

CRS Report for Congress

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Competitive Sourcing Legislation

March 29, 2005

L. Elaine Halchin
Analyst in American National Government
Government and Finance Division

Competitive Sourcing Legislation

Summary

As a federal government policy, competitive sourcing debuted in 1966 with the publication of Office of Management and Budget (OMB) Circular A-76. Under the circular, commercial activities performed by federal employees are subjected to public-private competition. Until the late 1990s, the executive branch, namely OMB, almost exclusively, led the competitive sourcing effort, issuing revisions to the circular, overseeing implementation of the policy, and providing guidance to agencies.

Beginning with the Federal Activities Inventory Reform (FAIR) Act (P.L. 105-270), congressional interest and involvement in competitive sourcing, as measured by legislation that has been enacted, has grown. During the 106th Congress, legislation (Section 832 of P.L. 106-398) was passed directing the General Accounting Office (GAO; now known as the Government Accountability Office) to establish a panel that would examine Circular A-76 and related issues. Eight bills with competitive sourcing provisions were passed, and signed by the President, during the 108th Congress. Protest rights for federal government employees, funding limits on competitive sourcing activities, and reporting requirements were some of the issues addressed by these provisions. A requirement for agencies to develop a most efficient organization (MEO) and to apply the conversion differential to competitions that involve more than 10 full-time equivalents (FTEs) was included in five statutes (P.L. 108-87, P.L. 108-108, P.L. 108-199, P.L. 108-287, and P.L. 108-375). (The MEO is the staffing plan of the agency tender, which is the government's response to a solicitation. The conversion differential, \$10 million or 10% of the government's personnel costs for the function under study, whichever is less, is added to the price or cost of the non-incumbent's proposal. An FTE is the staffing of a federal civilian position expressed in terms of annual productive work hours (1,776 hours).) This report will be updated if relevant legislation is enacted.

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Competitive Sourcing Legislation

Background

Competitive sourcing is a government-wide initiative that subjects commercial activities performed by federal government employees to public-private competition.¹ A commercial activity is “a recurring service that could be performed by the private sector,” whereas “an inherently governmental activity is an activity that is so intimately related to the public interest as to mandate performance by government personnel.”² In a public-private competition, federal agency employees prepare an “agency tender,” which is, in effect, the government’s equivalent of a contractor’s bid or proposal.

Until the 1990s, the policy and procedures (including revisions and other changes) involving competitive sourcing were effected by the executive branch, namely the U.S. Office of Management and Budget (OMB) and its predecessor, the Bureau of the Budget. The bureau issued the original Circular A-76, dated March 3, 1966. OMB has published six revisions to the circular and issued additional guidance, generally in the form of memoranda, on various subjects related to competitive sourcing.³ The Administrations of Ronald Reagan and George W. Bush also have been directly involved in competitive sourcing policy and guidance. In 1987, President Reagan signed an executive order that directed federal agencies, beginning in FY1989, to subject at least 3% of their civilian positions to public-private competition each fiscal year until all commercial activities had been studied.⁴ In 2001, President Bush identified competitive sourcing as one of the five major components of the *President’s Management Agenda* (PMA).⁵ In an effort “to achieve efficient and effective” public-private competition, the Bush Administration “committed itself to simplifying and improving the procedures for evaluating public

¹ Competitive sourcing is one of the *President’s Management Agenda* (PMA) initiatives. See [<http://www.whitehouse.gov/results/agenda/index.html>], visited Feb. 16, 2005.

² U.S. Office of Management and Budget, *Circular No. A-76 (Revised)*, May 29, 2003, pp. D-2 and A-2, available at [http://www.whitehouse.gov/omb/circulars/a076/a76_incl_tech_correction.pdf], visited Jan. 3, 2005.

³ Revisions were published in 1967, 1979, 1983, 1996, 1999, and 2003. The 1999 and 2003 revisions are available at [<http://www.whitehouse.gov/omb/circulars/index.html>], visited Mar. 22, 2005.

⁴ U.S. President (Reagan), “Performance of Commercial Activities,” Executive Order 12615, *Federal Register*, vol. 52, no. 225, Nov. 23, 1987, p. 44853.

⁵ See [<http://www.whitehouse.gov/results/agenda/index.html>], visited Feb. 16, 2005.

and private sources, to better publicizing the activities subject to competition and to ensuring senior level agency attention to the promotion of competition.”⁶

Legislation

On occasion, congressional committees have held hearings on competitive sourcing. In 1995, for example, the Subcommittee on Civil Service of the House Committee on Government Reform and Oversight held a hearing titled “Contracting Out: Summary and Overview.”⁷ However, congressional involvement in competitive sourcing, as measured by legislation that has been enacted, apparently was non-existent until the 105th Congress, when the Federal Activities Inventory Reform (FAIR) Act was signed into law.⁸ In the following Congress, a provision in a defense authorization act required the General Accounting Office (GAO, which was renamed the Government Accountability Office in 2004) to convene a panel to examine Circular A-76 and related issues.⁹ Legislation involving competitive sourcing proliferated during the 108th Congress. Key provisions of the measures enacted during the 105th, 106th, and 108th Congresses are summarized below, in **Table 1**. Following the table is a discussion of selected topics related to competitive sourcing legislation that has been enacted.

⁶ Executive Office of the President, Office of Management and Budget, *The President’s Management Agenda, FY2002*, p. 17, available at [<http://www.whitehouse.gov/omb/budget/fy2002/mgmt.pdf>], visited Mar. 22, 2005.

⁷ U.S. Congress, House Committee on Government Reform and Oversight, Subcommittee on Civil Service, *Contracting Out: Summary and Overview*, 104th Cong., 1st sess., Mar. 29, 1995 (Washington: GPO, 1995).

⁸ P.L. 105-270.

⁹ P.L. 106-398.

Table 1. Competitive Sourcing Statutes and Provisions

Statute	Scope	Duration	Summary
P.L. 105-270 Federal Activities Inventory Reform (FAIR) Act	Government-wide, excluding the General Accounting Office ^a , government corporations, nonappropriated funds instrumentalities, and certain DOD depot-level maintenance and repair functions	Indefinite	<ul style="list-style-type: none"> — Agencies are required to submit inventories of commercial activities to OMB by June 30. — Inventories are sent to Congress and made available to the public. — Interested parties may appeal the omission of an activity from, or the inclusion of an activity on, an agency's list.^b — An inherently governmental activity is a function that is so intimately related to the public interest as to require performance by federal government employees.
P.L. 106-398, Section 832 Floyd D. Spence National Defense Authorization Act, FY2001	Government-wide	Report due by May 1, 2002	<ul style="list-style-type: none"> — GAO was directed to convene a panel of experts to study the policies and procedures governing the transfer of commercial activities to contractors, including how to determine what functions should continue to be performed by federal employees, how costs of public and private performance should be compared, and how DOD has implemented FAIR and Circular A-76.^c — Commercial Activities Panel (CAP) was required to study A-76 procedures, implementation by the Dept. of Defense (DOD) of FAIR, and DOD procedures for public-private competitions.

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Statute	Scope	Duration	Summary
<p>P.L. 108-7, Section 647 Consolidated Appropriations Resolution, FY2003</p>	<p>Government-wide</p>	<p>FY2003</p>	<p>— None of the funds appropriated by the Treasury and General Government Appropriations Act, FY2003, could be used to establish, apply, or enforce any numerical goal, target, or quota for public-private competitions unless the goal, target, or quota was based on considered research and sound analysis.</p>
<p>P.L. 108-87, Sections 8014 and 8022 Department of Defense Appropriations Act, FY2004</p>	<p>DOD</p>	<p>FY2004</p>	<p>— None of the funds appropriated by this act could be used to convert a function that had more than 10 DOD civilian employees from government performance to contract performance unless a most efficient organization (MEO) was developed and the conversion differential was applied.^d</p> <p>— This section does not apply to Javits-Wagner-O’Day (JWOD) Act suppliers, Indian tribes, Native Hawaiian organizations, and depot contracts or contracts for depot maintenance.^e</p> <p>— Any conversions to contractor performance under this section would count toward any competitive sourcing goal or target.</p> <p>— None of the funds appropriated by this statute could be used for a public-private competition carried out under Circular A-76 if the competition exceeded 24 months (single function study) or 36 months (multifunction study).</p>

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Statute	Scope	Duration	Summary
<p>P.L. 108-108, Section 340 Department of the Interior and Related Agencies Appropriations Act, FY2004</p>	<p>Department of the Interior, Forest Service (Department of Agriculture), and Department of Energy programs and activities for which funds are appropriated by this statute</p>	<p>Varies</p>	<ul style="list-style-type: none"> — Beginning with FY2005, the Departments of the Interior and Energy and the Forest Service are to identify separately in their budget requests funds needed to perform competitive sourcing studies. — Beginning in 2003, the Secretaries of Agriculture (Forest Service), Energy, and the Interior are to submit reports on their competitive sourcing studies to the Committees on Appropriations no later than December 31 each year. — For FY2004, each Secretary named above was to submit a report that identified planned competitive sourcing studies. — In FY2004, the Department of Energy and the Department of the Interior could spend only \$500,000 and \$2.5 million, respectively, on competitive sourcing activities unless a reprogramming proposal was processed. No more than \$5 million of the funds appropriated by this act could be used in FY2004 for Forest Service competitive sourcing studies. — None of the funds appropriated by this act could be used to convert a function with more than 10 federal employees from government performance to contract performance unless an MEO was developed and the conversion differential was applied. Exceptions included JWOD suppliers, Indian tribes, and Native Hawaiian organizations. Any conversions to contractor

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Statute	Scope	Duration	Summary
<p>P.L. 108-199, Divisions A and F Consolidated Appropriations Act, FY2004</p>	<p>Agriculture, Rural Development, Food and Drug Administration, and Related Agencies (Division A); Departments of Transportation and Treasury, and Independent Agencies (Division F)</p>	<p>Varies</p>	<p>performance that occurred under this section were to have been counted toward any competitive sourcing goal or target.</p> <ul style="list-style-type: none"> — None of the funds in this act could be obligated for FAIR or Circular A-76 activities until the Secretary of Agriculture submitted a report to the Committee on Appropriation that described the department's contracting-out policies, including agency budgets for contracting out. — Unless USDA received specific authorization in subsequent legislation, the department could not use the funds made available in this statute to study a competitive sourcing activity relating to rural development or farm loan programs. — None of the funds appropriated by this statute could be used to convert a function with more than 10 federal employees from government performance to contractor performance unless an MEO was accomplished and the conversion differential was applied. — Annually, the head of each executive agency is to submit to Congress a report on competitive sourcing activities in his or her agency. — Agency heads are not required to limit the performance period in a letter of obligation issued to an MEO to five years or less.^f — Agency heads may use appropriated funds, and any

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Statute	Scope	Duration	Summary
<p>P.L. 108-287, Sections 8014 and 8022 Department of Defense Appropriations Act, FY2005</p>		<p>FY2005</p>	<p>other funds made available to their agencies, for monitoring the performance of an activity that has been subjected to a public-private competition.</p> <ul style="list-style-type: none"> — Any work converted to contractor performance cannot be moved to a location outside the United States if the work has been previously performed by federal government employees within the United States.
			<ul style="list-style-type: none"> — None of the funds appropriated by this act can be used to convert a function that has more than 10 civilian employees from government performance to contract performance unless a most efficient organization is developed, the conversion differential is applied, and the contractor does not receive an advantage for his or her proposal by not making a health insurance plan available to employees who are to be employed in the function or study, or by offering a health insurance plan that costs the contractor less than the amount paid by DOD. — This section does not apply to JWOD suppliers, Indian tribes, Native Hawaiian organizations, or depot contracts or contracts for depot maintenance. — Any conversions to contractor performance occurring under this section are to count toward any competitive sourcing goal or target. — None of the funds appropriated by this act may be used for a public-private competition carried out under

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Statute	Scope	Duration	Summary
P.L. 108-334, Section 527 Department of Homeland Security Appropriations Act, FY2005	Department of Homeland Security (DHS)	FY2005	Circular A-76 if the competition exceeds 24 months (single function study) or 36 months (multifunction study). — None of the funds appropriated by this statute may be used to approve or conduct a public-private competition involving employees of Citizenship and Immigration Services who are known as immigration information officers, contact representatives, or investigative assistants.
P.L. 108-375, Sections 326-328 Ronald W. Reagan National Defense Authorization Act, FY2005	Government-wide (Section 326); DOD (Sections 327 and 328)	Varies	— Amends 31 U.S.C. §§ 3551(2), 3552, and 3553, which means, in effect, that an agency tender official (ATO) may file a protest in connection with a public-private competition. ^s The determination to file, or not file, a protest is not subject to administrative or judicial review. An agency tender official is to notify Congress when he or she determines there is no reasonable basis for a protest. — For any competition that is required to include a formal comparison of the cost of federal employee performance with the cost of contractor performance, the function is to remain in-house unless the competitive sourcing official (CSO) determines that contractor performance would be less costly by an amount that equals or exceeds the lesser of the following: 10% of the MEO's personnel-related costs or \$10 million. ^h

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Statute	Scope	Duration	Summary
<p>P.L. 108-447, Divisions A, B, and E Consolidated Appropriations Act, FY2005</p>	<p>Agriculture, Rural Development, Food and Drug Administration, and Related Agencies (Division A); Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies (Division B);</p>	<p>Varies</p>	<ul style="list-style-type: none"> — The Secretary of Defense is to ensure that no DOD organization, function, or activity is altered in any way for the purpose of exempting the department from the requirement to formally compare the cost of federal government performance with the cost of contractor performance. This provision does not apply to any competitions conducted as part of a pilot program authorized by Section 336 of P.L. 108-136 (National Defense Authorization Act for Fiscal Year 2004). — The DOD Inspector General (IG) is required to submit a report no later than February 1, 2005, to Congress that addresses the questions of whether DOD has a sufficient number of adequately trained civilian employees to conduct public-private competitions and to administer any resulting contracts, and whether the department has implemented a comprehensive, reliable system to track and assess the cost and quality of work done by service contractors.
<p>P.L. 108-447, Divisions A, B, and E Consolidated Appropriations Act, FY2005</p>	<p>Agriculture, Rural Development, Food and Drug Administration, and Related Agencies (Division A); Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies (Division B);</p>	<p>Varies</p>	<ul style="list-style-type: none"> — None of the funds in this act may be obligated for FAIR or Circular A-76 activities until the Secretary of Agriculture has submitted a report to the Committees on Appropriations and the House Committee on Government Reform that describes the department's contracting out policies, including agency budgets for contracting out. — Section 757: Unless the Department of Agriculture

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Statute	Scope	Duration	Summary
	<p>Department of the Interior and Related Agencies (Division E)</p>		<p>receives specific authorization in subsequent legislation, the department cannot use the funds made available in this statute to study a competitive sourcing activity relating to rural development or farm loan programs.</p> <ul style="list-style-type: none"> — The EEOC cannot implement any workforce repositioning, restructuring, or reorganization until the Committees on Appropriations have been notified of such proposals. — None of the funds provided under this act or under previous appropriations acts for these agencies is to be used, through a reprogramming of funds, for contracting out or privatizing any functions or activities presently performed by federal employees, unless the Appropriations Committees are notified 15 days in advance of such reprogramming of funds. — In FY2005, the Department of Energy and the Department of the Interior may spend only \$500,000 and \$3.25 million, respectively, to continue or initiate competitive sourcing studies until a reprogramming proposal has been processed. No more than \$2 million of the funds appropriated by this act may be used in FY2005 for Forest Service competitive sourcing studies and related activities. — Section 340(b) of P.L. 108-108 is repealed. — For any competitions conducted by the Forest Service prior to FY2005 that meet the criteria outlined in

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Statute	Scope	Duration	Summary
			<p>Section 332(d), the Forest Service is exempt from implementing a letter of obligation and post-competition accountability guidelines.¹</p> <p>— Agencies funded by this act are to include, in any competitive sourcing reports submitted to the Committees on Appropriations, incremental costs directly attributable to conducting competitions.</p>

Notes:

- a. In 2004, the General Accounting Office was renamed the Government Accountability Office.
- b. For the purposes of filing a challenge or appeal under the FAIR Act, an interested party is, in brief, a private sector source, a representative of a business or professional association, an officer or employee of an organization within an executive agency, or the head of a labor organization. See Sec. 3(b) of P.L. 105-270 for the specific criteria that qualify an individual or an organization as an “interested party.”
- c. Commercial Activities Panel, *Improving the Sourcing Decisions of the Government* (Washington: U.S. General Accounting Office, 2002).
- d. The most efficient organization (MEO) is the staffing plan of the agency tender, which is the government’s response to a solicitation. It is the entity that would perform the work if the government wins the competition. The conversion differential, \$10 million or 10% of the government’s personnel costs for the function under study, whichever is less, is added to the price or cost of the non-incumbent’s proposal.
- e. The Javits-Wagner-O’Day Act (JWOD; 41 U.S.C. § 47) directed that, when government agencies purchase goods, priority is to be accorded to qualified nonprofit agencies for the blind and qualified nonprofit agencies for other severely handicapped individuals.
- f. A letter of obligation is “a formal agreement that an agency implements when a ... competition results in agency performance (e.g, MEO).” (U.S. Office of Management and Budget, *Circular No. A-76 (Revised)*, May 29, 2003, p. D-6.)
- g. An agency tender official (ATO) is “an inherently governmental agency official with decision-making authority who is responsible for the agency tender and represents the agency tender during source selection.” (Ibid., p. D-2.)
- h. A competitive sourcing official (CSO) is “an inherently governmental agency official responsible for the implementation” of Circular A-76 within his or her agency. (Ibid., p. D-3.)
- I. Post-competition accountability guidelines may be found in *Circular No. A-76 (Revised)*, pp. B-19-B-20.

Selected Topics Related to Competitive Sourcing Legislation¹⁰

Commercial Activities Inventory

The requirement for federal agencies to compile inventories of their commercial activities, or functions, dates to the original Circular A-76 in 1966. Passage of the FAIR Act in 1998 transformed this requirement into a statutory one and directed agencies to submit their commercial activities inventories to OMB by June 30 each year. The FAIR Act is also notable for including a definition of “inherently governmental,” a term that previously had been defined only in OMB guidance.¹¹ The subject of inventories was revisited in 2003, when OMB, in its revision of Circular A-76, included a requirement for agencies to compile and forward to OMB lists of their inherently governmental activities.

Applicable statute: P.L. 105-270.

Commercial Activities Panel (CAP)

During the 106th Congress, Senator John Warner proposed an amendment to S. 2549,¹² S.Amdt. 3464, that directed GAO to convene a panel to study the policies and procedures governing the transfer of commercial activities from the federal government to a contractor. Taking note of concerns voiced by federal employee unions and private industry about Circular A-76, Senator Warner concluded that an objective, systematic study of the competitive sourcing process was needed. The 13-member Commercial Activities Panel (CAP), which was chaired by the Comptroller General, issued its report, *Improving the Sourcing Decisions of the Government*, on April 30, 2002. The panel recommended that the government adopt a series of 10 sourcing principles, make limited changes to Circular A-76, develop and demonstrate an integrated competition process that would draw from both the *Federal Acquisition Regulation* (FAR) and Circular A-76, and promote the development of high-

¹⁰ For additional information on competitive sourcing, see CRS Report RL32017, *Circular A-76 Revision 2003: Selected Issues*, CRS Report RL32079, *Federal Contracting of Commercial Activities: Competitive Sourcing Targets*, CRS Report RL31024 *The Federal Activities Inventory Reform Act and Circular A-76*, by L. Elaine Halchin; CRS Report RS21489, *OMB Circular A-76: Explanation and Discussion of the Recently Revised Federal Outsourcing Policy*, by John Luckey; and CRS Report RL30392, *Defense Outsourcing: The OMB Circular A-76 Policy*, by Valerie Bailey Grasso.

¹¹ Office of Federal Procurement Policy (OFPP) Policy Letter 92-1, dated Sept. 23, 1992, available at [<http://www.acqnet.gov/Library/OFPP/PolicyLetters/Letters/PL92-1.html>], visited Feb. 17, 2005.

¹² S. 2549 was a defense authorization bill. It was incorporated as an amendment to H.R. 4205, which was enacted as the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 (P.L. 106-398, 114 Stat. 1654A-1, at 1654A).

performing organizations (HPOs).¹³ The panel's work may have served as an impetus to OMB, which issued a revised Circular A-76 on May 29, 2003.¹⁴

Applicable statute: P.L. 106-398.

Competitive Sourcing Targets¹⁵

When the Bush Administration launched its competitive sourcing initiative in 2001, it established competitive sourcing targets for federal government agencies: subject 5% of the full-time equivalents (FTEs)¹⁶ listed on their commercial activities inventories to public-private competition by the end of FY2002; and compete an additional 10% by the end of FY2003.¹⁷ An OMB memorandum indicated that the long-term goal for the federal government was to subject at least 50% of the FTEs listed on FAIR Act inventories to public-private competition.¹⁸ Criticism of these targets arose in 2002; the primary criticism was that the goals were arbitrary. Senator George V. Voinovich commented, in March 2002, that the targets were "arbitrary and potentially damaging."¹⁹ Eventually, in 2003, OMB dropped the 5% and 10% targets while encouraging agencies, with the promise of earning the highest grade for competitive sourcing on the President's PMA scorecard, to develop a competition schedule that would show that all agency commercial activities from FY2004 through FY2008 were slated for competition.²⁰

¹³ Commercial Activities Panel, *Improving the Sourcing Decisions of the Government* (Washington: U.S. General Accounting Office, 2002), pp. 46-53.

¹⁴ The Office of Federal Procurement Policy (OFPP) Administrator, who headed the effort to revise the circular, was a member of the panel.

¹⁵ See CRS Report RL32079, *Federal Contracting of Commercial Activities: Competitive Sourcing Targets*, by L. Elaine Halchin.

¹⁶ A full-time equivalent (FTE) is "[t]he staffing of Federal civilian employee positions, expressed in terms of annual productive work hours (1,776 [hours]) rather than annual available hours that includes non-productive hours (2,080 hours)." (U.S. Office of Management and Budget, *Circular No. A-76 (Revised)*, p. D-5.)

¹⁷ U.S. Office of Management and Budget, "Performance Goals and Management Initiatives for the FY 2002 Budget," memorandum M-01-15, Mar. 9, 2001, p. 1, available at [<http://www.whitehouse.gov/omb/memoranda/index.html>], visited Jan. 5, 2005; information provided electronically by the Office of Federal Procurement Policy, Jan. 14, 2003.

¹⁸ U.S. Office of Management and Budget, "Performance Goals and Management Initiatives for the FY 2002 Budget," p. 1.

¹⁹ U.S. Congress, Senate Committee on Governmental Affairs, *Who's Doing Work for the Government?: Monitoring, Accountability and Competition in the Federal and Service Contract Workforce*, 107th Cong., 2nd sess., Mar. 6, 2002 (Washington: GPO, 2002), pp. 19-20.

²⁰ U.S. Office of Management and Budget, *Competitive Sourcing: Conducting Public-Private Competition in a Reasoned and Responsible Manner*, July 2003, pp. 4-5; Clay Johnson III, Deputy Director for Management, U.S. Office of Management and Budget, "Development of 'Green' Plans for Competitive Sourcing," memorandum to the President's Management Council, Dec. 22, 2003, available at [<http://www.whitehouse.gov/omb/procurement/index.html>], visited Jan. 5, 2005.

Applicable statute: P.L. 108-7.

Funding Limits on Agency Competitive Sourcing Activities

Over the years, since the inception of Circular A-76, there does not appear to have been any coordinated, government-wide effort to calculate the costs of competitive sourcing to agencies, and to provide them, in turn, with funding for this initiative.²¹ Addressing this apparent lack of financial support, the conference committee that was convened for H.R. 2691 (P.L. 108-108) wrote:

The managers support the underlying principle of the Administration's competitive sourcing initiative The managers are concerned that this far-reaching initiative appears to be on such a fast track that the Congress and the public are neither able to participate nor understand the costs and implications of the decisions being made. The managers remain concerned that the Administration has failed to budget adequately for the cost of the initiative and to justify such costs in budget documents. As a result, significant sums are being expended in violation of reprogramming guidelines and at the expense of critical, on-the-ground work such as the maintenance of Federal facilities.²²

Other efforts to address the funding of competitive sourcing include a statutory prohibition involving the Department of Veterans Affairs (VA) and certain reporting requirements levied on federal agencies. 38 U.S.C. § 8110(a)(5) states that “funds appropriated for the Department [of Veterans Affairs] under the appropriation accounts for medical care, medical and prosthetic research, and medical administration and miscellaneous operating expenses may not be used for” any public-private competition. Among the information agencies are required to report annually to Congress under Section 647(b) of P.L. 108-199 is “the incremental cost directly attributable to conducting [public-private] competitions ... including costs attributable to paying outside consultants and contractors.”

Applicable statutes: P.L. 108-108, P.L. 108-447.

MEO and Conversion Differential Requirement

Under the 2003 circular, the instructions for standard competitions and streamlined competitions vary concerning, among other things, MEOs and the

²¹ Competitive sourcing activities include, but are not limited to, the development and maintenance of inventories of commercial activities and inherently governmental activities; responding to challenges and appeals concerning the inventories; preparing for, and conducting competitions; and carrying out post-competition tasks and activities.

²² U.S. Congress, Conference Committee, 2003, *Making Appropriations for the Department of the Interior and Related Agencies for the Fiscal Year Ending September 30, 2004, and for Other Purposes*, conference report to accompany H.R. 2691, H.Rept. 108-330, 108th Cong., 1st sess. (Washington: GPO, 2003), pp. 85-86.

conversion differential.²³ An MEO and the conversion differential are required for standard competitions.²⁴ An MEO is not required for, and the conversion differential is not applied to, streamlined competitions.²⁵

An argument for requiring an MEO is that government employees should have an opportunity to prepare an agency tender that is competitive. In developing an MEO, agency employees may draft a staffing plan that is more efficient and effective than the current plan, incorporates innovative practices or procedures not used by the incumbent function, and/or includes new or different equipment that would enhance the function's productivity or quality of work. If an MEO is not developed, then an agency bases its agency tender on an estimate of the cost of the incumbent activity. As described in Circular A-76, the rationale for having and applying a conversion differential is that it "preclude[s] conversions based on marginal estimated savings, and captures non-quantifiable costs related to a conversion, such as disruption and decreased productivity."²⁶

Applicable statutes: P.L. 108-87, P.L. 108-108, P.L. 108-199, P.L. 108-287, P.L. 108-375.

Protest Rights

Private sector sources, but not federal employees, have been eligible to file protests involving Circular A-76 competitions with the Government Accountability Office (GAO).²⁷ By amending 31 U.S.C. §§ 3551(2), 3552, and 3553, P.L. 108-375 has made it possible for an agency tender official (ATO) to file a protest on behalf of agency employees whose work is the subject of a public-private competition. Individual employees and unions are not allowed to file protests.

Applicable statute: P.L. 108-375.

²³ A standard competition must be performed for functions that have more than 65 FTEs. An agency may use streamlined competition procedures for functions that have 65 or fewer FTEs.

²⁴ The MEO is the staffing plan of the agency tender, which is the government's response to a solicitation; and it is the entity that would perform the work if the government wins the competition. The conversion differential, \$10 million or 10% of the government's personnel costs for the function under study, whichever is less, is added to the price or cost of the non-incumbent's proposal.

²⁵ U.S. Office of Management and Budget, *Circular No. A-76 (Revised)*, May 29, 2003, pp. B-4, C-2.

²⁶ *Ibid.*, p. B-16.

²⁷ GAO does not have bid protest jurisdiction over the Federal Aviation Administration (FAA), which has its own procurement system. FAA's Office of Dispute Resolution for Acquisition (ODRA) handles bid protests involving the FAA.

Reporting to Congress

A longstanding problem of competitive sourcing has been the dearth of accurate, reliable, useful, and comprehensive information about agency competitive sourcing activities and outcomes. Information has been made available, or otherwise obtained, on an ad hoc basis. Notable exceptions are DOD's Commercial Activities Management Information System (CAMIS) and the release of FAIR inventories and inherently governmental inventories. The statutory requirement for agencies to provide the same competitive sourcing information on a regular basis to Congress might aid in conducting oversight of the competitive sourcing initiative.²⁸

Applicable statutes: P.L. 108-108 (relevant section subsequently repealed), P.L. 108-199.

Conclusion

For many years — since the original circular was issued in 1966 — the executive branch has led the competitive sourcing effort. Circular A-76 was developed by OMB, and this agency has been actively involved in its implementation, particularly since 2001, when competitive sourcing was identified as one of the components of the *President's Management Agenda*. Increasing interest on the part of Congress in competitive sourcing has been demonstrated by the legislation that was enacted from the late 1990s. Legislation has touched upon a variety of topics, such as protest rights for federal employees, competitive sourcing targets, and the circular itself. It remains to be seen whether this trend of competitive sourcing legislation continues throughout the current Congress and, if so, what kinds of issues Members elect to address.

²⁸ Sec. 647(b) of P.L. 108-199; 118 Stat. 361.