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Federal Agencies: Public-Private Competitions

Background

Congress has passed legislation to define and scope how the government conducts and implements public-private competitions. The public-private competition process refers to how the federal government determines whether a certain activity is to be performed by a private-sector entity under contract or by government employees. The U.S. government is required to consider several factors, including efficiency and cost savings, in making such a determination.

In 1955, the Eisenhower Administration issued a Bureau of the Budget Bulletin that established policies for public-private competition, including regular review of such activities. Since then, Congress and the executive branch have pursued various efforts both to minimize and to expand government activities. Congress may consider exercising a role in defining what work is "inherently governmental," which could either reduce or expand the amount of government activities. Congress may also consider what work can be performed by the commercial sector, as well as its role in oversight of the executive branch's implementation of these definitions.

Public-Private Competitions

The Federal Activities Inventory Reform (FAIR) Act of 1998 (P.L. 105-270) created requirements for executive agencies, including the Department of Defense (DOD)—which is "using a secondary Department of War designation," under Executive Order 14347 dated September 5, 2025—to annually develop inventories of "government activities not inherently governmental in nature," or activities performed by the government that could otherwise be performed by commercial entities.

The FAIR Act requires agencies to submit inventories to the Office of Management and Budget (OMB), which in turn reviews and consults with the respective agency on its findings. Each agency head is to develop "within a reasonable time" a "review of the activities on the list" and use a "competitive process" including "realistic and fair cost comparisons" of the public and private sectors to determine whether to conduct the activity in question with a government or commercial source. The FAIR Act also allows for interested parties from either the public or private sector to submit challenges and findings to the list (e.g., if a private company believes it can perform an activity in a more cost-effective manner than the government, it may submit a challenge).

Inherently Governmental Functions

The FAIR Act defines an "inherently governmental function" as "a function that is so intimately related to the public interest as to require performance by Federal Government employees." The definition includes "the interpretation and execution of the laws of the United States" in ways that would impact government contractual actions, acquisitions, economic or military activity, employment or appointment of officers or employees of the government, any function that would "significantly affect the life, liberty, or property of private persons," and the expenditure of federal funds.

OMB Circular A-76, "Performance of Commercial Activities," establishes policies for implementing FAIR Act requirements related to conducting public-private competitions (i.e., "A-76 competitions"). Circular A-76 was first issued in 1966, and has been updated several times since, including to implement the FAIR Act in 1998. Since the FAIR Act's enactment, Circular A-76 was last updated in 2003 to provide further detail concerning the public-private competition process. This update stated that "the longstanding policy of the federal government has been to rely on the private sector for needed commercial services" and that "to ensure that the American people receive maximum value for their tax dollars, commercial activities should be subject to the forces of competition."

The Duncan Hunter National Defense Authorization Act (NDAA) for Fiscal Year 2009 (P.L. 110-417) required the OMB Director to "develop a single consistent definition" for the term "inherently governmental function." OMB's Office of Federal Procurement Policy (OFPP) provided a definition of "inherently governmental function" as one "so intimately related to the public interest as to require performance by Federal Government employees," an exact quotation from the FAIR Act. OMB determined that the FAIR Act language was "reasonable" and that it was "not appropriate to expand the definition." OFPP also offered examples of and guidelines for identifying inherently governmental functions.

The A-76 Competition Process

Per Circular A-76, the public-private competition process begins with the government publicly announcing a competition. The government then develops a performance work statement (PWS), which "identifies the technical, functional, and performance characteristics of the agency's requirements." This is similar to a PWS as required in government contracting. The agency then may solicit submissions from the private sector to perform the work.

Agencies then determine the "most efficient organization" (MEO) in the government that could perform the work outlined in the PWS. The government MEO's/MEOs' submission(s) are then compared with the private sector submissions to determine the most cost-effective option. To determine the most cost-effective option, Circular A-76 lists factors that agencies are to use to calculate public sector costs in comparison to private sector costs. These cost

estimates are prepared with a specific software and calculation methodology as directed in Circular A-76. "Standard" competitions are to be completed within 12 months, although, under certain circumstances, Circular A-76 allows for "streamlined competitions" that "shall not exceed 90 calendar days."

Case Study: DOD Privatization

DOD uses contractors to support a wide range of military operations. Whether certain functions should be performed by government, civilian, or uniformed personnel, or by contractors has long been a topic of discussion and sometimes controversy. In the early 2000s, DOD's use of A-76 competitions received public and congressional attention. An independent review found "A-76 ... contributed to the issues at Walter Reed Army Medical Center between 2001 and 2007." The FY2010 NDAA temporarily prohibited DOD from conducting public-private competitions that would convert performance of functions from government personnel to a contractor, until the Secretary completed a review of the process per DOD guidance.

Additionally, the FY2009 Omnibus Appropriations Act (P.L. 111-8) prohibited government-wide use of appropriated funds to conduct A-76 competitions through the end of that fiscal year, and Congress has since enacted similar restrictions in subsequent appropriations acts. For another example, see Section 741 of the government-wide general provisions of the Financial Services and General Government Appropriations Act of 2024 (P.L. 118-47).

In March 2025, the Secretary of Defense, who is using "Secretary of War" as a "secondary title" under Executive Order 14347 dated September 5, 2025, issued a memorandum, "Initiating the Workforce Acceleration and Recapitalization Initiative." The memo states that DOD is to "realign the size of our civilian workforce and strategically restructure it" to align with other guidance. Another memo, issued in April 2025 by the Deputy Secretary of Defense, who is using "Deputy Secretary of War" as a "secondary title" under Executive Order 14347 dated September 5, 2025, called for various DOD agencies and departments to "communicate potential opportunities to reduce or eliminate redundant or non-essential functions," and stated as a guiding principle that "all functions that are not inherently governmental ... should be prioritized for privatization." Some commentators assert that this guidance may drive privatization of military base amenities (e.g., commissaries).

Issues for Congress

Executive Branch Actions

As the Trump Administration moves toward its stated goal of achieving government efficiencies, Congress may assess whether the A-76 process and privatization of government functions generate cost savings and promote government efficiency. Congress may consider whether the original intent of the public-private competition—to "ensure that the American people receive maximum value for their tax dollars"—is still maintained in the contemporary A-76 competition process as outlined and defined in the FAIR Act. It may also consider whether the A-76 process, including cost-calculating factors, provides proper incentives to both the government and industry to provide "maximum value."

FAIR Act Submissions

Congress may consider whether or not it receives adequate information regarding public-private competitions to assess their efficacy. The FAIR Act does not require congressional notification. Absent any reporting requirements, publication of FAIR Act inventory reports is at the discretion of the agency. In practice, FAIR Act reports can be dated and sporadic. For example, the DOD Office of the Inspectors General last issued a FAIR Act inventory report in FY2017.

CRS has found no studies of public-private competitions performed in the past five years, so it may be difficult to fully ascertain if the performance of certain functions is more effective and economical using the government or using the commercial sector. Congress could consider mandating FAIR Act inventory reports be submitted to Congress or the public annually. This could potentially improve transparency of FAIR Act implementation, thereby facilitating congressional oversight of the process and opportunities for interested commercial parties to submit challenges to the published inventories.

Statutory Definitions

As the executive branch considers changes to federal procurement regulations, Congress may consider whether to amend language in statute concerning public-private competitions. For example, the current OMB definition of "inherently governmental functions" includes the concept of the activities being "intimately related to the public interest." OMB claimed, when it issued this guidance, that this was based on FAIR Act language. Congress may consider whether further detail in the FAIR Act's definition of "inherently governmental functions" is required in light of executive branch actions concerning federal procurement. For more information on executive branch actions concerning federal procurement, see CRS Insight IN12600, *Defense Acquisition Reform: Executive and Legislative Branch Actions*, by Alexandra G. Neenan.

Workforce Availability

A 1989 statement from the Government Accountability Office (GAO) on A-76 cost studies asserted that "the A-76 program's perceived threat to the morale and productivity of federal workers must be addressed if the program is to gain wider governmentwide acceptance." Congress may consider requiring GAO, the DOD Inspector General, or another independent body to conduct a similar study to understand how A-76 competitions currently impact the federal workforce, or whether the federal workforce can conduct all activities currently considered inherently governmental. Congress might also consider whether or not the federal workforce is able to effectively perform functions currently considered inherently governmental.

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