

COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS
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April 15, 1999
CODSIA Case Number 15-98

The Honorable Jacob J. Lew
Director, Office of Management and Budget
Room 252 OEOB
17th and Pennsylvania Ave, N.W.
Washington, D.C. 20503

Reference: Proposed Guidance on Implementation of FAIR Act Through Revisions to
the Supplemental Handbook to OMB Circular A-76

Dear Mr. Lew:

The undersigned members of the Council of Defense and Space Industry Associations (CODSIA) appreciate the opportunity to comment on the proposed guidance implementing the Federal Activities Inventory Reform Act (FAIR). This proposed rule appeared in the March 1, 1999 *Federal Register* (64 Fed. Reg. 10031).

Formed in 1964 by industry associations with common interests in the defense and space fields, CODSIA is currently composed of eight associations representing over 4,000 member companies across the nation. Participation in CODSIA projects is strictly voluntary; a decision by any member association to abstain from participating in a particular activity is not necessarily an indication of dissent.

We believe Congress, by passing the FAIR Act, presented OMB with a tremendous opportunity to resolve severe problems with how the federal government quantifies the commercial services it performs in house as well as how it conducts public-private competitions for those same services. We are concerned, however, that the proposed guidance has missed this opportunity altogether. OMB's implementation of the FAIR Act should clearly and fairly outline how the federal government will inventory commercial functions, which it currently performs in house. It should then spell-out the process by which the federal government will compete those activities, either through public-private or private-private competitions. Instead, OMB has subordinated the FAIR Act to the very process, Circular A-76, which has been labeled a "systems failure" by congressional sponsors. The proposed guidance amends A-76 in only the most superficial of ways.

CODSIA members strongly urge the OMB to withdraw its March 1st draft guidance and issue new guidance reflecting the mandates incorporated in the FAIR Act. As a framework for how this process should look, we offer the following recommendations and stand ready to assist you in any way to achieve these.

Most immediately, the FAIR Act requires annual inventories of commercial activities performed in house. To meet the June 30th deadline set by the Act, we recommend that OMB use the format contained in the *Memo from OMB Director Franklin Raines (May 15, 1998)* and make the format permanent. This has two distinct advantages. First, agencies have already compiled most of the information required by the memo. Because June 30th is rapidly approaching, using this product will help jump-start the process. Second, the information required by the memo is more detailed and will prove substantially more valuable to government managers and other oversight entities.

In addition, the new guidance should clearly define the timeline for OMB's review of agency inventory submissions, the procedures for review and when the inventories must be released to the public. CODSIA members recommend that release of the inventories should occur no later than 45 days after their submittal.

Our next recommendation is related to the first. The FAIR Act also addresses competitions and cost comparisons. These issues should be more fully developed in a subsequent guidance, that also would incorporate permanently the "Raines" memo inventory format for the future. This will enable OMB to quickly react to the immediate deadline for inventories, as well as give OMB adequate time to develop comprehensive, clear, and valuable guidance on the more difficult issues related to public-private competition.

We find it very disturbing that OMB is suggesting that any and all commercial activities currently performed by the government, and which are subject to outsourcing should be competed through A-76 only. We believe this is a clear misinterpretation of congressional intent, which could seriously hamper agency managers who are seeking improved operational performance and significant cost savings. Nothing in the Act should limit agency managers from taking advantage of all other currently permissible processes, including private-private competitions as detailed in FAR Parts 8, 15, and 36. We are confident that the legislative history of the FAIR Act supports this.

Despite industry's concern over the conduct of public-private competitions, we recognize that the FAIR Act does provide for just that. However, we recommend that the new guidance make it clear that agency managers have the option to conduct either public-private or private-private competitions.

In the event agency managers elect to conduct public-private competitions, it is critical that the process used resolves the multitude of concerns raised during the crafting

of the FAIR Act and which are mandated in the final law. It is also important to recognize that as activities become more complex, high-tech, and productivity-driven, the current A-76 simplistic cost comparisons between government and private sector contractors ultimately become entirely inappropriate.

To effectively implement the FAIR Act, in accordance with congressional intent, CODSIA members believe that the following issues should be addressed.

Specifically, the FAIR Act requires OMB to issue guidance instructing agencies, when conducting public-private competitions, to "ensure that all costs...are considered...[and] are realistic and fair." The current process clearly does not fulfill this mandate and the draft guidance's reliance on a flawed process is, therefore, unresponsive to congressional intent.

The FAIR Act directs such a system to incorporate "all costs (including the costs of quality assurance, technical monitoring of the performance of such functions, liability insurance, employee retirement and disability benefits, and all other overhead costs)." CODSIA members strongly point out that this would also include the "time value of money," including depreciation and amortization, as well as otherwise unaccounted for labor costs, such as the use of military personnel. The foregoing examples do not represent an exhaustive listing of direct and indirect cost deficiencies.

Therefore, to be responsive, the process used to account for costs requires total "visibility." It is absolutely critical that a government-wide accounting system ensure that federal cost proposals truly reflect all relevant direct and indirect costs. Only after such an accounting practice is adopted, in conjunction with other steps, will public-private competitions have the potential to be conducted fairly.

CODSIA members also emphasize that an activity-based cost accounting system, or other generally accepted accounting practices, alone is not enough to ensure taxpayers are getting fair public-private competitions. There are a number of other areas that must be addressed, including the following. Comparisons of public and private bidders should reflect unique elements on both sides, such as indemnification premiums and state and local taxes for private sector contractors. Areas where there are clear differences between industry and government operating structures should be identified and addressed in such a manner that results in true cost comparability. Further, the fundamental difference in contract type should be addressed. While a private offeror may be competing for a fixed-price contract, the public offeror in effect always competes for a cost-plus contract. The public sector offeror does not have to bear a financial consequence for an underestimate of the amount of work involved.

Another major shortcoming of the current process is that it focuses on low cost between the government and private sector bidder, while ignoring the most important

factor in government procurement: best value. Creating the situation where government organizations are ultimately competing with the private sector on a cost rather than a quality-dominated basis is in sharp contrast with the quality/best value principles that were strongly enunciated in the National Performance Review. Ironically, as government acquisition policy has significantly moved away from price as a key factor and toward best value, the current process for public-private competitions continues to require simplistic cost comparisons.

The current cost comparison process only applies best value comparisons to private sector bidders. Once a contractor has been selected on the basis of best value, it must then compete with the government on a cost only basis. This potentially allows the evaluators of the competition to select the highest priced industry offeror to compare to the government's Most Efficient Organization (MEO) which was simply prepared to compete on a low price basis. This is unfair to industry and does not achieve the cost savings intended nor does it give the government or taxpayer the best performance.

Public-private competitions must be based upon best value principles, subjecting both the government and the contractors to evaluation of past performance, quality, innovation, workforce flexibility, organizational capabilities, problem-solving approaches, management and key personnel, special scientific and technical capabilities, and other applicable non-cost/price factors.

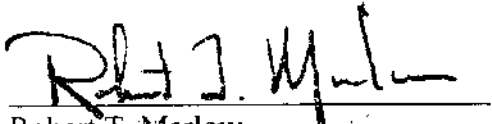
Also important is the incorporation of meaningful performance and service levels into the overall performance requirements. This is in addition to the utilization of performance-based work statements in all cases, as well as the incorporation of performance penalties, which have equivalent impact on both public and private sector performers.

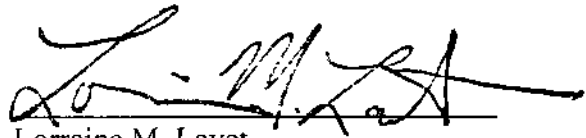
Another significant issue, which must be addressed, is the critical importance of an independent source selection board. Recent cases point to what the private sector has known for some time. The current process for public-private competitions has not addressed sufficiently the inherent conflict of interest found in some government source selection boards. The process continues to allow the activity being studied for possible outsourcing to conduct the procurement and act as the source selection authority for the award. Government personnel involved in evaluating the procurement should be required to declare any interest in the competing offers and if an employee is or will be affected by the procurement personally, that employee should not be in a position to influence the award decision.

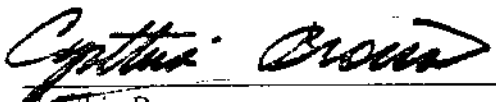
CODSIA members also stress that, in those circumstances where agencies elect to conduct public-private competitions, the process used should be kept as high-level and streamlined as possible, avoiding the excessively detailed, overly mechanistic, aspects of the current A-76 procedure.

We appreciate the opportunity to provide these comments. If you have any questions, please contact CODSIA Project Officer Charles Cantus at (703) 875-8059.

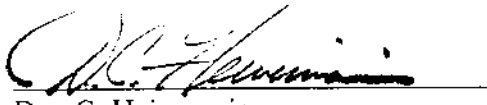
Sincerely,

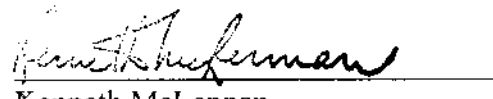

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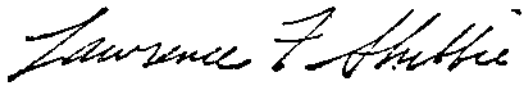

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