

CRS Report for Congress

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Competitive Sourcing Legislation

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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).) Six bills containing competitive sourcing provisions were enacted during the first session of the 109th Congress. Although some provisions were the same or similar to legislation enacted previously (P.L. 109-54, P.L. 109-90, P.L. 109-97, and P.L. 109-148), P.L. 109-115, in amending FAIR, added agencies with fewer than 100 full-time employees to the list of government entities not subject to FAIR. Additionally, the competitive sourcing language included in P.L. 109-163 revised and reorganized certain competitive sourcing provisions in Title 10 of the *U.S. Code* (Department of Defense). 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>P.L. 105-270</p> <p>Federal Activities Inventory Reform (FAIR) Act</p>	<p>Government-wide, excluding the General Accounting Office^a, government corporations, nonappropriated funds instrumentalities, and certain DOD depot-level maintenance and repair functions</p>	<p>Indefinite</p>	<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>P.L. 106-398, Section 832</p> <p>Floyd D. Spence National Defense Authorization Act, FY2001</p>	<p>Government-wide</p>	<p>Report due by May 1, 2002</p>	<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.

Statute	Scope	Duration	Summary
<p>P.L. 108-7, Section 647</p> <p>Consolidated Appropriations Resolution, FY2003</p>	Government-wide	FY2003	<ul style="list-style-type: none"> — 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.L. 108-87, Sections 8014 and 8022</p> <p>Department of Defense Appropriations Act, FY2004</p>	DOD	FY2004	<ul style="list-style-type: none"> — 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 — 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 — Any conversions to contractor performance under this section would count toward any competitive sourcing goal or target. — 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).

Statute	Scope	Duration	Summary
<p>P.L. 108-108, Section 340</p> <p>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

Statute	Scope	Duration	Summary
			performance that occurred under this section were to have been counted toward any competitive sourcing goal or target.
P.L. 108-199, Divisions A and F Consolidated Appropriations Act, FY2004	Agriculture, Rural Development, Food and Drug Administration, and Related Agencies (Division A); Departments of Transportation and Treasury, and Independent Agencies (Division F)	Varies	<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 Committees 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>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.
<p>P.L. 108-287, Sections 8014 and 8022</p> <p>Department of Defense Appropriations Act, FY2005</p>	DOD	FY2005	<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

Statute	Scope	Duration	Summary
			Circular A-76 if the competition exceeds 24 months (single function study) or 36 months (multifunction study).
P.L. 108-334, Section 527 Department of Homeland Security Appropriations Act, FY2005	Department of Homeland Security (DHS)	FY2005	— 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	<p>— 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.^g 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.</p> <p>— 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</p>

Statute	Scope	Duration	Summary
			<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</p> <p>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

Statute	Scope	Duration	Summary
	Department of the Interior and Related Agencies (Division E)		<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

Statute	Scope	Duration	Summary
			<p>Section 332(d), the Forest Service is exempt from implementing a letter of obligation and post-competition accountability guidelines.ⁱ</p> <ul style="list-style-type: none"> — 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>P.L. 109-54, Section 422</p> <p>Department of the Interior, Environment, and Related Agencies Appropriations Act, FY2006</p>	<p>Department of the Interior and the Forest Service (Department of Agriculture)</p>	<p>FY2006</p>	<ul style="list-style-type: none"> — In FY2006, the Department of the Interior can spend only \$3.45 million from this act or any other act on competitive sourcing activities, unless a reprogramming proposal is processed. No more than \$3 million of the funds appropriated by this act can be used by the Forest Service in FY2006 for competitive sourcing activities. — For any public-private competition conducted by the Forest Service that involves 65 or fewer full-time equivalents (FTEs), that was decided in favor of the agency provider, that did not yield a net savings, and that was completed prior to the date of this act, the Forest Service is exempted from implementing the letter of obligation and post-competition accountability guidelines.^j — Agencies funded by this act shall, in preparing any reports to be submitted to the Committees on Appropriations, include all costs directly attributable to conducting public-private competitions, including costs attributable to paying outside consultants and contractors.

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Statute	Scope	Duration	Summary
			<p>— For any competitions involving Forest Service employees, the Secretary of Agriculture is to determine whether any of the employees concerned are also qualified to participate in wildland fire management activities and to consider the effect that outsourcing would have on the Forest Service’s ability to fight and manage wildfires.</p>
<p>P.L. 109-90, Section 520</p> <p>Department of Homeland Security Appropriations Act, FY2006</p>	<p>DHS</p>	<p>FY2006</p>	<p>— None of the funds appropriated by this act may be used to process or approve a public-private competition for services provided as of June 1, 2004, by employees of Citizenship and Immigration Services who are known as immigration information officers, contact representatives, or investigative assistants.</p>
<p>P.L. 109-97, Title I (specifically, “Office of the Chief Financial Officer”) and Section 786</p> <p>Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, FY2006</p>	<p>Department of Agriculture</p>	<p>FY2006</p>	<p>— None of the funds provided by this act may be obligated for FAIR or Circular A-76 activities until the Secretary 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.^k</p> <p>— Unless the department receives specific authorization in subsequent legislation, the department cannot use the funds made available in this statute to conduct a competition of an agency activity relating to rural development or farm loan programs.</p>

Statute	Scope	Duration	Summary
<p>P.L. 109 -115, Sections 840 and 842</p> <p>Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act, FY2006</p>	Government-wide	Indefinite	<ul style="list-style-type: none"> — FAIR does not apply to executive agencies with fewer than 100 full-time employees. However, if such an agency plans to conduct a public-private competition, it is subject to Section 2 of FAIR. — None of the funds in this act or any other act can be used to convert a function with more than 10 federal employees from government performance to contractor performance unless an MEO is accomplished and the conversion differential is applied. This provision does not apply to, for example, DOD, commercial or industrial type functions that can be provided by JWOD organizations, and depot contracts. — Nothing in Circular A-76 shall prevent an agency head from conducting public-private competitions to evaluate the benefits of converting work performed by contractors to the federal government. Circular A-76 is to provide procedures and policies for these types of competitions that are similar to the procedures and policies applied to competitions where the government is the incumbent.
<p>P.L. 109-148, Sections 8014 and 8021</p> <p>Department of Defense Appropriations Act, FY2006</p>	DOD	FY2006	<ul style="list-style-type: none"> — None of the funds provided by this act can be used to convert a DOD function that has more than 10 civilian employees from government performance to contract performance unless an MEO is developed, the conversion differential is applied, and the contractor does not receive an advantage by not making a health

Statute	Scope	Duration	Summary
			<p>insurance plan available to employees who are to be employed in the function, or by offering a health insurance plan that costs the contractor less than the amount paid by DOD for the affected civilian employees.</p> <ul style="list-style-type: none"> — This section does not apply to JWOD suppliers, Indian tribes, Native Hawaiian organizations, 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 Circular A-76 if the competition exceeds 24 months (single function study) or 36 months (multifunction study).
<p>P.L. 109-163, Sections 341-344 and 672¹</p> <p>National Defense Authorization Act, FY2006</p>	DOD	Indefinite	<ul style="list-style-type: none"> — Public-private competitions that involve 10 or more DOD civilians cannot be converted to contractor performance unless the public-private competition includes a formal comparison of the cost of government performance and the cost of contractor performance, an agency tender (including an MEO), a solicitation, a determination of whether submitted offers meet DOD's needs with respect to non-cost factors, the application of the conversion differential, estimated costs of government performance and contractor performance,

Statute	Scope	Duration	Summary
			<p>an estimate of all costs and expenditures the government would incur if the work was converted to contractor performance, and an examination of the effect contractor performance would have on the military mission associated with the function to be competed.</p> <ul style="list-style-type: none"> — A DOD function that is, for example, reengineered or reorganized, but still provides essentially the same services is not be considered a new requirement.^m — A DOD function cannot be changed in any way for the purpose of exempting the function from the requirements of Sec. 341, and a function cannot be converted to contractor performance to circumvent a civilian personnel ceiling. — The Secretary is no longer permitted to delegate report preparation pursuant to 10 U.S.C. § 2461(b)(1). — The Secretary is required to submit a report for each public-private competition conducted by DOD to Congress. A decision made on the basis of a public-private competition cannot be implemented until after the report has been submitted to Congress. — The Secretary is required to submit an annual report to Congress by June 30 each year with information about, for example, the cost of conducting competitions and the actual savings. — The Secretary is required to monitor the performance of

Statute	Scope	Duration	Summary
			<p>functions that have been the subject of public-private competitions.</p> <ul style="list-style-type: none"> — 10 U.S.C. 2461(a)(1)(E), as amended by P.L. 109-163, does not apply to the pilot program for best-value source selection for information technology services. — 10 U.S.C. § 2463 is repealed.ⁿ — Sec. 327 of P.L. 108-37 is repealed.^o — The description of how a contractor may help fund health care for employees has been broadened to include payments that could be used in lieu of a health care plan, a health savings account, and a medical savings account. An inadequate contractor-provided health plan is one that does not comply with any federal law that governs the provision of health care benefits by government contractors. — The Secretary is required to prescribe guidelines and procedures for ensuring that consideration is given to federal employees for work that is currently performed or would otherwise be performed under DOD contracts. The guidelines and procedures are to provide special consideration to certain contracts, such as contracts that were not awarded on a competitive basis or are associated with the performance of inherently governmental functions. — The expiration date of the Secretary's authority to award contracts for increased performance of security guard

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			<p>functions at military installations or facilities under the Secretary's jurisdiction is extended from 2006 to 2007.</p> <p>— The Defense Commissary Agency is exempt from performing any public-private competitions until December 31, 2008.</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.
- j. 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.)
- k. Contracting out is one of several possible outcomes of a public-private competition. Considering the context in which the term "contracting out" is used here, it is likely that this term actually refers to, or means, competitive sourcing.

l. Sections 341-344 of P.L. 109-163 amend 10 U.S.C. §§ 2461-2463; and, therefore, it may be necessary to closely examine the statute and the *U.S. Code* in order to fully understand the changes.

m. A new requirement is an “agency’s newly established need for a commercial product or service that is not” being provided or performed by federal government personnel or a contractor. A public-private competition “is not required” for a new requirement if an agency decides that a contractor should perform the work. However, government personnel cannot perform work associated with a new requirement until and unless a public-private competition has been held. (U.S. Office of Management and Budget, *OMB Circular No. A-76*, pp. 2 and D-7.)

n. 10 U.S.C. § 2463 had required the Secretary to collect and retain cost information on DOD functions converted to contract performance, and DOD functions converted from contract performance to government performance. Apparently, cost data are or will be collected pursuant to some other provision, because the title of Sec. 341(f), which repealed 10 U.S.C. § 2463, is “Repeal of Redundant Provision.”

o. Section 327 of P.L. 108-375 had required, under certain conditions, the application of the conversion differential to public-private competitions and had prohibited modifying DOD functions in order to avoid having to formally compare the cost of government performance and the cost of contractor performance of a function. Section 327 was rendered moot by Section 341(a) of P.L. 109-163, which requires, when 10 or more DOD civilian employees are involved, the use of the conversion differential and a formal comparison of the cost of government performance and the cost of contractor performance.

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 statutes: P.L. 105-270, P.L. 109-115.

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 FY2002 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 FY2002 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.

Conversion from Contractor to Government Performance

Although Circular A-76 does not prohibit conducting a public-private competition for a function or activity that is being performed by a contractor, this type of competition apparently is rarely held.²¹ The government's competitive sourcing initiative focuses exclusively on inventorying work — both commercial and inherently government — that is being done by federal government employees and, where appropriate, subjecting commercial activities to public-private competition. A recent example where OMB declined an opportunity for federal government employees to participate in a public-private competition for work being performed by a contractor involved the Defense Logistics Agency (DLA).²² According to a 2005 article in *Federal Times*, a private firm won a public-private competition in 2001 for distribution operations at DLA's Defense Distribution Depot at Cherry Point, North Carolina (DDCN).²³ The contract was allowed to expire because the agency and the contractor had disagreed over pricing and workload. To keep distribution operations functioning, DLA hired temporary civilian employees to work at DDCN. When it was suggested that the temporary employees be permitted to continue working for two years so that their performance could be compared to a contractor's, OMB objected. Reportedly, the then-head of the Office of Federal Procurement Policy (OFPP) responded to this idea by saying:

A second public-private competition so soon after the first would not likely yield significantly different results in terms of public-sector performance By contrast, a recompetition among private-sector sources should enable [the Defense Logistics Agency] to enter into a better contract.²⁴

The head of competitive sourcing for the Department of Homeland Security, who previously had been the focal point at OMB for competitive sourcing, offered the following rationale for focusing on commercial activities:

Managers ought to know enough about their business to have a sense where competition for contracted work and competition for in-house work has the greatest probability of payback to the taxpayer It's an economic decision by

²¹ Apparently, a function was insourced (that is, converted from contractor performance to government performance) approximately 20 years ago. As reported in *Federal Times*, after the General Services Administration had outsourced building maintenance at the Interior Department's headquarters, agency officials came to believe that the contractor was charging too much for its services. A new public-private competition was held, and GSA employees won the competition. (Tichakorn Hill, "Competitive Sourcing Manager Also 'Insourcing' Advocate," *Federal Times*, Jan. 9, 2006, available at [<http://www.federaltimes.com/index2.php?S=1451960>].)

²² The term "insourcing" refers to converting from contractor performance to government performance as a result of a public-private competition.

²³ Tichakorn Hill, "DLA Employees Barred from Competing for Jobs; OMB: Past Study Already Proved Outsourcing Is the Better Deal," *Federal Times*, June 27, 2005, p. 4.

²⁴ Ibid.

competent managers to study that [commercial activities being performed by government employees] which has never been studied before.²⁵

On the other side of the issue of insourcing, some are concerned that the lack of support for allowing federal government employees to compete for work that was done previously by a government agency is unfair to the employees. Critics also use the infrequency of insourcing to argue that the purpose of competitive sourcing is to outsource government work.

Applicable statutes: P.L. 109-115, P.L. 109-163.

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.²⁶ 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.²⁷

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.”

²⁵ Ibid.

²⁶ 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.

²⁷ 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.

Applicable statutes: P.L. 108-108, P.L. 108-447, P.L. 109-54.

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 conversion differential.²⁸ An MEO and the conversion differential are required for standard competitions.²⁹ An MEO is not required for, and the conversion differential is not applied to, streamlined competitions.³⁰

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."³¹

Applicable statutes: P.L. 108-87, P.L. 108-108, P.L. 108-199, P.L. 108-287, P.L. 108-375, P.L. 109-115, P.L. 109-148, P.L. 109-163.

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).³² 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.

²⁸ 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.

²⁹ 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.

³⁰ U.S. Office of Management and Budget, *Circular No. A-76 (Revised)*, May 29, 2003, pp. B-4, C-2.

³¹ *Ibid.*, p. B-16.

³² 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.

Applicable statute: P.L. 108-375.

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.³³

Applicable statutes: P.L. 108-108 (relevant section subsequently repealed), P.L. 108-199, P.L. 109-54, P.L. 109-163.

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.

³³ Sec. 647(b) of P.L. 108-199; 118 Stat. 361.