"Lloyd, Robert E" <LloydRE@state.gov>
12/16/2002 02:19:55 PM

Record Type: Record

To: "'a76-comments@omb.eop.gov'" <a76-comments@omb.eop.gov>

cc: David C. Childs A-76comments/OMB/EOP@EOP
Subject: Comments on Revised OMB Circular A-76

Attached are the Department of State's comments on the proposed revision to OMB Circular A-76 dated November 14, 2002.

Rob Lloyd
Director, Policy Division
Office of the Procurement Executive

(These comments have been cleared by the Procurement Executive and the Assistant Secretary for Administration.)

- Rev-A-76-Comments.doc

Department of State Comments on Revised OMB Circular A-76 (draft of 11/14/02):

The Department appreciates the positive steps that OMB has made to improve the way A-76 cost comparisons work. We believe that allowing agencies to use both negotiated and sealed bidding techniques will provide a needed measure of flexibility that has not always been present in the past. Nevertheless, we have several concerns about the revised circular:

1. **Non-FAIR Act Positions**. Attachment A, paragraph B.1 requires agencies to inventory commercial positions not subject to the FAIR Act. This is a considerable burden whose cost would not exceed the benefit envisioned. We believe the focus should be on complying with the FAIR Act, so agencies should not be required to conduct an additional inventory of positions that, by definition, are not subject to the primary focus of this Circular, namely, implementing the FAIR Act. We are concerned that resources will be diverted to the non-FAIR inventory that could better be spent on compliance with this Circular.

2. **Foreign Nationals.** The revised Circular exempts foreign nationals in Attachment A, paragraph C.1.b, but it should also exempt Foreign Service Officers stationed overseas, as agreed to in June of this year between the Department and OMB.

3. **Timelines.** The revised Circular establishes rigid timelines for completion of the standard competition process and direct OMB oversight and involvement in any extensions. We believe this will be counter-productive. Each competition is unique, and circumstances may dictate alternative time frames, due to delays arising beyond agency control during the competition process. No other type of acquisition has such inflexible

timelines. By insisting on arbitrary milestones, Attachment B of the revised Circular may have the unintended effect of discouraging agencies from conducting competitions, especially where experience has shown that delays occur through no fault of the agency. For example, an agency that needs 9 months to gather its requirements and issue a solicitation, but can award a contract in 3-1/2 months instead of 4, the "4.e. official" must make approve this 2-week extension beyond the required 12-month period when the competition begins and notify the OMB Deputy Director for Management. Similarly, an agency that does a good job getting lots of competition (10 proposals instead of only 2 or 3) should not be penalized when the proposal evaluation process takes longer than expected.

Likewise, we do not believe that a 15 working day period is sufficient for completion of a Business Case Analysis for a direct conversion (Attachment C, paragraph D.1.e). We question whether such a system makes the best business sense for promoting the goals of competitive sourcing. In fact, these rigid timelines create an incentive to avoid competitive sourcing entirely.

There is an alternative:

- If OMB's goal is to track the progress of each study, then when an agency publishes a FedBizOpps announcemenet, OMB will have notice of the agency's plans. OMB can request ad hoc status reports at any time. OMB can examine the specifics of each study and alert the agency when problems appear. The solution to OMB's concern about delayed studies is for OMB to follow FedBizOpps postings and establish OMB's own tracking system, which can result in whatever communication with the agency is needed. In this way, each unique study can be managed as the circumstances dictate.

4. **Roles and Responsibilities.** Attachment B of the revised Circular establishes a complex web of responsibilities for independent officials involved in the competitive sourcing process. We believe it may be difficult for non-DOD agencies to implement such a system. In addition, paragraph C.1.b(1) requires that the "4.e. official" conduct annual performance appraisals for the ATO, CO, HRA, SSA, and AAA. In most cases, those officials will not be direct reports of the "4.e. official," thereby creating an untenable situation in terms of personnel management. For example, the "4.e. official" would have to write a performance appraisal on the Contracting Officer, who may be a GS-12 or GS-13 employee located several organizational layers below the "4.e. official." Typically, the "4.e. official" will be a political appointee, so the revised Circular creates an environment in which a political appointee would write a performance appraisal on a career civil servant who may be three or four supervisory layers beneath the "4.e. official." Given the existing issues with workforce morale, we believe there will be a distinct reluctance by most parties to participate in any competitive sourcing solicitation due to this level of management. In addition, the right of first refusal has been considerably limited in the revised Circular (Attachment B, paragraph D.2).

5. **Statement of Objectives.** It is unclear in Attachment B, paragraph C.2 and C.4.a.(3)(c)2a whether a Statement of Objectives (SOO) approach can be used in lieu of a performance work statement (PWS). The biggest trend in recent years concerning performance-base contracting is to use the more streamlined SOO approach when it is impractical to develop a PWS or when the agency wishes to focus more on solutions and outcomes rather than how the work is done. The Circular does not mention the SOO technique, so we are unsure whether it is permissible. We believe the SOO approach should be encouraged, as it would provide yet another means of advancing competitive sourcing, and we note that "decreasing the complexity of performing source selections" is a goal stated elsewhere in the Circular (Attachment B, paragraph C.2.a(11)).

6. **Bonds.** Attachment B, paragraph C2a(10) calls for the exclusion of any *"...costs associated with* the performance bond from the contract price before it is entered on Line 7 of the SCF." This is, nevertheless, a cost—one that could be categorized as a type of insurance. In Attachment E, Section B 3e, insurance costs for the in-house activity are not excluded. So, if the contractor's performance bond cost is to be excluded, some rationale for that exclusion should be stated.

7. **Agency Tender.** Paragraph C.4.a.(3)(c)2 in Attachment B implies that the Agency Tender must always be determined technically acceptable. What if it is so technically deficient as to preclude a determination of acceptability?

8. **Post Competition Accountability.** Attachment B, Section C5, "Post Competition Accountability" section imposes a substantial burden on agencies for which the benefits do not seem to warrant the costs. Conducting an A-76 cost comparison is an expensive, time-consuming operation. Now OFPP desires the conduct of mini A-76 reviews on an annual basis, with the number of such reviews increasing over time as more activities are contracted or stay in house as the result of A-76 decisions. Added to this burden is the question of whether Government employees in an MEO would have any right to refuse an increased or otherwise altered workload on the grounds that it would increase the chances that their jobs would be contracted out in the next competition.

   The size and sometimes the nature of an activity tend to change over time because annual appropriations and Congressional mandates vary. Also, mostly to seek greater efficiencies, agencies reorganize in minor or major ways. The result of such factors means that the initial perform work statement (PWS) often bears little or only a general relationship to the one that appears two or three years later. In these many cases there will be no clear answer to the question of whether an activity's costs went up or down after the A-76 competition. Essentially, it will not be the same activity. It is doubtful, therefore, that the benefit to U.S. taxpayers of tracking of all such changes and the related costs is worth the expense.

   Furthermore, whether or not this costly annual this process can be avoided, there is the issue of whether Government employees have any rights to appeal changes to their workload if such modifications might lower their overall productivity and, thus, their competitiveness. Is so, that unfortunate situation would be make their management much

more difficult. For this reason, the revised Circular should explicitly state whether or not employees would have any such rights, as well as what would be the agency's rights.

9. **Impact on Small Business.** Attachment C eliminates the preferential procurement exception that allows direct conversions using 8(a) contracts in the current Circular. We believe this exception should be retained.

10. **Fixed Price GSA Schedules**. The direct conversion approach using a Business Case Analysis in Attachment C, paragraph D.2.b only permits comparison with existing fixed price contracts. Many of the contracts that are normally used for comparison are labor-hour or time-and-materials contracts on GSA schedule. We believe that insisting on comparison only with fixed price contracts will effectively eliminate direct conversion based on Business Case Analysis as an option for agencies to use in promoting competitive sourcing.

11. **Direct Conversion.** Paragraph E.2.a of Attachment C requires a performance work statement to be prepared for a direct conversion, yet this subject is not discussed in the Business Case Analysis section (paragraph D), so it is unclear how this should occur and whether there are any time limits, in light of the 15-day rule in D.1.e. Also, Attachment C, Section B says, with regard to direct conversions, *"...the cost of obtaining the activity from another source is expected to be fair and reasonable in accordance with this Circular, OMB Circular A-25, when appropriate, and the FAR…."* Unfortunately, A-25 really does not provide any definition or guidance on how to determine fair and reasonable prices in the direct-conversion situation. To a large degree, fair and reasonable should be in comparison to what the activity is costing the Government with in-house performance. Since that will not be measured, the Circular itself should provide some guidance on how to determine fair and reasonable, instead of just making general references to another OMB circular and the FAR.

12. **Interagency Agreements**. Attachment D, paragraph A imposes strict controls and significant administrative burdens on customer agencies that use interagency agreements (using the DOD term "inter-service support agreements"). We are concerned that such action will inhibit cross-agency coordination in support of key initiatives (such as security programs) and promote "stovepipe" approaches. In many cases, other agencies are doing us a favor to do work for us, and may not even charge a fee. We believe the benefits of interagency agreements outweigh the cost of the restrictions that would be imposed by the revised Circular, so we recommend that these restrictions be lifted. As a minimum, the dollar threshold should be raised to $5 million (to coincide with the test program for commercial item acquisition) and clarified (the term "revenue generated by the reimbursable rate" is used, which implies that only agreements that involve $1 million in service fees, rather than $1 million in service provided, are affected).

    In addition, an exception should be made for overseas offices. At American Embassies and Consulates, an OMB-approved method known as ICASS (International Cooperative Administrative Support Services) is used to arrange for transactions among agencies. To

impose A-76 onto this structure would be an unreasonable burden with no benefit to American business.

13. **Costs of Competition.** In Attachment E, we believe the costs of conducting a Standard Competition should be calculated (and paragraph A.9 deleted). Otherwise, it is entirely possible that the cost of competition may exceed any savings to be obtained from the competition. There must be some way to account for the significant costs incurred by agencies in implementing competitive sourcing, if it is to make the most business sense.

14. **Public Announcement**. At various points (such as paragraph B.3.a of Attachment B and E.1 of Attachment C), the revised Circular requires "public announcements at the local level" but does not define this term. We would appreciate an expansion of the definition of "public announcement" in Attachment F.

15. **A-E Services.** The Circular is unclear as to its application to architect-engineering services. Following the new cost-technical tradeoff approach (integrated) may not be in full compliance with the Brooks Act. If A/E services are considered subject to competitive sourcing, then the Circular should describe how to comply with FAR Part 36 in addition to FAR Part 15.

16. **12% Overhead.** In Attachment E, paragraphs B1b(2) & *B4 and C3, t*he Circular requires, on the cost of the in-house activity, under **indirect labor,** that *"The agency shall include in the Agency* Cost Estimate, the cost of indirect labor to reflect personnel who are responsible to manage, control, regulate, preside over, oversee, or supervise MEO related activities but are not dedicated to the MEO as a direct labor cost."

    Under **overhead costs**, the agency must include a 12-percent overhead factor (i.e., 0.1 x total personnel costs) to represent *"costs that are not visible, allocable, or quantifiable to the agency, activity or MEO."*

    The 12-percent overhead factory is a carryover from the existing Circular, but apparently the definition has changed. The current Circular includes "management and administrative expenses" in the overhead rate. Presumably these, rather than the invisible costs, made up the bulk of the 12 percent. Now, the 12 percent is totally attributable to invisible costs, which seems to make that a relatively high and arbitrarily established expense for costs that cannot even be explained or documented.

    Furthermore, the now separately calculated, additive cost of personnel who "...manage, control, regulate, preside over, or supervise MEO-related activities...," will, as defined with such a string adjectives, now increase what used to be "management and administrative expenses."

    In addition, there is no reference to a distinction between personnel who do all those things under the MEO and those who actually would be eliminated or have their work proportionally reduced if the MEO were to be contracted out. What is missing here is a

phrase similar to the 8/83 OMB Circular A-76 that reflects reality by asking for "…only those costs that will not continue in the event of contract performance."

In contrast to these rising costs of in-house performance, all that is included on the private-sector firm cost calculation for Government personnel overhead is the cost of contract administration. For activities with under 100 employees—which would constitute the great majority of all commercial activities—these costs range from a factor of 0.5 percent up to 4.0 percent. So, for example, if the activity will have 50 employees, contract administration is presumed to be 2 percent of the personnel costs of those employees. Conversely, if the MEO remains in-house, Government personnel overhead equals 12 percent plus whatever is the estimated cost of those people who regulate, preside over, etc. the activity. In most cases the result probably will be an overhead percentage in the high teens. The fact is that after contracting, the Government will still have to perform a considerable amount of management, planning, control, etc. with regard to the contracted activity.

In summary, the proposed Circular in Attachment E has two defects that should be addressed:

There should be, in the Circular or in some official background papers, an explanation of how the 12-percent overhead factor remains at that level even though its principal component (management and administrative expenses) was transferred elsewhere. A close examination may well point to the conclusion that the 12-percent factor should be reduced.

When describing the overhead expenses, language in the Circular should state clearly that only control, regulate, etc. expenses that would not remain after contracting should be included.

17. **Contract Administration Costs.** Attachment E, paragraph C.3, continues the underestimation of **contract administration** costs put forth in the 1999 version of the Circular (which reduced these costs from those in the 1983 version). There should be an explanation of the empirical basis of what seem to be arbitrary percentages, including reference to the perpetuated idea that contract administration costs as a percentage of staffing become proportionally lower as activities become smaller. In absolute terms they are, of course, lower for smaller activities. In relative terms, however, administration costs for a contract with 11-20 FTE are not one-tenth the cost of a contract for 301-350 FTE. That there is an economy of scale is recognized in the draft after FTE exceed 451, when contract administration costs suddenly—and again arbitrarily—shrink from 11 to 2.5 percent. OFPP should explain why the ratio of administration costs to FTE does not shrink much earlier.