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

cc:

Subject: A-76 Comments of NSPE

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December 19, 2002

Mr. David C. Childs
Office of Federal Procurement Policy
Office of Management and Budget
725 17th Street NW
New Executive Office Building, Room 9013
Washington, DC 20503

Subject: Review Comments on Proposed Revision to OMB Circular A-76

Organization: National Society of Professional Engineers(NSPE)

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- Enclosures: (1) Review Comments on Proposed Revision to OMB Circular A-76
(2) NSPE Professional Policy PP No. 63 – Engineering Services for Government Projects
(3) NSPE Professional Policy PP No. 131 – Procurement of Engineering Services (QBS)

Dear Mr. Childs:

The National Society of Professional Engineers (NSPE) represents 53,400 engineers in government, industry, education, construction, and private practice, and would like to offer the comments noted in the Appendix to this letter on the proposed revisions to the Office of Management and Budget's Circular A-76. The Appendix details our comments broken down by page number and section. First, however, we offer some general comments and NSPE's perspectives on federal contracting out.

NSPE actively supports the passage of the Office of Management and Budget's proposed changes to Circular A-76. Greater transparency of the government's commercial activities will result in benefits beyond those presently anticipated. Agencies now competing directly with the private sector in providing engineering and construction management services, such as the Corps of Engineers, the Bureau of Reclamation, the U.S. Geological Survey and others, will now be compelled to compete on a level playing field with the private sector.

NSPE fully supports the revised OMB A-76 Circular's intent to distinguish between commercial and inherently governmental activities that each agency performs. We submit that these suggested changes will in fact lead to lower costs for taxpayers.

Mr. David C. Childs

Clarifying the existing process of contracting out services will serve to open up competition to many outside qualified entities. We all know and appreciate the value that competition brings to the free enterprise system that we enjoy in the United States.

The administration is to be congratulated on this much needed effort to overhaul the existing “contracting out” process. If employed properly, this new competitive outsourcing will not only improve agency performance, but also enable more private sector entities to perform commercial services at lower cost. Certainly, a side benefit is the streamlining of government.

Although NSPE believes that OMB Circular A-76 should be interpreted to contract for engineering services where such services are commercially available, there are several concerns. NSPE’s written Professional Policy *PP No. 63 – Engineering Services for Government Projects* states that we believe strongly that “Engineering organizations within public agencies should:

- a. *Be competently and sufficiently staffed to maintain the competency to carry out their engineering and technical missions that are within the services that are inherently governmental, consistent with the federal FAIR Act (Pub. L. 105-270, Oct. 19, 1998, 112 Stat. 2382), (or state requirement) of the agency;*
- b. *Be assigned engineering activities that permit maintenance of staff competence, training, and advancement for managerial positions;*
- c. *Be supported by regular appropriations adequate for the maintenance of salaries and conditions of employment at professional levels; and*
- d. *Be supervised by professional engineers within the management and policy-making levels of each agency.”*

NSPE’s Professional Policy *PP No. 131 – Principles for Securing of Engineering Services* states that we believe strongly that A/E services shall be “...performed by qualified engineers on the basis of design ability, experience, integrity, and judgment. Engineering is a learned profession, requiring of its members sound technical experience, personal ability, education, honesty, and integrity.” Congress recognized the value, economy, and efficiency in quality in architecture, engineering, surveying, mapping, and related services as far back as 1972, when it enacted the Qualifications Based Selection (QBS) process for the selection of firms for A/E services in Public Law 92-582 (codified in 40 USC 541-544), known as the Brooks Architect-Engineer Act.

December 19, 2002

In short, NSPE believes that reducing the size of government should be a long-term goal that is sought at the local, state, and federal levels, but more importantly government must not be either threatened or afraid of competition from the private sector. This market-based competition can be win-win for both through best value.

After considering input from organizations such as NSPE, OMB should move forward expeditiously with the revised A-76 "Contracting Out" Circular. This effort will serve to lower costs for taxpayers and improve program performance to citizens. Thank you for this opportunity to comment.

Sincerely,

Howard N. Blitman, P.E., F.NSPE
President

Attachments

ENCLOSURE (1)
Review Comments on Proposed Revision to OMB Circular A-76

Attachment A

Page A-1, section B. Inventory Submissions - NSPE is concerned about the motivation that agencies will have in submitting annual inventories by June 30th of each year. If some agencies fail to meet this deadline, how will this be enforced?

Attachment B

Page B-1, The Standard Competition Process graphic - NSPE believes that a box should be shown in the Standard Competition Process graphic under type of acquisition titled "Qualifications Based Selection" (QBS). Traditionally, government procurement procedures have appropriately emphasized awarding of contracts to the lowest bidder, in effect using price as the dominant factor. For many goods and services (i.e., paper, office equipment, desks, eye glasses, even construction services), this process serves the government and the taxpayer well. Many times, however, federal and Department of Defense agencies mistakenly assume professional architectural and engineering services fall into this category. Unfortunately, this assumption ignores such things as costs to administer the preparation of detailed scopes of work, bidding documents, evaluation of bids, and the remedies as well as the consequences of selecting nonqualified, unprofessional design services. Quality and best value should, therefore, always be the primary focus in source selection of Architecture/Engineering and Related Services (A/E) procurements. Only after the most highly qualified firm is selected and a detailed scope of work agreed to should the focus turn to contract price. Congress recognized the value, economy and efficiency in quality in architecture, engineering, surveying, mapping and related services as far back as 1972, when it enacted the QBS process in Public Law 92-582 (codified in 40 USC 541).

Page B-2, section A.2.a. (2) – The term "private sector source" is not defined in the Circular, and therefore should be defined to mean a private, for profit individual, association, partnership or corporation. The Circular should not permit state and local government units, universities, or other tax exempt or not for profit entities to compete for commercial activities of the federal government.

Page B-2 and B-3, section A.2.b. (4) – An expansion of a commercial activity should be subject to Direct Conversion or Standard Competition when the increase in operating cost is 10 percent not 30 percent as proposed. A 30 percent expansion is too high, lends itself to incremental expansion to avoid competition, and denies the government the benefits of competition.

Page B-6, section C.2.a. (3)&(4) – The Circular is currently in conflict with the Statute pertaining to Architecture/Engineering and Related Services (A/E). The Statute (40 USC

541 et.seq.) requires contracts for A/E services to be awarded on the basis of demonstrated competence and qualifications, not price competition. The Circular's standard competition process includes cost/price competition. Therefore, the Circular needs to be revised in order to be in compliance with Statute. It should be noted that there is a provision in the Statute that is implemented in FAR Part 36, including a definition of A/E services. Section C.2.a. (3)&(4) should definitely be revised to reflect the use of FAR Part 36 for A/E services, or such services should be subject to the direct conversion process.

Page B-6, section C.2.a (4) Source Selection Provisions – References to Paragraphs C.4.b.(a), C.4.b.(b)1., B.4.b.(b) 2. in the statement do not appear to follow the subsequent paragraph numberings.

Page B-9, section C.3.a. (5) – With regard to A/E services, Statute 40 USC 541 et. seq. does not permit either an agency cost estimate or a private sector cost estimate. In this section, and all subsequent sections of the Circular, references to bidding, costs and tenders should include a note that it does not apply to A/E services.

Page B-9, section C.3.a (9) Delayed Delivery – This section needs to be reconsidered and perhaps redrafted. If the Agency Tender Official (ATO) does not submit the Agency Tender to the Contracting Officer in time, offerors that have gone to the trouble of submitting proposals will most likely have them sent back without consideration, until an Agency Tender is received. This is unfair, expensive and wasteful for those submitting tenders and should be guarded against. The Contracting Officer should be instructed to proceed with source selection without the Agency Tender unless there is a compelling reason not to do so.

Page B-13, section C.4.a. (3)(c) Cost/Technical Tradeoff (CTTO) Source Selection – More discussion is needed to clarify how qualifications based selection (QBS) and best value will be used in lieu of cost for the selection of A/E services under CTTO source selections. It should be noted that preliminary, unsubstantiated budgetary limitations not be used a means to prevent private sector firms from consideration in CTTO source selections.

Attachment C

Page C-2, after section A.3. R&D – Serious consideration should be given to adding a provision that permits direct conversion of A/E services, as required and defined in 40 USC 541 et. seq. and FAR Part 36, provided such competition is carried out in accordance with 40 USC 541 et. seq. and FAR Part 36.

Page C-3, section D.2.b. Business Case Analysis Documentation – Why is the threshold of four (rather than three) comparable, existing, fixed price, federal contracts of similar size, workload, and scope used? Otherwise the agency is compelled to perform a Standard Competition.

Attachment D

Page D-3, section H.1. – Before a federal agency can provide commercial services to state and local governments, the proposed provision of those services should be made publicly known in either *FedBizOpps* or the *Federal Register* to provide the opportunity for the private sector to make an offer.

Page D-4, section H.1.d. – A request for services which is forwarded to OMB for approval should require a *FedBizOpps* or *Federal Register* notice requirement so that the private sector can either comment on or respond to in order to help determine whether the request indeed involves a commercially available service that the private sector might provide. Such transparency will serve to provide a market test for the request and prevent abuse during the process.

Attachment E

This section is reasonably well drafted but quite complex and will likely need further clarification. It is unclear what level of support documentation, calculations, spreadsheets, etc., will be required to be submitted with the completed Standard Competition Form (SCF). It is also unclear whether the authorizing legislation will cover more of the specifics on compilation of the SCF.

Attachment F

NO ACTION REQUESTED.

ENCLOSURE (2)
**NSPE Professional Policy PP No. 63 – Engineering Services for Government
Projects**

PP No. 63—Engineering Services for Government Projects

ADOPTED: Sept 2000

LATEST REVISION: Sept 2000

SUNSET: Sept 2005

NSPE CONTACT: Legislative & Government Affairs

It is the policy of the National Society of Professional Engineers to advocate and support the following:

1. NSPE recognizes and subscribes to the free enterprise system.
2. NSPE believes that public agencies should rely on the private sector for engineering services where such services are commercially available and when their own engineers are unable to perform such services.
3. NSPE also believes that public agencies should not advertise to offer services for their staff to perform.
4. Engineering organizations within public agencies should:
 - a. Be competently and sufficiently staffed to maintain the competency to carry out their engineering and technical missions that are within the services that are inherently governmental, consistent with the federal FAIR Act (Pub. L. 105-270, Oct. 19, 1998, 112 Stat. 2382), (or state requirement) of the agency;
 - b. Be assigned engineering activities that permit maintenance of staff competence, training, and advancement for managerial positions;
 - c. Be supported by regular appropriations adequate for the maintenance of salaries and conditions of employment at professional levels; and
 - d. Be supervised by professional engineers within the management and policy-making levels of each agency.
5. Government agencies should contract for engineering services with qualified private engineering and other technical professional consultants consistent with the federal FAIR Act and OMB Circular A-76 (or state requirement) where such services are commercially available and NSPE believes that qualified engineers in private practice, construction, and industry should be selected by government agencies for:
 - a. Projects, which are not inherently governmental;
 - b. Projects for which agency staff needs special engineering expertise;
 - c. Major programs beyond the capability of agency staff requiring the management and continuity of agency engineering staff, and, where management of contracts with private sector engineers requires appropriate technical professional competence to assure quality performance and cost effectiveness.
6. NSPE also believes that there is a need for an adequate number of engineers to staff government agencies whose core mission includes facilities planning, design, construction, research, development; and/or regulatory responsibilities involving engineering, scientific or technical disciplines. Appropriate agency engineering staff will help assure that program management for the procurement of engineering, construction and technical services, will be performed on the basis of qualifications at a fair and reasonable price.
7. NSPE also believes that government engineers should manage services that are inherently governmental (such as budgeting, legislative review and oversight, and contract management, quality assurance and control) and perform such other services (such as planning, design, construction management) to maintain competencies, to attract engineers to public service, or where such services are not commercially available.
NSPE believes that minimum levels of capability in engineering in both government and the private practice sector should be maintained as a necessary and desirable national resource.

Reference: NSPE Board of Directors Action 96-046, 7/96.

ENCLOSURE (3)
NSPE Professional Policy PP No. 131 – Procurement of Engineering Services (QBS)

PP No. 131—Procurement of Engineering Services (QBS)

ADOPTED: Prior to July 1994

LATEST REVISION: July 1999

SUNSET: July 2004

NSPE CONTACT: PEC, PEG, and PEPP Practice Divisions

It is the policy of the National Society of Professional Engineers (NSPE) that all engineering services should be performed by qualified engineers on the basis of design ability, experience, integrity and judgment. Engineering is a learned profession, requiring of its members sound technical experience, personal ability, education, honesty, and integrity.

To implement this principle, NSPE supports a Qualifications Based Selection (QBS) procedure for all engineering services procurement. With QBS, the interests of all professional services users are best served by a selection procedure for all engineering services on the basis of qualifications, including technical competence and staff consistent with the requirement of the project. The selection procedure should address specialized knowledge and skill, experience in the type of project involved, assignment of qualified personnel, ability of the engineers to perform on a timely basis, recognition of the importance of total cost of the project within budgetary limitations, and such other areas of expertise as may be identified by the owner for prime consultant services, or the prime consultant for the subconsultant services.

NSPE recommends a QBS procedure for procurement of *consultant and subconsultant* engineering services that recognizes the desirability of the opportunity for engineers and firms to be considered on their merits in the selection process, and further recognize that a means be provided whereby professionally qualified engineers or firms be ranked on the basis of ability to provide the service, followed by negotiations with the best qualified engineer or firm to determine a mutually satisfactory agreement for the scope of services agreed upon.

Reference: NSPE Board of Directors Action 96-046, 7/96