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September 7, 2001

Mr. David M. Walker
Comptroller General of the United States

Dear Sir:

Thank you again for the opportunity to address the Commercial Activities Panel on August 15 in San Antonio, Texas. In our testimony, we promised to provide the Panel with point papers on the following topics:

1. Recommended Centralized Management Source (Help Desk)
2. Certification of Training
3. Treating The MEO as an "Offeror"
4. Evaluations of "A-76 Proposals"
5. Improved Independent Review Board
6. Improved Administrative Appeal Board
7. Recommended Cost Rule Changes
8. Recommended Rewrite of the Supplemental Handbook

We hope these documents assist the Panel in finding fair and equitable guidance for implementing the concepts of competition between the public and private sectors. We stand ready to assist the working group in any manner desired.

Respectfully,

JoAnn G. Warden
President



Warden Associates, Inc.
Supporting Documentation for our
August 15 Testimony

The following documents were promised during our testimony on August 15, 2001. They are provided as recommendations to improve the A-76 program's stated objective: to result in fair and equitable competitions between the private and public sectors. However, the program is also a tool to direct convert from government performance to commercial performance without regard to cost. The following comments address this issue.

Expanding direct conversion authorization to a wide list of preferential procurement sources has been considered. The debate over this issue is best conducted in the political arena. However, as practitioners in this program, this consideration further erodes the appearance of fairness, as we discussed in our presentation. If direct conversion is to be a major tool, we encourage this panel to address the major impediment to "fairness" – the loss of federal workers on the verge of qualifying for retirement. We have always been strong supporters of finding a way to make all federal retirement programs more transferable. Few workers would absolutely resist conversion to commercial work if they could retain their retirement rights. **We believe that firing workers right before retirement is a business practice the federal government should avoid.** Also, performing major conversions with current Reduction-in-Force (RIF) rules will not assist the government in acquiring new skills during the period that should be dedicated to accession planning. Below the political appointee level, there has never been overwhelming support for this program. If A-76 is seen as encouraging direct conversion over competition, this limited support may erode even further.



Point Paper 1: Centralized Management Support

Issue: There is no central source for A-76 implementation guidance and data collection and analysis. The Circular continues the OMB policy of relying on individual agencies to implement the required policies.

Discussion: If the Circular is to be used as a major management tool, it needs considerable assistance in getting started and overcoming traditional problems in implementation. The traditional reliance on individual agencies for implementation has predictably resulted in:

- π “Reinventing “ the wheel
- π Delays from “deciding” rules after the reviews have begun
- π Delays from waiting for rules to begin the reviews
- π “Malicious” compliance from all levels of management that want the program to fail or be delayed
- π Delegation from agencies to component organizations that result in wide inconsistencies within an agency
- π Over-reliance on direct conversions to make up for time lost in planning
- π The loss of the “appearance of fairness” to all parties

The only element in the Freedom From Competition Act that we agreed with was the creation of a “Commercial Activities Center” within OMB. This Center could provide:

- π A clearinghouse for:
 - Agency implementation guidance
 - Best practices and lessons learned
 - Truly performance-based acquisition documents
 - Related documentation
- π A real time “help desk” that would supplement agency resources

- π An accurate collection of program data, including current reviews and historical results
- π A source for support services

The Executive Center for Commercial Activities (ECCA) would not circumvent or take precedence over agency policies and support. It would be a complimentary source for each agency to use as desired. At the agency level, it would provide additional resources to “jump-start” the program to meet current administration goals. At the Executive Branch level, it would provide insight that has been missing, specifically in regard to collection of documentation and statistics. The larger departments could also set up CA centers at their headquarters levels.

The need for the ECCA recognizes that one program manager, no matter how qualified and dedicated, can't provide adequate oversight of such a large Executive Branch initiative. We congratulate Mr. David Childs on his exceptional management of this program.

Alternatives: The ECCA could be centralized within OMB or assigned to a department. The most likely department would be the DoD. However, many civilian agencies already believe that this program is already dominated by DoD (see GSA comments and the lack of civilian agency representation on the GAO Commercial Activities Panel). Also, DoD is busy completing their own program within the budget limitations while responding to GAO and Congress.

Federal workers or consultants could staff the ECCA. The problem with most consulting firms is that they will have a conflict of interest with current CA or commercial clients. A consulting firm should not be in a position to “market” from its OMB contract, or comment on its own work at other agencies. Also, too many consulting firms also propose on CA competitions or provide competing commercial firms services such as accounting, auditing and management consulting.

The ECCA could issue A-76 support contracts or allow agencies to issue their own contracts or use GSA schedules. OMB should stay out of the business of hiring consultants to support agencies. However, the ECCA could provide an oversight role to compile consultant information on performance and cost. This

could address the DoD concern that some consultants are hired only on their “MEO win rate” and are biased in PWS development.

Recommendations:

1. Establish the Executive Center for Commercial Activities (ECCA) within OMB/OFPP, with a new federal employee position as the Center’s Director, and the following additional positions:
 - a. Subject Matter Expert – Senior program practitioner with extensive field-level and command experience in hands-on implementation of A-76 within DoD and civilian agencies (from announcement through management of the “contract” to resolicitation). This person would advise the other ECCA staff and provide the Help Desk with expertise on development of agency strategies and FAIR Act implementation.
 - b. Help Desk Staff – The Subject Matter Expert and two Program Specialists
 - i. One with A-76 acquisition and FAIR ACT inventory expertise
 - ii. One with A-76 Management Plan development expertise
 - c. Policy Analyst – to collect, compare and analyze agency FAIR Act and A-76 implementation policies and related documents from GAO, Congress, the Courts, etc.
 - d. Program Analyst – to collect, compare and analyze agency FAIR Act and A-76 program strategies, results, cost of implementation and tracking of savings
 - e. Systems Analyst – to develop automated systems supporting the FAIR Act and A-76 for use by the ECCA and all agencies.

This equals 7 total positions to support a program that is targeted to affect almost 500,000 federal workers.

2. The ECCA’s mission would be to:
 - a. Support the OMB Program Examiner
 - b. Assist agencies in implementation of the FAIR Act and OMB Circular A-76
 - c. Provide a clearinghouse for documentation and statistics

- d. Provide centralized support services, as requested by agencies
 - e. Reconcile agency interpretations pertaining to CA, including the definition of “inherently governmental”
3. The ECCA should be staffed with the best federal workers and consultants available. When required, staff the ECCA through a support contract that would have an organizational and personal conflict of interest clause prohibiting support to any other agencies, departments or commercial firms that propose on CA contracts.



Point Paper 2: Certification of Training

Issue: Proper implementation requires proper training. There is currently no official process within the A-76 Circular to approve or provide training to implement Circular A-76 or the FAIR Act. Each agency has been responsible for defining, developing and obtaining its own training.

Discussion: The need for and delivery of training to support A-76 and the FAIR Act has been left to agency determinations. There are several recognized sources for training (including WAI and the A-76 Institute). However, many agencies have reported a wide variance in the training quality and content and the use of training as simply marketing for the instructor's company. The lack of a centralized and certified training curriculum will only exacerbate the current problems in initiating the A-76 program in the civilian agencies.

At a recent conference, several "trainers" told a GSA representative that he was wrong on a subject. One trainer later called to admit to the GSA representative that he (the trainer) was wrong, having stated a DoD rule as a requirement in the Circular. Some consultant sales representatives have even tried to insist that OMB mandates DoD tools. If the A-76 program is to be a major management tool, then the training should be consistent. This consistency would reflect an OMB approved curriculum.

A certification process could review and approve:

- π The curriculum and specific courses
- π The training materials' accuracy, currency and completeness
- π The instructors' technical qualifications.

The certified training could be incorporated into the Executive Center for Commercial Activities (ECCA) and provided by the support contractor for the Center.

Recommendation: The ECCA (proposed in point paper #1) could either develop and present approved training, or certify other organizations to provide the “official” training. The civilian agencies, in particular, do not have time for trial-and error discovery within the training market.

(NOTE: WAI has a conflict of interest in this recommendation, since we would strongly compete for this training work. However, we would rather risk losing this business than to observe the continued lack of expertise provided in some of the training forums).



Point Paper 3: Treating the MEO as an “Offeror”

Issue: The MEO has neither the rights nor responsibilities of an “offeror” to a government request for proposal or awarded contract.

Discussion: The MEO is not a legal “offeror,” in that it cannot receive a contract or ISSA. It is also not held to a legal contract or agreement in performance. Also, the MEO is in the unique status of being “guaranteed to do no worse than second place.” All contractors and ISSA providers would covet that position. These facts have created the following inequities in the A-76 process for comparing public and private sector proposals:

- π The MEO “proposal” is legally little more than an elaborate independent government estimate on which to base a decision to award a contract/agreement or cancel the RFP. The management plan documentation is a poor attempt to mimic proposal requirements. The management plan is often completed well in advance of the RFP being issued, or certainly during the issuance of amendments. It is no wonder that many management plans have to be significantly changed to reflect the RFP. This advance documentation is required primarily for the independent review process.
- π The independent review has the appearance of a technical and cost evaluation. However, it is often both more and less. In some extremes the IRO requires a level of detail to justify proposed staffing and costs that would never be required from a commercial firm. In other extremes the IRO is only concerned with application of cost rules that do not address cost realism or the requirements of the RFP. This results in the MEO not usually receiving an evaluation equal to that provided for commercial/ISSA proposals.
- π The Source Selection Authority’s “evaluation” of memos is technically just a review to ensure that the same requirements,

standards and workload are applied equally to the MEO and the selected “challenger.” GAO has fully documented the errors that occur in this step.

- π The “cost comparison” guarantees the MEO will be at the table for the final decision. The Circular mandates this situation, as opposed to an equal evaluation of proposals.
- π The appeal process is primarily a review of all MEO documents. Commercial and ISSA documents are almost always deemed to be proprietary. The result has been that the release of almost all documents is restricted, making the appeals process a toothless tiger.
- π The MEO’s status as a non-offeror has resulted in GAO and court decisions restricting MEO parties from filing protests or litigation. One of the explanations for GAO siding with commercial complaints so often is that they are not allowed to hear complaints favoring the MEO.
- π The MEO has no legal requirement to perform after contract “award.” The post-MEO review process was designed to be limited and the task of ensuring the application of the QASP to the MEO is often left unfunded. The contractor receives a legal contract and ISSA providers receive a legal agreement. The MEO “win” results in cancellation of the RFP. In addition to not having the responsibilities for performance, the MEO also does not have the rights associated with clauses pertaining to modification of contract, variation in workload, and disputes. In effect, the relationship of the MEO to upper management is more “personal services” than contractual.

Alternatives:

The following are alternatives concerning the legal treatment of an MEO:

1. Change the laws to allow the federal government to sign legal contracts with federal employees. This is a clear action, but requires very complex legal changes that are not very technically or politically correct.
2. Change the laws to allow an Executive Agency to sign an InterService Support Agreement (ISSA) with itself in accordance with the Economy Act. In this regard, the MEO becomes another ISSA provider with similar rights and responsibilities.
3. Issue an Executive Order that “winning” MEO personnel would be transferred to another agency (such as GSA or DoD) and provide service through an ISSA. This would have human resource implications for the area of consideration, right to first refusal and promotion within the original agency.
4. Issue an Executive Order extending the rights and responsibilities of a contract/agreement to the MEO through an “Obligation Letter.”

The following are alternatives concerning the A-76 process as it applies to MEOs:

1. Keep it as it is. The current process has worked. The MEO “inequities” are balanced with the guarantee of a cost comparison.
2. Adapt alternatives listed above that would allow the MEO to be an offeror and compete with all other service providers in accordance with the FAR. This would give the MEO rights and responsibilities but take away the right to a cost comparison (the MEO could be eliminated during evaluations). Also, the use of “best value” would continue to be problematic, since evaluators may have a remote interest or bias. However, using evaluators with no potential for interest or bias is analogous to using jurors that never read the paper, watch the news or form an educated opinion.
3. Use technically acceptable, low cost criteria to determine which contractors/ISSA providers that are in the “competitive range.” Then evaluate the MEO proposal as an “offer.” If the MEO is technically acceptable and within the competitive range, conduct a cost comparison.

Recommendations:

1. An Executive Order should be issued extending the rights and responsibilities of an ISSA to “winning” MEOs. The “MEO Chief” would become the responsible authority for implementing these rights and responsibilities after the MEO is created. This is the least complicated alternative and most timely.
2. The Executive Branch should request that the GAO review “protests” filed by MEO certifying officials that dispute the outcome of a public/public-public/private competition (or request necessary legal changes). This would not allow “protests” by unions or affected workers. The certifying official may be in a conflict of interest in complaining about an agency decision, but this is consistent with her/his role to protect the interests of the requiring organization.
3. The MEO should be treated like any other “offeror” in submission of proposals. This means that:
 - a. The Independent Review process would not be required
 - b. Members of the “MEO development team” would be subject to the same conflict of interest and procurement integrity provisions as any other incumbent “contractor” and would gain access to documents with other offerors
 - c. MEO documents would be subject to the same procurement sensitive restrictions as commercial proposals
 - d. The MEO is not guaranteed a “cost comparison,” but is granted a fair and equitable evaluation
 - e. “Best value” cost and technical trade-off procedures would be eliminated in public/public and public/private evaluations.
4. Increase vigilance in the evaluation process to use qualified but impartial personnel.

These recommendations still recognize the MEO as a “unique offeror” but move closer to fair and equitable treatment of all parties.



Point Paper 4: Evaluations of A-76 Proposals

Issue: GAO continues to document at least one side of the errors in evaluation of “offerors” in A-76 competitions. Both sides have strong complaints concerning the process and the individuals assigned to the evaluations.

Discussion: The prior point paper addressed many changes that could significantly improve the “fairness” of the evaluation process. This paper discusses issues if the process remains as is:

- π The independent review is not equivalent to a FAR-driven evaluation (see discussion in paper #3)

- π The “firewalls” between evaluation and A-76 review roles are not clear or consistent. The procurement integrity rule would prohibit an individual from serving on both the MEO team and evaluations, but not prohibit working on both the PWS and MEO teams. However, DoD has prohibited consultants (not federal workers) from working on both the PWS and MEO teams. Some agencies encourage PWS team members to also serve on evaluation boards, since they know the intent of the requirements.

- π GAO perceived having effected employees on evaluation teams as creating a potential for bias. Many in the field see evaluations driven by headquarters as potentially biased in favor of contractors. All parties are looking for a fair and unbiased evaluation.

- π Noted contracting officers are known to say, “A-76 acquisitions are just like every other acquisition.” The most experienced contracting officers know that the A-76 process is unique in regards to the politics and emotions pertaining to a unique “offeror” – their fellow employees. Expertise in A-76 acquisitions is required and many contracting officers have had their work criticized by GAO for not

taking into account the differences unique to public/private competitions.

- π Most evaluation boards are acquisition specific. This limits experience and often delays the process during the “learning curve.”

Recommendation:

Each agency should consolidate A-76 acquisitions into one office. This will build expertise and consistency in implementation. Also, the consolidated acquisition office should establish a “standing A-76 evaluation board.” This board could gain expertise in the unique political and emotional considerations inherent in A-76 reviews. The board could be supplemented by “subject matter experts,” as required. The board’s activities should reflect a consistency over time or identify areas for improvement.



Point Paper 5: Improved Independent Review Board

Issue: The independent review is to be conducted by an independent review official, who certifies that the MEO is reasonable and in accordance with the rules.

Discussion: The current independent review process is not working. As noted in other point papers, the reviews have been at both extremes and are not comparable to commercial/ISSA evaluations. Prior point papers have recommended changes that would eliminate the need for the independent review. However, the following are issues if the IR process continues:

- π The IR process requires that the management plan be completed well in advance of receipt of proposals. This often requires the MEO team to work with draft documents that are continually changing. In many cases, the technical performance plan is required prior to publication of RFP sections L and M.
- π The IR process has its roots in only examining costs. The 1996 Revised Supplemental Handbook expanded the review to include the PWS and other management plan components. Results have been very mixed and have been determined more by the skills of the IRO than the requirements of the review.
- π Often, auditors assigned the IRO role know little about A-76, acquisition, or innovative management. This has not changed with the use of in-house or consultant support. Endless horror stories from the field relate the lack of qualifications of the IRO, or the use of the IRO role as a training ground to claim that someone knows the Circular.

- π The IRO is often a staff of one. Even the most qualified individual is hard pressed to have all of the necessary skills to perform the IR properly.

Recommendation:

An Independent Review Board should replace the IRO. This board should be composed of a minimum of three members with specialized skills in:

- π Acquisition
- π A-76 cost methodologies and rules
- π Management analysis

Each member of the IRB should sign the following statement:

“We certify that: (1) the acquisition documents comply with OMB Circular A-76; (2) the government proposal documentation complies with A-76 and the RFP; and, (3) the process is designed to be fair and equitable to all parties.”

The certification would require an independent look at the packaging decisions to determine if:

- π The original packaging resulted in a commercial activity that is separable and appropriate for potential contract performance,
- π The definition of inherently governmental was appropriately applied, and,
- π The acquisition process, including the evaluation plan, is designed to be fair and equitable.



Point Paper 6: Improved Administrative Appeal Board

Issue: The administrative appeal process was designed to answer complaints regarding the implementation of A-76. Appeals can be filled in response to decisions to grant a waiver and over the outcome of a cost comparison. This issue only concerns appeals in response to a cost comparison.

Discussion: The administrative appeal process is purposely narrow in scope. The appealable issues are the application of the costing rules, compliance with the Circular, and availability to information. Specifically excluded from the appeal process are the rules of the Circular, the selection of the “challenger” and the MEO decisions.

To further limit the scope, access to commercial documents is almost completely denied. Many contracting officers are “equaling” this situation by restricting access to government documents also. The result is that the appeal process is a “toothless tiger,” with limited scope and severely limited rights of discovery.

The process of responding to appeals is similarly flawed. The appeal authority is often a figurehead with a staff of just one to handle all appeals in a limited time frame. The predictable outcome is that the staff assumes a judiciary role where the appellants must “prove” their case beyond a reasonable doubt. When the staff is a lawyer, the judicial role seems to grow to the point where the appellants are dismissed as much on technicalities than on merit.

Recommendation: An appeal board should replace the appeal authority. The appeal board should be composed of three members designated by the contracting officer as being organizationally independent, independent of the acquisition process, and knowledgeable in acquisition, costing and management analysis. The board is to have a hands-on role in researching the appeals. A majority decision will be required to rule in favor of an appeal item. The board will have the rights of discovery into all related documentation. The Board will not have the right to publicly release or quote procurement sensitive documents, but can use the documents to form an opinion. The primary objective of the board is to ensure that the cost comparison is fair and equitable to all parties.



Point Paper 7: Recommended Cost Rule Changes

Issue: Many cost rules and factors have evolved since 1976. The Supplemental Handbook needs to reflect the most current and accurate rules and factors.

Discussion: The following are current cost issues:

- π The use of step 5 for GS and step 4 for FWS has stayed the same since 1979.
- π Some recent updates have blurred the definition between direct labor, operations overhead, and indirect labor.
- π The fringe benefit rates were adjusted in 1998, but should be continually researched for the effect of having less workers in the CSRS and more in FERS.
- π There is continued dispute as to the “equivalency” of labor EPA clauses to MEO positions in determining if inflation is warranted.
- π There is agency dispute as to what fringe rates apply to specific hiring classifications (term, re-annuitants, etc.).
- π Bonuses and awards are shown both as miscellaneous benefits and other pay.
- π Appendix 3, useful life and disposal value tables are very out-dated.
- π The insurance factors are not statistically proven. The current rates simply dropped a zero behind the decimal point from the rates that have been used since 1979.
- π “Overhead” is an inappropriate term for what is described in the Circular. Overhead implies an allocation of indirect costs to direct costs. The 12% rate was never intended to reflect allocation of costs. The 1979 handbook made an attempt to allocate costs, only to prove that most “overhead” costs were common to performance regardless of the outcome of the review. The 1983 handbook allowed for a review of operations overhead and general and administrative overhead cost centers. Unfortunately, this approach was abused and not properly challenged in the independent review

process. GAO has criticized the 12% rate, but has not offered an alternative.

- π The 65% percent factor for the cost of potential incentives and awards is significantly less than most contracts receive.
- π Table 3-1 has been reinterpreted in its application to contract administration. The table is misleading in terms of what duties are being staffed, what levels of contract administration are being staffed, why MEO staffing is the basis, the effect of contract type on contract administration, and why an economy of scale is achieved as the size of staffing increases (large multi-functional packages may need more contract administration than a small single function contract).
- π One-time conversion costs are legitimate costs that have often been abused in calculation. DoD has developed an all-encompassing factor for this cost element that might not have been statistically valid, but represented the best data available.
- π The federal tax rates that pertain to tax on gross revenue, Appendix 4, have changed little in the last 22 years, in spite of the massive tax law changes.
- π The minimum conversion differential of 10% of labor, capped at \$10 million, applies to the “status quo;” contract, ISSA or in-house service provider.

Most of the cost changes since 1983 have been in response to criticism over “cheating” and “taking too long.” A compromise can be made between changing rules to punish violators and maintaining a fair and equitable cost comparison.

Recommendations:

The cost comparison process must remain fair. The review or evaluation process must be used to identify “cheaters.” Rules must be used to ensure accuracy. The following are specific cost related recommendations:

1. All current cost factors and tables should be reviewed using statistically valid techniques. Agency specific factors should be approved by OMB based upon their mathematical validity. Additionally, OMB derived factors should be considered for one-time conversion costs.

2. Personnel costs should include all labor that is equivalent to what would be required from an ISSA/commercial proposal, as stated in the RFP.
3. Line 4, "overhead" should be retitled "support costs." All organizations supporting the MEO should be analyzed for potential cost savings that *could* occur if the commercial activity is converted to contract/ISSA performance (potential cost savings from current to MEO levels are common costs; only cost savings from MEO levels to conversion are applicable). This would include all operations and G&A overhead cost centers. The analysis should be based upon prorated costs on a position basis or other valid statistical basis. It is recognized that some savings would not occur immediately, but *could* occur eventually. The costs should include all cost elements in lines 1-5.
4. If the MEO is treated in the acquisition process as an "offeror," then the minimum cost differential should be abolished. Instead, the MEO should be treated as a procurement preference eligible organization in accordance with Chapter 3.B.4 of the Revised Supplemental Handbook. This clause provides all procurement preference eligible organizations with a 10% total cost adjustment that is uncapped.



**Point Paper 8:
Recommended Revisions to OMB Circular A-76 and the Revised
Supplemental Handbook**

Issue: Since 1983, the Circular has only been modified for the FAIR ACT. The Revised Supplemental Handbook was issued in 1996 and has been modified/clarified through the FAIR Act, transmittals and updates.

Discussion: This Panel and current initiatives (including draft transmittals 24 and 25) are significantly changing the Circular and Handbook. WAI had hoped to provide a draft incorporating these changes and our proposed recommendations. However, we have not had time to keep our document up to date and reflect the varied options recommended to the Panel.

Recommendations:

We highly encourage the Panel to recommend that OMB reissue the Circular and Handbook to reflect all current and future changes by September 30, 2002. Warden Associates, Inc is ready to work with the GAO working group and OMB on this critical endeavor.