



OFFICE OF FEDERAL
PROCUREMENT POLICY

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

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M-08-11

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: Paul A. Denett
Administrator

SUBJECT: Competitive Sourcing Requirements in Division D of Public Law 110-161

This memorandum provides guidance on certain government-wide provisions related to competitive sourcing in sections 739 and 747 of Division D of the Consolidated Appropriations Act, Fiscal Year (FY) 2008, P.L. 110-161. Specifically, this guidance addresses: (1) health and retirement fringe benefit comparability requirements, (2) the use of competitive sourcing for human resources (HR) activities, (3) application of the conversion differential, and (4) the performance of commercial activities by non-profit agencies under the AbilityOne Program.

1. Health and retirement fringe benefit comparability requirements

Section 739(a)(1)(C) prohibits agencies from converting an activity performed by more than 10 Federal employees to a contractor through public-private competition unless the contractor does not receive an advantage for a proposal that would reduce costs to the Federal Government by not making contributions to health insurance and retirement that are equal to or greater than what the agency contributes for its own employees. This requirement applies to competitions that are publicly announced on or after December 26, 2007. A copy of section 739(a)(1)(C), including exceptions to this requirement, is provided at Attachment A.

To ensure uniform application of the health and retirement comparability requirements, agencies shall make the adjustments described in Attachment B when applying OMB Circular A-76 to public-private competitions that are subject to Section 739(a)(1)(C).

2. The use of competitive sourcing for human resources activities

Section 747 imposes a temporary moratorium on public-private competitions announced on or after December 26, 2007 that involve the migration of HR services to a federal shared services center or the private sector under the Human Resources Line of Business (HRLOB) initiative. A copy of section 747 is provided at Attachment C.

The HRLOB covers competitions involving an upgrade to the next major release of an agency's current HR management system or modernization to a different HR management system. See *Competition Framework for Human Resources Management Line of Business Migrations*, available at <http://www.whitehouse.gov/omb/memoranda/fy2007/>

business_migrations.pdf. Competitions outside the HRLOB initiative should proceed in accordance with agency plans and any applicable legal requirements.

3. Application of the conversion differential

Section 739(a)(1)(B) prohibits agencies from converting work performed by more than 10 federal employees to private sector performance absent a showing, through competition, that performance by a contractor would be less costly to the agency by an amount that equals or exceeds the lesser of \$10 million or 10 percent of the personnel-related costs associated with performance by the agency's most efficient organization (MEO). Under section 739(a)(1)(B), an agency is precluded from converting work to private sector performance if this conversion differential is not met, even if the agency can demonstrate that private sector performance would provide a superior solution, when both cost and quality considerations are taken into account. Section 739(a)(1)(B) applies to competitions publicly announced on or after December 26, 2007.

The conversion differential requirements of section 739(a)(1)(B), and the exceptions thereto, are the same as those set forth in section 842(a) of P.L. 109-115. Section 842(a) was implemented by OMB Memorandum M-06-13 (April 24, 2006). Agencies shall continue to follow the guidance provided in OMB Memorandum M-06-13 (April 24, 2006) in applying the conversion differential requirements of section 739(a)(1)(B). In addition, notwithstanding Paragraph D of Attachment C of the Circular, agencies shall ensure that the full conversion differential is added to the total adjusted cost of the private sector performance for activities that are being considered for partial conversion from agency to contract performance.

4. Performance of commercial activities under the AbilityOne Program

The statutory public-private competition requirements of section 739(a) do not apply to work that is awarded to qualified nonprofit agencies under the AbilityOne Program, formerly known as the Javits-Wagner-O'Day Program. The AbilityOne Program is designed to leverage the skills and potential of individuals who are blind or have other severe disabilities by facilitating access to the federal marketplace and the performance of certain commercial activities.

Agencies who seek to consider contracting with AbilityOne nonprofit agencies for commercial work currently performed by federal employees may continue to use streamlined or standard public-private competitions under OMB Circular A-76, as appropriate. The Circular's streamlined competition process, in particular, provides an efficient method for determining if nonprofit agencies could provide a commercial service more cost-effectively than the government. Nonprofit agencies would be the sole representatives of the private sector in the agency's comparison of costs between the public and private sectors.

This memorandum authorizes agencies to use the streamlined competition procedures of the Circular for activities of any size when considering conversion of work to or from an AbilityOne nonprofit agency. This memorandum further authorizes agencies to directly convert activities to or from performance by nonprofit agencies under the AbilityOne Program

notwithstanding the requirements of the Circular, if appropriate and where the resulting contract would be performed at a fair market price, as required by law.¹

Questions regarding this memorandum may be referred to Jim Daumit at (202) 395-1052 or Mathew Blum at (202) 395-4953. I appreciate your attention to these matters.

Attachments

cc:

Chief Acquisition Officers

Agency Senior Procurement Executives

¹ This memorandum constitutes a deviation from OMB Circular A-76 for the purpose of conducting streamlined competitions involving more than 65 FTEs or direct conversions of work to a nonprofit agency under the AbilityOne Program as authorized by section 739(a)(2)(C) of P.L. 110-161.

Section 739(a) of Division D of Public Law 110-161

SEC. 739(a) Requirement for Public-Private Competition-

(1) Notwithstanding any other provision of law, none of the funds appropriated by this or any other Act shall be available to convert to contractor performance an activity or function of an executive agency that, on or after the date of enactment of this Act, is performed by more than 10 Federal employees unless--

(A) the conversion is based on the result of a public-private competition that includes a most efficient and cost effective organization plan developed by such activity or function;

(B) the Competitive Sourcing Official determines that, over all performance periods stated in the solicitation of offers for performance of the activity or function, the cost of performance of the activity or function by a contractor would be less costly to the executive agency by an amount that equals or exceeds the lesser of--

(i) 10 percent of the most efficient organization's personnel-related costs for performance of that activity or function by Federal employees; or

(ii) \$10,000,000; and

(C) the contractor does not receive an advantage for a proposal that would reduce costs for the Federal Government by--

(i) not making an employer-sponsored health insurance plan available to the workers who are to be employed in the performance of that activity or function under the contract;

(ii) offering to such workers an employer-sponsored health benefits plan that requires the employer to contribute less towards the premium or subscription share than the amount that is paid by the Federal Government for health benefits for civilian employees under chapter 89 of title 5, United States Code; or

(iii) offering to such workers a retirement benefit that in any year costs less than the annual retirement cost factor applicable to Federal employees under chapter 84 of title 5, United States Code.

(2) This paragraph shall not apply to--

(A) the Department of Defense;

(B) section 44920 of title 49, United States Code;

(C) a commercial or industrial type function that--

(i) is included on the procurement list established pursuant to section 2 of the Javits-Wagner-O'Day Act (41 U.S.C. 47); or

(ii) is planned to be converted to performance by a qualified nonprofit agency for the blind or by a qualified nonprofit agency for other severely handicapped individuals in accordance with that Act;

(D) depot contracts or contracts for depot maintenance as provided in sections 2469 and 2474 of title 10, United States Code; or

(E) activities that are the subject of an ongoing competition that was publicly announced prior to the date of enactment of this Act.

Application of Health and Retirement Fringe Benefit Comparability Requirements

Section 739(a)(1)(C) prohibits a private sector source from receiving an advantage in public-private competitions by: (i) not offering an employer-sponsored health plan to their workers, (ii) paying less toward health benefits for their workers than the agency pays for health benefits for its civilian employees, or (iii) offering workers a retirement benefit that, in any year, costs less than the annual retirement cost factor applicable to federal employees. Section 739(a)(1)(C) requires that adjustments be made to private sector proposals in certain instances, but does not authorize an agency to reject a private sector offer based on the cost or extent of the private sector offeror's health or retirement benefits.

To meet the requirements of section 739(a)(1)(C), agencies shall ensure, for evaluation purposes, that private sector proposals are adjusted, if necessary, to include amounts for employee health and retirement benefits at least equal to those amounts that are included in the agency cost estimate for federal employee health and retirement benefits. Specifically, agencies shall take the following steps in carrying out public-private competitions, except for activities exempted from the requirements of section 739(a)(1)(C) (see paragraph 4, below).

1. Determinations.

- a. Health benefit costs. Agencies shall determine if the ratio of health insurance costs to direct labor costs in a private sector offeror's cost proposal (health benefit ratio) is equal to the standard health benefit cost factor used in the agency cost estimate (health benefit factor), and, if necessary, make an upward adjustment to the private sector's evaluated costs by an amount that would equalize the health benefit ratio and health benefit factor.
- b. Retirement benefit costs. Agencies shall determine if the ratio of retirement benefit costs to direct labor costs included a private sector offeror's cost proposal (retirement benefit ratio) for any year is equal to the standard civilian retirement benefit cost factor used in the agency cost estimate (retirement benefit factor) for any such year, and, if necessary, make an upward adjustment to the private sector's evaluated costs for any year by an amount that would equalize the retirement benefit ratio and retirement benefit factor for that year.

2. Solicitations.

Solicitations for public-private competitions shall require private sector offerors to identify the following in the price narrative of their cost proposals:

- a. a clear statement as to whether the offeror and all subcontractors will provide an employer-sponsored health insurance plan to employees who will perform under the proposed contract;

- b. the dollar amount of the direct labor costs for each year included in the offeror's proposal (including prime contractor and all subcontractor employees' total salaries and wages for the proposed contract);
- c. the dollar amount contributed by the employer(s) (the offeror and all subcontractors) for the premium or subscription share of the employer-sponsored health benefits plan(s) for the employees identified in subparagraph 2.a, above; and
- d. the dollar amount contributed by the employer(s) (the offeror and all subcontractors) for retirement benefits for each year included in the offeror's proposal for the employees identified in subparagraph 2.a, above.

3. Calculations.

- a. Standard cost factors. Agencies shall use the standard health benefit cost factor and standard civilian retirement benefit cost factor in Attachment C of the Circular to make the determinations required by paragraph 1. In the event factors are updated by the Office of Management and Budget (OMB), agencies shall use the standard cost factors in effect on the performance decision date.
- b. Adjustments. Make the cost adjustment on Line 9 of the standard competition form (SCF) or streamlined competition form (SLCF) as follows:
 - (1) If the health benefit ratio is equal to, or greater than, the health benefit factor, the agency shall not make an adjustment to the private sector offeror's cost proposal.
 - (2) If the health benefit ratio is less than the health benefit factor, the agency shall make an upward adjustment for all performance periods to the evaluated cost of the private sectors cost proposal, so that the health benefit ratio is equal to the health benefit factor.
 - (3) If the retirement benefit ratio is equal to, or greater than, the retirement benefit factor, the agency shall not make an adjustment to the private sector offeror's cost proposal.
 - (4) If the retirement benefit ratio is less than the retirement factor, the agency shall make an upward adjustment for all performance periods to the evaluated cost of the private sectors cost proposal, so that the retirement benefit ratio is equal to the retirement benefit factor.
- c. Documentation. Document the ratio calculation and the amount of any cost adjustment made on SCF/SLCF Line 9 for each private sector offeror's proposal.
- d. Performance decision. Make the performance decision as indicated on the SCF/SLCF Line 18.

- e. Implementation. For a private sector performance decision, award the contract based on the private sector offeror's proposed cost.

4. Exemptions.

The health and retirement benefit requirements of section 739(a)(1)(C) do not apply to the following:

- a. Activities that are the subject of an ongoing competition publicly announced prior to December 26, 2007 in accordance with Paragraph B of Attachment B of the Circular.
- b. Competitions conducted by the Department of Defense (however, see 10 U.S.C. § 2461(a)(1), as amended by section 322(a) of the National Defense Authorization Act for FY 2008, P.L. 110-181).
- c. The security screening opt-out program provided under 49 U.S.C. § 44920.
- d. Activities included on the procurement list established pursuant to section 2 of the Javits-Wagner-O'Day Act (41 U.S.C. § 7) or planned to be converted to performance by a qualified nonprofit agency for the blind or other severely handicapped individuals in accordance with that Act.
- e. Depot contracts or contracts for depot maintenance as provided in 10 U.S.C. §§ 2469, 2474.
- f. Activities performed by 10 or fewer FTEs.

Section 747 of Division D of Public Law 110-161

SEC. 747. (a) None of the funds available under this or any other Act may be used to carry out a public-private competition or direct conversion under Office of Management and Budget (OMB) Circular A-76, or any successor regulation, directive or policy, relating to the Human Resources Lines of Business initiative until 60 days after the Director of the Office of Management and Budget submits to the Committees on Appropriations of the House of Representatives and the Senate a report on the use of public-private competitions and direct conversion to contractor performance as part of the Human Resources Lines of Business initiative.*

(b) The report required by this section shall address the following:

- (1) The role, if any, that public-private competitions under Circular A-76 or direct conversions to contractor performance are expected to play as part of the Human Resources Lines of Business initiative.
- (2) The expected impact, if any, of the initiative on employment levels at the Federal agencies involved or across the Federal Government as a whole.
- (3) An estimate of the annual and recurring savings the initiative is expected to generate and a description of the methodology used to derive that estimate.
- (4) An estimate of the total transition costs attributable to the initiative.
- (5) Guidance for use by agencies in evaluating the benefits of the initiative and in developing alternative strategies should expected benefits fail to materialize.

(c) The Director of the Office of Management and Budget shall provide a copy of the report to the Government Accountability Office at the same time the report is submitted to the Committees on Appropriations of the House of Representatives and the Senate. The Government Accountability Office shall review the report and brief the Committees on its views concerning the report within 45 days after receiving the report from the Director.

* Note: OMB is working expeditiously to prepare the required report so that any planned HRLOB migrations may proceed with minimal disruption. OMB intends to notify the President's Management Council when the report is transmitted to Congress.