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Subject: NISH Comments on Proposed Circular A-76

Memorandum for OMB

Subject: Comments on proposed OMB Circular A-76, dated November 14, 2002

From the inception of the A-76 process, the Javits-Wagner-O'Day Act (41 U.S.C. 46-48c) (JWOD) has always been recognized as an integral part of the Government's A-76 process; it is the only preferential source mentioned in the Circular. NISH greatly appreciates the ongoing support that the JWOD Program receives from OMB and understands that no intended changes to existing JWOD procedures were contemplated.

We noted that the revised Circular may alter the process for direct JWOD conversions making them procedurally harder, introducing mandatory cost comparisons, and setting up a potential conflict between direct conversion and the JWOD Act. We believe it was the intent of both the Panel and OMB to leave the JWOD direct conversion process as is. However, using the proposed language may create ambiguity.

As you know, it is very difficult for those with severe disabilities to obtain mainstream employment. Unemployment for individuals with severe disabilities is estimated at about 70%. The JWOD Program is one of the most significant programs for employing individuals with disabilities, providing employment for over 37,000 individuals. The JWOD Act provides that selected Federal procurements may be placed by the Committee for the Blind and Severely Disabled (hereinafter, the Committee) on a statutory Procurement List. After the procurement is placed on this list, it remains on this list and must be so procured unless the Committee removes it from the list (41 U.S.C. 47).

The JWOD Program is a win-win program for the Government and the disabled and blind community. The existing Circular recognized this by explicitly permitting direct conversion by a Federal Agency, without regard to size and without cost comparison. We believe that neither the Panel nor OMB, in its revised Circular, intended to change this process.

Under the existing Circular, the language is:

**A commercial activity of any size that is performed by Federal employees may be converted to contract performance, without cost comparison-even if it results in adverse employee actions, if the contract is awarded to a preferential source at a fair market price. At the agency's discretion, a cost comparison may be conducted.**

OMB's proposed change to Attachment C is:

**A. CRITERIA. A direct conversion is permitted when changing to or from an agency ... if a commercial activity meets any one of the following criteria:**

**7. JWOD. An activity may be converted to a source administered pursuant to Section 2 of the Javits-Wagner-O'Day Act (41 U.S.C. 44, 46-48).**

There are several concerns with OMB's proposed change.

(1) First, the procedural language – “any size,” “without cost comparison,” “even if adverse action” and “fair and reasonable price” – has been removed. Agencies are left without this important guidance regarding how to, and under what circumstances, a direct conversion may be made.

(2) Section 2 of the JWOD Act, cited above, states that the Committee may place selected procurements on the Procurement List. It has been the historic practice to work cooperatively with the procuring agencies and achieve agreement as to which procurements are to be placed on the list. Merely citing the Act does not provide any procedural guidelines for conversion.

(3) We believe the citation to 41 U.S.C. 44 to be an error, and the JWOD Act is correctly cited as 41 U.S.C. 46-48c. There is nothing in the JWOD Act about the A-76 process. JWOD and A-76 have co-existed for over twenty years by reasonable accommodation. While JWOD is a minor player in the Federal contracting process, dealing with less than 1% of all procurement dollars, nevertheless, our programs touch virtually all agencies and departments of the Federal Government. It is imperative that clear direction be provided for conversion from agency performance to JWOD.

(4) It would appear, from reading Attachment C, Direct Conversions, that a procedure is contemplated by which direct conversions are permitted to or from an agency if the Criteria of Section A is met, the Direct Conversion procedures of Section B are met, and/or a Competition Waiver is approved under Section C. It is not clear whether JWOD conversions fit under this procedure i.e., whether the 4.e official needs to provide written certification for a JWOD direct conversion. We believe it best to let JWOD direct conversion decision remain at the local contracting level.

(5) We are also concerned that Section D provides for an accelerated Business Case Analysis, for activities with 50 or fewer employees, by which agencies may also covert activities back and forth from agency to private sector. As the Committee establishes fair and reasonable prices for JWOD contracts, and due to the mandatory nature of JWOD contracts once they are awarded, we recommend that such reverse cost comparisons be coordinated with the Committee.

We recommend the following language to Attachment C:

**A. CRITERIA. A direct conversion is permitted when changing to or from an agency ... if a commercial activity meets any one of the following criteria:**

**7. JWOD. An activity may be converted to a source administered pursuant to the Javits-Wagner-O'Day Act (41 U.S.C. 46-48c). Such as activity maybe converted regardless of size or adverse impact**

**and without competition. An initial limited competition between the JWOD contractor and in-house support may be conducted by the agency, but is not required. Subsequent recompetition is to be coordinated with the Committee.**

In addition, there are two other recommended changes.

(a) Page E-13; we recommend the following language change because NISH and NIB are not technically “participating nonprofit agencies.” We are the Central Nonprofit Agencies, 41 CFR 51-3.

#### **4. Additional Costs (Line 9 of the SCF)**

**b. Nonprofit Agency Fees. When a Javits-Wagner-O’Day participating nonprofit agency (as defined in FAR Subpart 8.7) participates in a Competition, the SCF shall include the 4% program fee. This is required to determine the total cost of contract performance to the Government for Competition purposes with the agency cost estimate. The SSA shall determine if the 4% fee is included in the contract price and if so, this contract price is entered on Line 7 of the SCF. If the 4% fee is excluded from the contract price, then the fee shall be entered separately on Line 9 of the SCF.**

(b) We also recommend that a definition of “Javits-Wagner-O’Day” be provided in Appendix F (Glossary). We recommend the following language:

**Javits-Wagner-O’Day. A procurement program authorized by the Javits-Wagner-O’Day Act, 41 U.S.C. 46-48c (also known as the JWOD Program), which creates employment for people who are blind or have other severe disabilities by designating nonprofit agencies employing such people as mandatory sources for supplies and services appearing on the Procurement List maintained by the Committee for Purchase From People Who Are Blind or Severely Disabled.**

We appreciate your consideration of this matter.

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