Chapter 15
Competitive Sourcing & Privatization

2014 Contract Attorneys Deskbook

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CHAPTER 15

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CHAPTER 15

COMPETITIVE SOURCING AND PRIVATIZATION

I. COMPETITIVE SOURCING[1]

A. Origins and Development of Circular A-76

1. 1955: The Bureau of the Budget (predecessor of the Office of Management and Budget (OMB)) issued a series of bulletins establishing the federal policy to obtain goods and services from the private sector. See Federal Office of Management and Budget Circular A-76, Performance of Commercial Activities, ¶ 4.a (Aug. 4, 1983, Revised 1999) [hereinafter Circular A-76 (1999)]. [2]

2. 1966: The OMB first issued Circular A-76, which restated the federal policy and the principle that "[i]n the process of governing, the Government should not compete with its citizens." The OMB revised the Circular in 1967, 1979, 1983, and again in 1999. See Circular A-76 (1999), ¶ 4.a.

3. 1996: The OMB issued a Revised Supplemental Handbook setting forth procedures for determining whether commercial activities should be performed under contract by a commercial source or in house using government employees. In June 1999, OMB updated the Revised Supplemental Handbook. See Circular A-76 (1999), ¶ 1.

4. 2003: The OMB issued the current version of OMB Circular A-76 superseding the prior circular and any related guidance.[3]

5. 2009: By the spring of 2009 public-private competitions which would convert federal employee jobs into contractor jobs under Circular A-76 had been suspended, and in most cases remain so.[4] Competitive sourcing is currently only permitted in DoD where the result is to determine how to best source work that is not currently performed by federal employees (i.e. new work, or work currently done by contractors). In March 2009,

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[1] While referred to in the past as "contracting out" or "outsourcing," this outline will use the term-of-art "competitive sourcing." Competitive sourcing as used herein describes the implementation of procedures whereby a federal agency formally compares the performance of a commercial activity by government employees against performance by the private sector, to determine which is more cost-effective.

[2] The full text of Circular A-76 (2003) is available on-line at http://www.whitehouse.gov/omb/circulars_index-procure [hereinafter Circular A-76 (Revised)].

[3] Circular A-76 (Revised), *supra* note 2.

[4] Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, § 737 (2009); Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118, § 325 (2009).

President Obama reiterated the importance of Congress' taskings and further directed the OMB to "clarify when governmental outsourcing of services is, and is not, appropriate, consistent with section 321 of the 2009 NDAA."[5]

6. 2010: In the National Defense Authorization Act for Fiscal Year 2010 (NDAA 2010), Congress imposed a temporary moratorium on new competitions involving functions currently performed by DoD civilian employees until, among other things, DoD reviewed and reported to Congress on various aspects of its public-private competition policies.[6] DoD complied with the statutory requirements in conducting its review of public-private competitions and in submitting its June 2011 report to Congress. Specifically, the report addressed the five required topics:

   a. compliance with a new requirement expanding competition requirements to activities with fewer than 10 federal employees;

   b. actions taken in response to issues raised by the DoD Inspector General (IG) in a 2008 report;

   c. the ability of existing systems to provide comprehensive and reliable data on the cost and quality of functions subject to public-private competition;

   d. the appropriateness of certain cost differentials and factors, such as the overhead rate, used in public-private competitions; and

   e. the adequacy of DoD policies regarding mandatory recompetitions of work previously awarded to employee groups.

7. 2011: In response, to the directive of 2009, OMB (OFPP) issued Policy Letter 11-01.[7] Policy Letter 11-01 is the most recent attempt to define inherently governmental function and subsequently, what functions may and may not be outsourced. In essence, Policy Letter 11-01 prohibits outsourcing "inherently governmental functions" and cautions against

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[5] Memorandum of the President to the Heads of Exec. Dep'ts and Agencies, subject: Government Contracting (Mar. 4, 2009), *available at* http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-Subject-Government.

[6] Pub. L. No. 111-84 § 325 (2009).

[7] OFFICE OF FED. PROCUREMENT POL., OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OFPP POL. LETTER 11-01, PERFORMANCE OF INHERENTLY GOVERNMENTAL AND CRITICAL FUNCTIONS (2011) [hereinafter POLICY LETTER 11-01]. On February 13, 2012, OFPP published a correction to POLICY LETTER 11-01. POLICY LETTER 11-01 was originally addressed only to the Civil Executive Branch Departments and Agencies. *See* 77 Fed. Reg. 29, 7609 (Feb. 13, 2012) (extending the application of POLICY LETTER 11-01 to Defense Executive Branch Departments and Agencies). (Sec. C, Public Comments to the Notice of Final Policy Letter). The OFPP published its proposed policy letter on March 31, 2010 for public comments. More than 30,000 public and private organizations and/or citizens submitted comments and recommendations. Some recommendations were adopted by OFPP and incorporated into POLICY LETTER 11-01. A review of Section C, Public Comments, is instructive and may be used as a resource when dealing with Closely Associated and Critical Functions.

outsourcing "closely associated with inherently governmental functions" and "critical functions." Policy Letter 11-01 is composed of six parts, but for purposes of this primer, only three of the parts relevant parts are discussed below.[8]

8. 2011: In addition to the important Policy Letter 11-01 issued by OFPP referenced above, the GAO published in 2011, DOD MET STATUTORY REPORTING REQUIREMENTS ON PUBLIC-PRIVATE COMPETITIONS which was a review of the 2010 competitive sourcing review conducted by DoD.[9]

9. 2011: Although not controlling, an interesting review of the discussion surrounding Inherently Governmental Functions, can be found in Congressional Research Service, INHERENTLY GOVERNMENTAL FUNCTIONS AND OTHER WORK RESERVED FOR PERFORMANCE BY FEDERAL GOVERNMENT EMPLOYEES: THE OBAMA ADMINISTRATION'S PROPOSED POLICY LETTER, Oct. 1, 2011

B. Legislative Roadblocks

1. Legislative hurdles to the use of Circular A-76 studies are not a new phenomenon. The National Defense Authorization Act for Fiscal Year (FY) 1989 allowed installation commanders to decide whether to study commercial activities for outsourcing. Pub. L. No. 101-189, § 1319(a)(1), 103 Stat. 1352, 1560 (1989). Codified at 10 U.S.C. § 2468, this law expired on 30 September 1995. Most commanders opted not to conduct such studies due to costs in terms of money, employee morale, and workforce control.

2. The Department of Defense (DoD) Appropriations Act for FY 1991 prohibited funding Circular A-76 studies. See Pub. L. No. 101-511, § 8087, 104 Stat. 1856, 1896.[10]

3. The National Defense Authorization Acts for FY 1993 and FY 1994 prohibited DoD from entering into contracts stemming from cost

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[8] *See* id. The components not discussed in this primer are generally procedural and only apply once a determination is made to compete out Closely Associated Functions and Critical Functions for contractors to perform. The purpose of this primer is to provide sufficient knowledge of POLICY LETTER 11-01 for the reader to recognize when they are dealing with Inherently Governmental Functions, Closely Associated Functions, and Critical Functions. If the reader is able to spot these issues as they arise, the reader may return to POLICY LETTER 11-01 to determine what procedural safeguards are required.

[9] GAO-11-923R (2011).

[10] While not a "roadblock," a recurring limitation in DOD Appropriations Acts prohibited the use of funds on Circular A-76 studies if the DOD component exceeded twenty-four months to perform a single function study, or thirty months to perform a multi-function study. See Department of Defense Appropriations Act for FY 2008, Pub. L. No. 110-116, § 8021, 121 Stat. 1295 (2007); Department of Defense Appropriations Act for FY 2006, Pub. L. No. 109-148, § 8021, 119 Stat. 2680 (2005). The thirty-month limitation represents a change from prior years, as previously Congress provided forty-eight months for multi-function studies. See e.g., Department of Defense Appropriations Act, 2003, Pub. L. No. 107-248, § 8022, 116 Stat. 1519, 1541 (2002).

comparison studies under Circular A-76. See Pub. L. No. 102-484, § 312, 106 Stat. 2315, 2365 (1992) and Pub. L. No. 103-160, § 313, 107 Stat. 1547, 1618 (1993).

4. Recently, as noted above, the Omnibus Appropriations Act, 2009, prohibited the funding of any new studies funded from *any* source.[11] Similar prohibitions and limitations have occurred in all DoD authorizations/appropriations since.[12] [13]

5. DoD is far from the only federal agency to which these limitations were applied.[14] The government-wide moratorium, including the Department of Defense, on the use of funds for public-private competitions was extended for FY 2014 by section 737 (Title VII, General Provisions - Government-wide) of Division E- Financial Services and General Government Appropriations of the Consolidated Appropriations Act, 2014 (Public Law 113-76). Furthermore, the DoD specific suspension of public-private competitions remains in effect per section 325 of the National Defense Authorization Act for Fiscal Year 2010 (Pub. L. No. 111-84).[15]

C. Government-wide use of Competitive Sourcing through 2007

Until 2009, the OMB issued an annual report on competitive sourcing describing the competitive sourcing efforts throughout the government for the past fiscal year. The table below indicates government-wide numbers for previous fiscal years.

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[11] Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, § 737 (2009) ("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 policy.").

[12] National Defense Authorization Act for Fiscal Year 2010, 2010, Pub. L. No. 111-84, § 325 (2009); Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118, § 8117 (2009).

[13] The government-wide moratorium on use of funds for public-private competitions was extended through Fiscal Year 2012 by section 733, Title VII (General Provisions-Government-wide Departments, Agencies, and Corporations) of Division C (Financial Services and General Governmental Appropriations Act, 2012) of P.L. 112-74, the Consolidated Appropriations Act, 2012. See. http://www.asamra.army.mil/scra/documents/2014%20Update%20on%20OMB%20Circular%20A-76%20Public-Private%20Competition%20Prohibitions%20(10%20February%202014).pdf

[14] *See e.g.* Consolidated Appropriations Act, 2010, Pub. L. No. 111-117 § 735 (2009).

[15] Office of the Assistant Secretary of Defense (OASD) Memo, "Update on OMB Circular A-76 Public-Private Competition Prohibitions - FY 2014" dated 10 February 2014.

	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
Sourcing Competitions	662	217	181	183	132
FTE's Affected	17,000+	13,000+	10,000+	6,000+	4,000+
Retained In-house	89%	91%	83%	87%	73%

Source: OMB, Report on Competitive Sourcing Results: Fiscal Year 2004 (May 2005); OMB, Report on Competitive Sourcing Results: Fiscal Year 2005 (April 2006); OMB, Report on Competitive Sourcing Results: Fiscal Year 2006 (May 2007); OMB, Report on Competitive Sourcing Results: Fiscal Year 2007 (May 2008).

D. So what did not fall under Circular A-76?

7. Inapplicability. Agencies were not required to conduct A-76 competitions under the following circumstances:

a. Private sector performance of a "new requirement"[16];

b. Private sector performance of a segregable expansion[17] of an existing commercial activity performed by government personnel; or

c. Continued private sector performance of a commercial activity (i.e. following contract award after an A-76 competition or otherwise). Circular A-76 (Revised) ¶ 5.d.

Note: Circular A-76 (Revised) ¶ 5.d. mandates that before government personnel may perform a "new requirement," an expansion to an existing commercial activity, or an activity performed by the private sector, the agency must conduct a competition which determines that government personnel should perform this activity.[18] ***However***: 10 U.S.C. § 2463(c) specifically prohibits SECDEF from conducting an A-76 (or other such)

[16] Circular A-76 (Revised) Atch D. A "new requirement" is defined as "[a]n agency's newly established need for a commercial product or service that is not performed by (1) the agency with government personnel; (2) a fee-for-service agreement with public reimbursable source; or (3) a contract with the private sector. Any activity that is performed by the agency and is reengineered, reorganized, modernized, upgraded, expanded or changed to become more efficient, but still essentially provides the same service is *not* considered a new requirement." Id.

[17] Circular A-76 (Revised) Attach D. An "expansion" is defined as "an increase in the operating costs of an existing commercial activity based on modernization, replacement, upgrade or increased workload. An expansion of an existing commercial activity is an increase of 30 percent or more in the activity's operating costs (including the cost of FTEs) or total capital investment." Id. In contrast, a "segregable expansion" is defined as "an increase to an existing commercial activity that can be separately competed." Id.

[18] The new AR 5-20, effective 27 July 2008, has the same, arguably "illegal" mandate. U.S. DEP'T OF ARMY, REG. 5-20, COMPETITIVE SOURCING PROGRAM para. 2-6 (27 June 2008).

competition before assigning the function to DoD civilians (not to mention the plethora of acts mentioned above which have suspended A-76 studies in general).

8. Application to wartime and contingencies. "The DoD Competitive Sourcing Official[19] (without delegation) shall determine if this [A-76] circular applies during times of a declared war or military mobilization." Circular A-76 (Revised) ¶ 5.h.

E. DoD and Competitive Sourcing

9. 1993: National Performance Review (NPR). Part of Vice President Gore's "Reinventing Government" initiative, the NPR stated public agencies should compete "for their customers . . . with the private sector." AL GORE, REPORT OF THE NATIONAL PERFORMANCE REVIEW, FROM RED TAPE TO RESULTS, CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS (1993).

10. 1997: Quadrennial Defense Review (QDR). Addressing the issue of maintaining combat readiness, the QDR urged outsourcing defense support functions in order to focus on essential tasks while also lowering costs. WILLIAMS S. COHEN, REPORT ON THE QUADRENNIAL DEFENSE REVIEW 6 (May 1997).

11. 1997: Defense Reform Initiative (DRI). Expanding upon the QDR, the DRI recommended outsourcing more in-house functions and established outsourcing goals for DoD. WILLIAM S. COHEN, DEFENSE REFORM INITIATIVE REPORT (Nov. 1997).

12. Between Fiscal Year (FY) 1997 and FY 2001, DoD had completed approximately 780 sourcing decisions involving more than 46,000 full-time equivalent (FTE) positions (approximately 34,000 civilian positions and 12,000 military provisions). See GEN. ACCT. OFF., COMMERCIAL ACTIVITIES PANEL, IMPROVING THE SOURCING DECISIONS OF THE GOVERNMENT (2002) *available at* www.gao.gov.

13. From FY 2003 to 2007, DoD completed 208 sourcing competitions affecting 20,520 full-time equivalent positions. The most commonly

[19] The Competitive Sourcing Official (CSO) is an assistant secretary or equivalent level official within an agency responsible for implementing the policies and procedures of the circular. Circular A-76 (Revised) ¶ 4.f. For the DOD, the designated CSO is the Deputy Under Secretary of Defense (Installations and Environment). Memorandum, Deputy Secretary of Defense, to Secretaries of the Military Departments et al., subject: Designation of the Department of Defense Competitive Sourcing Official (12 Sept. 2003). The DOD CSO has in turn appointed DOD Component CSOs (CCSOs) and charged them with providing Circular A-76 (Revised) implementation guidance within their respective Components. Memorandum, Deputy Under Secretary of Defense (Installations and Environment), to Assistant Secretary of the Army (Installations and Environment) et al., subject: Responsibilities of the DOD CSO and Component CSOs (29 Mar. 2004).

competed functions in that timeframe include: maintenance/property management, logistics, health services, and finance & accounting. OMB calculates the actual savings to the department to date from completed competitions to be $1.2B, with a projected net savings of $17,000 per FTE competed. In FY 2007, only 42% of DoD's competed positions were kept in-house (based on a percentage of FTE's competed). In contrast, only 22 percent of the FTE's competed by DoD during FY 2006 were kept in-house (compared to 73% and 87% government-wide, respectively, as shown in the table above). See, OMB, REPORT ON COMPETITIVE SOURCING RESULTS: FISCAL YEAR 2007 (May 2008), *available at* http://www.whitehouse.gov/omb/procurement_commercial_service_mgmt.

14. DoD released a new instruction implementing many of the procedural and policy changes which requires the use of DTM compare which is very similar to the A-76 competitions. This instruction is DODI 7041.04 Estimating and Comparing the Full Costs of Civilian and Active Duty Military Manpower and Contract Support (3 July 2013).

a. When determining workforce mix the instruction recognizes that 10 U.S.C. §§ 129a, 2330a, 2461, and 2463, DODI 1100.22, "Policy and Procedures for Determining Workforce Mix," April 12, 2010, Office of Management and Budget Circular A-76, and Office of Federal Procurement Policy letter 11-01 are particularly relevant to decisions on workforce mix.[20] Cost analysts must consult these references when determining workforce mix options.[21]

(1) If a manpower analysis shows that a **new or expanded mission** requirement is not inherently governmental or exempt from private-sector performance, as required by § 2463, the official responsible for the function(s) in question will conduct a cost comparison using the business rules prescribed in DODI 7041.04 Enclosure 3 to determine which would cost less: DoD civilian employees or a private-sector contractor. [22]

(2) When considering conversion from contractor to government performance (**In-sourcing**) the analysis must first determine if the function was inherently governmental or exempted by § 2463. If the function is not exempted and not inherently governmental then to convert to DoD civilian employee performance a cost comparison using the business rules prescribed in this DODI 7041.04 Enclosure 3 must be done to determine whether DoD civilian employees or a private sector contractor would perform the function at a lower cost.

[20] DODI 7041.04 Enclosure 3, Estimating and Comparing the Full Costs of Civilian and Active Duty Military Manpower and Contract Support (3 July 2013).
[21] Id.
[22] Id

Conversions must meet the cost differential requirements set by § 2463.[23]

(3) For manpower conversions between military and DoD civilian where manpower may be either military or DoD civilian performance based, and can be converted from one to the other as needed in accordance the analysis should be done IAW DODI 1100.22. Although cost is not the only factor in such decisions, analysts may be asked to estimate the cost impact of the conversions. In such cases, an analyst will conduct a cost comparison using the business rules prescribed in DODI7041.04, Enclosure 3, to estimate the cost of converting a function from military to DoD civilian performance or from DoD civilian to military performance.[24]

(4) For conversions from government to contractor performance (**outsourcing**) DoD Components are required to conduct public-private competitions in accordance with OMB A-76, 10 USC 2461, and other applicable laws and regulations, in determining whether to convert a commercial activity performed by any number of civilian DoD personnel to private-sector performance.[25] Note currently there is a moratorium on A-76 studies.[26]

II. AGENCY ACTIVITY INVENTORY

A. Key Terms

The heart and soul of competitive sourcing rests on whether a governmental activity/function is categorized as commercial or inherently governmental in nature.

1. Commercial Activity. A recurring service that could be performed by the private sector. Circular A-76 (Revised), Attachment A, ¶ B.2. Some examples include functions that are primarily ministerial and internal in nature (i.e. building security, mail operations, operation of cafeterias, housekeeping, facilities operations and maintenance, warehouse operations, motor vehicle fleet maintenance, routine electrical or mechanical services).[27] **If a service is determined to be a "commercial activity," then that service *MAY* be subject to a streamlined or standard competition under OMB Circular A-76**. Circular A-76 (Revised) ¶ 4.c.

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[23] Id.
[24] Id.
[25] Id.
[26] *See Supra* note 13.
[27] Cf. Federal Activities Inventory Reform Act (FAIR Act) of 1998, Pub. L. No. 105-270, 112 Stat. 2382 (1998) (codified at 31 U.S.C. § 501 (note)).

2. Inherently Governmental Activities.[28] An activity so intimately related to the public interest as to mandate performance by government personnel. Such "activities require the exercise of *substantial* discretion in applying government authority and/or making decisions for the government." Circular A-76 (Revised), Attachment A, ¶ B.1.a. (emphasis added). **If a service is determined to be an "inherently governmental activity," then that service *MAY NOT* be subject to a competition under OMB Circular A-76**. Circular A-76 (Revised) ¶ 4.b.

a. Policy Letter 11-01 provides three methods to determining whether the work in question is an inherently governmental function: does it satisfy the definition, is it one of the examples and, even if the answer to the first two questions above is no, does it fall under one of the catch-all test?[29]

b. Policy Letter 11-01's definition of inherently governmental function is not a new definition but rather adopts the definition contained in the FAIR Act.[30] The policy's standardized definition of inherently governmental function is "a function that is so intimately related to the public interest as to require performance by Federal Government Employees."[31] As additional guidance, Policy Letter 11-01 states inherently government functions "includes functions that require *either* the exercise of discretion in applying Federal Government authority *or* the making of value judgments in making decisions for the Federal Government."[32]

c. Policy Letter 11-01, Appendix A: Examples of Inherently Governmental Functions. The list contains 24 historically and commonly accepted examples of inherently governmental functions[33] the primary purpose of the list is illustrative in nature and not intended to be interpreted as an exhaustive list.[34]

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[28] Additionally, absent specific authority to do so, the Federal Acquisition Regulation (FAR) generally prohibits the award of any contract for the performance of inherently governmental activities stating "contracts shall not be used for the performance of inherently governmental functions." FAR 7.503(a).
[29] POLICY LETTER 11-01., *supra* note 6 para. 5-1(a).
[30] *See* FAIR ACT, *supra* note 27, § 5, 2384-5.
[31] Id. para. 3.
[32] Id. para. 3(a) (emphasis added).
[33] Id.
[34] Id.

d. Policy Letter 11-01, Catch-All Tests: Nature of the Function and Exercise of Discretion Tests. The OFPP created a third method for making inherently governmental functions determination.[35] This third method involves applying two separate tests: the nature of the function test and the exercise of discretion test.[36] Under the nature of the functions test, a function is inherently governmental when it involves the exercise of the Government's sovereign powers.[37] This test does not look to see whether the work has the ability to exercise discretion, but rather classifies work based "strictly on its uniquely governmental nature."[38] In contrast, the exercise-of-discretion test classifies work as inherently governmental when the work leaves room for the actor to commit the government to a certain course of action where "two or more alternative courses of action exist."[39]

3. Inherently governmental activities fall into two broad categories:

a. The exercise of sovereign government authority. For example, exercise of command, prosecuting those accused of crimes, investigating crimes, awarding contracts, or to otherwise determine, advance, or protect the United States' interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, etc.[40]

b. The establishment of procedures and processes related to the oversight of monetary transactions or entitlements. For example, making the decision to pay claims against the government, disbursing appropriated funds, or developing policies for the disbursement of appropriated funds.[41]

4. Closely Associated Functions.[42] Closely associated functions are not *per se* inherently governmental but may become so when the nature of the functions impacts or impinges on a federal employee's ability to execute inherently governmental powers.[43]

5. Policy Letter 11-01, Appendix B: Examples of Closely Associated Functions. Closely associated functions may be competed out to

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[35] Id. para. 5-1(a).
[36] Id. paras. 5-1(a)(1)(i)-(ii).
[37] Id. para. 5-1(a)(1)(i) (listing representing the government at governmental functions and engaging in law enforcement and judicial type activities as examples of inherently governmental functions).
[38] Id.
[39] Id. para. 5-1(a)(1)(ii).
[40] See FAIR Act, *supra*, note 27.
[41] Id.
[42] Id. para. 5-1(a)(2).
[43] Id. para. 5-2(a)(2).

contractors to perform but before doing so, agencies are required to at least consider reserving these functions for federal employees.[44]

6. Critical Functions. Critical function is "a function that is necessary to the agency being able to effectively perform and maintain control of its mission and operations"[45] and typically "are recurring and long-term in duration."[46] Critical functions are defined as those functions that are critical to the mission and operations of an agency. Does not necessarily require the exercise of discretion or making of a value judgment that may bind the government, but it may depending on the size of the office, capacities of other employees, etc.

B. Inventory Requirements

Federal executive agencies are required to prepare annual inventories categorizing all activities performed by government personnel as either commercial or inherently governmental. The requirement is based on statute and the Circular A-76 (Revised).

1. Statutory Requirement - Federal Activities Inventory Reform Act (FAIR Act) of 1998, Pub. L. No. 105-270, 112 Stat. 2382 (1998) (codified at 31 U.S.C. § 501 (note)).

   a. Codifies the definition of "inherently governmental" activity.

   b. Requires each executive agency to submit to OMB an annual list (by 30 June) of non-inherently governmental (commercial) activities. After mutual consultation, both OMB and the agency must make the list of commercial activities public. The agency must also forward the list to Congress.

   c. Provides "interested parties" the chance to challenge the list within 30 days after its publication. The "interested party" list includes a broad range of potential challengers to include the private sector, representatives of business/professional groups that include private sector sources, government employees, and the head of any labor organization referred to in 5 U.S.C. § 7103(a)(4).

2. Circular A-76 (Revised) Inventory Requirements.

   a. Requires agencies to submit to OMB by 30 June each year an inventory of commercial activities, an inventory of inherently

[44] Id.
[45] Id. para. 3(b).
[46] Id.

governmental activities, as well as an inventory summary report. Circular A-76 (Revised), Attachment A, ¶ A.2.

b. After OMB review and consultation, agencies will make both the inventory of commercial activities and the inventory of inherently governmental functions available to Congress and the public unless the information is classified or protected for national security reasons. Circular A-76 (Revised), Attachment A, ¶ A.4.

c. Categorization of Activities.

(1) The agency competitive sourcing official (CSO)[47] must justify in writing any designation of an activity as inherently governmental. The justification will be provided to OMB and to the public, upon request. Circular A-76 (Revised), Attachment A, ¶ B.1.

(2) Agencies must use one of six reason codes to identify the reason for government performance of a commercial activity.[48] When using reason code A, the CSO must provide sufficient written justification, which will be made available to OMB and the public, upon request. Circular A-76 (Revised), Attachment A, ¶ C.2.

d. Challenge Process.

(1) The head of the agency must designate an inventory challenge authority and an inventory appeal authority.

(a) Inventory Challenge Authorities. Must be "agency officials at the same level as, or a higher level than, the individual who prepared the inventory." Circular A-76 (Revised), Attachment A, ¶ D.1.a.

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[47] For explanation of CSO, see *supra* note 19.

[48] The six reason codes include the following:

Reason code A – "commercial activity is not appropriate for private sector performance pursuant to a written determination by the CSO."

Reason code B – "commercial activity is suitable for a streamlined or standard competition."

Reason code C – "commercial activity is subject of an in-progress streamlined or standard competition."

Reason code D – "commercial activity is performed by government personnel as the result of a streamlined or standard competition . . . within the past five years."

Reason code E – "commercial activity is pending an agency approved restructuring decision (e.g., closure, realignment)."

Reason code F – "commercial activity is performed by government personnel due to a statutory prohibition against private sector performance."

Circular A-76 (Revised), Attachment A, ¶ C.1, Figure A2.

(b) Inventory Appeal Authorities. Must be "agency officials who are independent and at a higher level in the agency than inventory challenge authorities." Circular A-76 (Revised), Attachment A, ¶ D.1.b.

(2) Inventory challenges are limited to "classification of an activity as inherently governmental or commercial" or to the "application of reason codes." Circular A-76 (Revised), Attachment A, ¶ D.2.[49]

III. OMB CIRCULAR A-76 (REVISED)[50]

A. Resources

1. Statutes.

a. 10 U.S.C. § 2461 (Public-Private Competition Required Before Conversion to Contractor Performance).

b. 10 U.S.C. § 2462 (Reports on Public-Private Competition).

c. 10 U.S.C. § 2463 (Guidelines and Procedures for Use of Civilian Employees to Perform DoD Functions).

d. 31 U.S.C. § 501 note (Federal Activities Inventory Reform Act).

e. Annual DoD Appropriations and Authorization Acts.

2. OMB Guidance. OMB Circular A-76 (2003).[51]

3. DoD Guidance.[52]

a. U.S. Dep't of Defense, Dir. 4100.15, Commercial Activities Program (10 Mar. 1989).

b. U.S. Dep't of Defense, Instr. 4100.33, Commercial Activities Program Procedures (9 Sept. 1985 through Change 3 dated 6 Oct. 1995).

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[49] Originally Circular A-76 (Revised) stated interested parties could only challenge "reclassifications" of activities. The OMB issued a technical correction, however, revising Attachment A, paragraph D.2 by deleting the word "reclassification" and inserting "classification." Office of Mgmt. & Budget, Technical Correction to Office of Management and Budget Circular No. A-76, "Performance of Commercial Activities," 68 Fed. Reg. 48,961, 48,962 (Aug. 15, 2003).

[50] Attachments 1, 2, and 3 at the end of this outline pertain to the revised circular.

[51] Circular A-76 (Revised), *supra* note 1. OMB has since amended this Circular without changing the date, the latest amendment being the 2006 version.

[52] The applicable regulations, instructions, and guidance of the Department of the Army can be found at http://www.asamra.army.mil/scra/

c. U.S. Dep't of Defense, Department of Defense Strategic and Competitive Sourcing Programs Interim Guidance (Apr. 3, 2000).

d. U.S. Dep't of Defense Instruction (DODI) 7041.04, Estimating and Comparing the Full Costs of Civilian and Active Duty Military Manpower and Contract Support (3 July 2013).[53]

4. Military Department Guidance.

a. U.S. Dep't of Army, Reg. 5-20, Competitive Sourcing Program (27 June 2008).

b. U.S. Dep't of Army, Pam. 5-20, Competitive Sourcing Implementation Instructions (27 June 2008).

c. U.S. Dep't of Air Force, Instr. 38-203, Commercial Activities Program (20 June 2008).

d. U.S. Dep't of Navy, Instr. 4860.7D, Navy Commercial Activities Program (28 September 2005).

B. Key Players/Terms

1. Most Efficient Organization (MEO). The staffing plan of the agency tender, developed to represent the agency's most efficient and cost-effective organization. An MEO is required for a standard competition and may include a mix of government personnel and MEO subcontracts. Circular A-76 (Revised), Attachment D. Note that while under Circular A-76 (Revised), an MEO is not required for any streamlined competitions, federal law requires DoD to create an MEO for all competitions affecting 10 or more FTEs.[54]

2. Performance Work Statement (PWS). A statement in the solicitation that identifies the technical, functional, and performance characteristics of the agency's requirements. The PWS is performance-based and describes the agency's needs (the "what"), not the specific methods for meeting those needs (the "how"). The PWS identifies essential outcomes to be achieved, specifies the agency's required performance standards, and specifies the location, units, quality, and timeliness of the work. Circular A-76 (Revised), Attachment D.

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[53] http://www.asamra.army.mil/scra/documents/DoDI%207041.04%20Estimating%20and%20Comparing%20the%20Full%20Costs%20of%20Civilian%20and%20Active%20Duty%20Military%20Manpower%20and%20Contract%20Support%20(3%20July%202013).pdf

[54] *See* Department of Defense Appropriations Act for FY 2008, Pub. L. No. 110-116, § 8015(b), 121 Stat. 1295 (2007); 10 U.S.C. § 2461(a) (stating that DOD must complete an "MEO" (among other requirements) prior to converting any function that involves *10 or more civilian employees.*) There is an exception to 10 U.S.C. § 2461 for JWOD procurements and nonprofit agencies for the blind or severely handicapped. 10 U.S.C. § 2461(d). *See also infra* notes 56, 57 and 59.

3. Agency Tender. The agency management plan submitted in response to and in accordance with the requirements in a solicitation. The agency tender includes a most-efficient organization (MEO), agency cost estimate, MEO quality control and phase-in plans, and any subcontracts. Circular A-76 (Revised), Attachment D.

4. Agency Tender Official (ATO). An inherently governmental official with decision-making authority who is responsible for developing, certifying, and representing the agency tender. The ATO also designates members of the **MEO Team** and is considered a "directly interested party" for contest purposes. The ATO must be independent of the contracting officer, Source Selection Authority/Source Selection Evaluation Board, and the PWS Team. Circular A-76 (Revised), Attachment B, ¶ A.8.a.

5. **MEO Team**. (Conflict of Interest Avoidance) Directly affected government personnel (i.e. employees whose positions are being competed) may participate on the MEO Team. However, to avoid any appearance of a conflict of interest, members of the MEO Team shall not be members of the PWS Team. Circular A-76 (Revised), Attachment B, ¶ D.2. (emphasis added). See also Attachment 5 (this outline).

6. Contracting Officer (CO). An inherently governmental official who is a member of the PWS Team and is responsible for issuing the solicitation and the source selection methodology. The CO must be independent of the ATO, MEO Team, and the Human Resource Advisor (HRA). Circular A-76 (Revised), Attachment B, ¶ A.8.b and Attachment D.

7. PWS Team Leader. An inherently governmental official, independent of the ATO, Human Resource Advisor (HRA), and MEO team, who develops the PWS and the quality assurance surveillance plan, determines government-furnished property, and assists the CO in developing the solicitation. Responsible for appointing members of the **PWS Team**. Circular A-76 (Revised), Attachment B, ¶ A.8.c.

8. **PWS Team.** (Conflict of Interest Avoidance) *Directly affected government personnel* (i.e. employees whose positions are being competed) may participate on the PWS Team. However, to avoid any appearance of a conflict of interest, members of the MEO Team shall not be members of the PWS Team. Circular A-76 (Revised), Attachment B, ¶ D.2. See also attachment 5 (this outline).

9. Human Resource Advisor (HRA). An inherently governmental official and human resource expert. The HRA must be independent of the CO, the Source Selection Authority (SSA), the PWS Team, and the Source Selection Evaluation Board (SSEB). As a member of the MEO Team, the HRA assists the ATO and MEO Team in developing the agency tender.

The HRA is also responsible for employee and labor-relations requirements. Circular A-76 (Revised), Attachment B, ¶ A.8.d.

10. Source Selection Authority (SSA). An inherently governmental official appointed IAW FAR 15.303. The SSA must be independent of the ATO, HRA, and MEO team. Responsible for appointing members of the **Source Selection Evaluation Board (SSEB) Team**.

11. **Source Selection Evaluation Board (SSEB) Team**. (Conflict of Interest Avoidance) *Directly affected personnel* (i.e. employees whose positions are being competed) and other personnel (including but not limited to the ATO, HRA, MEO team members, advisors, and consultants) *with knowledge of the agency tender* shall not participate in any manner on the SSEB Team (as member or as advisors). So, PWS Team members (so long as they are not directly-affected personnel) may participate on the SSEB Team. Additionally, MEO Team members (because they have direct knowledge of the MEO) generally may not participate on the SSEB Team. Circular A-76 (Revised), Attachment B, ¶ D.2. See also Attachment 5 (this outline).[55]

C. Competition Procedures

1. Previously, agencies could "directly convert" to contractor performance functions performed by 10 or fewer full-time equivalents (FTEs). The Revised Circular A-76 eliminates the use of "direct conversions." Office of Management and Budget; Performance of Commercial Activities, 68 Fed. Reg. 32,134; 32,136 (May 29, 2003).[56] Under the current circular, the only two authorized competition procedures are "streamlined competitions" and "standard competitions."

2. **Streamlined Competitions**. The new "streamlined competition" process may be used for activities performed by 65 or fewer FTEs[57] "and/or any

[55] *But see* AR 5-20, para 4-1 (stating "members of the MEO team…will not be members of the PWS team and the SSEB").

[56] While the Circular A-76 (Revised) eliminates "direct conversions", Congress permits DOD to directly convert performance through a recurring provision in appropriation acts, to functions that: 1) are Javits-Wagner-O'Day (JWOD) Act procurements; 2) are converted to performance by qualified nonprofit firms for the blind or severely handicapped employees in accordance with JWOD; or 3) firms that are at least fifty-one percent owned by an Indian tribe or a Native Hawaiian organization. *See* Department of Defense Appropriations Act for FY 2008, Pub. L. No. 110-116, § 8015(b), 121 Stat. 1295 (2007).

[57] Note that for DOD, 10 U.S.C. § 2461 effectively changes the threshold. In DOD, if a commercial activity is being performed "by 10 or more Department of Defense civilian employees," then the agency must: (1) develop an agency tender and MEO, (2) issue a solicitation, (3) utilize a cost conversion differential in determining whether to award a contract, and (4) submit a report to Congress prior to commencing the competition. So, although DOD could still use streamlined competitions for those competitions affected 65 or less FTEs, the statute discourages streamlined competitions where the number of FTEs performing the commercial activity is 10 or more since the time period for streamlined competitions is only 90 days (vice 12 months for a standard competition). *See* 10 U.S.C. § 2461 (Westlaw 2008); *see also* Department of Defense Appropriations Act for Fiscal Year 2008, Pub. L. No. 110-116, § 8015, 121 Stat. 1295 (2007). In 2008, an amendment to 41 U.S.C. § 403 added similar requirements for non-

number of military personnel," or the agency may elect to use the standard competition. Circular A-76 (Revised), Attachment B, ¶¶ A.5.b. Recent Army and Air Force guidance allow the use of the streamlined process only for competitions of less than 10 FTEs.[58] The streamlined competition process includes:

a. Determining the Cost of Agency Performance. An agency may determine the agency cost estimate on the incumbent activity; "however, an agency is encouraged to develop a more efficient organization, which may be an MEO." Circular A-76 (Revised), Attachment B, ¶ C.1.a.[59]

b. Determining the Cost of Private Sector/Public Reimbursable Performance. An agency may use documented market research or solicit proposals IAW the FAR, to include using simplified acquisition tools. Circular A-76 (Revised), Attachment B, ¶ C.1.b; Office of Management and Budget; Performance of Commercial Activities, 68 Fed. Reg. 32,134; 32,137 (May 29, 2003).

c. Establishing Cost Estimate Firewalls. The individual(s) preparing the in-house cost estimate and the individual(s) soliciting private sector/public reimbursable cost estimates must be different and may not share information. Circular A-76 (Revised), Attachment B, ¶ C.1.d.

d. Implementing the Decision. For private sector performance decisions, the CO awards a contract IAW the FAR. For agency performance decisions, the CO executes a "letter of obligation"

DOD competitions where the commercial activity is being performed "by 10 or more agency civilian employees". *See* 41 U.S.C. § 403 (Westlaw 2008); *see also* Department of Defense Authorization Act for Fiscal Year 2008, Pub. L. 110-181, § 271, 122 Stat. 62 (2008); *cf. infra* note 27.

[58] Though the Army has recently published a new AR and DA PAM, the two conflict on their guidance. *Compare* U.S. DEP'T OF ARMY, REG. 5-20, COMPETITIVE SOURCING PROGRAM Figure 2-2 (27 June 2008), *with* U.S. DEP'T OF ARMY, PAM. 5-20, COMPETITIVE SOURCING IMPLEMENTATION INSTRUCTIONS Figure 2-2 (27 June 2008). It appears however, that the intent, for the reasons in note 57 *supra*, was to limit streamlined competitions to those involving less than 10 FTEs. Similar guidance can be found in U.S. DEP'T OF AIR FORCE, INST. 38-203, COMMERCIAL ACTIVITIES PROGRAM paras. 3.5.1.4 and 3.5.1.5 (20 June 2008).

[59] Though civilian agencies have historically been able to determine the estimated cost of in-house performance without creating an MEO, DOD's ability to do so is limited. Recall that DOD (and other executive agencies pursuant to 41 U.S.C. § 403) generally must complete a "most efficient and cost effective organization analysis" prior to converting any function that involves *more than 10 civilian employees*. *See supra* note 57. Note, however, that 10 U.S.C. § 2461(a), conflicts with the annual appropriation act language on the minimum number of civilian employees that must be affected to make the creation of an MEO (and other requirements) mandatory. The annual appropriations acts' requirements apply to the conversion of any function that involves *more than 10 DOD civilian employees* (instead of "*10 or more*" from the statute). Thus, practitioners, faced with exactly 10 FTEs, should look at the most recent appropriations act for guidance. *Compare* Department of Defense Appropriations Act for Fiscal Year 2008, Pub. L. No. 110-116, § 8015(a), 121 Stat. 1295 (2007) *with* 10 U.S.C. § 2461(a)(1) (Westlaw 2008).

with an agency official responsible for the commercial activity. Circular A-76 (Revised), Attachment B, ¶ C.3.a.

e. **Protests**. See discussion below in paragraph 3.e. (Standard Competition Protests) regarding changes made by the National Defense Authorization Act of 2008 to the Competition in Contracting Act (CICA) for protests. The amended CICA grants GAO jurisdiction to hear protests in both streamlined and standard competitions.

3. **Standard Competitions**. The new "standard competition" procedures must be used for commercial activities performed by more than 65 FTEs. Circular A-76 (Revised), Attachment B, ¶ A.5.[60]

a. Solicitation. When issuing a solicitation, the agency must comply with the FAR and clearly identify all the evaluation factors.

(1) The solicitation must state that the agency tender is not required to include certain information such as subcontracting plan goals, licensing or other certifications, or past performance information (unless the agency tender is based on an MEO implemented IAW the circular). Circular A-76 (Revised), Attachment B, ¶ D.3.a(4).

(2) The solicitation closing date will be the same for private sector offers and agency tenders. Circular A-76 (Revised), Attachment B, ¶ D.3.a(5). If the ATO anticipates the agency tender will be submitted late, the ATO must notify the CO. The CO must then consult with the CSO to determine if amending the closing date is in the best interest of the government. Circular A-76 (Revised), Attachment B, ¶ D.4.a(2).

4. Source Selection.

(1) In addition to sealed bidding and negotiated procurements based on a lowest priced technically acceptable source selections IAW the FAR, the Circular A-76 (Revised) also permits:

b. Phased Evaluation Source Selections.

(i) Phase One - only technical factors are considered and all prospective providers (private sector, public reimbursable sources, and the agency tender) may propose

[60] *See supra* note 48.

alternative performance standards. If the SSA accepts an alternate performance standard, the solicitation is amended and revised proposals are requested. Circular A-76 (Revised), Attachment B, ¶ D.5.b.2.(a).

(ii) Phase Two – the SSA makes the performance decision after the CO conducts price analysis and cost realism on all offers/tenders determined technically acceptable. Circular A-76 (Revised), Attachment B, ¶ D.5.b.2.(b).

(b) Cost-Technical Tradeoff Source Selections. May only be used in standard competitions for (1) information technology activities, (2) commercial activities performed by the private sector, (3) new requirements, and (4) segregable expansions. Circular A-76 (Revised), Attachment B, ¶ D.5.b.3.[61]

(2) The agency tender is evaluated concurrently with the private sector proposals and may be excluded from a standard competition if materially deficient. Circular A-76 (Revised), Attachment B, ¶ D.5.c.1.

(a) If the CO conducts exchanges with the private sector offerors and the ATO, such exchanges must be IAW FAR 15.306, except that exchanges with the ATO must be in writing and the CO must maintain records of all such correspondence. Circular A-76 (Revised), Attachment B, ¶ D.5.c.2.

(b) If an ATO is unable to correct a material deficiency, "the CSO may advise the SSA to exclude the agency tender from the standard competition." Circular A-76 (Revised), Attachment B, ¶ D.5.c.3.

(3) All standard competitions will include the cost conversion differential (i.e., 10% of personnel costs or $10 million, whichever is less). Circular A-76 (Revised), Attachment B, ¶ D.5.c.4.[62]

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[61] Note that the cost conversion differential effectively precludes the use of this method. *See infra* text at (3) below; *infra* note 30.

[62] As stated above, the "10% or $10 million" conversion differential requires the agencies to apply the differential in all competitions (streamlined or standard) involving ten or more (or more than ten) civilian employees. *See supra*

c. Implementing a Performance Decision. For private sector performance decisions, the CO awards a contract IAW the FAR. For agency performance decisions, the CO executes a "letter of obligation" with an agency official responsible for the commercial activity. Circular A-76 (Revised), Attachment B, ¶ D.6.f.

d. Contests.[63]

e. A "directly interested party" (i.e., the agency tender official, a single individual appointed by a majority of directly affected employees, a private sector offeror, or the certifying official of a public reimbursable tender) may contest certain actions in a **standard competition**. Matters that may be contested include: (1) the solicitation, (2) the cancellation of a solicitation, (3) a determination to exclude a tender or offer from a standard competition and (4) a performance decision. Circular A-76 (Revised), Attachment B, ¶ F.1.

(1) All such challenges will now be governed by the agency appeal procedures found at FAR 33.103. Circular A-76 (Revised), Attachment B, ¶ F.1.

(2) **No party** (private or government) **may contest** any aspect of **a streamlined competition**. Circular A-76 (Revised), Attachment B, ¶ F.2.

f. Protests

(1) Historical development of protest rights involving A-76 competitions.

(a) An "interested party" under the Competition in Contracting Act (CICA) may protest certain actions concerning a competition (streamlined or standard) conducted under OMB Circular A-76. Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-56 (2000).

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notes 57 and 59. Additionally, both 10 U.S.C. §2461 and the Department of Defense Appropriations Act for FY 2008 contain a limitation that states the contractor cannot receive an advantage for a proposal that reduces DOD costs by "not making an employer-sponsored health insurance plan available" to the workers who will perform the work under the proposal, or by "offering to such workers an employer-sponsored health benefits plan that the requires the employer to contribute less towards the premiums" than the amount paid by the DOD under chapter 89, title 5 of the United States Code. *See* Department of Defense Appropriations Act for Fiscal Year 2008, Pub. L. No. 110-116, § 8015(a)(3), 121 Stat. 1295 (2007); 10 U.S.C. § 2461(a)(1)(G).

[63] A "contest" is the term the OMB Circular A-76 (Revised) uses to describe what is referred to in FAR Part 33 as an agency-level protest.

(b) Shortly after OMB issued the Circular A-76 (Revised), GAO published a notice in the Federal Register requesting comments on whether the GAO should accept jurisdiction over bid protests submitted by the Agency Tender Official and/or an "agent" for affected employees. Government Accountability Office; Administrative Practices and Procedures; Bid Protest Regulations, Government Contracts, 68 Fed. Reg. 35.411 (June 13, 2003).

(c) In April 2004, the GAO ruled that notwithstanding the changes in the Circular A-76 (Revised), the in-house competitors in public/private competitions are not offerors and, therefore, under the current language of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-56 (2000), no representative of an in-house competitor is an "interested party" eligible to maintain a protest before the GAO. Dan Dufrene et al., B-293590.2 et al. (April 19, 2004).[64]

(d) In response, Congress included Section 326 in the Ronald W. Reagan National Defense Authorization Act, 2005 (2005 NDAA), and granted ATOs limited, yet significant bid protest rights. Pub. L. No. 108-375, § 326, 118 Stat. 1811, 1848 (2004).

(i) Amended the CICA definition of "interested party" by specifying that the term includes ATOs in public-private competitions involving more than sixty-five FTEs. *See* 31 U.S.C. § 3551(2).

(ii) Stated that ATOs "shall file a protest" in a public-private competition at the request of a majority of the affected federal civilian employees "unless the [ATO] determines that there is no reasonable basis for the protest." The ATO's determination whether to file a protest "is not subject to

[64] Recognizing the concerns of fairness that weigh in favor of correcting the current situation, where an unsuccessful private-sector offeror has the right to protest to the GAO, while an unsuccessful public-sector competitor does not, the Comptroller General sent a letter to Congress suggesting that Congress may wish to consider amending the CICA to provide for MEO standing. Dan Dufrene et al., B-293590.2 (April 19, 2004). The letter also suggested that any amendment to the CICA specify who would be authorized to protest on the MEO's behalf: the ATO, affected employees (either individually or in a representative capacity), and/or employees' union representatives. *Id.*

administrative or judicial review," however, if the ATO determines there is no reasonable basis for a protest, the ATO must notify Congress.

(e) Additionally, in any protest filed by an interested party in competitions involving more than sixty-five FTEs, a representative selected by a majority of the affected employees may have "intervened" in the protest.

(f) On 14 April 2005, the GAO amended its Bid Protest Regulations by revising the definition of "interested party" and "intervenor" IAW with the 2005 NDAA. 70 Fed. Reg. 19,679 (Apr. 14, 2005).

(2) On 28 January 2008, Congress significantly expanded protest rights for civilian employees involved in an A-76 competition pursuant to Section 326 of the National Defense Authorization Act of Fiscal Year 2008 (2008 NDAA) by again re-defining "interested party" under CICA. Pub. L. No. 110-181, § 326 (a), 122 Stat. 62 (2008). The 2008 NDAA thus amended CICA (31 U.S.C. § 3551) at paragraph (2) to state that an interested party with respect to a competition under OMB Circular A-76 includes:

(a) "Any official who submitted the agency tender in such [a] competition;" and

(b) "Any one individual who, for the purpose of representing the Federal employees engaged in the performance of the activity or function for which the public-private competition is conducted in a protest. . .has been designated as the agent of the Federal employees by a majority of such employees."

This new language gives the GAO jurisdiction to hear a protest filed by the ATO or a representative elected by a majority of the affected employees on behalf of the losing employees, without regard to whether or not sixty-five FTEs are involved.

5. Timeframes

a. Streamlined Competitions. Must be completed within 90 calendar days from "public announcement" to "performance decision," unless the agency CSO grants an extension not to exceed 45 days. Circular A-76 (Revised), Attachment B, ¶ C.2.[65]

b. Standard Competitions. Must not exceed 12 months from "public announcement" to "performance decision," unless the CSO grants a time limit waiver not to exceed 6 months. Circular A-76 (Revised), Attachment B, ¶ D.1.[66]

c. Preliminary Planning. Because time frames for completing competitions have been reduced, preliminary planning takes on increased importance. The new rules state that prior to public announcement (start date)[67] of a streamlined or standard competition, the agency must complete several preliminary planning steps to include: scoping the activities and FTEs to be competed, grouping business activities, assessing the availability of workload data, determining the incumbent activities baseline costs, establishing schedules, and appointing the various competition officials. Circular A-76 (Revised), Attachment B, ¶ A.

D. Final Decision and Implementation

1. After all appeals/protests have been resolved, the decision summary is sent to the Secretary of Defense (SECDEF) for approval and notice is forwarded to Congress. See 10 U.S.C. § 2462. This provision requires the SECDEF to notify Congress of the outcome of a competitive sourcing study which affects 10 or more FTEs, regardless of whether the study recommends converting to contractor performance or retaining the function in-house.

2. Contractor Implementation. If the private sector offer wins, the contracting officer awards the contract. Circular A-76 (Revised), Attachment B, ¶ D.

3. MEO Implementation. If the agency tender wins, then the contracting officer will issue a "letter of obligation" to an "official responsible for performance of the MEO." Circular A-76 (Revised), Attachment B, ¶ D.

E. Post Competition Accountability

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[65] *See supra* note 10.

[66] Id.

[67] Recall that both DOD and other federal agencies have a statutory requirement to notify Congress "before commencing a public-private competition" if the competition will involve 10 or more FTES of: (1) the function to be competed, (2) the location of the proposed competition, (3) the number of civilian employees potentially affected, and (4) the anticipated length and cost of the competition. 10 U.S.C. § 2461(b) and 41 U.S.C. § 401.

1. Monitoring. After implementing a performance decision, the agency must monitor performance IAW with the performance periods stated in the solicitation. The CO will make option year exercise determinations (for either contract performance or MEO performance) IAW FAR 17.207. Circular A-76 (Revised), Attachment B, ¶¶ E.4 and 5.

2. Terminations for Failure to Perform. The CO must follow the cure notice and show cause notification procedures consistent with FAR Part 49 prior to issuing a notice of termination. Circular A-76 (Revised), Attachment B, ¶ E.6. According to the circular, the CO may terminate a contract or a letter of obligation for failure to perform.

F. Follow-on Competition

1. Following contractor performance. After a commercial activity has been subjected to an A-76 competition and a private sector offeror has been awarded a contract, the commercial activity **does not** have to be competed again under A-76. After performance of the contract, the agency may simply re-solicit private sector offerors under the applicable provisions of the FAR. Circular A-76 (Revised), 5d.[68]

2. Following MEO performance. In contrast, pursuant to Circular A-76 (Revised), if a commercial activity is subject to a competition and the agency's employees were issued a letter of obligation, then the commercial activity **does** have to be competed again. So, after performance of the MEO under the letter of obligation, the agency must re-initiate the entire A-76 process. Circular A-76 (Revised), Attachment B, ¶ E.5. Ostensibly, this requirement supports the underlying presumption in the circular that "the longstanding policy of the federal government has been to rely on the private sector for needed commercial services." Circular A-76 (Revised). **<u>However</u>**, the 2008 NDAA amended 10 U.S.C. § 2461, adding a section that specifically exempts DoD from the requirement to recompete such functions. 10 U.S.C. § 2461(a)(4).

G. Exclusions (When Does OMB Circular Not Apply?)

In the Army, the following are excluded from using OMB Circular A-76 per AR 5-20, paragraph 2-2: [69]

a. Depot-level maintenance of mission-essential material at Army depots.

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[68] *But see* 10 U.S.C. §2463 (Westlaw 2008) (calling for increased consideration of "insourcing" requirements, especially where those requirements have been recently outsourced).

[69] Additionally, while Outside the Continental United States (excluding Alaska and Hawaii), commanders "may use…OMB Circular A-76 procedures…when doing so conforms to applicable law, treaties and international agreements."

b. Installations that are 180 days from closure.

c. Production operations performed in government-owned plants

d. Privatizations (such as housing and utility privatizations).

H. Latest Changes

The most recent changes to the law regarding competitions in DoD, performed under OMB Circular A-76, came as part of the National Defense Authorization Act (NDAA) of 2008 **(Practitioners should read these provisions of the NDAA in their entirety).**

1. The NDAA of 2008 made significant changes to DoD A-76 competitions. See NDAA of 2008, Pub. L. No. 110-181, §§ 322-342, 122 Stat. 62 (2008).

2. The following highlights some of these changes:

a. Section 322 (Modification to Public-Private Competition Requirements Before Conversion to Contractor Performance). Amends 10 U.S.C. §2461 by stating that a private offeror in a competition shall not receive an advantage over an agency tender by reducing the health or retirement benefits afforded to employees. Specifically, there can be no advantage given for:

(1) "[N]ot making an employer-sponsored health insurance plan" for workers who would be employed to perform the commercial activity if the work was transferred to contract performance;

(2) "[O]ffering to such workers an employer-sponsored health benefits plan that requires the employer to contribute less toward the premium…than the amount that is paid by the DoD;" and

(3) "[O]ffering to such workers a retirement benefit that, in any year, costs less than the annual retirement cost factor applicable to civilian employees of the DoD."

Additionally, Section 322 adds a requirement for monthly consultation with, and consideration of the views of, those civilian employees who will be affected by the potential conversion. This consultation is to occur during the development and preparation of the performance work statement and the management efficiency study.

b. Section 323 (Public-Private Competition at End of Period Specified in Performance Agreement Not Required). Amends 10 U.S.C. § 2461 by stating that where the agency tender "wins" the A-76 competition and DoD civilian employees perform the activity pursuant to a "letter of obligation" (LOO), at the end of LOO's performance period, DoD is not required to conduct another A-76 competition. This provision supersedes (for DoD) the OMB Circular A-76 general requirement that the agency conduct another competition at the end of a performance period under a LOO. *See* Circular A-76, para 5(d).[70]

c. Section 324 (Guidelines on Insourcing New and Contracted Out Functions). Amends 10 U.S.C. § 2462 by stating that the Secretary of Defense shall issue guidance "to ensure that consideration is given to using, on a regular basis, DoD civilian employees to perform new functions and functions that are performed by contractors and could be performed by DoD civilian employees." This provision thus requires special consideration be given to performance by DoD civilian employees of not only new functions, but also commercial activities that are being currently performed by contractors. So, this provision encourages, "insourcing" (transferring to in-house performance work that is being performed by a contractor). Specifically, this section states that "special consideration" must be given to using DoD employees to perform any function that:

(1) Is currently "performed by a contractor" *and* (a) "has been performed by DoD employees at any time during the past 10 years"; or (b) "is a function closely associated with performance of an inherently governmental function"; or (c) "has been performed pursuant to a contract awarded on a non-competitive basis"; or (d) "has performed poorly as determined by a contracting officer"; or

(2) Is a "new requirement."

d. Section 325 (Restriction of OMB Influence Over DoD Public-Private Competitions). States that OMB may not direct DoD "to prepare for, undertake, continue, or complete a public-private competition or direct conversion" of a DoD function to performance by a contactor pursuant to OMB Circular A-76. Thus, this provision explicitly curtails the authority that OMB (an arm of the executive branch) has over DoD in A-76 competitions.

[70] *See also supra* Sec. III.F.2.

e. Section 326 (Bid Protests by Federal Employees in Actions Under OMB Circular A-76). See earlier discussion on page 22 (Sec. C.4.f(2)), regarding changes to bid protest rights.

3. Continual provisions in each fiscal year have extended the prohibition to conduct A-76 competitions, not only within DoD.[71]

a. In FY2010, NDAA Section 322 amended language in 10 U.S.C. § 2461(a) that limited the duration of an A-77 competition to 24 months, with the possibility to extend that competition to 33 months if DoD notified Congress that an extension was needed.[72]

b. In FY2010, NDAA Section 325 extended the prohibition on A-76 competitions. Section 325 also required DoD to report to Congress on the status of its previous competitions under 10 U.S.C. § 2461, the actions it planned to take to address the DoD IG report, the appropriateness of the cost differential used; and the adequacy of DoD's policies. In addition, DoD was required to certify that it had completed its report and has implemented a plan for future A-76 competitions and/or services that could fall under the A-76 purview.[73]

c. In FY2011, NDAA section 8103 prohibited A-76 competitions except when certain conditions were met, such as completing all reporting and certifications required under section 325 of NDAA FY10.[74]

d. NDAA FY2012, Section 733 prohibited funds from being used to begin or announce a study or public-private competition.[75]

e. The government-wide moratorium, including the Department of Defense, on the use of funds for public-private competitions was extended for FY 2014 by section 737 (Title VII General Provisions - Government-wide) of Division E- Financial Services and General Government Appropriations of the Consolidated Appropriations Act, 2014,[76] and the DoD specific suspension of public-private competitions remains in effect per section 325 of the National Defense Authorization Act for Fiscal Year 2010.[77] Practitioners

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[71] See. *Infra*. Section I.A.5. The government-wide moratorium, including the Department of Defense, on the use of funds for public-private competitions was extended for FY 2014 by section 737 (Title VII, General Provisions - Government-wide) of Division E- Financial Services and General Government Appropriations of the Consolidated Appropriations Act, 2014 (Public Law 113-76).
[72] Pub. L. No. 111-84.
[73] Id.
[74] Pub. L. No. 112-10.
[75] Pub. L. No.112-74.
[76] Pub. L. No. 113-76
[77] Pub. L. No. 111-84

should check all current policies and review OASD Memo, dated 10 February 2014, "Update on OMB Circular A-76 Public-Private Competition Prohibitions - FY 2014" at http://www.asamra.army.mil/scra/documents/2014%20Update%20on%20OMB%20Circular%20A-76%20Public-Private%20Competition%20Prohibitions%20(10%20February%202014).pdf.

IV. CIVILIAN PERSONNEL ISSUES

A. Employee Consultation

By statute, the DoD must consult with affected employees. In the case of affected employees represented by a union, consultation with union representatives satisfies this requirement. 10 U.S.C. § 2461(a)(4).

B. Right-of-First-Refusal of Employment

1. The CO must include the Right-of-First-Refusal of Employment clause in the solicitation. See Circular A-76 (Revised), Attachment B, ¶ D.6.f.1.b; Revised Supplemental Handbook, Part I, Chapter 3, ¶ G.4; and FAR 7.305.

2. The clause, at FAR 52.207-3, requires:

a. The contractor to give the government employees, who have been or will be adversely affected or separated due to the resulting contract award, the right of first refusal for employment openings under the contract in positions for which they are qualified, if that employment is consistent with post-government employment conflict of interest standards.

b. Within 10 days after contract award, the contracting officer must provide the contractor a list of government employees who have been or will be adversely affected or separated as a result of contract award.

c. Within 120 days after contract performance begins, the contractor must report to the contracting officer the names of displaced employees who are hired within 90 days after contract performance begins.

C. Right-of-First-Refusal and the Financial Conflict of Interest Laws

1. Employees will participate in preparing the PWS and the MEO. Certain conflict of interest statutes may impact their participation, as well as, when and if they may exercise their Right-of-First Refusal.

2. Procurement Integrity Act, 41 U.S.C. § 2101 et seq.; FAR 3.104.

a. Disclosing or Obtaining Procurement Information (41 U.S.C. §§ 2102(a)-(b)). These provisions apply to all federal employees, regardless of their role during a Circular A-76 competition.

b. Reporting Employment Contacts (41 U.S.C. § 2103(a)).

(1) FAR 3.104-1(iv) generally excludes from the scope of "personally and substantially" the following employee duties during an OMB Cir. A-76 study:

(a) Management studies;

(b) Preparation of in-house cost-estimates;

(c) Preparation of the MEO; or

(d) Furnishing data or technical support others use to develop performance standards, statements of work, or specifications.

(2) PWS role. Consider the employee's role. If strictly limited to furnishing data or technical support to others developing the PWS, then they are not "personally and substantially" participating. See FAR 3.104-1(iv). If the PWS role exceeds that of data and technical support, then the restriction would apply.

c. Post-Employment Restrictions (41 U.S.C. § 2104). Bans certain employees for one year from accepting compensation.

(1) Applies to contracts exceeding $10 million, and

(a) Employees in any of these positions:

(i) Procuring contracting officer;

(ii) Administrative Contracting Officer;

(iii) Source Selection Authority;

(iv) Source Selection Evaluation Board member;

(v) Chief of Financial or Technical team;

(vi) Program Manager; or

(vii) Deputy Program Manager.

(b) Employees making these decisions:

(i) Award contract or subcontract exceeding $10 million;

(ii) Award modification of contract or subcontract exceeding $10 million;

(iii) Award task or delivery order exceeding $10 million;

(iv) Establish overhead rates on contract exceeding $10 million;

(v) Approve contract payments exceeding $10 million; or

(vi) Pay or settle a contract claim exceeding $10 million.

(2) No exception exists to the one-year ban for offers of employment pursuant to the Right-of-First-Refusal. Thus, employees performing any of the listed duties or making the listed decisions on a cost comparison resulting in a contract exceeding $10 million are barred for one year after performing such duties from accepting compensation/employment opportunities from the contractor via the Right-of-First-Refusal.

3. Financial Conflicts of Interest, 18 U.S.C. § 208. Prohibits officers and civilian employees from participating personally and substantially in a "particular matter" affecting the officer or employee's personal or imputed financial interests.

a. Cost comparisons conducted under OMB Cir. A-76 are "particular matters" under 18 U.S.C. § 208.

b. Whether 18 U.S.C. § 208 applies to officers and civilian employees preparing a PWS or MEO depends on whether the participation will have a "direct and predictable" effect on their financial interests. This determination is very fact specific.

4. Representational Ban, 18 U.S.C. § 207. Prohibits individuals who personally and substantially participated in, or were responsible for, a particular matter involving specific parties while employed by the government from switching sides and representing any party back to the government on the same matter. The restrictions in 18 U.S.C. § 207 do

not prohibit employment; they only prohibit communications and appearances with the "intent to influence."

a. The ban may be lifetime, for two years, or for one year, depending on the employee's involvement in the matter.

b. Whether 18 U.S.C. § 207 applies to employees preparing a PWS or MEO depends on whether the cost comparison has progressed to the point where it involves "specific parties."

c. Even if 18 U.S.C. § 207 does apply to these employees, it would not operate as a bar to the Right-of-First-Refusal. The statute only prohibits representational activity; it does not bar behind-the-scenes advice.

V. HOUSING PRIVATIZATION

A. Generally

Privatization involves the process of changing a federal government entity or enterprise to private or other non-federal control and ownership. Unlike competitive sourcing, privatization involves a transfer of ownership and not just a transfer of performance.

B. Authority

1. 10 U.S.C. §§ 2871-85 provides permanent authority for military housing privatization.[78] This authority applies to family housing units on or near military installations within the United States and military unaccompanied housing units on or near installations within the United States.

2. Service Secretaries may use any authority or combination of authorities to provide for acquisition or construction by private persons. Authorities include:

   a. Direct loans and loan guarantees to private entities.

   b. Build/lease authority.

   c. Equity and creditor investments in private entities undertaking projects for the acquisition or construction of housing units (up to a specified percentage of capital cost). Such investments require a collateral agreement to ensure that a suitable preference will be given to military members.

[78] Originally granted in 1996 as "temporary" legislation, this authority was made permanent by the FY 2005 National Defense Authorization Act. Pub. L. No. 108-375, § 2805, 115 Stat. 1012 (2005).

d. Rental guarantees.

e. Differential lease payments.

f. Conveyance or lease of existing properties and facilities to private entities.

3. Establishment of Department of Defense housing funds.

a. The Department of Defense Family Housing Improvement Fund.[79]

b. The Department of Defense Military Unaccompanied Housing Improvement Fund.[80]

C. Implementation

1. The service conveys ownership of existing housing units, and leases the land upon which the units reside for up to 50 years.

2. The consideration received for the sale is the contractual agreement to renovate, manage, and maintain existing family housing units, as well as construct, manage, and maintain new units.

3. The contractual agreement may include provisions regarding:

a. The amount of rent the contractor may charge military occupants (rent control).

b. The manner in which soldiers will make payment (allotment).

c. Rental deposits.

d. Loan guarantees to the contractor in the event of a base closure or realignment.

e. Whether soldiers are required to live there.

f. The circumstances under which the contractor may lease units to nonmilitary occupants.

g. Termination provisions and criteria.

D. Issues and Concerns[81]

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[79] 10 U.S.C. § 2883(a)(1).
[80] 10 U.S.C. § 2883(a)(2).
[81] *See* Government Accountability Office, Military Housing: Management Issues Require Attention as the Privatization Program Matures, Report No. GAO-06-438 (April 2006); Government Accountability Office, Military Housing: Management Improvements Needed As Privatization Pace Quickens, Report No. GAO-02-624 (June

1. Making the transition positive for occupants; including keeping residents informed during the process.

2. Loss of control over family housing.

3. The effect of long-term agreements.

   a. Future of installation as a potential candidate for housing privatization.

      (1) DoD must determine if base a candidate for closure.

      (2) If not, then DoD must predict its future mission, military population, future housing availability and prices in the local community, and housing needs.

   b. Potential for poor performance or nonperformance by contractors.

      (1) Concerns about whether contractors will perform repairs, maintenance, and improvements in accordance with agreements. Despite safeguards in agreements, enforcing the agreements might be difficult, time-consuming, and costly.

      (2) Potential for a decline in the value of property towards the end of the lease might equal decline in service and thus quality of life for military member.

4. Effect on federal employees

   a. The privatization of housing will result in the elimination of those government employee positions that support family housing.

   b. Privatization is not subject to Circular A-76.

5. Prospect of civilians living on base.

   a. Civilians are allowed to rent units not rented by military families.

   b. This prospect raises some issues, such as security concerns and law enforcement roles.

VI. UTILITIES PRIVATIZATION

2002); Government Accountability Office, Military Housing: Continued Concerns in Implementing the Privatization Initiative, NSIAD-00-71 (March 30, 2000); Government Accountability Office, Military Housing: Privatization Off to a Slow Start and Continued Management Attention Needed, Report No. GAO/NSIAD-98-178 (July 17, 1998).

A. Authority

10 U.S.C. § 2688 (originally enacted as part of the FY 1998 National Defense Authorization Act) permits the service secretaries to convey all or part of a utility system to a municipal, private, regional, district, or cooperative utility company. This permanent legislation supplements several specific land conveyances involving utilities authorized in previous National Defense Authorization Acts.

B. Implementation

1. In 1998, DoD set a goal of privatizing all utility systems (water, wastewater, electric, and natural gas) by 30 September 2003, except those needed for unique mission/security reasons or when privatization is uneconomical. Memorandum, Deputy Secretary of Defense, to Secretaries of the Military Departments, et al., subject: Defense Reform Initiative Directive (DRID) #49—Privatizing Utility Systems (23 Dec. 1998).

2. In October 2002, DoD revised its goal and replaced DRID #49 with updated guidance. Memorandum, Deputy Secretary of Defense, to Secretaries of the Military Departments, et al., subject: Revised Guidance for the Utilities Privatization Program (9 Oct. 2002) [hereinafter Revised Guidance Memo]. The Revised Guidance Memo establishes 30 September 2005 as the date by which "Defense Components shall complete a privatization evaluation of each system at every Active, Reserve, and National Guard installation, within the United States and overseas, that is not designated for closure under a base closure law." In addition to revising the milestones for utilities privatization, the Revised Guidance Memo addresses:

   a. Updated guidance concerning the issuance of solicitations and the source selection considerations in utilities privatization;

   b. DoD's position concerning the applicability of state utility laws and regulations to the acquisition and conveyance of the Government's utility systems;

   c. New instruction on conducting the economic analysis, including a class deviation from the cost principle at FAR 31.205-20 authorized by DoD for "utilities privatization contracts under which previously Government-owned utility systems are <u>conveyed</u> by a Military Department or Defense Agency to a contractor;" and

   d. The authority granted the Service Secretaries to include "reversionary clauses" in transaction documents to provide for ownership to revert to the Government in the event of default or abandonment by the contractor.

3. On 2 November 2005, the Undersecretary of Defense for Acquisition, Technology and Logistics issued a supplemental guidance. This guidance stated that "each Component shall provide the DUSD(I&E) [Deputy Under Secretary of Defense for Installations and Environment] with a plan of action and timeline by November 18, 2005 for the completion of all remaining evaluations. The Components shall continue to conduct privatization evaluations and provide quarterly updates to DUSD(I&E) until all remaining evaluations are complete." Memorandum, Deputy Secretary of Defense, to Secretaries of the Military Departments, et al., subject: Supplemental Guidance for the Utilities Privatization Program (2 Nov. 2005).

4. Requests for exemption from utility systems privatization, based on unique mission or safety reasons or where privatization is determined to be uneconomical, must be approved by the Service Secretary.

5. Agencies must use competitive procedures to sell (privatize) utility systems and to contract for receipt of utility services. 10 U.S.C.§ 2688(b). DoD may enter into 50-year contracts for utility service when conveyance of the utility system is included. 10 U.S.C. § 2688(c)(3).

6. Any consideration received for the conveyance of the utility system may be accepted as a lump sum payment, or a reduction in charges for future utility services. If the consideration is taken as a lump sum, then payment shall be credited at the election of the Secretary concerned for utility services, energy savings projects, or utility system improvements. If the consideration is taken as a credit against future utility services, then the time period for reduction in charges for services shall not be longer than the base contract period. 10 U.S.C. § 2688(c).

7. Installations may, with Secretary approval, transfer land with a utility system privatization. 10 U.S.C. § 2688(i)(2); U.S. Dep't of Army, Privatization of Army Utility Systems—Update 1 Brochure (March 2000). In some instances (environmental reasons) installations may want to transfer the land under wastewater treatment plants.

8. Installations must notify Congress of any utility system privatization. The notice must include an analysis demonstrating that the long-term economic benefit of privatization exceeds the long-term economic cost, and that the conveyance will reduce the long-term costs to the DoD concerned for utility services provided by the subject utility system. The installation must also wait 21 days after providing such congressional notice. 10 U.S.C. § 2688(e).

C. Issues and Concerns

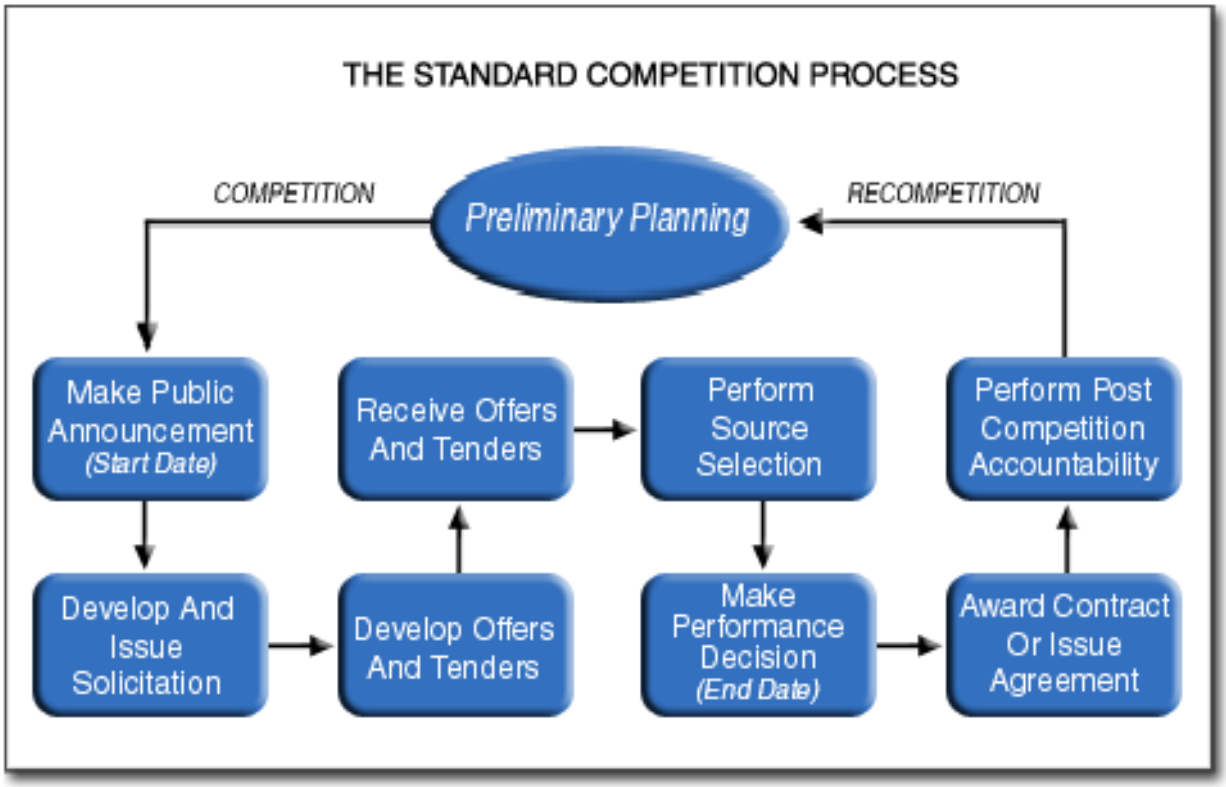
1. Effect of State Law and Regulation. State utility laws and regulations, the application of which would result in sole-source contracting with the company holding the local utility franchise at each installation, do not apply in federal utility privatization cases. See Virginia Electric and Power Company; Baltimore Gas & Electric, B-285209, B-285209.2 (Aug. 2, 2000) 2000 U.S. Comp. Gen. LEXIS 125 (holding 10 U.S.C. § 2688 does not contain an express and unequivocal waiver of federal sovereign immunity); see also Baltimore Gas & Electric v. United States, US District Court, District of Maryland, No AMD 00-2599 Mar. 12, 2001 (following the earlier GAO decision and finding no requirement for the Army to use sole-source procedures for the conveyance of utilities distribution systems and procurement of utilities distribution services). The DoD General Counsel has issued an opinion that reached the same conclusion. Dep't. of Def. General Counsel, The Role of State Laws and Regulations in Utility Privatization (Feb. 24, 2000).

2. Utility Bundling. An agency may employ restrictive provisions or conditions only to the extent necessary to satisfy the agency's needs. Bundled utility contracts, which not only achieve significant cost savings, but also ensure the actual privatization of all utility systems, are proper. Virginia Electric and Power Company; Baltimore Gas & Electric, B-285209, B-285209.2 (Aug. 2, 2000) 2000 U.S. Comp. Gen. LEXIS 125.

3. Reversionary Clauses. The contractual agreement must protect the government's interests in the event of a default termination. The use of reversionary clauses, which revoke the conveyance of the utility system, are an option. Revised Guidance Memo, supra.

VII. CONCLUSION

ATTACHMENT 1 (STANDARD COMPETITION)



Standard Competition Process under Circular A-76 (Revised)

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ATTACHMENT 2 (CONFLICT OF INTEREST TABLE)

Which A-76 Teams May Share Members
Without Violating the Conflict of Interest Rules
(OMB Circular A-76, dated May 29, 2003)*

	PWS Team	**MEO Team**	**SSEB Team**
PWS Team	*NA*	No[82]	Depends[83]
MEO Team	No[84]	*NA*	Depends[85]
SSEB Team	Depends[86]	Depends[87]	*NA*

*The purpose of this chart is to show which of the three "teams" (PWS Team, MEO Team, and SSEB Team) in an OMB Circular A-76 competition may—or may not—share some of the same members. Note that there are other conflict of interest rules which are not addressed by this chart.

[82] PWS Team and MEO Team may NOT share the same members. See OMB Cir. A-76, Attach B, para D(2).
[83] PWS and SSEB Teams may share members so long as the PWS Team members that are serving on the SSEB Team are not directly-affected employees. See OMB Cir. A-76, Atch B, para D(2).
[84] PWS Team and MEO Team may NOT share the same members. See OMB Cir. A-76, Attach B, para D(2).
[85] MEO and SSEB Teams may generally not share members *since most MEO Team members will have direct knowledge of the agency tender*. See OMB Cir. A-76, Atch B, para D(2). But see AR 5-20, para 4-1 which states "members of the MEO team…will not be members of the PWS team and the SSEB."
[86] PWS and SSEB Teams may share members so long as the PWS Team members that are serving on the SSEB Team are not directly-affected employees. See OMB Cir. A-76, Atch B, para D(2).
[87] MEO and SSEB Teams may generally not share members *since most MEO Team members will have direct knowledge of the agency tender*. See OMB Cir. A-76, Atch B, para D(2). But see AR 5-20, para 4-1 which states "members of the MEO team…will not be members of the PWS team and the SSEB."