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

cc:
Subject: Comments on Draft OMB Circular A-76

This is in response to OMB's request for comments on the draft revised OMB Circular A-76. I am a Government attorney. I am submitting these comments in my personal capacity. The views expressed in the following comments are mine alone and do not necessarily reflect the views of my agency or any other agency of the United States Government.

1. The cover of the Circular indicates that it is effective upon publication in the Federal Register and applies to all activities where the solicitation is dated on or after 1 Jan 03. However, the Federal Register publication was a notice, not an interim rule. Therefore, it is not clear whether the Circular actually does take effect on 1 Jan. This matter needs to be clarified.

2. The term "4.e official" first used on page 1 is not very descriptive. I recommend it be replaced by a more descriptive title, such as Competitive Sourcing Official.

3. Attachment A indicates that ISSAs are covered by the Circular. I believe ISSAs should not be included in the A-76 process. ISSAs are not necessarily commercial activities, and use of devices such as ISSAs should be governed by the Economy Act and other applicable statutory authority, not Circular A-76. As an aside, I note the term "ISSA" is not defined in this Circular.

4. Attachment A provides a somewhat cut-down discussion of what is and is not an inherently governmental function. This discussion appears to have been taken from OFPP Policy Letter 92-1, which provided many examples of each type of activity. While I recognize that OMB did not want to provide examples, nonetheless, I feel that providing some examples would be helpful.
Accordingly, I recommend that some examples of inherently governmental activities and commercial activities be included somewhere in this Circular.

5. Attachment A provides very specific times for challenges and appeals to the FAIR Act Inventories. It requires the Inventory Challenge Review Authority to perform his functions within 28 working days of receiving the challenge, and the Inventory Challenge Appeal Authority to decide the matter within 10 working days of receiving the appeal. There is no ovision for extending these times for good cause. I recommend that there be such a provision because not every case is amenable to rational resolution within these time frames.

6. Attachment B of the new Circular requires that Standard Competitions be completed within 12 months of announcement. I believe this time frame is completely unrealistic, particularly for agencies (such as NASA) that have little or no experience conducting cost studies. Indeed, the agency with by far the most experience, DoD, rarely completes even single function studies in less than 18 months. This unrealistic schedule,

if retained, will cause agencies to cut corners and rush to meet arbitrary deadlines, to the detriment of the credibility and fairness of the process. Even though the revised Circular permits certain preliminary activities prior to the public announcement, I do not believe that it is reasonable to expect a cost comparison to be completed in 12 months. Accordingly, I recommend this issue be revisited. I don't know what a reasonable schedule would be, but I believe it should be no less than 18 to 24 months. Further, the Circular does not state what the consequences are if an agency fails to complete the competition within the mandated time. While one extension is possible (see comment 12 below), I would expect that there should be some impact or remedy for not meeting the timeline, and that it should not be that the entire process to that point becomes void. Also, the Circular should indicate whether litigation will toll this time line.

7. Attachment B, Section B.1 purports to make the Agency Tender Official (ATO) a "directly interested party", conferring upon the ATO the standing to file protests at the GAO and the Courts. It is not clear that OMB can confer jurisdiction for those bodies. Further, by permitting the ATO to file protests, the process will be slowed in the event that a contractor wins a competition. While I recognize this is one of the issues frequently criticized by Government employees as being unfair, it is not clear that making the ATO a directly interested party will enhance the efficiency of the process, nor do I know whether the GAO or the courts will agree with OMB on this issue, given that their jurisdiction derives from CICA and related statutes, not from this Circular. I also note that the ATO is chosen by management. As such, the ATO represents management, not the employees who are impacted by the competition. If the ATO refuses to pursue and appeal or protest, this could spark challenges to his or her actions through the Civil Service laws and regulations rather than through the Circular. Finally, if the ATO, an inherently Governmental official, is to be allowed to litigate these matters, who will be that person's attorney? If it is agency counsel, this puts the agency in the position of litigating against itself.

8. Attachment B, Section B.3.a.(d) tasks the Human Resource Advisor (HRA) to make public announcement at the local level and in FedBizOpps and include in the announcements the agency, location, resources being competed and agency officials responsible to its completion. These responsibilities are more properly those of the Contracting Officer, rather than the HRA.

9. Attachment B, Section B.3.a.(f) tasks the HRA to provide post-employment restrictions to employees. Under regulations (5 CFR 2638.202(b)(4)) promulgated by the Office of Government Ethics pursuant to the Ethics in Government Act, this responsibility is that of the Designated Agency Ethics Official, or his or her designee. This ethics function is not ordinarily delegated to the HRA, who lacks both the training and experience to perform this function. Therefore, I recommend this provision be deleted and that the Attachment be amended to require the DAEO or designee to provide ethics advice to affected employees.

10. Attachment B, Section C.1.b.(1) requires the 4.e official to hold Competition Officials accountable for timely and proper conduct of Standard Competitions. I note the Circular does not require the 4.e official to provide the necessary resources to conduct the competitions within the mandated time frame. If personnel are to be held accountable,I believe they should be provided the resources to perform the job, and that requirement should be included somewhere in this Circular.

11. Attachment B, Section C.1.b.(2) - I recommend that Attachment F include a definition of "Performance Decision". Since this action triggers the clock for the appeal process, I believe there should be a clear and readily locatable definition for this term.

12. Attachment B, Section C.2.a.(3) reiterates the 12 month time requirement, and allows a single six month extension if the 4.e official obtains approval from the Deputy Director of Management at OMB. As indicated earlier, I believe the 12 month requirement is not realistic. The "safety valve" provided here also is not particularly helpful, because it requires approval from both a high level official within the agency and approval from OMB. I recommend that the 4.e official have the authority to grant extensions without having first to obtain permission from OMB. If OMB is not willing to accept this suggestion, then in the alternative, I recommend that if OMB fails to respond in a short period, e.g., 10 working days, that approval is deemed to have been granted.

13. Attachment B, Section C.2.a.(11) defines a compliance matrix that, among other things, refers to CDRLs (Contract Data List Requirements). This is a document used by DoD. Civilian agencies such as NASA do not make use of CDRLs. I recommend this matrix be clarified so as not to require use of DoD documentation systems. Agencies should be able to use the systems they use currently in their contracts.

14. Attachment B, Section C.3.a.(1) requires that any part of an Agency Tender be released to interested parties in an administrative appeal after a Performance Decision is made. If the MEO used subcontractors, those subcontractor proposals may well contain proprietary information. This Circular fails to address that matter. I recommend that the Circular be revised to indicate that proprietary information of contractors and subcontractors may not be released to interested parties except under Protective Orders such as is done in GAO protests. If an interested party does not have outside counsel, then the information should not be provided to that interested party.

15. Attachment B, Section C.3.a.(2) states that failure to submit the Agency Tender by the due date may result in it not being considered. This is a very harsh result that will deprive Federal employees of any chance to compete for their jobs. Because the employees do not have appeal rights under this Circular (see Section C.6.a, which vests that right in the ATO, not the employees or their labor representatives), this provision raises the perception that the process is not fair. If the ATO fails to perform his or her job within the time frame, the Government employees could lose their jobs for less than appropriate reasons. Their remedy, if any, would be found in the procedures set forth by the Civil Service laws and regulations. This perception of unfairness is further enhanced due to the rigid 12 month schedule, which, as I have said before, is not realistic.

16. Attachment B, Section C.3.a.(3) requires the Source Selection Authority (SSA) to conduct negotiations with the ATO. Such duties normally are carried out by the contracting officer. This problem appears repeatedly throughout the Circular. I recommend the Circular provisions be revised to indicate that the SSA will conduct negotiations through the CO, rather than to task the SSA to perform this duty himself.

17. Attachment B, Section C.3.d.(2)(b) requires the SSA to provide a debriefing to the ATO. Such duties normally are carried out by the contracting officer. I recommend the Circular clarify that the SSA should do this through the CO. The Circular is inconsistent in stating how the SSA performs his or her duties. In some instances it is through the CO, in others it is not. To be consistent, I recommend that the SSA work through the CO and SSEB (where appropriate). Our experience is that in many instances SSAs lack both the time and experience to perform all of these duties themselves. The Circular needs to take these realities into account.

18. Attachment B, Section C.4.a.(1)(a) requires the SSA to evaluate the offers. This duty normally is carried out by the Source

Selection Evaluation Board (SSEB). I recommend the Circular clarify that the SSA should do this through the SSEB. See comment 17 above, as well.

19. Attachment B, Section C.4.a.(1)(b) requires the SSA to perform a cost realism analysis of the agency tender, public reimbursable tender and the private section bids and proposals. These duties normally are carried out by the contracting officer and/or the SSEB. I recommend the Circular be clarified to indicate the SSA shall do this through the CO and SSEB. See comments 17 and 18 above, as well.

20. Attachment B, Section C.4.a.(2) indicates the Performance Decision is made when the SCF is certified in accordance with paragraph C.4.b. There is no paragraph C.4.b in this Attachment.

21. Attachment B, Section C.5.a talks about revising the PWS at the end of each performance period to reflect requirements and "scope changes" made during that performance period. It is not clear what is mean here by the term "scope changes". Ordinarily changes in the scope of a contract are cardinal changes that effectively are new procurements and must be justified as such. Is it the intent of this Circular to permit out of scope changes to the resulting contract or agreement? If so, that would seem to circumvent the intent of the process described by the Circular. Further, if the MEO wins the competition, such changes could force changes to the overall manning and grade structure of the organization and can force changes to position descriptions.

It is not clear from this provision how these scope changes square up with the Civil Service rules for personnel within the MEO and outside of it and how they compete for promotions or avoid being RIF'd due to changes to their jobs which render them no longer qualified to hold the position.

22. Attachment B, Section C.5.a.(3) and (4) - I recommend Attachment F include a definition of the term "Letter of Obligation".

23. Attachment B, Section C.6.a.(1) makes the ATO an interested party for purposes of an administrative appeal, but excludes unions. Effectively, this provision eliminates the current right of employee representatives to file administrative appeals. In this regard, see comment 15 above concerning the perceived fairness of this process.

24. Attachment B, Section C.6.a.(4)(e) permits suspension of implementation of the Performance Decision for "30 days" or less. First, the Circular needs to clarify whether this is 30 calendar days or working days.

Second, since a decision could take longer than this period, is it the intent of the Circular to require implementation of the Performance Decision even if the Administrative Appeal Authority has not yet decided the case? I believe a Performance Decision should not be implemented until after the appeal has been decided.

25. Attachment B, Section D.1 - The reference to "FAR 52.203" should be to FAR 52.207-3.

26. Attachment B, Section D.2.c.(1) - Define the term "directly affected personnel".

27. Attachment B, Section D.3 - The reference to "paragraph D.3 above" is not clear, since this is paragraph D.3.

28. Attachment C, Section B states that direct conversion certifications shall indicate that the cost of obtaining the activity from another source is expected to be "fair and reasonable". It seems that the cost should be less than the cost of the current activity, vice "fair and reasonable". If the cost will exceed the current cost, it is not economically reasonable to make the conversion. In addition, often realignments occur gradually, when employee duties are redefined in light

of evolving agency requirements. Requiring explicit identification of such shifts, public announcements and certifications may not be realistic and could adversely affect agency management flexibility. Using a process of attrition and then backfilling with contractor support will be very hard to do if the process mandated by the draft Circular must be followed in such situations.

29. Attachment C, Section D makes the Business Case Analysis (formerly the streamlined process) applicable to activities of 50 or fewer agency civilians. The process under the current Circular applies to activities of 65 or fewer FTE. I believe the higher number should be retained, particularly in light of the accelerated Standard Competition process, that must be completed in 12 months. If that time standard is not changed, then I should minimize the number of activities that are subjected to the Standard Competition process so as to avoid the probability of failing to complete the competition within the mandated period.

30. Attachment C, Section D.1.e requires that the Business Case Analysis be completed in 15 working days. I believe that standard is unrealistic. Just the process of finding and analyzing four comparable fixed-price contracts easily could take longer than fifteen working days. A more reasonable standard needs to be applied to this process.

31. Attachment C, Section D.1.f requires the 4.e official to certify that the cost of converting the activity to another source is "fair and reasonable". Again, I believe the standard should be that the cost is less than the cost of the current activity. See comment 27 above.

32. Attachment C, Section E.1 requires appointment of competition officials, announcements, development of criteria, and publication at the local level and in FedBizOpps of any direct conversion, regardless of size or impact upon employees. This requirement may be unrealistic and adversely affect management flexibility.

33. Attachment C, Section E.2.b and E.2.c - The references to paragraph C.6 of Attachment B are not correct. They should be to paragraph C.5.

34. Attachment D deals with ISSAs. For the reasons discussed in paragraph 3 above, I believe this Attachment should be removed from the Circular.

35. Attachment E, Section A.9, states that the cost of conducting a Standard Competition shall not be calculated. This ignores a significant drain on agency resources and is relevant to ensuring the cost of going through the process is exceeded by the savings realized. I believe these costs need to be captured in some way.

36. Attachment E, Section A.10 requires the SSA to perform the cost realism analyses. As indicated in paragraph 19 above, that function more properly is performed by the CO.

37. Attachment E, Section B.1.b.(1), fourth line - Should "ertime" be "overtime"?

38. Attachment E, Section B.1.l, addresses use of volunteers, inmate labor and borrowed military manpower, and says that these sources may be included only if the solicitations states such labor is available to all prospective offerors. As a practical matter, these types of labor rarely will be available for use by all prospective commercial offerors. This provision prevents an agency from factoring in one of the advantages accruing to it by virtue of its status as a governmental entity, and is not offset by similar rules that would prohibit commercial offerors from bidding based on advantages that accrue to commercial entities, such as accelerated depreciation.

Accordingly, I recommend this provision be revised to delete the requirement that the solicitation state such labor is available to all prospective offerors as a "common cost" labor source.

39. Attachment E, Section B.3.h.(2) mandates that if an Agency is using an award fee contract, that 65 percent of the total award fee pool be included when calculating contract costs. Historically this is a very low percentage. A number such as 85 or 90 percent of the award fee pool would be more realistic. This comment also applies to Attachment E, Section C.1.b.(4).

40. Attachment F, definition of "Contracting Officer" - In the second line, the word "Evaluation" needs to be added between "Selection" and "Board".

41. The Circular should also address the interplay of the Civil Service laws and merit protection principles as they impact personnel involved in the process. It does not appear to us that the impact of these laws and regulations has been fully taken into account in the draft Circular.

I appreciate this opportunity to provide comments. While I believe the draft Circular is a good start towards improving the competitive sourcing process, there is still considerable clarification and revision necessary to ensure that it is a fair and credible process to all players.