



Office of Management and Budget Circular A-76 and the Proposed Moratorium on Future DOD Competitions: Background and Issues for Congress

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Summary

There is a long-standing public debate over the conduct of public-private competitions under Office of Management and Budget (OMB) Circular A-76. OMB Circular A-76, first issued in 1966, defines federal policy for determining whether recurring commercial activities (sometimes called functions) should be performed by the private sector or federal employees. The core objective of the Circular states that to achieve greater efficiency and productivity, the federal government should, whenever possible, conduct competitions between public agencies and the private sector to determine who should perform the work. The policy of the government relying on the private sector for the performance of commercial services was first initiated by the Bureau of the Budget during the Eisenhower Administration. It was later developed into the A-76 policy in 1966. The Circular has been revised several times; the latest revision was released in 2003.

Competitive sourcing through managed competitions was a major initiative of President George W. Bush Administration's Presidential Management Agenda (PMA), and one of five government-wide initiatives put forth to improve the management and performance of the federal government. The Department of Defense (DOD) is the largest federal agency, and has conducted more A-76 competitions than any other federal agency. The characteristics of the DOD workforce make conducting A-76 competitions particularly challenging.

OMB Circular A-76 policy has drawn criticism from both public and private sectors. Some in Congress have expressed continued concern over A-76 competitions partly due to the aftermath of the events surrounding the A-76 competition at the U.S. Army Walter Reed Army Medical Center in 2007. A series of events converged at Walter Reed in 2007 which resulted in numerous media investigations, federal investigations, congressional hearings, and the passage of legislation to prohibit the conduct of future A-76 competitions at military medical facilities.

In P.L. 111-8, the Fiscal Year 2009 Omnibus Appropriations Bill, Congress prohibited the initiation of any new public-private competitions under Circular A-76. Similar moratoriums were proposed in both House and Senate versions of the Fiscal Year 2010 DOD authorization and appropriation bills. The Conference Report of the proposed Fiscal Year 2010 National Defense Authorization Act (H.R. 2647) contains no provisions on terminating A-76 competitions.

Questions about A-76 are largely centered around the costs and length of time to conduct competitions, how long-term savings are calculated, the effect of competitions on employee morale, and whether contractors are performing functions that are inherently governmental - functions that should be performed by federal employees.

This report will discuss the current moratorium on the conduct of A-76 competitions. In the event that A-76 competitions are no longer conducted within DOD, Congress may opt to examine other mechanisms to help federal agencies achieve greater efficiencies and garner costs savings.

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Background

What is OMB Circular A-76?

OMB Circular A-76 (A-76) is a federal policy that affects executive branch agencies. OMB Circular A-76 and its definition of inherently governmental functions apply to all executive departments named in 5 U.S.C. § 101 and all independent establishments as defined in 5 U.S.C. § 104. There are no exemptions. A-76 is a policy and does not have the force of law.¹

OMB Circular A-76 outlines a formal, complex, and often lengthy process for managing public-private competitions to perform functions for the federal government. A-76 states that, whenever possible, and to achieve greater efficiency and productivity, the federal government should conduct competitions between public agencies and the private sector to determine who should perform certain work. A-76 requires federal executive agencies to annually prepare lists of activities considered both commercial and inherently governmental. In general, commercial activities are subject to competition, while inherently governmental activities are not. A-76 competitions compete functions or activities, not positions.

Most federal government contracts are not awarded through Circular A-76 competitions, nor are the majority of federal government contracts subject to public-private competitions. According to the Government Accountability Office (GAO), A-76 competitions have over time represented a small portion of federal dollars spent on service contracts.²

Origin and History

The concept of A-76 first began as a statement of federal policy under the Bureau of the Budget in the Eisenhower Administration, and developed into a formal A-76 policy statement in 1966.. The policy stated that the government would rely on the private sector for the performance of commercial activities.³ OMB Circular A-76 has been revised several times. The latest revision was released in 2003. Competitive sourcing through A-76 was a major initiative identified in 2001 by the Bush Administration's PMA. It was one of five government-wide initiatives to improve the management and performance of the federal government.⁴ Some Members of Congress have been critical of the conduct of A-76 competitions under the Bush Administration,

¹ For a discussion of the use of inherently governmental functions in Department of Defense operations, see CRS Report R40641, *Inherently Governmental Functions and Department of Defense Operations: Background, Issues, and Options for Congress*, by John R. Luckey, Valerie Bailey Grasso, and Kate M. Manuel.

² U.S. General Accounting Office. Testimony of David M. Walker, Comptroller General of the United States, before the U.S. Senate Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, Committee on Governmental Affairs, July 24, 2003; and Sawicky, Max B. Show Me The Money: Evidence is Sorely Lacking that the Bush Administration's Proposed A-76 Rules for Contracting Will Bring Budget Savings. Briefing Paper from the Economic Policy Institute, October 9, 2003.

³ A commercial activity is defined in Circular A-76 as a recurring service that could be performed by the private sector. See the revised Circular at http://www.whitehouse.gov/omb/circulars_a076_a76_incl_tech_correction/.

⁴ For a discussion on competitive sourcing statutes and other provisions affecting public-private competitions throughout the federal government, see CRS Report RL32833, *Competitive Sourcing Statutes and Statutory Provisions*, by L. Elaine Halchin.

and this criticism and ensuing debate over whether to conduct future A-76 competitions has contributed to the development of a moratorium on such competitions.

The Debate Over Circular A-76

The debate over A-76 policy can be viewed within a larger debate over the role of the federal government, and over what functions the federal government should perform versus what functions the private sector should perform. While it is difficult to generalize the range of views and opinions over the application of the A-76, it is generally the case that federal employees and labor organizations believe that A-76 is unfairly slanted in favor of the private sector, while private sector contractors generally believe that federal government employees have an unfair advantage in A-76 competitions. Some proponents of the A-76 policy view it as a necessary mechanism for gaining efficiencies in federal operations; on the other hand, some opponents view A-76 as adversarial, expensive, and inefficient.

The A-76 Competition at the U.S. Army Walter Reed Army Medical Center

The public debate over A-76 policy was further ignited in February 2007 as a result of a series of published articles in the Washington Post on the conditions at the Walter Reed Army Medical Center (WRAMC) in Washington, DC.⁵ The articles led to several investigations, resignations of some senior Army officials, congressional hearings, and legislation passed by Congress to prohibit the conduct of A-76 competitions at military medical facilities. In a congressional hearing on the events at WRAMC, one former Army official summarized the WRAMC controversy as follows:

Others have described what occurred at Walter Reed as the “perfect storm” – the confluence of three forces that compromised the ability of the hospital to deliver to some patients the standard of care consistent with the traditions of its past. These forces were: the unexpected casualty load of the Iraq War; the “contracting out requirements” imposed by the A-76 program, which is administered by OMB, and dragged on for over five crucial years; and the decision to close Walter Reed pursuant to BRAC action. An action that was ratified by the Congress.⁶

How Does DOD Use Circular A-76?

DOD is the largest federal agency and conducts more A-76 competitions than any other federal agency. It has a unique workforce composed of civilians, military personnel, and contractors, and the nature of DOD’s mission makes the conduct of public-private competitions arguably more complex than at other federal agencies. DOD has conducted A-76 competitions for activities that are considered commercial, including food services, laundry services, building services, and

⁵ Priest, Dana and Hull, Ann. “Soldiers Face Neglect, Frustration at Army’s Top Medical Facility. Washington Post, February 18, 2007, p. A01. For background and discussion of the Walter Reed Army Medical Center’s A-76 Competition, see CRS Report RL34140, *Walter Reed Army Medical Center (WRAMC) and Office of Management and Budget (OMB) Circular A-76: Implications for the Future*, by Valerie Bailey Grasso.

⁶ The Honorable Jack Marsh, former Secretary of the U.S. Army and Co-Chair of the Independent Review Group investigating the WRAMC controversy, made these comments at a hearing of the House Armed Services Committee’s Subcommittee on Military Personnel, June 26, 2007.

public works. However, there is concern among policymakers that some A-76 activities may be considered inherently governmental, and should only be performed by federal employees.

DOD has relied on conducting A-76 competitions in an effort to achieve greater savings to finance defense operations and support costs. At the end of the Cold War, DOD had substantially reduced the size of the force structure and sought to achieve costs savings through a greater reliance on public-private competitions through Circular A-76.

Major Points of Contention Over Circular A-76 Policy

In general, there are four major points of contention over the Circular A-76 policy and process: (1) Costs savings, (2) delays and their effect on employee morale, (3) the adequacy of oversight mechanisms, and (4) the possible performance of “inherently governmental functions” by contractors.) Each of these points is discussed below.

Do Circular A-76 Studies Result in Savings to DOD?

OMB has reported that regardless of whether the federal government or the private contractor win the competition, the act of competition generates cost savings from 10%-40%, on average.⁷ GAO has questioned the reliability of the cost accounting systems in place to measure savings generated from A-76 competitions. Thus GAO indicates it is unable to state whether there are savings or not. In testimony before Congress, the GAO Comptroller General identified challenges facing DOD in the conduct of A-76 competitions, as discussed below.

DOD has been at the forefront of federal agencies in using the A-76 process and, since the mid-to-late 1990s, we have traced DOD’s progress in implementing its A-76 program. The challenges we have identified hold important lessons that civilian agencies should consider as they implement their own competitive sourcing initiatives. Notably: selecting and grouping functions to complete were problematic, and determining and maintaining reliable estimates of savings were difficult.⁸

Congress and GAO have questioned whether the federal government has the right management information systems in place to determine the amount of savings from A-76 competitions. GAO has raised specific concerns over the reliability of the Defense Commercial Activities Management Information Systems (DCAMIS) software data system,⁹ the official DOD source for tracking A-76 program data. Two GAO reports have stated that inaccurate guidance from OMB to Federal agencies has resulted in systematically overstated savings and understated costs, and that Federal agencies have not collected complete and reliable cost data related to the conduct of Circular A-76 competitions, making it difficult to determine overall savings. Another GAO report

⁷ Executive Office of the President, Office of Management and Budget. *Competitive Sourcing: Conducting Public-Private Competition in a Reasoned and Responsible Manner*. July 2003, p. 2.

⁸ U.S. General Accounting Office. Testimony of David M. Walker, Comptroller General of the United States, before the U.S. Senate Subcommittee on Oversight of Government Manage, the Federal Workforce, and the District of Columbia, Committee on Governmental Affairs, July 24, 2003.

⁹ The DCAMIS system of data collection is the official source for the tracking of costs and savings data on DOD’s implementation of the A-76 program.

has questioned whether DCAMIS can accurately report all of the savings from A-76 competitions.¹⁰

The DOD Inspector General (IG) also questioned the reliability of the DCAMIS data. The DOD IG found that the DCAMIS system users sometimes entered inaccurate data and sometimes omitted documentation to support the data, and that the Navy, Army, and Air Force all used different methods of developing A-76 baseline costs. The DOD IG concluded that Congress and the federal government had received data that were unreliable, and that this data could not serve as the basis of determining the costs and savings of the DOD Competitive Sourcing Program.¹¹

In addition, some policymakers have questioned whether Circular A-76 competitions result in any overall savings to the federal government, given how DOD tracks the costs of conducting competitions. In the introduction of S. 924, a legislative initiative known as the CLEAN-UP Act of 2009, a statement of findings questions the performance metrics that the government uses to calculate competition costs.¹²

Delays and Their Effect on Employee Morale

Long delays in the course of an A-76 competition can have an adverse effect on the morale of employees affected by the competition. As an example of the effect of long delays in an A-76 competition, consider the Walter Reed Army Medical Center (WRAMC) A-76 competition. This competition took longer than most A-76 competitions. While OMB reported that the average time frame for a standard public-private competition under Circular A-76 completed in FY2006 was just over 13 months, the WRAMC competition took over six years to complete.

A convergence of the following events made conducting the WRAMC A-76 competition difficult.

- Base Realignment and Closure Commission recommendations for closing Walter Reed and consolidating the base with other military medical facilities;

¹⁰ Government Accountability Office (GAO). Forest Service: Better Planning, Guidance, and Data Are Needed to Improve Management of the Competitive Sourcing Program, GAO-08-195, January 22, 2008; GAO, Competitive Sourcing: Greater Emphasis Needed on Increasing Efficiency and Improving Performance, GAO-04-367, February 27, 2004; and GAO, DOD Competitive Sourcing: Results of A-76 Studies Over the Past 5 Years, GAO-01-20, December 2000. Since 1979, DOD has used the DCAMIS software system to track A-76 costs and savings. The DCAMIS data are the only official source for costs and savings data for DOD's implementation of the A-76 program.

¹¹ Department of Defense Office of Inspector General. Defense Infrastructure: DOD Reporting System for the Competitive Sourcing Program (D-2006-028), November 22, 2005.

¹² S. 924, Correction in Long-Standing Errors in Agency's Unsustainable Procurements (CLEAN-UP) Act of 2009, Section 3, Findings. The CLEAN-UP Act states: "The OMB Circular A-76 process retains fundamental inequities. The minimum cost differential fails to take into account the quantifiable costs (such as hiring consultants and diverting Federal employees from their regular duties) of carrying out A-76 privatization studies. All in-house bids are charged 12 percent of their personnel costs for overhead costs, even though a Department of Defense Inspector General study revealed that overhead costs may not differ significantly, if at all, whether the functions are kept in-house or contracted out, even in the case of studies of large numbers of Federal employees. Despite time limits established in law and as part of the OMB Circular process A-76 process, privatization studies are allowed to continue indefinitely. The longer an A-76 privatization study lasts, the more it costs to conduct, the less likely there are to be savings from that study, and the more likely it will cost taxpayers more than it will save. In fact, given the costs and controversies associated with the OMB Circular A-76 privatization process, OMB should be encouraging agencies to use internal reengineering efforts, as OMB finally did, during the last year of George W. Bush's presidency."

- Entry into combat operations in Iraq and Afghanistan;
- Surge in the number of outpatient medical care visits for veterans returning from the war, resulting in a dramatic increase in the demand for services on military installations; and
- The U.S. Army's push to achieve competitive sourcing goals under the Bush Administration's Presidential Management Agenda.¹³

The competition was announced during the second term of the Clinton Administration, and was concluded in the second term of the Bush Administration. The six-year delay was, in part, due to a number of factors, including congressional intervention to seek a legislative compromise to prohibit the appropriation of funds for the competition - either by (1) reversing the decision to award the contract to the private sector, or (2) stopping the implementation of the BRAC decision. Other observers of the competition point to the Army's decision to continue the competition even though the agreed-upon time limits were not kept. Still others point to the fact that the Army added over 1,500 amendments (or changes) to the solicitation — amendments which were later added, according to GAO, to accommodate the surge in maintenance and upkeep activities needed at WRAMC after the start of combat operations — as the reason why the competition took longer than expected.

Critics note that the announcement of the WRAMC competition affected employee morale. They indicate that the most immediate impact of the announcement was that skilled personnel were the first to quit, while new employees were reluctant to accept jobs that were in the midst of transition. The length of time it took to complete this competition is seen as raising the anxiety level among existing employees, and creating uncertainty, particularly during a time when WRAMC experienced a surge in the usage of its medical facilities.

Some in Congress have criticized long delays in some DOD competitions. The Chairs of the House Armed Services Committee (HASC) and the HASC Readiness Subcommittee sent a 2009 letter to Secretary of Defense Robert Gates and the OMB Director Peter Orszag. Excerpts appear below.

Many of the Department's A-76 studies have dragged on far beyond the time limits authorized in the 2003 revised Circular A-76, as well as those imposed by statute. This creates an unfair strain on the federal employees whose jobs are being competed, as well as the contractors who have submitted bids for the work. In many cases, an individual service has requested a cancellation - either because the installation is seeking an alternative approach or because the original study was not appropriate - only to be denied by the Department.¹⁴

¹³ President George W. Bush's Presidential Management Agenda (PMA) was designed to improve the performance of the federal government. The PMA contained five government initiatives; competitive sourcing through public-private competitions under A-76 was one of the five government-wide initiatives. The PMA can be viewed at <http://www.whitehouse.gov/omb/budget/fy2002/mgmt.Pdf>.

¹⁴ House Armed Services Committee and HASC Readiness Subcommittee. Letters to Robert Gates, Secretary of Defense, and Peter Orszag, Director of the Office of Management and Budget. March 26, 2009. The letters can be viewed at http://armedservices.house.gov/pdfs/Letters/SkeltonOrtizGatesA76_032609.pdf.

Adequacy of Oversight Mechanisms

Some policymakers have argued that the government lacks the capacity to perform meaningful oversight over private contractors. This view was highlighted in the findings of Senate bill S. 924, the Correction in Long-Standing Errors in Agency's Unsustainable Procurements Act of 2009 (also known as the CLEAN-UP Act) as described in the statement of findings which follows.

The capacity of the Federal Government to oversee contractors and the OMB Circular A-76 privatization process continues to decline, as demonstrated in scandals involving reconstruction efforts in Iraq, Hurricane Katrina recovery efforts, and conditions at Walter Reed Army Medical Center. The Government Accountability Office (GAO), in two 2008 reports on the use of 'competitive sourcing' in different agencies, determined that costs of A-76 privatization reviews often exceeded savings because of systematically bad direction from the Office of Management and Budget.¹⁵

Are Contractors Performing Functions That Are Inherently Governmental?

Some policymakers in Congress are concerned that contractors may be performing functions that are inherently governmental and should be performed by federal employees. Other policymakers are concerned that Congress does not have a complete and detailed report of the number of contractors employed by the federal government, or the range of contractor services.

The Senate has raised concerns that DOD failed to comply with a requirement of 10 U.S.C. 2330a to develop an inventory of activities performed by private contractors. The inventory would provide Congress with a full view of the private contractor supplier base, and assist future planning of activities to be considered for competition under Circular A-76. The point of the inventory is to help the Congress to identify how many contractors are employed by the federal government, by federal agency, and what functions or activities they perform. In order to determine if contractors are performing functions that are inherently governmental, federal agencies must first know how many contractors are employed and what they do. Congress directed DOD to complete an inventory comparable to the inventory imposed by the Federal Activities and Inventory Reform Act of 1998.

Current Moratorium

Largely as a result of the issues discussed here, Congress passed legislation in March 2009 to halt the beginning of any new A-76 competitions. This moratorium differs from the moratorium passed in 2007 in that it applies to A-76 competitions throughout the federal government, not just affecting competitions for functions at military medical facilities. In Public Law (P.L.) 111-8, the Fiscal Year (FY) 2009 Omnibus Appropriations Bill, Congress has prohibited the initiation of any new public-private competitions under OMB Circular A-76 through September 30, 2009. Section 737 prohibits the use of appropriated funds (any funds from this statute, the FY2009 Consolidated Omnibus Act or any other Act) as described here. The effect of this provision is that no funds can be used to begin or announce a public-private competitive under OMB Circular A-76.

¹⁵ S. 924, Correction in Long-Standing Errors in Agency's Unsustainable Procurements (CLEAN-UP) Act of 2009, Section 3, Findings.

“None of the funds appropriated or otherwise made available by this or any other Act may be used to begin, or announce, a study or public-private competition, that has the purpose of converting any functions performed by Federal employees to performance by private sector contractors, in accordance with OMB Circular A-76 or any other administrative regulation, directive, or policy.”¹⁶

How has the Moratorium Affected DOD?

In light of the moratorium that is in place, and the prospect of future moratoriums, A-76 competitions at DOD bases and facilities are on the decline. The proposed moratoriums could pose a significant impact on DOD operations, as DOD is the largest federal agency and has conducted more A-76 competitions than any other federal agency.¹⁷

The moratorium may also affect competitions that are in process. According to officials from the DOD’s Office of Housing and Competition Sourcing, from October 1994 to July 27, 2009, 536 DOD A-76 competitions have been canceled, out of a total of 1,943 competitions (approximately 30% of all competitions were canceled.)¹⁸

While the moratorium only affects new A-76 competitions, the controversy that led to the moratorium may eventually affect competitions that are already underway, or where the performance decision has been made but not yet executed. There is another A-76 competition that is currently under review, and legislation has been introduced in Congress to prevent any further action to be taken on the results of the competition. This competition involves custodial and public works functions at the U.S. Army’s West Point Military Academy at West Point, NY. The Army began preliminary planning for the A-76 study in 2002 and formally announced the study in September 2006 to include both public works and custodial functions. In February 2008, the Army divided the study into two separate studies, one for public works position and the other for custodial positions. In March 2008, officials at West Point asked the Army for permission to cancel the studies and begin an internal reorganization; their request was denied. In March 2009, the Army announced that the federal employee group had won the A-76 competition for the custodial services positions, but lost the A-76 competition for the public works positions.¹⁹ In a letter to then-Secretary of the Army Pete Geren, some legislators questioned the study outcome and the process used to conduct the study, and asked the Army to reconsider its recommendations until their questions could be resolved. Excerpts of the letter appear below.

The study released last week at West Point has several serious flaws. First, the process compares different price structures, making it impossible to evaluate accurately which is the lower cost. For federal employees, the study estimates the total cost to the Army of performing the work. However, when soliciting bids from private contractors, the Army is

¹⁶ P.L. 111-8, Title VII. General Provisions, Government-Wide.

¹⁷ See section on Legislative Activity. At this writing, the Conference Report for FY2010 National Defense Authorization Act (H.R. 2647) contains no provisions on the termination of A-76 competitions. The Conference Report was filed on October 7, and the Conference Report was agreed to in the House on October 8. See the Conference Report to Accompany H.R. 2647, H.Rept. 111-288.

¹⁸ In July 2009, CRS requested and received some data from the DOD Office of Competitive Sourcing and Military Privatization. A telephone conversation with the Assistant Director of the DOD Office of Competitive Sourcing and Military Housing Privatization confirmed the data (October 2009).

¹⁹ James, Alexa. West Point workers rally vs. privatization. *Times Herald-Record*, April 15, 2009. Accessed online at <http://www.recordonline.com/apps/pbcs.dll/article?AID=/20090415/NEWS/904150353>.

asking for “cost plus firm fixed fee” contract. These contracts allow for variable costs, which cannot be accurately compared to the fixed cost used for continuing with federal employees.

Second, the Army changed the requirements for the union halfway through the study. Originally, the Army allowed the union to combine the operations/maintenance and custodial responsibilities into a single bid, which allowed them to achieve economies of scale. Halfway through the process, the Army required the union to separate these two contracts, but did not allow them to begin the process over.

Given the serious concerns related to this study in particular, we will be moving forward with an amendment to the FY2010 Defense Appropriations bill with the intention of preventing this review from being carried out. Millions of taxpayer dollars and hundreds of jobs are at stake, and we cannot afford to risk disregarding either by engaging in an inaccurate and unfair process. Again, we urge you to refrain from implementing the West Point A-76 study.²⁰

Oversight Issues for Congress

Congress has stated that the purpose of the moratorium on future A-76 competitions is to give the federal government (and DOD in particular) an opportunity to review the inventory of contract services to determine how much activity is contracted out, and whether contractors perform work that is inherently governmental and that should be performed by federal employees. However, after the moratoriums have expired, questions will likely continue to be raised as to whether the federal government should continue to invest time and resources in conducting future A-76 competitions.

Some potential oversight issues may include the following:

- Are public-private competitions through OMB Circular A-76 the right tool to determine the appropriate public, private, and military workforce to achieve DOD missions?
- Is there complete and reliable cost data related to the conduct of A-76 competitions that make it possible to determine the overall savings to the Department of Defense?
- Given the current moratorium, and the prospect of future moratoriums, how will Department of Defense agencies be incentivized to achieve greater efficiencies in the conduct of federal activities and functions?
- If the Department of Defense stops conducting A-76 competitions, how will the Congress balance priorities and the competing demands for resources? Supporters of the A-76 public-private competition approach are likely to continue to maintain that these competitions are a valuable mechanism to improve efficiency and improve the balance between government and private sector activity.

²⁰ United States Senate. Letter to the Honorable Pete Geren, Secretary of the Army, from Senators Charles E. Schumer and Kristen E. Gillibrand, April 3, 2009.

Legislative Activity

Legislation Introduced in the 111th Congress

New moratoriums have been proposed in several bills. Some proposed provisions would affect DOD only, while other provisions would affect all Federal agencies.

H.R. 2647, the Proposed Fiscal Year 2010 National Defense Authorization Act (Conference Report)²¹

Legislative Provisions Not Adopted

Termination of certain public-private competitions for conversion of Department of Defense functions to performance by a contractor

- The House bill contained a provision (Sec. 326) that would halt all ongoing public-private competitions being conducted by the Department of Defense pursuant to Office of Management and Budget Circular A-76 , and establish a review and approval process for recommencing such competitions.
- The Senate amendment contained a provision (Sec. 323) that would terminate public-private competitions that exceed certain time limitations.
- The conference agreement does not include either provision.

S. 1390, the Proposed Fiscal Year (FY) 2010 National Defense Authorization Act²²

- Section 323²³ would suspend temporarily the announcement or beginning of all DOD Circular A-76 competitions pursuant to Title 10, Section 2461 of the United States Code,²⁴ until the date on which the Secretary of Defense meets certain requirements: (1) that the Secretary of Defense has completed and submitted to Congress a complete inventory of DOD service contracts required by Title 10, Section 2330a of the United States Code²⁵, and (2) that the Secretary of each military service and head of each DOD component and agency with responsibilities

²¹ H.R. 2647, H.Rept. 111-288. The Conference Report for the FY2010 National Defense Authorization Act (H.R. 2647) contains no provisions on the termination of A-76 competitions. The Conference Report was filed on October 7, and was agreed to in the House on October 8.

²² National Defense Authorization Act for Fiscal Year 2010, S. 1390 (Public Print).

²³ Subtitle C. Workplace and Depot Issues. Section 323. Temporary Suspension of Authority for Public-Private Competitions.

²⁴ United States Code, Title 10, Section 2461. Public-private Competition Required Before Conversion to Contractor Performance.

²⁵ Subtitle C. Workplace and Depot Issues. Section 323A. Public-Private Competition Required Before Conversion of any Department of Defense Function Performed by Civilian Employees to Contractor Performance.

for activities in the inventory comply with the review and planning requirements of subsection (e) of Title 10, Section 2330a;

- Section 323A²⁶ would amend Title 10, United States Code, Section 2461(a)(1) to require DOD to conduct public-private competitions before conversion of any function to performance by contractors of any functions performed by civilian employees; and
- Section 323B²⁷ would impose a statutory time requirement that the duration of DOD public-private A-76 competitions can take no longer than 30 months for a single-function competition and 36 months for a multiple-function competition; the time period would begin on the date on which funds are obligated for contractor support of the preliminary planning for the competition begins through the date on which a performance decision is rendered;²⁸ Section 323B would also apply to public-private competitions covered by this section that are being conducted on or after the date of enactment of this Act; and
- Section 323C²⁹ would require the Secretary of Defense to review and consider for termination any DOD public-private competition that exceeds the time limits established in Title 10 United States Code Section 2461(a); and requires a report to Congress should the Secretary fail to cancel the competition.³⁰

²⁶ http://www.whitehouse.gov/omb/circulars_a076_a76_incl_tech_correction/

²⁷ Subtitle C. Workplace and Depot Issues. Section 323B. Time Limitation On Duration of Public-Private Competitions.

²⁸ Preliminary planning, for the purposes of this section of the bill, include any action taken to carry out the following activities: (a) determination the scope of the competition; (b) conducting research to determine the appropriate groups of functions for the competition; (c) assessing the availability of workload data, quantifiable outputs of functions, and agency or industry performance standards applicable to the competition; and (d) determining the baseline cost of any function for which the competition is conducted. Additionally, this time limitation does not include delays caused by reason of protest before the Government Accountability Office (GAO) or the United States Court of Federal Claims, unless the Secretary of Defense determines that the delay is caused by issues not raised during the competition.

²⁹ Subtitle C. Workplace and Depot Issues. Section 323C. Termination of Certain Public-Private Competitions For Conversion of Department of Defense Functions to Performance by a Contractor.

³⁰ The current Circular, last revised in 2003, calls for a 12-month time limit on all Circular A-76 competitions. The A-76 competition begins with the formal announcement to Congress and is considered completed upon the announcement of the performance decision (the selection of either the government or the private sector as winner of the competition). Circular A-76 states that federal agencies can request an extension of up to six additional months (up to 18 months total) on specific competitions should it become necessary. However, many competitions last longer than the 18-month cap. Also, these time limits do not include time spent in preliminary planning, which can last a year or two in some cases, as well as the length of time that competition award decisions are under protest. According to data provided to CRS, in July 2009, from the DOD Office of Housing and Competitive Sourcing, approximately 240 of the 1,383 of the competitions completed since 1994 (about 17%) took 3 years or longer to complete. Furthermore, of the 536 cancelled competitions, roughly 160 competitions, or 30%, were cancelled after 3 or more years after the announcement of the competition. Some observers state that the claim of savings is overstated because some of the costs attributed to performing a competition are not accounted for. For example, preliminary planning for a competition, which occurs before the “clock starts” on competitions and therefore is not bound to a time limit, can have significant costs and use of personnel. These costs are not reflected anywhere when calculating the costs of conducting a competition. Similarly, they maintain that any transition costs from using government personnel to using contractor personnel are not counted in the total competition costs. Lastly, competitions that are cancelled, whether cancelled during preliminary planning, before solicitation, or after solicitation, have costs associated to the conduct of that competition that are not included in the costs data and are usually not accounted for or tracked

H.R. 3326, the Proposed FY2010 National Defense Appropriations Act³¹

- Section 8015(a) contains provisions that would prohibit of the use of appropriated funds to conduct an A-76 competition, unless the following conditions are met.

(1) the conversion is based on the result of a public-private competition that includes a most efficient and cost effective organization plan developed by such activity or function;

(2) the Competitive Sourcing Official determines that, over all performance periods stated in the solicitation of offers for performance of the activity or function, the cost of performance of the activity or function by a contractor would be less costly to the Department of Defense by an amount that equals or exceeds the lesser of--

(A) 10 percent of the most efficient organization's personnel-related costs for performance of that activity or function by Federal employees; or

(B) \$10,000,000; and

(3) the contractor does not receive an advantage for a proposal that would reduce costs for the Department of Defense by--

(A) not making an employer-sponsored health insurance plan available to the workers who are to be employed in the performance of that activity or function under the contract; or

(B) offering to such workers an employer-sponsored health benefits plan that requires the employer to contribute less towards the premium or subscription share than the amount that is paid by the Department of Defense for health benefits for civilian employees under chapter 89 of title 5, United States Code;³² and

- Section 8022 would limit the conduct of A-76 competitions to a period of 24 months, after initiation of the competition, for a single-function activity, or 30 months, after initiation of the competition, for a multi-function activity.³³

The Correction in Long-Standing Errors in Agencies' Unsustainable Procurements (CLEAN-UP) Act of 2009 (S. 924)

- The Correction in Long-Standing Errors in Agencies' Unsustainable Procurements (CLEAN-UP) Act of 2009 (S. 924) was introduced on April 29, 2009, and referred to the Senate Committee on Homeland Security and Governmental Affairs. A comparable House bill of the same name (H.R. 2736) was introduced on June 4, 2009.³⁴ These bills would prohibit action on any A-76 competitions by providing that no competitions could be "prepared, announced, undertaken, continued, or finished" until certain conditions

³¹ Department of Defense Appropriations Act for Fiscal Year 2010, H.R. 3326 (Reported in Senate)

³² Department of Defense Appropriations Act for Fiscal Year 2010 (Reported in Senate), Title VIII, General Provisions. Section 8015.

³³ Department of Defense Appropriations Act for Fiscal Year 2010 (Report in Senate). Title VIII. General Provisions. Section 8022.

³⁴ H.R. 2736 was introduced on June 4, 2009 and on June 26, 2009 was referred to the House Subcommittee on Government Management, Organization, and Procurement.

were met ; one condition is that three-quarters of all federal executive agencies would be required to make substantial progress in implementing the Circular A-76 reforms required, as stated in this provision, and that the OMB Director had implemented reforms listed under Section 12 of the CLEAN-UP Act.³⁵ These bills would require a temporary moratorium on new Circular A-76 competitions until certain reforms required in the CLEANUP Act were substantially implemented.³⁶

Both the House and Senate Financial Services and General Government Appropriations Acts for Fiscal Year 2010 (H.R. 3170 and S. 1432, respectively) contain provisions that would extend the moratorium on the conduct of new A-76 competitions.

H.R. 3170, Financial Services and General Government Appropriations Act for Fiscal Year 2010, H.R. 3170³⁷

- Section 734 would prohibit the use of appropriated funds to begin or announce a public-private competition under OMB Circular A-76, or “any other administrative regulation, directive, or policy.; and
- Section 743, which would establish a requirement for all federal executive agencies, excluding DOD,³⁸ to submit an inventory to OMB for all activities procured through contracts for services for the agency or on behalf of the agency.³⁹

S. 1432, Financial Services and General Government Appropriations Act for Fiscal Year 2010, H.R. 3170⁴⁰

- Section 734 would prohibit the use of appropriated funds to begin or announce a public-private competition under OMB Circular A-76, or “any other administrative regulation, directive, or policy,”⁴¹ and;
- Section 735, which would establish a requirement for all federal executive agencies, excluding DOD, to submit an inventory to OMB for all activities procured through contracts for services for the agency or on behalf of the agency.⁴²

³⁵ See S. 924, Section 12 – Reforms to the OMB Circular A-76 Process.

³⁶ For further discussion on the implications of the CLEANUP ACT, see CRS Report R40641, *Inherently Governmental Functions and Department of Defense Operations: Background, Issues, and Options for Congress*, by John R. Luckey, Valerie Bailey Grasso, and Kate M. Manuel.

³⁷ Financial Services and General Government Appropriations Act for Fiscal Year 2010, H.R. 3170 (Placed on the Calendar in the Senate).

³⁸ DOD is covered under S. 1390, the proposed National Defense Authorization Act for Fiscal Year 2010.

³⁹ Financial and General Government Appropriations Act for Fiscal Year 2010, H.R. 3170, Section 743.

⁴⁰ Financial Services and General Government Appropriations Act for Fiscal Year 2010, S. 1432 (Placed on the Calendar in the Senate)

⁴¹ Financial Services and General Government Appropriations Act for Fiscal Year 2010, S. 1432, Section 734.

⁴² Financial Services and General Government Appropriations Act for Fiscal Year 2010, S. 1432, Section 735.

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