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October 31, 2003

The Honorable Richard Shelby
Chair, Subcommittee on Transportation,
Treasury and General Government Appropriations
133 Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Chairman:

On behalf of the American Federation of Government Employees, AFL-CIO, which represents more than 600,000 federal employees serving the American people across the nation and around the world, I regret to report that we were all misled about the actual contents of a floor amendment (S.AMDT.1923) offered by Senators Craig Thomas and George Voinovich to the Transportation, Treasury and General Government Appropriations Bill (H.R 2989).

The sponsors of this amendment portrayed it as a measure to address at least a few of the many problems in the widely discredited OMB Circular A-76 privatization process. Because the amendment was not made available until it was voted on, all of us were dependent on the sponsors to accurately and reliably describe its contents.

1. SURPRISE PACKAGE FOR WELL-CONNECTED CONTRACTORS

The sponsors of the amendment never told Senators, either in literature circulated or in their remarks on the floor before the vote, that their amendment included a raid on the treasury on behalf of a particular group of contractors. Upon inspection, one can certainly see why sponsors felt compelled to hide this provision in order to trick the taxpayers and treat the contractors.

Section (f) would require contracting officers to use in all public-private competitions for architecture and engineering (A&E) work a controversial sole-source contracting out process established under the Brooks Act in which cost to the taxpayers is never considered until after an award has been made.

Senator Voinovich repeatedly insisted that his amendment included **five** provisions: 1) "accountability" reports (a), 2) A-76's automatic recompetition requirement (b), 3) encouraging better contract administration (c), 4) appeal rights for federal employees (d), and 5) overseas contracting (e). The sixth provision, section (f), was never mentioned.

Because the Thomas-Voinovich Amendment was not made available for inspection, Senator Barbara Mikulski and other Senators relied on Senators Thomas and Voinovich to accurately and reliably describe their amendment.

Ms. MIKULSKI. Mr. President, I feel at a bit of a disadvantage. I am all set to debate, but we keep waiting. We waited for the amendment. Now we have to wait for the Senator from Ohio to make his points in the argument and then he tells me to go ahead and make the argument. My argument is to rebut their amendment. So I am waiting for the Senator from Ohio to make his argument…Perhaps if he could explain his amendment. I listened carefully to Senator *Thomas*, but I am not sure I grasped the full extent of the amendment. There are many elements about the amendment I find attractive and I would like to comment on those. Those I find deficient I would like to identify…

Mr. VOINOVICH. Mr. President, in my previous remarks in opposition to the Senator's amendment, I went into the details of the amendment we presented to the floor. So those five provisions I just mentioned--and they were reiterated by the Senator from Wyoming--basically constitute the amendment. I think that lays it out. I am more than happy to hear the Senator's thoughts in regard to that.

Later, Senator Mikulski again tried to induce the sponsors of the Thomas-Voinovich Amendment to reveal the measure's contents.

Ms. MIKULSKI…I ask my colleague from Ohio and my colleague from Wyoming, am I right in saying that your amendment would want more accountability; it would allow an appeals process, which now they do not have; that they would not bid every 5 years; and they cannot contract overseas? I ask either the Senator from Wyoming or the Senator from Ohio, have I grasped your amendment? Have I? What are your five points? I will repeat it: Greater accountability; reporting requirements; the right for Federal employees to have an appeal, just like the private contractors; that they would not have to compete every 5 years; and this wonderful one that says they cannot contract out to move jobs overseas. Is that what I understand your amendment to be?

Senator Mikulski eventually encouraged lawmakers to support the amendment only because of the incomplete description provided by its sponsors. In fact, any Senator could have made a point of order against the Thomas-Voinovich Amendment—because it was clearly adding authorization language to an appropriations bill—had they known the actual contents of the amendment.

Moving from process to substance, or from the insult to the injury, under the manifestly anti-taxpayer Brooks Act competition process, there is no cost trade-off against technical factors. Cost is never even discussed until after a putative award has been made. Only if the contractor is completely over-the-top with respect to costs would a contracting officer walk away from the deal. Currently, contracting officers have discretion not to use this process in competitions between contractors when they feel the taxpayers could be disadvantaged. This secret provision in the Thomas-Voinovich Amendment would make that approach mandatory for all public-private competitions.

Professor W. Noel Keyes of the Pepperdine University School of Law is the author of the well-known *Government Contracts Under the Federal Acquisition Regulation* (2nd Edition, 1996, pocket revision, 2002). On pages 859-60, he writes:

> *"Although construction contracts are normally awarded following the same sealed bidding procedures applicable to supply contracts, this has no longer been true with respect to the procurement of A&E services since the 1972 enactment of the so-called Brooks Act. There a political determination was made to prevent the federal government from using sealed bid procedures (and thus forcing negotiation of all such contracts) and contractor selection without consideration of price...The Act requires negotiation on the basis of qualification for the type of professional services required, that is,* ***without any price competition whatsoever.*** *Not only is there no empirical data supporting this approach but, on the contrary, transportation officials from two states have reported the price competition for A-E services has not adversely affected the design quality of highway projects...Accordingly, Congress should consider revision of the Brooks Act."* (Emphasis added.)

Engineering contractors have long striven to impose a requirement to use the Brooks Act approach on all public-private competitions, despite strong bipartisan opposition. In fact, even the author of the May 29 OMB Circular A-76, Office of Federal Procurement Policy (OFPP) Administrator Angela Styles, refused to make this change, despite the fact that her deputy was the former top lobbyist for the major engineering contractors pressure group, the American Council of Engineering Companies (ACEC).

In the *Federal Register* notice accompanying release of the May 29 rewrite of A-76, OMB flatly rejected the pleadings of ACEC and other engineering contractor pressure groups to establish a special privatization process for A&E work: “OMB appreciates that the processes statutorily prescribed for acquiring A&E services are different from those in FAR Parts 14 and 15, which are used for most types of purchases other than for A&E services. OMB does not believe that this difference should automatically render the policies and management responsibilities of the Circular inapplicable to A&E services.” OMB also wrote that “additional thought is required regarding the specifics of how the revised Circular would be applied to A&E services and the type of deviation that might be needed (to use the Brooks Act).”

Among the questions that need additional research, even assuming merely for the sake of argument that this anti-taxpayer approach was appropriate for public-private competition:

A-76 establishes the Executive Branch policy for privatization reviews and sets forth four methods for competition, all of which include cost competition. The Brooks Act precludes cost competition. Based on this inconsistency, how would agencies be able to use public-private competitions pursuant to A-76 for A&E services? Is this provision a subterfuge not just to bilk the taxpayers but also to eliminate public sector competition for A&E services?

The Brooks Act is applicable to "firms" (i.e., legal entities permitted by law to practice the professions of architecture or engineering). If the federal government is not a “firm,” would federal employees even be allowed to compete under Brooks Act competitions? Again, is this amendment a subterfuge not just to bilk the taxpayers but also to eliminate public sector competition for A&E services?

The Brooks Act process favors large contractors. Under 40 U.S.C. 544, contracting officers must negotiate starting with the "highest qualified firm” based on statement of qualifications and performance data. Presumably, large firms would have more and better qualifications and performance data than would small business concerns. Moreover, the absence of cost competition would preclude small business contractors from benefiting from their greatest asset: their smaller size. Is this amendment a subterfuge not just to bilk the taxpayers but also to eliminate small business contractor competition for A&E services?

Ironically, ACEC agrees that there are many questions that need to be addressed. In a December 19, 2002, submission to OMB in reference to the November 2002 revisions to the A-76 privatization process, ACEC acknowledged that, “For many years there has been a conflict between the OMB Circular A-76 procedures and the statutory procedures that establish a qualifications-based selection process for architecture and engineering services. OMB has never addressed this conflict and does not address it in the current revisions to A-76.” In fact, not only did OMB refuse to include the Brooks Act process in the May A-76 final draft, but, as discussed earlier, OMB also postponed consideration of the questions raised by the “conflict” between cost-based public-private competition processes and the anti-taxpayer Brooks Act process.

Clearly, section (f) in the Thomas-Voinovich Amendment is not a minor technical change; rather, in attempting to force agencies to use a privatization process that OMB explicitly chose not to include in A-76, it is a radical departure from the May 29 process.

AFGE is strongly opposed to a provision that would make the Brooks Act approach mandatory for all public-private competitions for A&E work, or even encourage the use of that anti-taxpayer process, particularly in that the provision’s existence was never revealed prior to the vote. AFGE strongly urges conferees to exclude this provision from the conference report.

2. STANDING PROVISION THAT FAILS TO WORK AS ADVERTISED

Senator Voinovich asserted that section (d) of his amendment would allow federal employees to obtain standing so that they would have the same rights as contractors to hold decision-makers accountable in court. On the floor, Senator Voinovich declared,

> *"Currently, when private contractors lose a competition with a Government entity, or another private sector contractor, they have a right to appeal the decision to the General Accounting Office…This provision levels the playing field and makes the competition process fair to Federal employees. We put them in the same position as we do the private contractors. We want them to be able to appeal it. This time, it says if our employees lose, they can appeal that, just as the private contractor can appeal."*

However, the General Accounting Office (GAO) and others have reported that the provision includes confusing and ambiguous language. It is imperative that standing not be invested, as private contractors are insisting, in a senior management official, who could not possibly be expected to act with the requisite autonomy.

AFGE urges the conferees to finally and unambiguously provide federal employees with the same rights as contractors to appeal privatization decisions. In order to give federal employees the same standing as private contractors before the Court of Federal Claims, 28 U.S.C. Section 1491(b) should be amended by adding a subsection known as 1491(b)(5) which should read as follows: "(5) As used in this section the term `interested party' shall include federal employees and their labor organizations." In order to give federal employees the same standing as private contractors before the GAO, 31 U.S.C. Section 3551(2) should be amended by adding the following words to that provision: "and the federal employees who are or potentially may be affected and the labor organizations which represent them."

3. THE AUTOMATIC RECOMPETITION PROVISION IS ALIVE AND WELL, DESPITE WHAT WE WERE TOLD

Typical of the one-sided approach of the May 29 OMB Circular A-76 privatization process is the requirement that federal employees, in all but the narrowest circumstances, be automatically recompeted every five years. Per the May A-76, performance periods are not supposed to exceed five years, and activities are supposed to be recompeted upon expiration of the performance periods. Hence, the establishment in the May A-76 of what is universally considered to be an automatic five-year recompetition requirement. That is, in all but the narrowest circumstances, federal employees who prevail in a privatization process will be recompeted five years later. The process includes no comparable recompetition provision for contractors.

Senator Voinovich described his amendment as one that would eliminate the automatic recompetition requirement:

> *"Third, this amendment modifies the provision of the new Circular A-76, which requires that activities identified for competitive sourcing must be recompeted every 5 years if the Federal organization wins the competition. I am concerned about the effects this requirement may have on employee morale. This amendment removes the provision. In doing so, it sends a signal that as long as the MEO continues to perform well, it doesn't need to be subject to future competition. In other words, if the Federal workers win the competition, why should they, at the end of 5 years, have to have it recompeted? If you want to recompete it, the Department decides that; it means they are not getting the job done. But to have an automatic 5 years that says, hey, boys and girls, you are getting the job done, but after 5 years we are going to recompete it, that is not fair."*

Upon closer review, however, the Thomas-Voinovich Amendment leaves the five-year automatic recompetition requirement in place. Rather, the amendment's section (b) merely prevents activities from being recompeted "**within** five years." There is no requirement in the May A-76 that activities performed by federal employees be recompeted before five years are up, i.e., before the maximum number of years in a performance agreement expire, although managers retain the discretion to craft shorter performance agreements and then conduct recompetitions. The provision in the Thomas-Voinovich Amendment would eliminate that managerial discretion to recompete those activities "**within** five years." It does not, however, eliminate **automatic** recompetitions after five years. In other words, contrary to what we were led to believe, this provision addresses a scenario unlikely to occur, i.e., discretionary recompetitions within five years, instead of an eventuality that **must** occur in almost all circumstances because of the May A-76, i.e., automatic recompetitions after five years.

In order to address the problems caused by the new A-76's automatic recompetition requirement, AFGE suggests substituting this language: "None of the funds appropriated by this Act may be used by the Office of Management and Budget, under OMB Circular A-76 or any other administrative regulation, directive, or policy, to require agencies to conduct any follow-on competition." Such a provision would allow agencies to conduct recompetitions at their discretion while preventing OMB from using the A-76 to establish any automatic recompetition requirements.

4. AN “ACCOUNTABILITY” REQUIREMENT THAT APPLIES ONLY TO FEDERAL EMPLOYEES?

Well into the third year of the wholesale privatization effort, OMB and its defenders are suddenly discovering the virtues of “accountability.” However, the “accountability” provision in section (a) in the Thomas-Voinovich Amendment applies only to work currently performed by federal employees, fails to ensure the reliability and accuracy of information reported to the Congress, does not take into account the inability of agencies to perform basic contract oversight, and cannot even be implemented according to a senior OMB official.

Although the contractor workforce has been estimated to be twice as large as the federal workforce, the “accountability” reports would cover only work currently performed by federal employees. Agencies would not be required to submit annual reports to the Congress on the cost and the quality of the more than $125 billion spent annually on services that are performed by contractors.

The “accountability” provision would not ensure that GAO reviews the accuracy and reliability of “accountability” reports submitted to the Congress, which is no small concern given how politicized privatization has become.

The “accountability” provision would not even ensure that agencies maintain sufficient staff to accurately and reliably collect and compile the information necessary for the preparation of “accountability” reports. OMB has provided agencies with no new resources to implement the privatization mandate and would provide no new resources for the preparation of “accountability” reports. As GAO has pointed out, the safeguards necessary to protect the American taxpayers from the OMB privatization initiative require

> *“a skilled workforce and adequate infrastructure and funding…Building this capacity will likely be a challenge…An additional challenge facing agencies in managing this effort will be doing so while addressing high-risk areas, such as human capital and contract management. In this regard, GAO has listed contract management at (several agencies) as an area of high-risk.”*

Finally, these “accountability” reports can not even be prepared, according to OMB. In the October 20 edition of *Federal Times*, OMB’s October 2 report to the Congress, the latest attempt to relaunch its privatization initiative, is discussed:

> *"Absent from the OMB report is any information on progress achieved so far: how many jobs have been competed, how many were awarded to contractors, the cost of the competitions, and anticipated savings from the job contests…`We don't yet have the infrastructure to collect this information on a governmentwide basis,' OMB's deputy director for management, Clay Johnson, told*

Federal Times. `But we are aggressively developing the data base that will allow us to answer these and future questions.'"

AFGE suggests that conferees include the attached alternative language that would address at least some of the serious concerns discussed above.

Thank you for your consideration of the views discussed in this correspondence. If you have any questions, please call Beth Moten or John Threlkeld in AFGE's Legislative Department at (202) 639-6413.

Sincerely,

Beth Moten
Director, Legislative and
Political Action Department

REVISED ACCOUNTABILITY LANGUAGE

Not later than December 31 of each year, the head of each executive agency shall submit to Congress (instead of the report required by section 642) a report on the competitive sourcing activities that were performed for such executive branch agency during the previous fiscal year. The report shall include—

1. the total number of competitions completed for activities performed by federal employees, activities performed by private contractors, and activities that had not been previously performed by federal employees or private contractors, with a list of the activities covered by all three categories of competitions;

2. the total number of competitions announced for activities performed by federal employees, activities performed by private contractors, and activities that had not been previously performed by federal employees or private contractors, together with a list of the activities covered by all three categories of competitions;

3. the total number of full-time equivalent federal employees and the total number of private contractor employees studied under completed competitions;

4. the total number of full-time equivalent federal employees and the total number of private contractor employees being studied under competitions announced, but not completed;

5. the cost incurred by the agency in carrying out its competitive sourcing program, including the costs attributable to paying outside consultants and contractors as well as the costs attributable to paying agency personnel for each competition announced as well as for each competition completed;

6. an estimate of the total anticipated savings from, or a quantifiable description of improvements in service or performance, from each completed competition;

7. actual savings, or a quantifiable description of improvements in service or performance, derived, from each competition completed after May 29, 2003;

8. the total projected number of federal employees and contractor employees that are to be covered by competitions scheduled to be announced in the fiscal year covered by competitions scheduled by the next report required under this section; and

9. a general description of how the competitive sourcing decisionmaking processes of the executive agency are aligned with the strategic workforce plan of that executive agency.

The General Accounting Office shall review the reports and provide an assessment as to the reliability and accuracy of the information provided, particularly with respect to savings, both estimated and actual, as well as costs of conducting competitive sourcing activities.