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Defense Outsourcing: The OMB Circular A-76 Policy

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Summary

This report provides information on the Office of Management and Budget's (OMB) Circular A-76, "Performance of Commercial Activities," and the impact of a related reform initiative, the Federal Activities Inventory Reform Act (FAIR) of 1998, within the Department of Defense. The Circular defines federal policy for determining whether recurring commercial activities should be outsourced to commercial sources, Governmental facilities, or through inter-service support agreements. The FAIR Act creates statutory reporting requirements for federal executive agencies, by requiring Federal executive agencies to identify activities "not inherently governmental" and consider outsourcing through managed competitions. However, FAIR does not require that agencies contract out these activities.

Despite the fact that DOD has substantially downsized its force structure after the end of the Cold War, operations and support cost have not been proportionately reduced. In order to achieve greater reductions, and as part of its Defense Reform Initiative, DOD announced that 229,000 positions would be opened to managed competition; by FY2005, some 237,000 jobs. Historically, DOD has set the pace as the lead federal agency in using OMB Circular A-76 cost comparison studies as a tool for managing competition for federal contracts. Few civilian agencies have utilized the process; in fact, in FY1997, not one civilian agency reported conducting an OMB Circular A-76 cost comparison study.

The effectiveness of the OMB Circular A-76 policy has been the subject of rising debate. Some proponents view the policy as a catalyst for competition in the marketplace, and as the vehicle to increase efficiencies, lower costs and encourage technological advances. They argue that the government should stop providing some services, and not compete against its private citizens. Some proponents view the policy as an instrument for driving efficiencies.

Some opponents of the program view it and the passage of FAIR as efforts to dismantle what has been traditionally viewed as the "proper role of government." They challenge the notion that the process will ultimately save money, by arguing that projections of costs savings have been overly optimistic. Others assert that besides resulting in the loss of thousands of federal jobs, FAIR may create new constituencies that could generate new pressures for federal outsourcing.

The degree to which managed competitions, throughout the federal government, increase efficiency and save money will likely depend on the extent to which federal agencies enforce both the letter and spirit of the law governing FAIR. Congress can exercise its oversight authority by (1) monitoring federal agency progress in the implementation of OMB Circular A-76 policy and FAIR; (2) watching the level of managed competitions, since there is no requirement that agencies must conduct them; and (3) granting federal agencies the authority to explore alternatives to the OMB Circular A-76 that will yield the same projected cost savings. Congress may also want to circumscribe certain government activities as inherently governmental, since the process in the executive branch may prove both complex and controversial.

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Introduction

The end of the Cold War and the reduction of Department of Defense (DOD) spending created a strong need to reform the manner in which the federal government procured goods and services. In the 1980s, the Reagan Administration emphasized the view that big government was inefficient, wasteful and unmanageable. Later, the recommendations of the Clinton Administration's National Performance Review (formerly called NPR, now the National Partnership for Reinventing Government) served as an impetus for the executive branch to propose new procurement reform.[1] The NPR effort broadened the goal of creating a government that "works better and costs less " to a government that "works better and does less."[2] The NPR promoted the idea that the government should focus its attention on those activities which it should and could do best, and then put incentives in place to insure optimum results.

DOD has substantially reduced its force structure since the end of the Cold War. Unfortunately, defense operations and support costs have not reduced proportionately to the size of the force.[3] As a result, DOD must reduce spending further to achieve greater cost savings to finance weapons and military equipment modernization. Combined with a national mood reflecting a growing change in the public's perception of the role of government, a shrinking defense procurement budget, increased private sector lobbying for government contracts, the notion of contracting out, or **outsourcing**, of federal procurement activities has taken center stage.

Outsourcing is a decision by the government to purchase goods and services from sources outside of the affected government agency. In the past, outsourcing has usually meant that the government purchased specific goods or services from the private sector. For example, an agency may hire a janitorial cleaning service, a cafeteria/food service vendor, or an audio-visual equipment vendor. Outsourcing evolved as one of the principal mechanisms used to reduce the size, scope, and costs of the federal government.

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[1]Office of the Vice President. *From Red Tape to Results: Creating a Government that words Better and Costs Less.* Report of the National Performance Review. Washington 1993, 168p.

[2]Office of the Vice President. *Serving the American Public: Best Practices in Downsizing, Bench-marking Study Report*. Report of the National Performance Review. Washington 1997, 36 p.

[3]General Accounting Office. *Observations on the Department of Defense's Fiscal Year 2000 Performance Plan.* July 20, 1999. GAO/NSIAD-99-178R. 14 p.

A 1996 Report of the Defense Science Board, Task Force on Outsourcing and Privatization, defined outsourcing in this way:

> Outsourcing often refers to the transfer of a support function traditionally performed by an in-house organization to an outside service provider. Outsourcing occurs in both the public and private sectors. While the outsourcing firm or government organization continues to provide appropriate oversight, the vendor is typically granted a degree of flexibility regarding how the work is performed. In successful outsourcing arrangements, the vendor utilizes new technologies and business practices to improve service delivery and/or reduce support costs. Vendors are usually selected as the result of a competition among qualified bidders.[4]

Under the umbrella of outsourcing, **privatization** occurs when the government ceases to provide certain goods or services. When an activity is privatized, the level of the government's involvement is altered, and the government may exercise any one of a number of options. Each option represents a different business decision. The options are the following business decisions: (1) selling the government assets and/or operational capabilities, and (2) creating inter-service agreements, voucher arrangements, franchises, or government corporations.[5] For the purposes of this report, privatization will be referred to as the contracting out of government goods and services, not the sale of government assets.

The OMB Circular A-76 has been viewed by some as a management reform tool to facilitate government outsourcing and privatization. This report will discuss the Office of Management and Budget (OMB) Circular A-76 policy titled "Performance of Commercial Activities," and the impact of a closely-related reform initiative, the Federal Activities Inventory Reform (FAIR) Act, P.L. 105-270, within DOD.

The OMB Circular A-76

The OMB A-76 Circular provides "an analytical framework on which the government bases a decision on who can best provide the products and services it needs."[6] OMB Circular A-76 has defined a commercial activity as one that is a result of a requirement, or need, that the federal government has for a product or service, and that the product or service could be obtained from a private sector source. A "recurring" commercial activity is one that is required by the federal government on a consistent, long-term basis. The Circular provides federal executive agencies with guidance and procedures for determining whether recurring commercial activities should be performed by private sector sources, government sources, or through an

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[4]Department of Defense, Office of the Undersecretary of Defense for Acquisition and Technology. *Report of the Defense Science Board, Task Force on Outsourcing and Privatization.* Aug. 1996. p. 7a.

[5]*"Where Do We Stand?" AFGE's Privatization Policy.* American Federation of Government Employees, AFL-CIO. 28 p.

[6]*The AFGE Activist's Personal Consultant to A-76 Policy Implementation.* American Federation of Government Employees.

"Inter-Service Support Agreement," which is an agreement between two federal agencies to provide each other with certain services or functions.[7]

The policy[8] outlines a very formal, intricate and often lengthy process for conducting managed competitions. Initially, no time frames were required for the completion of competitions. Later, a provision was included in the FY1991 DOD Appropriations Act (P.L. 101-511) and future DOD appropriation bills directing that single function competitions are to be completed within 24 months and multi-function competitions are to be completed within 48 months.[9] DOD estimated that increased efficiencies resulting from these competitions could yield a 20-30% cost savings, regardless of whether the government or the commercial sector wins. According to DOD, about 60% of the competitions are won by the original employing agency, reconfigured into a "most efficient organization (MEO)," while 40% are won by competing private contractors and government agencies.[10]

The policy rests on these assumptions:

(1) The federal government should not compete against its citizens, but rely on the commercial sector to supply products and services needed by the government.

(2) The government can conduct cost comparison studies to determine "who best to do the work" through a process of "managed competitions."

(3) Market forces can determine the most effective and cost-efficient methods to operate functions in both government and commercial sectors; and,

(4) The nature of competition within the marketplace can be "self-managed," and not require government oversight.

The policy states that, whenever possible, and to achieve greater efficiency and productivity, the federal government should conduct cost comparison studies to determine who can best perform the work. Under the OMB Circular A-76 policy, a

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[7]See OMB Circular A-76 Supplemental Handbook.

[8]The current OMB Circular A-76 policy was issued in 1966. The policy was revised in 1977 and 1979. The *Supplemental Handbook* was issued in 1983, and revised in 1996. The policy, supplemental handbook, and accompanying policy memoranda were revised together and issued on June 14, 1999. Authority for the OMB Circular A-76 originated in the Budgeting and Accounting Act of 1921 (31 U.S.C. 1 et seq.) and the Office of Federal Procurement Policy Act Amendments of 1979 (41 U.S.C. 401 et seq.) Legal or procedural challenges to the policy or procedures are provided for in the *Supplemental Handbook*. The handbook also allows for direct conversion to a private sector contractor and cost comparison waivers to the OMB Circular A-76 policy. Copies of updated versions can be found on the Internet at [http://www.whitehouse.gov/OMB/circulars/index-procure.html].

[9]General Accounting Office. *DOD Competitive Sourcing: Results of Recent Competitions.* Letter 4.2, GAO/NSIAD-88-44. Feb. 22, 1999. 2 p.

[10]Camelo, Wilson (First Lt.). "Competitive Sourcing, Privatization Vital to Air Force Future." *Air Force News.* May 25, 1998. 2 p.

managed competition is the vehicle to conduct cost comparison studies. Competitions are held between public agencies and the private commercial sectors. The three types of managed competitions under the policy are (1) public-public, (2) public-private, and (3) private-private. In accordance with the provisions of the Circular, the federal government will not start, or maintain, a commercial product or service that the private sector can provide more economically.

Federal agencies are not required to use the OMB Circular A-76 policy; however, federal executive agencies are required to (1) develop a performance work statement, defining the technical aspects of the work to be performed; (2) determine the most efficient organizational structure using the current government workforce (called the "Most Efficient Organization, or MEO) through realignment/reexamination of the management structure, personnel requirements and procedures; and, when such a comparison is required, (3) conduct cost comparison studies among all sectors, including private, other public agencies, and the current government MEO.[11] Cost-comparison studies are not required to convert certain activities to, or from, an in-house operation, commercial contract, or inter-service support agreements.[12]

Views on OMB Circular A-76

Some proponents of OMB Circular A-76 view the culture of most federal agencies as slow, conservative, averse to risk, and resistant to change. They view the OMB Circular A-76 policy as a way to gain efficiencies in the contracting process, while reducing overall costs. They argue that the resulting managed competitions enhance quality, efficiency, and productivity, and spur on technological advances. Within DOD it is believed that potential contract cost savings from the competition for defense work would free up sorely needed funds to finance weapons and equipment modernization.

Some opponents support the competitive aspects of the policy, and believe that the process is unfavorable to the private, commercial sector. Criticisms include, but are not limited to, perceptions that the 12-13% administrative and overhead costs (that the government routinely assigns to federal agencies when competing for contracts) are too low, and that the low overhead costs give the government an automatic advantage in formulating lower bids. Additionally, to win the competition, outside proposals must be at least 10% less than the MEO's proposals. Some argue that this policy favors the government. Within the information technology community, an overhead rate of 40% is viewed as the standard. The private sector believes that the 12-13% overhead rate does not accurately and completely reflect infrastructure and overhead costs; some suggest that the rate is significantly higher for all industries.[13] Other critics believe that government procurement specialists decide

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[11]See OMB Circular A-76: Oversight and Implementation Issues.

[12]OMB Circular No. A-76. Executive Office of the President, Office of Management and Budget. June 14, 1999 (revised). p. 4-6.

[13]For a discussion of overhead rates, see "Part II - Preparing the In-house and Contract Cost (continued...)

contract awards based on the lowest cost, not necessarily what would represent the best value to the government.

There is general agreement on both sides that the OMB Circular A-76 process takes too long to complete. Managed competitions have ranged from 18 months, for smaller, single-function agency activities, to more than four years, for multi-functioned agency activities; however, GAO reports that multi-function studies conducted since 1991 have taken about 30 months, on average.[14] Both sides concede that managed competitions could result in the loss of jobs and benefits for tens of thousands of federal government employees; they believe that some organic, technical capability should be retained within the federal government, to support unique requirements (for example, some computerized engineering or nuclear propulsion capability), although exactly how much (or how many employees) is unclear. Evidence has shown that when government employees are reorganized into MEOs, often they can operate more efficiently and cost-effectively than commercial contractors.[15] However, it is unclear whether MEOs should be allowed to continue to perform activities viewed to be outside "the proper role of government."

Federal labor unions, such as the American Federation of Government Employees (AFGE),[16] have opposed any policy that promotes the outsourcing or privatization of functions performed by the federal government. Nevertheless, AFGE has sought to play an active role in the execution of A-76 policy on the national and local levels. AFGE does not believe that privatization ultimately saves money, nor that competition within the marketplace is capable of self-management. AFGE believes that the current debate on A-76 policy is being driven by a desire to downsize the federal work force, rather than to benefit from greater private-sector efficiencies and technological advances. During the debate leading to the passage of the FAIR Act, managers at twenty-one DOD depots protested the expansion of the jobs that would be subject to review for A-76 competitions through outsourcing. The Federal Managers Association's (FMA) President Michael Styles wrote to Secretary of Defense Cohen, commenting that "DOD managers believe that contractors low-ball their bids in order to get the work and then increase their prices once the government competition is eliminated."[17]

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[13](...continued)
Estimates, OMB Circular No. A-76-Revised Supplemental Handbook." Executive Office of the President. Office of Management and Budget. March 1996. p. 15-34; and, *Defense Outsourcing: Better Data Is Needed to Support Overhead Rates for A-76 Studies.* General Accounting Office, GAO/NSIAD-98-62. Feb. 27, 1998. 20 p.

[14]Ferris, Nancy. "Targeting Jobs." *Government Executive*. December 1999, p. 6.

[15]Statement of Maj. Gen. Robert L. Van Antwerp, Jr., Assistant Chief of Staff for Installations Management, Department of the Army. Mar. 2, 1999. House National Security Subcommittee on Military Readiness.

[16]For a discussion of AFGE's policy on privatization, see *Where Do We Stand? AFGE's Privatization Policy.* The American Federal of Government Employees, AFL-CIO. 28 p.

[17]Friel, Brian. "Depot Managers Protest Outsourcing." *Government Executive.* Sept. 21, 1998 [http:www.govexec.com/dailyfed/0998/092198b2.htm].

Congressional Interest in Outsourcing

Over the past seven years, Congress has passed a series of important federal procurement initiatives which promoted outsourcing, including the following legislation:[18]

(1) The Federal Acquisition Streamlining Act (P.L. 103-355), which encouraged federal agencies to buy more commercial products, and simplified procurement procedures for securing commercial programs;

(2) The Federal Acquisition Reform Act (P.L. 104-106), which eliminated the requirement for certified costs and pricing data for commercial products, thus further simplifying procurement procedures, while preserving the concept of full and open competition;

(3) The Information Technology Management Reform Act of 1996 (P.L. 104-106), which eliminated the General Services' Administration's (GSA) central authority in the administration of information technology, empowered each federal agency to develop its own information technology procurement program and combined bid protests authority for both information technology and federal procurement under GAO; and

(4) The Defense Reform Initiative,[19] which evolved out of the Quadrennial Defense Review and is focused on reducing DOD infrastructure support and streamlining its business practices.

The 105th Congress considered a greater use of outsourcing for government goods and services when Rep. John J. Duncan, Jr. introduced H. R. 716, the "Freedom from Governmental Competition Act." Introduced on February 12, 1997, this bill would have required the government to procure all goods and services from the private sector; however, the bill would have prohibited the competitive outsourcing of federal functions. The Clinton Administration voiced strong objections to the bill and it did not survive the challenge. Another version of the bill was later introduced; it would have required that all commercial activities be subject to competitive outsourcing within a 5-year period, as well as the appointment of a "Commercial Activities Czar." That bill was dropped in Committee due to a lack of congressional support.

On the same day (February 12, 1997), Senator Craig Thomas introduced S. 314, "a bill to provide a process for the government to identify functions not inherently

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[18]For a discussion on federal procurement reform, see CRS Report 96-373, *Federal Acquisition Reform Act of 1996*, by Michael Seitzinger, April 29, 1996, 6 p.; CRS Report 96-598, *Civilian Procurement Reform Efforts*, by Stephanie Smith, July 3, 1996, 5 p.; and CRS Issue Brief IB96022, *Defense Acquisition Reform: Status and Current Issues*, by Valerie Bailey Grasso (updated regularly).

[19]For a discussion of the progress of the Defense Reform Initiative, see *Defense Reform Initiative. Organization, Status, and Challenges.* General Accounting Office. April 1999, GAO/NSIAD-99-87. 95 p.

governmental." A final version of S. 314 became the Federal Activities Inventory Reform (FAIR) Act. FAIR passed in the second session of the 105th Congress and was signed into law on October 19, 1998 (P.L. 105-270). The Act was published in the *Federal Register* at 64 FR 100031.

The Federal Activities Inventory Reform Act of 1998 (FAIR)

The passage of FAIR created statutory federal agency reporting requirements. OMB published the proposed implementation rules in the *Federal Register* on March 1, 1999; final guidance on the implementation of the FAIR Act was published on June 24, 1999, in Transmittal Memorandum #20.[20] The FAIR Act contained both the requirement for agencies to inventory their commercial activities, and the pre-existing definition of "inherently governmental functions." Federal executive agencies[21] are required to submit to OMB, by June 30th of each year, annual inventories (or lists) of "non-inherently governmental functions." Agencies are afforded opportunity to argue for inclusions/exclusions to their lists. Such lists will be made available to Congress and eventually published in the *Federal Register*. The lists can be challenged by "interested parties," as defined in the legislation. Once challenged, agencies must either accept the challenge, make changes to the list, or reject the challenge, and agree to do so within 30 days after the challenge is filed. September 30,1999 was the deadline for agencies to respond to the first FAIR Act inventory challenges.[22]

What did emerge through the passage of the FAIR Act was a process whereby the federal government would identify activities considered "not inherently governmental" in nature. Inherently governmental activities are described as "those so intimately related to the exercise of the public interest as to mandate performance by federal employees."[23] The Office of Federal Procurement Policy (OFPP) Policy Letter 92-1, dated September 23, 1992, provides the following guidance on how to identify inherently governmental activities:

> These functions include those activities that require either the exercise of discretion in applying Government authority or the making of value judgements in making decisions for the Government. Governmental functions normally fall into two categories: (1) the act of governing, i.e., the discretionary exercise of Governmental authority, and (2) monetary transactions and entitlement. An

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[20]See the FAIR Internet site, [http://www.whitehouse.gov/OMB/circulars/index-procure.html].

[21]Exceptions to the FAIR Act include, but are not limited to, the General Accounting Office, government corporations or "government-controlled corporations," non-appropriated funds instrumentalities, and certain depot-level maintenance and repair organizations. FAIR Act, P.L. 105-270, p.4.

[22]Saldarini, Katy. "Challenges To Agency Job Lists Keep Rolling In." *Government Executive.* Nov. 12, 1999, 2 p.

[23]"Inherently Governmental Functions." Appendix 5, *Office of Federal Procurement Policy Letter 92-1*, Sept. 23, 1992, p. 53.

> inherently governmental function involves, among other things, the interpretation and execution of the laws of the United States so as to:
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> (a) bind the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;
> (b) determine, protect, and advance its economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise;
> (c) significantly affect the life, liberty, or property of private persons;
> (d) commission, appoint, direct, or control officers or employees of the United States; or
> (e) exert ultimate control over the acquisition, use, or disposition of the property, real or personal, tangible or intangible, of the United States, including the collection, control, or disbursement of appropriated and other Federal funds.
>
> Inherently governmental functions do not normally include gathering information for or providing advice, opinions, recommendations, or ideas to Government officials. They also do not include functions that are primarily ministerial and internal in nature, such as building security; mail operation, operation of cafeterias; housekeeping; facilities operations and maintenance, warehouse operations, motor vehicle fleet management and operations, or other routine electrical or mechanical services.[24]

Any function not considered inherently governmental would be considered commercial, and subject to competitive outsourcing.[25]

The Use of OMB Circular A-76 Within the Federal Government

Within the federal government, the OMB Circular A-76 has not been used uniformly. On the one hand, DOD has set the pace as the lead federal agency to use the OMB Circular A-76 policy. On the other hand, civilian agencies did not report a single federal position for outsourcing, under OMB Circular A-76, in 1997. Reportedly, they have relied instead on management improvement techniques, such as re-invention, re-engineering, and consolidation, as recommended in the National Partnership for Reinventing Government.[26] The Clinton Administration has encouraged more frequent use of the policy, as reflected below:

> As noted in the President's FY1999 budget, competition spurs efficiency. Agencies that require or provide administrative or other commercial support services should have the stimulus of competition to make available new technologies, capital and new management techniques to improve performance and

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[24]Ibid, p. 53.

[25]Definitions of terms commonly associated with the OMB Circular A-76 Program are provided in Appendix I, OMB Circular A-76, Revised Supplemental Handbook (Mar. 1996.)

[26]Maxwell, Alison. "Agencies Avoid Contracting Studies." *Government Executive.* June 5, 1998.

> reduce costs. This Administration is expanding the level of competition for the provision of commercial goods and services, by requiring agencies to compete with one another and with the private sector on a level playing field.[27]

One estimate of the extent to which the OMB Circular A-76 is being used appears below. **Table 1** summarizes the number of federal job positions that have been studied and subjected to the process, government-wide, from 1988-1997.

Table 1. Number of Positions Studied, 1988-1997

Fiscal Year	Total FTEs	DOD FTEs	Civilian Agencies FTEs
1988	17,249	12,000	5,249
1989	8,469	6,100	2,369
1990	9,547	6,989	2,558
1991	2,026	1,243	783
1992	564	496	68
1993	509	441	68
1994	1,691	1,623	68
1995	2,386	2,128	258
1996	5,267	5,241	26
1997	25,255	25,255	0

Sources: This table and the accompanying explanation were provided by J. Christopher Mihm,Director, Federal Management Workforce Issues, General Government Division, GAO. Mr. Mihm testified before the Subcommittee on Oversight of Government Management Restructuring, and the DC Committee on Governmental Affairs, U.S. Senate, on June 4, 1998. Table 1 was prepared by Bill Reinsberg, National Defense Analyst, Federal Management and Workforce Issues, General Government Division, GAO. As reported by OMB, civilian agencies data for 1992-95 are based on annual averages for that time period. Not all agencies are included, but OMB stated that the number excluded is significant. GAO did not independently verify the accuracy of the data provided by OMB.

An FTE is the calculation of staffing levels using staff work time as a factor. As a result of an OMB Circular A-76 competition, the functions currently performed by federal agency workers could be transferred to a source outside of the agency, including another federal agency or the private sector. As previously stated, DOD heads the lists in using OMB Circular A-76 as a tool for managing outsourcing competitions for federal contracts.

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[27]Office of Management and Budget, Executive Office of the President. *Memorandum For Heads of Executive Departments And Agencies.* Issued by Franklin Raines. May 12, 1998.

Table 2 shows DOD's projections for FY2000 cost comparison studies. As part of the President's FY2000 Budget, DOD and the military services have announced the following positions currently under study.[28] Under OMB Circular A-76, DOD plans to open about 250,000 jobs to managed competitions by the year 2003, much of it conducted through FAIR.

Table 2. DOD's FY2000 Budget Submission, Reflecting Positions Currently Under OMB Circular A-76 Study

Type of Study	Air Force	Army	Navy	Marine Corps	Defense Agencies	Total Positions
Single-function	5,080	–	638	none	1,215	6,933
Multi-function	4,123	14,757	4,910	none	3,753	27,543
Total Positions	9,203	14,757	5,548	none	4,968	34,476

DOD has projected that it could save about $6 billion by FY2003, and $2.5 billion each year thereafter, through a more aggressive use of the OMB Circular A-76 policy.[29] The General Accounting Office (GAO) has questioned whether these savings are overly optimistic.[30] Historically, savings resulting from competitions have reportedly ranged from 20-30% lower than original projections. Generally, about 60% of the competitions are won by the original employing agency, reconfigured into a "most efficient organization," while 40% are won by competing private contractors and government agencies.[31] Results of recent competitions, however, reflect a shift. Private contractors now win about 60% of the competitions, while government agencies garner about 40%.[32]

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[28]Provided by the Competitive Sourcing and Privatization Office, Office of the Deputy Undersecretary of Defense for Industrial Affairs and Installations.

[29]Statement of David Warren, Director, Defense Management Issues, U.S. General Accounting Office. Mar. 13, 1998. House National Security Subcommittee on Military Readiness.

[30]For a discussion of projected savings from A-76 competitions, see *Outsourcing DOD Logistics: Savings Achievable But Defense Science Board's Projected Are Overstated.* Dec. 8, 1997. GAO/NSIAD-98-48. 18 p.

[31]General Accounting Office. *DOD Competitive Sourcing: Results of Recent Competitions.* Feb. 22, 1999. GAO/NSIAD 99-4. 36 p.

[32]Ferris, Nancy. "Targeting Jobs." *Government Executive.* Dec. 1999.

Results of Selected OMB Circular A-76 Cost Comparison Studies

The results of some recent OMB Circular A-76 competitions suggest that the process can work effectively and efficiently, even when protests are filed. Two years ago, the Army's Aberdeen Proving Grounds solicited for proposals to perform logistics, operations and maintenance, risk management, organizational support, and community and family activities under OMB Circular A-76. Initially, the in-house MEO lost the competition to Aberdeen Technical Services (ATS), a group of private contractors. The employee group appealed, based on allegations that ATS incorrectly calculated health and welfare benefit costs; as a result, the contract award was overturned. ATS protested the award and challenged the veracity of the cost comparison study. The Comptroller General recently upheld the contractor's protest. Aberdeen officials have until the end of April 2000 to determine whether to issue a new request for bids or award the contract to ATS.[33]

However, another competition has proven both arduous and controversial. In April 1999, the Army announced that it would outsource the management of its Wholesale Logistics Modernization Program. To avoid a lengthy competition process, the Army sought a waiver from OMB Circular A-76. If the Army is successful, some 500 employees could potentially lose their jobs, without the opportunity to compete as an MEO. Public criticism has mounted. The National Federation of Federal Employees, Local 1763, filed an appeal in May. Some employees have filed age discrimination complaints with the Army's Equal Employment Opportunity Office. The Small Business Administration and affected employees filed an appeal with the Secretary of the Army; the appeal was denied. Finally, a provision was added to the FY2000 DOD Authorization Bill requiring the Army to allow the current employees to compete for their jobs. That provision was changed to a "Sense of the Congress" resolution that the Army retain sufficient in-house expertise to ensure that DOD's warfighting capabilities are not compromised, and that contractor performance can be monitored. The Army had projected December 10, 1999 as the contract award date. Since the Army announced its decision to outsource, 10% of the employees at the two software centers that run the program have quit. This type of controversy is likely to continue.

Another Air Force OMB Circular A-76 award decision was overturned by the GAO Board of Contract Appeals, and later reinstated by the Office of Government Ethics. In this case, interested parties were invited to submit initial technical proposals for work at Wright-Patterson Air Force Base, Dayton, Ohio. The proposal was to perform maintenance, operation, repair and minor construction services for the Base. The contract solicitation for bids was issued on May 29, 1998. Two technical proposals were received: one from DZS/Baker LLC, the other from the Morrison Knudsen Corporation.

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[33]General Accounting Office. Comptroller General decision. Aberdeen Technical Services, B283727.2, Feb. 22, 2000, 10 p.

On the basis of the technical evaluation team's review of the two proposals, the Air Force requested revised technical proposals. The evaluation team reviewed the revised technical proposals and determined that both proposals were incomplete and unacceptable. Based on their assessment, the Air Force canceled the original solicitation, meaning that the proposal was withdrawn. Both companies were notified. Afterwards, the Air Force made plans to implement its most efficient organization, meaning, to re-engineer the current work unit to keep the work within the government, performed by federal workers.

The two competing companies were notified; they promptly filed protests with GAO. On January12, 1999, the GAO Board of Contract Appeals overturned the Air Force A-76 award decision to cancel the solicitation, due to the appearance of a conflict of interest. After investigating the protests, GAO ruled:

> DZS/Baker and Morrison Knudsen argue that the determination that their proposals were technically unacceptable — that is, the determination on which cancellation of the solicitation was based — resulted from a failure to conduct meaningful discussions, and an unreasonable evaluation of technical proposals by evaluators with an improper conflict of interest. In this latter regard, the protesters note that 14 of 16 evaluators — 4 of 6 core evaluators (5 "designated" core evaluators and an evaluator considered by the evaluation team to be a core evaluator) responsible for evaluating the entire proposals, and all 10 technical advisers responsible for evaluating specific portions of the proposals — held positions that were under study as a part of the A-76 study.
>
> We agree with the protesters that the evaluation process was fundamentally flawed as a result of a conflict of interest.[34]

The Office of Government Ethics (OGE) later challenged GAO's decision. Citing an exemption to "conflict of interest" rules, as prescribed under Section 208 of Title 18 of the U.S. Code,[35] OGE ruled that:

> In accordance with 18 U.S.C. § 208(b)(2), OGE has provided an exemption for such employees who participate in particular matters where the disqualifying financial interest arises from Federal Government employment. While an employee may not make determinations that would individually or specially affect his own salary and benefits, the exemption does permit an employee to make determinations that would affect an entire office or group of employees, even though the employee is a member of that group. Under those circumstances, employees who participate in matters connected with OMB A-76 procedures, including the evaluation of bids or proposals, are not in violation of Section 208(a). This Memorandum does not purport to interpret OMB Circular A-76 nor the Revised Supplemental Handbook to OMB Circular A-76.[36]

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[34]General Accounting Office. *GAO Bid Protest Decision.* DZS/Baker LLC; Morrison Knudsen Corporation, B-281224. Jan. 12, 1999. 5 p.

[35]Friel, Brian. "A-76 Conflict Of Interest Ruling Challenged." *Government Executive.* Sept. 24, 1999.

[36]Office of Government Ethics. *OGE Reaffirms Applicability of Section 208 Exemption in* (continued...)

Major New Developments

The Federal Activities Inventory Reform Act (FAIR) requires that by June 30th of each year, federal agencies must submit annual lists of jobs that are potential candidates for outsourcing. Jobs must be classified as either (1) inherently governmental, (2) commercial, or (3) commercial exempt.[37] OMB released the first round of such lists on October 1, 2000. About 26 agencies, representing some 258,000 employees, reported that 75% of their jobs were candidates for outsourcing. OMB released the second round of job lists on December 14, 2000,[38] although DOD has yet to release its lists.

OMB implemented two significant changes to the OMB Circular A-76 Revised Supplemental Handbook.[39] First, the deadline for interested parties to challenge agency decisions under the FAIR Act was extended from 30 days to 30 "working" days. Second, individuals who hold positions under a current cost comparison study cannot serve as members of the Source Selection Team, unless authorized by the agency contracting officer.

President Clinton signed the FY2001 Defense Appropriations Bill (P.L. 106-259) on August 9, 2000. The bill prohibits the conversion of DOD functions from government to contractor performance unless a "most efficient organization" analysis is completed and certified to House and Senate Defense Appropriation Committees; the bill also authorizes public-private competitions for depot maintenance and repair work, provided that DOD certifies that all successful bids include comparable estimates of all direct and indirect costs. Such competitions are exempt from the requirements of OMB Circular A-76.

On October 30, 2000, President Clinton signed the FY2001 Defense Authorization Bill (P.L. 106-398), totaling some $310 billion in defense spending and including $60 billion for defense procurement. Key provisions require the Comptroller General to conduct studies on (1) the use of "contract bundling" in military construction contracts (report due February1, 2001), and (2) rules governing source selection in public and private sector competitions, including those under OMB Circular A-76. The Comptroller General is to convene a panel of experts to conduct this study; a final report to Congress is due May 1, 2002. Another required study, to be conducted by the Secretary of Defense, will analyze the impact of purchasing military parts, components, and materials from foreign sources (due October 30, 2001.)

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[36](...continued)
Outsourcing and Privatization Activities. Sept. 9, 1999.

[37]Saldarini, Katy. "Agencies Release First Round of FAIR Act Lists. " *Government Executive*, Oct. 1, 2000.

[38]Cahlink, George. "Second Round of Outsourcing Lists Released." *Government Executive,* Dec. 18, 2000.

[39]OMB Circular A-76 Transmittal Memorandum No. 22. Published in the Federal Register, Volume 65, Number 87. May 4, 2000.

The following table outlines three other bills, introduced during the 106th Congress, that could potentially affect future defense outsourcing initiatives.

H.R. 3766, 2/29/00	Truthfulness, Responsibility and Accountability in Contracting (TRAC)	Referred to Subcommittee on Government Management, Information and Technology, 3/10/00
S. 2242, 3/9/00	Federal Activities Inventory Reform Act (FAIR) Amendments of 2000	Referred to Subcommittee on Oversight of Government Management, Restructuring and the District of Columbia, 5/19/00
H.R. 4722, 6/22/00	Department of Defense Privatization and Outsourcing Moratorium Act	Referred to Subcommittee on Military Readiness and Executive Comment requested from DOD, 6/29/00

Key provisions of H.R. 3766, known as "TRAC," include a temporary suspension of all new federal contracting activities, including outsourcing initiatives, privatization, and cost comparison studies to convert the performance of functions from the federal work force to a contractor work force. TRAC would affect (1) all federal agencies, including civilian employees in those units of the legislative and judicial branches having positions in the competitive service, (2) the Library of Congress, (3) the Government Printing Office, and (4) the Governors of the Federal Reserve System. Employees of the General Accounting Office are exempted, as well as those in defense depot-level maintenance and repair activities.[40] Within 180 days after bill enactment, each agency would be required to develop a centralized reporting system to generate periodic reports on agency contracting efforts.

S. 2242 would amend the FAIR Act by requiring agencies to (1) list both "inherently governmental" and non-inherently governmental functions; (2) notify all employees who perform non-inherently governmental functions that their jobs may be contracted out; (3) consider *all* costs (including all overhead costs) in the conduct of public-private competitions; and (4) prohibit the performance of non-inherently governmental functions for other federal agencies, unless the contract was won due to a successful public-private competition. Once enacted, the bill would require OMB to study the portability of federal pension benefits (in the transition of moving federal employees from public to private employment) and report to Congress within 180 days.

The third legislative initiative, H.R. 4722, would impose a moratorium on the outsourcing and privatization of work performed by DOD civilian employees. The moratorium itself would be tied to the Secretary of Defense' certification to Congress that all actions in the 1995 round of base closures (under the Defense Base

[40]Depot-level maintenance and repair activities are defined in Section 2460 of Title 10, United States Code.

Realignment and Closure Act of 1990) had been completed. The bill was referred to the Armed Services Committee.

Questions for the 107th Congress

Congress, in its oversight role, may conduct hearings on the past and present OMB Circular A-76 cost comparison studies. Hearings may be conducted to review legislative requirements of the FY2000 Defense Appropriations Act (P.L. 106-79), which directed the Secretary of Defense to submit a report, detailing all OMB Circular A-76 reviews conducted since 1995, including work performed by civilian, military and contract employees.[41]

Furthermore, as part of its Defense Reform Initiative, DOD has announced that 229,000 jobs would be opened to managed competition; by FY2005, some 237,000 jobs.[42] DOD has announced that out of about 504,000 civilian jobs (about three out of every four civilian jobs), some 308,000 could be subject to outsourcing.[43] In light of these projections, Congress might want to consider the following questions, discussed below.

Will DOD Comply with the Reporting Requirements?

P.L. 105-270, the Federal Activities Inventory Report Act of 1998, required federal executive agencies to submit annual lists, or inventories, of government activities "not inherently governmental" in nature, not later than the end of the third quarter of each fiscal year (June 30) to OMB. Federal agencies were slow to meet the legislative requirements, but all released inventories by December1999. DOD released its first inventory to the public on December 30, 1999.

In a hearing before the House Subcommittee on Management, Information and Technology, Acting OMB Deputy Director Deirdre Lee explained that the first implementation of the FAIR Act would require OMB and federal agencies to mount a thorough and time-consuming effort to meet the legislative requirements:

> The inventories required by the FAIR Act represent a significant workload. Unless specifically exempted by the FAIR Act itself, OMB's guidance requires that all executive branch agencies, regardless of their size, submit either a compliant inventory or a letter indicating that all of their Federal Full-Time Equivalents (FTE) are inherently governmental. It is a massive data collection effort. The FAIR Act inventory is the first inventory of commercial activities that has been required by law and is the first that has ever been prepared for release to the Congress or the public. Each function and, in many cases, each function at any

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[41]Section 8109 of the FY2000 Defense Appropriations Bill, P.L. 106-65.

[42]General Accounting Office. *Defense Reform Initiative: Organization, Status, and Challenges (Chapter Report)*. April 21, 1999. GAO/NSIAD-99-87. p. 50.

[43]Friel, Brian. "DOD Puts 500,000 Jobs On Outsourcing List." *Government Executive.* Dec. 14, 1999.

> given location, has been associated with a point of contact who can address questions regarding that function. It is also the first inventory where agency decisions as to what is inherently governmental are subject to administrative challenge and appeal by outside parties. Not surprisingly, the initial inventory submissions have taken longer to prepare and have required more analysis on the part of OMB than previous A-76 inventories. It is our hope that next year's inventories (due June 30, 2000) will require less effort on the part of the agencies since they will be able to build on the substantial efforts they have made this year in developing their initial inventories.[44]

According to the FAIR Act, OMB will review and consult with agency heads, and the lists will be made available to Congress and the public. The Director of OMB is required to publish the list in the Federal Register, "within a reasonable time thereafter." The agency head is then required to review the activities on the list and consider contracting them out through a competitive process (some exceptions are noted[45]. OMB now devotes space on its web site for the inventories of federal executive agencies.

Can An Agency Conduct Its Own Inventory?

Can DOD and civilian agencies be expected to fairly and accurately conduct inventories of their own activities? This is particularly important for civilian agencies, since no OMB Circular A-76 studies were conducted by civilian agencies in 1997. Perhaps a more significant question is whether agencies will outsource those activities deemed "not inherently governmental" through managed competitions. FAIR does not require that agencies outsource, but implies that agencies will strongly consider outsourcing as an alternative.

Disputes may require mediation over commercial activities which, because of their unique application, an agency may be considered inherently governmental. Furthermore, agencies may follow the letter of the law, but not the spirit of the law. Since agencies were required to list only those activities deemed not inherently governmental, agencies are under no obligation to list those activities that they consider inherently governmental. It will be difficult for outsiders to the agency (including contractors and other federal agencies) to get a complete and accurate picture of the entire portfolio of activities and functions performed within each agency. Congressional oversight will be important to provide an objective and impartial decision over what commercial activities should be outsourced.

How Will Challenges to the Outsourcing Lists be Resolved?

Federal agencies, contractors, and labor unions have all filed challenges to the inclusion or exclusion of certain activities from agency inventories. Once challenged,

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[44]Excerpts from the testimony of Acting OMB Deputy Director Deirdre Lee. House Subcommittee on Management, Information and Technology, Committee on Government Reform. Oct. 28, 1999.

[45]Ibid., p. 2.

agencies must either accept the challenge, make changes to the list, or reject the challenge, and agree to do so within 30 days after the challenge is filed.

Several federal agencies have received challenges, questioning why certain agency activities are not included on their lists. Among them, NASA, for example, has received about seven challenges, and has sought to exclude about 1,550 mapping positions from its FAIR Act list. The U.S. Chamber of Commerce and the Management Association for Private Photogrammetric Surveyors have challenged NASA because, in their opinion, these mapping positions are commercial and should be contracted out.[46] The final disposition is pending, At this time, NASA has reportedly rejected all its seven challenges.[47]

Unions representing federal employees have also filed challenges; among them, the National Treasury Employees Union (NTEU) and the American Federation of Government Employees (AFGE). NTEU was able to persuade the Department of Health and Human Services to reconsider approximately thirty-one positions that were believed to be commercial, but in fact may be inherently governmental. Of the thirty-one positions, twenty-three are in human resources management support, while eight are in personnel management. Both unions have promised to review each new round of FAIR lists as they are released to the public.[48]

Aggrieved bidders may ultimately seek legal remedies; however, if not handled expeditiously, legal challenges could lengthen the procurement cycle time, generate more federal rule-making, and empower the courts and other regulatory agencies to provide greater management of the procurement process.

Will the Policy Result in Actual Cost Savings?

In a recent GAO report,[49] auditors concluded that DOD's 1998 estimates of savings from competitions may have been too high. GAO stated those investment costs associated with competitions were not fully calculated; that because DOD experienced difficulty in commencing and completing competitions within initially projected time frames, projected savings would be delayed. The GAO auditors summed up their conclusions in this way:

> DOD has established an ambitious competition program as a means of reducing its infrastructure support costs and increasing funding available for modernization and procurement. Establishing realistic competition and savings goals are key to achieving the program's desired results. However, DOD's savings projections

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[46]Friel, Brian. "Contractors Challenge Outsourcing Lists." *Government Executive.* Nov. 1, 1999.

[47]Saldarini, Katy. "Agencies Reject Challenges To FAIR Act Job Lists." *Government Executive.* Dec. 8, 1999.

[48]Saldarini, Katy. "Unions Fight To Get Jobs Off FAIR Act Lists." *Government Executive.* Dec.10, 1999. 2 p.

[49]General Accounting Office. *DOD Competitive Sourcing: Questions About Goals, Pace, and Risks of Key Reform Initiative.* Feb. 22, 1999. Letter 1-GAO/NSIAD-99-46. 2 p.

> have not adequately accounted for the costs of conducting the competitions. These costs could significantly reduce DOD's expected level of savings in the short term. In addition, the planned competitions are likely to take longer than initially projected, further reducing the annual savings that will be realized. Consequently, the estimated savings between fiscal year 1997 and 2003 are overstated. The effects of failing to realize these annual savings could be significant, since DOD has already reduced future operating budget estimates to take into account the estimated savings.
>
> Also, the number of competitions DOD expects to complete over the next several years continues to increase, even as difficulties in meeting previous goals grow. Service officials are increasingly expressing concern about their ability to meet these targets, especially considering the unprecedented number of competitions that are planned to be ongoing simultaneously in the near future. Finally, we believe there is merit to this concern because most components lack detailed plans and analyses to help determine whether the numbers of positions to be competed would be practical.[50]

DOD's Office of the Inspector General conducted an audit, dated March 10, 2000, of all service contracts for professional, administrative, and management support activities. In light of the fact that DOD is relying more and more on the use of service contracts, while downsizing its acquisition workforce, the report revealed that:

> The 15 contracting activities and program offices requesting the contracts for services did not adequately manage the award and administration of the 105 contracting actions. Every contract action had one or more of the following problems:
> non-use of prior history to define requirements (58 of 84 or 69%), inadequate Government cost estimates (81 of 105 or 77%), cursory technical reviews (60 of 105 or 57%), inadequate competition (63 of 105 or 60%), failure to award multiple-award contracts (7 of 38 or 18%), inadequate price negotiation memorandums (71 of 105 or 68%), inadequate contract surveillance (56 of 84 or 67%), and lack of cost control (21 of 84 or 25%).
>
> As a result, cost-type contracts that placed a higher risk on the government continued without question for the same services for inordinate lengths of time-39 years in one extreme case-and there were no performance measures in use to judge efficiency and effectiveness of the services rendered. DoD procurement system controls had material weaknesses.[51]

Furthermore, the final report of the House Appropriations Committee (H.Rept. 106-244) expressed strong reservations as to whether outsourcing and privatization initiatives would result in the kinds of savings projected by DOD:

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[50]Ibid, p. 2.

[51]Department of Defense, Office of the Inspector General. *Contracts for Professional, Administrative and Management Support Services.* Mar. 10, 2000. Audit Report No. D-2000-100. p. 5-6.

> The Committee harbors serious concerns about the current DoD outsourcing and privatization effort. While the Committee recognizes the need to reduce DoD infrastructure costs, the cost savings benefits from the current outsourcing and privatization effort are, at best, debatable. Despite end-strength savings, there is no clear evidence that this effort is reducing the cost of support functions within DoD with high cost contractors simply replacing government employees. In addition, the current privatization effort appears to have created serious oversight problems for DoD especially in those cases where DoD has contracted for financial management and other routine administrative functions. DoD appears to be moving toward a situation in which contractors are overseeing and paying one another with little DoD oversight or supervision. As a result of this developing situation, the Committee recommends a reduction of $100,000,000 from the budget request as described in a new general provision, Section 8109. In addition, the Committee directs that DoD undertake a comprehensive review of A-76 Studies as described in a new general provision, Section 8110.[52]

What Will Be the Impact on Defense Operations?

There is a growing perception among some critics that outsourcing is not always to the government's advantage, and that outsourcing may actually compromise DOD's ability to protect its national security mission.[53] One example of where the use of outsourcing has been questioned is with the Navy's decision to privatize weapons handling at a half dozen military bases, including Seal Beach Naval Weapons Station, one of the nation's largest munition depots.

Critics of the Navy's efforts to privatize weapons handling believe that national security interests are being compromised for the "promise" of greater efficiencies and costs savings. Some critics believe that weapons handling is a poor choice for outsourcing efforts because: (1) safety is being compromised, since private contractors (through their own admission) will not subject their workers to the same level of education and training requirements as federal workers; (2) the threat of strikes and work stoppages, prohibited by federal workers, could damage the military's operational capabilities; (3) federal workers take oaths to uphold the national interest, while private contractors do not; and, (4) costs and efficiency will govern contractor business decisions, potentially replacing loyal, experienced, and higher paid federal workers with disloyal, inexperienced, and lesser-paid contract workers.[54]

Are There Alternatives To OMB Circular A-76?

There is general agreement that the process takes too long. As reported earlier, GAO reports that multi-function studies conducted since 1991 have taken about 30

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[52]House Appropriations Committee Report, H.Rept. 106-244, 106th Congress, 1st Session.

[53]Friel, Brian. "Depot Managers Protest Outsourcing." *Government Executive,* Sept. 21, 1998.

[54]"Navy to Seek Private Bids for Weapons Handling." *Los Angeles Times,* Part A, Mar. 13, 1999.

months, on average.[55] Alternatives to the policy may prove more time-efficient and cost-effective.

Currently, the Defense Resources Board (DRB) has required DOD and the military services to plan for achieving 11.2 billion dollars in savings, by the year 2005, using the managed competition process as outlined in OMB Circular-A 76 policy. However, one alternative to the Circular, now approved by the DRB, may represent a fundamental shift in DOD's outsourcing policy. By the end of this year, DOD is expected to issue new guidelines which will outline how military services can modify federal jobs and keep them without having to conduct managed competitions. This alternative would give military services the authority to independently pursue other alternatives to reach the same projected costs savings; each military service would be free to explore other ways to re-engineer its workforce, but be held responsible for meeting the savings goal. Although giving the military services more flexibility, critics are concerned that, without some cost/benefit analysis, outsourcing decisions will be made arbitrarily, absent of any competitive process.[56]

The DRB is considering such a change because the Navy has asked DOD to consider an alternative to the traditional OMB Circular A-76 policy. The Navy seeks to review all its functions, and to develop a plan to streamline the entire organization. According to Randall Yim,[57] Deputy Secretary of Defense for Installations, the Navy has stated that it could reorganize its workforce and workflow so that about 40% of the projected 64,000 commercial jobs targeted for managed competitions can be eliminated in-house, avoiding a managed competition and still produce the projected costs savings.[58] DOD may consider many other options, in whole or part, including restructuring, re-engineering, consolidation, termination of inefficient practices, and adoption of more streamlined business practices.

This new way of doing business focuses not just on what jobs are commercial; rather, the focus is on an assessment of both governmental and non-inherently governmental functions. The goal is a systemwide analysis and review, designed to streamline, improve, or eliminate processes that do not work or add value. DOD calls this new initiative "strategic sourcing," and describes it as the "umbrella" under which all outsourcing future decisions will be made.[59]

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[55]Ferris, Nancy. "Targeting Jobs." *Government Executive.* Dec. 1999, p. 6.

[56]*New DOD Outsourcing Guidelines.* Dec. 16, 1999. Available on Military Report website, [http://www.militaryreport.com/].

[57]For more information on structuring alternatives to the OMB Circular A-76 policy, see Friel, Brian. "DOD Considers Downsizing Options Besides A-76." *Government Executive,* July 23, 1999.

[58]Cahlink, George. "DOD May Avoid A-76 Contests." *Defense News,* July 26, 1999, p. 60.

[59]Friel, Brian. "DOD May Put More Jobs Up For Outsourcing." *Government Executive.* Jan. 5, 2000, p. 1.

Conclusion

There is continued, strong congressional and public interest in reducing the size and scope of government. Congress will need to exercise oversight over the implementation of FAIR. The degree to which managed competitions, throughout the federal government, increase efficiency and save money will likely depend on the extent to which federal agencies enforce both the letter and spirit of the law governing FAIR. Congress can exercise its oversight authority by (1) monitoring federal agency progress in the implementation of OMB Circular A-76 policy and FAIR, and whether federal agencies meet deadlines and report promptly, accurately and completely; (2) watching the level of managed competitions, since there is no requirement that agencies must conduct them; without such a requirement, activity lists may not actually lead to a greater use outsourcing; and (3) granting federal agencies the authority to explore alternatives to the OMB Circular A-76 policy. Furthermore, Congress may also want to further prescribe that certain government activities are to be considered inherently governmental, since the process in the executive branch may prove arduous, complex, and controversial.