



Circular A-76 and the Moratorium on DOD Competitions: Background and Issues for Congress

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Summary

This report discusses the current moratorium on the conduct of Department of Defense (DOD) public-private competitions under Office of Management and Budget (OMB) Circular A-76 and issues for Congress.

There is a long-standing public debate over the conduct of A-76 competitions. 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. OMB Circular A-76, first issued in 1966, defines federal policy for determining whether recurring commercial activities should be performed by the private sector or federal employees. The Circular has been revised several times; the latest revision was released in 2003.

Public debate over A-76 policy ignited in February 2007 as a result of a series of articles in the Washington Post on the conditions at the former Walter Reed Army Medical Center in Washington, DC. 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. Congress passed legislation in Public Law (P.L.) 110-181, the National Defense Authorization Act for Fiscal Year (FY) 2008 to suspend DOD public-private competitions under OMB Circular A-76. Congress also passed legislation in P.L. 111-8, the Omnibus Appropriations Act for FY2009, to halt the beginning of any new A-76 competitions throughout the rest of the federal government. The government-wide moratorium has continued to the present.

Congress has directed the completion of several reports before the moratorium can be lifted. The congressionally-required reports are the “Section 325” report which DOD was required to submit to Congress within 30 days of the enactment of the FY2010 National Defense Authorization Act, the DOD Inspector General’s report on issues involving DOD’s conduct of A-76 competitions, and two Government Accountability Office (GAO) reports: one on DOD’s conduct of public-private competitions, and the other on DOD’s inventory of service contracts. All of these reports have been completed except the GAO assessment on the inventory of service contracts.

Some policymakers advocate an end to the moratorium on the conduct of DOD A-76 competitions. Questions about the moratorium are largely centered around to what extent the problems identified with Circular A-76 have been corrected, and whether the congressionally required reports have been completed and the issues resolved to the satisfaction of Congress.

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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 applies to all executive departments named in 5 U.S.C. Section 101 and all independent establishments as defined in 5 U.S.C. Section 104. There are no exemptions. A-76 is a policy but 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 the work. A-76 requires federal executive agencies to annually prepare lists of activities considered both commercial and inherently governmental activities. In general, commercial activities are subject to competition, while inherently governmental activities are not.² 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.³

Origin and History of OMB Circular A-76

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.⁴ OMB Circular A-76 has been revised several times, the latest revision in 2003. Competitive sourcing through A-76 was a major initiative identified in 2001 by the Bush Administration's Presidential Management Agenda. It was one of five government-wide

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 OMB recently issued a final policy letter on what constitutes an inherently governmental function. See Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions. Office of Management and Budget, Office of Federal Procurement Policy, Federal Register Volume 76, Number 176, Monday, September 12, 2011, p. 56227-56242. The effective date is October 12, 2011.

³ 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.

⁴ A commercial activity is defined 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/.

initiatives to improve the management and performance of the federal government.⁵ Some Members of Congress were critical of the conduct of A-76 competitions under the Bush Administration, and this criticism and ensuing debate over whether to conduct future A-76 competitions contributed to the current moratorium.

In accordance with statutory provisions, DOD suspended ongoing public-private competitions in 2008 and has not initiated any new public-private competitions since that time. President Obama signed into law the FY2009 Omnibus Appropriations Act [Public Law (P.L.) 111-8] which suspended all new, government-wide, OMB Circular A-76 studies through FY2009. (See section entitled “The Current Moratorium on the Conduct of A-76 Competitions” for further information on this topic.)

The Debate Over Circular A-76

The current moratorium on A-76 competitions is tied to the debate over Circular A-76 policy, which 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 poor conditions at the Walter Reed Army Medical Center in Washington, DC.⁶ The journalists interviewed soldiers and documented the living conditions and the frustration felt by many who were returning from the war in Iraq. The articles concluded that many factors converged to create the events at Walter Reed, including both administrative and bureaucratic failures. The ensuing public debate 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. The moratorium at military medical facilities ultimately led to a moratorium on the conduct of A-76 competitions government-wide.

⁵ 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.

⁶ 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.

How Does DOD Use Circular A-76?

DOD is the largest federal agency and has conducted 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, some argue, make the conduct of public-private competitions more complex than at other federal agencies. DOD has conducted A-76 competitions for activities such as food services, laundry services, building services, and 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. Since the end of the Cold War, DOD had substantially reduced the size of the force structure and sought to achieve additional cost 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 at least three major points of contention over the Circular A-76 policy and process: (1) savings generated from the competitions, (2) the adequacy of oversight mechanisms, and (3) 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 alone generates cost savings from 10%-40%, on average.⁷ GAO has questioned the reliability of the DOD cost accounting systems in place to measure savings generated from A-76 competitions. In testimony before Congress, the former 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, the official DOD source for

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 Management, the Federal Workforce, and the District of Columbia, Committee on Governmental Affairs, July 24, 2003.

tracking A-76 program data.⁹ 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 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 or 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 these 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. For example, in the introduction of S. 924, a legislative initiative known as the CLEAN-UP Act of 2009, a statement of findings questioned the performance metrics that the government uses to calculate competition costs.¹²

Adequacy of Oversight Mechanisms

Decisions reached through the conduct of A-76 competitions result in a performance decision of who is best to perform the work – the federal government or the private sector. Some policymakers have argued that the government lacks the capacity to perform meaningful oversight over private contractors. This view was discussed in the CLEAN-UP Act as described here.

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.

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."

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.¹³

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.¹⁴ Other policymakers are concerned that Congress does not have a complete and detailed report of the number and costs of contractors employed by the federal government, or the range of contractor services.¹⁵

Some in Congress have raised concerns that DOD had failed to comply with a requirement of 10 U.S.C. 2330a to develop an inventory of activities performed by private contractors.¹⁶ The point of the inventory is to help Congress 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.

The Current Moratorium On the Conduct of A-76 Competitions

Congress passed legislation in January 2008 to suspend DOD public-private competitions under OMB Circular A-76 and again in March 2009 to halt the beginning of any new A-76 competitions throughout the rest of the federal government. No new competitions have taken place since that time.

- In Section 325 of the National Defense Authorization Act for Fiscal Year (FY) 2008, Congress prohibited the Office of Management and Budget (OMB) and the Secretary of Defense from taking steps to “direct or require the Secretary of Defense or the Secretary of a military department to prepare for, undertake, continue, or complete a public-private competition or direct conversion of a Department of Defense function to performance by

¹³ S. 924, Correction in Long-Standing Errors in Agency’s Unsustainable Procurements (CLEAN-UP) Act of 2009, Section 3, Findings.

¹⁴ See Section 939 of House Report 112-078, the proposed National Defense Authorization Act for Fiscal Year 2012.

¹⁵ U.S. Senate. Letter from Senator Claire McCaskill, Chairman, Subcommittee on Readiness and Management Support, to the Honorable Frank Kendall, Acting Under Secretary of Defense for Acquisition, Technology, and Logistics, October 21, 2011.

¹⁶ U.S. House of Representatives. Letter from Representative Howard McKeon, Chairman, House Armed Services Committee, and Representative Adam Smith, ranking Member of the House Armed Services Committee, to the Honorable Leon E. Panetta, Secretary of Defense, November 14, 2011.

a contractor under Office of Management and Budget Circular A-76, or any other successor regulation, directive, or policy,” through September 30, 2008;¹⁷

- In Sections 212 and 737 of the Omnibus Appropriations Act for FY2009, Congress prohibited the initiation of any new public-private competitions under OMB Circular A-76 through September 30, 2009. Section 737 of the bill prohibited the use of appropriated funds (any funds from this statute, the FY2009 Consolidated Omnibus Act or any other Act) for conducting A-76 competitions government-wide. The effect of this provision was that no funds could be used to begin or announce a public-private competition under OMB Circular A-76;¹⁸
- In Section 735 of the Consolidated Appropriations Act FY2010, Congress imposed a government-wide moratorium, prohibiting any federal agency from initiating or announcing a new public-private competition under OMB Circular A-76 through September 30, 2010;¹⁹
- In Section 325 of the National Defense Authorization Act for FY2010, Congress suspended all ongoing public-private competitions being conducted by the Department of Defense pursuant to Office of Management and Budget Circular A-76, and established a review and approval process for recommencing such competitions;²⁰
- In Sections 322(c) and 325 (c) of the National Defense Authorization Act for FY2010, Congress required GAO to assess DOD’s report on public-private competitions under Circular A-76, and DOD’s use of its authority to extend the 24-month time limit on the conduct of A-76 competitions;²¹
- In Section 8117 of the Department of Defense Appropriations Act for FY2010, Congress prohibited the spending of any FY2010 funds to conduct public-private competitions under OMB Circular A-76 through September 30, 2010;²²
- In Section 323 of the Ike Skelton National Defense Authorization Act for FY2011, Congress prohibited the Secretary of Defense from establishing any quotas or goals for converting functions performed by DOD civilian employees to performance by contractors, “unless such goal, target, or quota is based on

¹⁷ P.L. 110-181, signed into law January 28, 2008.

¹⁸ P.L. 111-8, signed into law March 11, 2009.

¹⁹ P.L. 111-117, signed into law December 16, 2009.

²⁰ H.R. 2647, the National Defense Authorization Act for FY2010 (P.L. 111-84), was signed into law on October 28, 2009.

²¹ P.L. 111-84, signed into law October 28, 2009.

²² H.R. 3326, the Department of Defense Appropriations Act for FY2010 (P.L. 111-118) was signed into law on December 19, 2009. Section 8117 reads: (a) Prohibition on Conversion of Functions Performed by Federal Employees to Contractor Performance- None of the funds appropriated or otherwise made available by this Act, or that remain available for obligation for the Department of Defense from the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009 (Public Law 110-329), the American Recovery and Reinvestment Act of 2009 (Public Law 111-5), and the Supplemental Appropriations Act, 2009 (Public Law 111-32), may be used to begin or announce the competition to award to a contractor or convert to performance by a contractor any functions performed by Federal employees pursuant to a study conducted under Office of Management and Budget (OMB) Circular A-76.

considered research and analysis, as required by section 235, 2330a, or 2463 of Title 10, United States Code;²³

- Section 323 also required the Secretary of Defense to submit to the congressional defense committees, no later than March 31, 2011, a report on the decisions with respect to the conversion of functions to performance by DOD civilian employees made during FY2010, including the basis and rationale for decisions reached, and the number of contract employees whose functions were converted to performance by DOD civilian employees (an inventory of contracts for services for FY2010).²⁴
- Also, Section 323 required GAO to complete an assessment of DOD's report, and report to Congress no later than 120 days after DOD submitted its related report to Congress. GAO's assessment is underway. Since this report is also linked to the moratorium on the conduct of A-76 competitions, it appears that the moratorium cannot be lifted until the completion of this report.²⁵
- Section 8103 of P.L. 112-10, the Consolidated Appropriations Act for FY2011 prohibits federal agencies from initiating or announcing new public-private competitions under OMB Circular A-76, unless all reporting and certification requirements required by Section 325 of the National Defense Authorization Act for FY2010 have been "satisfactorily completed."²⁶

In addition to these enacted legislative initiatives, a provision was introduced in the 112th Congress to extend the government-wide moratorium through September 30, 2011. This provision was included in the House and Senate versions of the FY2011 Financial Services and General Government Appropriations Act, but the bill was not enacted and the provisions were not included in the various continuing resolutions passed by Congress for FY2011.²⁷

²³ Section 323. Prohibition on Establishing Goals or Quotas For Conversion of Functions To Performance BY Department of Defense Civilian Employees, P.L. 111-383, signed into law on January 7, 2011.

²⁴ U.S. Department of Defense. Report to the Congressional Defense Committees on the Department of Defense's FY2010 In-sourcing Actions. Prepared by the Office of the Under Secretary of Defense for Personnel and Readiness, Requirements and Strategic Integration Directorate, Requirements and Program & Budget Coordination Office, September 2011.

²⁵ P.L. 112-10 was signed into law on April 15, 2011. The purpose of this annual inventory of service contracts was to determine whether work now being performed by private contractors should be insourced to federal employees. The Department of Defense defines insourcing as the conversion of any contracted service to performance by DOD civilian and/or military personnel. Insourcing is conceived as a vehicle to ensure that there is an appropriate balance of contractors, military, and civilian personnel to execute DOD's mission.

²⁶ b) Exception- The prohibition in subsection (a) shall not apply to the award of a function to a contractor or the conversion of a function to performance by a contractor pursuant to a study conducted under Office of Management and Budget (OMB) Circular A-76 once all reporting and certifications required by Section 325 of the National Defense Authorization Act for Fiscal Year 2010 (Public Law 111-84) have been satisfactorily completed.

²⁷ Section 734 of H.R. 3170 and Sections 740-741 of S. 3677, the House and Senate versions of the FY2011 Financial Services and General Government Appropriations Act.

Obama Administration Fiscal Year 2012 Budget Request

The Obama Administration's FY 2012 budget request to Congress sought to prohibit the conduct of future public-private competitions under OMB Circular A-76, as described here.

SEC. 728. 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 regarding the conversion to contractor performance of any function performed by Federal employees pursuant to Office of Management and Budget Circular A-76 or any other administrative regulation, directive, or policy²⁸.

Congressionally-Mandated Reports on DOD's Conduct of A-76 Competitions

Congress has enacted legislation to require several reports to evaluate DOD's conduct of A-76 competitions. The congressionally-required reports discussed below. These reports are listed in **Table 1** below. The moratorium on the conduct of A-76 competitions cannot be lifted until all of these reports have been completed. Following **Table 1**, some of these reports are discussed in greater detail.

Table 1. Congressionally Directed Reports Related to the Conduct of Circular A-76 Competitions

Report Title	Purpose of Report	Report Required By	Status of Report
Office of the Inspector General. Report to Congress on Section 325 of the National Defense Authorization Act for Fiscal Year 2008, Office of Management and Budget Influence Over DOD Public-Private Competitions. Report No. D-2009-034,	To conduct a comprehensive review of OMB's influence over DOD's conduct of public-private competitions under Circular A-76.	P.L. 110-181, Section 325.	Completed, December 15, 2008 (See Appendix A-1)
Report to the Congressional Defense Committees on the Department of Defense's Conduct of Public-Private Competitions.	To review DOD policies with regard to the conduct of public-private competitions under OMB Circular A76.	P.L. 111-84, Section 325.	Completed August 2011.
DOD Met Statutory Reporting Requirements on Public-Private Competitions.	To review DOD's report on its statutory reporting requirements on public-private competitions, and to assess DOD's use of the authority to extend the 24-month time limit.	P.L. 111-84, Sections 322(c) and 325(c).	Completed

²⁸ The White House. Budget Request for FY2012, General Provisions-Government Wide, Section 728, February 2011. Accessed online at <http://www.gpo.gov/fdsys/pkg/BUDGET-2012-APP/pdf/BUDGET-2012-APP-1-2.pdf>.

Report Title	Purpose of Report	Report Required By	Status of Report
Report to the Congressional Defense Committees on the Department of Defense's FY2010 Insourcing Actions (DOD's Inventory of Contract Services for FY2010).	To review the Department of Defense insourcing decisions for Fiscal Year 2010.	P.L. 111-383, Sections 323.	Completed September 2011.
GAO's Assessment of DOD's Inventory for Contract Services in FY2010.	To assess DOD's report, and report to Congress no later than 120 days after DOD submitted its report to Congress. These data are critical to examining the size of the contractor workforce, and necessary to inform budgetary and personnel decisions on the composition of the DOD total workforce. Since this report is also tied to the moratorium on the conduct of A-76 competitions, it appears that the moratorium cannot be lifted until the completion of this report.	Sections 323 of the Ike Skelton National Defense Authorization Act for FY2011.	Not released.

Section 325 Report²⁹

Section 325 of the National Defense Authorization Act for FY 2010 (P.L. 111-84) required DOD to do the following: (1) conduct a comprehensive review of A-76 policies that govern the conduct of public-private competitions, (2) cease spending FY2010 funds for any competitions until the review was completed, (3) publish in the Federal Register that the review was completed, (4) submit to the congressional defense committees an inventory of contracts for services (to include the Secretary of each military department and the head of each Defense Agency) in compliance with 10 U.S.C. 2330a, and (5) submit budget information on contract services in compliance with 10 U.S.C. 236. In addition, Section 325 required GAO to conduct an assessment, within 90 days of the date when the DOD report was submitted to Congress, of DOD's review and report any findings, conclusions, or recommendations to Congress. DOD's response to Section 325 was released in June 2011. GAO's assessment of DOD's report (in response to Section 325) was submitted to Congress in September 2011.

DOD's Response to Section 325

The DOD report focused on the five requirements of Section 325(b), summarized in **Table 1**.

- (1) the status of the compliance of the Department with the requirement of 2461(a)(1) of title 10, United States Code, as amended by section 321 of this Act;

²⁹ See Legislative Activity section of this report.

(2) actions taken by the Secretary to address issues raised in the report of the Department of Defense Inspector General numbered D-2009-034 and dated December 15, 2008;

(3) the reliability of systems in effect as of the date of the enactment of this Act to provide comprehensive and reliable data to track and assess the cost and quality of the performance of functions that have been subjected to a public-private competition;

(4) the appropriateness of the cost differential in effect as of the date of the enactment of this Act for determining the quantifiable costs and the current overhead rates applied with respect to such functions; and

(5) the adequacy of the policies of the Department of Defense in implementing the requirements of section 2461(a)(4) of title 10, United States Code.³⁰

³⁰ Section 325 of P.L. 110-181, signed into law January 28, 2008.

Other Issues Raised in DOD's Report on Section 325 of the National Defense Authorization Act for Fiscal Year 2010 (P.L. 111-84)

DOD-wide Recommendations

In the conclusion of the report, OUSD (P&R) recommended that DOD develop policies to improve the A-76 competitive sourcing policy and process. Three specific recommendations are put forth as department-wide, cross-cutting policies to be integrated into a new approach to A-76 competitions, as described below.

- That DOD provide incentives to managers to use the A-76 competition process while providing centralized support to components, using the capabilities of the Defense Acquisition University to improve the delivery and timeliness of training, lowering the overall cost of competitions to the commands;
- That DOD incorporate current guidance for determining the full cost of total force manpower into the preliminary planning process for any future A-76 competition; and
- That DOD modify internal processes to provide more timely and collaborative outcomes.³¹

DOD's Recommendations to Congress

DOD concluded its report with two major recommendations to Congress: (1) lift the suspension on A-76 competitions, and (2) exclude the preliminary planning process from the statutory time limit for conducting the A-76 competition. The justifications for these recommendations were described in excerpts from the DOD report.

The Department finds nothing in its review that requires a special provision restricting public-private competition in DOD. The Department needs to rebuild a viable program, align resources, and promulgate improved guidance. These must be informed recommendations for improvement noted by the Congress, federal labor unions, the private sector, and DOD IG and GAO audits. Joint oversight by the OUSD(P&R) and the OUSD(AT&L) will ensure well-reasoned acquisition processes incorporate Total Force management principles. Competitions nominated by commanders and managers will be central to the success of future efforts. DOD will, of course, respect the government-wide moratorium on public-private competition should it remain in effect after the suspension is lifted. Any competitions following the lifting of the suspension and the moratorium will be required to incorporate the preliminary recommendations and best practices.

Legislative remedy to section 322 of Public Law 111-84, the National Defense Authorization Act for Fiscal Year 2010, which modified section 2461 of Title 10, United States Code, is critical to ensuring the success of future competitions. As noted in detail earlier in this report, the management-level evaluation process associated with preliminary planning may or may

³¹ U.S. Department of Defense. Report to the Congressional Defense Committees on the Department of Defense's Conduct of Public-Private Competitions. Prepared by the Office of the Undersecretary of Defense for Personnel and Readiness, Requirements and Strategic Integration Directorate, Requirements and Program & Budget Coordination Office, June 2011, p. 19.

not result in a decision to conduct a public-private competition. The work completed during this phase ensures that competitions are viable, and should not be artificially “rushed” to complete all competition requirements during statutory time limits. It is the OUSD(P&R)’s recommendation that the start date of the competition be the public announcement date, and the end date be the performance decision date.

In order to ensure appropriate accountability to all stakeholders for the preliminary planning process, OUSD(P&R) recommends that the Department adopt a Navy best practice and announce a Component’s preliminary planning intent to Congress. This practice would establish that a preliminary planning effort “starts” when the letter to Congress is signed and dated for delivery, and includes an estimated review period time frame to reasonably delineate the review. Such announcement would include a list of the DOD functions, the related manpower mix criteria codes, locations of the functions, and the related number of positions under review. This announcement would be simultaneously communicated to the potentially affected workforce, concerned unions, as well as interested private sector firms, both virtually and by formal letter notification. Components would apply the Section 2461 of Title 10, United States Code requirement to consult with civilian employees on a monthly basis during the preliminary planning process to solicit, consider, and adjudicate their input to the process throughout the planning period. Components would then be required to certify the results of preliminary planning, formally supported by documentation, for the record. Documentation of these results would include the acquisition feasibility, based on market research, of a decision to pursue a public-private competition or not, contained in a memorandum signed by the appropriate level of Component leadership.³²

GAO Assessment of DOD’s Section 325 Report³³

In addition to requiring the “Section 325” report, the National Defense Authorization Act for FY2010³⁴ also required GAO to assess the report and review DOD’s authority to extend the 24-month time limit on the conduct of public-private competitions.³⁵ GAO conducted its review from July through September 2011 and: (1) identified the methodology and data sources used by DOD to review its A-76 policies, (2) assessed the extent to which DOD’s report addressed statutory requirements and considered A-76 issues raised by GAO and others, and (3) analyzed documents, regulations, statutes and other guidance DOD used in conducting its review.³⁶

GAO concluded that DOD complied with the five statutory requirements in conducting its review of public-private competitions. However, GAO raised a number of questions and identified ongoing issues and challenges that continued to remain problematic, as described in excerpts of the GAO report.³⁷ (See **Table 1**, Summary of DOD’s Response to the Five Requirements in

³² Ibid, p. 20.

³³ U.S. Government Accountability Office. DOD Met Statutory Reporting Requirements on Public-Private Competitions. GAO-11-923R, September 26, 2011, 16 pages. Accessed online at <http://www.gao.gov/products/GAO-11-923R>.

³⁴ H.R. 2647, Public Law 111-84, was signed into law on October 28, 2009.

³⁵ Another provision, Section 322 of the FY2010 NDAA, limited the duration of an A-76 competition to 24 months, with a possible extension to 33 months if DOD notifies Congress of the basis for the need for the extension.

³⁶ U.S. Government Accountability Office. DOD Met Statutory Reporting Requirements on Public-Private Competitions. GAO-11-923R, September 26, 2011, 16 pages. Accessed online at <http://www.gao.gov/products/GAO-11-923R>.

³⁷ Ibid, p. 2.

Section 325 of the National Defense Authorization Act for FY 2010 (P.L. 111-84) and GAO's Assessment of DOD's Response.)

Other GAO Observations and Findings

Preliminary Planning Phase for A-76 Competitions

Section 322 of the National Defense Authorization Act for FY2010 contained a provision that limits the duration of an A-76 competition to 24 months, with a possible extension to 33 months if DOD notifies Congress of the basis for the need for the extension.³⁸ The DOD report recommended that preliminary planning (which has generally occurred prior to the announcement of an A-76 competition) not be included in the time-limits for conducting A-76 competitions. The length of time to conduct a competition (from the date of the announcement of the start of the competition to the announcement of the winner of the competition) could range from 20-22 months for a single function competition, contrasted with 31-35 months for a multifunction competition. GAO concluded that more guidance on clarifying the preliminary planning phase was needed before concluding that preliminary planning time should be excluded from statutory time limits.³⁹

Table 2. Summary of DOD's Response to the Five Requirements in Section 325 of the National Defense Authorization Act for FY 2010 (P.L. 111-84) and GAO's Assessment of DOD's Response

Statutory Requirement	DOD's Response	GAO's Assessment ⁴⁰
The status of compliance with the requirement of 2461(a)(1) of 10 USC 2461, as amended by section 321 of this Act. (10 USC 2461 requires that a public-private competition be held before conversion of work performed by civilian employees to performance by private contractors.)	Due to the moratorium, DOD reported that it was unable to respond to this requirement. However, DOD stated that once the moratorium on the conduct of public-private competitions was lifted, the Department would not have any "issues implementing/complying with this recent amendment." ⁴¹	GAO stated that DOD is now required to conduct an A-76 competition for any commercial activity performed by DOD civilian employees, regardless of the number of affected DOD civilian positions. In the event the current moratorium on the conduct of A-76 competitions is lifted, GAO states that DOD reports that it will not have any issues with the current requirement.
Actions taken by the Secretary to address issues	for a discussion of DOD's response to issues raised in the DOD Inspector General report	GAO stated that the DOD Inspector General identified several

³⁸ GAO reported that DOD had not provided written notification to Congress to use the extended time period because no new A-76 competitions have begun since the moratorium began.

³⁹ Ibid, p. 11.

⁴⁰ U.S. Government Accountability Office. DOD Met Statutory Reporting Requirements on Public-Private Competitions. GAO-11-923R, September 26, 2011, p. 7. Accessed online at <http://www.gao.gov/products/GAO-11-923R>. Responses here were quoted from the GAO report.

⁴¹ U.S. Department of Defense. Report to the Congressional Defense Committees on the Department of Defense's Conduct of Public-Private Competitions. Prepared by the Office of the Undersecretary of Defense for Personnel and Readiness, Requirements and Strategic Integration Directorate, Requirements and Program & Budget Coordination Office, June 2011.

Statutory Requirement	DOD's Response	GAO's Assessment ⁴⁰
<p>raised in the DOD Inspector General report (D-2009-034, December 15, 2008). (On December 15, 2008, the DOD Inspector General issued a report to Congress in accordance with the requirements of the National Defense Authorization Act for FY 2008.</p>	<p>(D-2009-034), see Table A-1</p>	<p>areas of concern, consistent with GAO's past findings, that if addressed could potentially offer some improvement to the conduct of future A-76 competitions. GAO identified best practices that could improve DOD's conduct of public-private competitions. These best practices are grouped into four categories: (1) Building and maintaining agency staff capable of managing competitions; building the in-house MEO, and overseeing the implementation of competition decisions (2) Centralizing responsibility for conducting public-private competitions to increase control and effectively use support contractors to management competitions, (3) Establishing a basic program infrastructure that would oversee the program and create policies and procedures to ensure that DOD competition policies and directives are carried out, and (4) Avoiding conflicts of interest and protecting the integrity of the public-private competition decision-making process.</p>
<p>The reliability of systems to provide comprehensive and reliable data, designed to track and assess the cost and quality of the performance of functions that have been subjected to a public-private competition.</p>	<p>The Office of the Under Secretary of Defense for Personnel and Readiness [OUSD (P&R)] stated that the DOD Commercial Activities Management Information System (DCAMIS) was established to meet DOD's official reporting requirements on the conduct and results of A-76 competition decisions. DCAMIS has been used to collect, maintain and track A076 competitions since the early 1980s, and DOD states that the system was updated in 2001 and 2005 to meet the revised A-76 requirements. DOD expressed confidence in DCAMIS and disagreed with the findings of the November 2005 DOD Inspector General Report that raised issues of system reliability.</p> <p>Furthermore, OUSD(P&R) believed that the conceptual framework for DCAMIS can be expanded beyond just tracking public-private competition data. OUSD(P&R) recommended that DCAMIS be appropriately resourced, with shared burden across</p>	<p>GAO stated that since 2002, DOD has used DCAMIS as the system to track the results of A-76 competitions. GAO stated that it has previously reported on various problems with the accuracy and completeness of the data contained in the DCAMIS system, and has recommended previously that DOD develop guidance for making needed improvements. According to GAO, DOD agreed to make improvements and has reported that changes have been made to the system, but no additional reviews of DCAMIS have occurred since the implementation of the improvements. However, DCAMIS was taken offline in May 2011 due to the moratorium, and a Center for Naval Analyses study to address the reliability of DCAMIS was</p>

⁴² U.S. Department of Defense. Report to the Congressional Defense Committees on the Department of Defense's Conduct of Public-Private Competitions. Prepared by the Office of the Undersecretary of Defense for Personnel and Readiness, Requirements and Strategic Integration Directorate, Requirements and Program & Budget Coordination Office, June 2011, p. 12.

Statutory Requirement	DOD's Response	GAO's Assessment ⁴⁰
<p>The appropriateness of the cost differential in effect as of the date of the enactment of this Act for determining the quantifiable costs and the current overhead rates applied with respect to such functions.</p>	<p>multiple stakeholders, and modified to serve broader management needs, such as possibly tracking in-sourcing efforts across the Department, automating the Inherently Governmental/Commercial Activity (IG/CA) Inventory processes, and enabling compliance with the requirement for the Inventory of Contracts for Services.⁴²</p> <p>The OUSD(P&R) review asserted that the cost differential represents an appropriate methodology to ensure the government is not changing sources (i.e., government to private sector) based on a minimal savings projection. According to OUSD(P&R), in 2007, Congress changed the Circular's method for applying the cost differential, so that it no longer permits the application of the conversion differential when the incumbent source is the private sector. This differential cost is now only added to the contractor's cost proposal when the incumbent source is the government. Since it can no longer be subtracted from the contractor's cost proposal when the incumbent is a private sector contractor, conversions from contract performance to government performance have no conversion differential. This means, theoretically, a conversion can be made even if there is less than one dollar cost difference, providing an advantage to the public sector.</p> <p>DOD's Office of Installations & Environment provided updated guidance to DOD components on the application of overhead costs based on the results of a detailed study by the Center for Naval Analyses (CNA) regarding overhead definitions and methodologies used in both the private and public sectors. The outcome of this study is germane in that neither the public nor private sector has a commonly accepted definition for overhead. Based on the study, I&E developed clarifying guidance to consistently define the calculation of overhead for the public sector with commonly held accounting practices of the private sector.</p> <p>OUSD(P&R) did not find a need for any significant changes at this time to the conversion differential but plans to review recommendations made by various stakeholders to determine if further refinements would be beneficial.⁴³</p>	<p>suspended after DCAMIS was taken offline.</p> <p>GAO stated the following: "In our past work, we reported that the standard 12 percent rate for general and administrative overhead was adopted by OMB for all competitions government wide, leaving some doubts as to how closely this rate matched actual overhead costs on a site-by-site, activity-by-activity, or agency-by-agency basis. We noted in our report that OMB established this standard rate in response to private sector concerns that federal agencies were not properly recognizing overhead in their cost of performance and to reduce the administrative burden of estimating general and administrative overhead cost because of difficulties in obtaining accurate information on the full cost of government programs. Our past work acknowledged the difficulty of obtaining reliable cost data that could provide a sound basis for an overhead rate, but we concluded that until actual overhead costs are used to develop a more meaningful standard overhead rate, the magnitude of savings expected from public-private competitions will be imprecise and competition decisions could continue to be controversial. We recommended that OMB and DOD develop a methodology to determine appropriate overhead rates. The agencies did not agree with our recommendation.</p> <p>Similarly, the DOD IG reported in March 2003 that the standard 12 percent rate was not a fair estimate for calculating general and administrative overhead costs. DOD officials we met with in August 2011 stated that DOD is</p>

⁴³ Ibid, p. 14.

Statutory Requirement	DOD's Response	GAO's Assessment ⁴⁰
The adequacy of the policies of the Department of Defense in implementing the requirements of section 2461(a)(4) of title 10, United States Code. ⁴⁵	DOD stated that departments, components, bases and installations may choose to review work that may currently be, or previously has been, within the scope of the Most-Efficient Organization (MEO). ⁴⁶ Also, DOD reported that due to the current moratorium and a decreased emphasis on A-76 competitions, a draft revision of proposed changes in public-private competition policy had been suspended. (U.S. Department of Defense. Report to the Congressional Defense Committees on the Department of Defense's Conduct of Public-Private Competitions. Prepared by the Office of the Undersecretary of Defense for Personnel and Readiness, Requirements and Strategic Integration Directorate, Requirements and Program & Budget Coordination Office, June 2011, p. 14)	reviewing the procedures used to estimate and compare costs of different configurations of military and DOD civilian staffing with the cost of service contracts. The review is intended to help make DOD workforce mix decisions and could better inform DOD regarding the methodologies that might be used to compute more accurate overhead cost estimates in public-private competitions.” ⁴⁴ GAO reported that DOD stated that, in the Department's opinion, its policies are adequate to implement this statutory provision. However, GAO reports a March 2008 DOD policy memorandum recognizes that the individual military components may use their own discretion to independently determine which commercial activities may be subject to A-76 competition during the budget and review process. DOD's report recommends for clarifying guidance on the application of the statutory limitations on re-competitions when considering work previously subject to an A-76 competition.

Sources: Report to the Congressional Defense Committee's on DOD's Conduct of Public-Private Competitions, June 2011, and GAO-11-923R, DOD Public-Private Competitions, September 26, 2011.

(...continued)

⁴⁴ U.S. Government Accountability Office. DOD Met Statutory Reporting Requirements on Public-Private Competitions. GAO-11-923R, September 26, 2011, p. 79 Accessed online at <http://www.gao.gov/products/GAO-11-923R>.

⁴⁵ Title 10, Section 2461 (a)(4) states that DOD is not required to conduct a “re-competition” at the end of the performance period for the MEO.

⁴⁶ The MEO is the staffing plan of the Agency Tender, developed to represent the agency's most efficient and cost effective organization. The MEO is required for a standard competition and may include a mix of government personnel and MEO subcontracts. The Agency Tender is the agency management plan submitted in response to a solicitation for a standard competition. The agency tender includes an MEO, agency cost estimate, MEO quality control plan, MEO phase-in plan, and copies of any MEO subcontracts (with the private sector providers' proprietary information redacted). See Acronyms and Definitions, Circular A-76, revised May 29, 2003. Accessed online at http://www.whitehouse.gov/omb/circulars_a076_a76_incl_tech_correction/.

Issues for Congress

Some in Congress view the current moratorium period as an opportunity to study the A-76 competition policy, to review the inventory of contracted services to determine how much work is contracted out to private contractors, and to ascertain whether contractors perform work that is inherently governmental. While the issue of continuing or suspending the moratorium is in debate, 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:

- The DOD moratorium was imposed in part because of previous GAO and DOD Inspector General reports that concluded that DOD components were unable to demonstrate that A-76 competitions consistently resulted in savings to the government. Was there complete and reliable cost data related to the conduct of A-76 competitions that make it possible to determine the overall savings to DOD? If savings cannot be demonstrated, why should A-76 competitions resume?
- The DOD Inspector General reported as early as 2003 that the standard 12 percent rate was not a fair estimate for calculating general and administrative overhead costs for A-76 competitions, and DOD officials who met with GAO in August 2011 stated that DOD is now reviewing the procedures used to estimate and compare costs of different configurations of military and DOD civilian staffing with the cost of service contracts. Should the lifting of the moratorium occur before these financial decisions are resolved?
- DOD is prohibited from conducting new A-76 competitions until the DOD inventory of contract services is completed and GAO had rendered its assessment of the service contract inventory. DOD's response to Section 325 was completed in June 2011. Given the fact that the GAO has not completed its assessment of DOD's inventory, should Congress continue the moratorium until the GAO assessment of the inventory is completed? To what degree has the inventory of service contract requirements under National Defense Authorization Act for FY 2008 been implemented by DOD?
- Should Congress give DOD an opportunity to better refine its methodologies used to help make better decisions on the total workforce mix before lifting the moratorium?
- To what degree have the problems that led to the moratorium been resolved? Would the process be any different today if the moratorium were lifted?

Summary of Selected A-76 Legislation Enacted

Legislation Passed in the 112th Congress

Section 8103 of P.L. 112-10, the Consolidated Appropriations Act for FY2011 prohibits federal agencies from initiating or announcing new public-private competitions under OMB Circular A-76, except when the certain conditions are met.⁴⁷

b) Exception- The prohibition in subsection (a) shall not apply to the award of a function to a contractor or the conversion of a function to performance by a contractor pursuant to a study conducted under Office of Management and Budget (OMB) Circular A-76 once all reporting and certifications required by section 325 of the National Defense Authorization Act for Fiscal Year 2010 (Public Law 111-84) have been satisfactorily completed.

Legislation Passed in the 111th Congress

Section 322 of H.R. 2647, the National Defense Authorization Act for Fiscal Year 2010⁴⁸

Section 322 of the FY2010 NDAA contained a provision that limits the duration of an A-76 competition to 24 months, with a possible extension to 33 months if DOD notifies Congress the basis for the need for the extension.

Section 322. Time Limitation On Duration of Public-Private Competitions

(a) Time Limitation- Section 2461(a) of title 10, United States Code, as amended by section 321, is further amended by adding at the end the following new paragraph:

(5)(A) Except as provided in subparagraph (B), the duration of a public-private competition conducted pursuant to Office of Management and Budget Circular A-76 or any other provision of law for any function of the Department of Defense performed by Department of Defense civilian employees may not exceed a period of 24 months, commencing on the date on which the preliminary planning for the public-private competition begins and ending on the date on which a performance decision is rendered with respect to the function.

(B)(i) The Secretary of Defense may specify an alternative period of time for a public-private competition, which may not exceed 33 months, if the Secretary--

‘(I) determines that the competition is of such complexity that it cannot be completed within 24 months; and

⁴⁷ P.L. 112-10 was signed into law on April 15, 2011.

⁴⁸ H.R. 2647, Public Law 111-84, was signed into law on October 28, 2009.

‘(II) submits to Congress, as part of the formal congressional notification of a public-private competition pursuant to subsection (c), written notification that explains the basis of such determination.

(ii) The notification under clause (i)(II) shall also address each of the following:

‘(I) Any efforts of the Secretary to break up the study geographically or functionally.

‘(II) The Secretary’s justification for undertaking a public-private competition instead of using internal reengineering alternatives.

‘(III) The cost savings that the Secretary expects to achieve as a result of the public-private competition.

(iii) If the Secretary specifies an alternative time period under this subparagraph, the alternative time period shall be binding on the Department in the same manner and to the same extent as the limitation provided in subparagraph (A).

(C) The time period specified in subparagraph (A) for a public-private competition does not include any day during which the public-private competition is delayed by reason of the filing of a protest before the Government Accountability Office or a complaint in the United States Court of Federal Claims up until the day the decision or recommendation of either authority becomes final. In the case of a protest before the Government Accountability Office, the recommendation becomes final after the period of time for filing a request for reconsideration, or if a request for reconsideration is filed, on the day the Government Accountability Office issues a decision on the reconsideration.

(D) If a protest with respect to a public-private competition before the Government Accountability Office or the United States Court of Federal Claims is sustained, and the recommendation is final as described in subparagraph (C), and if such protest and recommendation result in an unforeseen delay in implementing a final performance decision, the Secretary of Defense may terminate the public-private competition or extend the period of time specified for the public-private competition under subparagraph (A) or subparagraph (B). If the Secretary decides not to terminate a competition, the Secretary shall submit to Congress written notice of such decision. Any such notification shall include a justification for the Secretary’s decision and a new time limitation for the competition, which shall not exceed 12 months from the final decision and shall be binding on the Department.

(E) For the purposes of this paragraph, preliminary planning with respect to a public-private competition, begins on the date on which the Department of Defense obligates funds for the acquisition of contract support, or formally assigns Department of Defense personnel, to carry out any of the following activities:

Section 325 of H.R. 2647, the National Defense Authorization Act for Fiscal Year 2010 ⁴⁹

Section 325 of the FY2010 NDAA contained a provision that temporarily suspended all ongoing public-private competitions being conducted by the Department of Defense pursuant to Office of Management and Budget Circular A-76 , and established a review and approval process for recommencing such competitions. Here is the report language from Section 325.

Section 325. Temporary Suspension of Public-Private Competitions For Conversion of Department of Defense Functions to Performance By A Contractor

(a) Temporary Suspension- During the period beginning on the date of the enactment of this Act⁵⁰ and ending on the date that is 30 days after the date on which the Secretary of Defense submits to the congressional defense committees the certification required under subsection (d), no study or competition regarding a public-private competition for the conversion to performance by a contractor for any function performed by Department of Defense civilian employees may be begun or announced pursuant to 2461 of title 10, United States Code, or otherwise pursuant to Office of Management and Budget Circular A-76.

(b) Review and Report to Congress- During fiscal year 2010, the Secretary of Defense, acting through the Under Secretary of Defense for Personnel Readiness, in consultation with the Under Secretary for Acquisition, Technology, and Logistics and the Comptroller of the Department of Defense, shall undertake a comprehensive review of the policies of the Department of Defense with respect to the conduct of public-private competitions. The Secretary shall submit to the congressional defense committees a report on such review not earlier than June 15, 2010.⁵¹

The review, at a minimum, shall address—

- (1) the status of the compliance of the Department with the requirement of 2461(a)(1) of title 10, United States Code, as amended by section 321 of this Act;
- (2) actions taken by the Secretary to address issues raised in the report of the Department of Defense Inspector General numbered D-2009-034 and dated December 15, 2008;
- (3) the reliability of systems in effect as of the date of the enactment of this Act to provide comprehensive and reliable data to track and assess the cost and quality of the performance of functions that have been subjected to a public-private competition;
- (4) the appropriateness of the cost differential in effect as of the date of the enactment of this Act for determining the quantifiable costs and the current overhead rates applied with respect to such functions; and

⁴⁹ H.R. 2647, Public Law 111-84, was signed into law on October 28, 2009.

⁵⁰ This Act was signed into Law on October 28, 2009.

⁵¹ U.S. Department of Defense. Report to the Congressional Defense Committees on the Department of Defense's Conduct of Public-Private Competitions. Prepared by the Office of the Undersecretary of Defense for Personnel and Readiness, Requirements and Strategic Integration Directorate, Requirements and Program & Budget Coordination Office, June 2011.

(5) the adequacy of the policies of the Department of Defense in implementing the requirements of section 2461(a)(4) of title 10, United States Code.

(c) Comptroller General Review- Not later than 90 days after the date on which the report required under subsection (b) is submitted to the congressional defense committees, the Comptroller General shall conduct an assessment of the review required under paragraph (b) and shall submit to the congressional defense committees a report on the findings of such assessment and any conclusions or recommendations of the Comptroller General based on such assessment.

(d) Certification Required- The Secretary of Defense shall publish in the Federal Register and submit to the congressional defense committees certification that--

(1) the review required by subsection (b) has been completed, and that the 90-day period during which the assessment of the Comptroller General is to be completed under subsection (c) has expired;

(2) the Secretary of Defense has completed and submitted to the congressional defense committees a complete inventory of contracts for services for or on behalf of the Department in compliance with the requirements of subsection (c) of section 2330a of title 10, United States Code;

(3) the Secretary of each military department and the head of each Defense Agency responsible for activities in the inventory has initiated the review and planning activities of subsection (e) of such section; and

(4) the Secretary of Defense has submitted budget information on contract services in compliance with the requirements of section 236 of title 10, United States Code.

Section 323 of H.R. 6523, the Ike Skelton National Defense Authorization Act for Fiscal Year 2011

Section 323 of H.R. 6523, the Ike Skelton National Defense Authorization Act for FY2011,⁵² prohibited the use of the establishment of goals for quotas for conducting A-76 competitions. In addition, Section 323 also required DOD and GAO to report to Congress on the inventory of contracts for services, as described below.

Section 323. Prohibition On Establishing Goals Or Quotas For Conversion Of Functions To Performance By Department Of Defense Civilian Employees.

(a) PROHIBITION.-The Secretary of Defense may not establish, apply, or enforce any numerical goal, target, or quota for the conversion of Department of Defense functions to performance by Department of Defense civilian employees, unless such goal, target, or quota is based on considered research and analysis, as required by section 235, 2330a, or 2463 of title 10, United States Code.

⁵² H.R. 6523, Public Law 111-383, was signed into law on January 7, 2011.

(b) DECISIONS TO INSOURCE.-In deciding which functions should be converted to performance by Department of Defense civilian employees pursuant to section 2463 of title 10, United States Code, the Secretary of Defense shall use the costing methodology outlined in the Directive-Type Memorandum 09-007 (Estimating and Comparing the Full Costs of Civilian and Military Manpower and Contractor Support) or any successor guidance for the determination of costs when costs are the sole basis for the decision. The Secretary of a military department may issue supplemental guidance to assist in such decisions affecting functions of that military department.

(c) REPORTS.-(1) REPORT TO CONGRESS.-Not later than March 31, 2011, the Secretary of Defense shall submit to the congressional defense committees a report on the decisions with respect to the conversion of functions to performance by Department of Defense civilian employees made during fiscal year 2010. Such report shall identify, for each such decision:

(A) the agency or service of the Department involved in the decision;

(B) the basis and rationale for the decision; and

(C) the number of contractor employees whose functions were converted to performance by Department of Defense civilian employees.

(2) COMPTROLLER GENERAL REVIEW.-Not later than 120 days after the submittal of the report under paragraph

(1) the Comptroller General of the United States shall submit to the congressional defense committees an assessment of the report.

(d) CONSTRUCTION.-Nothing in this section shall be construed-

(1) to preclude the Secretary of Defense from establishing, applying, and enforcing goals for the conversion of acquisition functions and other critical functions to performance by Department of Defense civilian employees, where such goals are based on considered research and analysis; or

(2) to require the Secretary of Defense to conduct a cost comparison before making a decision to convert any acquisition function or other critical function to performance by Department of Defense civilian employees, where factors other than cost serve as a basis for the Secretary's decision.⁵³

⁵³ Section 323 of H.R. 6523, Public Law 111-83, signed into law on January 7, 2011.

Legislation Passed in the 110th Congress

P.L. 110-181, the National Defense Authorization Act for Fiscal Year 2008⁵⁴

Section 325. Restriction On Office of Management and Budget Influence Over Department of Defense Public-Private Competitions

(a) Restriction on Office of Management and Budget- The Office of Management and Budget may not direct or require the Secretary of Defense or the Secretary of a military department to prepare for, undertake, continue, or complete a public-private competition or direct conversion of a Department of Defense function to performance by a contractor under Office of Management and Budget Circular A-76, or any other successor regulation, directive, or policy.

(b) Restriction on Secretary of Defense- The Secretary of Defense or the Secretary of a military department may not prepare for, undertake, continue, or complete a public-private competition or direct conversion of a Department of Defense function to performance by a contractor under Office of Management and Budget Circular A-76, or any other successor regulation, directive, or policy by reason of any direction or requirement provided by the Office of Management and Budget.

(c) Inspector General Review-

(1) COMPREHENSIVE REVIEW REQUIRED- The Inspector General of the Department of Defense shall conduct a comprehensive review of the compliance of the Secretary of Defense and the Secretaries of the military departments with the requirements of this section during calendar year 2008. The Inspector General shall submit to the congressional defense committees the following reports on the comprehensive review:

(A) An interim report, to be submitted by not later than 90 days after the date of the enactment of this Act.

(B) A final report, to be submitted by not later than December 31, 2008.

(2) INSPECTOR GENERAL ACCESS- For the purpose of determining compliance with the requirements of this section, the Secretary of Defense shall ensure that the Inspector General has access to all Department records of relevant communications between Department officials and officials of other departments and agencies of the Federal Government, whether such communications occurred inside or outside of the Department.

⁵⁴ Section 325 of P.L. 110-181 was signed into law on January 28, 2009.

Summary of Selected A-76 Legislative Proposals

Legislation Introduced in the 112th Congress

Section 733 of H.R. 2434, the proposed Financial Services and General Government Appropriations Act for FY2012, would prohibit funds to begin or announce an A-76 competition.⁵⁵

H.R. 2219, the DOD Appropriations Act for FY2012, would prohibit federal agencies from initiating or announcing new public-private competitions under OMB Circular A-76, with some exceptions.

H.R. 1540, the House-passed version of the National Defense Authorization Act for FY2012, contains three provisions which would affect the conduct of public-private competitions under OMB Circular A-76. The provisions are listed here.⁵⁶

Section 937. Modification of Temporary Suspension of Public-Private Competitions for Conversion of Department of Defense Functions to Contractor Performance.

Section 325 of the National Defense Authorization Act for Fiscal Year 2010 (Public Law 111-84; 123 Stat. 2253) is amended--

(1) in subsection (a), by striking 'Secretary of Defense submits to the congressional defense committees the certification required under subsection (d)' and inserting 'Comptroller General submits to the congressional defense committees the assessment required under subsection (c)'; and

(2) by striking subsection (d).

Section 938. Preliminary Planning and Duration of Public-Private Competitions.

Section 2461(a)(5) of title 10, United States Code, is amended--

(1) in subparagraph (E)—

(A) by striking ', begins' and inserting 'shall be conducted in accordance with guidance and procedures that shall be issued and maintained by the Under Secretary of Defense for Personnel and Readiness and shall begin';

(B) by inserting after 'the date on which' the following: 'a component of';

⁵⁵ H.R. 2434 was introduced on July 7, 2011.

⁵⁶ H.R. 1540, the House-passed version of the National Defense Authorization Act for FY2012, was introduced on April 14, 2011, passed by the House on May 26, 2011, and referred to the Senate on June 6, 2011.

- (C) by inserting `first' before `obligates';
 - (D) by inserting `specifically' after `funds';
 - (E) by inserting `for the preliminary planning effort' after `support'; and
 - (F) in clause (i), by inserting `a public-private' before `competition'; and
- (2) in subparagraph (F)--
- (A) by inserting `or Defense Agency' after `military department';
 - (B) by striking `of such date' and inserting `of the actions intended to be taken during the preliminary planning process';
 - (C) by inserting `of such actions' after `public notice';
 - (D) by inserting after `website' the following: `and through other means as determined necessary';
 - (E) by inserting after the first sentence the following: `Following the completion of preliminary planning for a public-private competition, if applicable, the head of a military department or Defense Agency shall submit to Congress written notice of the initiation of the public-private competition and shall announce such initiation in the Federal Register.'; and
 - (F) by striking `Such date is the first day of preliminary planning for a public-private competition for' and inserting `The date of such announcement shall be used for'.

Section 939. Conversion of Certain Functions from Contractor Performance to Performance by Department of Defense Civilian Employees.

Section 2463 of title 10, United States Code, is amended—

- (1) in subsection (b)(1)--
- (A) by striking subparagraph (A) and inserting the following new subparagraph (A):
“(A) is an inherently governmental function;”
 - (B) by redesignating subparagraphs (C) and (D) as subparagraphs (F) and (G), respectively; and
 - (C) by inserting after subparagraph (B) the following new subparagraphs (C), (D), and (E):
“(C) acquisition workforce functions;”
“(D) is a critical function that is necessary to maintain sufficient organic expertise and technical capability;”

“(E) has been performed by Department of Defense civilian employees at any time during the previous 10-year period;”;

(2) by redesignating subsections (d) and (e) as subsections (f) and (g), respectively;

(3) by inserting after subsection (c) the following new subsections (d) and (e):

“(d) Determinations Relating to the Conversion of Certain Functions- (1) Except as provided in paragraph (2), in determining whether a function should be converted to performance by Department of Defense civilian employees, the Secretary of Defense shall--

(A) develop methodology for determining costs based on the guidance outlined in the Directive-Type Memorandum 09-007 entitled ‘‘Estimating and Comparing the Full Costs of Civilian and Military Manpower and Contractor Support’’ or any successor guidance for the determination of costs when costs are the sole basis for the determination;’’

“(B) take into consideration any supplemental guidance issued by the Secretary of a military department for determinations affecting functions of that military department;’’ and

“(C) ensure that the difference in the cost of performing the function by a contractor compared to the cost of performing the function by Department of Defense civilian employees would be equal to or exceed the lesser of--

(i) 10 percent of the personnel-related costs for performance of that function; or

(ii) \$10,000,000.”

(2) Paragraph (1) shall not apply to a function described in subparagraph (A) of subsection (b)(1).

(e) Notification Relating to the Conversion of Certain Functions- The Secretary of Defense shall establish procedures for the timely notification of any contractor who performs a function that the Secretary plans to convert to performance by Department of Defense civilian employees pursuant to subsection (a). The Secretary shall provide a copy of any such notification to the congressional defense committees.’; and

(4) in subsection (g), as redesignated by paragraph (2)--

(A) by striking “this section” and all that follows and inserting ‘this section.’; and

(B) by adding at the end the following new paragraphs:

“(1) The term “functions closely associated with inherently governmental functions” has the meaning given that term in section 2383(b)(3) of this title.”

“(2) The term ‘acquisition function’ has the meaning given that term under section 1721(a) of this title.

“(3) The term ‘inherently governmental function’ has the meaning given that term in the Federal Activities Inventory Reform Act of 1998 (Public Law 105-270; 31 U. S.C. 501 note).”

Legislation Introduced in the 111th Congress

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

- The Correction of 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, 2009.⁵⁷ These bills would have prohibited action on any A-76 competitions by providing that no competitions could be “prepared, announced, undertaken, continued, or finished” until certain conditions 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.⁵⁸ These bills would require a temporary moratorium on new Circular A-76 competitions until certain reforms required in the CLEAN-UP Act were substantially implemented.⁵⁹

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. However, neither of these bills became law.

H.R. 3170, Financial Services and General Government Appropriations Act for Fiscal Year 2010⁶⁰

- Section 734 would have prohibited 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 have established a requirement for all federal executive agencies, excluding DOD,⁶¹ to submit an inventory to OMB for all

⁵⁷ 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.

⁵⁸ See S. 924, Section 12 – Reforms to the OMB Circular A-76 Process.

⁵⁹ For further discussion on the implications of the CLEAN-UP 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.

⁶⁰ Financial Services and General Government Appropriations Act for Fiscal Year 2010, H.R. 3170, was introduced on July 9, 2009, passed by the House on July 16, 2009, placed on the Senate calendar on July 20, 2009.

⁶¹ DOD is covered under S. 1390, the proposed National Defense Authorization Act for Fiscal Year 2010.

activities procured through contracts for services for the agency or on behalf of the agency.⁶²

S. 1432, Financial Services and General Government Appropriations Act for Fiscal Year 2010 ⁶³

- Section 734 would have prohibited 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,”⁶⁴ and;
- Section 735, which would have established 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.⁶⁵

⁶² Financial and General Government Appropriations Act for Fiscal Year 2010, H.R. 3170, Section 743.

⁶³ Financial Services and General Government Appropriations Act for Fiscal Year 2010, S. 1432, was introduced on July 9, 2009 and placed on the Senate calendar.

⁶⁴ Financial Services and General Government Appropriations Act for Fiscal Year 2010, S. 1432, Section 734.

⁶⁵ Financial Services and General Government Appropriations Act for Fiscal Year 2010, S. 1432, Section 735.

Appendix. Summary of DOD IG Report No. D-2009-034

Table A-1. Summary of the DOD Inspector General's Report No. D-2009-034 on Provisions in Section 325 of the National Defense Authorization Act for Fiscal Year 2008 (P.L. 110-181)

Issue Identified by the IG in Report No. D-2009-034	Effect on the Conduct of A-76 Competitions	DOD's Response to Issues Raised by the IG
Lack of a dedicated staff whose sole function is to conduct A-76 competitions, thus staff are assigned to other additional duties	The report suggested that Circular A-76 competitions put a strain on the workforce and adversely affected the mission of the organization.	OSD stated that it would not be prudent use of department resources to assign employees full-time when they do not participate in a full-time capacity.
Follow-on competitions before the final performance of the Most Efficient Organization (MEO) were required by Circular A-76, but new legislative amendments stated that follow-on competitions were no longer required	Some DOD officials suggested that the cost of conducting the follow-on competitions could negate savings generated by the original competition; another official felt that the savings generated by the follow-on competitions were minimal.	OSD stated that DOD components should not focus on recompetiting MEOs but on fostering competition within all of the work performed regardless of the source or the organization. Furthermore, these competitions should be grouped in such a way to strive for efficient performance and cost-effectiveness.
The qualifications of the Agency Tender Official (ATO) were inconsistent across the military services and fell short of the requirements set forth in OMB Circular A-76, and that Section 326 of P.L. 110-181 left open the question of whether the ATO has standing to file a GAO protest.	Some smaller bases found it difficult to dedicate a single GS-13 employee as the ATO (Agency Tender Official), and removing a GS-13 level employee from his/her primary position had a negative effect on the overall mission of the base. In one case, no GS-13 employees worked in the functional area selected for competition. Further, ATOs without standing could not file protest and created inconsistencies in the ability of the government to compete against the private sector.	OSD stated that ATOs play a significant role in the conduct of A-76 competitions, should meet certain qualifications, and should be routinely assigned to conduct A-76 competitions to allow the individuals to grow in their skill and competency levels. Base commanders cannot serve as ATOs as they will have oversight over the selected service provider, regardless of the outcome of the competition
Guidance on A-76 guidelines was described as multi-faceted, overlapping, confusing, and untimely, making compliance difficult particularly with the methodology used for costing. Congressionally enacted restrictions on A-76 competitions often changed every year.	Differing interpretations of the A-76 guidance at all levels and between OMB and OSD made it difficult to keep up with the changing nature of laws and regulations, making compliance difficult.	OSD stated that DOD has issued guidance to implement any statutory obligations imposed by Congress on the conduct of A-76 competitions, and that the Share A-76! Website and the DOD A-76 Costing Help Desk are available to answer costing policy questions and to encourage that consistent costing methodology is applied to all agency cost estimates.
Support contractors hired to assist in writing the Performance Work Statement (PWS) ranged in competency from adequate to unsatisfactory. PWS teams commented that the support contractors were often hired	In some cases, it appears that the apparent lack of confidence in the selection of the support contractors, coupled with (in some cases) the lack of technical expertise of some of the support contractors, created challenges in writing the PWS, identifying	OSD stated that new guidance was written titled "Interim DOD Guidance on Competitive Sourcing Program Support for Consultants" and assigned to the OSD General Counsel for coordination. This guidance is consistent with the

Issue Identified by the IG in Report No. D-2009-034	Effect on the Conduct of A-76 Competitions	DOD's Response to Issues Raised by the IG
because they represented the lowest cost contractor to the government, not because they were more technically competent.	workload requirements , and appeared to make for a less efficient effort and possibly, work product.	Federal Acquisition Regulation but has been written for individuals not trained in acquisition-related matters.
Training in competitive sourcing policy	The descriptions of the quality and relevance of the competitive sourcing training that officials received at bases and installations was mixed – from “generic, not specific enough,” “helpful, worthwhile, and in-depth.” The quality of the instruction was mixed, in one case described as “inadequate” and in another, “ill-timed.”	OSD stated that the services did not request funding for competitive sourcing training if FY2009, and that due to the lack of a competitive sourcing program, “any future training would have to be incorporated into consultant support contracts.”
Firewalls (defined as a separation between the PVS and MEO teams established to avoid any appearance of a conflict of interest)	Firewalls increased the amount of people needed to conduct a competition, often resulting in a duplication of effort, which sometimes resulted in limiting critical communication resulting in slowing down the pace and outcome of the competition.	OSD stated that the firewall requirement was a result of the GAO protest decision in “Navy vs. Jones/Hill Venture” case in May 2002. OSD had developed DOD Interim Guidance on Firewalls which was in coordination with OSD General Counsel to clarify these roles.
Contracting Issues	Some base and installation officials expressed concern with the inability to acquire and retain competent contracting officers, the lack of control over the sometimes constant turnover of contracting officers during the course of a competition, sometimes resulting in periods of time without an assigned contracting officer; a limited number of contracting officials, and the resulting delays in establishing an acquisition strategy for the competitions.	OSD stated that the DOD Office of Competitive Sourcing did not require bases and installations to organize their competitive sourcing offices in a specific manner and left such decisions to their own management purview. Within the bases and installations, the Army appeared to express the most challenges in acquiring and maintaining sufficient contracting personnel and support.

Source: U.S. Department of Defense, Office of the Inspector General. Report to Congress on Section 325 of the National Defense Authorization Act for Fiscal Year 2008, Office of Management and Budget Influence Over DOD Public-Private Competitions. Report No. D-2009-034, December 15, 2008, 22 p. Some of the numerical data in the report was redacted, thus making report analysis and interpretation difficult..

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