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12/19/2002 07:29:45 PM

Record Type: Record

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

Attached is a revised comment letter from the Design Professionals Coalition regarding the revisions to OMB Circular A-76. This supercedes the previous letter sent a short while ago. The revised comments are contained in the attached signed letter from DPC Chairman Tom O'Neill, as well as shown below in case there is a problem opening the attachment. Thank you for this opportunity to comment. If there are any questions, please do not hesitate to contact DPC through:

Richard Corrigan
Vice Chairman
1250 H Street, NW, Suite 575
Washington, DC 20005
Office: 202/393-2426 Fax: 202/783-8410

Thank you.

Text of REVISED Letter follows:

Dear Mr. Childs:

The Design Professionals Coalition (DPC) strongly supports OMB's November 19, 2002 revisions to Circular A-76 and several related policy documents that govern how the Federal Government obtains goods and services.

DPC is a national organization created in 1983 to represent the governmental affairs and business interests of larger A-E firms. Its membership includes the nation's leading engineering, architectural, surveying and mapping firms. Member companies are multi-disciplined, multi-practice firms with both domestic and international practices, and employ alternative project delivery as well as design-bid-build approaches. We are the leading edge companies which provide the ideas, innovative approaches, designs, and related services without which there would be no infrastructure, environmental protection, or transportation projects. How well these services are performed directly, impact project life-cycle costs and customer satisfaction.

Our member companies enthusiastically applaud these revisions, and the underlying premise that activities which are not inherently governmental and therefore are presumed to be commercial in nature should be fairly competed.

Below are our specific comments on the following areas of the proposed revisions to OMB Circular A-76: **1) Alignment with the Federal Acquisition Regulations (FAR); 2) Circular A-76 and Architectural-Engineering (A-E) Services; 3) The Inventory Process; 4) Public-Private Competition Terminology; 5) Support Agreements (Work for Others); 6) Calculating Public-Private Competition Costs; and 7) Definition of "Agency Source".**

1) Alignment with the Federal Acquisition Regulations (FAR)

Alignment of OMB Circular A-76 with the Federal Acquisition Regulations (FAR) is a sound and long over due decision. With the exception of procurement of Architectural-Engineering (A-E) services, which will be explained later in these comments, this revision will facilitate the Administration's competitive sourcing policy and ensure "apples to apples" comparisons in any resulting competition between the private sector and government agencies for matters that are judged commercial in nature.

2) Circular A-76 and Architectural-Engineering (A-E) Services

There is a fundamental conflict between the revised Circular A-76 and the statutory requirements for the procurement of A-E services, including surveying and mapping. While use of Acquisition Planning principles to establish time frames and standard competition procedures as outlined in Part 7 of the FAR and the appointment of a Source Selection Authority (SSA) are consistent with FAR Part 15 and appropriate for obtaining most goods and services, such are not permitted for the procurement of "A-E services," which are prescribed by different regulations and statutes.

The procurement of these unique services is done through "Qualifications Based Selection" (QBS) as prescribed under (40 USC Section 541 et seq.) and not on the basis of cost. If it is OMB's intention to allow Federal agencies to compete for such service requirements, an approach must be crafted to enable Federal agencies to do so in a manner consistent with the statute. Alternatively, if this cannot be accomplished, consideration should be given to Direct Conversion.

Qualifications Based Selection Process (QBS)

Accordingly, it is recommended that the November 19, 2002 Circular A-76 revisions be modified to incorporate a Qualifications Based Selection (QBS) Process whenever an agency's needs for A-E services exceeds \$100,000 per Fiscal Year.

This modification would set out that:

A-E services are to be procured through the QBS process as set forth in P.L. 92-582 as amended (40 U.S.C. 541) (aka "The Brooks Law"), and implemented by FAR Part 36.6. In accordance with this statutorily required process, Federal Agencies will be afforded all the same rights, responsibilities, and opportunities as the private sector.

If an Agency wishes to compete, it shall develop and submit Standard Forms 254 and 255 as would A-E firms. Such submissions shall include agency's past performance with regard to its qualifications (including professional licensure) of personnel, agency record on meeting delivery and completion schedules, and other data required for QBS submissions.

The selection criteria for these services, set forth in FAR Part 36.602.1, will be used to determine the most technically qualified firm, which could include a government agency, selected pursuant to FAR Part 36.602-2. QBS dictates that price shall not be considered until after the highest technically ranked firm has been determined and the scope of work has been negotiated. If the Federal agency is determined to be the most highly technically qualified and has negotiated the scope of work, it would then negotiate a price for the services to be provided in accordance with FAR Part 36.606.

Compliance with both statutory and regulatory requirements mandates that there be a separate process for the procurement of A-E services. Should OMB determine that it is not feasible for Federal Agencies to compete using QBS, then OMB should consider the alternative option to "directly convert" those services included in 40 U.S.C. 541.

The Alternative: Direct Conversion

There are professional requirements and responsibilities that distinguish the performance of A-E services from other services provided pursuant to the Services Contract Act, which underlie the rationale for using a QBS

process for the procurement of A-E services. The challenge, which will be formidable, will be to craft a way for the Federal Agencies to use QBS to compete for commercial services consistent with statutes and regulations.

A-E services must be provided by registered Design Professionals who possess appropriate certifications and are licensed in the states in which they practice. See FAR 52.236-25 entitled “Requirements for Registration of Designers.”

Private sector A-Es are required to purchase professional liability insurance as they and their respective companies are both individually and collectively responsible for the professional accuracy of their business decisions. See FAR both 36.608, “Liability for Government costs resulting from design errors or deficiencies,” and FAR 36.609-1, “Design within funding limitations.”

Interestingly, A-E services are analogous to Research and Development (R & D) services that require the application of professional and technical skills. In fact, in Circular A-76, R & D services have long been exempt from Federal agency competition.

Direct Conversion for A-E services, should it be the preferred alternative of OMB, could be accomplished through an exemption similar to that of R&D, although if made, the QBS process should still be used for the procurement of A-E services. A suggested insert along these lines for Page 2, Attachment C would be:

“3. A-E services – An activity that provides direct professional services of an Architect–Engineer as defined by 40 U.S.C. 541. ((A&E) See Attachment F)) Commercial activities providing A&E support would be subject to the Qualification Based Selection (QBS) procedures outlined in FAR 36.606 included in this Circular.”

3) Attachment A – The Inventory Process

DPC applauds a timely and rigorous Inventory Process to identify commercial activities. Historically, the Federal Government has classified functions performed by Government Architects and Engineers as inherently governmental. The revised inventory process should result in a more accurate classification of A-E positions for the purposes of the FAIR Act inventory.

4) Attachment B – Public-Private Competition Terminology

We recommend defining some terms to eliminate potential confusion and controversy. The terms “private sector source” and “private sector,” both used throughout the Circular, mean “a private, for profit individual, association, partnership or corporation.” Consistent with the thrust of the Circular A-76 revisions, state and local government units, universities, other tax exempt, or not for profit entities should not be eligible to compete for commercial activities unless they too are competing on the same basis, i.e., subject to FAR regulations, market-based rates and not subsidized by the Federal and/or state or local government.

5) Attachment D – Support Agreements (Work for Others)

DPC strongly applauds eliminating non-competed “work for others” activities such as Inter- and Intra-Services agreements (ISSA) as well as Inter-Governmental ones. The former two preclude the private sector from being considered and the later enables Federal agencies to aggressively market their services to our members’ clients – state, local, and tribal governments – on a subsidized basis. Requiring these to be competed is strongly endorsed.

6) Attachment E – Calculating Public-Private Competition Costs

We strongly believe that the 12 percent overhead factor established by OMB for Federal Agencies will understate their true costs. An A-E firm’s overhead costs are established by DCAA audits in accordance with the FAR. If Federal Agencies are to be permitted to compete for A-E services, OMB needs to develop comparable overhead factors that reflect the true costs incurred by Federal agencies, ones that are commensurate with all of those incurred by the private sector.

7) Attachment F – Definition of “Agency Source”

Insert after “Agency Source” the following new definition:

“Direct A-E Services. Activities of professional architects-engineers, as defined by applicable state law, which requires their work to be performed or approved by a registered architect or engineer and whose selection for Federal work is based on the competence and qualifications of the prospective contractors. A-E includes other professional services of an architectural or engineering nature or services incidental thereto (including studies, investigations, surveying and mapping, tests, evaluations, consultations, comprehensive planning, program management of design execution, conceptual designs, plans and specifications, value engineering, construction phase services, soils engineering, drawing reviews, preparation of operating and maintenance manuals, and other related services) that logically or justifiably require performance by registered architects or engineers or their employees.”

Conclusion

The Design Professionals Coalition and the employees of its member companies applaud OMB’s initiative to revise OMB Circular A-76 and related policy documents and we thank you for this opportunity to comment on them.

Sincerely yours,

Thomas J. O'Neill

Chairman