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Comments on Proposed Revision to OMB-A-76

Submitted by Space and Naval Warfare Systems Center (SPAWARSYSCEN), Charleston

December 2002

Attachment D, Commercial Interservice Support Agreements (ISSA)

Background

The proposed language fails to take into consideration the role of a Working Capital Fund engineering activity and the value added by its specific governmental expertise being available to other federal activities. As an example, SPAWARSYSCEN Charleston is a Naval command with unique governmental expertise in engineering, building, integrating, testing, fielding, and supporting Command, Control, Communication, Computer, Intelligence, Surveillance, and Reconnaissance (C4ISR) systems. We bring to bear the "smart buyer" characteristic that is inherently governmental. As a working capital fund activity, we provide this expertise to other government activities, contracting out to the maximum extent feasible the portions of the project that are commercial activities, but retaining as inherently governmental, the ability to provide the technical expertise to:

- Determine the scope and requirements of the proposed project,
- Provide technical oversight and make engineering and programmatic decisions,
- Manage and direct the project to meet the requirements,
- Maintain contract oversight,
- Manage the risk,
- Write the contractual statements of work,

- Evaluate options and the end result, and
- Provide the independent verification and validation of a system.

By layering the inherently governmental expertise on top of the portion of the project that is best performed by the private sector, a working capital funded activity can assist customer agencies in reducing the size of their workforces. Those customer agencies do not have to hire technical experts and can rely on the economies of scale provided by the engineering expertise of other agencies.

Recommendations:

1. Recommend that an additional exception (exception 6) be recognized for reimbursable work between DoD activities. Secretary Rumsfeld has spoken to the need to consolidate service functions into joint operations. The restrictions to be imposed by the proposed changes to OMB Circular A-76 will result in it being harder for DoD activities to work together and share their expertise.

2. Recommend that Working Capital Fund Activities (WCF) be exempted from the competition requirements found in attachment D, Commercial Interservice Support Agreements (ISSA). Recommend adding an exception as follows:

> (7) the supplying activity is a Working Capital Fund Activity with an approved rate structure.

Discussion:

Working Capital Fund Activities as established by 10 U. S. C. 2208 and DoD Financial Management Regulation Volume 11A and B have, implicit in their operation, financial incentives to implement efficiencies and retain a competitive "rate" structure. In order to keep rates competitive, the financial management system favors contracting when it is cost effective. The ability to mange the inherently governmental functions and derive the maximum benefit from commercial activity depends in large part on having the same entity that provides the engineering expertise manages the contract process and administration.

The working capital fund concept allows our command to blend its inherently governmental expertise with best value contracting to acquire technically superior systems for the best cost for the customer command or activity. The existing concept of utilizing a WCF activity with technical expertise promotes the best combination of commercial and governmental interaction--particularly if the desired product is complex and technically sophisticated. Knowledgeable governmental expertise and oversight is essential for systems that have a security or national defense role as well as for systems in which interoperability, or commonality of features is desirable. Requiring federal activities to merely compete the commercial aspects of the work will avoid or degrade the value, advantages, and safeguards provided by the technical expertise of the governmental "smart buyer."

Comment

1. Proposed attachment D apparently changes governmental policy in which it has been considered inappropriate for government activities to compete with the private sector, except where authorized by Congress.

The presumptive mechanism for acquiring supplies and services for the Department of Defense is by contracting with the private sector unless it is determined that government provision of the goods or services is cheaper, 10 U. S. C. § 2462. See also:

- Existing Circular A-76, paragraph 4: "In the process of governing, the Government should not compete with its citizens."
- Various selling statutes (e.g. 10 USC §§2563, 2539b) only allow the government activity to "sell" if it will not represent prohibited competition with the private sector, and
- U.S. Navy Regulations 0835

The proposed language of A-76 purports to require public private competition notwithstanding the current statutory framework.

2. Attachment D appears to be redundant and perhaps inconsistent with the Economy Act, 31 U. S. C. §1535. The Economy Act permits inter/intra agency acquisition where the required goods or services cannot be acquired as cheaply or conveniently from a commercial source. Thus, the Economy Act which usually provides the underlying legal authority for intra-governmental support already requires that a Determination and Finding (D&F) be accomplished to ensure that the goods or services cannot be obtained more cheaply from the private sector. To impose on

that process a separate requirement for competition places the government in a position not only of competing with the private sector, but of undertaking efforts which are redundant, expensive and time consuming in an attempt to ensure low cost. Instead of streamlining an acquisition process to provide goods and services cheaply, conveniently, and rapidly, it makes the process more cumbersome, with no guarantee of best value.

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Attachment B, Public-Private Competition

Paragraph: B1, B2, B3

Background:

The revised circular states that the Agency Tender Official (ATO) shall be "… independent of the CO, SSA, and AAA." (B1). The circular states that the SSA shall be "… independent of (1) the activity being competed and (2) the ATO and AAA." (B2).

The revised circular states that the Human Resource Advisor "…shall be independent of the CO, SSA and AAA." (B)

Comment:

The definitions (Attachment E) do not define or give guidance to the term "independent." Can they be within the same command? Must they be under distinctly different supervision? The circular revisions do not account for HR regionalization within the Navy.

Paragraph C2a (1)

Background:

This subparagraph states that the solicitation shall not be issued that "places additional risk on one offeror over another, violates industry service or service grouping norms; or omits statutory obligations or necessary regulatory requirements."

Comment:

Without further definition these seemingly egalitarian and innocuous requirements will be the fertilizer for numerous protests. They should be deleted unless there is very clear definition of what is proscribed.

Paragraph C2a (15)

Background:

This subparagraph states that, "The 4.e official shall assign individuals responsible for the QASP (Quality Assurance Surveillance Plan) that are external to the selected service provider (i.e. agency, private sector or public reimbursable source) to perform quality assurance."

Comment:

This requirement ignores military command distinctions. If the QASP is to be "external" will that require a contract? Will it require an A-76 study itself in order to determine what activity will provide the QASP service?

Paragraph C3 (4)

Background:

In describing the Most Efficient Organization (MEO) this subparagraph states that the MEO can be composed of Federal employees or federal employees and "existing contracts." "New contracts shall not be created as part of MEO development."

Comment:

It is difficult to envision how "existing" contracted work is to part of a MEO. The MEO must be directly responsive to the PWS. Why would work that is already performed by contract be part of the PWS? If the PWS includes work that is currently contracted out: a) would an MEO be allowed to change the performance of that existing contract, and if so, would the A-76 process be allowed to interfere with an existing contract, b) to have a level playing field, would commercial sources be allowed/required to subcontract with the current commercial contractor? This provision requires examples for clarification.

Paragraph C3a (5), (7)

Background:

Agency cost estimate and phase-in plan are required.

Comment:

The revisions do not contemplate the current contractual arrangement between the Navy and EDS as NMCI prime contractor. It is assumed that almost any PWS would involve the use of the IT that is the subject of the NMCI contract. Should private offers be required to independently

contract with EDS? Should a modification of the EDS contract be required if the service provide is not the agency?

Paragraph C4c

Background:

This subparagraph states that an agency may accept an offer or agency tender that is not the lowest priced if that offer is within the agency's current budgetary limitation.

Comment:

The term "agency" could mean the Department of the Navy/Army/Air Force etc. A literal reading of this subparagraph would mean that any offer might be accepted if less than the entire agency budget. This unlikely, but possible, eventuality should be addressed or modified.

Paragraph C6a(1)

Background:

This subparagraph states, "While private sector proposals shall not be a subject to appeal, questions regarding a private sector's compliance with the scope and technical performance requirements of the solicitation may be appealed."

Comment:

Considerable clarification is required.

Paragraph C6a (4)(c)

Background:

This subparagraph states that, "The AAA shall not …(2) review any issue not specifically addressed in an appeal including corrections to documentation (e.g. correcting mathematical errors)…"

Comment:

Presumably any mathematical errors would be corrected by the time of an AAA decision. However, the literal meaning of the revision provision is that the AAA is required to ignore mathematical errors that could determine the result of the competition. There should be a capability to correct errors that could affect the competition, or an alternative process should be provided.