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

cc:

Subject: Submission of comments -- A-76

Attached is the electronic version of the following, submitted by the Honorable Daniel K. Akaka, U.S. Senator, Chairman, Governmental Affairs Subcommittee on International Security, Proliferation, and Federal Services. Should you have any difficulty in opening the attachment, please contact me: Nanci Langley, Deputy Staff Director, Subcommittee on International Security, Proliferation & Federal Services, [202] 224-4551

December 19, 2002

Mr. David C. Childs
Office of Federal Procurement Policy
Office of Management and Budget
725 17th Street, N.W., Room 9013
Washington, DC 20503

Dear Mr. Childs:

The Office of Management and Budget (OMB) Federal Register Document 02-29472 raises serious concerns relating to fairness to federal workers, cost efficiency, and public accountability of contracted out government functions. The OMB proposal to revamp the A-76 public-private competition process could adversely impact the federal workforce and procurement policies. Improvements to the current process must be fair, promote cost-efficiency, transparency, and accountability.

The proposed revisions to A-76 would allow for a broader application of the best value standard over low bid as the primary factor in the public-private competition process. The use of best value could threaten cost-effective procurement policies. Under the draft rules, subjective notions of best value would replace objective cost savings in driving decisions as to whether federal work would be performed in-house or by the private sector. The proposed rules do not clearly identify how and when these standards should be used, nor do they guide source selection authorities on the weight that should be given to cost when utilizing the best value standard. This shift could disadvantage federal workers who compete for contracts through the use of subjective standards that until now have been used only under special statutory authority.

The use of a best value standard for contracting decisions could also promote uncompetitive procurement practices that shut the door on small businesses. The increased emphasis on contractor past performance and subjective interpretations of "best value," absent

any established standards, could seriously inhibit the participation of small businesses attempting to initiate business with government.

The best value standard approach is not without controversy. The congressionally-mandated Commercial Activities Panel (CAP), charged with finding ways to improve public-private competitions, was deeply divided over this standard. Although the majority of public-private competitions under the proposed rules would continue to be based on the current lowest-cost standard, there would be a pilot project to test the best value standard on information technology jobs. However, the proposed revisions do not clearly state whether the best value standard would be limited to a pilot project. In addition to information technology jobs, the proposed rules would also allow for agencies to use the best value standard as approved by OMB. It is my hope that the application of the best value standard would be limited to a genuine pilot project, in order to allow for a careful, objective review of the results of using the best value standard in lieu of the low cost standard in outsourcing decisions.

Mr. David C. Childs
December 19, 2002
Page Two

The proposed rules would drastically alter the way government reviews the types of work eligible for outsourcing by transforming the presumption of inherently governmental and commercial activities. Whereas the existing circular guides agencies in evaluating government functions that could be performed commercially, the proposed circular requires that federal agencies presume all activities are commercial in nature unless justified as inherently governmental. The issue of the definition of inherently governmental activities was not addressed by the CAP.

The presumption that all government activities are commercial raises fundamental questions over public accountability. When government functions are performed by private contractors instead of government workers, a different set of laws and obligations apply to such issues as conflicts of interest, information disclosure, pay, political activity, and constitutional protections. Unlike private contractors, federal workers are forbidden by law from striking and almost never are allowed to compete for new work or work that has been contracted out.

The federal government currently cannot identify the true cost and size of the federal contractor workforce, and by default, cannot account for the true cost of delivering government services. Changes to improve accountability in federal outsourcing must include transparent standards for distinctions between government and commercial work, a total accounting of the true cost and size of the federal contractor workforce, and clear guidelines for bringing contractor performed work back into government. Federal outsourcing policies must be transparent with clear standards for deciding competitions. Government procurement should be based on sound analysis giving the greatest weight to cost savings. Decisions to contract out federal jobs, which are based on projections and expectations of performance, risk squandering limited public resources on contractor promises to deliver more work than is needed, at a higher cost to the public.

I am concerned about the lack of clarity regarding the appeals process for federal employees. Whereas federal employee unions or associations may currently appeal A-76 competitions within their agency, the proposed rules provide this option only to the Agency Tender Official (ATO). It is unclear whether the ATO can appropriately represent the interests of federal employees in the appeals process within the agency. This is of significant concern because of the unintended result of eliminating any rights to appeal by federal employees.

I am also concerned about the compressed time-frame for public-private competitions in the proposed rules. The OMB proposal would give agencies eight months to complete the solicitation and only four months to complete the competition. If a federal agency failed to finish a competition in this time, OMB could simply outsource the federal jobs to a contractor without any competition. According to findings presented by the Commercial Activities Panel, “. . . it is unknown whether Federal Acquisition Regulations (FAR) based competitions would be any faster than A-76 cost comparisons.”

Mr. David C. Childs
December 19, 2002
Page Three

The proposed deadlines, coupled with the threat of direct conversions, do not represent true competition. Moreover, the draft rules support the administration’s goal of reviewing for privatization “all commercial activities performed by government personnel,” which would include at least 850,000 federal jobs. I oppose arbitrary targets that impose artificial goals for outsourcing regardless of an agency’s need. Arbitrary targets for contracting out are unfair to federal employees and severely detract from federal agency efforts to address recruitment and retention challenges.

Federal agencies lack the resources to complete each competition within the proposed 12 month deadline. The creation of this deadline, absent additional resources for training and hiring to complete these competitions, puts federal employees at a distinct disadvantage. The OMB proposal would expand government requirements for A-76 competitions without addressing the need for additional resources. Comptroller General David Walker, chairman of the CAP, has said that federal agencies cannot conduct the proposed added competitions without additional resources.

Federal managers have also expressed concern over how to carry out the proposed rules with existing resources. The proposed rules would place significantly higher responsibilities on government officials by requiring them to decide competitions based on undefined, subjective best value criteria and to oversee the performance of in-house teams in addition to contractors. The proposal would require the government to write solicitations and in-house bids from separate teams. The A-76 competition deadline creates new in-house requirements for additional training, personnel, and resources. We must ensure, at minimum, that government teams have the resources, training, and people required to meet competition requirements.

I appreciate having the opportunity to present my views. I am confident that you will clarify the proposed rules to address some of the concerns I have raised in an effort to ensure that federal outsourcing competitions are conducted in a manner that achieves both the best return on the dollar and is fair to our federal workforce.

Aloha pumehana,

/ss/

DANIEL K. AKAKA
Chairman, Subcommittee on
International Security, Proliferation and
Federal Services, Senate Committee on
Governmental Affairs

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