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Defense Outsourcing: The OMB Circular A-76 Policy

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Summary

This report provides information on the Office of Management and Budget's (OMB) Circular A-76, "Performance of Commercial Activities," and the impact of a related reform initiative, the Federal Activities Inventory Reform Act (FAIR) of 1998, within the Department of Defense (DOD). The Circular defines federal policy for determining whether recurring commercial activities should be outsourced to commercial sources, governmental facilities, or through inter-service support agreements. The FAIR Act creates statutory reporting requirements for federal executive agencies, by requiring federal executive agencies to identify activities "not inherently governmental" and consider outsourcing through managed competitions. However, FAIR does not require that agencies contract out these activities.

Despite the fact that DOD has substantially downsized its force structure after the end of the Cold War, operations and support cost have not been proportionately reduced. In order to achieve greater reductions, and as part of its Defense Reform Initiative, DOD announced that 229,000 positions would be opened to managed competition; by FY2005, some 237,000 jobs. Historically, DOD has set the pace as the lead federal agency in using OMB Circular A-76 cost comparison studies as a tool for managing competition for federal contracts.

The effectiveness of the OMB Circular A-76 policy has been the subject of rising debate. A revised circular, a recommendation of the congressionally mandated Commercial Activities Panel, is currently under OMB review.

Some proponents view the policy as a catalyst for competition in the marketplace, and as the vehicle to increase efficiencies, lower costs and encourage technological advances. They argue that the government should stop providing some services, and not compete against its private citizens. Some proponents view the policy as an instrument for driving efficiencies. Some opponents of the program view it and the passage of FAIR as efforts to dismantle what has been traditionally viewed as the "proper role of government." They challenge the notion that the process will ultimately save money, by arguing that projections of costs savings have been overly optimistic. Others assert that besides resulting in the loss of thousands of federal jobs, FAIR may create new constituencies that could generate new pressures for federal outsourcing.

The degree to which managed competitions, throughout the federal government, increase efficiency and save money will likely depend on the extent to which federal agencies employ OMB Circular A-76 and the FAIR Act. Congress can exercise its oversight authority by (1) monitoring federal agency progress in the implementation of OMB Circular A-76 policy and FAIR, and the level of managed competitions, since there is no requirement that agencies must conduct them, and (2) granting federal agencies the authority to explore alternatives to the OMB Circular A-76. Congress may also review the results of a congressionally-mandated study, chaired by the Comptroller General, that examined the policies and procedures governing the transfer of commercial activities from the federal government to the private sector.

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Defense Outsourcing: The OMB Circular A-76 Policy

Introduction

The end of the Cold War and the reduction of Department of Defense (DOD) spending created a strong need to reform the manner in which the federal government procured goods and services. In the 1980s, the Reagan Administration emphasized the view that big government was inefficient, wasteful and unmanageable. Later, the recommendations of the Clinton Administration's National Performance Review (formerly called NPR, now the National Partnership for Reinventing Government) served as an impetus for the executive branch to propose new procurement reform.¹ The NPR effort broadened the goal of creating a government that "works better and costs less" to a government that "works better and does less."² The NPR promoted the idea that the government should focus its attention on those activities which it should and could do best, and then put incentives in place to insure optimum results. In August 2001, President Bush unveiled "The President's Management Agenda," which identified competitive sourcing as one of five management initiatives designed to enhance government effectiveness.³

DOD has substantially reduced its force structure since the end of the Cold War. Unfortunately, defense operations and support costs have not reduced proportionately to the size of the force.⁴ As a result, DOD must reduce spending further to achieve greater cost savings to finance weapons and military equipment modernization. Combined with a national mood reflecting a growing change in the public's perception of the role of government, a shrinking defense procurement budget, increased private sector lobbying for government contracts, the notion of contracting out, or **outsourcing**, of federal procurement activities has taken center stage.

Outsourcing is a decision by the government to purchase goods and services from sources outside of the affected government agency. In the past, outsourcing

¹ Office of the Vice President. *From Red Tape to Results: Creating a Government that works Better and Costs Less*. Report of the National Performance Review. Washington 1993, 168p.

² Office of the Vice President. *Serving the American Public: Best Practices in Downsizing, Bench-marking Study Report*. Report of the National Performance Review. Washington 1997, 36 p.

³ U.S. Office of Management and Budget. *The President's Management Agenda for FY2002* (Washington: OMB, 2001), p. 1. [<http://www.results.gov/agenda/fiveinitatives.html>]

⁴ General Accounting Office. *Observations on the Department of Defense's Fiscal Year 2000 Performance Plan*. July 20, 1999. GAO/NSIAD-99-178R. 14 p.

has usually meant that the government purchased specific goods or services from the private sector. For example, an agency may hire a janitorial cleaning service, a cafeteria/food service vendor, or an audio-visual equipment vendor. Outsourcing evolved as one of the principal mechanisms used to reduce the size, scope, and costs of the federal government.

A 1996 Report of the Defense Science Board, Task Force on Outsourcing and Privatization, defined outsourcing in this way:

Outsourcing often refers to the transfer of a support function traditionally performed by an in-house organization to an outside service provider. Outsourcing occurs in both the public and private sectors. While the outsourcing firm or government organization continues to provide appropriate oversight, the vendor is typically granted a degree of flexibility regarding how the work is performed. In successful outsourcing arrangements, the vendor utilizes new technologies and business practices to improve service delivery and/or reduce support costs. Vendors are usually selected as the result of a competition among qualified bidders.⁵

Under the umbrella of outsourcing, **privatization** occurs when the government ceases to provide certain goods or services. When an activity is privatized, the level of the government's involvement is altered, and the government may exercise any one of a number of options. Each option represents a different business decision. The options are the following business decisions: (1) selling the government assets and/or operational capabilities, and (2) creating inter-service agreements, voucher arrangements, franchises, or government corporations.⁶ For the purposes of this report, privatization will be referred to as the contracting out of government goods and services, not the sale of government assets.

The OMB Circular A-76 has been viewed by some as a management reform tool to facilitate government outsourcing and privatization. This report will discuss the Office of Management and Budget (OMB) Circular A-76 policy titled "Performance of Commercial Activities," and the impact of a closely-related reform initiative, the Federal Activities Inventory Reform (FAIR) Act, P.L. 105-270, within DOD.

⁵ Department of Defense, Office of the Undersecretary of Defense for Acquisition and Technology. *Report of the Defense Science Board, Task Force on Outsourcing and Privatization*. August 1996. p. 7a.

⁶ "Where Do We Stand?" *AFGE's Privatization Policy*. American Federation of Government Employees, AFL-CIO. 28 p.

The OMB Circular A-76

The OMB A-76 Circular provides “an analytical framework on which the government bases a decision on who can best provide the products and services it needs.”⁷ OMB Circular A-76 has defined a commercial activity as one that is a result of a requirement, or need, that the federal government has for a product or service, and that the product or service could be obtained from a private sector source. A “recurring” commercial activity is one that is required by the federal government on a consistent, long-term basis. The Circular provides federal executive agencies with guidance and procedures for determining whether recurring commercial activities should be performed by private sector sources, government sources, or through an “Inter-Service Support Agreement,” which is an agreement between two federal agencies to provide each other with certain services or functions.⁸

The policy⁹ outlines a very formal, intricate, and often lengthy process for conducting managed competitions. Initially, no time frames were required for the completion of competitions. Later, a provision was included in the FY1991 DOD Appropriations Act (P.L. 101-511) and future DOD appropriations bills directing that single function competitions are to be completed within 24 months and multi-function competitions are to be completed within 48 months.¹⁰ DOD estimated that increased efficiencies resulting from these competitions could yield a 20-30% cost savings, regardless of whether the government or the commercial sector wins. According to DOD, about 60% of the competitions are won by the original employing agency, reconfigured into a “most efficient organization (MEO),” while 40% are won by competing private contractors and government agencies.¹¹

⁷ *The AFGE Activist's Personal Consultant to A-76 Policy Implementation*. American Federation of Government Employees.

⁸ See OMB Circular A-76 Supplemental Handbook.

⁹ The current OMB Circular A-76 policy was issued in 1966. The policy was revised in 1977 and 1979. The *Supplemental Handbook* was issued in 1983, and revised in 1996. The policy, supplemental handbook, and accompanying policy memoranda were revised together and issued on June 14, 1999. Authority for the OMB Circular A-76 originated in the Budgeting and Accounting Act of 1921 (31 U.S.C. 1 et seq.) and the Office of Federal Procurement Policy Act Amendments of 1979 (41 U.S.C. 401 et seq.) Legal or procedural challenges to the policy or procedures are provided for in the *Supplemental Handbook*. The handbook also allows for direct conversion to a private sector contractor and cost comparison waivers to the OMB Circular A-76 policy. Copies of updated versions can be found on the Internet at [<http://www.whitehouse.gov/OMB/circulars/index-procure.html>].

¹⁰ General Accounting Office. *DOD Competitive Sourcing: Results of Recent Competitions*. Letter 4.2, GAO/NSIAD-88-44. Feb. 22, 1999. 2 p.

¹¹ Camelo, Wilson (First Lt.). “Competitive Sourcing, Privatization Vital to Air Force Future.” *Air Force News*. May 25, 1998. 2 p.

The policy rests on these assumptions:

- (1) The federal government should not compete against its citizens but rely on the commercial sector to supply products and services needed by the government.
- (2) The government can conduct cost comparison studies to determine “who best to do the work” through a process of “managed competitions.”
- (3) Market forces can determine the most effective and cost-efficient methods to operate functions in both government and commercial sectors; and
- (4) The nature of competition within the marketplace can be “self-managed,” and not require government oversight.

The policy states that, whenever possible, and to achieve greater efficiency and productivity, the federal government should conduct cost comparison studies to determine who can best perform the work. Under the OMB Circular A-76 policy, a managed competition is the vehicle to conduct cost comparison studies. Competitions are held between public agencies and the private commercial sectors. The three types of managed competitions under the policy are (1) public-public, (2) public-private, and (3) private-private. In accordance with the provisions of the Circular, the federal government will not start, or maintain, a commercial product or service that the private sector can provide more economically.

Federal agencies are not required to use the OMB Circular A-76 policy; however, federal executive agencies are required to (1) develop a performance work statement, defining the technical aspects of the work to be performed; (2) determine the most efficient organizational structure using the current government workforce (called the “Most Efficient Organization, or MEO) through realignment/reexamination of the management structure, personnel requirements and procedures; and, when such a comparison is required, (3) conduct cost comparison studies among all sectors, including private, other public agencies, and the current government MEO.¹² Cost-comparison studies are not required to convert certain activities to, or from, an in-house operation, commercial contract, or inter-service support agreements.¹³

¹² See OMB Circular A-76: Oversight and Implementation Issues.

¹³ OMB Circular No. A-76. Executive Office of the President, Office of Management and Budget. June 14, 1999 (revised). p. 4-6.

Views on OMB Circular A-76

Some proponents of OMB Circular A-76 view the culture of most federal agencies as slow, conservative, averse to risk, and resistant to change. They view the OMB Circular A-76 policy as a way to gain efficiencies in the contracting process, while reducing overall costs. They argue that the resulting managed competitions enhance quality, efficiency, and productivity, and spur on technological advances. Within DOD it is believed that potential contract cost savings from the competition for defense work would free up sorely needed funds to finance weapons and equipment modernization.

Some opponents support the competitive aspects of the policy, and believe that the process is unfavorable to the private, commercial sector. Criticisms include, but are not limited to, perceptions that the 12-13% administrative and overhead costs (that the government routinely assigns to federal agencies when competing for contracts) are too low, and that the low overhead costs give the government an automatic advantage in formulating lower bids. Additionally, to win the competition, outside proposals must be at least 10% less than the MEO's proposals. Some argue that this policy favors the government. Within the information technology community, an overhead rate of 40% is viewed as the standard. The private sector believes that the 12-13% overhead rate does not accurately and completely reflect infrastructure and overhead costs; some suggest that the rate is significantly higher for all industries.¹⁴ Other critics believe that government procurement specialists decide contract awards based on the lowest cost, not necessarily what would represent the best value to the government.

Both sides generally agree that the OMB Circular A-76 process takes too long to complete. Managed competitions have ranged from 18 months, for smaller, single-function agency activities, to more than four years, for multi-functioned agency activities; however, GAO reports that multi-function studies conducted since 1991 have taken about 30 months, on average.¹⁵ Both sides concede that managed competitions could result in the loss of jobs and benefits for tens of thousands of federal government employees; they believe that some organic, technical capability should be retained within the federal government, to support unique requirements (for example, some computerized engineering or nuclear propulsion capability), although exactly how much (or how many employees) is unclear. Evidence has shown that when government employees are reorganized into MEOs, often they can operate more efficiently and cost-effectively than commercial contractors.¹⁶

¹⁴ For a discussion of overhead rates, see "Part II - Preparing the In-house and Contract Cost Estimates, OMB Circular No. A-76-Revised Supplemental Handbook." Executive Office of the President. Office of Management and Budget. March 1996. p. 15-34; and *Defense Outsourcing: Better Data Is Needed to Support Overhead Rates for A-76 Studies*. General Accounting Office, GAO/NSIAD-98-62. Feb. 27, 1998. 20 p.

¹⁵ Ferris, Nancy. "Targeting Jobs." *Government Executive*. December 1999, p. 6.

¹⁶ Statement of Maj. Gen. Robert L. Van Antwerp, Jr., Assistant Chief of Staff for Installations Management, Department of the Army. Mar. 2, 1999. House National Security (continued...)

However, it is unclear whether MEOs should be allowed to continue to perform activities viewed to be outside “the proper role of government.”

Federal labor unions, such as the American Federation of Government Employees (AFGE),¹⁷ have opposed any policy that promotes the outsourcing or privatization of functions performed by the federal government. Nevertheless, AFGE has sought to play an active role in the execution of A-76 policy on the national and local levels. AFGE does not believe that privatization ultimately saves money, nor that competition within the marketplace is capable of self-management. AFGE believes that the current debate on A-76 policy is being driven by a desire to downsize the federal work force, rather than to benefit from greater private-sector efficiencies and technological advances. During the debate leading to the passage of the FAIR Act, managers at twenty-one DOD depots protested the expansion of the jobs that would be subject to review for A-76 competitions through outsourcing. The Federal Managers Association’s (FMA) President Michael Styles wrote to Secretary of Defense Cohen, commenting that “DOD managers believe that contractors low-ball their bids in order to get the work and then increase their prices once the government competition is eliminated.”¹⁸

Congressional Interest in Outsourcing

Over the past seven years, Congress has passed a series of important federal procurement initiatives that promoted outsourcing, including the following legislation:¹⁹

- (1) The Federal Acquisition Streamlining Act (P.L. 103-355), which encouraged federal agencies to buy more commercial products, and simplified procurement procedures for securing commercial programs;
- (2) The Federal Acquisition Reform Act (P.L. 104-106), which eliminated the requirement for certified costs and pricing data for commercial products, thus further simplifying procurement procedures, while preserving the concept of full and open competition;

¹⁶ (...continued)

Subcommittee on Military Readiness.

¹⁷ For a discussion of AFGE’s policy on privatization, see *Where Do We Stand? AFGE’s Privatization Policy*. The American Federal of Government Employees, AFL-CIO. 28 p.

¹⁸ Friel, Brian. “Depot Managers Protest Outsourcing.” *Government Executive*. September 21, 1998 [<http://www.govexec.com/dailyfed/0998/092198b2.htm>].

¹⁹ For a discussion on federal procurement reform, see CRS Report 96-373, *Federal Acquisition Reform Act of 1996*, by Michael Seitzinger, April 29, 1996, 6 p.; CRS Report 96-598, *Civilian Procurement Reform Efforts*, by Stephanie Smith, July 3, 1996, 5 p.; and CRS Issue Brief IB96022, *Defense Acquisition Reform: Status and Current Issues*, by Valerie Bailey Grasso (updated regularly).

(3) The Information Technology Management Reform Act of 1996 (P.L. 104-106), which eliminated the General Services' Administration's (GSA) central authority in the administration of information technology, empowered each federal agency to develop its own information technology procurement program and combined bid protests authority for both information technology and federal procurement under GAO; and

(4) The Defense Reform Initiative,²⁰ which evolved out of the Quadrennial Defense Review and is focused on reducing DOD infrastructure support and streamlining its business practices.

The 105th Congress considered a greater use of outsourcing for government goods and services when Representative John J. Duncan, Jr. introduced H.R. 716, the "Freedom from Governmental Competition Act." Introduced on February 12, 1997, this bill would have required the government to procure all goods and services from the private sector; however, the bill would have prohibited the competitive outsourcing of federal functions. The Clinton Administration voiced strong objections to the bill, and it did not survive the challenge. Another version of the bill was later introduced; it would have required that all commercial activities be subject to competitive outsourcing within a 5-year period, as well as the appointment of a "Commercial Activities Czar." That bill was dropped in Committee due to a lack of congressional support.

On the same day (February 12, 1997), Senator Craig Thomas introduced S. 314, "a bill to provide a process for the government to identify functions not inherently governmental." A final version of S. 314 became the Federal Activities Inventory Reform (FAIR) Act. FAIR passed in the second session of the 105th Congress and was signed into law on October 19, 1998 (P.L. 105-270). The Act was published in the *Federal Register* at 64 FR 100031.

The Federal Activities Inventory Reform Act of 1998 (FAIR)

The passage of FAIR created statutory federal agency reporting requirements. OMB published the proposed implementation rules in the *Federal Register* on March 1, 1999; final guidance on the implementation of the FAIR Act was published on June 24, 1999, in Transmittal Memorandum #20.²¹ The FAIR Act contained both the requirement for agencies to inventory their commercial activities, and the pre-existing definition of "inherently governmental functions." Federal executive

²⁰ For a discussion of the progress of the Defense Reform Initiative, see *Defense Reform Initiative. Organization, Status, and Challenges*. General Accounting Office. April 1999, GAO/NSIAD-99-87. 95 p.

²¹ See the FAIR Internet site, [<http://www.whitehouse.gov/OMB/circulars/index-procure.html>].

agencies²² are required to submit to OMB, by June 30 of each year, annual inventories (or lists) of “non-inherently governmental functions.” Agencies are afforded opportunity to argue for inclusions/exclusions to their lists. Such lists will be made available to Congress and eventually published in the *Federal Register*. The lists can be challenged by “interested parties,” as defined in the legislation. Once challenged, agencies must either accept the challenge, make changes to the list, or reject the challenge, and agree to do so within 30 days after the challenge is filed. September 30, 1999, was the deadline for agencies to respond to the first FAIR Act inventory challenges.²³

What did emerge through the passage of the FAIR Act was a process whereby the federal government would identify activities considered “not inherently governmental” in nature. Inherently governmental activities are described as “those so intimately related to the exercise of the public interest as to mandate performance by federal employees.”²⁴ The Office of Federal Procurement Policy (OFPP) Policy Letter 92-1, dated September 23, 1992, provides the following guidance on how to identify inherently governmental activities:

These functions include those activities that require either the exercise of discretion in applying Government authority or the making of value judgements in making decisions for the Government. Governmental functions normally fall into two categories: (1) the act of governing, i.e., the discretionary exercise of Governmental authority, and (2) monetary transactions and entitlement. An inherently governmental function involves, among other things, the interpretation and execution of the laws of the United States so as to:

- (a) bind the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;
- (b) determine, protect, and advance its economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise;
- (c) significantly affect the life, liberty, or property of private persons;
- (d) commission, appoint, direct, or control officers or employees of the United States; or
- (e) exert ultimate control over the acquisition, use, or disposition of the property, real or personal, tangible or intangible, of the United States, including the collection, control, or disbursement of appropriated and other Federal funds.

²² Exceptions to the FAIR Act include, but are not limited to, the General Accounting Office, government corporations or “government-controlled corporations,” non-appropriated funds instrumentalities, and certain depot-level maintenance and repair organizations. FAIR Act, P.L. 105-270, p.4.

²³ Saldarini, Katy. “Challenges To Agency Job Lists Keep Rolling In.” *Government Executive*. November 12, 1999, 2 p.

²⁴ “Inherently Governmental Functions.” Appendix 5, *Office of Federal Procurement Policy Letter 92-1*, September 23, 1992, p. 53.

Inherently governmental functions do not normally include gathering information for or providing advice, opinions, recommendations, or ideas to Government officials. They also do not include functions that are primarily ministerial and internal in nature, such as building security; mail operation, operation of cafeterias; housekeeping; facilities operations and maintenance, warehouse operations, motor vehicle fleet management and operations, or other routine electrical or mechanical services.²⁵

Any function not considered inherently governmental would be considered commercial, and subject to competitive outsourcing.²⁶

The Use of OMB Circular A-76 Within the Federal Government

Within the federal government, the OMB Circular A-76 has not been used uniformly. On the one hand, DOD has set the pace as the lead federal agency to use the OMB Circular A-76 policy. On the other hand, civilian agencies did not report a single federal position for outsourcing, under OMB Circular A-76, in 1997. Reportedly, they have relied instead on management improvement techniques, such as re-invention, re-engineering, and consolidation, as recommended in the National Partnership for Reinventing Government.²⁷ The Clinton Administration has encouraged more frequent use of the policy, as reflected below:

As noted in the President's FY1999 budget, competition spurs efficiency. Agencies that require or provide administrative or other commercial support services should have the stimulus of competition to make available new technologies, capital and new management techniques to improve performance and reduce costs. This Administration is expanding the level of competition for the provision of commercial goods and services, by requiring agencies to compete with one another and with the private sector on a level playing field.²⁸

Table 1 summarizes the number of federal job positions that have been studied and subjected to the process, government-wide, from 1988-1997.

²⁵ Ibid, p. 53.

²⁶ Definitions of terms commonly associated with the OMB Circular A-76 Program are provided in Appendix I, OMB Circular A-76, Revised Supplemental Handbook (Mar. 1996.)

²⁷ Maxwell, Alison. "Agencies Avoid Contracting Studies." *Government Executive*. June 5, 1998.

²⁸ Office of Management and Budget, Executive Office of the President. *Memorandum For Heads of Executive Departments And Agencies*. Issued by Franklin Raines. May 12, 1998.

Table 1. Number of Positions Studied, 1988-1997

Fiscal Year	Total FTEs	DOD FTEs	Civilian Agencies FTEs
1988	17,249	12,000	5,249
1989	8,469	6,100	2,369
1990	9,547	6,989	2,558
1991	2,026	1,243	783
1992	564	496	68
1993	509	441	68
1994	1,691	1,623	68
1995	2,386	2,128	258
1996	5,267	5,241	26
1997	25,255	25,255	0

Sources: This table and the accompanying explanation were provided by J. Christopher Mihm, Director, Federal Management Workforce Issues, General Government Division, GAO. Mr. Mihm testified before the Subcommittee on Oversight of Government Management Restructuring, and the DC Committee on Governmental Affairs, U.S. Senate, on June 4, 1998. Table 1 was prepared by Bill Reinsberg, National Defense Analyst, Federal Management and Workforce Issues, General Government Division, GAO. As reported by OMB, civilian agencies data for 1992-95 are based on annual averages for that time period. Not all agencies are included, but OMB stated that the number excluded is significant. GAO did not independently verify the accuracy of the data provided by OMB.

An FTE is the calculation of staffing levels using staff work time as a factor. As a result of an OMB Circular A-76 competition, the functions currently performed by federal agency workers could be transferred to a source outside of the agency, including another federal agency or the private sector. As previously stated, DOD heads the lists in using OMB Circular A-76 as a tool for managing outsourcing competitions for federal contracts.

Table 2 shows DOD's projections for FY2000 cost comparison studies. As part of the President's FY2000 Budget, DOD and the military services have announced the following positions currently under study.²⁹ Under OMB Circular A-76, DOD plans to open about 250,000 jobs to managed competitions by the year 2003, much of it conducted through FAIR.

²⁹ Provided by the Competitive Sourcing and Privatization Office, Office of the Deputy Undersecretary of Defense for Industrial Affairs and Installations.

**Table 2. DOD's FY2000 Budget Submission,
Reflecting Positions Currently Under OMB Circular A-76 Study**

Type of Study	Air Force	Army	Navy	Marine Corps	Defense Agencies	Total Positions
Single-function	5,080	—	638	none	1,215	6,933
Multi-function	4,123	14,757	4,910	none	3,753	27,543
Total Positions	9,203	14,757	5,548	none	4,968	34,476

DOD has projected that it could save about \$6 billion by FY2003, and \$2.5 billion each year thereafter, through a more aggressive use of the OMB Circular A-76 policy.³⁰ The General Accounting Office (GAO) has questioned whether these savings are overly optimistic.³¹ Historically, savings resulting from competitions have reportedly ranged from 20-30% lower than original projections. Generally, about 60% of the competitions are won by the original employing agency, reconfigured into a “most efficient organization,” while 40% are won by competing private contractors and government agencies.³² Results of recent competitions, however, reflect a shift. Private contractors now win about 60% of the competitions, while government agencies garner about 40%.³³

Results of Selected OMB Circular A-76 Cost Comparison Studies

The results of some recent OMB Circular A-76 competitions suggest that the process can work effectively and efficiently, even when protests are filed. Two years ago, the Army's Aberdeen Proving Grounds solicited for proposals to perform logistics, operations and maintenance, risk management, organizational support, and community and family activities under OMB Circular A-76. Initially, the in-house MEO lost the competition to Aberdeen Technical Services (ATS), a group of private contractors. The employee group appealed, based on allegations that ATS incorrectly calculated health and welfare benefit costs; as a result, the contract award was overturned. ATS protested the award and challenged the veracity of the cost comparison study. The Comptroller General recently upheld the contractor's protest.

³⁰ Statement of David Warren, Director, Defense Management Issues, U.S. General Accounting Office. Mar. 13, 1998. House National Security Subcommittee on Military Readiness.

³¹ For a discussion of projected savings from A-76 competitions, see *Outsourcing DOD Logistics: Savings Achievable But Defense Science Board's Projected Are Overstated*. December 8, 1997. GAO/NSIAD-98-48. 18 p.

³² General Accounting Office. *DOD Competitive Sourcing: Results of Recent Competitions*. Feb. 22, 1999. GAO/NSIAD 99-4. 36 p.

³³ Ferris, Nancy. “Targeting Jobs.” *Government Executive*. December 1999.

Aberdeen officials have until the end of April 2000 to determine whether to issue a new request for bids or award the contract to ATS.³⁴

However, another competition has proven both arduous and controversial. In April 1999, the Army announced that it would outsource the management of its Wholesale Logistics Modernization Program. To avoid a lengthy competition process, the Army sought a waiver from OMB Circular A-76. If the Army is successful, some 500 employees could potentially lose their jobs, without the opportunity to compete as an MEO. Public criticism has mounted. The National Federation of Federal Employees, Local 1763, filed an appeal in May. Some employees have filed age discrimination complaints with the Army's Equal Employment Opportunity Office. The Small Business Administration and affected employees filed an appeal with the Secretary of the Army; the appeal was denied. Finally, a provision was added to the FY2000 DOD Authorization Bill requiring the Army to allow the current employees to compete for their jobs. That provision was changed to a "Sense of the Congress" resolution that the Army retain sufficient in-house expertise to ensure that DOD's warfighting capabilities are not compromised, and that contractor performance can be monitored. The Army had projected December 10, 1999 as the contract award date. Since the Army announced its decision to outsource, 10% of the employees at the two software centers that run the program have quit. This type of controversy is likely to continue.

Another Air Force OMB Circular A-76 award decision was overturned by the GAO Board of Contract Appeals, and later reinstated by the Office of Government Ethics. In this case, interested parties were invited to submit initial technical proposals for work at Wright-Patterson Air Force Base, Dayton, Ohio. The proposal was to perform maintenance, operation, repair and minor construction services for the Base. The contract solicitation for bids was issued on May 29, 1998. Two technical proposals were received: one from DZS/Baker LLC, the other from the Morrison Knudsen Corporation.

On the basis of the technical evaluation team's review of the two proposals, the Air Force requested revised technical proposals. The evaluation team reviewed the revised technical proposals and determined that both proposals were incomplete and unacceptable. Based on their assessment, the Air Force canceled the original solicitation, meaning that the proposal was withdrawn. Both companies were notified. Afterwards, the Air Force made plans to implement its most efficient organization, meaning, to re-engineer the current work unit to keep the work within the government, performed by federal workers.

The two competing companies were notified; they promptly filed protests with GAO. On January 12, 1999, the GAO Board of Contract Appeals overturned the Air Force A-76 award decision to cancel the solicitation, due to the appearance of a conflict of interest. After investigating the protests, GAO ruled:

³⁴ General Accounting Office. Comptroller General decision. Aberdeen Technical Services, B283727.2, February 22, 2000, 10 p.

DZS/Baker and Morrison Knudsen argue that the determination that their proposals were technically unacceptable — that is, the determination on which cancellation of the solicitation was based — resulted from a failure to conduct meaningful discussions, and an unreasonable evaluation of technical proposals by evaluators with an improper conflict of interest. In this latter regard, the protesters note that 14 of 16 evaluators — 4 of 6 core evaluators (5 “designated” core evaluators and an evaluator considered by the evaluation team to be a core evaluator) responsible for evaluating the entire proposals, and all 10 technical advisers responsible for evaluating specific portions of the proposals — held positions that were under study as a part of the A-76 study.

We agree with the protesters that the evaluation process was fundamentally flawed as a result of a conflict of interest.³⁵

The Office of Government Ethics (OGE) later challenged GAO’s decision. Citing an exemption to “conflict of interest” rules, as prescribed under Section 208 of Title 18 of the U.S. Code,³⁶ OGE ruled that:

In accordance with 18 U.S.C. § 208(b)(2), OGE has provided an exemption for such employees who participate in particular matters where the disqualifying financial interest arises from Federal Government employment.³⁷

Major New Developments

Revised DOD Acquisition Policy

DOD has issued a revised acquisition policy, to replace the DOD 5000 series that was cancelled on October 30, 2002. The new policy consists of two directives: 1) the DOD 5000.1, and 2) the DOD 5000.2. The DOD 5000.1, *The Defense Acquisition System*, defines the management principles and policy for defense acquisition programs, while the DOD 5000.2, *Operation of the Defense Acquisition System*, describes the procedures for the Major Defense Acquisition Programs (MDAP) and Major Automated Information Systems Acquisition Programs.³⁸

The Director of Defense Procurement has published a summary of the new and existing procurement authorities for the use of temporary emergency procurement funds. The Army, Navy, and Air Force have also issued guidelines and techniques

³⁵ General Accounting Office. *GAO Bid Protest Decision*. DZS/Baker LLC; Morrison Knudsen Corporation, B-281224. January 12, 1999. 5 p.

³⁶ Friel, Brian. “A-76 Conflict Of Interest Ruling Challenged.” *Government Executive*. September 24, 1999.

³⁷ Office of Government Ethics. *OGE Reaffirms Applicability of Section 208 Exemption in Outsourcing and Privatization Activities*. September 9, 1999.

³⁸ [<http://www.acq.osd.mil/dpap/policy/directives.htm>].

to foster acquisition flexibility in responding to urgent, unusual, and compelling circumstances.³⁹

The President's Management Agenda and the Army's Third Wave

The current effort to change the business operations of the Army fall under the government-wide President's Management Agenda (PMA) and a United States Army initiative known as the "Third Wave."⁴⁰

The PMA was undertaken as part of President Bush's movement toward a more entrepreneurial government. The competitive sourcing initiative is one of five components of the PMA. The goal of the competitive sourcing initiative is to "simplify and improve the procedures for evaluating public and private sources, to better publicize the activities subject to competition, and to ensure senior level agency attention to the promotion of competition."⁴¹ The PMA applies to 850,000 commercial positions throughout the government, including DOD. According to the PMA, nearly half of all federal employees perform tasks that are readily available in the commercial marketplace. Accordingly, the Bush Administration has directed that half of the 850,000 commercial positions identified in the Federal Activities Inventory Reform (FAIR) Act⁴² inventories be competed or directly converted to private sector performance.⁴³ Although no date for the 50% target has been formally

³⁹ [<http://www.acq.mil/dpap>].

⁴⁰ The agenda is available at [<http://www.whitehouse.gov/omb/budget/fy2002/mgmt.pdf>]. CRS Report RL31409, *The President's Management Agenda* provides background and analysis.

⁴¹ *The President's Management Agenda*, 2002, p.17.

⁴² The FAIR Act (P.L. 105-270), a legislative companion to the OMB Circular A-76, requires agencies to submit inventories of their commercial activities to OMB. The FAIR Act inventories are lists compiled by agencies of the commercial activities performed by their employees. A "commercial activity" is a not inherently governmental good or service that can be obtained from the private sector. Photography, data processing, and management support services are examples of categories of commercial activities. In contrast, an inherently governmental activity intimately relates to the public interest, thus mandating performance by government employees. This includes activities that require the exercise of discretion in applying government authority or the making of value judgments. More information is available in CRS Report RL31024, *The Federal Activities Inventory Reform Act and Circular A-76*. The current definitions of activities for the Corps' civil works in the FY2000 inventory are available at [<http://www.asamra.army.pentagon.mil/fair/USACEFunctionsCodeDictionaryOMBVersion.htm>].

⁴³ OMB Circular A-76, first issued in 1966, provides guidance for agencies to determine whether commercial activities should be provided through contract with commercial sources, use of in-house government personnel, or through interservice support agreements with other federal agencies. Once an activity is selected for Circular A-76 review, the agency is required to first develop a performance work statement and quality assurance plan. It then issues a request for proposals or invitation for bids from the private sector. As

(continued...)

established, the Administration set a target of 5% for FY2002 and 10% for FY2003. The 50% target was used by OMB in the Administration's FY2004 budget documents to assign a rating in the management scorecard for the competitive sourcing component of the PMA.⁴⁴

The PMA and Third Wave were undertaken separately but are nonetheless interrelated. Aspects of the Third Wave dovetail with the PMA's competitive sourcing component; however, the Army's initiative is broader. It searches for ways to not only improve operations but also focus the Army's energies on its core, war-fighting competencies. One difference between the two initiatives is that the PMA questions what activities should government employees perform, in general, while the Third Wave questions what activities, in particular, should the Army perform. The PMA has directed executive federal agencies to competitively source their commercial activities in order to produce quality services at a reasonable cost through efficient and effective competition between public and private sources.⁴⁵

Unlike the government-wide PMA, the Third Wave is specific to the U.S. Army. In a memorandum dated October 4, 2002, Secretary of the Army Thomas E. White announced an effort to streamline the Army's activities to focus on its core competencies⁴⁶. The Third Wave has three purposes: (1) to free up military manpower and resources for the global war on terrorism, (2) to obtain non-core products and services from the private sector to enable Army leaders to focus on the Army's core competencies, and (3) to support the PMA.⁴⁷ The Third Wave questions not only what activities can be performed at less cost by private sources but also on what activities should the Army focus its energies. The Army's initiative is referred to as the Third Wave because there were two earlier competitive sourcing initiatives. During the first wave, which began in 1979, the Army reviewed 25,000 positions for competition. The second wave was undertaken as part of the Defense Reform Initiative Directive. During the second wave, as part of the late 1990s' reinventing government initiatives, the Army competed 13,000 jobs; 375 civilians were involuntarily separated as a result of these competitions.

Under the Third Wave, the Army is reviewing all of its commands to identify how to focus the agency's activities on its war-time fighting capabilities. The Third Wave reviews all positions and *functions* (i.e., entire areas of responsibilities and

⁴³ (...continued)

industry develops proposals, the agency puts together a more efficient organization for retaining the work in-house and prepares its own proposal. The best-value contract offer is compared with the agency's proposal to determine final award. The contractor's offer must be at least 10% or \$10 million below the government's offer to be awarded the contract. Otherwise, the savings are not deemed significant enough to outsource.

⁴⁴ *Performance and Management Assessments: Fiscal Year 2004*, 2003.

⁴⁵ *The President's Management Agenda*, 2002, p. 4.

⁴⁶ Secretary White announced his resignation on April 25, 2003. See Gruber, Amelia. Army Faces Two Top Leadership Vacancies. *Government Executive*, April 28, 2003.

⁴⁷ Statement by Dr. John Anderson at the Third Wave Media Roundtable Discussion on Oct. 10, 2002, [<http://www.dtic.mil/armylink/news/Oct2002/r20021023transcript160ct02.html>].

missions, such as wetlands regulation) that are not part of the Army's war-fighting competencies. What defines core and non-core activities is currently under discussion within the Army. According to the Secretary of the Army, 32,587 commercial positions are non-core to the Army and are included in the Third Wave. Options that can be considered for non-core functions and positions include competitive sourcing, transfer of responsibilities to other agencies, and divestiture. In the initial phase of the Third Wave, 154,910 civilians (i.e., more than half of the Army's 247,400 civilian positions) and 58,727 military positions are being reviewed.

To start the Third Wave, the Army has identified 402,310 commercial positions in the various commands that would be initially considered. In addition to reviewing these specific positions, the Third Wave will evaluate how entire functions contribute to the Army's core competencies. For example, the civil works program of the Army Corps of Engineers may be significantly affected by the Third Wave, depending on whether its water resources functions are deemed core or non-core to its mission. Because the Third Wave includes the review of entire functions, it encompasses commercial and inherently governmental activities at the Corps (see previous section on *The Federal Activities Inventory Reform Act of 1998* for a definition of what is inherently governmental). As previously noted, the options being considered for functions and positions include competitive sourcing, transfer of responsibilities to other agencies, and divestiture.

The Third Wave is now in its first phase: a pre-decisional study. The Secretary has directed the Army commands to develop an implementation plan. The Army expects to have its core and non-core functions identified in April 2003, including any requests for exemptions based on disruption to core missions. Each command has requested exemptions for positions based on disruption to core missions. The deadline for the request for exemptions was extended from the original deadline of November 29, 2002, to January 15, 2003, largely because more information was needed to evaluate many of the exemption requests. The Secretary of the Army assigned the Assistant Secretary of the Army for Manpower and Reserve Affairs (M&RA) responsibility to make determinations on exemptions. If commands do not agree with the exemption recommendations made by the Assistant Secretary, there will be a negotiation process to determine the final outcome.

OMB Circular A-76

The proposed, revised circular was published in the *Federal Register* during November 2002, and the public was given a 30-day comment period. Approximately 700 comments were received and can be viewed at the OMB competitive sourcing Web site.⁴⁸ As of this date, no new announcements have been made.

The revised circular was a recommendation of the Commercial Activities Panel, a congressionally mandated, GAO-convened panel (in accordance with Section 832 of the FY2001 National Defense Authorization Act, P.L. 106-398), to study the policies and procedures governing the transfer of commercial federal activities from government personnel to federal contractors. The panel recommended abolishing of

⁴⁸ [http://www.whitehouse.gov/omb/procurement/comp_sourcing_init.html]

OMB Circular A-76 and replacing it with an “integrated competition process” based on the Federal Acquisition Regulations (FAR) with elements of OMB Circular A-76.

The FY2001 Defense Authorization Act (P.L. 106-398) directed the Comptroller General to convene a panel to study the process used by the federal government to make competitive sourcing decisions. The Commercial Activities Panel was created largely because of the ineffectiveness of OMB Circular A-76. The Commercial Activities Panel, chaired by the Comptroller General, was comprised of representatives from DOD, OMB, federal labor organizations, and private industry. The mission of the Panel was “to improve the current sourcing framework and processes so that they reflect a balance among taxpayer interests, government needs, employee rights, and contractor concerns.”⁴⁹

The Panel’s final report has made four recommendations: 1) the adoption of ten sourcing principles as a benchmark against which to measure sourcing decisions; 2) the abolishment of OMB Circular A-76, replacing it with an “integrated competition process” that combines elements of the OMB Circular A-76 with the Federal Acquisition Regulations (FAR)⁵⁰; 3) the implementation of limited changes to the Circular that do not require legislation; and 4) the move to develop federal agencies into high-performing organizations, known as HPOs. OMB has accepted the Panel recommendations and plans to begin the process to implement the Panel’s recommendations in civilian agencies. DOD, on the other hand, would require congressional approval to abolish the OMB Circular A-76, because the requirements of Title 10, Section 2462 of the United States Code (U.S.C.) dictate that DOD make defense contracting award decisions based on costs, not “best value.”⁵¹ The House Armed Services Committee, Subcommittee on Military Readiness, heard testimony from members of the Commercial Activities Panel on June 26, 2002.⁵² The Panel issued a final report on April 30, 2002.

The Bush Administration has viewed the OMB Circular A-76, and its legislative companion, the Federal Activities and Inventory Reform (FAIR) Act, as important management reform tools to meet the Administration’s competitive sourcing goals. According to Angela Styles, head of OMB’s Office of Federal Procurement Policy,

⁴⁹ See Commercial Activities Panel Report at [<http://www.gao.gov/>].

⁵⁰ Federal procurement policy is defined in the Federal Acquisition Regulation system, more commonly referred to as the FAR. DOD’s procurement rules are defined in the Defense FAR, or DFAR.

⁵¹ Title 10, Subtitle A, Part IV, Chapter 146, Section 2462 (a) of the United States Code reads: “In general, except as otherwise provided by law, the Secretary of Defense shall procure each supply or service necessary for or beneficial to the accomplishment of the authorized functions of the Department of Defense (other than functions which the Secretary of Defense determines must be performed by military or Government personnel) from a source in the private sector if such a source can provide such supply or service to the Department at a cost that is lower (after including any cost differential required by law, Executive order, or regulation) than the cost at which the Department can provide the same supply or service.”

⁵² Hearing on Outsourcing. House Armed Services Committee, Subcommittee on Military Readiness, June 26, 2002.

about 850,000 people in the federal government perform jobs that are commercial in nature. OMB has directed federal agencies to compete, or outsource, 5% of all federal jobs considered commercial by October 2002, and to compete, or outsource, 10% of all federal jobs considered commercial in nature by October 2003.⁵³ DOD has used OMB Circular A-76 as a way to competitively source its commercial functions, and as a vehicle to raise funds for weapon systems modernization,⁵⁴ and formed the Business Initiative Council (BIC) to take the lead in identifying what is a core function (and what is *not* a core function) within DOD.⁵⁵

The FY2002 FAIR Act Inventories

DOD has issued its FY2002 FAIR Act inventory lists of commercial activities, as identified by DOD components. The inventory shows that at the beginning of FY2002, DOD reported 410,699 civilian full-time equivalents (FTE) that perform a variety of commercial activities, of which 239,001 (58%) have been identified as potential candidates for competitive sourcing under OMB Circular A-76. The remaining 171,698 FTE have been judged by DOD to be exempt from competition. By October 2003, the Bush Administration has required federal agencies to compete 15% of all commercial jobs on the inventory. The DOD FY2002 FAIR Act inventory can be found on the FAIRNET Web site at [<http://web.lmi.org/fairnet/home.html>].

Congressional Action

The House-passed version of the FY2004 Defense Authorization Bill, H.R. 1588, contains a provision (Section 1455) that would require the head of a federal executive agency to publicly disclose any contract entered into, without full and open competition, for the repair, maintenance, or construction of the Iraqi infrastructure. The Senate-passed version of H.R. 1588 would allow for the development of a pilot program (Section 8122) to analyze the use of “best value” criteria in the source selection for information technology services.

H.R. 1836, The Civil Service and National Security Personnel Improvement Act, was introduced on April 29, 2003, approved by the House Government Reform Committee (voice vote) on May 7, and approved by the House Armed Services Committee on May 15 (58-2). The bill would provide a major overhaul of the civil

⁵³ Peckenpaugh, Jason. OMB targets more jobs for outsourcing in 2003. *Government Executive*, June 25, 2001. 1 p.

⁵⁴ Defense competitive sourcing decisions are usually based on one of three factors: 1) whether the work activity or function is considered “core” to the mission, or component; 2) whether the function has been identified as “inherently governmental” according to the rules of the Office of Management and Budget (OMB) Circular A-76; and, 3) how the function is coded on the FAIRNET, the Web-based guide to DOD’s inventory in accordance with the FAIR Act.

⁵⁵ BIC was created in June 2001 by Secretary of Defense Donald Rumsfeld, is chaired by the Undersecretary of Defense for Acquisition and Logistics Mr. Edward “Pete” Aldridge, and is comprised of military service secretaries, several undersecretaries, and the Vice Chairman of the Joint Chiefs of Staff. The leadership of BIC is rotated among military services; in May, the lead was transferred to the Department of the Army.

service personnel system, and give the Secretary of Defense “sole and unreviewable discretion” to implement changes.

H.R. 1837, The Service Acquisition Reform Act (SARA), was introduced on April 29, 2003, and referred to the House Armed Services and Government Reform Committees. The purpose of the Act is to improve the federal acquisition workforce, processes, and services. Key provisions include statutory changes in the management of training, career accession, and career education.

OMB Circular A-76, Part 7c (3) notes that the Circular and its Supplement are not applicable to DOD in times of a declared war or military mobilization. The Undersecretary of Defense for Acquisition, Technology, and Logistics has issued a DOD policy memorandum.

H.R. 5010, the FY2003 DOD appropriations bill (P.L. 107-248), contains several provisions that affect DOD contracting rules, including Section 8014, which would prohibit the contracting out of some DOD activities unless a “most efficient and cost-effective analysis” is performed and certified to House and Senate Appropriations Committees; Section 8022, which would prohibit the use of funds to perform an Office of Management and Budget (OMB) Circular A-76 cost comparison study if the study exceeds 24 months (for a single-function study) and 48 months (for a multi-function study); Section 8025, which would afford qualified nonprofit agencies for the blind or severely handicapped the “maximum practicable opportunity” to participate as subcontractors and suppliers; Sections 8016 and 8030, which would prohibit both the procurement of welded shipboard anchor and mooring chain 4 inches in diameter and under, unless manufactured from components that are substantially manufactured in the United States, and the procurement of carbon, alloy, or armor steel plates that were not melted and rolled in the United States or Canada; Section 8032, which would permit competition for depot maintenance and repair work between DOD depot maintenance activities and private firms; Section 8033, which would require DOD to submit a report to Congress on the amount of purchases from foreign entities in FY2003; and Sections 8019 and 8090, which would prohibit both the demilitarization of certain weapons and the transfer of “armor piercing ammunition,” unless rendered incapable of reuse.

On June 27, 2002, the Senate passed S. 2514 and incorporated the bill into H.R. 4546 (the House version of the defense authorization bill). H.R. 4546 was passed as amended and was forwarded to the President on November 13, 2002. Provisions of H.R. 4546 include 1) the granting of new waiver authority to the Secretary of Defense though amending 10 U.S.C. 2465, which prohibits the use of contract firefighters or security guards at military installations or facilities; 2) management improvements in the DOD Purchase Card Program, to require an annual review, periodic audits by the DOD Inspector General, appropriate training for both purchase card holders and management officials, and penalties for violations of purchase card management regulations; 3) the establishment of rapid acquisition and deployment procedures, including an expedited procurement and contracting process, for items urgently needed in “significant and urgent situations”; and 4) new rules governing the use of Federal Prison Industries contracts. Section 335 would amend 10 U.S.C. 2464 by specifying those DOD core logistic capabilities that are to be maintained as government-owned and government-operated.

Section 832 of the FY2002 National Defense Authorization Act (S. 1438, P.L. 107-107) codifies and modifies the Berry Amendment, repealing Sections 9005 of the FY1993 DOD Appropriations Act (P.L. 102-396) and Section 8109 of the FY1997 DOD Appropriations Act (P.L. 103-139). The Act calls for the overhaul of DOD's management structure for procurement services under the auspices of the Under Secretary of Defense for Acquisition, Technology, and Logistics (Section 801), to be established and implemented within 180 days of enactment (report due by June 28, 2002); set procurement savings goals for the next 10 fiscal years; directing the Secretary of Defense to report to congressional defense committees on the progress made toward the goals and objectives of the procurement management plan (report due no later than March 1, 2002); requires the Secretary of Defense to revise the Defense Federal Acquisition Regulations (a supplement to the Federal Acquisition Regulations) to develop rules for competition in the procurement of multiple award contracts (report due by June 28, 2002); and grants temporary emergency procurement authority to raise the simplified acquisition threshold to facilitate the defense against terrorism or biological or chemical attack (Section 836). Section 1062 of S. 1438 (the provision requiring the demilitarization of significant military equipment) was eliminated from the enrolled bill.

The FY2002 Department of Defense Appropriations Act (H.R. 3338) prohibits the conversion of certain DOD activities or functions to contractor performance, if the activities are performed by ten or more civilian DOD employees, until a "most efficient and cost-effective analysis" is completed and certified to the congressional appropriations committees (other conditions are noted; see Section 8014), and prohibits DOD from purchasing welded shipboard anchor and mooring chain (4 inches in diameter) unless the anchor and mooring chain are manufactured in the United States from components that are substantially manufactured in the United States (Section 8016). Section 8020 of the Act also prohibits the demilitarization or disposal of certain military equipment (M-1 Carbines, M-1 Garand rifles, M-14 rifles, .22 caliber rifles, .30 caliber rifles, or M-1911 pistols).

Other Issues

The Undersecretary of Defense for Acquisition, Technology, and Logistics has reversed his earlier decision not to comply with OMB's mandate to compete or directly convert approximately 15% of all federal jobs considered commercial in nature. However, DOD plans to use the Business Initiative Council to explore other ways to drive down costs and gain efficiencies. This new development will bring DOD in line with OMB's mandate for all federal agencies. Under the OMB competitive sourcing plan, DOD is required to compete 10% of all jobs on its 2001 inventory.⁵⁶

On December 18, 2001, the Federal Acquisition Regulation (FAR) published a final rule in the Federal Register, effective February 19, 2002, that requires contractors to 1) notify the contracting officer if the contractor becomes aware of an overpayment, and 2) request instructions for disposition of the overpayment. On

⁵⁶ Peckenpau, Jason. "Pentagon Wants Out of OMB Competitive Sourcing Plan." *Government Executive*. January 11, 2002.

December 27, 2001, the FAR Council repealed the “contractor responsibility rule,” a rule that required federal contractors to consider an outside company’s federal track record before hiring them. The former rule spelled out specific rules of conduct for companies to win federal contracts and required companies to investigate the legal practices of other companies.

Table 3. 106th Congress, Outsourcing Bills

Bill, Date Introduced	Short Title	Status
S. 2242, March 9, 2000	Federal Activities Inventory Reform Act (FAIR) Amendments of 2000	Referred to Subcommittee on Oversight of Government Management, Restructuring and the District of Columbia, May 19, 2000
H.R. 4722, June 22, 2000	Department of Defense Privatization and Outsourcing Moratorium Act	Referred to Subcommittee on Military Readiness and Executive Comment requested from DOD, June 29, 2000

S. 2242 would amend the FAIR Act by requiring agencies to (1) list both “inherently governmental” and non-inherently governmental functions; (2) notify all employees who perform non-inherently governmental functions that their jobs may be contracted out; (3) consider *all* costs (including all overhead costs) in the conduct of public-private competitions; and (4) prohibit the performance of non-inherently governmental functions for other federal agencies, unless the contract was won due to a successful public-private competition. Once enacted, the bill would require OMB to study the portability of federal pension benefits (in the transition of moving federal employees from public to private employment) and report to Congress within 180 days.

The third legislative initiative, H.R. 4722, would impose a moratorium on the outsourcing and privatization of work performed by DOD civilian employees. The moratorium itself would be tied to the Secretary of Defense’ certification to Congress that all actions in the 1995 round of base closures (under the Defense Base Realignment and Closure Act of 1990) had been completed. The bill was referred to the Armed Services Committee.

Questions for the 108th Congress

Congress, in its oversight role, may conduct hearings on the implementation of the proposed, newly revised OMB Circular A-76, the impact of the provisions of Title 10 U.S.C., 2462, which requires DOD to make contracting decisions based on lowest cost, rather than “best value,” as proposed in the revised circular,⁵⁷ and whether legislation to repeal 10 U.S.C. 2462 is necessary in order for DOD to implement the new Circular. Hearings may be conducted to review legislative requirements of the FY2000 Defense Appropriations Act (P.L. 106-79), which directed the Secretary of Defense to submit a report, detailing all OMB Circular A-76 reviews conducted since 1995, including work performed by civilian, military and contract employees.⁵⁸

Furthermore, as part of its Defense Reform Initiative, DOD has announced that 229,000 jobs would be opened to managed competition; by FY2005, some 237,000 jobs.⁵⁹ DOD has announced that out of about 504,000 civilian jobs (about three out of every four civilian jobs), some 308,000 civilian jobs could be subject to outsourcing.⁶⁰ In light of these projections, Congress might want to consider the following questions, discussed below.

Will DOD Comply with the Reporting Requirements?

P.L. 105-270, the Federal Activities Inventory Report Act of 1998, required federal executive agencies to submit annual lists, or inventories, of government activities “not inherently governmental” in nature, not later than the end of the third quarter of each fiscal year (June 30) to OMB. In a hearing before the House Subcommittee on Management, Information and Technology, Acting OMB Deputy Director Deirdre Lee explained that the first implementation of the FAIR Act would require OMB and federal agencies to mount a thorough and time-consuming effort to meet the legislative requirements:

The inventories required by the FAIR Act represent a significant workload. Unless specifically exempted by the FAIR Act itself, OMB’s guidance requires

⁵⁷ The OMB Circular A-76 Supplemental Handbook allows for the use of “best value” tradeoffs among the private bidder proposals; however, the winning private sector bidder’s proposal is later compared with the government’s proposal, and the contract is always awarded based on lowest cost. In contrast, under the proposed, newly revised OMB Circular A-76, the government and private sector proposals are competed together. Contract awards can be made based on best value. The use of best value allows the contracting official to consider factors other than cost, including technical superiority, quality, innovation, and past performance. The proposed revision to OMB Circular A-76 can be viewed at [http://www.whitehouse.gov/omb/circulars/a076/a76_111402.pdf].

⁵⁸ Section 8109 of the FY2000 Defense Appropriations Bill, P.L. 106-65.

⁵⁹ General Accounting Office. *Defense Reform Initiative: Organization, Status, and Challenges (Chapter Report)*. April 21, 1999. GAO/NSIAD-99-87. p. 50.

⁶⁰ Friel, Brian. “DOD Puts 500,000 Jobs On Outsourcing List.” *Government Executive*. December 14, 1999.

that all executive branch agencies, regardless of their size, submit either a compliant inventory or a letter indicating that all of their Federal Full-Time Equivalents (FTE) are inherently governmental. It is a massive data collection effort. The FAIR Act inventory is the first inventory of commercial activities that has been required by law and is the first that has ever been prepared for release to the Congress or the public. Each function and, in many cases, each function at any given location, has been associated with a point of contact who can address questions regarding that function. It is also the first inventory where agency decisions as to what is inherently governmental are subject to administrative challenge and appeal by outside parties. Not surprisingly, the initial inventory submissions have taken longer to prepare and have required more analysis on the part of OMB than previous A-76 inventories. It is our hope that next year's inventories (due June 30, 2000) will require less effort on the part of the agencies since they will be able to build on the substantial efforts they have made this year in developing their initial inventories.⁶¹

According to the FAIR Act, OMB will review and consult with agency heads, and the lists will be made available to Congress and the public. The Director of OMB is required to publish the list in the Federal Register, "within a reasonable time thereafter." The agency head is then required to review the activities on the list and consider contracting them out through a competitive process (some exceptions are noted⁶². OMB now devotes space on its Web site for the inventories of federal executive agencies.

Can An Agency Conduct Its Own Inventory?

Can DOD and civilian agencies be expected to fairly and accurately conduct inventories of their own activities? This is particularly important for civilian agencies, since no OMB Circular A-76 studies were conducted by civilian agencies in 1997. Perhaps a more significant question is whether agencies will outsource those activities deemed "not inherently governmental" through managed competitions. FAIR does not require that agencies outsource, but implies that agencies will strongly consider outsourcing as an alternative.

Disputes may require mediation over commercial activities which, because of their unique application, an agency may be considered inherently governmental. Furthermore, agencies may follow the letter of the law, but not the spirit of the law. Since agencies were required to list only those activities deemed not inherently governmental, agencies are under no obligation to list those activities that they consider inherently governmental. It will be difficult for outsiders to the agency (including contractors and other federal agencies) to get a complete and accurate picture of the entire portfolio of activities and functions performed within each agency. Congressional oversight will be important to provide an objective and impartial decision over what commercial activities should be outsourced.

⁶¹ Excerpts from the testimony of Acting OMB Deputy Director Deirdre Lee. House Subcommittee on Management, Information and Technology, Committee on Government Reform. October 28, 1999.

⁶² Ibid., p. 2.

How Will Challenges to the Inventory Be Resolved?

Federal agencies, contractors, and labor unions have all filed challenges to the inclusion or exclusion of certain activities from agency inventories. Once challenged, agencies must either accept the challenge, make changes to the list, or reject the challenge, and agree to do so within 30 days after the challenge is filed.

Several federal agencies have received challenges, questioning why certain agency activities are not included on their lists. Among them, NASA, for example, has received about seven challenges, and has sought to exclude about 1,550 mapping positions from its FAIR Act list. The U.S. Chamber of Commerce and the Management Association for Private Photogrammetric Surveyors have challenged NASA because, in their opinion, these mapping positions are commercial and should be contracted out.⁶³ The final disposition is pending. At this time, NASA has reportedly rejected all its seven challenges.⁶⁴

Unions representing federal employees have also filed challenges; among them, the National Treasury Employees Union (NTEU) and the American Federation of Government Employees (AFGE). NTEU was able to persuade the Department of Health and Human Services to reconsider approximately thirty-one positions that were believed to be commercial, but in fact may be inherently governmental. Of the thirty-one positions, twenty-three are in human resources management support, while eight are in personnel management. Both unions have promised to review each new round of FAIR lists as they are released to the public.⁶⁵

Aggrieved bidders may ultimately seek legal remedies; however, if not handled expeditiously, legal challenges could lengthen the procurement cycle time, generate more federal rule-making, and empower the courts and other regulatory agencies to provide greater management of the procurement process.

Will the Policy Result in Actual Cost Savings?

In a recent GAO report,⁶⁶ auditors concluded that DOD's 1998 estimates of savings from competitions may have been too high. GAO stated those investment costs associated with competitions were not fully calculated; that because DOD experienced difficulty in commencing and completing competitions within initially projected time frames, projected savings would be delayed. The GAO auditors summed up their conclusions in this way:

⁶³ Friel, Brian. "Contractors Challenge Outsourcing Lists." *Government Executive*. November 1, 1999.

⁶⁴ Saldarini, Katy. "Agencies Reject Challenges To FAIR Act Job Lists." *Government Executive*. December 8, 1999.

⁶⁵ Saldarini, Katy. "Unions Fight To Get Jobs Off FAIR Act Lists." *Government Executive*. December 10, 1999. 2 p.

⁶⁶ General Accounting Office. *DOD Competitive Sourcing: Questions About Goals, Pace, and Risks of Key Reform Initiative*. February 22, 1999. Letter 1-GAO/NSIAD-99-46. 2 p.

DOD has established an ambitious competition program as a means of reducing its infrastructure support costs and increasing funding available for modernization and procurement. Establishing realistic competition and savings goals are key to achieving the program's desired results. However, DOD's savings projections have not adequately accounted for the costs of conducting the competitions. These costs could significantly reduce DOD's expected level of savings in the short term. In addition, the planned competitions are likely to take longer than initially projected, further reducing the annual savings that will be realized. Consequently, the estimated savings between fiscal year 1997 and 2003 are overstated. The effects of failing to realize these annual savings could be significant, since DOD has already reduced future operating budget estimates to take into account the estimated savings.

Also, the number of competitions DOD expects to complete over the next several years continues to increase, even as difficulties in meeting previous goals grow. Service officials are increasingly expressing concern about their ability to meet these targets, especially considering the unprecedented number of competitions that are planned to be ongoing simultaneously in the near future. Finally, we believe there is merit to this concern because most components lack detailed plans and analyses to help determine whether the numbers of positions to be competed would be practical.⁶⁷

DOD's Office of the Inspector General conducted an audit, dated March 10, 2000, of all service contracts for professional, administrative, and management support activities. In light of the fact that DOD is relying more and more on the use of service contracts, while downsizing its acquisition workforce, the report revealed that:

The 15 contracting activities and program offices requesting the contracts for services did not adequately manage the award and administration of the 105 contracting actions. Every contract action had one or more of the following problems:

non-use of prior history to define requirements (58 of 84 or 69%), inadequate Government cost estimates (81 of 105 or 77%), cursory technical reviews (60 of 105 or 57%), inadequate competition (63 of 105 or 60%), failure to award multiple-award contracts (7 of 38 or 18%), inadequate price negotiation memorandums (71 of 105 or 68%), inadequate contract surveillance (56 of 84 or 67%), and lack of cost control (21 of 84 or 25%).

As a result, cost-type contracts that placed a higher risk on the government continued without question for the same services for inordinate lengths of time—39 years in one extreme case—and there were no performance measures in use to judge efficiency and effectiveness of the services rendered. DoD procurement system controls had material weaknesses.⁶⁸

⁶⁷ Ibid, p. 2.

⁶⁸ Department of Defense, Office of the Inspector General. *Contracts for Professional, Administrative and Management Support Services*. Mar. 10, 2000. Audit Report No. D-2000-100. p. 5-6.

Furthermore, the final report of the House Appropriations Committee (H.Rept. 106-244) expressed strong reservations as to whether outsourcing and privatization initiatives would result in the kinds of savings projected by DOD:

The Committee harbors serious concerns about the current DoD outsourcing and privatization effort. While the Committee recognizes the need to reduce DoD infrastructure costs, the cost savings benefits from the current outsourcing and privatization effort are, at best, debatable. Despite end-strength savings, there is no clear evidence that this effort is reducing the cost of support functions within DoD with high cost contractors simply replacing government employees. In addition, the current privatization effort appears to have created serious oversight problems for DoD especially in those cases where DoD has contracted for financial management and other routine administrative functions. DoD appears to be moving toward a situation in which contractors are overseeing and paying one another with little DoD oversight or supervision. As a result of this developing situation, the Committee recommends a reduction of \$100,000,000 from the budget request as described in a new general provision, Section 8109. In addition, the Committee directs that DoD undertake a comprehensive review of A-76 Studies as described in a new general provision, Section 8110.⁶⁹

What Will Be the Impact on Defense Operations?

A perception growing among some critics is that outsourcing is not always to the government's advantage and that outsourcing may actually compromise DOD's ability to protect its national security mission.⁷⁰ One example of where the use of outsourcing has been questioned is with the Navy's decision to privatize weapons handling at a half dozen military bases, including Seal Beach Naval Weapons Station, one of the nation's largest munition depots.

Critics of the Navy's efforts to privatize weapons handling believe that national security interests are being compromised for the "promise" of greater efficiencies and costs savings. Some critics believe that weapons handling is a poor choice for outsourcing efforts because (1) safety is being compromised, since private contractors (through their own admission) will not subject their workers to the same level of education and training requirements as federal workers; (2) the threat of strikes and work stoppages, prohibited by federal workers, could damage the military's operational capabilities; (3) federal workers take oaths to uphold the national interest, while private contractors do not; and (4) costs and efficiency will govern contractor business decisions, potentially replacing loyal, experienced, and higher paid federal workers with disloyal, inexperienced, and lesser-paid contract workers.⁷¹

⁶⁹ House Appropriations Committee Report, H.Rept. 106-244, 106th Congress, 1st Session.

⁷⁰ Friel, Brian. "Depot Managers Protest Outsourcing." *Government Executive*, September 21, 1998.

⁷¹ "Navy to Seek Private Bids for Weapons Handling." *Los Angeles Times*, Part A, Mar. 13, 1999.

Are There Alternatives To OMB Circular A-76?

There is general agreement that the process takes too long. As reported earlier, GAO reports that multi-function studies conducted since 1991 have taken about 30 months, on average.⁷² Alternatives to the policy may prove more time-efficient and cost-effective.

Currently, the Defense Resources Board (DRB) has required DOD and the military services to plan for achieving 11.2 billion dollars in savings, by the year 2005, using the managed competition process as outlined in OMB Circular-A 76 policy. However, one alternative to the Circular, now approved by the DRB, may represent a fundamental shift in DOD's outsourcing policy. By the end of this year, DOD is expected to issue new guidelines which will outline how military services can modify federal jobs and keep them without having to conduct managed competitions. This alternative would give military services the authority to independently pursue other alternatives to reach the same projected costs savings; each military service would be free to explore other ways to re-engineer its workforce, but be held responsible for meeting the savings goal. Although giving the military services more flexibility, critics are concerned that, without some cost/benefit analysis, outsourcing decisions will be made arbitrarily, absent of any competitive process.⁷³

The DRB is considering such a change because the Navy has asked DOD to consider an alternative to the traditional OMB Circular A-76 policy. The Navy seeks to review all its functions, and to develop a plan to streamline the entire organization. According to Randall Yim,⁷⁴ Former Deputy Secretary of Defense for Installations, the Navy had stated that it could reorganize its workforce and workflow so that about 40% of the projected 64,000 commercial jobs targeted for managed competitions can be eliminated in-house, avoiding a managed competition and still produce the projected costs savings.⁷⁵ DOD may consider many other options, in whole or part, including restructuring, re-engineering, consolidation, termination of inefficient practices, and adoption of more streamlined business practices.

This new way of doing business focuses not just on what jobs are commercial; rather, the focus is on an assessment of both governmental and non-inherently governmental functions. The goal is a systemwide analysis and review, designed to streamline, improve, or eliminate processes that do not work or add value. DOD

⁷² Ferris, Nancy. "Targeting Jobs." *Government Executive*. December 1999, p. 6.

⁷³ *New DOD Outsourcing Guidelines*. December 16, 1999. Available on Military Report Web site, [<http://www.militaryreport.com/>].

⁷⁴ For more information on structuring alternatives to the OMB Circular A-76 policy, see Friel, Brian. "DOD Considers Downsizing Options Besides A-76." *Government Executive*, July 23, 1999.

⁷⁵ Cahlink, George. "DOD May Avoid A-76 Contests." *Defense News*, July 26, 1999, p. 60.

calls this new initiative “strategic sourcing” and describes it as the “umbrella” under which all outsourcing future decisions will be made.⁷⁶

Conclusion

There is continued, strong congressional and public interest in reducing the size and scope of government. Congress will need to exercise oversight over the implementation of FAIR. The degree to which managed competitions, throughout the federal government, increase efficiency and save money will likely depend on the extent to which federal agencies enforce both the letter and spirit of the law governing FAIR. Congress can exercise its oversight authority by (1) monitoring federal agency progress in the implementation of OMB Circular A-76 policy and FAIR, and whether federal agencies meet deadlines and report promptly, accurately and completely; (2) watching the level of managed competitions, since there is no requirement that agencies must conduct them; without such a requirement, merely the submission of activity lists may not lead to a greater use outsourcing; and (3) granting federal agencies the authority to explore alternatives to the OMB Circular A-76 policy. Furthermore, Congress may also want to further prescribe that certain government activities are to be considered inherently governmental, since the process may prove arduous, complex, and controversial.

⁷⁶ Friel, Brian. “DOD May Put More Jobs Up For Outsourcing.” *Government Executive*. January 5, 2000, p. 1.