-private competition, through direct conversion, or through the standard competition of commercial activities as contemplated under the draft revised Circular A-76 issued November 14, 2002.

Direct Conversion

In the context of a direct conversion, The Performance Institute and the Reason Foundation recommended that the OMB implement the ECO approach using a "Streamlined Competition ...under a FAR based process." Their October, 2002 report recommends that a **"federal agency may want to allow employees to transition into an Employee Conversion Organization (ECO) vehicle. Under this path, the agency would announce a direct conversion and employees would have the option to form either a governmental or non-governmental vehicle to compete for the work. Regardless of what vehicle the employees choose, their vehicle would be fully subject to the FAR during a standard public-private competition. Should the employees win, their vehicle would be placed under contract and treated as a standard vendor for the agency. The contract would be re-competed on a regular cycle using the FAR. ... Creation of non-governmental ECO's would essentially be a public-private partnership between employees and a private organization. Should the employees win, they would become members of the private organization."**

In order to implement this approach, OMB should include in the draft circular, in Attachment C: Direct Conversion Process the ability for an agency, and agency employees, to form an ECO to compete if the direct conversion is contemplated from an agency source to a private sector or public reimbursable source under a Competition Waiver. The ECO would compete under the acquisition strategy determined by the CO as contemplated in the draft circular, Direct Conversion Process: Conversion Phase as found on page C-4.

An agency should be mandated to perform pre-feasibility analyses and feasibility analyses of the ECO during the Start-Up phase of the Direct Conversion Process [page C-4] and to submit these analyses as a part of the Competition Waiver Documentation as a part of the agency's explanation that the direct conversion will result in significant financial improvement based on the full costs as calculated in the revised circular, or significant service improvement that cannot be achieved by the current [federal] service provider.

These analyses should determine whether enhanced competition by an ECO would likely deliver benefits to the government and the affected employees. These feasibility and pre-feasibility studies should analyze and document the potential [if it is found to exist] for comparable cost savings and operational improvements by the ECO as might be expected from other private sector sources or public reimbursable sources. These studies should document the ability of the ECO to achieve cost savings and/or operational improvements while retaining comparable compensation and employee benefits [including retirement benefits] to what the impacted federal employees currently enjoy. Such analysis and documentation should provide a basis for concluding that the ECO can achieve success by providing commercial activities services and products to the current agency customer on the basis of expected future workloads to be solicited, as well as serving other customers in the Agency, or in other federal agencies, or state and local governments or the commercial private sector marketplace.

Past federal experience shows that such analyses and documentation for the ECO will not delay the timelines contemplated in the Draft Circular. Such analyses and studies can be performed in 30-60 days, and should be performed in the Start-Up phase in parallel with the other activities required for documentation of the Competition Waiver.

Such studies will also benefit the agency by providing by providing cost and operational improvement data that will be useful when it is making its determination of an Acquisition strategy in the Conversion Phase. Once a Direct Conversion is in process, past experience of the federal government with ESOP ECO's has shown that the ECO can and will respond in the timeframes required of other private sector sources as determined by the Acquisition strategy.

The Competition Waiver Documentation should also include an explanation that agency assistance will be provided to adversely affected federal employees (who do not voluntarily accept employment with the ECO upon success of their offer in the competition) in accordance with 5CFR Part 351 and that the employees will be provided the Right of First Refusal [as required by FAR Part 52.207-3] by the ECO.

Standard Competition

In the context of Standard public-private competitions of federal commercial activities as contemplated under the draft revised circular, OMB should recognize and approve of the ability of federal employees to utilize an ECO vehicle to enhance the competition required under the circular. Specifically, the ECO and/or ESOP implementation approach would allow the affected employees have the option of forming a partnership with an existing or newly created private sector firm which will enter a bid in the private sector competition within the [revised] A-76 process. If this ECO partnership wins the private sector competition, then the employees will "win" either by virtue of the success of the MEO or by joining the private sector as a result of their private sector partner's success in the final public private competition.

The Performance Institute and the Reason Foundation recommended that the OMB consider the ECO approach because:

“An ECO puts employees in control of their destiny far more than direct conversion (where they do not have an opportunity to compete) or the MEO (where they remain constrained by the federal processes, must live with the uncertainty of the A-76 process, and will remain federal employees after they win).

Providing agency financial support for this approach would be cost beneficial in the long run as it would significantly reduce ...competition costs that the transitional public-private competition process would impose.

Competitions and protests would be governed fully by the FAR, widely recognized as a better vehicle for governing competitions and contracting.

An ECO would encourage employees and management to think creatively about different kinds of public-private partnerships to perform federal activities

ECO's maximize competition. There is no guarantee that the ECO would win – its chances should be just as good as private vendor chances. However, should the ECO demonstrate better cost and performance in its proposal, the ECO should rightfully win.”

In order to implement this approach, the agency would undertake the following actions in the context of the Public-Private Competition as contemplated in Section B of the [draft] circular: The Standard Competition Process. As a part of its Preliminary Planning activities, the Agency should be allowed (but not mandated to) to conduct analyses and studies to determine whether enhanced competition by an ECO would likely deliver benefits to the government and the affected employees. These studies should be in the form of feasibility and pre-feasibility studies of the potential ability of ECO vehicle(s) to deliver cost savings and operational improvements of the same magnitude to be expected from the standard competition process.

Such studies should analyze and document the potential for comparable cost savings and operational improvements by the ECO, on the basis of potential ECO operation based on comparable compensation and employee benefits [including retirement benefits] to what the affected federal employees currently enjoy.

Such analysis and documentation should provide a basis for concluding that the ECO can achieve success by providing commercial activities services and products to the current agency customer on the basis of expected future workloads equivalent to what might be solicited under the Standard Competition process, as well as serving other customers in the Agency, or in other federal agencies, or state and local governments or the commercial private sector marketplace.

If these feasibility and pre-feasibility studies successfully document the potential ability of ECO vehicle(s) to deliver cost savings and operational improvements of the same magnitude to be expected from the standard competition process, then the agency should be able to proceed with an enhanced A-76 competitive process as described above. Under the Standard Competition process, the agency should make available the final documentation of these studies [public documents under FOIA] to the affected employees and to interested private sector competitors for their review.

The enhanced competitive process would then proceed as under the standard competitive process except as follows:

Ø As a part of the third step of the Standard Competitive Process as shown on page B-1 of the draft circular, Agency, Private Sector, and Public Reimbursable Responses Developed; the agency would direct that an Employee Liaison Committee (ELC) would be formed of certain affected employees that are not part of the MEO process or of the procurement (PWS/Solicitation) process.

Ø This ELC would be supported by an ECO Employee Representative (ER) an independent source of technical, business and contracting expertise contracted for by the agency. The ER would provide support services to the ECO that are similar to but completely independent from the contractor expertise and support provided to the MEO.

Ø This ER would be contracted by the agency to provide business planning, business formation, proposal development and other assistance to the ECO in formation.

Ø This ER contractor would serve as an ECO Employee Representative, and would undertake all actions required to participate in and hopefully successfully compete in the [revised] A-76 competitive process.

Ø The ECO Representative would undertake any and all actions that might expose the current affected federal employees to ethical taint or potential conflict of interest with respect to the [revised] competitive process and the FAR.

Ø The ECO Representative or the private sector firm or private sector partnership formed from the activities of the ECO would submit a private sector bid in the public-private competition. If the ECO's private sector firm or partnership is successful in the competition, then the ECO representative [under contract to the agency] will provide transition support to the agency and the federal employees to ensure that their employment rights, compensation and benefits are protected in the transition to private sector (ECO) performance, including the Right of First Refusal as required by FAR Part 52.207-3.

Past federal experience shows that feasibility analyses and documentation for the ECO performed in the Preliminary Planning Phase will not delay the timelines contemplated in the Draft Circular. Such analyses and studies can be performed in 30-60 days, and should be performed in the Preliminary Planning phase in parallel with the other activities required.

Once a Standard Competition is in process, then the ECO [as a private sector offeror] must and will respond under the FAR within the timeframes and procedures established by the solicitation and PWS, as required for Private Sector Offers, page B-10. Past experience of the federal government with ESOP ECO's has shown that the ECO can and will respond in the timeframes required of other private sector sources as determined by the solicitation.

The ECO approach can be structured as a non-profit organization, or 501 {c} {3}, to provide increased retirement security for current federal employees impacted by A-76 procedures. Under the non-profit approach, current federal employees who become the employees of a public non-profit corporation on the basis of a successful ECO A-76 competition can continue in federal retirement programs for up to four years after joining the private sector. These employees and their business units can then transition to for-profit operation in the private sector prior to the end of the four year period, where ESOP and other private sector retirement plans can additionally enhance their retirement security.

Questions & Answers

ESOP Advisors suggests below information in the Q&A format that would address some concerns and issues that might arise from the utilization of ECO approaches.

1. Is it possible for an agency to utilize and ECO approach if it is privatizing a function/operation, exiting a line of business, or withdrawing from reimbursable operations?

If an agency of the federal government decides to rationalize commercial activities through privatization or other approaches that do not involve public-private competition, then the employees of the federal line of business being exited through privatization or through withdrawal of a reimbursable business activity should have the opportunity to compete for any workload or services. This includes workloads still required on an ongoing basis by the agency or any other operations served by the business line to be privatized, or its reimbursable customers by forming an ECO and competing under the FAR. The formation of the ECO would not require the current federal employees in the business line to surrender any protections or benefits that are available to them as federal employees under the civil service regulations if their ECO vehicle does

not win such competitions. However, if the ECO wins the competitions, and the federal employee accepts a position with the ECO, on the basis of a successful competition, said employee would be required to voluntarily leave federal service.

2. Are ECO approaches and acquisition strategies conducted outside of the FAR?

No. Acquisition strategies based including ECO approaches must be conducted under the FAR. Bids or proposals developed and submitted under an ECO approach will be submitted by a private sector offeror, and must satisfy the relevant solicitation/PWS as well as meet all requirements of the FAR.

3. Is the success of the ECO dependent on the utilization of non-competitive sourcing strategies?

No. There have been six successful ECO/ESOP implementations in the federal context since 1993, and in only one instance did an agency decide to employ a non-competitive procedure. Even in this case, the agency acquisition strategy and the ECO proposal and subsequent negotiated bid process were developed in and implemented in accordance with the FAR. The agency was sustained in a court of law with respect to the validity of its acquisition strategy. In four other instances, the ECO was subjected to full and open competition under the FAR in order to bid on future workloads. In two cases, the ECO won such FAR competitions, one in an IDIQ context and one in firm fixed price competition. In two cases, the ECO lost such initial competitions. In one case, the USPS has yet to decide what acquisition strategy it will employ, but will make such a decision in January 2003. The Draft Circular recognizes that agency's have the ability to determine the best acquisition strategy [Direct Conversion: page C-4], using competitive or non-competitive procedures, for sourcing commercial activities workloads. All such ECO acquisition strategies must comply with the FAR.

4. How can ECO approaches be implemented so as not engender ethics taint on the part of the affected employees or conflict of interest in the procurement process?

If an ECO approach is to be utilized in the context of a direct conversion, then an Employee Representative will be put under contract by the agency to represent the interest of the affected employees. This representative will undertake all actions that might expose the employees to ethics taint or the agency to conflict of interest in the procurement process. The ER or a private sector entity formed by the ER on a stand-alone or partnership form will participate in the agency's acquisition process, and will submit and negotiate any bids or proposals with the agency. These bids and proposals will not personally identify any current federal personnel with job titles or positions, nor will such employment opportunities as may arise from the acceptance of such proposals be offered to current federal employees until the procurement process has been completed. Employment opportunities for current federal personnel will be guaranteed by the right of first refusal. Any current employees that participate in the Employee Liaison Committee [discussed above] will not be able to participate in the development of the MEO or in any agency activities concerned with the procurement process such as PWS development. Any employees participating in the ECO process must not be Agency Tender Officials, Contracting Officers, Human Resource Advisors', Source Selection authorities or Administrative Appeal authorities with respect to the acquisition in question, as contemplated in the Standard Competition Process in the revised Circular A-76.