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Subject: Professional Services Council A-76 Comments

Please find attached the Professional Services Council's comments on the proposed revisions to OMB Circular A-76.

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- PSC A-76 Comments.PDF



19 December 2002

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

Dear Mr. Childs:

The Professional Services Council (PSC) is pleased to provide these comments on the proposed revisions to OMB Circular No. A-76, Performance of Commercial Activities, published in the Federal Register November 19, 2002 (67 FR 69769). PSC is the principal national trade association of companies that provide the full range of professional, technical, and support services to the federal government

OMB's proposed revisions to Circular A-76 are long overdue and represent a clear improvement over the current Circular. We applaud OMB for taking an important, initial step toward achieving the vision of a fair, transparent, accountable, and effective process. While the revisions contain many important improvements, we believe that additional changes must be made in order to achieve that vision. In addition, given the importance and scope of these revisions, we think it also would be appropriate to delay implementation for a short time until OMB has fully reconciled the many comments being submitted and releases a final document. Accordingly, we suggest that the effective date of the changes be moved to at least February 1, 2003.

PSC's member companies believe that competition is a fundamental ingredient for optimizing performance and efficiency in any organization. Indeed, PSC member companies compete every day in a robust marketplace. As such, PSC also has long held that the government's focus internally should be on the optimal performance of those core and inherently governmental activities that must be performed by public sector employees, while at the same time fully exploiting the competitive marketplace to ensure high quality performance of the government's other missions.

As a matter of policy, PSC believes that competition between the government and the private sector for such work often is contrary to the best interests of the government and its workforce. Nonetheless, PSC also recognizes the reality that public-private competition will continue for those activities currently being performed by the government, and is thus committed to helping forge a process and policy that, as recommended by the Commercial Activities Panel (CAP), is genuinely fair, transparent, and accountable, and which enables the government to access and implement solutions that serve the best interests of the American people. Thus, we believe it is important that the Circular explicitly reaffirm the more than fifty years of established federal policy of reliance on the private sector to provide commercial goods and services. This recognition of and reliance on the private sector not only is consistent with five decades of public policy, but also was recently reaffirmed by Congress and the President in the legislation creating the Department of Homeland Security.

Most significantly, the proposed revisions apply key elements of the Federal Acquisition Regulation (FAR) to all public-private competitions. The FAR is the common language for the more than 95 percent of federal procurements that are not competed under A-76 and do not involve incumbent federal employees, and is founded on the tenets of fairness and accountability. PSC believes that the FAR should be the basis for all federal procurements and that it is inappropriate to segregate a single, small category of procurements from those basic tenets. Thus, PSC strongly supports the application of the FAR to public-private competitions and believes that the full flexibility of the FAR should be made available to all public-private competitions.

At the same time, much work remains to be done to fully recognize the vision described above. In addition, numerous clarifications included in this letter must be addressed in order for the new process to be implemented effectively.

The following is a summary of the positive steps taken in the proposed revision. We also include comments on those elements of the proposed revisions that must be further reformed.

Policy and Process Improvements

Overall, there are ten major process and policy improvements which PSC strongly supports and urges be retained in the final proposed revisions to Circular A-76. These changes are briefly summarized below:

- I. The proposed revision clearly states that a government activity is presumed to be commercial unless otherwise documented to be inherently governmental in nature. This is an important statement that reflects the reality of current government missions and functions. It also is particularly important in the context of the proposed rescission of OFPP Policy Letter 92-1, "Inherently Governmental Functions," the substance of which is incorporated into the new circular. While the language of 92-1 remains largely intact, the proposed revision is clearer, more precise, and less open to abuse or confusion.
- II. The proposed revisions require that the FAIR Act inventory include data relative to an agency's "inherently governmental" functions. This represents a permanent policy change that should be retained, and builds on the Administration's recent administrative requirements. However, the specific inventory listings remain *so vague and non-specific that meaningful challenges to either the commercial or inherently governmental classifications are virtually impossible*.
- III. The revised Circular provides important new clarity with regard to the roles and responsibilities of government personnel managing and overseeing public-private competitions. Specifically, the articulation of the roles and responsibilities of the 4.e. official, the Agency Tender Official, the Contracting Officer, and the Source Selection Authority are vital to ensure both functional effectiveness and the application of appropriate conflict-of-interest rules.
- IV. The proposed revision seeks to establish appropriate limits on the circumstances in which announced studies can be cancelled (Paragraph C.1.b.(2)). This is a critically important step toward improving the process; today, numerous studies are arbitrarily cancelled after announcement. In fact, the Center for Naval Analyses estimated that half of all studies commenced by the Navy between 1995 and 1999 were cancelled by June 2000, a trend most recently evidenced at a Naval Depot which cancelled four existing studies in favor of a sub-optimal, completely non-competitive, process that guarantees all work will be retained in-house. By limiting the criteria by which a study can be cancelled, OMB is taking an important step toward imposing critically needed discipline on the process.

However, these limitations conflict with the language in C.2.(14) that indicates that the cancellation of a solicitation after a private sector company is selected is authorized, apparently with little or no formal rationale required. In these cases, the selected contractor should be authorized to recover bid and proposal costs associated with the cancelled solicitation. Further, the language in C.2.(14) pertaining to cancellations authorized under FAR Part 15.206 should be clarified. As written, it is inconsistent with, and apparently represents a significant expansion of the authorities contained in FAR Part 15.206, which limits the authority to cancel a procurement to cases in which the scope of

an amendment is so great that it could affect the outcome of the competition or where the government no longer has the requirement for the services involved.

- V. The revisions include vital changes clarifying conflict-of-interest rules contained in C.1.b.(4). In recent years, a number of protests of A-76 studies have confronted this issue, and the General Accounting Office has held consistently that the A-76 process must be held to the same levels of integrity and accountability as all government procurements. As such, the revisions, which effectively incorporate into the Circular the conflict-of-interest rules contained in the Federal Acquisition Regulation, are of significant importance and value and will help ensure the integrity of the process. In addition to specifying that “procurement integrity, ethics and standards of conduct rules” will apply, we recommend that the Procurement Integrity Act (41 USC 423) and Trade Secrets Act (18 USC 1905) be mentioned specifically. In addition, *while PSC applauds this change, we believe that the issue of conflicts-of-interest is so significant that it should be subjected to further modifications and protections similar to those imposed on private sector offerors. Specifically, government personnel should be required to sign Non-Disclosure Agreements when provided access to source selection sensitive information and data. Such NDAs already are required by some agencies, and we believe their use should become standard for government personnel.*
- VI. The revisions take an important, initial step toward placing on government activities some of the basic requirements that always are placed on private sector offerors. One of those requirements is that of a timely submission of a proposal (or, in the case of the incumbent government entity, a tender). The revision makes clear that if a tender is not submitted on time, it may be eliminated from the competition. This is a start; however, *to ensure fairness, the language should be aligned with rules now governing all other government procurement, under which any offer not submitted on time is automatically eliminated from consideration, absent special circumstances governing late submissions and the application of the normal FAR provisions under which proposal submission deadlines can be extended for all offerors.*
- Moreover, the proposed revisions are self-contradicting on this point. In one place the proposed revision states that an agency tender may be eliminated from the competition if not submitted on time; yet in two of the four source selection processes, the revisions explicitly prohibit the source selection authority from moving to the cost phase of the competition unless and until the government has been deemed to be technically qualified. This contradiction must be eliminated and can most effectively be dealt with by applying the FAR provisions for submittal extensions AND eliminating the prohibition on moving forward with a competition until the government is deemed qualified, as addressed more fully later in this letter.*
- VII. The creation of a single solicitation document for all parties and clarity relative to the roles of the contracting officer and the source selection authority should help to eliminate both a significant amount of confusion and criticism of the current process. Specifically, these requirements will help to eliminate one of the most highly criticized elements of the current process, which involves inconsistent statements of work and an ensuing inconsistency in the evaluation process.
- VIII. The proposed revision’s focus on timelines also is important and addresses one of the most problematic—and expensive—elements of the current A-76 process. A-76 competitions take an average of two to three years to complete and can last as long as four years, not including the extraordinary post-award time consumed by repeated appeals, protests, and political intervention. It is estimated that the cost to a company of participating in procurement under A-76 is fifty to one hundred percent higher than that

for an equivalent, traditional government procurement. PSC thus strongly supports the time boundaries established by the revisions. Moreover, since contracting activities will be conducting the competitions, the time associated with planning prior to public announcement (which is not addressed in the revision) also should be reduced. The Commercial Activities Panel report states that private-only source selections took only two-thirds as much time as public-private competitions when the study involved more than 100 positions, and less than one-third the time when the study involved less than 100 positions. We believe that the 12 months from public announcement to award decision as provided for in the proposed revision, is appropriate.

- IX. The revision also takes an important step toward ensuring post-award accountability of A-76 decisions, particularly with regard to in-house “wins,” which today are subject to little or no post-award oversight. A recent study of long-term post-A-76 award performance by both private sector and government activities highlighted this problem. The study, conducted by the Center for Naval Analyses (CNA), established that over the long term, contracted activities were achieving the savings and performance goals established in the initial award. However, CNA was unable to make any assessment of long-term performance by government activities because the data simply does not exist.

In addition, in a recent survey of government procurement leaders conducted by PSC, the issue of post-award accountability for in-house activities frequently was cited as a key challenge. To that end, the fact that the revisions now require the establishment of a Letter of Obligation (LoO) is a step toward enabling better post-award accountability, even though it is not clear how that accountability will be implemented. While PSC remains concerned with the monitoring of in-house costs and performance and the methodology for doing so, we strongly support the requirement for, and the essential elements of, the LoO.

- X. Finally, PSC strongly supports the revised Administrative Appeals process. Under the current process, administrative appeals often are protracted and confusing. The establishment of a single appeals process will help address that problem in a manner that is fully fair to all parties. While it is clear that the administrative appeal authority will review all appeals concurrently and not conduct a sequential appeals process, we encourage OMB to revise the proposed revision to make the optional comment period standard in all cases. We also believe *it is important to make clear that, in the case of such appeals, all parties to the procurement are to be notified by the appeal authority of the issues that the appeal authority has deemed relevant and on which the appeal decision will focus, and then given time to submit their comments on any or all of those issues. This clarification, which is fully consistent with the intent of the proposed revision, will greatly improve the appeals process.* This additional information will enable the AAA to make a more informed decision that is less likely to be protested. In addition, the revisions make clear that only the Agency Tender Official may file such appeals, another important clarification that recognizes that only an official of a company or government activity who has cognizance over and responsibility for both the proposal and subsequent performance, can be deemed to be an “interested party” with “standing,” be it for appeals or protests. Finally, the definition of the Administrative Appeal Authority should be amended to make clear that not only must the individual be independent of the activity, ATO, CO, SSA and HRA, but the Authority must also be so remote from the activity and affected individuals that the AAA could not be influenced.

PSC views these ten major changes as representing significant improvements to the current A-76 process. These changes will help create consistency and fairness in a process that is currently neither consistent nor fair. Nonetheless, while important, these changes themselves are not adequate to achieve the goal of a transparent, accountable, fair, and effective sourcing process. To achieve that vision, additional changes must be incorporated into the new circular. A summary of those changes follows.

Process and Policy Weaknesses

The Problem: Processes Out of Alignment

The proposed revisions do not create the kind of consistent, clear, and common process that is applicable regardless of the source selection methodology (sealed bid, low price/technically acceptable, phased, or integrated). Instead, the revisions create an unnecessary amalgam of processes that is bound to create confusion and conflict for both government acquisition professionals and tenders, and contractors. Each of the source selection processes described in the revision share some positive as well as negative aspects; but there also are a number of important, sometimes subtle, differences that limit the proposed revision's ability to achieve the vision of a fair, accountable, transparent, and effective process. These differences almost certainly will increase confusion and sub-optimize the process. To resolve this critical weakness, PSC recommends that the four methodologies be aligned by adopting their common positive elements, eliminating their common weaknesses, and resolving the remaining differences to create a single, consistent source selection process that is applicable to all four source selection methodologies.

Among those key differences, and perhaps the single most important inconsistency in the revision, is the question of the status of the agency tender in a source selection. In all of the source selection process options, the proposal due date may be extended if the agency tender is not completed on time—a luxury rarely available to private sector offerors and only made available when genuine extenuating circumstances can be demonstrated.

In two of the four processes (sealed bid or phased cost/technical trade-off) the government is explicitly guaranteed to be included in the final phase of the competition regardless of technical competence and quality. The revision is clear that in these cases, the source selection cannot proceed to the cost phase unless and until the agency tender offer has been deemed to be technically acceptable. In addition, under the negotiated Low Price/Technically Acceptable and the Integrated Cost/Technical Trade-Off processes, the extent to which the source selection authority must go to ensure the technical viability of the agency tender offer virtually ensures that the government always will be in the final cost competition, even if achieving that end requires the government to ignore higher quality solutions and/or to establish performance requirements that are sub-optimal.

The revisions also perpetuate one of the most criticized and litigated elements of the current A-76 process: technical leveling. Regardless of the terms used to define it, any time one bid must be adjusted, up or down, to guarantee it is able to achieve performance levels proposed by other offerors, technical leveling is involved. This raises significant questions of fairness, intellectual property protection, and more.

In no other aspect of public OR private sourcing is any specific source guaranteed to be technically acceptable. Indeed, it is an arbitrary and unacceptable premise. It leads to a perpetuation of the widely criticized and litigated practice of technical leveling, serves as a stark disincentive for innovation and excellence, and inhibits the participation of companies that place a high premium on exceptional service, innovation and quality. It also is in diametric opposition to the principles adopted unanimously by the CAP, which explicitly called for a process in which all offerors are treated the same. Unless and until that inconsistency is removed, the proposed revisions cannot achieve the goal of a fair, transparent, accountable, and efficient process, and the process will continue to suffer from severe credibility problems.

For this reason, we propose that three source selection methods (sealed bid, negotiated and integrated) be aligned to create a common, single set of characteristics that apply regardless of the source selection method used. The phased method should be phased out as soon as is practical. The alignment of these three processes, and the eventual elimination of the phased approach, will eliminate the inappropriate but unavoidable incentive to choose a source selection process based on one’s ability to affect the outcome of the source selection process rather than use a source selection methodology that genuinely serves best the nature and scope of the procurement and the agency’s needs.

Finally, in an era when the government is appropriately seeking to foster more performance-based contracting, the guarantee that the government always will be technically competent is a disincentive to achieving that goal. A true performance-based approach invites all solutions—from those involving little technology to solutions that are far more sophisticated. The government then determines which solution meets a combination of performance and budget requirements. However, IF the government does not have the technical capabilities to propose a more sophisticated approach, there will be no incentive for companies to propose high performance solutions. Indeed, the likely outcome of having the government always guaranteed a seat at the finalists’ table is that the performance requirements will be tied to the government’s existing, documented capabilities, rather than new, more innovative solutions. Companies that have invested in innovation and excellence will thus be strongly disincentivized to propose top-quality, contemporary solutions since they would almost certainly have little or no chance of winning. Moreover, the government’s laudable goal of fostering more performance-based contracting strategies will become ever more difficult to achieve.

At the same time, PSC recognizes OMB’s appropriate concern for ensuring that the organic federal workforce involved in a public-private competition is given a full and fair opportunity to compete. We believe that opportunity can be accomplished by following the recommendations of the CAP, which suggested that the government not be eliminated from any competition without at least one opportunity to revise its proposal and correct deficiencies. PSC supports the application of this principle to all source selection processes that are a part of the new Circular, including, if necessary, the sealed bid option, even though, in that case, the opportunity for revision might have to be available only to the government.

Achieving Alignment

Achieving the alignment recommended above involves first assessing the principal similarities and differences among the four source selection methodologies. Those similarities and differences are outlined in the following chart:

	Positive Aspects	Negative Aspects
Sealed Bid	<ul style="list-style-type: none"> • Roles and responsibilities described • Guidance provided concerning cancellations • Procurement integrity, standards of conduct and ethics rules apply universally • Common solicitation for all bidders • Common source evaluation • Time limits • Performance agreements apply regardless of outcome 	<ul style="list-style-type: none"> • Opportunity exists to extend proposal due date if agency tender is not completed • <i>The agency tender must be adjusted to be responsive and satisfy cost realism analysis</i>
Negotiated – Lowest Priced Technically Acceptable	<ul style="list-style-type: none"> • Roles and responsibilities described • Guidance provided concerning cancellations • Procurement integrity, standards of conduct and ethics rules apply universally • Common solicitation for all bidders • Common source evaluation • Time limits • Performance agreements apply regardless of outcome • <i>Communication must be consistent with FAR</i> 	<ul style="list-style-type: none"> • Opportunity exists to extend proposal due date if agency tender is not completed • <i>Independent person appointed by 4.e. official assigned to resolve differences between SSA and ATO appointed by 4.e. official</i> • <i>Process drives agency tender toward being technically acceptable</i>

Cost/Technical Tradeoff	Integrated	<ul style="list-style-type: none"> • Roles and responsibilities described • Guidance provided concerning cancellations • Procurement integrity, standards of conduct and ethics rules apply universally • Common solicitation for all bidders • Common source evaluation • Time limits • Performance agreements apply regardless of outcome • Conducted consistent with the FAR • <i>Source selection can be based on low cost or a cost technical tradeoff</i> • <i>Agency tender may be eliminated if it is not technically acceptable</i> 	<ul style="list-style-type: none"> • Opportunity exists to extend proposal due date if agency tender is not completed • <i>Use limited to IT if performed in-house, already contracted work regardless of the type, or when a waiver is obtained</i> • <i>If ATO and SSA disagreement over agency tender, person appointed to resolve differences or justify tender exclusion</i>
	Phased	<ul style="list-style-type: none"> • Roles and responsibilities described • Guidance provided concerning cancellations • Procurement integrity, standards of conduct and ethics rules apply universally • Common solicitation for all bidders • Common source evaluation • Time limits • Performance agreements apply regardless of outcome • Conducted consistent with the FAR • <i>Source selection can be based on a cost technical tradeoff</i> 	<ul style="list-style-type: none"> • Opportunity exists to extend proposal due date if agency tender is not completed • <i>Agency tender must be found technically acceptable before the start of the second phase</i> <ol style="list-style-type: none"> 1. <i>Cannot be down selected</i> 2. <i>Result in technical leveling</i> • <i>Source selection based on lowest cost of all technically acceptable offers</i>

While each of the source selection methodologies have more in common than they have differences, the key differences, which are in italics in the chart, will have profound adverse impacts on the conduct of the competitions. Moreover, it is difficult to understand the logic behind perpetuating these differences that run so clearly contrary to both the tenets of the FAR and the CAP’s unanimously agreed to principles.

In order to achieve the alignment that is necessary, PSC recommends the following:

- I. Eliminate the guarantee that the agency tender will be technically acceptable, as described in the Sealed Bid and Phased Cost/Technical Trade-Off processes. Require instead that the Agency Tender Official be notified of deficiencies and be given at least one opportunity to revise the agency tender to resolve those deficiencies. Additional opportunities for revision are at the discretion of the source selection official and must be available equally to all offerors, as provided for under the FAR.
- II. Eliminate the role of the “independent official” designated to resolve differences between the SSA and ATO under the Negotiated Low Price/Technically Acceptable and Integrated Cost/Technical Trade-Off processes. Direct that disputes over technical qualifications, and any down-selections that result, are settled through the Administrative Appeals process, as is currently the case with competitions conducted under the FAR.
- III. Establish a firm sunset date for the Phased Cost/Technical Trade-Off process. This methodology differs from the Negotiated Low Price/Technically Acceptable process only in that it explicitly prohibits the source selection authority from moving to the cost phase of the process until the agency tender is deemed technically acceptable—whether or not doing so requires the government to ignore higher quality, higher performance options. For the reasons articulated earlier, this inequitable “guarantee” is contrary to all precepts of smart and fair sourcing and serves principally to disadvantage the government.
- IV. Similarly, the Circular should recognize explicitly the reality that the Negotiated Low Price/Technically Acceptable process is one end of the Integrated CTTO process

established under the current FAR. To set it off independently is contrary to the FAR and will cause additional and unnecessary confusion.

- V. Further align the changes with FAR provisions by explicitly prohibiting the sharing of any solution-related information in the course of identifying deficiencies in the any offeror's tender or proposal. For example: a requirement is for a maintenance activity to be able to repair 100 trucks a week. One proposal offers a performance level of 150 trucks a week (and identifies, as required, the basic cost deltas that would be involved in getting to the higher performance level), and achieves that higher level largely through a different management structure and innovative use of technology. In the course of identifying deficiencies to other offerors (including the Agency Tender Official), the source selection authority must make known only that an offeror has proposed 50 percent higher performance and ask all offerors to submit proposals that achieve that level of performance. As articulated in the FAR, no elements of the technical solution or cost information can be shared with any other offeror.
- VI. Expand the definition of functions that are authorized to utilize the Integrated CTTO process. The CAP specifically recommended that this approach be phased in utilizing a variety of requirements. The limitation on utilizing the Integrated CTTO process in the absence of a waiver to information technology, or new or already contracted work, is contrary to a key—and logical—recommendation of the CAP. There are many government requirements that, by any measure, should never be procured on a low bid basis. If the intent of phasing-in the Integrated CTTO is to develop a body of knowledge and lessons learned, it follows that it should be utilized on a variety of requirements during the phase-in process. Limiting the use of the Integrated process to IT functions will limit the number of opportunities to generate lessons learned. Lastly, the revisions indicate that the integrated process can only be used for IT requirements currently being performed in-house, but it can be used by any agency to convert any type of currently contracted work back in-house. This would seem to contradict the rationale behind OMB's effort to phase in the integrated process.
- VII. Modify the definition of "Information Technology" contained in the revisions. As reported by the CAP, the contemporary irrelevance of the current A-76 is driven in large part by the fact that many government requirements, even those for what have traditionally been considered "low tech," now involve substantial information technology foundations. However, the definition contained in the revision would not enable those requirements to utilize the Integrated CTTO process. A recent A-76 study at Lackland AFB provides an excellent example of this dichotomy. The winning private sector offeror proposed an IT-driven solution for a base operations support requirement. Under the proposed definition in the revisions, that requirement could not have been conducted under the Integrated CTTO process unless a waiver was obtained, yet it is precisely that kind of information that only becomes clear during a performance-based, best value procurement, long after the time a waiver would have had to be sought.
- VIII. Require that whenever the Cost/Technical Trade Off process is utilized, all rules governing use of CTTO under the FAR be applicable. This would include requiring that the relative weights of ALL factors to be considered in the evaluation process be made known to all offerors in advance, and may not be changed unless all offerors are both notified of the change and provided the opportunity to adjust their proposals/tenders to reflect the new balance of evaluation factors.
- IX. The current A-76 incentivizes all participants, public and private, to focus on the lowest possible cost and to eliminate as many jobs as possible. This is true for both private sector offers and for the government most efficient organization (MEO); indeed, in many

cases, the MEOs are proposing workforce levels far below those proposed by the private sector, thereby actually placing MORE federal jobs at risk than would be the case with a conversion to private contract.

To address this problem, PSC proposes that in cases involving negotiated procurements in which the agency tender is deemed not to be technically acceptable, or an Integrated CTTO in which the agency tender is eliminated from the competitive range through a downselect, or a public-private competition is waived, the solicitation should add a source selection factor relative to the treatment of the incumbent federal workforce. The offerors' ability and commitment to smoothly transition and mitigate adverse impacts faced by the incumbent federal workforce should be a significant evaluation criteria, and all remaining offerors should be given the opportunity to revise their proposals to address this new evaluation criteria.

- X. While the circular repeatedly and appropriately talks about the importance of cost realism, additional guidance is needed to ensure that cost realism is "real." Specifically, PSC recommends that the Circular require either a pre-award cost audit of the agency tender (such as those often conducted on private sector companies) or that the activity have a certified Activity Based Costing (ABC) capability similar to a company having an approved financial and/or purchasing system. While the definitions of ABC vary across government, work should be commenced immediately to establish a credible, widely accepted standard against which agency ABC efforts can be measured. This is similar to the standard accounting requirements government contractors must meet.

This issue is also relevant to the post-award environment. By definition, a Letter of Obligation with a government activity must be a cost-type contract. Under a true fixed-price contract, companies are at risk if they fail to meet performance requirements. It is inconceivable, however, that a government agency could or would not pay its workforce or its other infrastructure costs, regardless of its performance. As such, the government LoO must be treated like a cost-type contract when it comes to post-award accountability and transparency. Just as private contractors are subject to a range of post-award auditing requirements when they hold cost-type contracts, similar post-award cost and performance audits should be required of each government activity that wins a public-private competition.

- XI. The revised Circular is very unclear on the application of the current ten percent conversion differential. While the revisions clearly require application of the differential to sealed bid, negotiated Low Price/Technically Acceptable, and the Phased Cost/Technical Trade-off processes, its application to the Integrated CTTO is not clear. Indeed, various OMB officials have expressed differing opinions on this question. At a minimum, the cost differential question must be explicitly clarified. In addition, clear guidance must be provided on how to apply the differential in a process in which cost is deemed to be less important than technical factors, particularly because the application of the differential could imbalance the stated weights of evaluation factors.
- XII. A critical element missing from this process is the treatment of a past performance factor for the incumbent government provider. Performance risk is, by definition, based on an offeror's likelihood of success in performing the requirements, and that offeror's record of past and current performance is rightly considered a critical indicator. PSC has long supported the government's use of Past Performance as a key source selection criterion. Logically and fairly, an agency's or an agency component's past performance history also is critical to making a sound sourcing decision.

Therefore, an independent audit needs to be able to assess an agency's or activity's performance record and assess, in quantifiable terms, the relevance, currency, and significance of past performance data, management capabilities, existing workforce skills, and more, by reviewing the quality of products/services delivered, adherence to schedules, cost control, management of key personnel, and the quality of business relationships. Those making the source selection decision need to be impartial and are the appropriate officials for completing the past performance assessment of the agency tender.

Lastly, since the Circular requires that the government identify in its tender any subcontractors it plans to utilize for a given requirement, the past performance of those subcontractors, particularly the most significant subcontractors, should be considered by the source selection officials in the source selection analysis.

PSC believes that these recommendations are essential to achieving the vision of a fair, transparent, accountable, and effective process. They are consistent with the FAR, are competitively neutral, and are common to the remaining 95 percent of government procurement. If these recommendations are adopted, the new A-76 process for conducting public-private competitions will be marked by the following attributes:

- Conducted consistent with the FAR
- Roles and responsibilities described
- Guidance provided concerning cancellations
- Procurement integrity, standards of conduct, and ethics rules apply universally
- Common solicitation for all bidders
- Common source evaluation
- Time limits reduce length of process
- Common due dates for proposals and rules for extensions
- Post-award accountability via performance agreements apply for all
- Cost accountability for all achieved through audits/approved financial systems
- Agency tender assured at least one round of discussions
- If Agency tender is eliminated, solicitation modified to establish incumbent workforce transition and benefits as a significant evaluation criteria
- Down-selection disputes addressed by administrative appeals process, as per FAR today for private-private competitions
- Single, comprehensive administrative appeal process for all parties
- Consistent with Administration and Congressional support for Performance-Based Government
- Enables Agency to match an acquisition strategy to the performance requirement, rather than to the desired source selection outcome

Each of the improvements being proposed by PSC is fully executable and fundamental to one or more of the precepts of fairness, accountability, and transparency unanimously endorsed by the CAP to guide the federal sourcing process. Indeed, each of the proposed additional improvements enhances the Circular's ability to achieve those critical objectives, simplify the process, and more fully align it with the Federal Acquisition Regulation. As such, we urge OMB to adopt these additional changes in the final version of the new Circular.

Thank you for the opportunity to provide these comments. We look forward to working with OMB on efforts to improve the federal sourcing process.

Sincerely,

A handwritten signature in black ink, appearing to read "Stan Z. Soloway". The signature is stylized and cursive.

Stan Z. Soloway
President

cc: Hon. Angela Styles, Administrator
Office of Federal Procurement Policy

Mr. David M. Walker
Comptroller General
and Chairman,
Commercial Activities Panel

Hon. Michael Wynne
Principal Deputy Under Secretary of Defense (AT&L)

Hon. Raymond Dubois
Deputy Under Secretary of Defense (I&E)

Mr. Corey Rindner
Senior Procurement Executive
Department of Treasury